

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 81 of 2014**

1. Vishal Parihar @ Banti son of Ambika Prasad Parihar, aged about 19 years, resident of village Sonegaon, Police Station Katangi, District Balaghat (MP) at present resident of Kukurbeda, Near Gurudwara, Police Station Saraswati Nagar, Raipur, Civil and Revenue District Raipur, CG

---- Appellant**Versus**

1. State of Chhattisgarh through the Station House Officer, Police Station Saraswati Nagar, Raipur, Civil and Revenue District Raipur, CG

---- Respondent

For Appellant	:	Shri Gautam Khetrapal, Advocate
For Respondent/State:		Shri Adil Minhaj and Shri Vaibhav Goverdhan, PLs

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice Sanjay Agrawal****Judgment On Board by Pritinker Diwaker, J****29/06/2018**

This appeal has been filed against the judgment of conviction and order of sentence dated 30.12.2013 passed by Additional Sessions Judge (FTC) Raipur in Sessions Trial No. 117/2013 convicting the accused/appellant under Sections 376 (1), 377, 292 IPC and Section 4 of Protection of Children from Sexual Offences Act 2012 (hereinafter referred to POCSO Act) and sentencing him to undergo imprisonment for life with fine of Rs. 1000/- u/s 376 (1), 377 IPC and section 4 of POCSO Act each, and RI for one year with fine of Rs. 500/- u/s 292 IPC,

plus default stipulations.

2. Facts of the case in brief are that on 01.05.2013 written report Ex. P-1 was made by Ajay Pandey (PW-1) - the father of the prosecutrix (PW-2) alleging that the accused/appellant was his neighbour. Written report says that the children of PW-1 used to visit the house of accused/appellant. Written report further discloses that on 30.04.2013 when the window of the house was opened the prosecutrix aged about 07 years at the relevant time was scared and on being asked the reason therefor she disclosed that on 27.04.2013 when she visited the house of accused/appellant, he took her inside the room, showed blue film to her and made her suck his private part. On hearing all this from PW-2, PW-1 lost his senses and then on inquiry made from the accused, he accepted the said act. Based on this written report, FIR Ex. P-2 was registered against the accused/appellant for the offences punishable under Sections 377, 292 IPC and 3 and 4 of POCSO Act. Though looking to the allegations contained in the written report and the FIR medical examination of the prosecutrix was not required to be conducted yet the police tried to seek consent of PW-1 for the same which however was not given by him. Accused/appellant was medically examined by Dr. O.P. Shrivastava (PW-6) who vide his report Ex. P-10 opined him to be capable of performing sexual intercourse. On the memorandum of accused/appellant Ex. P-7, seizure of LED computer monitor, CPU, three cords and one CD was made under Ex. P-8. After completion of investigation police filed

the *challan* against the accused/appellant u/s 377, 292, 376 (1) IPC and Sections 3 and 4 of POCSO Act. Court below however framed the charge u/s 377, 376 (1), 292 IPC and 4 of the POCSO Act .

3. In order to prove the complicity of the accused/appellant in the crime in question, the prosecution has examined 07 witnesses. Statement of the accused/appellant under Section 313 Cr.P.C. was also recorded in which he denied his guilt and pleaded innocence and false implication in the case. Two witnesses namely Ambika Prasad Parihar (DW-1) and Badri Prasad Mishra (DW-2) have also been examined by the defence in support of its case.

4. After hearing the parties, the Court below has convicted and sentenced the accused/appellant as mentioned above.

5. Counsel for the accused/appellant submits that he is not pressing this appeal as far as it pertains to conviction part of the judgment impugned and that his only argument would be for reduction of sentence to imprisonment for seven years looking to the fact that at the relevant time the accused was in his teens and as such a boy of premature understanding as to the repercussions of his act. His submission is that if the accused is made to stay inside as per the sentencing done by the Court below, his entire life would become hellish making him half dead for the long span lying before him. Not only this, life long incarceration of the adolescent accused would also bring miseries to his entire family in particular the parents.

6. State counsel however support the judgment impugned and submit that the findings recorded by the Court below convicting and sentencing the accused/appellant as described above are based on due appreciation of the evidence on record and there is no infirmity in the same.

7. Heard counsel for the parties and perused the material available on record.

8. Father of the prosecutrix (PW-1) has stated that on 27.04.2013 when he had gone out of his house in connection with the treatment of his elder brother, his wife telephonically asked him to get back home immediately and after he got back she informed him about the disclosure made to her by the prosecutrix by gesticulation about the act of the accused making her suck his private part. On hearing all that, this witness is stated to have lost his senses and then called his family members and told them about the incident. He has stated that as the relations between his family and that of the accused were intimate, they used to visit the house of each other. He has further stated that on account of parents of the accused being out of the village on the fateful day, it was decided by his family members to discuss the matter after their arrival back. According to this witness, on 30.04.2013 when his wife was changing the curtains, his daughter (prosecutrix) asked her not to do so because of fear on account of the fact that house of the accused was situated opposite to her house. On that, he along with his wife went to

the house of the accused where he admitted his guilt. Thereafter, this witness told father of the accused about the incident on phone and asked him to get back soon and then on the next day when parents of the accused returned, he again narrated the incident to his father but he blamed his daughter (prosecutrix) only whereupon written complaint Ex. P-1 was made to the police of police station Saraswatinagar. In cross-examination barring certain variations, he remained firm to what he stated in the examination-in-chief.

Prosecutrix (PW-2) – a girl aged just seven years at the relevant time was put certain questions by the Court below to assess her intelligence level and on being satisfied with her ability to answer the questions, her examination followed. By gesticulation the prosecutrix disclosed to the Court that the accused/appellant first sucked her private part and then made her suck his own, which she did per force. Thereafter, her mother came and took her along. However, in cross-examination first she has stated that her mother did not come to the house of the accused and she disclosed to her about his act after reaching home. Just thereafter, she has again stated that her mother had come to the house of the accused for taking her along. PW-3 – the mother of the prosecutrix has stated that on 27.04.2013 when her daughter (prosecutrix) did not return after playing, she went out in search of her. When the prosecutrix was not found nearby, this witness went to the house of the accused calling out her on which she came to her and started weeping. On being asked by this

witness as to for what she was weeping, the prosecutrix told her about the act of the accused making her suck his private part and he had already sucked that of her. This witness then telephonically informed her husband about the same. She also apprised the parents of the accused about the incident on their arrival. According to her also the accused/appellant admitted the act alleged against him. Tarunendra Sharma (PW-4) has not supported the case of the prosecution and has been declared hostile. J.D. Diwan (PW-5) is the investigating officer who has duly supported the case of the prosecution. Dr. O.P. Shrivastava (PW-6) is the witness who medically examined the accused and gave his report Ex. P-10 stating that he was capable of performing sexual intercourse. Vijendra Kumar Jha (PW-7) is the Patwari who prepared spot map Ex. P-13. Ambika Prasad Parihar (DW-1) has stated that there was a dispute between him and the father of the prosecutrix over the electricity bill being excessive. Badri Prasad Mishra (DW-2) has stated that on account of some previous dispute PW-1 had threatened DW-1 for implicating him in some serious case.

9. Though counsel for the accused/appellant is not interested in assailing the conviction part of the judgment impugned at this stage and keeping his arguments within the confines of sentence part thereof only yet in view of the decision of the Apex Court in the matter of **Jeetu alias Jitendra and others v. State of Chhattisgarh** reported in **(2013) 11 SCC 489** this Court is not inclined to accept such concession and therefore proceeds to decide the appeal on its

own merits as a whole.

10. We have taken note of the entire evidence available on record including that of the tender aged prosecutrix and her parents, with every care and caution. From the evidence of prosecutrix (PW-2) it is manifest that on 27.04.2013 when she had gone to the house of accused/appellant to play, taking advantage of her helplessness he gave vent to his perverted mentality by first sucking her private part and then making her do so of his own. Testimony of the prosecutrix has also been corroborated by her parents (PW-1 and PW-3) in its entirety and according to them on 30.04.2013 when the window of their house was to be opened for changing the curtains, the prosecutrix got scared and asked for not doing so for the reason that house of the accused situated in the front. When her mother (PW-3) further asked the prosecutrix about the cause of fear, she disclosed to her the effrontery of the accused described above. PW-1 and PW-3 – the parents of the prosecutrix have further stated that on being asked by them, the accused/appellant admitted his mistake. Though there are certain variations in the depositions of these witnesses yet on material particulars they have been consistent enough in lending support to the case of the prosecution that the prosecutrix was made to suck private part of the accused after he himself sucked that of her. Statements of the defence witnesses that father of the prosecutrix had once threatened the father of the accused (DW-1) to implicate him in a false case on account of some dispute existing between them is not

very convincing as no father would ever go to the extent of bringing his minor daughter in between and thereby making her life stigmatic. Accordingly, no fault is found in the finding recorded by the Court below in convicting the accused under Section 376 (1) IPC. However, as the prosecution could not establish that the accused showed her any obscene film or that the CD seized by it contained any such material, his conviction under Section 292 IPC is not sustainable in law. Likewise, after being held guilty under Section 376 (1) IPC for sucking the private of the prosecutrix and then making her suck his own private part, his conviction under Section 377 IPC cannot be made to stand particularly when there is no evidence that he did anything other than that against the order of nature. Thus conviction of the accused/appellant under Sections 376 (1) IPC and 4 of the POCSO Act is hereby maintained whereas the conviction under Sections 377 and 292 IPC is hereby set aside and he is acquitted of the said charges.

11. As regards sentence, keeping in view the fact that at the time of incident the accused/appellant was a young boy of 19 and that way not aware of the consequences of his act and further considering the fact that if he is made to remain in jail for the period as sentenced by the Court below, his entire life would be ruined and so also the life of his parents would become a living hell in the absence of their young son in their midst, this Court is of the opinion that ends of justice would be achieved if the sentence imposed on him is reduced to the RI

for 10 years. It is done so.

12. As stated above, the appeal is allowed in part.

Sd/-

(Pritinker Diwaker)

Judge

Sd/-

(Sanjay Agrawal)

Judge

Jyotishi