

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 107 of 2015

- Tularam Yadav @ Golu Yadav S/o Shivprasad Yadav Aged About 21 Years
R/o Village Bundela, At Present R/o Village Ghuru, Police Station
Chakarbhatha, Civil And Rev. Distt. Bilaspur C.G. , Chhattisgarh

---- Appellant

Versus

- The State Of Chhattisgarh Through The Police Station Chakarbhatha, Civil
And Rev. Distt. Bilaspur C.G. , Chhattisgarh

---- Respondent

For Appellants	:	Shri Chitendra Prasad, Advocate
For Respondent	:	Shri Adil Minhaj, Panel Lawyer.

Hon'ble Shri Justice Pritinker Diwaker

Hon'ble Shri Justice Gautam Chourdiya

Judgement

Per P. Diwaker, J

08/08/2018

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 16.1.2015 passed by the Additional Sessions Judge (FTC) Bilaspur in Special Sessions Case No.94/2014 whereby the learned Additional Sessions Judge has convicted the accused/appellant for the offences punishable under Sections 376 (2) (i) & 354 of the Indian Penal Code (henceforth 'the IPC') and Sections 4 & 8 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the Act of 2012") and sentenced him to undergo RI for 5 years & fine of Rs.500/-; RI for Life & fine of Rs.1,000/- and RI for 5 years & fine of Rs.500/-, with usual default clauses, respectively. Needless to mention here that in the light of Section

42 of the Act of 2012, the trial Court found it appropriate to sentence the appellant only under Section 4 of the Act of 2012 and accordingly imposed the sentence as aforesaid.

2. In the present case victim (PW-3) is an infant girl aged around seven years.
3. Facts of the case, in brief, are that on 24.2.2014 at 7.30 p.m. the accused/appellant took the victim girl in his house, made her lie on the cot, asked her to open her mouth and then he inserted his male organ into her mouth. When the victim girl started crying, the accused/appellant dropped her on the road. The victim narrated the entire incident to PW-3 who in turn informed PW-1, mother of the victim, and thereafter FIR (Ex.P-1) was lodged at her instance on 24.2.2014 at 10 in the night against the accused/appellant for the offence punishable under Section 354B of IPC and Sections 7 & 8 of the Act of 2012. After completion of investigation, charge sheet was filed against the accused/appellants and accordingly, the charges under the aforesaid sections were framed against him by the trial Judge. However, on 20.6.2014 the charges were amended and the accused/appellant has been charged with the offence punishable under Sections 354, 376 (2) (i) of IPC and Section 6 & 10 of the Act of 2012.
4. So as to hold the accused/appellants guilty, the prosecution has examined 07 witnesses. After recording of the evidence for the prosecution was over, the accused/appellant was examined under Section 313 of Cr.P.C. regarding the incriminating materials found in the evidence adduced on the side of prosecution. He denied such evidence to be false and once again reiterated his stand that he is not guilty of any offence.
5. After hearing counsel for the respective parties and considering the material available on record, the trial Court by the impugned judgement,

convicted and sentenced the accused/appellant in the manner as described above.

6. Learned counsel for the appellant submits that:-

- Madhuri Kashyap (PW-1) & Anand Kashyap (PW-2), who are grandmother & father of the victim respectively, have not supported the prosecution and turned hostile.
- conviction of appellant is based basically on the evidence of victim child but the statement made by her in the Court is contrary to her statement before the police wherein she has not alleged insertion of male organ in her mouth by the appellant. Even if the testimony of victim girl is accepted to be true, there is nothing to remotely suggest that ingredients of Sections 376 & 354 of IPC and Sections 4 & 8 of the Act of 2012 are satisfied so as to attract the said provisions against the appellant and at best, the act of the appellant would fall within the purview of Section 354B of IPC.
- the appellant is a young boy of 21 years age and was not aware of the consequence of his act, therefore, he deserves sympathy and the life sentence imposed upon the appellant may be reduced to the period already undergone.

7. State counsel however supports the judgment impugned and submits that the findings recorded by the Court below convicting the accused/appellants under the aforesaid sections are based on due appreciation of the evidence on record and there is no infirmity in the same warranting interference in exercise of appellate jurisdiction.

8. We have heard learned counsel for the parties and perused the material available on record.

9. Madhuri Kashyap (PW-1) is the grandmother of victim and also lodger of FIR. Though she has admitted that FIR was lodged at her instance but

she did not support the prosecution case and turned hostile.

10. Anand Kashyap (PW-2), father of victim, has also not supported the prosecution and therefore declared hostile by the prosecution.

11. The victim girl has been examined as PW-3. Since at the time of recording of evidence of victim, her age was about 7 years, the trial Judge had put certain questions to ascertain as to she was in a position to give the evidence on oath or not. The trial Court has observed that the manner in which the victim has replied shows that she is competent to understand the questions and is able to give rationale answer. Accordingly, her statement was recorded but without administering oath. She has stated that on the date of incident accused/appellant took her to the shop of Guddu uncle for purchasing chips for her from where he took her to his house, asked her to open her mouth and thereafter he inserted his male organ in her mouth. In the cross-examination she has admitted that she does not know as to what she has stated to the police during investigation. She has further stated that the accused laid her on cot, removed her jeans pant and when she started crying, he dropped her on the road. In the cross-examination, on being asked by the Court whether she remembers as to what was done by accused Golu with her, at one place she states in the affirmative, at another in negative and at last she keeps mum.

12. Madhu Yadav (PW-4), neighbour of victim, did not support the prosecution case and turned hostile. Prabhu Prakash Lakda (PW-5) is the investigating officer who has duly supported the prosecution case. N.L. Dhritlahare (PW-6) & Vinodini Tandi (PW-7) did initial part of the investigation.

13. We have heard learned counsel for the parties. We have gone through the evidence on record.

14. So far as the conviction of accused/appellant under Section 376 (2) (i) of IPC is concerned, before proceeding further, it would be profitable to refer to Section 376 of IPC, which reads as under:-

"376. Punishment for rape: -(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years."

15. Rape is defined under the sub-chapter heading 'Sexual Offences' vide Section 375 of IPC, which reads thus:

"Sexual offences Rape- A man is said to commit 'rape' if he-

- a) penetrates his penis, to any extent, into the vagina, mouth or any other person; or
- b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any

part of body of such woman or makes her to do so with him or any other person; or

d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions.....”

16. From a reading of Section 375 of IPC it is apparent that the offence of rape can be said to have been committed in respect of any sexual act committed by a 'man' against a 'woman' falling within the mischief of Section 375 (a) to (d). In other words, for convicting any person under Section 376 of IPC, the prosecution has to prove firstly that sexual intercourse was committed with the prosecutrix, and secondly, that sexual intercourse was committed with her forcibly against her will and without her consent. Even, in view of explanation to Section 375 of IPC, slightest degree of penetration is sufficient to prove the offence of sexual intercourse.

In the case in hand, however, from the evidence available on record, it can be safely said that the learned trial Judge has gone more on moralities than evaluating the evidence in light of the provisions of law. Though while making statement in Court the victim (PW-3) levelled the allegation of insertion of male organ by accused/appellant into her mouth, but when we advert to her statement made before the police and contents of FIR (Ex.P-1), it would transpire that therein she has clearly stated that after removing her *paijama*, when the accused/appellant asked her to open her mouth she started crying and therefore the accused/appellant dropped her on the road. Similar facts have been reiterated by her in the cross-examination. Even in the police statement (Ex.P-4) of Madhuri Kashyap (PW-1), mother of victim and lodger of FIR, there is no whisper

about the insertion of male organ by the appellant into the mouth of victim. Thus, a comparison of the victim's statement recorded under Section 161 CrPC, FIR (Ex.P-1) and the statement made in Court coupled with diary statement of lodger of FIR, would reveal that the victim has made improvement while making statement in Court regarding insertion of male organ in her mouth by accused/appellant as her aforesaid version is not supported by any other evidence on record. Hence, if the aforesaid uncorroborated statement of the victim (PW-3) is excluded, there is virtually no evidence on record on the basis whereof the charge under Section 376 of IPC could be proved against the accused/appellant. In other words, from the evidence on record the fact reveals that there was no penetration or insertion of male organ into any orifice of the body of victim and/or there was no sexual activity on the victim and it is settled position at law that where the accused had made no effort to penetrate, no offence punishable under Section 376 of IPC is made out against him. Under such circumstance conviction under Section 376 (2) (i) of IPC is not sustainable and accordingly the same is liable to be set aside.

17. As regards the conviction of accused/appellant under Section 354 of IPC, there is nothing on record to show that the appellant in any way used any criminal force with intent to outrage the modesty of victim. The only admissible evidence against the appellant is that he took the victim to his house, laid her on a cot, took off her jeans pant and when he asked her to open her mouth, she started crying and therefore he dropped her on the road. This conduct on the part of the appellant cannot be considered to be sufficient for holding him guilty under Section 354 of IPC because the essential ingredients of the offence under Section 354 of IPC are not satisfied from the evidence on record and this being the position, his conviction for the offence under Section 354 IPC also deserves to be set

set aside. However, in the given facts and circumstances of the case, the accused/appellant cannot escape his conviction under Section 354B of IPC, which envisages that whoever assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, with intent to disrobe, shall be punished under this section.

18. So far as the conviction of accused/appellant under Section 4 of the Act of 2102 is concerned, since there is nothing to establish that there was penetrative sexual assault committed by the appellant, he cannot be said to have been rightly convicted for the said offence. However, from the Court statement of the minor victim, aged about 7 years, it is clear that the accused/appellant had sexual intention when he physically touched the victim and thereby he had committed the offence as defined under Section 7 of the Act of 2012 which is punishable under Section 8 of the Act of 2012.
19. As regards the quantum of sentence, Sections 354B of IPC provides punishment which shall not be less than 3 years but which may extend to 7 years. Section 8 of the Act of 2012 provides punishment which shall not be less than 3 years but which may extend to 5 years. Keeping in view the fact that at the time of incident the accused/appellant was a young boy of 21 and that way not aware of the consequences of his act and further considering that he has served sentence of almost four years & six months, which is more than minimum sentence under Section 354B of IPC and Section 8 of the Act of 2012, this Court is of the opinion that ends of justice would be achieved if the appellant is sentenced to the period already undergone.
20. For the foregoing reasons, the criminal appeal is partly allowed. Conviction and sentence of accused/appellant under Sections 376 (2) (i) & 354 of IPC and Section 4 of the Act of 2012 are hereby set aside. Instead

thereof he is held guilty under Section 354B of IPC and Section 8 of the Act of 2012 and sentenced to the period already undergone by him, for each offence. Accused/appellant is directed to pay an additional fine of Rs.15,000/-, to be deposited before the concerned trial Court within a period of six months from today. If the accused/appellant fails to deposit the amount of fine as aforesaid, he shall undergo further RI for 6 months and in that eventuality the trial Court shall issue non-bailable warrant against the accused/appellant to secure his presence so that he can be sent to serve the sentence imposed.

21. The fine amount so deposited shall be paid as compensation under Section 357 of Cr.P.C. to the victim girl (PW-3) by the trial Court after due verification.
22. Accused/appellant is reported to be in custody, therefore, he be set free forthwith if not required to be detained in connection with any other offence.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(Gautam Chourdiya)
Judge

roshan/-