

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 208 of 2015

- Vijay Dewangan S/o Prahlad Dewangan Aged About 48 Years
R/o Prabhat Chouk, Chingrajpara, P.S. Sarkanda, Post-
Sarkanda, Civil And Rev. Distt. Bilaspur C.G.

---- Appellant

Versus

- State Of Chhattisgarh Through District Magistrate, Bilaspur Civil
And Rev. Distt. Bilaspur C.G.

---- Respondent

For Appellant	:	Shri DK Gwalre & Shri Keshav Dewangan, Advocate.
For Respondent/State	:	Shri Ravindra Agrawal, Govt. Adv.

Hon'ble Shri Justice Pritinker Diwaker

Hon'ble Shri Justice Gautam Chourdiya

Judgment on Board by Justice Pritinker Diwaker

25.06.2018:

This appeal arises out of the judgment of conviction and order of sentence dated 15.1.2015 passed by the Additional Sessions Judge (FTC), Bilaspur in Special S.T. No.14/2013, convicting the appellant under Section 376(2)(i) of IPC read with Section 4 of Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act") and sentencing him to undergo imprisonment for life and pay a fine of Rs.5000/- with default stipulation.

02. As per the prosecution case, on 20.6.2013 FIR (Ex.P/2) was lodged by PW-2 Smt. Durgarani Soni, mother of the minor prosecutrix (PW-10), alleging in it that the accused/appellant is her neighbour and

her daughter/prosecutrix, aged about 6 years, quite often used to go to his house for playing. On 17.6.2013 she had gone to the house of the appellant and when she did not return she (this witness) went to the house of the appellant, upon opening the door of his house she found the appellant lying on bed covering himself with a gamchha and his private part was visible. She further states that next to the appellant, the prosecutrix was also lying on bed and she brought her back to him. However, on 19.6.2013 the prosecutrix complained of pain in her private part and when she saw her private part in torchlight, she noticed swelling, reddishness and hollowness there. On being enquired, the prosecutrix disclosed to her that the appellant had inserted his finger into her private part and thereafter also inserted his private part into that of her. Based on this FIR, offence under Section 376 of IPC read with Section 3(a)(b) of POCSO Act was registered against the appellant.

The prosecutrix was medically examined on 20.6.2013 vide Ex.P/5 by PW-5 Dr. Sheena Anand Chaubey who noticed no external or internal injury on her body, there was no sign of commission of rape with her, her hymen was intact and no injury noticed on her private part. However, for determination of age of the prosecutrix she referred her to radiologist. She also prepared two vaginal slides of the prosecutrix and handed over the same to the police constable. As per ossification test vide Ex.P/11, the age of the prosecutrix was assessed in between 4 and 6 years. The appellant was also medically examined by PW-6 Dr. PC Banerjee who found him capable of performing sexual intercourse vide Ex.P/8.

Vide seizure memo Ex.P/6, underwear of the prosecutrix worn at the time of incident was seized and vide seizure memo Ex.P/1, underwear of the appellant was also seized. The vaginal slide seized vide Ex.P/7 as also the underwear of the prosecutrix and the appellant were sent to FSL for chemical examination. As per FSL report (Ex.P/18), semen and spermatozoa was found on the underwear of the prosecutrix whereas no semen or spermatozoa was found on the vaginal slide and underwear of the appellant. However, the semen found on underwear of the prosecutrix was not sufficient for serological examination. While framing charge, the trial Court framed charges under Sections 376(2)(i) of IPC and Section 4 of POCSO Act.

03. So as to hold the accused/appellant guilty, the prosecution examined 12 witnesses in all. Statement of the accused was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case, pleaded innocence and false implication.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment convicted and sentenced the appellant as mentioned in para-1 of this judgment.

05. Counsel for the appellant submits as under:

(i) that both the prosecutrix and her mother have exaggerated their version while deposing in the Court as there is some property dispute between father of the prosecutrix and the appellant.

(ii) that medical report of the prosecutrix completely falsifies the

statement of the prosecutrix and her mother.

(iii) that no injury, external or internal, was found on the person of the prosecutrix including her private part and as such, the alleged act of the appellant does not fall within the definition of Section 3 of POCSO Act.

(iv) the Court below has erred in law in convicting the appellant under Section 4 of POCSO Act and at best, the act of the appellant would fall within the definition of Section 7 of the POCSO Act i.e. sexual assault, for which punishment is provided under Section 8 of the Act.

(v) that the appellant is in jail since 20.6.2013 and as such has already completed more than five years jail sentence whereas the maximum sentence provided under Section 8 of the Act is five years and therefore, the appellant may be released forthwith.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel that conviction of the appellant is strictly in accordance with law. He submits that mentality of the appellant has to be seen where he, a man of about 50 years, has committed such a heinous act with a tender aged girl of 4-6 years. He submits that if the Court finally comes to the conclusion that the act of the appellant would fall under Section 7 of POCSO Act, then while sentencing him an exorbitant amount of compensation may be directed to be paid by the appellant to the prosecutrix.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-10 is the prosecutrix who was about 7 years at the time of deposition. The trial Court after recording its satisfaction about the competence of the witness to give evidence proceeded to record her evidence without administering oath to her. She has stated that she knew the appellant, whom she used to call *Bade Papa*, who was residing near her house. On the date of incident she had gone to play in the house of the appellant, at that time two daughters of the appellant were also there; when she was watching TV, the appellant was caressing her private part and was making attempt to insert his private part into that of her. She states that thereafter the appellant gave her one rupee and she purchased some sweets and that her aunt (बड्डी मम्मी) came there, took her to hospital where the hospital staff told her that it is a police case and then she took her to her mother (PW-2). Thereafter, her mother (PW-2) splashed some water on her private part and then she was taken to police station by her mother and father. She further states that she was medically examined by the doctor.

In cross-examination she states that on account of some property dispute between her father and the accused/appellant, once her father had threatened the appellant. When she was confronted with her diary statement Ex.D/3 she states that she did inform the police that the appellant was caressing her private part and was trying to insert his private part into that of her and if the same is not recorded, she can not tell the reason. Likewise, she states that her other statement that she was taken to hospital from where she returned and then her mother splashed some water on her private part, one rupee

was given by the appellant for purchasing sweets, was also made to police and if the same is not recorded, she can not tell the reason.

It is relevant to note here that in her diary statement, the prosecutrix has never stated that the appellant inserted his finger into her private part or that he made an attempt to insert his private part into that of her. In diary statement she has stated that after removing her underwear the appellant used to touch her private part and used to rub the same. She states that as she was having itching in her private part and was feeling pain there, she informed her mother about the same.

09. PW-2 Smt. Durgarani Soni, mother of the prosecutrix, has stated that in search of the prosecutrix when she went to the house of the appellant, upon opening the door of his room she found the appellant lying on bed, he was naked below the waist and his private part was visible and that next to the appellant her daughter/prosecutrix was also lying. She called out the prosecutrix and took her to her house. At that time, the prosecutrix was very dull. When she enquired from the prosecutrix, she disclosed to her about the act of the appellant. In cross-examination, though there are some contradictions as compared to her diary statement but she remained firm so far as making allegation against the appellant is concerned.

10. PW-5 Dr. Sheena Anand Choubey medically examined the prosecutrix on 20.6.2013 vide Ex.P/5. She did not notice any external or internal injury on her body, there was no sign of commission of rape with her, hymen was intact, no injury noticed on her private part. However, for determination of age of the prosecutrix she referred her to

radiologist. She also prepared two vaginal slides of the prosecutrix and handed over the same to the police constable. In cross-examination she states that if private part of a tender aged girl is rubbed, there may occur reddishness, however, no such reddishness or sign of insertion of finger into vagina was noticed by her on the private part of the prosecutrix.

11. PW-6 Dr. PC Banerjee medically examined the appellant and found him capable of performing sexual intercourse vide Ex.P/8. PW-8 Dr. SK Tiwari conducted ossification test of the prosecutrix and found her aged between 4 and 6 years vide Ex.P/11. PW-3 Gaya Prasad, father of the prosecutrix, came to know about the incident from his wife and the prosecutrix. PW-4 Krishna Kumar Dubey, PW-9 Manisha Chandra and PW-11 Vimla Manhar, police personnel, assisted in the investigation whereas PW-12 KMS Khan is the investigating officer who has supported the prosecution case.

12. Before appreciating the evidence, we deem it proper to refer to the provisions of Sections 3 & 4 of POCSO Act, which read as under:

“3. Penetrative sexual assault.-

A person is said to commit "penetrative sexual assault" if-

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

with him or any other person; or

d. he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

4. Punishment for penetrative sexual assault.-

Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.”

13. Close scrutiny of the evidence makes it clear that in the Court the prosecutrix has stated that on the date of incident when she had gone to the house of the appellant and was watching TV, the appellant was trying to insert his private part into that of her but in her diary statement this fact is totally missing where she states that the appellant had touched her private part and was trying to rub the same. Even as per PW-2 Smt. Durgrarani Soni, mother of the prosecutrix, when she entered the room of the appellant, she saw him lying on bed in almost naked condition below the waist and next to him was lying the prosecutrix. PW-2 too has not stated that she saw the appellant committing sexual intercourse with the prosecutrix. This apart, medical report of the prosecutrix (Ex.P/5) also negates the possibility of rape with the prosecutrix. PW-5 Dr. Sheena Anand Choubey who medically examined the prosecutrix on 20.6.2013 states that she did not notice any external or internal injury on her body, there was no sign of commission of rape with her, her hymen was intact, no injury was noticed on her private part. Furthermore, as per FSL report (Ex.P/18), semen and spermatozoa was though found on the underwear of the prosecutrix but there is no serological report and that no semen or spermatozoa was found on the vaginal slide and underwear of the

appellant.

Thus, considering the totality of the case and the nature of evidence adduced, we are of the view that the act of the appellant is covered under Section 7 of the POCSO Act and not under Section 3, as there is unrebutted evidence of the prosecutrix and her mother that the appellant touched the private part of the prosecutrix with sexual intent and she was found lying on bed with the appellant who was naked below the waist. Section 7 of the Act reads as under:

“7. Sexual assault.-

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

14. As regards punishment, the same has been prescribed under Section 8 of POCSO Act, wherein it has been mentioned that whoever commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine. In the case in hand, it is an admitted fact that the appellant has already remained inside for more than five years and as such, has already completed the maximum jail sentence provided for the offence under Section 7 of the Act. Even otherwise, considering the act of the appellant, the jail sentence suffered by him appears to be commensurate with the gravity of the offence. This apart, we also deem it necessary to award suitable compensation to the victim/prosecutrix.

15. In the result, the appeal is allowed in part. The impugned judgment is hereby modified to the extent that the appellant is held guilty under Section 7 of POCSO Act, 2012 and sentenced to the period of five years' R.I. He is also directed to pay compensation of Rs.50,000/- under Section 357 of CrPC to the victim/prosecutrix. The amount so deposited shall be kept in a nationalized bank in the name of the prosecutrix till she attains majority. In default of payment of compensation amount, the appellant shall suffer additional R.I. for six months.

Sd/

(Pritinker Diwaker)

Judge

Sd/

(Gautam Chourdiya)

Judge