

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on: 07/03/2019

Judgment delivered on:01/04/2019

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 589 of 2017

- Yogesh Bharti @ Jugnu S/o Harihar Bharti, aged about 22 Years, R/o Jagannath Mandirpara, Sariya, Police-Station-Sariya, District-Raigarh, Chhattisgarh.

---- Appellant

Versus

- State of Chhattisgarh, through Station House Officer of Police-Station Sariya, District-Raigarh, Chhattisgarh.

---- Respondent

For the Appellant : Mr. Roop Naik, Advocate.

For the State/Respondent : Mr. Adil Minhaj, Panel Lawyer.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV Judgment

01/04/2019

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 23.12.2016 passed by the learned Upper Session Judge, Raigarh, District-Raigarh(CG) in CNR No.CGRG04-000099-2014/2014 POCSO Case No.4/2015, convicting the accused/appellants under Section 376(2)(i), 377 of Indian Penal Code (for short 'IPC') & Sections 6 & 8 of the Protection

of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and sentencing him to undergo R.I. for 10 years with fine of Rs.1000/-, RI for 5 years with fine of Rs.500/-, R.I. for 10 years with fine of Rs.1000/- & R.I. for 3 years with fine of Rs.200/- plus default stipulations.

2. The prosecution case, in brief, is this that two days prior to 7.10.2014 the appellant by taking the two victims in his influence, took them to a lonely place inside a primary school. It is alleged that the appellant disrobed both the girls and licked their private parts and thereafter he also made the girls to lick his private part. The victims later on informed about this incident to mother of victim PW-1 Laxmi Namdev PW-11, who informed about this incident to complainant Vishnu Namdev PW-10. As the girls were not acquainted with the name of the appellant, Vishnu Namdev took the victims in the street, where the appellant was painting the house of Nohar Singh Patel(PW-5), who was immediately identified by the victim girls. FIR Ex.P-5 was lodged by Vishnu Namdev on 7.10.2014. The victim girls aged about 4 & 4 ½ years respectively, were medically examined and their statements were recorded under Section 164 of CrPC. Other investigative procedures were made and after completion of investigation, charge-sheet was filed against the appellant.
3. Appellant was charged with offences punishable under Sections 376 r/w 511 & 377 of IPC and Sections 4 & 8 of the POCSO Act. The appellant denied the charges framed against him and prayed for trial. On completion of prosecution evidence, the appellant was examined

under Section 313 of CrPC in which he denied all the incriminating evidence appearing against him in the prosecution case, pleaded innocence and false implication. No witness has been examined in defence.

4. On completion of trial, the impugned judgment has been passed in which appellants stand convicted and sentenced in the manner as mentioned herein-above.
5. It is submitted by learned counsel for appellant that the appellant has been convicted without there being any material in the prosecution evidence establishing his guilt beyond reasonable doubt. It is firstly submitted that identity of the appellant has not been established as none of the victims knew his name. In cross-examination, victim PW-1 has admitted that the incident was reported to the police by her mother. Another victim PW-2 aged about 4 years & 6 months has stated in her cross-examination that she knows the accused but she is not acquainted with his name. None of the other witnesses has seen the appellant during alleged commission of offence and even Test Identification Parade (TIP) has not been conducted in the course of investigation. Apart from this, the victims have exaggerated before the Court which has been admitted by Investigation Officer Jagatraj Singh PW-19 in his cross-examination. It is submitted that as the prosecution has failed to prove its case beyond reasonable doubt, therefore, the appeal be allowed and the appellant be acquitted of all the charges levelled against him. In the alternative, it is submitted that if this Court is not inclined to allow this appeal then, in the given

facts and circumstances of the case, the sentence imposed upon the appellant may be reduced as it is too harsh.

6. Learned counsel for the State opposes the submissions made in this respect. It is submitted that the victims PW-1 & PW-2 had been very consistent witnesses. Although the victim did not know the name of the appellant but they were acquainted with him and had correctly identified him in the street in presence of other witnesses. It is not a case where the accused was an unknown person only because of tender age the victims thus could not recollect his name and the same cannot be a ground to reject the evidence regarding identification of the appellant. There is no such contradiction, omission or discrepancy in the statement of the witnesses so as to hold them unreliable or untrustworthy, therefore, it is prayed that this appeal is devoid of merits and the same is liable to be dismissed as such.
7. I have heard learned counsel for the parties and perused the record of the trial Court including the impugned judgment.
8. The question that requires determination in this appeal is as to whether on the basis of evidence available on record the prosecution has been able to establish guilt of accused/appellants beyond reasonable doubt ?
9. Victim PW-1 (aged about 4 years) has clearly stated that on the date of incident the appellant allured her and PW-2 by promising to give them chocolate and took them to a lonely place i.e. inside the primary

school. She has further stated that the appellant removed her undergarments as also of PW-2 and started licking their private parts. Thereafter, the appellant made this victim and PW-2 to lick his private part, by putting it into their mouths. Due to continuous kissing of private part, she felt bad and thereafter she came back. In cross-examination, her statement remained unrebutted. She has admitted that the matter was reported by her mother to the police and thus it is clear that she is not the lodger of FIR. Apart from that, her statement under Section 164 of IPC has been recorded by the Court concerned. On the contrary she has made a statement in her examination-in-chief that the appellant is known as Babatura which has not been contradicted in the cross-examination. No question has been put to her with intention to dispute the identity of the appellant. On the other hand, her statement in examination-in-chief has remained unrebutted.

10. Victim PW-2 (aged about 4 ½ months) has made similar statement and fully corroborated victim PW-1, her statement has remained unrebutted and uncontradicted in her cross-examination.

11. PW-3 Smt. Laxmi Namdev is mother of victim PW-1 and PW-4 Shanta Namdev is mother of victim PW-2. These statements are under Section 164 of CrPC, which cannot be taken into consideration.

12. PW-5 Nohar Singh Patel has stated that in his presence, the victims were asked to identify the appellant, whom they did not identify. In cross-examination, he has admitted that the appellant was present to

paint his house for whole of the day, thus, this witness has made a contradictory statement.

13. PW-8 Ram Prasad Namdev is father of victim PW-2, who has stated about the narration of incident given to him by his wife. In cross-examination, he has admitted that PW-2 herself did not make a statement regarding the incident to him. He is not a direct witness nor he has stated about the identification of appellant.

14. PW-9 Shanta Namdev is mother of victim PW-2, who has stated that her daughter PW-2 informed her about the incident and alleged that appellant was the person responsible. In cross-examination, she has admitted that for the first time she had seen the appellant in the police station and prior to that she had never seen him. The appellant was not a frequent visitor to her house. However, she is a hearsay witness whose statement is based on the statement given by her daughter. There is no such statement made by her in cross-examination that her daughter had not informed her about the incident.

15. PW-10 Vishnu Namdev is father of victim PW-1, who has stated in detail about the incident which was informed to him by his wife Laxmi Namdev PW-11. He has stated that after coming to know about the incident, he took both the victims on his motorcycle towards the township, where the appellant was found painting the house of one Shekhar Patel. Seeing the appellant, both the victims immediately identified him and therefore, he lodged FIR Exp-5. In cross-

examination, his statement has remained unrebutted and there is no such statement made by him so as to contradict him on the point of identification of the appellant and about the information given to him by his wife regarding the incident. He has denied all the adverse suggestions given in defence. The reaction of this witness had been immediate and according to him he came to know about the incident on the next date of incident and then he took the victims for the purpose of identifying the appellant. This statement made by him contradicts the statement made by Nohar Singh in cross-examination that the appellant was present throughout the day for painting his house because he has made the statement for the other day when the appellant is said to have been identified, therefore no ground of alibi is made out and his statement on the point of identification cannot stand against the statements of the victims who have clearly identified the appellant.

16. Laxmi Namdev PW-11 has given statement before the Court that her daughter PW-1 and another victim PW-2 both informed her in detail about the incident and thereafter she gave this information to her husband Vishnu Namdev PW-10. PW-2 had said that the concerned boy was wearing an earring and she will identify him. Thereafter, the girls were shown a number of boys, out of which the appellant was identified by them. In cross-examination, she has admitted that she knows the appellant on the date of incident and she did not know him before that. Her statement has remained unrebutted, in her cross-examination. Minor variations made by her are of no consequence.

Another witness on this point is PW-12 who did not support the prosecution case and turned hostile.

17. Dr. Smt. J. Tripathi PW-6 examined victim PW-1 on 8.10.2014 and found no injury on her body. She has given her opinion vide Ex.P-1 that PW-1 was not subjected to any sexual intercourse. She has also examined victim PW-2 on the same day and gave similar opinion vide ExP-2 that the girl was not subjected to sexual intercourse nor any injury was found on her body.

18. ASI Jagat Raj Singh PW-19 has made statement in his examination-in-chief regarding the investigative procedures done by him. In cross-examination, he admitted the fact that none of the witnesses had stated that the appellant had made the victims to take his private part into their mouth. Although this question was not put to the victim PW-1 and 2 but the other statement made by them that the appellant made them lick his private part still remains uncontradicted. Other statements made by him in his cross-examination do not contradict or controvert the statement of other witnesses of this case.

19. After closely scrutinizing the evidence of all the relevant witnesses, who have made statement before the Court regarding the incident and their knowledge about the incident, it is found there had been no issue at all of identification of the appellant in this case. The victim PW-1 and PW-2 were acquainted with the appellant. The only thing remains that they do not know his name. Looking to the tender age of the victims it cannot be expected from them to know each and

every person within their acquaintance by name, because at this age a child usually knows a person by relation name like father, brother, uncle etc., therefore, this lapse about the naming the appellant on the part of the victims does not carry any gravity. Non-conduction of TIP also does not make the evidence of victims unreliable, for the reason that the appellant was known to the victims and according to the evidence present after seeing number of similar persons in the street, the victims had identified the appellant only in presence of Vishnu NamdevPW-10. Although there is statement made by PW-5 in his examination-in-chief that the appellant was not identified by the victims, but there is also statements of the victims PW-1 & PW-2 and another witness Vishnu Namdev PW-10 which cannot be ignored. Further, the statement of witnesses who have stated against the appellants cannot be held unreliable for any reason to be mentioned as there is nothing in their cross-examination to suggest in that manner, therefore, I find the evidence of witnesses reliable in this case on the basis of which the order of conviction has been passed against the appellant.

20. Considered on the propriety of the conviction in the offences in which appellant has been convicted. Conviction of the appellant under Section 376(2)(i) of IPC is not based on any evidence in this respect because there is no evidence to prove that the victims PW-1 & PW-2 were raped, therefore, their conviction under that section is bad in law. Similarly, the conviction of the appellant under Section 377 of IPC is also not based on any evidence because it is not the case of

prosecution that any unnatural intercourse had taken place. The additional statement recorded in evidence before this Court is this that the appellant made the victims to take his private part in their mouth has been found to be improved statement which cannot be relied upon, therefore, the conviction of the appellant under Section 377 of IPC is also bad in law.

21. The conviction of appellant under Section 6 of POCSO Act is also not proper finding of the Court below. The aggravated penetrative sexual assault of the kind, which is mentioned in Section 5 of the POCSO, Act is punishable under Section 6 of the POCSO Act. For conviction in such offence, the person committing offence should be a police officer or member of armed forces etc., which is not a case here, therefore, the act of the appellant in this case would be covered under Section 7 of the POCSO Act which defines 'simple sexual assault' which is punishable under Section 8 of the Act. No fault is found with the conviction of appellant under Section 8 of the POCSO Act.

22. After considering on the entire material present in the record and on the basis of above discussions, this appeal is allowed in part. Conviction and sentence of the appellant under Section 376(2)(i) and 377 of IPC are set aside. Conviction and sentence of appellant under Section 6 of POCSO Act is also set aside. His conviction under Section 8 of POCSO Act is upheld, for which he has been sentenced with RI for 3 years along with fine of Rs.20/- by the Court below, which is maintained as it is. Appellant is in jail since 8.10.2014. there

the he has already undergone the in the conviction U/s 8 of POCSO Act. Appellant be released from jail in case he is not required to be detained in any other case.

23. Accordingly, appeal disposed off.

Sd/-
(Rajendra Chandra Singh Samant)
Judge

Nisha