

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 524 of 2019**

- Sonu @ Mahendra Sen S/o Suresh Sen, aged about 25 years,
R/o - Balodagahan, Police Station - Gurur, District - Balod (C.G.)

---- Appellant**Versus**

- State of Chhattisgarh Through : Police Station Dhamtari, District
Dhamtari (C.G.)

---- Respondent

For Appellant : Mr. M.K. Baeg, Advocate.
For Respondent/State : Mr. Anand Verma, Dy. G.A.

**D.B. : Hon'ble Shri Justice Prashant Kumar Mishra &
Hon'ble Smt Justice Rajani Dubey**

Judgment On Board**15.05.2019****Per Rajani Dubey, J**

01. With the consent of learned counsels for the parties, the matter is heard finally.

02. This appeal is directed against the impugned judgment of conviction and order of sentence dated 29.01.2019 passed by Special Judge, POCSO (F.T.C.), Dhamtari, District Dhamtari, in Special Criminal Case No.96/2018 whereby and whereunder, the appellant has been held guilty of commission of offence and sentence him as described below.

Conviction	Sentence
Under Sections 376-2 of IPC and 6 of Protection of Children from Sexual	R.I. for 15 years and fine of Rs.500/-, in default of payment of fine, 6

Offences Act	months additional S.I.
Under Section 506(B) IPC	R.I. for 1 year

03. The Prosecutrix (PW/5) lodged an FIR in the police station on 16.05.2018 stating that she is a student of 10th class and her date of birth is 03.08.2003. Sagar Jadhav is her neighbour in whose house accused/applicant Sonu @ Mahendra used to come. On 11.11.2017 at about 7.30 PM, accused/applicant made a call to her over telephone and said that she was called by Sagar's mother (Buwa). When she went there, she found the accused/applicant alone, he allured her saying that he likes her most, caught hold of her, committed forcible sexual intercourse with her and threatened that if she discloses the incident, she would be killed. It has been further alleged that from 11.11.2017 to 30.11.2017, the appellant had sexual intercourse with the prosecutrix on number of occasions, as a result of which she became pregnant. Thereafter, she tried to contact the appellant but he didn't reply. Based on this FIR, offence under Section 363, 376, 506 IPC and Sections 4 and 6 of Protection of Children from Sexual Offences Act (for short 'POCSO Act'), were registered against the appellant. The prosecutrix was medically examined vide Ex.P/6 and according to the doctor, at that time, she was carrying pregnancy of 5 months. After investigation charge sheet was filed against the appellant under Sections 363, 376, 506 IPC and Sections 4 and 6 of POCSO Act, and thereafter, the trial Court framed charges under Sections 376(2), 506 -B IPC and Section 6 of POCSO Act against him.

04. So as to hold the appellant guilty, the prosecution examined as

many as 19 witnesses. Statement of the appellant 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.

05. 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.

06. Learned counsel for the appellant submits that there is inordinate delay of about six months in lodging the FIR and the said delay has not been explained by the prosecutrix as per requirement of law. He would further submit that the report was lodged only when pregnancy of the prosecutrix came to the knowledge of her family members and before that the appellant and the prosecutrix had sexual intercourse on number of occasions without any protest or resistance on her part. It has been also argued that the statement of prosecutrix is wholly unreliable, considering the overall evidence on record, it is clear that if there was any sexual intercourse between the appellant and the prosecutrix, she was a consenting party to that act and as such, the appellant cannot be held guilty under Section 376 (2) IPC. The alternate submission of learned counsel for the appellant is that the sentence awarded under Section 376 IPC and Section 6 of POCSO Act i.e. 15 years R.I. is very harsh punishment and the appellant may be saddled with minimum punishment of 10 years as the incident had taken place prior to amendment in Section 376 IPC.

07. 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 and there is no illegality or infirmity in the judgment impugned warranting interference by this Court.

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

09. Prosecutrix (PW/5) has stated that she knew appellant Mahendra Sen as also her neighbour Sagar Jadhav. She has stated that her date of birth is 03.08.2003. In February, 2017, the appellant had come to her brother's marriage where they had interaction with each other. The appellant also used to visit Sagar's house, who is her brother in relation. The appellant had called her in Sagar's house saying that her aunty (Buwa) is calling her. When she reached there, except appellant, no one was present there, thereafter, appellant said that he loves her most, to which she denied and came back to her house. She has further stated that the appellant again called her and when she went in Sagar's house at 7.30 PM, the appellant bolted the door from inside and committed forcible sexual intercourse with her. According to her, thereafter, the appellant had sexual relations with her on number of occasions. The appellant used to threat her that if she discloses the incident, she would be killed, and, therefore, she did not disclose the incident to anyone. This witness has also stated that when she developed problem in menstruation, she made a call to appellant but he did not reply and during medical check up at Masihi Hospital, she came to know that she was carrying five months' pregnancy. She has also stated that the incident of sexual relation and

her pregnancy was informed to her elder mother Sarita Bhandulkar (PW/7). She has further stated that she lodged FIR in the police station vide Ex.P/7, gave consent in written for her medical check-up vide Ex.P/8 and admits her signature thereon. Her radiologist examination was also done. Her blood sample was also taken for DNA test vide Ex.P/25. In para 9 of her cross-examination, she admits that she never informed the incident to anyone and when she became pregnant, the report was lodged. She admits that the report was lodged after six months from the incident.

10. Smt. Gayatri Sinha (PW/3) is the Sub Inspector. She has stated that after coming to know about the incident, she registered the FIR under Sections 363, 366, 376, 506 IPC and Sections 4 & 5 of the POCSO Act vide Ex.P/7 and carried out further investigation. In para 6 of her cross-examination, she has admitted that the report was lodged after six months from the date of incident.

11. Smt. Bharti Bhandulkar (PW/4) is the mother of the prosecutrix. She has stated in her evidence that the prosecutrix is her elder daughter and her date of birth is 03.08.2003. She has further stated that the incident was of the year 2017. There was swelling on the body of the prosecutrix and for the treatment of the same she had taken the prosecutrix to Masihi Hospital, Dhamtari, where, after medical examination, she came to know that the prosecutrix was carrying pregnancy of five months. She has also stated that on being inquired, the prosecutrix informed that the appellant had come to her (prosecutrix) contact in a marriage and, thereafter, they had physical relation first time in the house of neighbour Sagar Yadav and on

number of occasions, as a result of which she became pregnant. This witness has also stated that the appellant had threatened the prosecutrix that if she discloses the incident, she would be killed, and, therefore, on account of fear, the prosecutrix did not disclose the incident to anyone. She has also stated that upon medical examination of the prosecutrix, they came to know about the dead child in her uterus. She has further stated that the progress report and copy of birth certificate of the prosecutrix were seized vide Ex.P/14 and she admits her signature thereon. In para 7 of her cross-examination, she states that while admitting the prosecutrix in the nursery, she had registered the date of birth of the prosecutrix by guessing. A suggestion that the progress report of the prosecutrix has been prepared according to the police, has been denied.

12. Dr. S.M.M. Moorthy (PW/1) is the Pathologist. He has stated that he had collected blood sample of the appellant and the prosecutrix for DNA test and proved his report Ex.P/4 and P/5 respectively. Dr. Rohit Dubey (PW/2) has stated that on 18.09.2018, the prosecutrix was produced before him for determination of age and he had referred the prosecutrix to radiology department vide Ex.P/6.

13. Deepakrao Bhandulkar (PW/6) is the father of the prosecutrix. He has stated that he and his wife used to go to work at morning and come at night. He noticed swelling on the body of the prosecutrix and they had taken the prosecutrix to Masihi Hospital, Dhamtari, for treatment where, after medical examination and tests, he came to know that the prosecutrix was carrying five months' pregnancy. He has further stated that when they came back from hospital, the prosecutrix

narrated the incident to Sarita Bhandulkar (PW/7), his sister-in-law (Bhabhi), that the appellant had called her (prosecutrix) to her aunty's house and when she went there the appellant committed forcible sexual intercourse with her and also threatened her. A bare perusal of the evidence of this witness goes to show that he has not stated anything regarding date of birth of the prosecutrix. Sarita Bhandulkar (PW/7) is the witness to whom, the prosecutrix, after medical examination, has narrated the incident that it is the appellant who committed forcible sexual intercourse with her. Pradeep Kumar Sahu (PW/11) is the patwari who prepared spot map vide Ex.P/21. Dr. (Smt.) Madhuri Wankhede (PW/12) medically examined the prosecutrix vide Ex.P/27 and noticed that the prosecutrix was carrying pregnancy of 5 months. She did not notice any external or internal injury on the person of the prosecutrix. She has stated that secondary sexual characters were fully developed, breast were developed, the size of uterus was of 20-22 weeks, pubic hair were present in private part, old hymen was torn and her vagina was admitting two fingers easily. She has also stated that the prosecutrix was referred to Radiologist, Medical College, Raipur for determination of age as there was no Radiologist posted in District Hospital, Dhamtari. Dr. Rakesh Soni (PW/13) medically examined the appellant and found him capable of performing sexual intercourse. Uttam Nishad (PW/14) and Sushila Mandavi (PW/15), Constable, are the witnesses to seizure of a dead child of 20-22 weeks of the prosecutrix, which was preserved for DNA test, vide Ex.P/31. B.R. Sinha (PW/16) - Sub Inspector, is the investigating officer, who has duly supported the prosecution case. Dr.

Pratibha Tiwari (PW/17) has treated the prosecutrix at B.R. Ambedkar Hospital, Raipur. She has stated that during the course of treatment, her ultrasound was done in which fetus was found to be dead, and for delivery of dead fetus, consent of parents was taken. She has proved the bed head ticket vide Ex.P/54 to P/57. In para 5 of her cross-examination, she states that an application was given for taking blood sample of the prosecutrix for DNA test, on which, consent of parents of the prosecutrix was taken. She also states that information with regard to consent for taking blood sample of the prosecutrix for DNA test was given to Hospital Superintendent, vide Ex.P/52.

14. Close scrutiny of the evidence makes it clear that, though, there is inordinate delay of six months in lodging the FIR, but the said delay has been properly explained by the prosecutrix. From the evidence of the witnesses, including the prosecutrix, it is clear that report was lodged only when pregnancy of the prosecutrix came to the knowledge of her parents after her medical examination. The evidence on record, in particular the Birth Certificate (Ex.A/1), progress report (Ex.P/19) and x-ray report (unexhibited) of the prosecutrix, goes to show that on the date of incident the prosecutrix was below 17 years of age, and as such, she was minor. Though, according to the statement of the prosecutrix, she appears to be a consenting party to the act of the appellant, but once it is proved that the prosecutrix, at the time of incident, was minor, her consent is immaterial. That apart, there is DNA report on record, which proved that the appellant is a biological father of the dead child. Thus, complicity of the appellant stands proved beyond reasonable doubt.

15. We have given our anxious consideration to the submission of learned counsel for the appellant that 15 years R.I. is a very harsh punishment, and in the interest of justice, the appellant may be saddled with minimum punishment of ten years for the alleged commission of offence.

Considering the facts and circumstances of the case, age of the appellant and further considering that the appellant has no criminal antecedent, we are inclined to reduce the sentence period and order that the appellant shall undergo R.I. for 10 years.

16. The appeal is partly allowed. The conviction of the appellant under Sections 376 (2), 506 (B) IPC and Section 6 of POCSO Act & fine amount shall remain same, however, sentence awarded under Section 376 (2) IPC and 6 of POCSO Act is reduced to R.I. for 10 years.

Sd/-

(Prashant Kumar Mishra)
Judge

Sd/-

(Rajani Dubey)
Judge