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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.363 of 2019

Judgment Reserved on : 2.7.2019

Judgment Delivered on : 27.9.2019

Dinesh Nishad, aged about 20 years, S/o Gautam Nishad, R/o Village Nandghat, P.S. Nandghat, District Bemetara, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through the Police Station Nandghat, District Bemetara, Chhattisgarh

--- Respondent

and

Criminal Appeal No.558 of 2019

Raiesa Be @ Rahmat Bano, age about 22 years, D/o Aziz Mohammad, R/o Village Nandghat, P.S. Nandghat, Tahsil Navagarh, District Bemetara, Chhattisgarh

---- Appellant

versus

1. State of Chhattisgarh through District Magistrate Bemetara, District Bemetara, Chhattisgarh
2. Dinesh Nishad, age about 20 years, S/o Goutam Nishad,
3. Rajendra Nishad, age about 22 years, S/o Ballu Ram Nishad,
4. Hirakni (absconded), age about 22 years, W/o Jitendra Nishad,
Respondents No.2 to 4, R/o Nandghat, P.S. Nandghat, District Bemetara, Chhattisgarh

--- Respondents

For Respective Appellants : Shri Shobhit Koshta and Shri Yogesh Pandey,
Advocates

For Respondent/State : Shri Amit Singh, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. Since both the appeals arise out of a common judgment, they are decided together by this common judgment.
2. Criminal Appeal No.363 of 2019 has been preferred by accused Dinesh Nishad against judgment dated 14.2.2019 passed by the Special Judge (FTC), Bemetara in Special Case No.53 of 2016, whereby he has been convicted under Sections 363, 366A, 376(1) of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (henceforth 'the POCSO Act') and sentenced to undergo rigorous imprisonment for 5 years with fine of Rs.500/-, 5 years with fine of Rs.500/-, 10 years with fine of Rs.500/- and 10 years with fine of Rs.500/- with default stipulations, respectively. All the sentences are directed to run concurrently.
3. Criminal Appeal No.558 of 2019 has been preferred by the victim/prosecutrix against the said judgment dated 14.2.2019 because the Trial Court has not granted her any compensation under Rule 7 of the Protection of Children from Sexual Offences Rules, 2012 (henceforth 'the POCSO Rules') read with Section 357 of the Code of Criminal Procedure.
4. Facts of the case, in brief, are that on the relevant date, age of the prosecutrix (PW1) was about 17 years. On 20.9.2013, father of the prosecutrix, namely, Aziz Mohammad (PW2) lodged a report of missing of his daughter (the prosecutrix), which was recorded in Rojnamcha Sanha (Ex.P19). He informed that the prosecutrix was

missing since 25.7.2013. On 14.10.2013, the prosecutrix was recovered from the possession of Appellant Dinesh Nishad. Her statement was recorded under Section 161 of the Code of Criminal Procedure. She was medically examined by Dr. Smt. R. Deodhar (PW9). Her report is Ex.P15 in which she opined that there was an old sexual intercourse done with the prosecutrix. For determination of age of the prosecutrix, she advised for ossification test, but no such test was conducted by the prosecution. Statements of other witnesses were also recorded under Section 161 of the Code of Criminal Procedure. After completion of the investigation, a charge-sheet was filed against accused/Appellant Dinesh Nishad and co-accused persons Hirakni and Rajendra Nishad. During trial, Hirakni absconded.

5. In support of its case, the prosecution examined as many as 17 witnesses. In examination under Section 313 of the Code of Criminal Procedure, the accused persons denied the guilt and pleaded innocence. No witness has been examined in defence.
6. After trial, the Trial Court acquitted co-accused Rajendra Nishad of all the charges framed against him, but convicted and sentenced accused/Appellant Dinesh Nishad as mentioned in the second paragraph of this judgment.
7. Learned Counsel appearing for Appellant Dinesh Nishad submitted that from the statement of the prosecutrix (PW1) it is well established that due to love relation with Appellant Dinesh Nishad, she herself left her house and travelled with him at various places, i.e., Raipur, Nagpur, Mumbai and Pune. They also resided together at those places as husband and wife. Thus, from her

statement, it is well established that she was a consenting party. It was further submitted that at the time of occurrence, age of the prosecutrix was more than 18 years. At the time of her medical examination also, for determination of her age, the examining doctor had advised for ossification test of the prosecutrix, but no such test was conducted by the prosecution. In the birth certificate (Ex.P26) of the prosecutrix, her date of birth is mentioned as 6.11.1995 and as per the entries mentioned in Dakhil- Kharij register also, her date of birth is 6.11.1995. In kotwari register (Ex.P38) also, her date of birth is mentioned as 6.11.1995. But, Kotwar Khamman Das (PW16) has categorically admitted that Aziz Mohammad (PW2), father of the prosecutrix had come to him for registration of date of birth of the prosecutrix after 4-5 months of her birth. At that time, Aziz Mohammad had not been able to tell the correct date of birth of the prosecutrix and he had got recorded her date of birth on his surmises. Aziz Mohammad (PW2), father of the prosecutrix has also stated that at the time of admission of the prosecutrix in the school, he had got her date of birth recorded in the school based on the entries of the kotwari register itself. Thus, it is clear that on the date of incident, age of the prosecutrix was below 18 years is not established. Since she was a consenting party, no offence is made out against Appellant Dinesh Nishad.

8. Learned Counsel appearing for the Appellant/victim/prosecutrix submitted that while holding Appellant Dinesh Nishad guilty, the Trial Court did not grant any compensation in favour of the victim/prosecutrix as provided under Rule 7 of the POCSO Rules read with Section 357 of the Code of Criminal Procedure. Therefore, he prayed for grant of an appropriate compensation in

favour of the victim.

9. Learned Counsel appearing for the State/Respondent supported the impugned judgment of conviction and sentence.
10. I have heard Learned Counsel appearing for the parties and perused the record with due care.
11. With regard to the incident, the prosecutrix (PW1) has deposed that Appellant Dinesh Nishad had made her a telephonic call asking her for roaming with him somewhere and had also threatened her that if she does not come to him he will commit suicide. Thereafter, she went to him on the same day at about 8:00 p.m. Thereafter, both they along with acquitted accused Rajendra Nishad went to Tilda. Rajendra Nishad returned from there. Thereafter, she and Appellant Dinesh Nishad went to Raipur and from Raipur they went to Nagpur, from Nagpur they went to Mumbai and thereafter finally from Mumbai they went to Pune. She has also deposed that at Pune, both resided together in a hut for about 2½ months. During that period, physical relationship had developed between them. Though this witness has deposed that in the said hut at Pune, the Appellant had forcefully committed sexual intercourse with her without her will and he had also tried to commit sexual intercourse with her daily and also used to rope her hands and legs, she has admitted the fact that she herself had taken the Appellant from Pune to Rajnandgaon. She has also admitted that initially when she had gone along with the Appellant to Tilda in a sumo vehicle, at that time, she had not tried to run away from his possession nor did she shout during that period. She has also admitted that the Appellant

and acquitted accused Rajendra Nishad, leaving her alone at Tilda, had gone to railway station for purchasing railway ticket. Thus, from the above, it is clear that she had ample opportunity to run away from the possession of the Appellant at Tilda, but she did not do so. This witness has also admitted that many people met her in the train, but she did not tell any of them anything. She has also admitted that during the period of her 2½ months' stay along with the Appellant in the hut at Pune, the Appellant used to go out of the hut for earning livelihood and at that time she was living in the hut alone and she used to cook food. From the above also, it is well established that both were residing at Pune as husband and wife. Therefore, the statement of the prosecutrix that the Appellant had kept her there forcefully and used to rope her hands and legs and commit sexual intercourse with her forcefully is not acceptable. From the statement of the prosecutrix, it is well established that she was a consenting party to the act done with her by Appellant Dinesh Nishad.

12. With regard to age of the prosecutrix (PW1), in her Court statement, on the date of her deposition, i.e., 23.4.2014, she has stated her age to be 19 years. Her father Aziz Mohammad (PW2) has stated date of birth of the prosecutrix to be 6.12.1995. He has also deposed that he himself had got the date of birth of the prosecutrix registered in the kotwari register. In his cross-examination, in paragraphs 15 and 16, he has also deposed that he has one son and four daughters and he was not able to tell age of any of his children on his surmises. He has also admitted that according to the entries of the kotwari register, he had got the date of birth of the prosecutrix registered in the school. Mother of the

prosecutrix, namely, Gulshan Bano (PW6) has also admitted that she was not able to tell date of birth of the prosecutrix.

- 13.** Toran Lal Verma (PW10), Headmaster of the school has deposed that as per the entries of Dakhil-Kharaj register (Ex.P17), date of birth of the prosecutrix is 6.11.1995. He has also admitted that birth entries in the Dakhil-Kharaj register were not made in his presence.
- 14.** Kotwar Khamman Das (PW16), who has proved kotwari register (Ex.P38), has deposed that as per the entries of kotwari register, date of birth of the prosecutrix is 6.11.1195. In paragraphs 3 and 4 of his cross-examination, this witness has also admitted that on the date when father of the prosecutrix had come to him to get the date of birth of the prosecutrix recorded in the kotwari register, 4-5 months prior to that birth of the prosecutrix had taken place and no reason was explained by father of the prosecutrix for the much belated registration of the date of birth of the prosecutrix. Father of the prosecutrix had also not stated him the exact date of birth of the prosecutrix and told him the date of birth of the prosecutrix on his surmises.
- 15.** From the above discussion, it is established that though both in the Dakhil-Kharaj register and kotwari register, the date of birth of the prosecutrix is mentioned as 6.11.1195, Aziz Mohammad (PW2) and Gulshan Bano (PW6), who are parents of the prosecutrix, have not been able to state the exact date of birth of the prosecutrix. From the admission made by Kotwar Khamman Das (PW16), birth of the prosecutrix had taken place 4-5 months prior to the date of making entry of her birth in the kotwari register and

the exact date of birth of the prosecutrix was not told by her father and the date of birth of the prosecutrix was got recorded by him on his surmises. Thus, the entry made in the kotwari register regarding date of birth of the prosecutrix is suspicious and as stated by father of the prosecutrix, based on the entries of the kotwari register, the date of birth of the prosecutrix was got registered by him in the Dakhil-Kharij register of the school at the time of admission of the prosecutrix in the school. Therefore, the entry of Dakhil-Kharij register also does not disclose the exact date of birth of the prosecutrix. In this case, after medical examination of the prosecutrix, Dr. Mrs. R. Deodhar (PW9) has opined that she had advised for ossification test of the prosecutrix for determination of her exact age, but, why did the prosecution not conduct ossification test of the prosecutrix can be explained by the prosecution itself for the reasons best known to it. From the evidence adduced by the prosecution, it is not established that on the date of incident, the age of the prosecutrix was below 18 years. Since the prosecutrix was a consenting party and it is not proved that on the date of incident her age was below 18 years, no offence is made out against Appellant Dinesh Nishad. Hence, his appeal deserves to be allowed.

- 16.** As regards the appeal preferred by the victim/prosecutrix, the argument advanced by Learned Counsel appearing for her was that after holding accused/Appellant Dinesh Nishad guilty, the Trial Court ought to have granted an adequate compensation in favour of the prosecutrix as contained in Section 33(8) of the POCSO Act, Rule 7 of the POCSO Rules and Section 357 of the Code of Criminal Procedure. No doubt, the Trial Court convicted Appellant

Dinesh Nishad under Sections 363, 366A, 376(1) of the Indian Penal Code and Section 6 of the POCSO Act. Since this Court has already held above that the prosecutrix was a consenting party and on the date of occurrence her age was below 18 years is not established and, therefore, Appellant Dinesh Nishad has been acquitted of the charges framed against him and as defined under Section 2(1)(d) of the POCSO Act the prosecutrix does not fall within the definition of a child, she is not entitled to get any compensation. Hence, her appeal deserves to be dismissed.

17. Consequently, Criminal Appeal No.363 of 2019 preferred by accused/Appellant Dinesh Nishad is allowed. His conviction and sentence are set aside. He is acquitted of the charges framed against him. Criminal Appeal No.558 of 2019 preferred by the victim/prosecutrix is dismissed.
18. Record of the Court below be sent back along with a copy of this judgment forthwith for information and necessary compliance.

Sd/-

(Arvind Singh Chandel)
JUDGE