

**HIGH COURT OF CHHATTISGARH, BILASPUR****CRA No. 301 of 2014**

Rajkumar Awsar S/o Shri Narendra Awsar, Aged About 22 Years, R/o Sukhi Hotel, Nayapara, Mahasamund, PS Mahasamund, Distt. Mahasamund Chhattisgarh  
**---- Appellant**

**Versus**

State Of Chhattisgarh Through The SHO, Mahasamund, Distt. Mahasamund Chhattisgarh  
**....Respondent**

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| For Appellant | : | Mr. Y.C. Sharma, Advocate        |
| For State     | : | Mr. Santosh Bharat, Panel Lawyer |

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**DB : Hon'ble Shri Justice Manindra Mohan Shrivastava****Hon'ble Smt. Justice Rajani Dubey****Judgment On Board by Manindra Mohan Shrivastava, J.****06.03.2019**

Heard.

1. This appeal is directed against impugned judgment of conviction and order of sentence dated 20.02.2014 passed by Special Judge (Prevention of Children from Sexual Offences, Act 2012), Fast Track Court, Mahasamund (CG) in Special Sessions Trial No.2/2013, whereby and whereunder, the appellant has been held guilty of commission of offence and sentenced as described below :

| Conviction                                                                                                   | Sentence                                                                                        |
|--------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------|
| Under Section 6 of the Prevention of Children from Sexual Offences, Act, 2012 (for short 'the Act of POCSO') | Imprisonment for life and fine of Rs.1000/-, in default of which, additional R.I. for 2 months. |

2. On allegation of having committed rape on a minor girl aged 9 years, the appellant was arrested, investigation was carried out and charge-sheet was filed. The girl being 9 years, the appellant was charged of commission of offence under

Section 376(2)(f) of IPC and Section 6 of the POCSO Act. Thereafter, the appellant denied having committed the offence and having abjured guilt, was put to trial. The prosecution, in order to prove its case, examined the prosecutrix (PW5) and led medical evidence to prove that the prosecutrix was subjected to rape by the appellant. Learned trial Court relied upon the evidence of the prosecutrix, corroborated from the medical evidence and held that the appellant was guilty of commission of offence. Taking into consideration the age of the girl, learned trial Court imposed life imprisonment on the appellant.

3. Learned counsel for the appellant would argue that the statement of the prosecutrix read along with medical evidence does not prove beyond doubt that there was actual penetration. He would argue that the opinion of the doctor based on the examination of the prosecutrix rules out insertion of the genital part and possibility of any penetration. Further more, the prosecutrix in her cross-examination, has admitted the suggestion that it was only a case of rubbing of genital organs which also supports that actual penetration has not taken place. Therefore, it would only be a case of attempt to commit rape/sexual assault punishable only under Section 511 of IPC. It is next argued that in that event, no case of sexual assault or aggravating sexual assault is made out under the POCSO Act but at the most, it could be a case of penetrative sexual assault or aggregated sexual assault for which, minimum sentence is 5 years and maximum is 7 years.

4. On the aspect of sentence, learned counsel for the appellant argued that even if the age of the prosecutrix is taken as the aggravating factor, considering that there is no evidence of any penetration, the sentence may be reduced to the period already undergone by the appellant as the appellant has undergone almost 5 years of sentence by now.

5. On the other hand, learned State counsel opposes and submits that the prosecutrix has clearly stated regarding insertion of male organ into her genital part and coupled with the medical evidence of the doctor that the genital part were found swelled and prosecutrix was in pain so much so that she was not able to properly walk and there was blood also found, is proved from the FSL report, present is a case of penetrative assault and it is a case of rape. He would further argue that since the prosecutrix was less than 12 years of age, it would be a case of aggravated sexual assault for which the punishment of life imprisonment could

be imposed. He would also argue that even under Section 376(2)(f) of IPC, the prosecutrix being a minor, the appellant has rightly been sentenced with life imprisonment.

6. The evidence of prosecutrix, (PW5) is very emphatic. She has given the details of the commission of offence of rape in para 2 of her statement and she has clearly stated regarding insertion of male genital organ and also that she not only sustained pain but also bleeding. In the cross-examination, the evidence of the child witness could not be impeached, though, the child witness admits suggestion regarding rubbing of the genital organ.

7. Dr. Karuna Awde (PW7) who examined the prosecutrix, has clearly stated regarding the prosecutrix's physical condition and also observed regarding her physical growth. According to her, even the menstruation has not begun and secondary sexual signs were not fully developed. The doctor has further deposed that there was redness in the private part and the prosecutrix was complaining of pain in her private parts. Hymen was not seen, though, the doctor has also stated that insertion of even the tip of finger was not getting through.

8. However, the doctor states that without chemical examination it would not be possible for him to give a definite opinion regarding commission of offence of rape. The FSL report in Ex.P/20 proves presence of blood in the undergarments of the prosecutrix, the full pant seized from the appellant and the vaginal slide C-1 as well as C-2. The aforesaid evidence proves that the appellant had made all attempts to insert his genital organ but could not succeed and in that process, both the genital organs started bleeding. The redness in the private parts of the prosecutrix, observed by doctor, taken altogether with oral evidence and prosecutrix evidence and medical report proves that there was penetration to some extents, had taken place. In order to constitute an offence of rape, as is well settled, full penetration is not necessary. In this regard, we shall refer to the decision of the Hon'ble Supreme Court in the case of **Aman Kumar and another Vs. State of Haryana, (2004) 4 SCC 379**, wherein, the Lordship in the Supreme Court held as below :

“7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (See Joseph Lines IC & K 893). It is well-known in the medical world that the examination of smegma loses all importance after twenty four

hours of the performance of the sexual intercourse. ([See Dr. S.P. Kohli \(Dr.\) v. High Court of Punjab and Haryana](#) (1979) 1 SCC 212). In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under [Section 376](#) IPC. ”

9. We have, therefore, no doubt in our mind that in the present case, however, little, it was, but there was penetration. That much of the criminal overt act on the part of the appellant would certainly amount to commission of offence of rape. According to the prosecution and the evidence which has come on record, as stated by the prosecutrix and also the evidence of Dr. Karuna Awde (PW7) prosecutrix was 9 years of age. Therefore, it will not only be a case of aggravated penetrative sexual assault as defined under Section 5(m) of the POCSO Act but also a case of commission of offence under Section 376(2)(f) of IPC.

10. In this regard, we find that in both the cases, the commission of offence punishable under Section 6 of POCSO Act as well as under Section 376(2)(f) of IPC, minimum sentence prescribed under the law is 10 years, which may extend to imprisonment for life.

11. Looking to the age of the prosecutrix that she was about 9 years of age, the extent of criminal overt act on the part of the appellant considering the age and social background of the appellant that he was working as a worker in *Dhaba* and balancing the aggravating and mitigating circumstance, we are inclined to modify the sentence part in the manner that the appellant is sentenced to 12 years of rigorous imprisonment in place of life imprisonment. The fine amount as imposed by learned trial Court shall remain the same. The sentences, however, shall run concurrently.

12. In the result, the appeal is allowed, though in part, in the manner and to extent as indicated above.

**Sd/-**

**(Manindra Mohan Shrivastava)**  
**Judge**

**Sd/-**

**(Rajani Dubey)**  
**Judge**