

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on: 14/03/2019****Judgment delivered on: 24/04/2019****CRA No. 610 of 2015**

- Dinesh @ Montu Manikpuri S/o Vijay Das Manikpuri Aged About 24 Years
R/o Beldarpara, Ward No.1, District Durg, Chhattisgarh.

---- Application**Versus**

- State of Chhattisgarh, Through Station House Officer, Police of Police
Station Durg, District- Durg, Chhattisgarh.

---- Respondent

For the Appellant : Mr. B.P. Singh, Advocate.

For the State/Respondent : Mr. I. Lakra, Dy. Govt. Advocate.

Hon'ble Shri Justice Rajendra Chandra Singh Samant**CAV Judgment****24/04/2019**

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 8.5.2015, passed by the Additional Sessions Judge (F.T.C.), Durg, District-Durg, Chhattisgarh, in Sessions Trial No.17/2014, convicting accused/appellant under Sections 363 & 366 of Indian Penal Code (for short 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act, 2012 and sentencing him to undergo RI for 4 years & fine of

Rs.1,000/-, RI for 4 years & fine of Rs.5,000/- and RI for 10 years & fine of Rs.5,000/-, with default clauses, respectively.

2. The prosecution case, in brief, is this that Goukaran Sinha PW-3 lodged a missing report ExP-22A in police station Durg regarding missing of his daughter i.e. prosecutrix aged 14 years on 1.12.2013. During inquiry, the prosecutrix PW-1 was recovered from the custody of appellant on 4.12.2013 vide Ex.P-11. On the basis of statement given by the prosecutrix, it was found that the appellant had allured the prosecutrix with promise of marriage, then abducted and raped her. FIR Ex.P-18 was lodged registering offences against the appellant. During investigation, the prosecutrix and the appellant both were medically examined and statement of witnesses were recorded. Evidence regarding age of the prosecutrix were collected. On completion of investigation, the charge-sheet has been filed before the concerned Court.
3. Charges under Sections 363 and 366 of IPC and Section 6 of POCSO Act were framed against the appellant, he denied the same and sought for trial. Appellant was examined under Section 313 of CrPC in which he denied all the incriminating evidence appearing against him, pleaded innocence and false implication. The prosecution in order to prove its case examined 6 witnesses in all. No witness was examined by appellant in his defence.
4. It is submitted by counsel for the appellant that the appellant has been erroneously convicted for offences which he has not committed. The prosecutrix in this case had been a consenting party which is

apparent from her conduct as also her statement. She left her house on asking of appellant and thereafter he took her to a village on foot but the prosecutrix never raised alarm during all that time and never made any attempt to escape from the clutches of appellant. The appellant had sufficiently disputed age of the prosecutrix, that she was not below 18 years of age on the date of incident. Prosecutrix PW-1 has stated that her date of birth is 13.11.1999 but she has not disclosed the source about her date of birth. Indrawati Sinha PW-2 is the mother of prosecutrix, who does not remember date of birth of prosecutrix and she has been declared hostile by the prosecution. Similarly Goukaran Sinha PW-3, father of prosecutrix, has also been declared hostile by the prosecution, therefore, their evidence cannot be relied upon. Dr. B.N. Dewangan PW-11, Radiologist, has opined that the age of prosecutrix was about 15 to 16 years and this should have been considered by adding margin of two years. The school register was not produced by the prosecution because of which adverse inference should have been drawn against the prosecution, which Court below failed to do. Further, according to evidence of prosecution, the sister of appellant is also a witness of this incident, who has not been made witness in this regard and therefore the Court below ought to have drawn adverse inference against the prosecution. The case of prosecution was full of doubts and therefore the appellant had been entitled for acquittal. In alternative, it is submitted that if this Court is not inclined to allow this appeal then, in the given facts and circumstances of case, the sentence imposed upon the appellant may be reduced as it is too harsh.

5. Learned counsel for the State has opposed the grounds raised in this appeal as also arguments advanced by the counsel for appellant. It is submitted that prosecution has proved its case beyond doubt. The judgment impugned passed by the trial Court is strictly in accordance with law and needs no interference by this Court in exercise of its appellate jurisdiction. Statement of prosecutrix PW-1 that her date of birth is 13.11.1999 gets corroboration from the version of Goukaran Sinha PW-3, who has also deposed in similar manner. Apart from that, birth certificate (Ex.P-8A) issued by Registrar (Birth & Death) has been produced which is clear proof that on the date of incident, the prosecutrix had just completed 14 years of age, therefore, any conduct of the prosecutrix which shows that she had any leniency for appellant cannot be regarded as her consent. Hence, there is no scope of interference in the impugned judgment. Hence, the appeal be dismissed.
6. Prosecutrix PW-1 has stated that her date of birth is 13.11.1999. Not a single sentence has been put to her in the cross-examination so as to contradict this statement made by her.
7. Indrawati Sinha PW-2 has stated about not remembering the date of birth of prosecutrix. However, Goukaran Sinha PW-3 has stated that date of birth of his daughter is 13.11.1999. He has also produced original birth certificate of the prosecutrix Ex.P-8 on the basis of which certified copy ExP-8A was marked and exhibited in the record of the trial Court. However, due to some discrepancies in his statement, he has been declared hostile by the prosecution. In

cross-examination some queries have been made as to when he informed about the date of birth in the Registrar Office etc., which are of no consequences. No contradictory statement was made by him to make his statement regarding date of birth of the prosecutrix doubtful or unreliable. No other witnesses has been examined by the prosecution regarding age or date of birth of the prosecutrix. Doctor Manju Rathore PW-10 had advised for radiological examination of the prosecutrix. Dr. B.N. Dewangan PW-11, Radiologist had done radiological examination of the prosecutrix and opined vide report of Ex.P-3 that on the date of incident the prosecutrix was between 15 to 16 years of age. In cross-examination, this witness has though admitted that there is possibility of margin of error of two years and by adding such margin, the age of prosecutrix may be considered as 18 years, but this is only an opinion and it is not safe to rely upon the opinion alone, when there is documentary evidence present showing prosecutrix to be a minor is exact proof. The direct evidence made by prosecutrix and her father PW-3 is supported with documentary evidence. The certificate issued by the office of Registrar (Birth and Death) has relevance and it is a document having evidentiary value which cannot be discarded only on the basis of some opinion given by radiologist.

8. Therefore, on close scrutiny the evidence on the point of age of prosecutrix, it is found that the Court below has not committed any error in giving this finding, that the prosecutrix was minor on the date of incident. According to the scrutiny made and according to the

evidence brought regarding date of birth of the prosecutrix, it is clear that on the date of incident she was below 16 years of age.

9. The appellant does not dispute that the prosecutrix was in his custody and he had exploited her sexually which further finds support from the evidence of prosecutrix PW-1. Though the prosecutrix had not the appealed for her rescue from the custody of appellant but the fact remains that he exploited her sexually which amounts to rape as on the date of incident the prosecutrix being below 16 years of age was not competent to give any consent for sexual intercourse. PW-10 has opined vide his report ExP-11, the prosecutrix was habitual to sexual intercourse which further confirms that prosecutrix had been exploited sexually earlier also. Therefore, the act on the part of the appellant regarding sexual exploitation of the prosecutrix is clearly an offence of rape.
10. Reliance on the judgment of ***Rajjak Mohammad Vs. State of Himachal Pradesh*** reported in **(2018) 9 SCC 248** is of no help to the appellant for the reason that facts of cited case are distinguishable and not applicable to the facts of present case.
11. After closely scrutinizing of the evidence of relevant prosecution witnesses and after due consideration, I am of this opinion that trial Court has not committed any mistake in convicting appellant under Sections 363 of 366 of IPC and Section 6 of POCSO Act. As regards the sentence, as the appellant has been sentenced with the minimum sentence prescribed under Section 6 of POCSO Act, therefore, there

is no scope for reduction of sentence.

12. In the result, the appeal has no substance, the same is liable to be and is hereby dismissed.

Sd/-

(Rajendra Chandra Singh Samant)
Judge

Nisha