

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 1401 of 2015

Reserved on : 05.12.2019

Delivered on : 30.01.2020

Hemant, S/o Budhwar Gond, aged about 20 years, R/o Birgaon, Police Station- Urla, Civil & Revenue District- Raipur (C.G.)

---- Appellant

Versus

State of Chhattisgarh, Through: Station House Officer, Police of Police Station- Kumhari, District- Durg (C.G.)

---- Respondent

For Appellant : Mr. B.P. Singh, Advocate.
For State/respondent : Mrs. Smita Jha, Panel Lawyer.

Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

1. This appeal is preferred under Section 374 (2) of the Code of Criminal Procedure, 1973 against judgment dated 24.08.2015 passed by Special Judge under Protection of Children from Sexual Offences Act, 2012 (for short "the Act, 2012") & Additional Sessions Judge (F.T.C.), Durg (C.G.) in Special Session Trial No. 02/2014, wherein the said court convicted the appellant in the following manner with further default stipulation:-

Conviction		Sentence
U/s 363 of IPC, 1860	:	R.I. for 4 years and fine of Rs. 5,000/-
U/s 366 of IPC, 1860	:	R.I. for 4 years and fine of Rs. 5,000/-
U/s 6 of the POCSO Act (in alternate) U/s 376 (2) (n) of IPC, 1860	:	R.I. for 10 years and fine of Rs. 10,000/-

2. In the present case, prosecutrix is PW-7. As per version of the prosecution, the appellant took the minor prosecutrix on 17.11.2013 at about 12:30 p.m. by inducement and committed rape repeatedly. The matter was reported, the appellant was charge-sheeted and after completion of trial, the trial court convicted as mentioned above.
3. Learned counsel for the appellant submits as under:-
 - (i) There is no legally admissible evidence regarding age of the prosecutrix because father and mother of the prosecutrix have not clearly stated about actual date of birth and they have stated that the prosecutrix was aged about 15 years.
 - (ii) Kotwari register & school register are not seized by the investigating officer.
 - (iii) Radiological examination is not proved age of the prosecutrix to be below 18 years, therefore, finding of the trial court on this count is liable to be reversed.
 - (iv) The FIR is delayed and there is no sufficient explanation about the delay.
 - (v) The prosecutrix was having affair with the appellant and the report was lodged by parents of the prosecutrix and the entire evidence is not sufficient to bring home the guilt.
 - (vi) Medical evidence is not supporting version of the prosecution and there is serious contradiction and omission in statement of the prosecution witnesses.
 - (vii) The attention of the appellant is not drawn during his examination to the specific point, therefore, he could not give

explanation, therefore, finding arrived at by the trial court is liable to be set aside.

4. On the other hand, learned State counsel submits that the finding arrived at by the trial court is based on proper marshaling of evidence and the same does not warrant any interference of this Court with invoking jurisdiction of the appeal.
5. I have heard learned counsel for the parties and perused the records.
6. First question for consideration before this Court is whether the age of the prosecutrix was below 18 years on the date of incident i.e. on 17.11.2013. Sunita Yadav (PW-9) is mother of the prosecutrix. As per version of this witness, date of birth of the prosecutrix is 04.08.1999. Evidence of mother is of higher value regarding date of birth of child because child is delivered by mother. Version of mother is unrebutted during cross-examination and it is supported by version of father- Sanjay Yadav (PW-8) and Head-Master- Suresh Kumar Kamde (PW-5) who brought the school register in which date of birth of the prosecutrix is mentioned as 04.08.1999.
7. Dr. A.K. Sahu (PW-3) is medical expert who conducted radiological examination of the victim, opined that age of the prosecutrix is between 15-16 years. Version of this witness is unrebutted, therefore, there is nothing to disbelieve testimony of mother that date of birth of the prosecutrix is 04.08.1999 and on the date of incident i.e. on 17.11.2013, she was aged about 14 years & 3 months and she was minor on the date of incident. From statement of father- Sanjay Yadav (PW-8) and mother- Sunita (PW-9), it is clearly established that the

appellant took the prosecutrix from her lawful guardianship without consent of mother and father who were the lawful guardian. The act of the appellant falls within mischief of Section 363 of IPC and his conviction is hereby affirmed.

8. From statement of prosecutrix (PW-7), it is clearly established that the appellant taken her to Village- Birgaon and then Beladi where he committed sexual intercourse with her repeatedly. Version of the prosecutrix (PW-7) is unrebutted during cross-examination and it is further supported by version of father-Sanjay Yadav (PW-9), mother-Sunita Yadav (PW-9) and Sub-Inspector Shivanand Tiwari (PW-11) who is investigating officer. All the witnesses have been subjected to searching cross-examination, but nothing could be elicited in favour of the defence.
9. From the entire evidence, it is clearly established that minor prosecutrix was subjected to sexual intercourse repeatedly by the appellant and since the prosecutrix is child as defined in the Act, 2012, her consent is immaterial as per provision of the Act, 2012. From act of the appellant, it is clearly established that the prosecutrix was seduced for illicit intercourse which falls within mischief of Section 366 of IPC and his conviction is also hereby affirmed.
10. Committing rape repeatedly with the prosecutrix falls within mischief of Section 376 (2)(n) of IPC and aggravated penetrative assault is punishable under Section 6 of the Act, 2012. The act of the appellant falls within mischief of Section 376 (2)(n) of IPC, but the trial court convicted the appellant for offence under Section 6 of the Act, 2012. Arguments advanced on behalf of the appellant is not sustainable.

Conviction of the appellant for offence under Section 6 of the Act, 2012 is also hereby affirmed.

Heard on the point of sentence.

11. The trial court awarded R.I. for 10 years for commission of offence under Section 6 of the Act, 2012 which is minimum sentence and less than minimum cannot be awarded. The whole sentence part is also not liable to be interfered with. Accordingly, the appeal is liable to be and is hereby dismissed.
12. The appellant is reported to be in jail, therefore, no further order of arrest etc. is required.

Sd/-
(Ram Prasanna Sharma)
Judge

Arun