

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.410 of 2016

Judgment Reserved on : 26.11.2019

Judgment Delivered on : 25.2.2020

Kamlesh Singh Gond, son of Jadubir Singh Gond, aged about 30 years, resident of Wadrafnagar, Ward No.11, Bhimrao Ambedkar Ward, Police Station Basantpur, District Balrampur Ramanujganj, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through Station House Officer, Police Station Basantpur, District Balrampur Ramanujganj, Chhattisgarh

--- Respondent

For Appellant : Shri Shakti Raj Sinha, Advocate
For Respondent : Shri Ajay Kumrani, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. The instant appeal has been preferred against the judgment dated 27.2.2016 passed by the Additional Sessions Judge, Ramanujganj in Sessions Trial (Pocso) No.41 of 2015, whereby the Appellant has been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 376 of the Indian Penal Code	Rigorous Imprisonment for 10 years and fine of Rs.20,000/- with default stipulation

2. Prosecution case, in brief, is that on the relevant date, the prosecutrix (PW1) was aged about 4 years. On 5.4.2013, between 5 and 6 p.m., she was playing along with her brother Rahul (PW2). At that time, the Appellant came there and gave them *Kulfi* (ice-

cream) and thereafter he took the prosecutrix to his house and closed the door from inside. The prosecutrix started weeping. Her brother Rahul (PW2) tried to get the door opened, but he could not succeed. He went to his mother Lalita (PW8) and told her about the incident. Lalita (PW8) went to the spot. She went to the bathroom of the house. She saw that underwear of her daughter (the prosecutrix) was lying there. The prosecutrix started weeping and told her that the Appellant was caressing her private part. Lalita (PW8) informed about the incident to her nephew, brother and husband. The matter was reported by Lalita vide Ex.P8. Statements of the prosecutrix as well as other witnesses were recorded under Section 161 of the Code of Criminal Procedure. The prosecutrix was medically examined by Dr. Kamini Rai (PW4). Her report is Ex.P3 in which she found small abrasions over labia majora of the prosecutrix. Redness was present over the wall of fourchette and vagina of the prosecutrix. Hymen was intact. On completion of the investigation, a charge-sheet was filed against the Appellant. Charges were framed against him under Sections 363, 366 of the Indian Penal Code and Section 3(ख) of the Protection of Children from Sexual Offences Act (henceforth 'the Pocso Act') alternatively under Section 5(ड) of the Pocso Act, under Section 376/511 of the Indian Penal Code and Section 376(1)(ख) of the Indian Penal Code.

3. In support of its case, the prosecution examined as many as 16 witnesses. In examination under Section 313 of the Code of Criminal Procedure, the Appellant denied the guilt and pleaded innocence. In defence, the Appellant examined himself as Defence Witness No.2 and also examined his mother Rampati as

Defence Witness No.1 and one Ramnaresh as Defence Witness No.3.

4. On completion of the trial, vide the impugned judgment, the Trial Court convicted and sentenced the Appellant for the offence punishable under Section 376 of the Indian Penal Code and acquitted him of all other charges. Hence, this appeal.
5. Learned Counsel appearing for the Appellant submitted that without there being sufficient evidence on record against the Appellant, the Trial Court has wrongly convicted him. It was further submitted that there is sufficient material available on record on the basis of which it can be established that there was a previous enmity between mother of the prosecutrix and the Appellant and due to the enmity the Appellant has been falsely implicated in this case. It was further submitted that the prosecutrix and her brother and mother have developed their statements on material points. Therefore, their statements are not reliable. According to the statement of Dr. Kamini Rai (PW4) and her report (Ex.P3), hymen of the prosecutrix was found intact. Thus, even if the entire case of the prosecution is taken as it is, the only offence punishable under Section 376 read with Section 511 of the Indian Penal Code can be made out. Since the Appellant is in jail and has already undergone about 6½ years, he may be sentenced with the period already undergone by him.
6. Learned Counsel appearing for the State/Respondent opposed the arguments advanced on behalf of the Appellant and supported the impugned judgment of conviction and sentence. He submitted that from the statement of Dr. Kamini Rai (PW4) and her report (Ex.P3),

it is clear that certain abrasions were found on the private part of the prosecutrix and redness was also present over the wall of fourchette and vagina of the prosecutrix. From the statement of the prosecutrix (PW1), it is also established that at the time of incident, the Appellant had entered his finger-tip into her vagina. Therefore, the offence under Section 376 of the Indian Penal Code is duly proved and the Appellant has rightly been convicted by the Trial Court.

7. I have heard Learned Counsel appearing for the parties and perused the record with due care.
8. The prosecutrix (PW1), aged about 4 years, has deposed that on the date of incident, the Appellant had lifted her up and taken to the bathroom of his house and removed her underwear there. She has further deposed that he was inserting his penis into her vagina and therefore she suffered pain there and blood had also oozed out. According to this witness, at that time, the Appellant also inserted his finger into her vagina and was caressing there. According to her, her brother Rahul (PW2) had tried to get the door of the Appellant's house opened. Thereafter, he called their mother. Then the Appellant opened the door. The statement of the prosecutrix is duly corroborated by her brother Rahul (PW2), who is also a child witness aged about 7 years. He has also stated that the Appellant after giving *Kulfi* (ice-cream) to both of them had taken the prosecutrix to the bathroom of his house and closed the door from inside. The prosecutrix had started weeping. He called his mother and thereafter the door of the house was got opened. He has further deposed that he had also seen that underwear of

the prosecutrix was removed.

- 9.** Lalita (PW8), mother of the prosecutrix has also supported the statement of the prosecutrix and has stated that on the date of incident, she was cleaning utensils at her house. At that time, the Appellant came there and saying that he will give *Kulfi* to her children took along with him her both the children, i.e., her daughter (the prosecutrix) and her son Rahul. After sometime, Rahul returned home and told that the Appellant had closed the door of his house from inside and the prosecutrix was weeping inside the house. Running, she went to the house of the Appellant and got the bathroom of the Appellant's house opened. She saw that the prosecutrix was lying down there and her underwear was removed. She has further deposed that on being asked, the prosecutrix had told her that the Appellant was inserting his penis into her private part.
- 10.** Dr. Kamini Rai (PW4) examined the prosecutrix on 6.4.2013 and gave her report (Ex.P3). She has deposed that she found small abrasions over labia majora of the prosecutrix. She also found that redness was present over the wall of fourchette and vagina of the prosecutrix. She found that hymen of the prosecutrix was intact.
- 11.** During cross-examination of the prosecutrix (PW1), a suggestion was put to her by the defence that on the date of incident, she herself and her brother Rahul (PW2) had gone to the house of the Appellant. In paragraph 9 of the statement of Lalita (PW8), a suggestion was put to her by the defence that prior to taking place of the incident, family members of the Appellant and her were visiting houses of each others and there was no previous enmity

between them.

- 12.** On a minute examination of the evidence available on record, it is clear that the prosecutrix (PW1) has categorically stated that at the time of incident, the Appellant had removed her underwear and he was caressing her private part by his finger. From the statement of her brother Rahul (PW2) and mother Lalita (PW8), it is also established that when they got the door of the bathroom of the Appellant's house opened, they saw that the underwear of the prosecutrix was removed and was lying there. From the statement of Dr. Kamini Rai (PW4) and her report (Ex.P3), it is evident that small abrasions were found over labia majora of the prosecutrix. Redness was also present over the wall of fourchette and vagina of the prosecutrix. Those abrasions and redness took place due to any itching or infection, no evidence is available in this regard. Though the prosecutrix (PW1) and her mother Lalita (PW8) have developed their statements on some points, they have remained firm on the point that the Appellant was caressing vagina of the prosecutrix by inserting his finger-tip. Though hymen of the prosecutrix was not ruptured, from the statements of Dr. Kamini Rai (PW4) and the prosecutrix (PW1), it is clear that the Appellant had inserted his finger-tip into vagina of the prosecutrix and as a result of which the prosecutrix had suffered abrasions and redness over her private part. Family members of the prosecutrix and the Appellant were previously visiting to each other and there was no enmity between them and, therefore, the Appellant has been falsely implicated in the instant case due to a previous enmity is not acceptable. Hence, from the act committed by the Appellant, the offence punishable under Section 376 of the Indian Penal Code

is proved. The Trial Court has rightly convicted him. The sentence imposed upon him is also just and proper.

- 13.** Consequently, the appeal is dismissed.
- 14.** 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