

HIGH COURT OF CHHATTISGARH, BILASPURJudgment reserved on 12-02-2020Judgment delivered on 23-09-2020CRA No. 231 of 2014

1. Devanand Yadav Alias Chhote S/o Thanuram Yadav Aged About 22 Years R/o Village Kodva, Bhatapara Chowk-Silyari, Ps Dharseewa Distt. Raipur, Chhattisgarh

---- Appellant

Versus

1. State Of Chhattisgarh Through PS Dharseewa Chowki Silyari Distt. Raipur, Chhattisgarh

---- Respondent

For Appellant	Mr. Kamlesh Kumar Pandey, Advocate
For Respondent/State	Mr. Rajendra Tripathi, Panel Lawyer

Hon'ble Shri Prashant Kumar Mishra, J.Hon'ble Shri Gautam Chourdiya, J.

By
Prashant Kumar Mishra, J.

1. Appellant would call in question his conviction under Sections 363, 366 & 376(2)(i) of the Indian Penal Code (for short 'the IPC') and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') and sentence of RI for 3 years; RI for 10 years; life imprisonment & life imprisonment, respectively by the Additional Sessions Judge (FTC), Raipur, in ST No.157/2013 for committing rape with the minor prosecutrix, aged about 14 years.

2. As per the prosecution case, the mother of the prosecutrix namely; Neera Nirmalkar (PW-3) lodged First Information Report (FIR) (Ex.P/4) at 13.30 hours on 22-4-2013 informing that in the evening of 21-4-2013 her husband had gone to attend meeting of the society leaving herself and her daughter in the house. Since the battery of her mobile had got discharged and there was no electricity in the house she had sent the prosecutrix to the house of Sunita Nirmalkar at 8.30 pm to charge the mobile, however, her daughter did not return till 10.00 pm on which she went to the village basti in the house of Sunita Nirmalkar & Sanat Yadav but did not find her daughter. At 10.30 pm the prosecutrix returned and informed her that when she plugged the mobile in the house of Sunita Didi and was returning home the present appellant met her near the house of Narayan Yadav. The appellant requested her to sit on the motorcycle on which she agreed thinking that he is like her brother, but the appellant took her to the nursery of village Bagsa Khar and tried to commit forcible sexual intercourse. Initially the offence was registered under Sections 376 & 511 of the IPC and the prosecutrix was sent for medical examination. The medical report (Ex.P/15) was conducted by Dr. Nidhi Gupta (PW-9A) and found fresh tear +ve at 4'O clock position; bleeding & hymen torn. She opined that sexual act has been tried.
3. After completing necessary investigation including recording diary statements of the witnesses; charge sheet was filed; and the appellant was charged for committing offence under Sections 363, 366 & 376 of the IPC and under Section 4 of the POCSO Act.

4. In course of trial the prosecution examined 12 witnesses to bring home the charges. The appellant abjured the guilt; pleaded innocence; and false implications, but did not examine any defence witness. Upon appreciation of evidence, the trial Court convicted & sentenced the appellant as mentioned above.
5. Shri Kamlesh Kumar Pandey, learned counsel appearing for the appellant, would submit that the appellant has been falsely implicated and a case to attempt to commit rape has been converted into rape and sentence of life imprisonment has been imposed. Shri Pandey would further submit that the appellant has been implicated in the present case owing to groupism in the village. In the alternative, he would submit that the sentence awarded to the appellant may be reduced to the period already undergone.
6. Shri Rajendra Tripathi, learned counsel appearing for the State, *per contra*, would support the impugned judgment. Learned counsel would submit that rape with a minor girl deserves to be dealt with sternly and the trial Court has rightly convicted and sentenced the appellant.
7. Prosecutrix, aged about 14 years, has been examined as PW-2 before the trial Court. She has fully supported the prosecution by narrating the turn of events as has been stated in the FIR. She has reiterated that the appellant did not commit rape, but only tried to enter his private part into her private part. This witness has been extensively examined, but she has remained firm on her statement and there is nothing in her cross-examination, which would dilute her statement in the examination-in-chief. She has denied that she has lodged a false report against the appellant.

8. Neera Nirmalkar (PW-3) is the mother of the prosecutrix, who has proved the FIR (Ex.P/4) lodged by her. She also fully supports the prosecution and there is nothing in her statement which would discredit her or make her untrustworthy. She has proved the birth certificate of the prosecutrix (Article 'C-C') in which the date of birth of the prosecutrix is registered as 25-10-1998. Thus, it is clearly proved that the age of the prosecutrix on the date of incident is 14 years 5 months 27 days.
9. Shagun Das (PW-4) is the Kotwar of village, who also supports the prosecution by stating that PW-3 Neera Nirmalkar had approached him for lodging the FIR (Ex.P/4), on which he had accompanied her to the police station. PW-9A Dr. Nidhi Gupta is the Medical Officer, who has proved the MLC of the prosecutrix vide Ex.P/15.
10. From the above evidence, it is an open and shut case against the appellant, as there is no infirmity whatsoever in the statement of the witnesses discussed above. The FIR against the appellant is prompt and the medical report supports the prosecution version. Thus, the prosecution has proved the offence against the appellant beyond all reasonable doubt.
11. The only question now to be considered is whether the appellant deserves minimum sentence of ten years imprisonment as provided under Section 376(2)(i) of the IPC as it then existed at the time the offence was committed because at present the said provision has been deleted and reenacted as sub-section (3) of Section 376 of the IPC, carrying minimum sentence of 20 years.
12. It is argued that the sentence awardable under Section 376(2)(i) is minimum sentence of 10 years, which may extend to imprisonment for life, therefore, considering that the appellant is

in jail since 24-4-2013 he may be awarded the minimum sentence. In support of his contention, learned counsel for the appellant would place reliance upon the decision rendered by the Supreme Court in *Mahendra Subhashbhai Vankhede v State of Gujarat, etc.* (AIR 2017 SC 5059).

13. It is to be seen that initially the offence was registered under Sections 376 & 511 of the IPC for the reason that as per the prosecutrix the appellant undressed her and tried to insert his private part, but due to resistance he could not penetrate and commit rape on her. Section 376 of the IPC got attracted because of the amendment in the definition of 'rape' as provided under Section 375 of the IPC by Act 13 of 2013 with retrospective effect from 3-2-2013. Under the new definition a man is said to commit 'rape' if he penetrates his penis, *to any extent*, into the vagina. Thus, the appellant having undressed himself and the prosecutrix and tried to insert his private part the offence of rape was committed as provided under Section 375 of the IPC.
14. Rape on a woman when she is under sixteen years of age was punishable, on the date of commission of offence, under Section 376(2)(i) of the IPC, which provides for minimum sentence of 10 years extendable up to life imprisonment. The trial Court has awarded the maximum sentence of life imprisonment.
15. Similarly, Section 4 of the POCSO Act provides for minimum sentence of 7 years extendable up to life imprisonment, here again the maximum sentence has been awarded by the trial Court.
16. Having considered all the relevant aspects of the matter, particularly for the fact that the appellant is in jail since

24-4-2013; he is aged about 22 years on the date of commission of offence; and relying on the decision of the Supreme Court in *Mahendra Subhashbhai Vankhede* (supra), we are of the considered view that the sentence imposed upon the appellant for offence under Section 376(2)(i) of the IPC and under Section 4 of the POCSO Act deserves to be reduced suitably.

17. Accordingly, the sentence awarded for offence under Section 376(2)(i) of the IPC and that under Section 4 of the POCSO Act is reduced to undergo RI for a period of 10 years & RI for a period of 10 years, respectively. Conviction & sentence imposed under Sections 363 & 366 of the IPC are maintained. Sentence of fine amount awarded for the offences under Sections 363, 366 & 376(2)(i) of the IPC and under Section 4 of the POCSO Act shall remain unaltered. All the sentences shall run concurrently.
18. In the result, the appeal is allowed in part, in the above stated terms.

Sd/-

(Prashant Kumar Mishra)
Judge

Sd/-

(Gautam Chourdiya)
Judge

Gowri