

NAFRHIGH COURT OF CHHATTISGARH, BILASPURCRA No. 1202 of 2015

- Keshav Sahu @ Pintu Sahu, S/o- Vishnu Sahu, Aged about- 19 years, R/o- Machandur, P.S.- Utai, District- Durg (C.G.)

---- Appellant

Versus

- State of Chhattisgarh, through- Police Station- Utai, District- Durg (C.G.)

---- Respondent

For Appellant : Shri N.S. Dhurandhar, Advocate.For State/Respondent : Shri Ishwar Jaiswal, Panel Lawyer.
-----Hon'ble Shri Justice Ram Prasanna SharmaJudgment on Board04/02/2020

1. This appeal is preferred against the judgment dated 17th August, 2015 passed by Additional Sessions Judge (F.T.C.), Durg (C.G.) in Special Case No. 145/2014 wherein the said Court convicted the appellant for commission of offence under Section 6 of the Protection of Children from Sexual Offences (for short "the POCSO Act") Act, 2012 and sentenced him to undergo rigorous imprisonment for ten years and fine of Rs. 5000/- with default stipulation.
2. In the present case, the prosecutrix is (PW-2) who is aged about 6 years. As per version of the prosecution, the date of incident is 21st October, 2014. The appellant committed penetrative sexual assault against the prosecutrix on the said date which come into knowledge of her mother who informed about the incident to her father and thereafter, report was lodged. The matter was

investigated, 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) The statement made by the prosecutrix (PW-2) before the trial Court and her earlier statement recorded before the investigating officer under Section 164 of the Cr.P.C. is contradictory in nature, but the same is overlooked by the trial Court.
- (ii) The story put forth by the prosecutrix (PW-2) is not supported by version of Dr. Kalpana Sharma (PW-4).
- (iii) The prosecutrix (PW-2) appears to be tutored witness and delay in lodging of report is not explained.
- (iv) Version of the prosecutrix (PW-2) is not corroborated by version of Roshan Lal Sahu (PW-1) who is father of the prosecutrix and Tejeswari (PW-3) who is mother of the prosecutrix.
- (v) The trial court has not evaluated the evidence properly, therefore, the finding arrived at by the trial Court is liable to be set aside.

4. On the other hand, learned State counsel submits that finding of the trial Court is based on proper marshaling of evidence which is not required to be interfered while invoking jurisdiction of the appeal.

5. I have heard learned counsel for the parties and perused the record of the Court below wherein judgment has been passed.

6. The prosecutrix (PW-2) deposed before the trial Court that she went to house of Nehal for playing and when she returning from

her house then the appellant called her in his house after that he closed the door and made her to seat on a chair and thereafter inserted his penis into her mouth and tried to penetrate his penis into backside (anus) of the said victim.

7. In her earlier statement recorded under Section 164 of the Cr.P.C. (Ex. P/8), she stated the same fact. Version of this witness is unrebutted during cross- examination and it is further supported by version of Tejeswari (PW-3) who is her mother to whom she informed the incident and it is further supported with the statement of Roshan Lal Sahu (PW-1) who is father of the victim. There is nothing on record to say that all the three witnesses have deposed before the trial Court to falsely implicate the appellant in the charge in question.
8. As per birth certificate (article-A-C) of the prosecutrix, her date of birth is 22nd February, 2009 and the date of incident is 21st October, 2014, therefore, she was aged about 5 years and 8 months on the date of incident. The statement of the prosecutrix and supportive witness inspire confidence because there is no iota of evidence that the appellant has been falsely roped on account of any grudge or otherwise. In the statement of the prosecutrix, there is no sufficient corroboration. No one charged of this kind of offence to jeopardize future prospect of the family. The case of penetrative sexual assault is different with other kind of offences, therefore, it is not a case which can be thrown out on account of any minor, discrepancy which do not go to the root of the case.

9. Penetrative sexual assault is defined under Section 3 of the Act, 2012 which may be reads as under:-

A person is said to commit "penetrative sexual assault" if-

'the appellant penetrates his penis into mouth of the prosecutrix is established which is well within definition of penetrative sexual assault.'

10. The prosecutrix is aged below 6 years, therefore, act of the appellant falls within mischief of aggravated penetrative sexual assault which is mentioned under Section 5 of the Act, 2012 and as per sub-Section 5(m) who committed sexual assault below 12 years is committing aggravated penetrative sexual assault which is punishable under Section 6 of the Act, 2012.
11. On overall assessment of the entire evidence, this Court has no reason to take a contrary view what is recorded by the trial Court. Accordingly, the act of the appellant falls within mischief of Section 6 of the Act, 2012 for which the trial Court convicted the appellant, therefore, argument advanced on behalf of the appellant is not sustainable. Conviction of the appellant for the said offence is hereby affirmed. The trial Court awarded sentence of 10 years which is minimum prescribed sentence for the said offence and less than minimum sentence cannot be awarded.
12. In view of the above, appeal filed by the appellant is liable to be and is hereby dismissed. It is reported that the appellant is in jail, therefore, no further order of his arrest etc. is required.

Sd/-
(Ram Prasanna Sharma)
Judge