

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR
CRA No. 1141 of 2013

- Yogesh Nirmalkar S/o Dashrath Lal Nirmalkar Aged About 19 Years R/o Kasaridih, Fokatpara, Civil And Rev. Distt. Durg C.G.

---- Appellant

Versus

- State Of Chhattisgarh Through SHO, PS Durg, Distt. Durg C.G.

---- Respondent

For Appellant	:Mr. Utkal Pradhan and Mr. Vivek Sharma, Advocates.
For State/Respondent	:Mr. Anand Verma, Dy. G.A.

Hon'ble Shri Justice Arvind Singh Chandel
Judgment on Board

16.03.2021

1. This appeal has been preferred against the judgment dated 07.11.2013 passed in Sessions Trial No.123/2013 by the Learned Additional Sessions Judge (FTC) Durg, District Durg(C.G.) wherein, the Appellant has been convicted for the offence punishable under Sections 363, 366 & 376(2)(अ) of the IPC and Section 5 (D) read with Section 6 of the POCSO Act 2012 and sentenced to undergo RI for 07 years and to pay fine of Rs. 10,000/-, RI for 10 years and to pay fine of Rs. 10,000/-, RI for 10 years and to pay fine of Rs. 40,000/- & RI for 10 years and to pay fine of Rs. 40,000/- respectively, with default stipulations. All the sentence to run concurrently.
2. According to the case of prosecution, at the time of alleged incident, the age of the victim girl was about 3 years. On

04.12.2012, Mahesh Kumar Sahu(PW-6), father of the victim girl, lodged a report against the Appellant alleging therein that on 04.12.2012 itself, at around 7 PM, when he took her daughter (aged about 3 years) to ice-cream parlour and after purchasing ice cream for her daughter he told her to go home, the Appellant was also standing there and he asked Mahesh Kumar Sahu that he would drop his daughter to his home. Thereafter, Mahesh had gone for his work. After returning home from his work, he came to know that her daughter had not returned. Immediately, he went to the house of present Appellant, where on stairs her daughter was crying and her underwear and jacket were not on her body, he checked her private part, there was some redness occurred in her private part and some liquid was also discharging from her private part. When, he asked her about her clothes, she indicated towards upstairs. When he went on terrace of the Appellant, he saw the Appellant was roaming on his terrace wearing undergarments and the clothes of victim girl were also found from there. On the basis of said report lodged by Mahesh Kumar Sahu, offence has been registered against the Appellant. The victim girl was medically examined by Dr. Vineeta Dhurve (PW-13) whose medical report is Ex.P-2-A. Thereafter, Statements of witnesses were recorded under Section 161 of Cr.P.C. After completion of investigation, charge-sheet was filed by the Police. Trial Court framed the charges against the Appellant. To robe the Appellant in the

crime-in-question, the prosecution has examined as many as 14 witnesses. In the statement of the Appellant recorded under Section 313 of Cr.P.C, he has pleaded his innocence and false implication in the matter. However, no defence witness was examined by the Appellant. After completion of trial, Trial Court convicted and sentenced the Appellant as mentioned in paragraph 01 of this judgment. Hence, this appeal.

3. Learned Counsel appearing for the Appellant submit that the Appellant has wrongly convicted by the Trial Court without there being any clinching and sufficient evidence available on record. Referring the statement of Dr. Vineeta Dhurve (PW-13), it has been argued by the Counsel that Dr. Vineeta Dhurve (PW-13) has categorically admitted the fact that there was no penetration done in private parts of the victim girl, redness may be occurred by rubbing penis on it. Looking to the above statement of Dr. Vineeta Dhurve (PW-13), conviction of the Appellant under Section 376(2)(^अ) of the IPC and Section 5 (D) read with Section 6 of the POCSO Act 2012 is not sustainable. The Counsel for the Appellant further submits that the Appellant is in jail since 05.12.2012 i.e. for about 9 years. He has no criminal antecedents and he is facing the *lis* since 2013. Therefore, the jail sentence awarded to the Appellant may be reduced to the period already undergone by him.

4. On the contrary, learned State Counsel opposes the appeal and supports the impugned judgment.
5. I have heard Learned counsel appearing on behalf of the parties and perused the record minutely. I have also gone through the statements of the witnesses.
6. Mahesh Kumar Sahu (PW-6), father of the victim girl, supported and deposed according to the entire case of prosecution. He categorically stated that the Appellant took the victim girl to his own home and when he reached to the home of the Appellant, he saw that victim girl was crying on stairs, there was some redness occurred in her private part and some liquid was also discharging from her private part. When, he asked her about her clothes, she indicated towards upstairs. When he went on terrace of the Appellant, he saw that Appellant was roaming on his terrace wearing his undergarments and the clothes of victim girl was also found from there. The above statement of this witness has not been rebutted during his cross-examination. Dushyant Kumar Sahu (PW-5) also deposed that when he heard the voice of shouting from the Appellant's house, he reached there and he saw Mahesh Kumar Sahu taking his daughter from the house of the Appellant. At that time he saw that the victim girl was not wearing her underwear. The above statement of this witness has also not been rebutted during his cross-examination. Immediately, after the incident, the matter was

reported by Mahesh Kumar Sahu (PW-6), father of the victim girl, and on 04.12.2012 itself, at around 10:30 PM, the victim girl was medically examined by Dr. Vineeta Dhurve (PW-13). According to the medical report of the victim girl, there was some pain and redness occurred in her private part. This witness categorically admitted the fact that there was no penetration done in her private part. She further categorically admitted that redness could be occurred in her private part by rubbing penis on it.

7. Penetrative sexual assault is defined in **Section 3** of The Protection of Children from Sexual Offences Act, 2012 which reads as under:-

3. Penetrative Sexual Assault.- A person is said to commit "penetrative sexual assault" if--

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person;or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person;or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person;or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

8. As defined in Sub-Section (a) of Section 3 of the POCSO Act, for committing the offence i.e. Penetrative Sexual Assault, Penetration of penis to any extent into the vagina, mouth, urethra or anus of a child is required. But, in this case, as deposed by Dr. Vineeta Dhurve (PW-13), it is clear that no penetration to any extent was done with the victim girl and the redness would have occurred due to rubbing of penis. Looking to the above, conviction of the Appellant under Section 376(2)(a) of the IPC and Section 5 (D) read with Section 6 of the POCSO Act is not sustainable instead of that the act committed by the Appellant falls within the ambit of Section 7 of the POCSO Act i.e. **sexual assault** which is punishable under Section 10 of the POCSO Act and Section 376 read with Section 511 of the IPC. Thus, Conviction of the Appellant altered accordingly. The Conviction under Section 363 & 366 of the IPC is affirmed.

9. With regard to the sentence of the Appellant, considering the facts and circumstances of the case particularly considering the fact that the Appellant is in jail since more than 8 years. He is facing the *lis* since 2013, further considering his age, I am of the view that the ends of justice would be met if the jail sentence awarded to him is reduced to the period already undergone by him and the relevant fine sentences are affirmed. Ordered Accordingly.

10. Consequently, the appeal is partly allowed.

11. It is reported that the Appellant is in jail, if the fine amounts imposed upon him by the Trial Court have already been deposited, he be released forthwith if not required in any other case.

12. Records 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