

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No. 30 of 2015**

Kumar Nirmalkar S/o Kamta Prashad Nirmalkar, aged about 36 years R/o Ramsagar Para Vill. Tumgaon, P.S. Tumgaon, Distt. Mahasamund (C.G.) Civil & Revenue District Mahasamund (C.G.).

----Appellant**Versus**

State of Chhattisgarh through Aarakshi Kendra Tumgaon, Distt. Mahasamund (C.G.)

---- Respondent

For Appellant	:	Mr. Vikash Shrivastava, Advocate
For Respondent	:	Mr. Rakesh Sahu, Dy. Govt. Advocate

Hon'ble Shri Justice Arvind Singh Chandel**Judgment on Board****25/01/2021**

1. This appeal has been preferred under Section 374 (2) of Cr.P.C against the judgment dated 14/10/2014 passed in Sessions Trial No. 23/2014 by the Additional Sessions Judge (FTC)/Special Judge (POCSO), whereby the Appellant has been convicted under Section 6 read with Section 18 of the Protection of Children from Sexual Offence Act, 2012 and sentenced to undergo RI for 10 years with fine of Rs. 3000/- with default stipulation.
2. In this case, the Prosecutrix (PW1) is daughter of the appellant. The Prosecutrix was 13 years old at the time of incident. Her mother was residing separately 10 years prior to the incident. According to the case of the prosecution, two months prior to recording of FIR, on the date of incident, grant mother of the Prosecutrix was not at home. The Prosecutrix and her father i.e. the appellant were taking rest at their

home. At about 11 pm, the appellant called the Prosecutrix and committed rape with her. On crying, he also threatened the Prosecutrix to kill. Thereafter, the appellant as and when used to get opportunity, he committed rape with the Prosecutrix. On 13/06/2014 in the afternoon also, the appellant committed rape with the Prosecutrix. The Prosecutrix narrated the whole incident to her friend Savitri Nirmalkar, Manisha Nirmalkar, her Aunt Radhika and her grand mother, and her neighbors Sarita Sahu and Motim Sahu. On the basis of report made by the Prosecutrix, offence was registered against the appellant. Statements of witnesses and the Prosecutrix were recorded under Section 161 of the Cr.P.C. After completion of investigation, a charge-sheet was filed. Trial Court framed the charges. As many as 10 prosecution witnesses have been examined. Statement of the Appellant under Section 313 of the Cr.P.C was recorded, wherein he has pleaded his innocence and false implication in the matter. No defence witness has been examined.

3. After trial, the trial Court has convicted and sentenced the Appellant as mentioned in paragraph one of this judgment. Hence, this appeal.
4. Learned Counsel appearing for the Appellant submits that the trial Court has wrongly convicted the appellant without there being sufficient and clinching evidence on record. He further submits that there are material contradictions and omissions occurred in the statement of the Prosecutrix and other witnesses, but the trial Court has ignored the fact. He further submits that from the statement of the Prosecutrix as well as the medical report of the Prosecutrix, it is well established that in this case penetration was not proved, inspite of that the trial Court has

convicted the appellant, therefore, the conviction of the appellant is not sustainable.

5. Per contra, learned Counsel appearing for the State supported the impugned judgment.
6. I have heard learned Counsel appearing on behalf of the parties and perused the record as well as statements of the Prosecutrix and other witnesses minutely.
7. There is no dispute on the point that the appellant is real father of the Prosecutrix. There is also no dispute on the point that the Prosecutrix was below 14 years of age at the time of incident.
8. Penetrative sexual assault has been 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.

9. After perusal of above provision, it makes clear that penetration of penis, to any extent, is said to be called penetrative sexual assault. It is not necessary that penetration must be fully. Now discussing the evidence available in this regard.
10. In her Court statement, the Prosecutrix (PW1) has supported the entire case of the prosecution. She has categorically stated that on the date of incident also at about 11-12 in the night, when her grant mother was not in the house, the appellant called her to his bed. Thereafter, he removed her Salwar. When she tried to escape, he threatened her to kill. The appellant tried to enter his penis into her vagina. This witness has further deposed that prior to this incident also, the appellant had attempted three times to rape her. According to this witness, she disclosed this fact to her Aunt Radhika and her grand mother. She also disclosed this fact to her friend Savitri and Manisha.
11. Manisha (PW3), Savitri (PW4) and Radhika (PW10) have also supported the statement of the Prosecutrix. According to these witnesses after the incident the Prosecutrix informed them about the incident. All the above witnesses including the Prosecutrix were remained firm during their cross-examination. The Prosecutrix was medically examined by Dr. Smt. Karuna Aavde (PW5). According to her report, vagina of the Prosecutrix was ruptured and one finger was easily going inside the vagina.
12. On minute examination of the above evidence, it makes clear that on the date of incident, the Prosecutrix was alone with her father in their house. At that time, the appellant called her and tried to enter his penis into her

vagina. From the medical report also, it is well established that hymen of the Prosecutrix was ruptured. At the time of medical examination of the prosecutrix, one finger was easily going inside her vagina. Though as per court statement of the Prosecutrix, the appellant was trying to enter his penis into her vagina, from the medical report of the prosecutrix, it appears that the appellant, to any extent, penetrated his penis into the vagina of the Prosecutrix. As defined in Section 3 of the Protection of Children from Sexual Offences Act, 2012, penetration, to any extent, would be called penetrative sexual assault.

13. Looking to the entire evidence adduced by the prosecution, in my considered view, the trial Court has rightly convicted the appellant.
14. Accordingly, I do not find any merit in this appeal. The appeal is dismissed.

**Sd/-
(Arvind Singh Chandel)
Judge**