

(2023) 08 CHH CK 0053
In the Chhattisgarh High Court
Case No : Criminal Appeal No.101 Of 2023

Guddu Poyam

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 25-08-2023

Acts Referred:

Indian Penal Code, 1860 — Section 359, 361, 363, 366, 366A, 376, 376(3)
Code Of Criminal Procedure, 1973 — Section 164, 313, 374(2), 437A
Protection of Children from Sexual Offences Act, 2012 — Section 4, 6

Citation : (2023) 08 CHH CK 0053

Hon'ble Judges : Ramesh Sinha, CJ; N. K. Chandravanshi, J

Bench : Division Bench

Advocate : Anusha Naik, Avinash Singh

Final Decision : Allowed

Judgement

Ramesh Sinha, CJ

1. This criminal appeal under Section 374(2) of the CrPC is directed against the judgment dated 15.11.2022 passed by the Additional Sessions Judge (FTC), South Bastar Dantewada in Special Sessions (POCSO) Case No.37/2018, whereby the learned Additional Sessions Judge has convicted the appellant for offences punishable under Sections 363, 366A and 376(3) of the Indian Penal Code (hereinafter called as 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter called as 'POCSO') and sentenced to undergo RI for three years and fine of Rs.500/-, in default of payment of fine to further undergo RI for one year, RI for three years and fine of Rs.500/-, in default of payment of fine to further undergo RI for one year and RI for twenty years and fine of Rs.1000/-, in default of payment of fine to further undergo RI for one year. The trial Court has not awarded separate sentence to the appellant under Section 6 of the POCSO Act.

2. Case of the prosecution, in brief, is that on 24.09.2018 at about 10 o'clock, the accused committed the offence of inducing the minor prosecutrix out of the

lawful guardianship without her parents consent and repeatedly engaged in physical relationship with her and committed aggravated penetrative sexual assault with her over 5 days on the pretext of marriage. Mother of the prosecutrix / victim (PW-4) has lodged written complaint before the Police Station Gadiras. On the basis of written report, the police of police station Gadiras registered the FIR in Crime No.14/2018 for offences under Sections 363, 366 and 376 of the IPC and Sections 4 & 6 of the POCSO Act vide Ex.P-8 against the accused-appellant. Statement of the prosecutrix was recorded under Section 164 CrPC vide Ex.P-2. The appellant was arrested vide arrest memo Ex.P-12. The prosecutrix was sent for medical examination vide Ex.P-14. Medico legal examination report of sexual violence was given by the doctor vide Ex.P-22. Her clothes and vaginal slides were sent for chemical examination and FSL report is Ex.P-20. Thereafter, charge-sheet was filed for the aforesaid offences against the appellant / accused.

3. In order to bring home the above-stated offences, the prosecution examined as many as 10 witnesses including the prosecutrix (PW-1). Statement of the accused/appellant was recorded under Section 313 of the CrPC, in which he denied his guilt and has taken the stand that he has been falsely implicated in this case. However, the accused examined none in his defence.

4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment dated 15.11.2022, convicted the appellant herein for offences under Sections 363, 366A and 376 (3) of the IPC and Section 6 of the POCSO Act and sentenced him as aforementioned.

5. Ms.Anusha Naik, learned counsel for the appellant would submit that as per Dakhil Kharij register, age of the prosecutrix was 15 years 07 months and 14 days on the date of commission of offence, but no authentic documentary proof was adduced in order to show that the prosecutrix was a minor girl on the date of the incident. She would further submit that the prosecutrix was a consenting party and she had established physical relationship with the appellant on her own will. The trial Court has committed grave legal error in convicting the appellant herein for offences under Sections 363, 366A and 376 of the IPC and Section 6 of the POCSO Act as the prosecutrix (PW-1) and her mother (PW-4) have turned hostile and they have not supported the case of the prosecution. She would also submit that it is the case of elopement and not of taking away, enticing or abduction and as per the FSL report of the prosecutrix (Ex.P-20), no human sperm was found on the vaginal swab and clothes of the prosecutrix. There are material contradictions and omissions in the statements of the prosecution witnesses and on that basis, the appellant cannot be convicted. As such, the impugned judgment of conviction recorded and sentence awarded deserves to be set-aside.

6. On the other hand, Mr.Avinash Singh, learned Panel Lawyer appearing for the respondent/State, would support the impugned judgment and submit that the prosecution has proved its case beyond reasonable doubt that the prosecutrix

was minor on the date of commission of offence and the trial Court has rightly convicted and sentenced the appellant for offences punishable under Sections 363, 366A and 376(3) of the IPC and Section 6 of the POCSO Act. As such, the appeal deserves to be dismissed.

7. We have heard learned counsel for the parties, considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

8. The first question for consideration would be, whether the trial Court is justified in convicting the appellant for offence under Section 363 of the IPC ?

9. The appellant has been convicted for offence under Section 363 of the IPC, which is punishable for kidnapping. Kidnapping has been defined under Section 359 of the IPC. According to Section 359 of the IPC, kidnapping is of two kinds: kidnapping from India and kidnapping from lawful guardianship. Section 361 of the IPC defines kidnapping from lawful guardianship which states as under:-

"361. Kidnapping from lawful guardianship.-Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

10. The object of Section 359 of the IPC is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the the protection of the rights of parents and guardians having the lawful charge or custody of minors or insane persons. Section 361 has four ingredients:-

(1) Taking or enticing away a minor or a person of unsound mind.

(2) Such minor must be under sixteen years of age, if a male, or under eighteen years or age, if a female.

(3) The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.

(4) Such taking or enticing must be without the consent of such guardian.

So far as kidnapping a minor girl from lawful guardianship is concerned, the ingredients are : (i) that the girl was under 18 years of age; (ii) such minor was in the keeping of a lawful guardian, and (iii) the accused took or induced such person to leave out of such keeping and such taking was done without the consent of the lawful guardian.

11.The Supreme Court while considering the object of Section 361 of the IPC in the matter of S.Varadarajan v. State of Madras AIR 1965 SC 942, took the view that if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so and held that if

evidence to establish one of those things is lacking, it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian and held as under:-

"It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. If evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. But that part falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking"."

12. Reverting to the facts of the present case in light of ingredients of offence under Section 361 of the IPC which is punishable under Section 363 of the IPC & as well as principles of law laid down by the Supreme Court in the matter of S.Varadarajan (supra), it is evident that the victim / prosecutrix on the date of occurrence accompanied with the appellant in a weekly market of Sukma. She has been examined as PW-1. In para 3 of her evidence, she has stated that the accused had brought Sukma with him saying that he had to go to the weekly market, then she refused to come to Sukma, yet he brought her to Sukma in a bus and thereafter the accused forcibly brought her in his village Ramsargipal, Jagdalpur. In para 4 of her evidence, she has stated that the appellant accompanied her for five days and committed sexual intercourse with her against her will. After five days, the accused left her at Geedam, from where she came back to her house at Chingawaram. She has clearly stated in para 11 of her evidence before the trial Court that in village Ranisargipal the accused on the pretext of marriage committed rape with her against her will for five days and physically abused her. As such, there is no evidence on record that at any point of time the appellant solicited or persuaded the victim to leave the company of her parents. On the other hand, it is clearly established that the victim herself accompanied the appellant and thereafter, she and the accused proceeded for Sukma and thereafter from Sukma to Ramsargipal, Jagdalpur in his house. As such, there is no inducement to the victim by the appellant to leave the lawful guardianship of her parents. Therefore, in the considered opinion of this Court, the act/omission of the appellant, if any, would not tantamount to "taking" within the meaning of Section 361 of the IPC in light of judgment of the Supreme Court in S.Varadarajan (supra). Similarly, there is no evidence of enticing the minor victim by the appellant. As such, the trial Court is absolutely unjustified in convicting the appellant for offence under Section 363 of the IPC.

13. The next question for consideration would be, whether the trial Court is

justified in convicting the appellant for offence under Section 366A of the IPC ?

14. Though, other witness i.e. mother of the prosecutrix (PW-4), examined by the prosecution, turned hostile. Moreover, the doctor who conducted medical examination of the prosecutrix has concluded in Ex.P-22 that there is complete absence of injuries on the body of the prosecutrix. She has further concluded that no tenderness, redness, swelling or injury was found on the genitals of the prosecutrix. FSL report (Ex.P-20) proves that human sperm was not found on the pubic hair, vaginal swab, vaginal slide and underwear of the prosecutrix. The prosecutrix, her mother and her brother who are the important witnesses to establish the case of the prosecution have not supported the case of the prosecution and have turned hostile. As such, there is no corroborative evidence placed by the prosecution to prove the guilt of the accused for the offence punishable under Section 366A of the IPC. By perusal of the evidence of the victim girl, it appears that victim girl was simply accompanied the accused without being enticed or influenced. Mere accompanying a person without being induced does not constitute an offence under Section 366A of the IPC. Though, the learned Panel Lawyer vehemently contended that age of the victim girl has proved by the prosecution that she is minor as on the date of incident, nevertheless, in order to convict the accused for the offence under Section 366A of the IPC, other two essential ingredients i.e. the victim girl must be induced by the accused and she must be induced by the accused person to go from a place or to do any act with an intent that such girl may be knowing that it is likely that she will be forced or seduced to illicit intercourse by another person. As such, the prosecution has failed to prove the ingredients of offence under Section 366A of the IPC.

15. The question for consideration would be whether the prosecution has been able to bring home the offence under Sections 376 (3) of the IPC beyond reasonable doubt against the appellant herein.

16. Sikandar Tigga (PW-3) is the teacher who was called to produce dakhil kharij register of the school where the prosecutrix used to be enrolled in. He has admitted in his cross-examination that he was not posted in the school at the time when the prosecutrix was admitted in the school. He has further admitted that since he was not posted in the school when the prosecutrix took admission, he cannot tell if any document related to the date of birth of the prosecutrix was presented or not at the time of admission.

17. How dakhil kharij register is treated to be relevant came up for consideration before the Hon'ble Supreme Court in Babloo Pasi v. State of Jharkhand and another (2008) 13 SCC 133 wherein it has been held as under:-

"22. It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The medical evidence as to the age of a person, though

a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.

28. It is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely:

(i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. (See: *Birad Mal Singhvi Vs. Anand Purohit* (1997) 4 SCC 241)".

18. Smt. Payke Madwi (PW-4) (mother of the prosecutrix) in para 2 of her evidence has admitted that she does not know the date of birth of her daughter and merely on the basis of approximation she has stated that the prosecutrix has not attained marriageable age. Raju Madwi (PW-5) (brother of the prosecutrix) in para 2 of his evidence has stated that he does not know the age of the prosecutrix, but she has not attained 18 years of age. He has also admitted in para 10 of his cross-examination that he does not know the date of birth of the prosecutrix.

19. It is to be noted that in offences as grave as this, approximation of age cannot take the place of exact date of birth to convict the appellant.

20. The Supreme Court in the matter of *Sunil v. State of Haryana* (2010) 1 SCC 742 has held as under:-

"26. Bishan, PW 8, the father of the prosecutrix has also not been able to give correct date of birth of the prosecutrix. In his statement he clearly stated that he is giving an approximate date without any basis or record. In a criminal case, the conviction of the appellant cannot be based on an approximate date which is not supported by any record. It would be quite unsafe to base conviction on an approximate date.

34. On consideration of the totality of the facts and circumstances of this case, it would be unsafe to convict the appellant when there are so many infirmities, holes and lacunas in the prosecution version. The appellant is clearly entitled to benefit of doubt and consequently the appeal filed by the appellant deserves to be allowed. The appellant is directed to be released forthwith, if not required in any case."

21. The Supreme Court in the matter of *State of Madhya Pradesh v. Munna @ Shambhoo Nath* Criminal Appeal No.658 of 2011(decided on 18.9.2015) has held as under:-

"9.....Further, the mother of the prosecutrix also was not able to give the exact age of the prosecutrix. No question was also asked to the prosecutrix by the prosecution about her age. Taking into account all these facts, the High Court correctly came to the conclusion that the prosecution has totally failed to prove beyond reasonable doubt that the girl was less than 16 years of age at the time of the incident. Therefore, the High Court presumed that the girl was more than 16 years of age and was competent to give her consent.

11. In view of the evidence on record and the rationale in the aforementioned cases, we are of a considered view that the prosecution has totally failed to prove beyond reasonable doubt that the girl was less than 16 years of age at the time of the incident. Therefore, it can be held that the girl was more than 16 years of age and she was competent to give her consent as held by the High Court. Hence, in the present case, the question of rape does not arise as consensual intercourse has been proved."

22. Applying the principle of law laid down by the Supreme Court in the above-stated judgments (supra) to the facts of the present case, it is quite vivid that only the prosecutrix knowing her date of birth devoid of even a single corroborative testimony or document is not admissible in the eyes of law. It is well settled principle that admission register / dakhil kharij in itself is a weak piece of evidence with no probative value. Hence, it is essential to substantiate it with other material records or by the examination of the author of such document or examination of the person who is expected to have special knowledge about it. In the present case, the totality of facts stated above leaves room for ample doubt with regard to the exact date of birth of the prosecutrix. In such a circumstance, the benefit of doubt must naturally go in favour of the accused. It is difficult to believe that a serious event like unconsented sexual intercourse which allegedly took place over 4 days continuously is an event that the prosecutrix herself conveniently forgot. This shows that the testimony of the prosecutrix is not creditworthy and she was a consenting party but was tutored to give statement against the appellant. Mother of the prosecutrix (PW-4) in para 3 of her evidence has stated that the prosecutrix informed merely that a boy named Guddu took her to Sukma. No other information regarding sexual assault was given by her daughter. This witness has declared hostile. The reason given for such omission by the mother of the prosecutrix (PW-4) is not tenable in the eye of law since being less educated or illiterate has hardly anything to do with remembering the alleged unfateful event that happened with her own minor daughter over the course of 4 days. Hence, the testimony of this witness is also not credible. Raju Madwi (PW-5) (brother of the prosecutrix) has categorically stated in para 4 of his evidence that his sister did not tell anything else apart from the fact that accused Guddu took her to Sukma. This witness after being declared hostile has also categorically denied that the prosecutrix told him that the appellant engaged in unconsented sexual intercourse with her over a period of 4 days. He has further denied giving "A" to "A" part of his police statement (Ex.P-7).

23. Considering the negative medical report (Ex.P-22) and FSL report (Ex.P-20) coupled with unreliable testimony of the prosecutrix herself and her family members creates a serious lacuna in the prosecution story, the benefit of which should be granted to the appellant. On the basis of material available on record and evidence collected by the prosecution, it cannot be held that the prosecution has been able to bring home the offences under Sections 363, 366A and 376(3) of the IPC beyond reasonable doubt as evidence brought on record is not sufficient to bring home the offences against the appellant / accused herein.

24. As a fallout and consequence of the aforesaid legal analysis, the criminal appeal is allowed. Impugned judgment dated 15.11.2022 passed by the Additional Sessions Judge (FTC), South Bastar Dantewada in Special Sessions (POCSO) Case No.37/2018 convicting and sentencing the appellant for the offences under Sections 363, 366A & 376(3) of the IPC and Section 6 of the POCSO Act is hereby set aside. The accused / appellant is acquitted of the said charges levelled against him. He is in jail. He shall be set at liberty forthwith if no longer required in any other criminal case.

25. The appellant is directed to file personal bond and two sureties in the like amount to the satisfaction of the Court concerned in compliance with Section 437-A of the Code of Criminal Procedure, 1973.

26. Let a copy of this judgment and the original record be transmitted to the trial court concerned forthwith for necessary information and compliance.