



AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 375 of 2024

XYZ

---- Appellant

Versus

State of Chhattisgarh Through- Police Station - Ambagarh Chowki,
District- Rajnandgaon (C.G.)

---- Respondent

(Cause Title taken from Case Information System)

For Appellant : Mr. Pushendra Kumar Patel, Advocate.

For Respondent/State : Mr. Ranbir Singh Marhas,
Additional Advocate General

Hon'ble Mr. Ramesh Sinha, Chief Justice
Hon'ble Mr. Sachin Singh Rajput, Judge

Judgment on Board

Per Ramesh Sinha, Chief Justice

20.06.2024

1. The appellant has preferred this appeal under Section 374(2) of Code of Criminal Procedure, 1973 (for short, 'CrPC') questioning the impugned judgment dated 31.01.2024 passed by the learned Additional Sessions Judge, F.T.S.C. (POCSO), Rajnandgaon, District- Rajnandgaon (C.G.) in Special Criminal (POCSO) Case No.71/2020, whereby the trial Court has convicted the appellant under Section 376AB of the Indian Penal Code, but not awarded sentence under this Section and also convicted under Section 5(m) read with Section 6 of the Protection of Children from the Sexual Offences Act, 2012 (for



short 'the POCSO Act') and sentenced him to undergo life imprisonment till natural death with fine of Rs. 20,000/-, in default of payment of fine, additional rigorous imprisonment for 01 year.

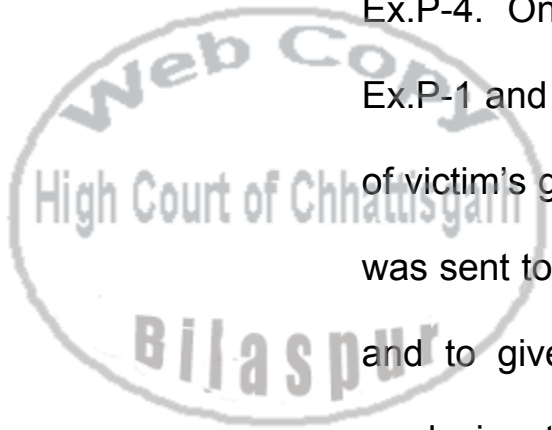
2. Case of the prosecution, in brief, is that on 05.11.2020, at around 3.00 PM, the applicant *i.e.* the aunt of the victim (PW-03) was in her house. The applicant's sister-in-law (*jethani*) *i.e.* the victim's mother (PW-02) and the applicant's brother-in-law (*jeth*) *i.e.* the victim's father (PW-07) had gone to the fields. The children of applicant's house U(N), victim, KMDR, PRTM, GJN, victim's friend (PW-08) and other children were playing in the street and applicant/victim's aunt was working inside the house. Then, all the children came to the house of the applicant and told her that the accused "D alias DN" has taken the victim to his house for long time and had locked the door from inside and had committed sexual intercourse with the victim, then victim's aunt (PW-3) asked the elder sister of victim that where is the victim when she saw that the victim was standing near the door, she called the victim near her and asked her what had happened to which victim told her that accused had forcefully made intercourse with her. The applicant's aunt then informed victim's uncle (PW-06) about the the incident and later in the evening, when victim's parents came back from field, they were also told about the incident. Thereafter, victim's father called elderly people of the village to his house and





told them about the incident after which, the villager called a vehicle by dialing 112 and then, in the said vehicle, the village kotwar, victim's father, her uncle and other people took her to District Hospital, Rajnandgaon for her treatment.

3. On giving information by the victim's aunt (PW-03) at police out-post, District Hospital, Rajnandgaon about the accused taking the minor victim to his house and rape against her, on 05.11.2020, at about 23.40, dehati nalsi against the accused under section 376 of the IPC and Section 4, 6 of the POCSO Act was registered vide Ex.P-4. On 05.11.2020, permission from victim's mother vide Ex.P-1 and from father vide Ex.P-8 were received for examination of victim's genitals from the lady doctor and a memo vide Ex.P-17 was sent to District Hospital, Rajnandgaon for genital examination and to give report on the same day. On the same day, on producing the undergarment worn by the victim in front of the witnesses, the same was seized vide Ex.P-2. On 06.11.2020 on the basis of Dehati Nalsi, FIR was registered against the accused under Section 376 of the IPC and Section 4, 6 of the POCSO Act at Crime No.205/2020 vide Ex.P-14. On 06.11.2020, an application (Ex.P-18) was sent by the District Hospital, Rajnandgaon to inform the result about the seized maroon colour undergarment of the victim after which, the same was received (Ex.P-29).





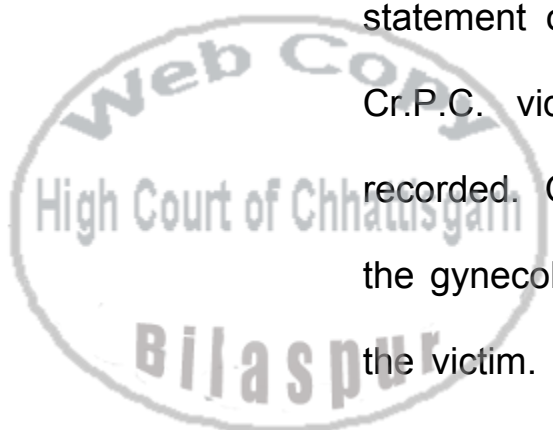
4. During the course of investigation, on 06.11.2020, the medical examination report (Ex.P-28) of the private parts of the victim was received from the female doctor and during the examination, 02 pieces of vaginal slides were prepared, sealed and given to lady constable Lileshwari Bhandari and the victim was referred to a gynecologist for expert opinion and further treatment. On 06.11.2020 itself, when lady constable No.69 Lileshwari Bhandari brought and presented 02 pieces of vaginal slides of the victim were found in a sealed packet and maroon colored undergarment of the victim was found in another sealed packet in the police post premises of District Hospital, Rajnandgaon, the same were seized vide Ex.P-3. On 06.11.2020, in the police station premises of Ambagarh outpost, the undergarment of the accused was seized vide Ex.P-20. On 06.11.2020, an application regarding getting the undergarment of the accused inspected was sent to the Community Health Center Ambagarh Chowki vide Ex.P-22 and query report of the same was received vide Ex.P-13. Further, an application was sent to the Community Health Center, Ambagarh outpost for testing the private parts of the accused regarding his ability to have sexual intercourse vide Ex.P-21 and the test report was received vide Ex.P-12. On 06.11.2020, when constable number 1350 Ramesh Mandavi brought the underwear of accused "D alias DN" from Community Health Center Ambagarh outpost, the same was seized vide Ex.P-23. The accused was





arrested on 06.11.2020 as per arrest sheet Ex.P-24 and information about his arrest was given vide Ex.P-25.

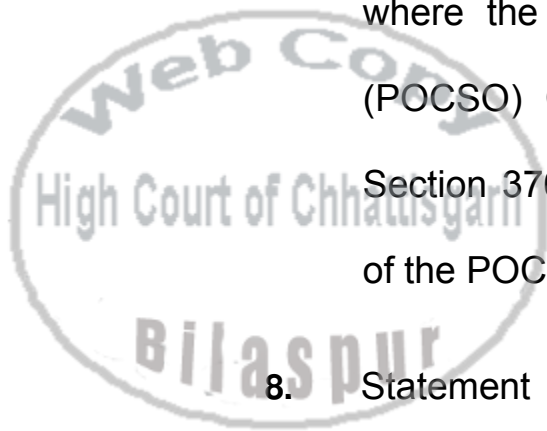
5. During the course of investigation, on 06.11.2020, a visual map of the room of accused where the incident took place was prepared vide Ex.P-05. Further, on the same day, an application for providing map of the incident site was sent to the Tehsildar vide Ex.P-15 and spot map was prepared by the Patwari vide Ex.P-06. On 06.11.2020, an application before the Judicial Magistrate First Class, Ambagarh Police Station was presented for recording the statement of applicant and applicant's aunt under Section 164 Cr.P.C. vide Ex.P-19 and later on, their statements were recorded. On 09.11.2020, test report (Ex.D-4) was obtained from the gynecologist regarding the sexual assault committed against the victim. On 10.11.2020, a notice (Ex.P-09) under Section 91 I.P.C. was issued to the victim's father to produce the birth certificate or any other document to determine the age of the victim. On the same date, the victim's father was called to the Police Station Ambagarh Chowki and photocopy of the birth certificate Article P-1 (C) was seized as per the seizure sheet (Ex.P-10) and its original copy was returned to the victim's father as per supurdnama (Ex.P-11).
6. Statements of the victim's uncle (PW-6), victim (PW-1) and victim's elder sister under Section 161 Cr.P.C (Ex.D-2) were recorded vide Exs. P-07, D-01 and D-02 respectively as well as





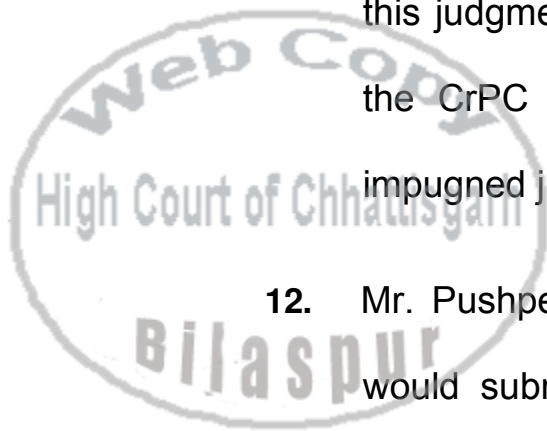
statement of other witnesses were also recorded. Seized articles were sent for chemical examination to Forensic Science Laboratory, Raipur and report was received therefrom vide Ex.P-27.

7. After completion of investigation, the police submitted the police report alongwith charge-sheet against the appellant/convict under Section 376, 376(2)(n), 342 of the IPC and Sections 04 & 06 of the POCSO Act before the Court of Additional Sessions Judge, F.T.S.C. (POCSO), Rajnandgaon, District- Rajnandgaon (C.G.), where the case was commenced for trial in Special Criminal (POCSO) Case No.71/2020, and charges were framed under Section 376AB of the IPC and Section 5(m) read with Section 6 of the POCSO Act.
8. Statement of accused was recorded under Section 313 of the Cr.P.C. in which he denied all the circumstances appearing against him and stated that he is innocent and has been falsely implicated. He has examined 05 witnesses in his defence, namely Smt. R.B. Sahu (DW-1), Smt. B.S. (DW-2), Smt. S.T. (DW-3), Dr. Vimal Khunte (DW-4) and Binda (DW-5).
9. The prosecution in order to bring home the offence examined as many as 14 witnesses and exhibited 29 documents (Exhibits P-1 to P-21).





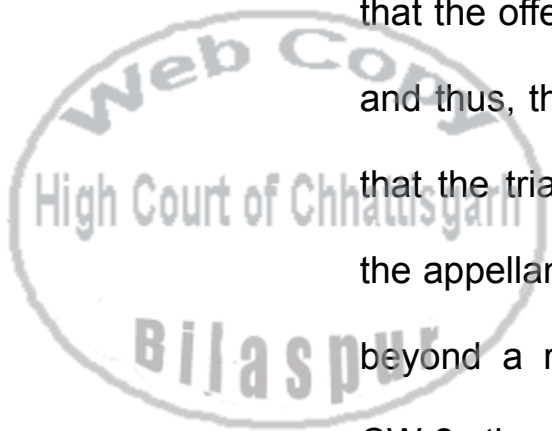
10. Main plea of the appellant herein taken during the course of trial was the plea of insanity as provided under Section 84 of the Indian Penal Code, on which, the trial Court has recorded the statements of Dr.A.S. Saraf as CW-01 and Akshay Singh Rajput as CW-02.
11. The trial Court after completion of trial and after appreciating oral and documentary evidences available on record, by the impugned judgment dated 31.01.2024 convicted and sentenced the appellant in the manner mentioned in the opening paragraph of this judgment, against which this appeal under Section 374(2) of the CrPC has been preferred by him calling in question the impugned judgment.
12. Mr. Pushpendra Kumar Patel, learned counsel for the appellant would submit that as per case of the prosecution, victim was minor on the date of incident, but this fact has not been proved by adducing lawful evidence. It is further submitted that since prosecution has failed to prove by adducing cogent evidence that, on the date of incident, victim was minor, hence the finding recorded by learned trial Court in this regard is not sustainable. He further submitted that learned trial Court erred in reading MLC Report and statement of PW-13 Dr. Sahodra Thakur and has also failed to consider that there is nothing in medical report to show that forcible sexual intercourse was committed upon the victim. He also submitted learned trial Court has committed grave legal error





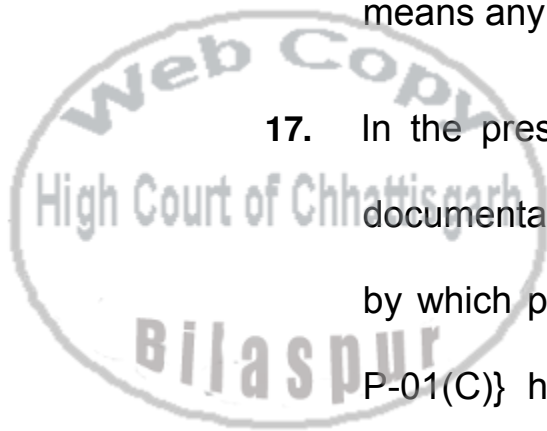
in not accepting the plea of unsoundness of mind of the appellant herein as provided under Section 84 of the IPC and the statement of Dr. A.S. Saraf (CW-1) who has specifically stated in para 09 of his evidence that the appellant will require regular counseling and therapy by the Composite Regional Centre, Rajnandgaon, as such, the judgment of conviction recorded and sentence awarded deserves to be set-aside.

13. On the other hand, learned State Counsel opposed the submissions of learned counsel for the appellant and submitted that the offence committed by the appellant is heinous in nature and thus, the trial court had rightly convicted him. He submitted that the trial Court had considered all the arguments made by the appellant and there was sufficient evidence to prove his guilt beyond a reasonable doubt. As per evidence of CW-1 and CW-2, the appellant is of the sound mind and he is able to understand each and every aspect. Moreover, the FSL Report also indicates presence of semen in the articles seized from the prosecutrix and appellant and also the MLC is positive. Therefore, the judgment passed by the trial court was sound and did not warrant any interference.
14. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the original records of the trial Court with utmost circumspection and carefully as well.



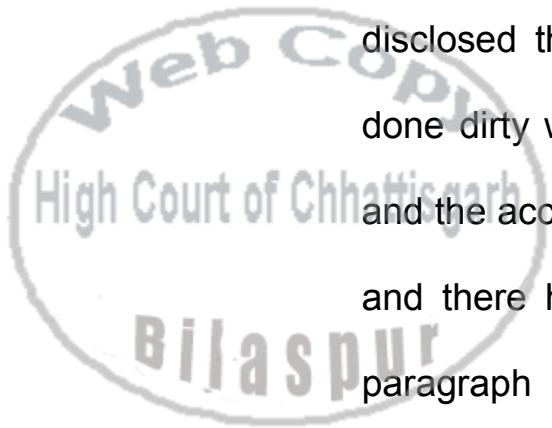


15. The first question for consideration before this Court would be, whether the trial Court is rightly held that on the date of incident, the victim was minor below the age of 12 years ?
16. When a person is charged for the offence punishable under the POCSO Act, or for rape punishable in the Indian Penal Code, the age of the victim is significant and essential ingredients to prove such charge and the gravity of the offence gets changed when the child is below 18 years, 12 years and more than 18 years. Section 2(d) of the POCSO Act defines the “child” which means any person below the age of eighteen years.
17. In the present case, the seizure sheet Ex.P-10 was used as documentary evidence to prove the fact of the age of the victim by which photocopy of the birth certificate of the victim {Article P-01(C)} has been seized, in which date of birth has been mentioned as 29.05.2014, which has been duly supported by the evidence of victim (PW-1), victim’s mother (PW-2), victim’s aunt (PW-3), victim’s father (PW-7), Dr. Sahodra Thakur (PW-13). The defence has not presented any oral or documentary evidence to refuse the said date of birth, therefore, there is no reason to disbelieve the date of birth of the victim, as 29.05.2014 hence, the trial Court has rightly held that the date of birth of the victim is 29.05.2014 and on the date of incident i.e. on 05.11.2020, she was minor and her age was 06 years 05 months and 06 days.





18. The next question for consideration before us is whether the appellant has committed rape on minor victim?
19. In this regard, the statements of the victim (PW-1), her aunt (PW-3), victim's friend (PW-4), victim's uncle (PW-6), victim's friend (PW-8), Dr. Nishant Sori (PW-9) and Dr. Sahodra Thakur (PW-13) are of most important.
20. The victim (PW-1) has clearly stated in paragraphs 01 and 02 of her statement that she knows the accused and the accused had raped her. In the same paragraph, this child witness has clearly disclosed the incident of rape and said that the accused had done dirty work with her by removing her frock and underwear and the accused had taken her to his house saying 'Jam Dunga' and there he had done dirty work with her. This witness, in paragraph 04 of her statement under cross-examination, has accepted the suggestion of the defense that there is a street in front of their house and on one side of the street is her house and on the other side is the house of the accused and she keeps playing with her friends in the street opposite to her house and on the date of incident also she was playing with her friends and there was a jam tree planted in the house of the accused. Due to acceptance given by the victim regarding the above suggestion of the defense, this fact is undisputedly proved that on the date of incident, the victim was playing with

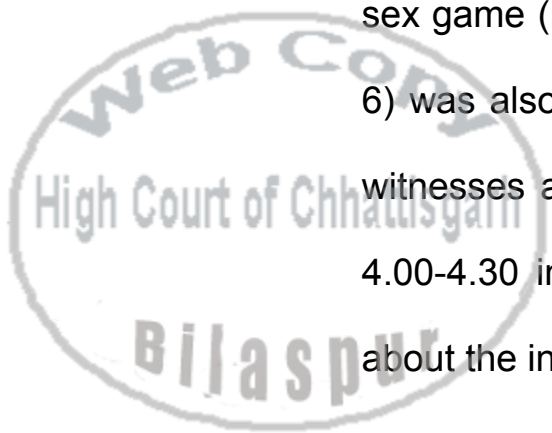




her friends in the street opposite to her house, on the other side of which is the house of the accused.

21. The victim's aunt (PW-3) has stated in paragraph 2 of her statement that the incident took place before Diwali last year and she was in her house on the date of incident. According to the statement of this witness, on the date of incident, at 02.30-3.00 pm, child "U (N)", victim's elder sister, "GJN", victim's friend "M" (PW-8), "KMDR", "PRTM" and two-three children had come home and told her that the accused and the victim were playing sex game (rape) and her brother-in-law, the victim's uncle (PW-6) was also at home at that time. In the same paragraph, this witness also says that when the victim's parents returned at 4.00-4.30 in the evening, she and the children also told them about the incident and after that they collected the villagers.

22. The victim's friend (PW-4) has also stated in paragraph 01 her statement that she know the accused and has stated that the victim is her friend. According to paragraph 2 of the statement of this witness, on the date of incident, she and her friend the victim were playing and apart from her other friends were also there, while playing, the accused "D alias DN" had called her friend the victim inside his house. This witness has also accepted the suggestion of the defense in paragraph 03 of his statement that there was a guava (jam fruit) tree planted in the courtyard of the accused's house and they used to play in front





of the house of the accused every day. It is noteworthy that throughout the cross-examination of this witness, his statement that the accused had called his friend, the victim, inside his house remained unbroken.

23. The victim's uncle (PW-6) has supported the above fact in paragraph 2 of his statement by saying that the incident happened in the year 2019-20 which he does not remember properly and he was sleeping at home that day and his sister-in-law and brother i.e. the victim's mother and father had gone to work in the fields. In the same paragraph, this witness says that around 4.30 in the day, his sister-in-law came and woke him up and told him that the accused "D alias DN" had committed wrongdoing (rape) with his niece, the victim, then he had gone to call his brothers and on arrival of his brothers, the prominent people village were also called.

24. The victim's friend "M" (PW-8) has also revealed in her court statement the fact of knowing the accused and has said that the victim is her friend and about 3 years ago, while they were playing together along with the victim in front of the house of the accused "D alias DN", the accused had called the victim inside his house to give her jam (guava) and on the call of the accused, when the victim went inside the accused's house, the accused closed the door of his house. After this, her friend the victim had come out of the house of accused after a long time.

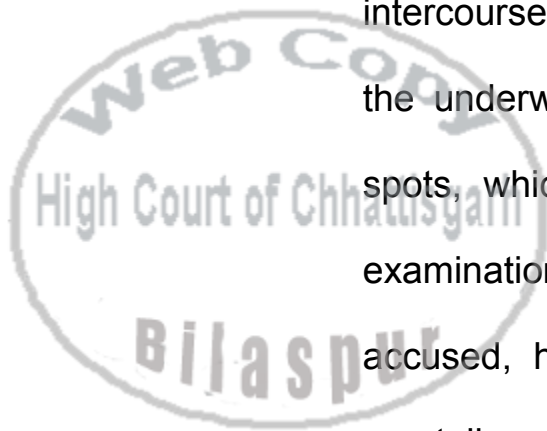




In para 03 of her statement, she has stated that after the victim came out from the house of the accused, when they asked her what she was doing inside, then the victim told that the accused had fucked her. After that, they went to the victim's house and informed the victim's aunt about the incident.

25. Dr. Nitansh Sori (PW-9), who has medically examined the accused/appellant, has stated in paragraph 4 of his evidence that on physical examination of the accused, he found that the accused was completely capable for establishing physical intercourse. In paragraph 6, he has stated that while examining the underwear seized from the accused, he had found three spots, which he has circled with sketch pen. In his cross-examination, he denied the suggestion that while examining the accused, he had found that he was mentally abnormal and mentally retarded.

26. Dr. Sahodra Thakur (PW-13), who has medically examined the victim, has stated in paragraph 4 of her statement that when the victim's genitals are examined, redness was present around the vaginal opening. She found the victim to have paid when touched near the vaginal opening. Hymen was found. She had prepared 02 vaginal slides from the discharge present near the vaginal opening of the victim, which was sealed and signed and handed over to the said constable No.69 Lileshwari Bhandari for forensic examination. In paragraph 6, she has stated while



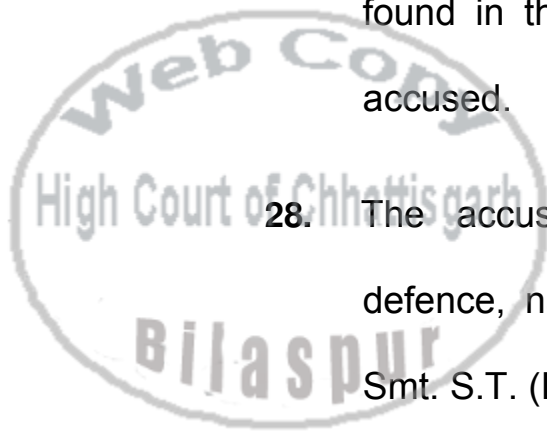


examining the underwear seized from the victim, she had found white spot on the inner part of the underwear, which has been marked by her with blue dot pen. In her cross-examination, she has denied the suggestion that the discharge slide prepared by her in connection with the vaginal examination of the victim was prepared from the urine of the victim. She also denied the suggestion that in case of children falling during a fight, the victim may have pain near the vaginal opening.

27. As per FSL report (Ex.P-27), semen and human sperms were found in the seized underwears of the victim as well as the accused.

28. The accused/apellant has examined 05 witnesses in his defence, namely Smt. R.B. Sahu (DW-1), Smt. B.S. (DW-2), Smt. S.T. (DW-3), Dr. Vimal Khunte (DW-4) and Binda (DW-5).

29. Defence witness Smt. R.B. Sahu (DW-1) in paragraph 2 of her evidence, has stated that accused/apellant is crippled, disabled and mentally retarded by birth. According to her information, the accused had not done any wrong to the said victim aged about 05-06 years old and he has been falsely implicated in the rape case by the victim's family members. In paragraph 6 of her cross-examination, she admitted that she came to about the incident after a crime has been registered against the accused. She also admitted that the accused can move around well and do his work on his own.





30. Another defence witness Smt. B.S. (DW-2), in paragraph 2 of her evidence, has stated that since she have known the accused, he has been handicapped and mentally retarded. The accused has not done anything to the victim, the victim's family members have falsely implicated the accused due to mutual enmity and greed of money. In paragraph 5 of her cross-examination, she has stated that she do not know whether the victim's family had asked for money from the accused's family or not. She also though admitted that accused can walk well, but herself has stated that the accused cannot do his work on his own.

31. Another defence witness Smt. S.T. (DW-3), in paragraph 2 of her evidence, has stated that since she have known the accused, he has been handicapped and mentally retarded. The accused has not done anything to the victim, the victim's family members have falsely implicated the accused due to mutual enmity and greed of money. She is a Mitantin of the village, so after the incident, she and other women went to the victim's house and took off the underwear of the victim, they did not find any injury, scratch, swelling or redness on the genitals of the victim and after the incident the victim was playing normally, if an incident had happened to the victim, then the victim would not have remained normal. In paragraph 5 of her cross-examination, she has admitted the she is not a doctor, she had

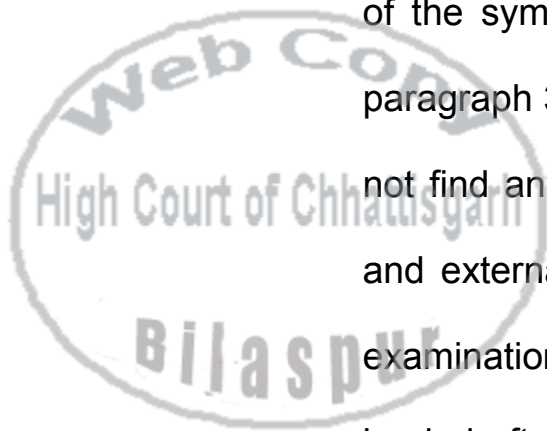




not received any medical certificate. She herself stated that she is a Mitanin and they are given health related training and their training, they are generally given training related to fever and immediate epidemics. In paragraph 6, she though admitted that accused can walk well, but herself has stated that the accused cannot do his work on his own.

32. Another defence witness Dr. Vimal Khunte (DW-4), in paragraph 2 of her evidence, has stated that she had examined the victim on 09.11.2020, in which, she had given her opinion on the basis of the symptoms she received after examining the victim. In paragraph 3 she stated that, on the date of examination, she did not find any injury, scratch, swelling or redness on the internal and external parts of the victim. In paragraph 6 of her cross-examination, she has admitted that any injury caused can be healed after 04-05 days of the incident. Injuries like laceration, contusion, abrasion, etc. in the genitals can occur at the time of sexual assault and can heal completely after 04-05 days, if the laceration is deeper then it can take time to heal.

33. Another defence witness Binda (DW-5), who is mother of the accused, has stated in paragraph 2 of her evidence that the accused is handicapped and mentally retarded since birth. From birth till he was about 08-10 years old, he used to sit at one place and could not move. They have treated their son the accused for 14-15 years and he learned to walk a little from his





own. It was she who used to bath, dress and feed her son accused with her own hands.

34. Thus, from the aforesaid oral and documentary evidence, it has been duly proved that while the victim, who was minor below the age of 12 years and her friends were playing in the street in front of the house of the accused, he had called the victim inside his house for giving her jam (guava) and thereafter closed the door and committed rape on her.
35. Plea of insanity as provided under Section 84 of the IPC has been taken by the appellant herein before the trial Court as well as before this Court.
36. In order to consider the plea raised at the Bar, it would be appropriate to notice Section 84 of the IPC which states as under:-

“84. Act of a person of unsound mind.- Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.”

37. The burden of proving an offence is always on the prosecution; it never shifts. Intention, when it is an essential ingredient of an offence, has also to be established by the prosecution. But the state of mind of a person can ordinarily only be inferred from circumstances. Section 84 of the IPC can be invoked by the accused for nullifying the evidence produced by the prosecution.



This he can do by establishing that he was at the relevant time incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. The prosecution need not establish that a person who strikes another with a deadly weapon was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law. The prosecution has not to establish these facts. It is for this reason that Section 105 of the Evidence Act places upon the accused person the burden of proving the exception relied upon by him. (See **Bhikari v. The State of Uttar Pradesh**¹).

38. The Supreme Court in the matter of **Dahyabhai Chhaganbhai Thakkar v. State of Gujarat**² has held that the prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite, mens rea. It was further held that when a plea of legal insanity is set up, the Court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as

¹ AIR 1966 SC 1

² AIR 1964 SC 1563



to be entitled to the benefit of Section 84 of the Penal Code can only be established from the circumstances which preceded, attended and followed the crime. It was observed as under:-

“5.....It is a fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in S. 299 of the Indian Penal Code. This general burden never shifts and it always rests on the prosecution. But, as S.84 of the Indian Penal Code provides that nothing is an offence if the accused at the time of doing that act, by reason of unsoundness of mind was incapable of knowing the nature of his act or what he was doing was either wrong or contrary to law. This being an exception, under S. 105 of the Evidence Act the burden of proving the existence of circumstances bringing the case within the said exception lies on the accused, and the court shall presume the absence of such circumstances. Under S. 105 of the Evidence Act, read with the definition of "shall presume" in S. 4 thereof, the court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a "prudent man". If the material placed before the court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of "prudent man", the accused will have discharged his burden. The evidence so placed





may not be sufficient to discharge the burden under S. 105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the judge whether the accused had the requisite intention laid down in S. 299 of the Indian Penal Code. If the judge has such reasonable doubt, he has to acquit the accused, for in that event the prosecution will have failed to prove conclusively the guilt of the accused. There is no conflict between the general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defence of insanity.”

39. Likewise, the Supreme Court in the matter of **Shrikant Anandrao Bhosale v. State of Maharashtra**³ has held that in coming to the conclusion that a man was labouring under defect of reason as not to know the nature of the act he was doing relevant circumstances like the behaviour of the accused before the commission of the offence and his behaviour after the commission of the offence should be taken into consideration and the Court may rely not only on defence evidence but also on what is elicited from the prosecution witnesses as well as on circumstantial evidence consisting of the previous history of the accused and his subsequent conduct in the surrounding circumstances including absence of the motive. It was further held that the accused has only to satisfy the standard of a prudent man and he need not establish his plea beyond all reasonable doubt. It was also held that even if the accused was

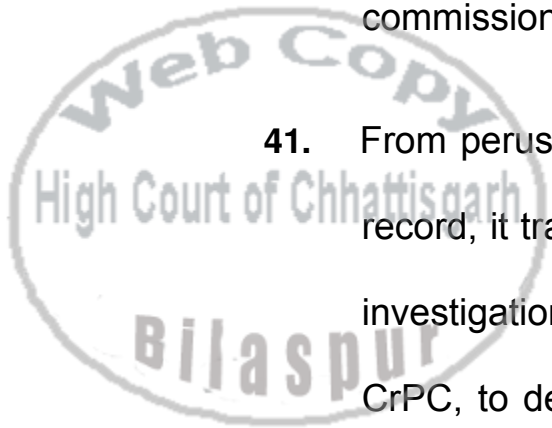
³ 2002 Cri LJ 4356



not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution has been discharged.

40. The question for consideration would be, whether the appellant herein was suffering from unsoundness of mind on the date of commission of offence on 05.11.2020 ?

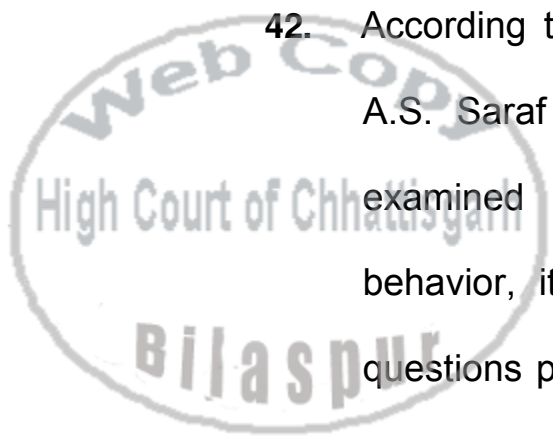
41. From perusal of the impugned order and materials available on record, it transpires that during the pendency of the case, in the investigation conducted by the trial Court under Section 329 CrPC, to determine the fact of mental disorder of the accused, psychiatrist Dr. A.S. Saraf (CW-1) has tested the mental health of the accused on the basis of various parameters like his general awareness, understanding of charges and punishment, understanding of trial, general conduct and behavior and observation report given by jail management etc. According to paragraph 03 of the statement of Dr.A.S. Saraf (CW-1), in the test conducted on 15.03.2023 regarding general comprehension ability, the accused used to listen properly to the questions asked to him during the conversation and after some time, he would answer those questions in short words. According to





paragraph 04 of the statement of this Court witness, when the accused was examined regarding charges and punishment on 15.03.2023, when asked the reason for bringing him to jail, he shyly lowered his head and looked at him. When asked about the allegations, he became serious and started shaking his head in denial. The above facts shows that the appellant has the capacity to understand the seriousness of the charge imposed on him and his criminal responsibilities and also has a feeling of guilt.

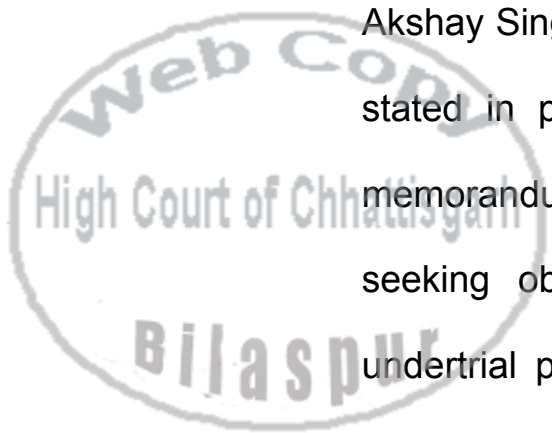
42. According to paragraph 06 of the evidence of Psychiatrist Dr. A.S. Saraf (CW-1), on 15.03.2023, when the accused was examined regarding understanding of normal conduct and behavior, it was observed that the accused understood the questions properly during the conversation and answered them as per his understanding and no unusual or aggressive behavior was shown by the accused during the conversation. According to paragraph 07 of the statement of this Court witness, on 15.03.2023, when he examined the observation report given by the jail managers during the mental health examination of the accused and as per the information given in it, he had found that the accused takes care of himself in jail, he takes bath, goes to the toilet, wears his own clothes, eats his own food and keeps himself clean. According to this Court witness, he had also received information that the accused has good behavior with





other prisoners inside the jail and he sits, laughs, talks and roams with them and obeys the jail managers. Apart from this, he sleeps on time and wakes up on time and also follows the jail rules satisfactorily. The above fact, along with the fact of satisfactory social contact interaction and behavior of the accused, also shows that the daily activities of the accused are natural and normal in which there is no abnormality.

- 43.** During the pendency of the case, in the investigation conducted by the trial Court under Section 329 CrPC, Jail Superintendent Akshay Singh Rajput (CW-2) has also been examined, who has stated in paragraph 05 his statement that he has received memorandum dated 14.03.2023 from the concerned trial Court seeking observation report for the treatment given to the undertrial prisoner "D alias DN" in the jail regarding his daily activities and regular activities. According to paragraph 06 of the statement of this Court witness, as per the order of the Court, along with the said undertrial prisoner "D alias DN", co-undertrial prisoners Uttam Kumar Bhuarya, Dinesh Kumar Raote, Sohan Yadav, Nokhelal Sahu, Vijay Jangde, Pawan Yadav and other officers and employees posted in jail were interrogated regarding his daily routine and behavior. In the same paragraph, this witness has also stated that apart from this, he had also talked to the said prisoner from time to time and observed his behavior. In paragraph 07 this Court witness





has stated that based on the statements of above mentioned undertrial prisoners detained in District Jail, Rajandgaon, jail staff and officers and his own personal observation, in his opinion, the appellant does not behave in any unusual, aggressive or strange manner inside the jail and he lives normally.

44. Thus, from perusal of the evidence of these two witnesses, it cannot be said that the appellant herein was suffering from unsoundness of mind on the date of commission of offence on 05.11.2020 or thereafter.

45. On the basis of the evidence-analysis done as above, it is held that the prosecution had been successful in proving beyond reasonable doubt that the accused had raped and severe penetrative sexual assault were committed by establishing sexual relations with a minor girl below 12 years of age in his house on the incident dated 05.11.2020 at around 15.00 hrs. Thus, the learned trial Court has

46. Section 5(m) of the POCSO Act reads as under :

“Section 5 - Aggravated penetrative sexual assault

(m) whoever commits penetrative sexual assault on a child below twelve years”

47. Section 6 of the POCSO Act reads as under:



“6. Punishment for aggravated penetrative sexual assault.-- (1) *Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.*

(2) *The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”*

48. Section 376AB of the IPC reads as under:

“376AB. Punishment for rape on woman under twelve years of age.-- *Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:*

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.”

49. In the case in hand, the victim was minor below the age of 12 years on the date of incident, which has been proved by documentary evidence i.e. birth certificate of the victim (Article P-1C) wherein her date of birth has been mentioned as 29.05.2014 hence, the trial Court has rightly held that the date of





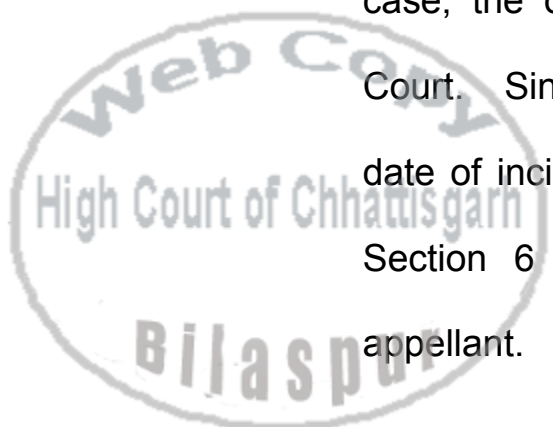
birth of the victim is 29.05.2014 and on the date of incident i.e. on 05.11.2020, her age was 06 years 05 months and 06 days and as such, she was minor below the age of 12 years.

50. In our opinion, the above chain of circumstances is complete and leads only to one conclusion that it was the accused/appellant who has committed the aforesaid crime. The view taken by the learned trial Court that the appellant is the author of the crime is a pure finding of fact based on evidence available on record and we are of the opinion that in the present case, the only view possible was the one taken by the trial Court. Since the victim was below the age of 12 years on the date of incident, hence, offence under Section 5(m) read with Section 6 of the POCSO Act is fully proved against the appellant.

51. Section 42 of the POCSO Act, 2012 reads as under:

"42. Alternate punishment.- Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

42A. Act not in derogation of any other law. - The provisions of this Act shall be in addition to and not





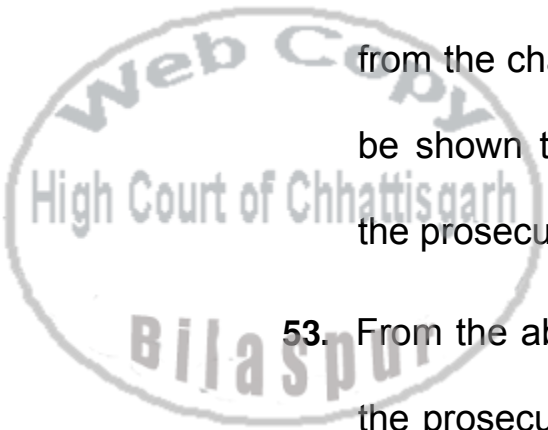
in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

52. Since the commission of offence under Section 376AB of the IPC and Section 5(m) read with Section 6 of the POCSO Act have been duly proved, the learned trial Court has rightly convicted and sentenced the appellant under Section Section 5(m) read with Section 6 of the POCSO Act and under the principle of double punishment, he has exempted the accused from the charges of Section 376AB of the IPC. No leniency can be shown towards the appellant as he has sexually assaulted the prosecutrix aged below 12 years of age.

53. From the above analysis, we are of the considered opinion that the prosecution has been successful in proving its case beyond reasonable doubt and the learned trial Court has not committed any legal or factual error in arriving at the finding with regard to the guilt of the appellant/convict.

54. Accordingly, the appeal being devoid of merit is liable to be and is hereby **dismissed**.

55. The appellant/convict is stated to be in jail. He shall serve out the sentence awarded by the trial Court by means of the impugned judgment and order dated 31.01.2024.





56. Let a certified copy of this order alongwith the original record be transmitted to trial Court concerned forthwith for necessary information and action, if any.

Sd/-
(Sachin Singh Rajput)
Judge

Sd/-
(Ramesh Sinha)
Chief Justice

Chandra





HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 375 of 2024

XYZ

Versus

State of Chhattisgarh

Head-Note

Accused cannot be exempted on the ground of mere insanity in special offences under the POCSO Act, 2012. The doctrine to prove exceptions beyond reasonable doubt must sustain.

POCSO अधिनियम, 2012 के तहत विशेष अपराधों में केवल पागलपन के आधार पर आरोपी को छूट नहीं दी जा सकती है। उचित संदेह से परे अपवादों को साबित करने का सिद्धांत कायम रहना चाहिए।

