



AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 722 of 2023

Ashish Sendariya @ Bhundu, aged 20 years, S/o Shri Munkushi Sendariya, R/o Bapunagar, Thana Kotwali, District Raigarh (CG)

---- Appellant (in jail)

Versus

State of Chhattisgarh Through the PS-City Kotwali, District Raigarh (CG)

---- Respondent

Cause title taken from Case Information System

For Appellant : Mr.J.K.Gupta, Advocate
For State/Respondent : Mr.Sakib Ahmad, Panel Lawyer

Hon'ble Shri Justice Ramesh Sinha, Chief Justice

Hon'ble Shri Justice Ravindra Kumar Agrawal, J.

Judgment on Board

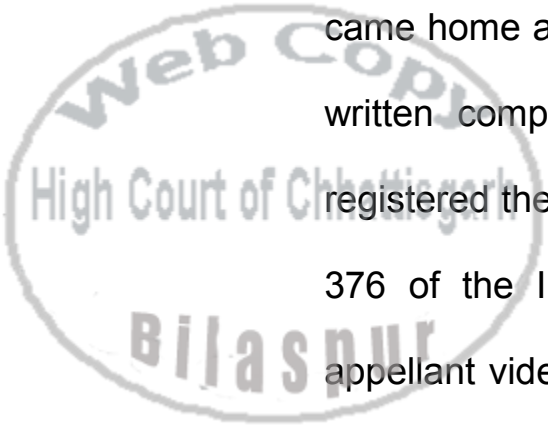
Per **Ramesh Sinha, CJ**

15/07/2024

1. This appeal arises out of the judgment of conviction and order of sentence dated 02.12.2022 passed by the Additional Sessions Judge, F.T.S.C. (POCSO Act), Raigarh in Special Pocso Case No. 64/2021, whereby the appellant has been convicted for offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter called as 'POSCO') and sentenced to undergo RI for 20 years and fine of Rs.5000/-, in default of payment of fine to further undergo imprisonment for six months.
2. The prosecution story, in brief, is that father of the prosecutrix made written complaint (Ex.P-5) in the Police Station Kotwali, Raigarh



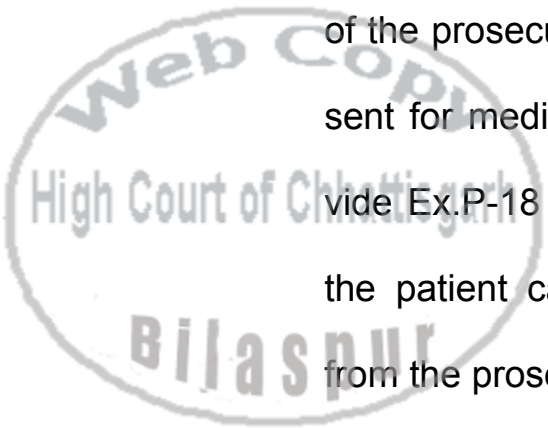
alleging that the victim aged 16 years, who is his daughter, is mentally weak, lives at home. On 16.08.2021 at about 2 P.M. he came home after work, his wife told that accused Bhundu taking the victim to his house, she is telling that she was raped, she was screaming, then both he and his wife asked the victim, then she told that in the afternoon she was sitting in front of her maternal aunt's house, then the accused made a hand gesture and on calling to her house, she went away, the accused took her inside the house, locked the door and raped her forcefully, then opened the door, she came home and told her mother about the incident. On the basis of written complaint, the police of Police Station Kotwali, Raigarh registered the FIR in Crime No.1155/2021 for offence under Section 376 of the IPC and Section 6 of the POCSO Act against the appellant vide Ex.P-6. Spot map was prepared by the investigating officer vide Ex.P-1. Rs.20 note given by the accused to the prosecutrix was seized on the production of the prosecutrix vide Ex.P-3. The statement of the prosecutrix was recorded under Section 164 CrPC vide Ex.P-4. The appellant was arrested on 17.08.2021 vide arrest memo Ex.P-9. The Station House Officer of Police Station-Kotwali written letter to the Head Master for dakhil kharij register regarding the date of birth of the prosecutrix vide Ex.P-10. Dakhil kharij register of the prosecutrix for the year 2011-12 whose Saral No.925 the victim Ku.Rakhi father Kishan Kumar mother Santoshi Bai date of birth 01.06.2005 date of leaving school





01.04.2017 class 5th passed is recorded was seized vide Ex.P-11. Copy of dakhil kharij register in which date of birth of the prosecutrix has been mentioned as 01.06.2005 has been seized vide Ex.P-13C. The prosecutrix was sent for MLC to Kirodimal Government Hospital, Raigarh where Dr.Rakhi Agrawal (PW-5) examined her vide Ex.P-15 and found that no injury over hand, back, leg, abdomen, face, no injury in perineal region, one finger inserted in vagina, hymen absent, no bleeding present at the time of examination. Two vaginal slides and one dark purple coloured panty of the prosecutrix were seized vide Ex.P-16. The accused was also sent for medical examination to the Government Hospital, Raigarh vide Ex.P-18 where the doctor has examined him and opined that the patient can conduct sexual activity. Slides and panty seized from the prosecutrix were sent to FSL for chemical examination vide Ex.P-22 and as per FSL report (Ex.P-23), semen stains and human sperm were found in Article A and B i.e. slides and panty seized from the prosecutrix.

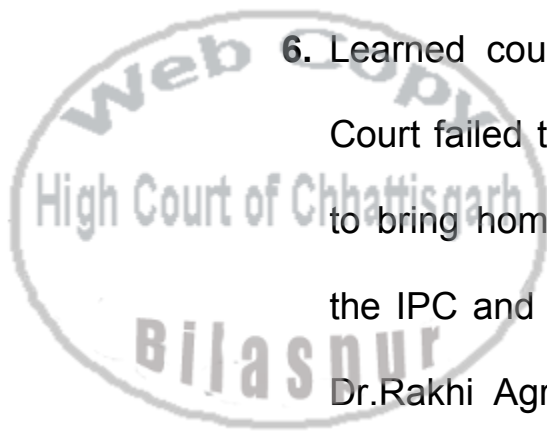
3. After completion of investigation, the charge-sheet was filed before the Additional Sessions Judge F.T.S.C., Raigarh for trial in accordance with law.
4. The trial Court has framed charges against the appellant under Section 376(J) of the IPC and Section 6 of POCSO Act. The appellant abjured his guilt and pleaded innocence.





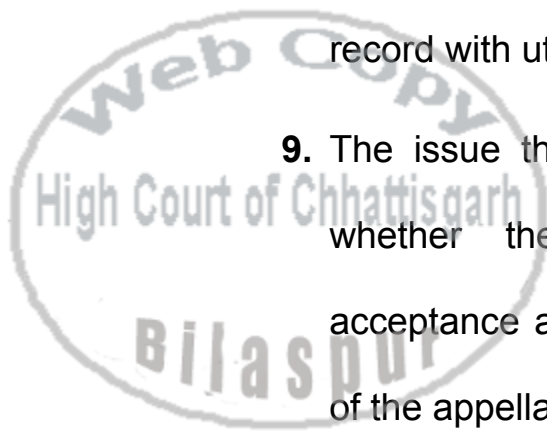
5. In order to establish the charge against the appellant, the prosecution examined as many as 8 witnesses and exhibited the documents (Exs.P-1 to P-23) . The statement of the appellant under Section 313 of CrPC was also recorded in which he denied the material appearing against him and stated that he is innocent and he has been falsely implicated in the case. After appreciation of evidence available on record, the learned trial Court has convicted the accused/appellant and sentenced him as mentioned in para 1 of the judgment. Hence, this appeal.

6. Learned counsel for the appellant submits that the learned trial Court failed to appreciate that the prosecution has miserably failed to bring home the ingredients of charges under Section 376(J) of the IPC and Section 6 of the POCSO Act. He further submits that Dr.Rakhi Agrawal (PW-5) has stated that no internal or external injury found on the body of the prosecutrix and there were no sign of any sort of injuries on her private. He also submits that the FSL report was never exhibited by the prosecution as it was never supported the prosecution story at any stage and conviction is only based on presumptions as the statement of the prosecutrix itself demonstrates the consent of the prosecutrix. Looking to the entire evidence adduced by the prosecution, the alleged offence is not made out against the appellant and he has been falsely implicated in the present case. As such, the criminal appeal deserves to be allowed and the impugned judgment deserves to be set aside.



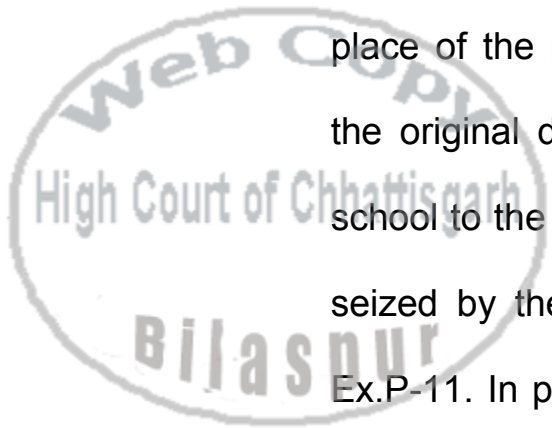


7. On the other hand, learned counsel for the State opposes the submissions made by the learned counsel for the appellant and submits that the prosecution has proved its case beyond reasonable doubt and the prosecutrix (PW-1) has clearly deposed the conduct of the appellant in her statement recorded under Section 164 CrPC and in the Court statement and the learned trial Court after considering the material available on record has rightly convicted and sentenced the appellant, in which no interference is called for.
8. We have heard the learned counsel for the parties and perused the record with utmost circumspection.
9. The issue that arises for consideration in the present appeal is whether the testimony of the victim/prosecutrix deserves acceptance and whether the prosecution has established the case of the appellant beyond reasonable doubt.
10. It is pertinent to observe that the question whether conviction of the accused can be based on the sole testimony of the victim in cases of sexual assault/rape is no longer res integra. The Hon'ble Supreme Court has dealt with the issue in a catena of judgments and has held that the sole testimony of the prosecutrix if found reliable can be the sole ground for convicting the accused and that the creditworthy testimony of the victim in cases of such nature deserves acceptance.





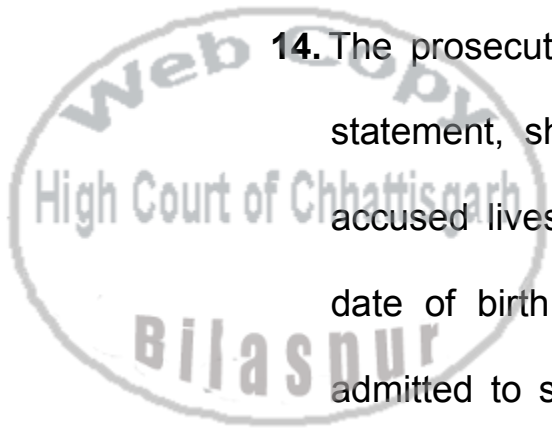
11. Insofar as, age of the victim on the date of the commission of the offence is concerned, she was admittedly 16 years old at the time of the unsavory incident.
12. Bhagwan Singh Khusro (PW-3) is Headmaster of Government Primary School, Nirdhi where the prosecutrix was studying. In para 2 of his statement, he has stated that on 01.09.2021 intimation was given by the Station House Officer of Police Station, Kotwali regarding providing dakhil kharij register of the victim in this case, which is Ex.P-10, on part A to A of which his signature is there in place of the recipient. After receiving the said intimation, he gave the original dakhil kharij register of the victim studied in the said school to the Station House Officer, the certified copy of which was seized by the Station House Officer of Police Station, seizure is Ex.P-11. In para 3, he has stated that after seizure of dakhil kharij register, it was given to him on a surrender note to the Station House Officer. He had written a handover acknowledgment to the Station House Officer which is Ex.P-12. Today he has brought with him the original dakhil kharij register of the said school, in whose serial No.925, the names of the victim and her parents are recorded. The date of birth of the victim is recorded as 01.06.2005 and she has taken admission on 28.06.2011 in class 1st. Original dakhil kharij register is Ex.P-13 and certified copy of Ex.P-13C.
13. Further, upon perusal of the testimony made by the victim in her statement recorded under Section 164 CrPC, it is observed that





she has stated that she live in her house with her parents. When she was sitting at home, Bhundu bhaiya called her, so she went to his house, Bhundu bhaiya closed the door, then she told she will go home, then he twisted her hand and held her, she was screaming, thereafter he closed her mouth with his hand and made her lie down. He did a wrong thing to her, after that, he opened the door and pushed her out of the room and told that she should not tell anyone about what he did and he gave her twenty rupees, she would not take twenty rupees, then he told that he would marry her.

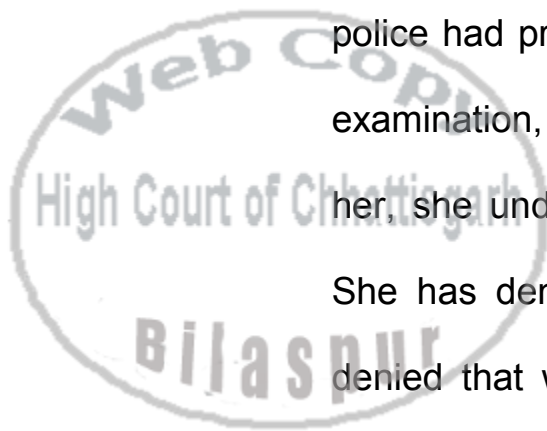
14. The prosecutrix has been examined as (PW-1). In para 1 of her statement, she has stated that she recognize the accused. The accused lives in her locality, that is why she recognize him. Her date of birth is 01.05.2006. She studied till class 8th. She was admitted to school by her father. She has two mothers. The first mother gave birth to her. Her second mother lives in Raigarh. She live with her second mother. In para 3 of her statement, she has stated that before two-three months from today, she was sitting at her maternal aunt's house, at the same time, the accused was standing in front of his house and called her with a gesture, then she went to him. After that the accused took her inside his house and asked her to sit, then she told the accused that she will go to home. After that, the accused closed the door of his house and gave her Rs.20/- and told that he will marry her. After this, the accused asked her to lie down and took off her clothes and





underwear and raped her and the accused put his penis in her mouth. In para 4 of her statement, she has stated that when she screamed, the accused pressed her mouth with his hand. After this, she wore her clothes and the accused pushed her away from his house. It was raining at that time, when she came out of the accused house, her mother saw her, after that her mother asked and then she told the whole incident to her parents. Her parents took her to the police station and reported the matter to the police station. Spot map is Ex.P-1, parts of which are signed by her. The police had prepared a map in front of her. In para 13 of her cross-examination, she has stated that when the accused pointed out at her, she understood that the accused was asking for vegetables. She has denied that the accused did not point at her. She has denied that when the accused removed her clothes, she did not refuse or scream. She has also denied that the accused has not caused any incident to her. She has admitted that she did not tell this incident to her uncle. Spontaneously said that she had told her mother and her mother's friend who was with her mother.

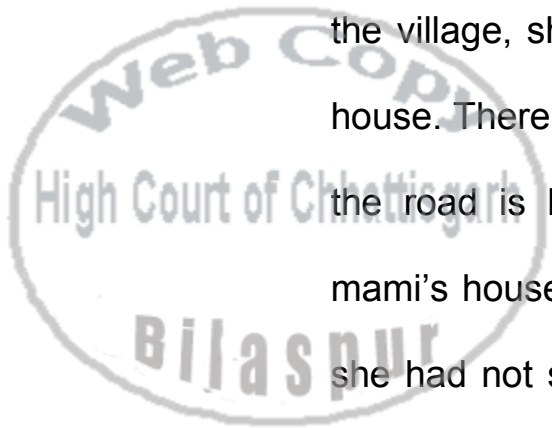
- 15.** Stepmother of the prosecutrix (PW-4) has stated in para 3 of her statement that the incident happened last year. That day at 11-12 in the morning the victim left the house saying she was going to her elder aunt's (badki mami's) house and was sitting in the shade outside her elder aunt's house. At the same time, the accused beckoned her and called her towards his house. After that, the





victim went to the house of the accused, the accused took the victim inside his house, closed the door, removed the victim's clothes, raped her and then pushed the victim out of his house. At the same time, she was searching for the victim asking where she had gone, when the victim was coming from the side of the accused house, then she asked the victim where she had gone, then the victim told her that the accused had taken her to his house and told the above incident that happened to her. In para 6 of her cross-examination, she has stated that she do not know the name of badki mami, but in the village, she is called badki. Their house is behind the accused house. There is a road in front of her house and on the other side of the road is her elder aunt's house. She has denied that badki mami's house is not visible from her house. She had admitted that she had not seen the victim going to the accused house. She has said that she has seen the victim being pushed out of the accused house by the accused.

16. Now coming to the medical evidence adduced; the medical opinion contained in the MLC report dated 16th August, 2021, it was opined that no injury over hand, back, leg, abdomen, face, no injury in perineal region, one finger inserted in vagina, hymen absent, no bleeding present at the time of examination. Two vaginal slides and panty of the prosecutrix were seized vide Ex.P-16. Slides and underwear seized from the prosecutrix was sent to FSL for chemical





examination vide Ex.P-23 in which semen stains and human sperm were found in Article A and B.

17. The Supreme Court in the matter of **Rai Sandeep @ Deenu v. State of NCT of Delhi, 2012 (8) SCC 21** held as under:-

“22. In our considered opinion, the ‘sterling witness’ should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to





the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

18. In the matter of **Alakh Alok Srivastava v. Union of India & Ors.**,

(2018) 17 SCC 291, in paras 14 and 20, it is observed as under:

"14. At the very outset, it has to be stated with authority that the Pocso Act is a gender legislation. This Act has been divided into various chapters and parts therein. Chapter II of the Act titled "Sexual Offences Against Children" is segregated into five parts. Part A of the said Chapter contains two sections, namely, Section 3 and Section 4. Section 3 defines the offence of "Penetrative Sexual Assault" whereas Section 4 lays down the punishment for the said offence. Likewise, Part B of the said Chapter titled "Aggravated Penetrative Sexual Assault and Punishment therefor" contains two sections, namely, Section 5 and Section 6. The various



subsections of Section 5 copiously deal with various situations, circumstances and categories of persons where the offence of penetrative sexual assault would take the character of the offence of aggravated penetrative sexual assault. Section 5(k), in particular, while laying emphasis on the mental stability of a child stipulates that where an offender commits penetrative sexual assault on a child, by taking advantage of the child's mental or physical disability, it shall amount to an offence of aggravated penetrative sexual assault.”

“20. Speaking about the child, a three Judge Bench in M.C. Mehta v. State of T.N. (1996) 6 SCC 756 “1. ... “child is the father of man”. To enable fathering of a valiant and vibrant man, the child must be groomed well in the formative years of his life. He must receive education, acquire knowledge of man and materials and blossom in such an atmosphere that on reaching age, he is found to be a man with a mission, a man who matters so far as the society is concerned.”

19. The Supreme Court in the matter of **Nawabuddin v. State of Uttarakhand** (CRIMINAL APPEAL NO.144 OF 2022), decided on 8.2.2022 has held as under:-

“10. Keeping in mind the aforesaid objects and to achieve what has been provided under Article 15 and 39 of the Constitution to protect children from the offences of sexual assault, sexual harassment, the POCSO Act, 2012 has been enacted. Any act of sexual assault or sexual harassment to the children should be viewed very seriously and all such offences of sexual assault, sexual harassment on the children have to be dealt with in a





stringent manner and no leniency should be shown to a person who has committed the offence under the POCSO Act. By awarding a suitable punishment commensurate with the act of sexual assault, sexual harassment, a message must be conveyed to the society at large that, if anybody commits any offence under the POCSO Act of sexual assault, sexual harassment or use of children for pornographic purposes they shall be punished suitably and no leniency shall be shown to them. Cases of sexual assault or sexual harassment on the children are instances of perverse lust for sex where even innocent children are not spared in pursuit of such debased sexual pleasure.

Children are precious human resources of our country; they are the country's future. The hope of tomorrow rests on them. But unfortunately, in our country, a girl child is in a very vulnerable position. There are different modes of her exploitation, including sexual assault and/or sexual abuse. In our view, exploitation of children in such a manner is a crime against humanity and the society. Therefore, the children and more particularly the girl child deserve full protection and need greater care and protection whether in the urban or rural areas. As observed and held by this Court in the case of **State of Rajasthan v. Om Prakash, (2002) 5 SCC 745**, children need special care and protection and, in such cases, responsibility on the shoulders of the Courts is more onerous so as to provide proper legal protection to these children. In the case of **Nipun Saxena v. Union of India, (2019) 2 SCC 703**, it is observed by this Court that a minor who is subjected to sexual abuse needs to be protected even more than a major victim because a





major victim being an adult may still be able to withstand the social ostracization and mental harassment meted out by society, but a minor victim will find it difficult to do so. Most crimes against minor victims are not even reported as very often, the perpetrator of the crime is a member of the family of the victim or a close friend. Therefore, the child needs extra protection. Therefore, no leniency can be shown to an accused who has committed the offences under the POCSO Act, 2012 and particularly when the same is proved by adequate evidence before a court of law.”

20. When considering the evidence of a victim subjected to a sexual offence, the Court does not necessarily demand an almost accurate account of the incident. Instead, the emphasis is on allowing the victim to provide her version based on her recollection of events, to the extent reasonably possible for her to recollect. If the Court deems such evidence credible and free from doubt, there is hardly any insistence on corroboration of that version. In **State of H.P. v. Shree Kant Shekar (2004) 8 SCC 153** the Hon^{ble} Supreme Court held as follows:“

“21. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional. However, if the court on facts finds it difficult to accept the version of the



prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration, as understood in the context of an accomplice, would suffice.”

21. On these lines, the Hon’ble Supreme Court in **Shivasharanappa and Others v. State of Karnataka, (2013) 5 SCC 705** observed as follows:

“17. Thus, it is well settled in law that the court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought on record. Needless to say as a rule of prudence, the court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of the witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, apply to a child witness who is competent and whose version is reliable.”

22. The Supreme court in the matter of **State of UP v. Sonu Kushwaha, (2023) 7 SCC 475** has held as under :

“12. The POCSO Act was enacted to provide more stringent punishments for the offences of child abuse of various kinds and that is why minimum punishments have been prescribed in Sections 4, 6, 8 and 10 of the





POCSO Act for various categories of sexual assaults on children. Hence, Section 6, on its plain language, leaves no discretion to the Court and there is no option but to impose the minimum sentence as done by the Trial Court. When a penal provision uses the phraseology “shall not be less than...”, the Courts cannot do offence to the Section and impose a lesser sentence. The Courts are powerless to do that unless there is a specific statutory provision enabling the Court to impose a lesser sentence. However, we find no such provision in the POCSO Act. Therefore, notwithstanding the fact that the respondent may have moved ahead in life after undergoing the sentence as modified by the High Court, there is no question of showing any leniency to him. Apart from the fact that the law provides for a minimum sentence, the crime committed by the respondent is very gruesome which calls for very stringent punishment. The impact of the obnoxious act on the mind of the victim/child will be lifelong. The impact is bound to adversely affect the healthy growth of the victim. There is no dispute that the age of the victim was less than twelve years at the time of the incident. Therefore, we have no option but to set aside the impugned judgment of the High Court and restore the judgment of the Trial Court.”

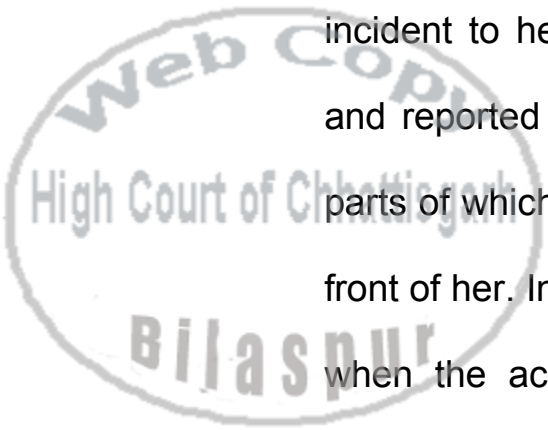
23. The prosecutrix (PW-1), in para 3 of her statement has stated that before two-three months from today, she was sitting at her maternal aunt's house, at the same time, the accused was standing in front of his house and called her with a gesture, then she went to him. After that the accused took her inside his house and asked her to sit, then she told the accused that she will go to home. After that, the





accused closed the door of his house and gave her Rs.20/- and told that he will marry her. After this, the accused asked her to lie down and took off her clothes and underwear and raped her and the accused put his penis in her mouth. In para 4 of her statement, she has stated that when she screamed, the accused pressed her mouth with his hand. After this, she wore her clothes and the accused pushed her away from his house. It was raining at that time, when she came out of the accused house, her mother saw her, after that her mother asked and then she told the whole incident to her parents. Her parents took her to the police station and reported the matter to the police station. Spot map is Ex.P-1, parts of which are signed by her. The police had prepared a map in front of her. In para 13 of her cross-examination, she has stated that when the accused pointed out at her, she understood that the accused was asking for vegetables. She has denied that the accused did not point at her. She has denied that when the accused removed her clothes, she did not refuse or scream. She has also denied that the accused has not caused any incident to her. She has admitted that she did not tell this incident to her uncle. Spontaneously said that she had told her mother and her mother's friend who was with her mother.

24. Considering the statement of the prosecutrix (PW-1) who has specifically stated the act of the present appellant, statement of her stepmother (PW-4), statement of Headmaster Bhagwan Singh





Khusaro (PW-3), further considering the statement of the prosecutrix recorded under Section 164 CrPC (Ex.P-4), MLC report of the prosecutrix (Ex.P-15) conducted by Mr.Rakhi Agrawal (PW-5) and FSL report (Ex.P-23), the material available on record and the principle of law laid down by the Supreme Court in the above-stated judgments, we are of the considered opinion that the learned Special Judge has rightly convicted the appellant for offence under Section 6 of the POCSO Act. We do not find any illegality and irregularity in the findings recorded by the trial Court.

25. In the result, this Court comes to the conclusion that the prosecution has succeeded in proving its case beyond all reasonable doubts against the appellants. The conviction and sentence as awarded by the Special Judge to the appellants is hereby upheld. The present criminal appeal lacks merit and is accordingly **dismissed**.

26. It is stated at the Bar that the appellant is in jail. He shall serve out the sentence as ordered by the trial Court.

27. The Registry is directed to transmit the certified copy of this judgment along with the record to the trial Court concerned for necessary information and compliance.

Sd/-

(Ravindra Kumar Agrawal)
Judge

Sd/-

(Ramesh Sinha)
Chief Justice