



AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 595 of 2024

Thanda Ram Sidar S/o Banshilal Sidar, aged about 24 years R/o Village, Onki, Police Station-Jharband, District Bargarh (Orissa)

---- **Petitioner**

Versus

State of Chhattisgarh Through Station House Officer, Police Station - Sankra, District- Mahasamund (C.G.)

---- **Respondent**

(Cause Title taken from Case Information System)

For Appellant : Mr. Gurudev I. Sharan along with
Mr. Shubham Dewangan and
Ms. Seema Verma, Advocates
For Respondent/State : Mr. Malay Jain, Panel Lawyer

Hon'ble Mr. Ramesh Sinha, Chief Justice
Hon'ble Mr. Ravindra Kumar Agrawal, Judge

Judgment on Board

Per Ramesh Sinha, Chief Justice

22.07.2024

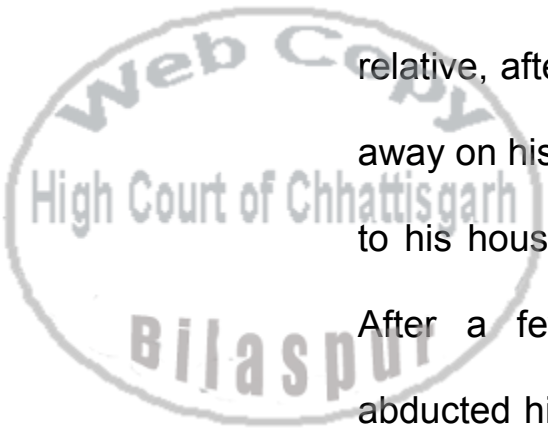
1. The appellant has preferred this appeal under Section 374(2) of Code of Criminal Procedure, 1973 (for short, 'CrPC') questioning the impugned judgment dated 28.02.2024 passed by the learned Special Judge (POCSO Act), Mahasamund, District - Mahasamund in Special Session Trial No. H-08/2023, whereby the trial Court has convicted and sentenced the appellant with a direction to run all the sentences concurrently in the following manner :

CONVICTION	SENTENCE
U/s 363 of IPC	R.I. for 5 years and fine of Rs.1,000/-, in default of payment of fine additional imprisonment for 1 month



U/s 366 of IPC	R.I. for 7 years and fine of Rs.2,000/-, in default of payment of fine additional imprisonment for 2 months
U/s 4(2) of the POCSO Act	R.I. for 20 years and fine of Rs. 10,000/, in default of payment of fine additional imprisonment for 6 months
U/s 506 Part-2 of IPC	R.I. for 01 year and fine of Rs.1,000/-, in default of payment of fine additional imprisonment for 1 month

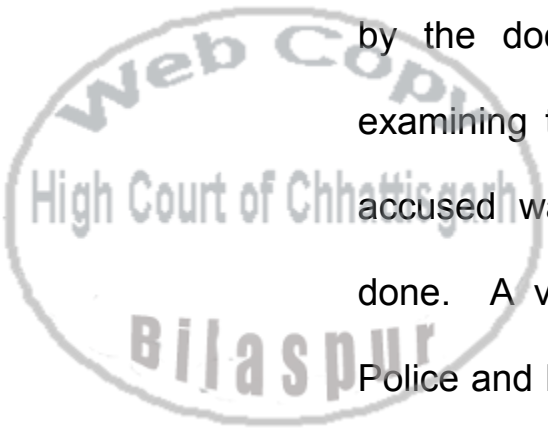
2. Case of the prosecution, in brief, is that, complainant Mayadhar Sidar (PW-2), who is the father of the victim, lodged a report in the Sankara Police Station on 29.11.2022 that on the night of 17.11.2022, accused - Thandaram Sidar, who is his distant relative, after alluring his minor daughter, aged 14 years, took her away on his motorcycle and after searching for the victim, he went to his house, pacified his daughter and brought her back home. After a few days, on 28.11.2022, when Thandaram again abducted his daughter and was fleeing away, he was stopped by his wife and Dhaneshwar Pareshwar, then the accused threatened them to kill by saying that he would abduct his daughter and take her away. On the report of the complainant, First Information Report was registered in Sankara Police Station under Sections 363, 506 IPC under Crime Number 217/2022. During investigation, the victim told during interrogation that on 24.10.2022, she and her younger siblings were at home, then Thandaram came to their house, when her siblings went out of the house to play, Thandaram threatened her and established forceful physical relations with her and threatened to kill her if she told the





incident to anyone. On the night of 17.11.2022, the accused lured her and took her to his village on a motorcycle. The next day his parents brought her back home. After this, Thandaram used to call her and threaten her, "Come with me, otherwise I will kill your family." After that, on 28.11.2022, Thandaram was again trying to take her away, when her parents caught him. On the basis of the statement of the accused, the offense of Sections 366, 376 of Indian Penal Code and Section 6 of Protection of Children from Sexual Offenses Act, 2012 was added. After obtaining consent from the victim and her father, the victim's genitals were examined by the doctor. Vaginal slides and underwear obtained after examining the private parts of the victim were confiscated. The accused was arrested and his medical examination was also done. A visual map of the incident site was prepared by the Police and Patwari. The slides and underwear seized in the case were sent to the Forensic Science Laboratory for testing. Thereafter, after recording the statements of the witnesses and completing the investigation process, the charge sheet was presented in the Court of Special Judge (POCSO Act), Mahasamund, District - Mahasamund for trial.

3. So as to prove the complicity of the accused/appellant in the crime in question, prosecution has examined as many as 10 witnesses and exhibited 29 documents in support of its case. Statement of the accused/appellant under Section 313 Cr.PC was also recorded in which he pleaded his innocence and false

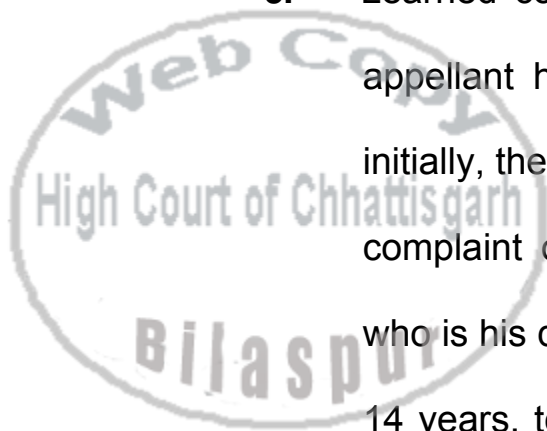




implication in the case. None has been examined by the accused/appellant in his defence.

4. The trial Court after completion of trial and after appreciating oral and documentary evidences available on record, by the impugned judgment dated 28.02.2024 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 them calling in question the impugned judgment.

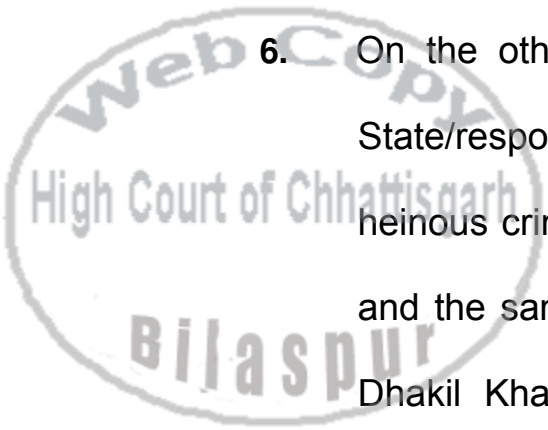
5. Learned counsel for the appellant vehemently argued that the appellant has been falsely implicated in the present case as initially, the complainant, who is father of the victim had lodged a complaint on 29.11.2022, alleging that the accused/appellant, who is his distant relative, after alluring his minor daughter, aged 14 years, took her away on his motorcycle and after searching for the victim, he went to his house, pacified his daughter and brought her back home. After a few days, on 28.11.2022, when the accused again abducted his daughter and was fleeing away, he was stopped by his wife and Dhaneshwar Pareshwar, then the accused threatened them to kill by saying that he would abduct his daughter and take her away, on the basis of said complaint, FIR was registered under Section 363, 506 of IPC. He further argued that though allegation of rape has been levelled by the victim in her statement recorded under Section 161 CrPC, on the basis of which subsequently, the offence





under Sections 366 and 376 of IPC has been added by the Police, but in her statement recorded under Section 164 CrPC before the Magistrate, she has not stated anything against the appellant with regard to commission of rape upon her and only allegation is with regard to her abduction. He also submitted that MLC as well as the FSL report do not support the prosecution story, as such, at the most offences under Section 363 & 506 Part II of IPC may be made out, but no offences under Section 366 of IPC and Section 4(2) of the POCSO are made out.

6. On the other hand, learned Panel Lawyer appearing for the State/respondent submitted that the appellant has committed a heinous crime of rape against a minor girl aged about 14 years and the same has been duly proved by the prosecution as per Dhakil Kharij Register (Ex.P-11C) and statement of Dayalal Patel (PW-4), the head master of Government Primary School, Choteloram. He further submitted that the victim has specifically stated in her statement that the accused has committed rape. As such, the judgment of conviction and sentence awarded by the learned trial Court is just and proper warranting no interference.
7. We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.



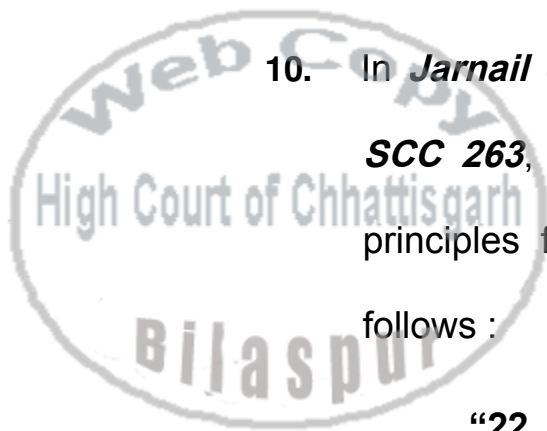


8. **The first question for consideration before this Court would be, whether the trial Court has rightly held that on the date of incident, the victim was minor?**
9. When a person is charged for the offence punishable under the POCSO Act, or for rape punishable in the Indian Penal Code, the age of the victim is significant and essential ingredient 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.

10. In *Jarnail Singh Vs. State of Haryana, reported in (2013) 7 SCC 263*, the Hon'ble Supreme Court laid down the guiding principles for determining the age of a child, which read as follows :

“22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under :

“12. Procedure to be followed in determination of Age.?” (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.





(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may





be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub- rule(3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an





option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.”

11. In the present case, the prosecution has presented a certified copy of the Dakhil Kharij Register (Ex.P-11C) of the Government Primary School, Choteloram and in this regard, the Headmaster of the concerned school, Dayalal Patel (PW-4), appeared in the Court and displayed the original Dakhil Kharij Register, in which the date of birth of the victim is mentioned as 08.08.2008. 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 08.10.2008 hence, we are of the considered opinion that the trial Court has rightly held that the date of birth of the victim is 08.10.2008 and her age was about 14 years.

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

13. 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.”

14. 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 of 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.

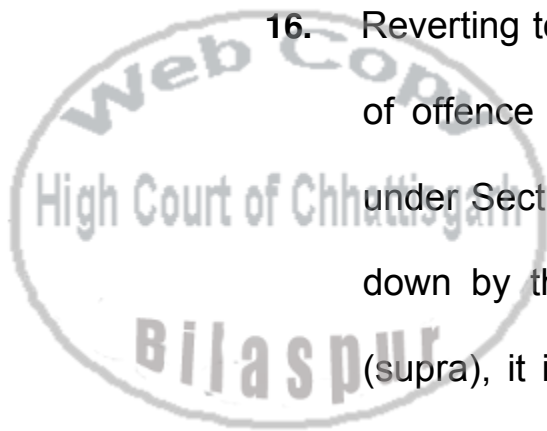
15. The Supreme Court while considering the object of Section 361 of the IPC in the matter of **S.Varadarajan v. State of Madras**¹, took the view that if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he 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:-

¹AIR 1965 SC 942



“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”.”

16. 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 as per the statement of complainant, who is father of the victim, on the night of 17.11.2022, accused - Thandaram Sidar, who is his distant relative, after alluring his minor daughter, aged 14 years, took her away on his motorcycle and after searching for the victim, he went to his house, pacified his daughter and brought her back home. After a few days, on 28.11.2022, when the accused again abducted his daughter and was fleeing away, he was stopped by his wife and Dhaneshwar Pareshwar, then the accused threatened them to kill by saying that he would abduct his daughter and take her away. As such, we are of the considered view that the trial Court is absolutely





justified in convicting the appellant for offence under Section 363 of the IPC.

17. The next question for consideration before us is whether the appellant has committed rape on minor victim?

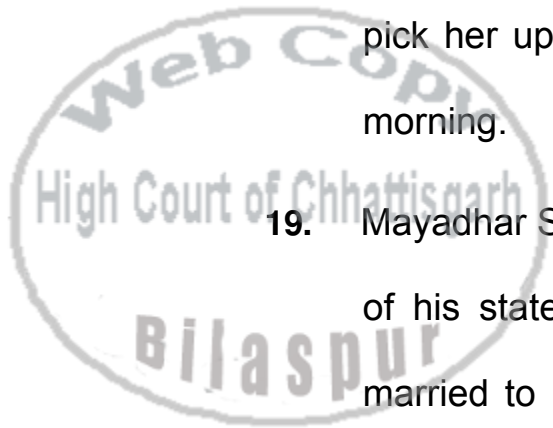
18. The victim (PW-1) in para 2 of her court's evidence has stated that being a relative, the accused used to come to their house. Whenever the accused used to come home, he used to tell her that he loves her and used to threaten her to have physical relations. Last year, in the month of October, her parents had gone out of the house to earn money and she was alone at home that day also the accused came to her house and after finding her alone at home, the accused threatened her to have physical relationship and forcefully had established physical relationship with her. After having physical relations, the accused threatened her that if she told this matter to anyone, he would kill her and her parents. After that the accused went back to his village. In para 3, she has stated that the accused always used to threaten her on phone from his village that he love her and want to get married, if she don't run away with him, he will kill hr and her parents. On Thursday, 2022, the accused came to her house and taken her to village Onki (Odisha) by threatening her to assault. In para 4, she has stated that when her parents came to know about this, they brought her back from village Onki to their village Chhoteloram. Even after this incident, the accused used to continuously threaten her over phone and





asked her to run away with him. In para 5, she has stated that she had told her parents about the constant threats by the accused. Her parents had given advice to accused Thandaram, but he did not listen. One day the accused again called her and asked to come to Kolihadipa and threatened to kill her if she did not come, then she told this to her mother, then her parents asked her to go ahead to the accused and they came behind and caught the accused. In para 14 of her cross-examination, she has stated that on the next morning of the night on which the accused had taken her, her parents came to village Onki to pick her up. Her parents had come to village Onki at 6 in the morning.

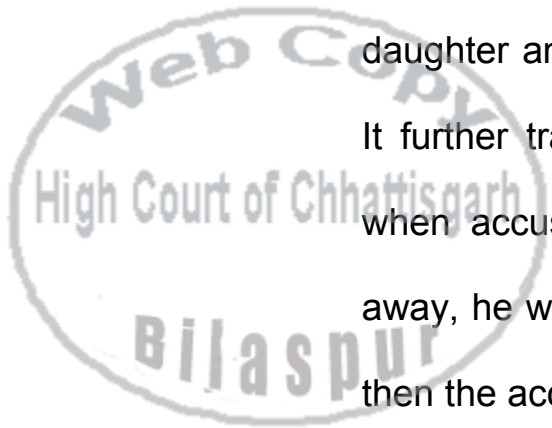
19. Mayadhar Sidar (PW-2), father of the victim, has stated in para 2 of his statement made in Court that sister of the accused is married to his elder brother's son, hence the accused used to come and go to their house at the elder brother's place. The accused had taken the victim to his home in Orissa in the month of December. While searching, he along with his wife went to the accused's house in village Onki, Orissa and after convincing the accused and his family members, brought the victim back to his home. He further stated that after returning home, the victim told that the accused had forcefully had physical relations with her. In para 17 of his cross-examination, when this witness was asked whether the victim had told that the accused had taken the victim with him to village Onki and had physical relations





with her, the witness said that the victim had told him that once the accused had established forceful physical relations with her.

20. On conjoint reading of evidence of both these witnesses, it is quite clear that before lodging the FIR against the accused, though the complainant / father of the victim (PW-2) was having knowledge about the commission of rape by the accused, but from perusal of the FIR lodged on 29.11.2022 it transpires that there was allegation that on the night of 17.11.2022, accused - Thandaram Sidar, took her minor daughter, aged 14 years, on his motorcycle and after searching for the victim, he pacified his daughter and brought her back home on the next day morning. It further transpires that after a few days, i.e. on 28.11.2022, when accused again abducted his daughter and was fleeing away, he was stopped by his wife and Dhaneshwar Pareshwar, then the accused threatened them to kill by saying that he would abduct his daughter and take her away, there was no allegation of commission of rape, though having knowledge about the same as per their evidence. Moreover, in the statement recorded under Section 164 CrPC before the Magistrate, the victim has not stated anything about the commission of rape. Even from perusal of the MLC report of the victim (Ex.P-18) given by Dr. Avanish Kaur (PW-9), it is quite clear that there was no external injury found over the body of the victim and on internal examination, the hymen membrane was not torn. The uterus was of normal size, cervix and vagina were healthy and



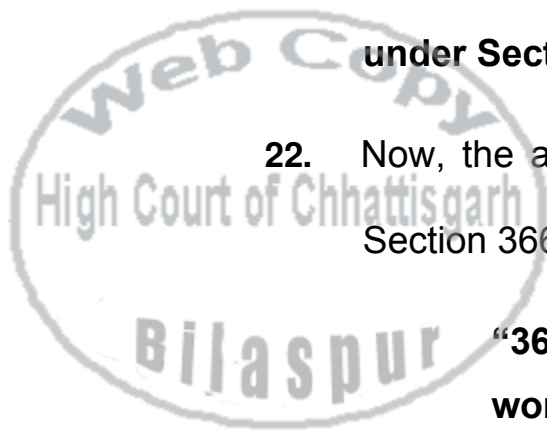


as per opinion of the said Doctor, the victim may be virgin & no signs of sexual intercourse was seen in victims body. Moreover, as per FSL report (Ex.P-29) also semen stains and human sperm were not found in the underwear of the victim, vaginal slides of the victim and underwear of the accused. As such, we are of the considered opinion that the prosecution has failed to establish its case beyond reasonable doubt that the appellant has committed rape on minor victim.

21. The next question for consideration would be, whether the trial Court is justified in convicting the appellant for offence under Section 366 of the IPC ?

22. Now, the appellant has also been convicted for offence under Section 366 of the IPC which states as under: -

“366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or





seduced to illicit intercourse with another person shall be punishable as aforesaid.”

23. In order to constitute offence under Section 366 of the IPC, it is necessary for the prosecution to prove that the accused induced the complainant woman or compelled by force to go from any place, that such inducement was by deceitful means, that such abduction took place with the intent that the complainant may be seduced to illicit intercourse and / or that the accused knew it to be likely that the complainant may be seduced to illicit intercourse as a result of her abduction. Mere abduction does not bring an accused under the ambit of this penal provision. So far as charge under Section 366 of the IPC is concerned, mere finding that a woman was abducted is not enough, it must further be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse.

24. Their Lordships of the Supreme Court in the matter of ***Mohammed Yousuff alias Moula and another v. State of Karnataka***² pointing out the essential ingredients required to be proved by the prosecution for bringing a case under Section 366 of the IPC, relying upon the decision rendered in the matter of ***Kavita Chandrakant Lakhani v. State of Maharashtra***³, has

² 2020 SCC OnLine SC 1118

³ (2018) 6 SCC 664



clearly held that in order to constitute an offence under Section 366 of the IPC, besides proving the factum of abduction, the prosecution has to prove that the said abduction was for one of the purposes mentioned in Section 366 of the IPC, and observed as under: -

“8. Chapter XVI of IPC contains offences against the human body. Section 366, which is the pertinent provision, is contained within this Chapter. Kidnapping/abduction simpliciter is defined under Section 359 and maximum punishment for the same extends up to seven years and fine as provided under Section 363. However, if the kidnapping is done with an intent of begging, to murder, for ransom, to induce women to marry, to have illicit intercourse stricter punishments are provided from Section 363A to Section 369.

9. Section 366 clearly states that whoever kidnaps/abducts any woman with the intent that she may be compelled or knowing that she will be compelled, to either get her married or forced/seduced to have illicit intercourse they shall be punished with imprisonment of up to ten years and fine. The aforesaid Section requires the prosecution not only to lead evidence to prove kidnapping simpliciter, but also requires them to lead evidence to portray the abovementioned specific intention of the kidnapper. Therefore, in order to constitute an offence under Section 366, besides proving the factum of the abduction, the prosecution has to prove that the said abduction



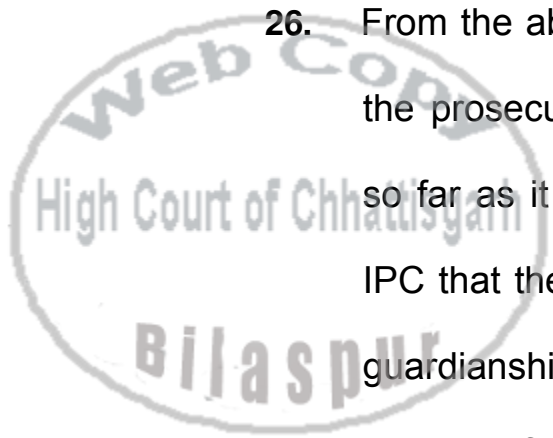


was for one of the purposes mentioned in the section. In this case at hand the prosecution was also required to prove that there was compulsion on the part of the accused persons to get the victim married. [See Kavita Chandrakant Lakhani v. State of Maharashtra, (2018) 6 SCC 664].”

25. In the instant case, as the offence of sexual assault has not been found proved by the prosecution which satisfies the requirement of Section 366 of the IPC, we are of the considered view that the trial Court is absolutely unjustified in convicting the appellant for offence under Section 366 of the IPC.

26. From the above analysis, we are of the considered opinion that the prosecution has proved its case beyond reasonable doubt so far as it relates to offence punishable under Section 363 of IPC that the appellant has kidnapped the victim from the lawful guardianship of her parents without their consent and kept her with him for the whole night, but has failed to prove its case beyond reasonable doubt so far as it relations to offence punishable under Sections 366 of IPC and Section 4(2) of the POCSO Act that the appellant has kidnapped the victim and committed penetrative sexual assault on the pretext of marriage with the victim.

27. Accordingly, we affirm the conviction and sentence awarded by the learned trial Court so far as it relates to offence punishable under Section 363 and 506-II of IPC is concerned and set aside the conviction and sentence awarded by the learned trial Court





so far as it relates to offence punishable under Section 366 of IPC and Section 4(2) of the POCSO Act is concerned.

28. Accordingly, the appeal is **partly allowed** to the extent indicated herein-above.
29. The appellant/convict is stated to be in jail. He shall serve out the remaining sentence as modified by this Court.
30. 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/-
(Ravindra Kumar Agrawal)
Judge

Sd/-
(Ramesh Sinha)
Chief Justice



Head – Note

Every abduction of a minor female cannot be construed to be an offence under Section 366 IPC and the same needs to be corroborated from the statement of the victim and other medical and forensic evidences available on record with regard to the intention of the accused.

