



HIGH COURT OF CHHATTISGARH AT BILASPUR
Criminal Appeal No. 121 of 2022

XXX

---Appellant

Versus

State of Chhattisgarh through Aarakshi Kendra Bijapur,
Distt. Bijapur, Chhattisgarh.

---Respondent

For Appellant :- Mr. Vikash A. Shrivastava, Advocate

For Respondent/State :- Mr. Animesh Tiwari, Dy. A.G.

Mr. Ashish Tiwari, G.A.

Mr. Arjit Tiwari, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal
Hon'ble Shri Justice Rakesh Mohan Pandey

Judgment on Board

14/11/2022

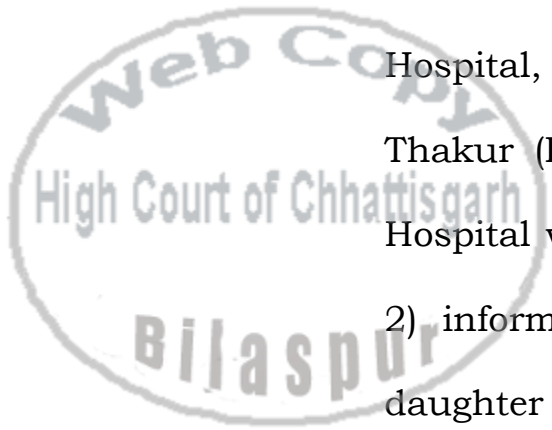
Sanjay K. Agrawal, J.

1. This criminal appeal under Section 374 (2) has been preferred by the appellant against impugned judgment dated 23/12/2021 passed by learned Additional Sessions Judge (FTC), South Bastar, Distt. Dantewada in Special Sessions Case No. 12/2021 whereby the appellant has been convicted for offences punishable under Section 376(3) of the Indian Penal Code and Section 6 of Protection of Children from Sexual Offences Act, 2012.



Prosecution story :-

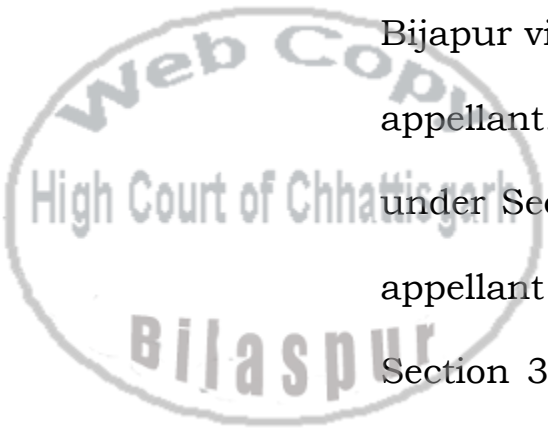
2. Case of the prosecution, in brief, is that the appellant herein, on the pretext of marriage, committed sexual intercourse with the victim, aged less than 16 years, on 02/08/2020 at about 11 AM and on 15/08/2020 at his mother's house in Forest Colony Deepopara within the ambit of Police Station Bijapur on account of which she got pregnant and he thereby, committed the aforesaid offences.
3. Further case of the prosecution is that a memo was received at the Bijapur Police Station vide Ex. P/22 from the District Hospital, Bijapur pursuant to which the Gopal Singh Thakur (P.W.-9), A.S.I, Police Station Bijapur went to the Hospital wherein upon enquiry, mother of the victim (P.W.-2) informed him that on 28/12/2020, she brought her daughter (victim) to the Hospital wherein after medical examination, the Doctor confirmed that the victim was pregnant and she was informed by the victim that the appellant had committed sexual intercourse with her twice, on 02/08/2020 and 15/05/2020 on the pretext of marriage. On the complaint of victim's mother (P.W.-2), dehati nalishi was registered vide Ex. P/2 and thereafter, first information report was registered against the appellant for offence punishable under Section 376 of IPC and Sections 4 and 6 of POCSO Act vide Ex. P/23. During investigation, nazri naksha was prepared vide Ex. P/4 and patwai naksha was prepared vide Ex. P/13 and thereafter,





panchnama was prepared vide Ex. P/14. With regard to the date of birth of the victim, Dakhil Khariz Register (Ex. P/11C) was seized vide Ex. P/9. After obtaining consent from the victim as well as her mother vide Ex. P/3 and P/5, medical examination of the victim was conducted vide Ex. P/1 and certain articles were seized from her vide Ex. P/25 which were sent for FSL and as per the FSL report (Ex. P/28), no incriminating evidence was found against the appellant. Thereafter, statement of the victim under Section 164 of CrPC was recorded by the Chief Judicial Magistrate, Bijapur vide Ex. P/6 in which she has clearly implicated the appellant. The statements of the witnesses were recorded under Section 161 of CrPC and after due investigation, the appellant was charge-sheeted for offences punishable under Section 376(3) of the IPC and Sections 5(j)(ii) and 5(l)/6 of the POCSO Act which was committed to the Court of Sessions for hearing and disposal in accordance with law. The appellant/accused abjured his guilt and entered into defence.

4. In order to bring home the offence, prosecution examined 9 witnesses and brought on record 28 documents. The statement of the appellant/accused was examined under Section 313 of CrPC wherein he denied guilt, however, he examined none in his defence.
5. Learned Special Judge, after appreciating the oral and documentary evidence on record, convicted the appellant for

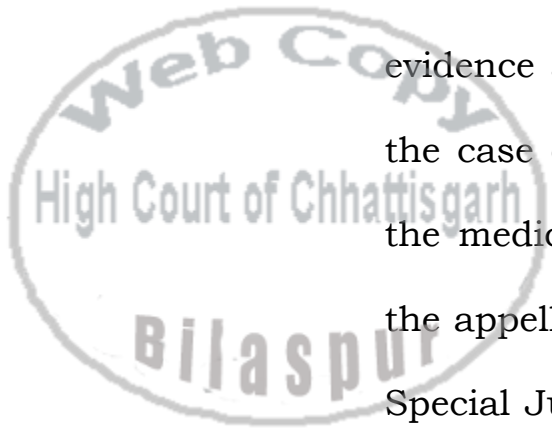




the aforesaid offences and sentenced him as aforesaid on the basis of the statements of victim's father (P.W.-8) and mother (P.W.-2) and Dr. Monika (P.W.-1) as well as on the basis of the victim's statement recorded under Section 164 of CrPC vide Ex. P/6.

Submission of the parties :-

6. Mr. Vikash A. Shrivastava, learned counsel for the appellant/accused, would submit that learned Special Judge is absolutely unjustified in convicting the appellant for the aforesaid offences in absence of legally admissible evidence as the victim's mother (P.W.-2) has not supported the case of the prosecution at all and only on the basis of the medical evidence of Dr. Monika (P.W.-1), conviction of the appellant cannot rest. He would further submit that the Special Judge has also erred in relying upon the statement of the victim recorded under Section 164 of CrPC vide Ex. P/6 as it is not a substantive piece of evidence, as such, the instant appeal be allowed and after setting aside the impugned judgment, the appellant be acquitted from the aforesaid charges levelled against him.
7. Per contra, Mr. Arjit Tiwari, learned State counsel, would support the impugned judgment and submit that victim's mother (P.W.-2) has supported the case of the prosecution and as the victim herself has stated in her statement under Section 164 of CrPC that appellant committed sexual intercourse with her twice on the pretext of marriage after





which she became pregnant, and she was less than 18 years of age on the date of the offence, the appellant has rightly been convicted for the aforesaid offences and the instant appeal deserves to be dismissed.

8. We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.
9. The short question for consideration is, whether the Special Judge is justified in convicting the appellant on the basis of the oral testimonies of victim's mother (P.W.-2) and Dr. Monika (P.W.-1) as well as on the basis of the statement of the victim recorded under Section 164 of CrPC vide Ex. P/6 ? We shall look into the correctness of both of these findings one by one.

Oral evidence of victim (P.W.-3), her mother (P.W.-2) and

Dr. Monika (P.W.-1) :-

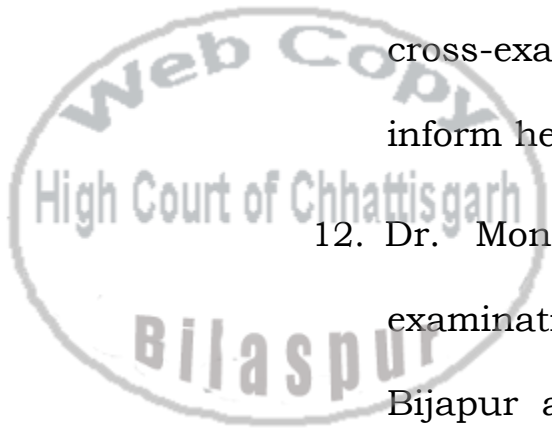
10. Victim (P.W.-3) herself has been examined before the Court and a careful perusal of her statement would show that she has not supported the case of the prosecution at all. She has clearly stated that appellant did not do anything wrong with her on the dates of the offence. Thereafter, the trial Court permitted to open her statement under Section 164 of CrPC pursuant to which, upon being declared hostile, she was subjected to leading question to which she has refuted the fact that appellant took her to his mother's house and



on the pretext of marriage committed sexual intercourse with her and she has further refuted that she did not state anything of this sort in her statement under Section 164 of CrPC.

11. Similarly, victim's mother (P.W.-2) has also turned hostile and not supported the case of the prosecution. Firstly, in paragraph 6 of her statement, she has stated that when she asked the victim about the incident, she informed her that appellant committed sexual intercourse with her on the pretext of marriage but thereafter, upon being subjected to cross-examination, she has stated that victim did not inform her about anything.

12. Dr. Monika (P.W.-1), who conducted victim's medical examination on 28/12/2020 at the District Hospital, Bijapur and submitted her report (Ex. P/1), has clearly stated that on being inquired, the victim herself stated that the appellant committed sexual intercourse with her on 02/08/2020 and 15/08/2020 on the pretext of marriage but in cross-examination, she has stated in paragraph 8 that the victim did not inform her about the name of the person who committed sexual intercourse with her. It is pertinent to note here that Dr. Monika (P.W.-1) also did not mention anything in victim's examination report (Ex. P/1) about such a statement allegedly made by the victim to her at the time of her medical examination.



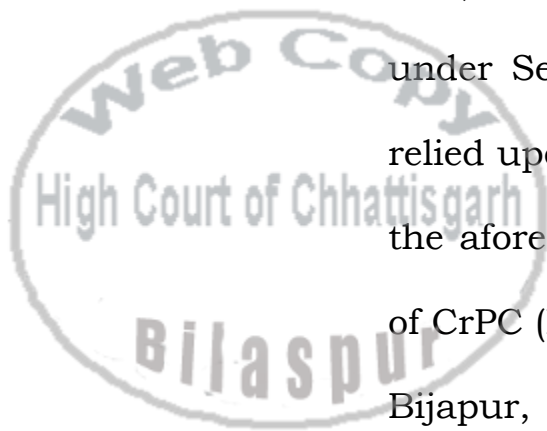


13. After going through the statements of the aforesaid prosecution witnesses, it is quite vivid that there is no such oral evidence to hold that it was the appellant who committed sexual intercourse with the victim on account of which she got pregnant. As such, we are of the considered opinion that with regard to the entire oral evidence available on record, there is no legally admissible evidence to implicate the appellant for the crime in question.

Statement of the victim under Section 164 CrPC :-

14. Now, we shall consider the statement of the victim recorded under Section 164 of CrPC vide Ex. P/6, which has been relied upon by the Special Judge to convict the appellant for the aforesaid offences. In her statement under Section 164 of CrPC (Ex. P/6) made before the Chief Judicial Magistrate, Bijapur, the victim has clearly stated that it was the appellant who had committed sexual intercourse with her on two different dates whereas in her statement before the Court which has been marked as P.W.-3, she has refuted that she made any such statement before the Magistrate under Section 164 of CrPC.

15. The question that arises for consideration herein is, whether the statement of the victim under Section 164 of CrPC would come within the meaning of evidence under Section 3 of the Evidence Act, 1872 ?





16. In **Brijhusan Singh v. Emperor**¹, the Privy Council has observed that a statement made under Section 164 CrPC cannot be used as a substantive piece of evidence and it can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false. But that does not establish that what he stated out of Court under Section 164 CrPC is true. Similarly, in **Mamand and others v. Emperor**², it has been observed by the Privy Council that the statement of a witness made under Section 164 CrPC can be used only to discredit the evidence given by him in Court, and not for any other purpose. Such a statement cannot be treated as substantive evidence of the facts stated.

17. In the matter of **Ram Kishan Singh v. Harmit Kaur and another**³, with regard to the value to be given to a statement under Section 164 CrPC, the Supreme Court has held that “a statement under Section 164 of the Code of Criminal Procedure is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness.”

18. The Supreme Court, in the matter of **Sunil Kumar and others v. State of Madhya Pradesh**⁴, has held that statement recorded under Section 164 of CrPC can be used for corroboration or contradiction.

1 AIR 1946 38

2 AIR 1946 45

3 AIR 1972 SC 202

4 AIR 1997 SC 940



19. Similarly, in the matter of **George and others v. State of Kerala and another**⁵, their Lordships of the Supreme Court have considered the issue as to whether the statement recorded under Section 164 CrPC constitutes substantial evidence and held that a statement of a witness recorded under Section 164 CrPC cannot be used as substantive evidence and can be used only for the purpose of contradicting or corroborating the maker of such statement.
20. Furthermore, in the matter of **R. Shaji v. State of Kerala**⁶, similar proposition of law has been laid down by their Lordships of the Supreme Court, which state as under :-

“27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. (Vide *Jogendra Nahak v. State of Orissa*⁷ and *CCE v. Duncan Agro Industries Ltd.*⁸)

28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence.”

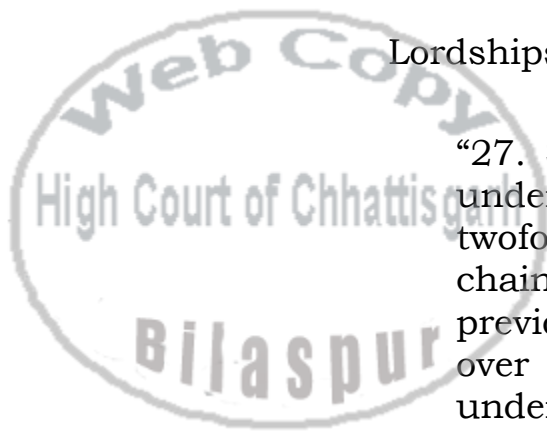
21. Finally, in the matter of **Somasundaram alias Somu v. State represented by the Deputy Commissioner of**

5 (1998) 4 SCC 605

6 (2013) 14 SCC 266

7 (2000) 1 SCC 272

8 (2000) 7 SCC 53





Police⁹, a three judge bench of the Supreme Court considered the purport and value of Section 164 CrPC and further considered the issue which is similar to the issue in hand before us as to, what would be the position if the person giving the statement resiles from the same completely when he is examined as a witness ? In paragraph 81 of the report following question was framed by their Lordships :-

“81. Section 164 CrPC enables the recording of the statement or confession before the Magistrate. Is such statement substantive evidence ? What is the purpose of recording the statement or confession under Section 164 ? What would be the position if the person giving the statement resiles from the same completely when he is examined as a witness ? These questions are not res integra. Ordinarily, the prosecution which is conducted through the State and the police machinery would have custody of the person. Though, Section 164 does provide for safeguards to ensure that the statement or a confession is a voluntary affair it may turn out to be otherwise. We may advert to statements of law enunciated by this Court over time.”

22. Thereafter, considering the decisions rendered in the matters of **George** (supra) and **R. Shaji** (supra), their Lordships held in paragraph 84 as under :-

“84. Thus, in a case where a witness, in his statement under Section 164 CrPC, makes culpability of the accused beyond doubt but when he is put on the witness stand in the trial, he does a complete somersault, as the statement under Section 164 is not substantial evidence then what would be the position ? The substantive evidence is the evidence rendered in the court. Should there be no other evidence against the accused, it would be impermissible to convict the accused on the basis of the statement under Section 164.”



23. From the aforesaid principle of law laid down by their Lordships of the Supreme Court in the aforesaid judgments (supra) qua statement under Section 164 CrPC, it is quite vivid that statement under Section 164 of CrPC is not an evidence, much less, substantial evidence within the meaning of Section 3 of the Evidence Act and it can be used only for the purpose of corroboration or contradiction. In absence of any other legally admissible evidence corroborating the evidence under Section 164 of CrPC, no conviction can be recorded. In the instant case, there is no direct evidence available including that of the victim to implicate the appellant herein for the offences in question.

The medical evidence sought to be produced qua commission of the offence is also not reliable as Dr. Monika (P.W.-1), in her cross-examination, has clearly stated that the victim did not name the person who committed sexual intercourse with her. Apart from that, the statement of the victim under Section 164 of CrPC is the only piece of evidence, on the basis of which, conviction of the appellant for the aforesaid offences has been recorded by the Special Judge, which is absolutely perverse and bad in law as the statement of the victim under Section 164 of CrPC, though it was recorded before the Magistrate, would not be substantive evidence and on the strength of the said statement, no conviction can be based. At the most, if the deponent or victim, as he/she has turned hostile and not





supported the case of the prosecution, he/she can be prosecuted for perjury but no conviction can be based and recorded, on the basis of that statement.

Conclusion :-

24. In view of the aforesaid analysis, we are of the considered opinion that prosecution has miserably failed to bring home the offences punishable under Sections 376(3) of IPC and Section 6 of POCSO Act against the appellant and the Special Judge is absolutely unjustified in convicting him for the said offences. We hereby set aside the impugned judgment of conviction and order of sentence passed by the Special Judge and acquit the appellant from the charges levelled against him. He be released forthwith, if his detention is not required in any other case.

25. Accordingly, this criminal appeal stands allowed.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Rakesh Mohan Pandey)
Judge