IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No.57 of 2019

From judgment and order dated 26.06.2019 passed by the Additional Sessions Judge -cum- Special Judge, Balasore in Special Case No.379 of 2017.

Bapun Singh .... Appellant

-Versus-

State of Odisha .... Respondent

For Appellant: - Mr. Akhaya Kumar Beura
Amicus Curiae

For Respondent: - Mr. Manoranjan Mishra
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing and Judgment: 19.07.2023

S.K. SAHOO, J. The appellant Bapun Singh faced trial in the Court of learned Additional Sessions Judge -cum- Special Judge, Balasore in Special Case No.379 of 2017 for commission of offences punishable under sections 363/366/376(2)(i)(n) of the Indian Penal Code (hereinafter referred to as 'I.P.C.') read with section 6 of the Protection of Children from Sexual Offences Act

(hereinafter referred to as 'POCSO Act') on the accusation that on 29.09.2017 at about 6.00 a.m., he kidnapped the victim (P.W.1), who was the minor daughter of the informant (P.W.2) aged less than sixteen years, from village Bankapada without the consent of the informant from his lawful guardianship, with the intent that she might be compelled or forced to marry him against her will or might be forced to illicit intercourse, committed rape on the victim repeatedly and also committed aggravated penetrative sexual assault on her.

The learned trial Court vide impugned judgment and order dated 26.06.2019 found the appellant guilty under sections 363/366/376(2)(i)(n) of the I.P.C. and section 6 of the POCSO Act and sentenced him to undergo R.I. for five years and to pay a fine of Rs.5,000/-(rupees five thousand), in default, to undergo further R.I. for three months for the offence under section 363 of the I.P.C., R.I. for five years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo further R.I. for three months for the offence under section 366 of the I.P.C. and R.I. for ten years and to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to undergo further R.I. for three months for the offences punishable under section 376(2)(i)(n) of the I.P.C. and in view of section 42 of the POCSO Act, no separate sentence was awarded for the offence under section 6 of the

HIGH COURT ORISSA सत्यमेव जयते

POCSO Act and all the substantive sentences were directed to run concurrently.

2. P.W.2 Katia Singh, the father of the victim (P.W.1) lodged the first information report on 05.10.2017 before the Officer in-charge of Chandipur police station stating therein that the victim was aged about fourteen years and on 29.09.2017, in the early morning at about 6.00 a.m., she was missing from the house for which he himself, his sons and neighbours searched for her but could not locate her. Subsequently, they came to know that the appellant was staying in the house of his grandmother, who is a co-villager of the informant, had kidnapped the victim on the pretext of visiting *jatra*. Thereafter, the informant (P.W.2) searched for both the appellant as well as the victim at different places and ultimately on 05.10.2017 at about 12.00 noon, they were caught while the appellant was attempting to take the victim out of Odisha from Balasore railway station. Thereafter the informant (P.W.2) asked the victim about the appellant and she told that the appellant proposed her for marriage and took her to his friend's house at Balasore and there, he committed rape on her repeatedly. It is further stated in the F.I.R. that the appellant was a married person and his wife had left him. The informant (P.W.2) brought the victim as well as the appellant to the police station and on the basis of such report, first

HIGH COURT ORISSA सत्यमेव जयते

information report was lodged by P.W.2 at Chandipur police station which was registered as Chandipur P.S. Case No.89 of 2017 under sections 363/366/376(2)(n) of the I.P.C. and section 6 of the POCSO Act against the appellant and P.W.15, the Officer-in-charge, of Chandipur himself took up investigation of the case.

During course of the investigation, P.W.15 the investigating officer examined the informant, sent the appellant as well as the victim for medical examination, visited the spot, prepared the spot map (Ext.12), seized the biological sample and wearing apparels of both the victim as well as the appellant and thereafter, he arrested the appellant and forwarded him to Court. On 10.10.2017, the I.O. made prayer for recording the statement of the victim under 164 Cr.P.C. and accordingly, the same was recorded vide Ext.15. On 14.10.2017, the I.O. received medical examination report of the victim and made a prayer for sending the exhibits to R.F.S.L. and the same was done. The school admission register, where the victim was prosecuting her studies i.e. Garada Primary School, was seized by the I.O. vide Ext.4. On completion of investigation, on 31.12.2017, the I.O. submitted the charge sheet against the appellant under sections 376(2)(i)(n)/363/366 of the I.P.C. read with section 6 of the POCSO Act.

HIGH COURT
सत्यमेव जयते
ORISSA

3. After submission of charge sheet, the learned trial Court framed charges against the appellant and since he refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

4. During course of the trial, in order to prove its case, the prosecution examined as many as fifteen witnesses.

P.W.1 is the victim. She supported the prosecution case and stated about the commission of rape on her by the appellant.

P.W.2 Katia Singh is the informant in the case and the father of the victim. He stated that in the year 2017, the unfortunate incident happened when the appellant took his daughter to witness *jatra* in their village and in the mid of *jatra*, he called the victim and took her away to his friend's house and kept her for two days and committed rape on her forcibly.

P.W.3 Dr. Jharana Dutta, who was working as Senior Medical Officer, D.H.H., Balasore, examined the victim on police requisition on 06.10.2017 and proved her report marked as Ext.1. She stated that as per the radiologist, the age of the victim was more than fifteen years and less than sixteen years.

HIGH COURT ORISSA

P.W.4 Mandakini Mahanta was the Sub-Inspector of Police attached to Balasore Sadar police station and she stated that as per the direction of the S.D.P.O., Sadar, she recorded the statement of the victim and handed over the same to the Officer in-charge of Chandipur police station.

P.W.5 Basanta Kumar Singh is the scribe of the F.I.R. (Ext.3) and he stated that on instruction of P.W.2, he scribed it, read over and explained the contents to the informant.

P.W.6 Keshab Singh and P.W.7 Gopal Singh are the sons of the informant (P.W.2) and the brothers of the victim (P.W.1) who stated in identical manner about the disclosure made by the victim regarding commission of rape on her by the appellant and his attempt to take her away out of the State.

P.W.8 Dharitri Mishra was the Headmistress of Barada Primary School, who produced the school admission register before the investigating officer wherein the date of birth of the victim was reflected as 18.05.2005. She stated about the seizure of such register which was later on given in her zima as per zimanama (Ext.5).

P.W.9 Arati Singh and P.W.10 Harish Chandra Singh were the constables attached to Chandipur police station and they were also the witnesses to the seizure of biological samples

HIGH COURT
सत्यमेव जयते
ORISSA

of the victim as well as the appellant as per seizure lists Ext.7 and Ext.8 respectively.

P.W.11 Surendra Singh is the grandson of the informant. He stated that his maternal uncle telephoned him and informed about the kidnapping of the victim and they searched for her and after three to four days, they recovered the victim and the appellant. He further stated that after recovery of the victim, she disclosed that the appellant had committed sexual assault on her after kidnapping her from *jatra* padia and kept her in Patrapada.

P.W.12 Anjali Das and P.W.14 Chandan Singh are two independent witnesses.

P.W.13 Dr. Prafulla Kumar Sahu, who was Medical Officer at D.H.H., Balasore, examined the appellant on police requisition on 06.10.2017 and opined that the appellant was capable of doing sexual intercourse but there was no sign and symptom of recent sexual intercourse and proved his report marked as Ext.9.

P.W.15 Rajendra Kumar Das was working as officer in-charge of Chandipur police station and he is the investigating officer of the case.

HIGH COURT ORISSA सत्यमेव जयते

From the side of prosecution, eighteen documents were exhibited. Ext.1 is the medical report of the victim, Ext.2 is the report of the radiologist, Ext.3 is the F.I.R., Ext.4 is the seizure list in respect of school admission register of Garada Primary School, Ext.5 is the zimanama, Ext.6 is the admission register, Ext.7 is the seizure list in respect of one sealed vial containing public hair of victim, one sealed vial containing vaginal swab of victim and one sealed vial containing vaginal swab of victim, Ext.8 is the seizure list of one sealed vial containing public hair of appellant, one sealed vial containing nail clipping of appellant, one sealed vial containing semen of appellant, Ext.9 is the medical report of the appellant, Ext.10 is the medical requisition of the victim, Ext.11 is the medical requisition of the appellant, Ext.12 is the spot map, Ext.13 is the seizure list in respect of one dark green colour underwear, one printed black pink colour ghagra, one black and while colour check tops, Ext.14 is the seizure list in respect of one yellow colour shirt of the appellant and one black colour track pant of the appellant, Ext.15 is the prayer for recording 164 Cr.P.C. statement of the victim, Ext.16 is the prayer for sending exhibits to R.F.S.L., Ext.17 is the forwarding letter and Ext.18 is the Chemical Examination Report.

HIGH COURT
सत्यमेव जयते
ORISSA

The prosecution also proved seven material objects. M.O. I is the dark green colour chadi of the victim, M.O.II is the pink colour ghagra of the victim, M.O.III is the black and white top, M.O.IV is the biological sample bottles, M.O.V is the biological sample bottles, M.O.VI is the black colour track pant and M.O.VII is the yellow shirt.

5. The defence plea of the appellant is one of complete denial of the prosecution case and of false implication in this case due to civil dispute. The appellant being examined as D.W.1 stated that the victim was more than eighteen years of age and both of them met at village Paganai, where the victim's maternal aunt's house was situated. It was pleaded that the victim, on her own volition, gave proposal of marriage to the appellant but the appellant refused the proposal due to financial scarcity. In his statement recorded under section 313 Cr.P.C., the appellant pleaded that he had come to his grandmother's house and a quarrel ensued between his uncle's family and that of the victim for which a false case has been foisted against him.

HIGH COURT ORISSA सत्यमेव जयते

6. The learned trial Court after analyzing the oral and documentary evidence on record came to hold that the victim was a minor girl at the time of commission of the alleged offence. It has been further held that the evidence of the

prosecution witnesses including the victim was clear and cogent that she was subject to sexual assault and the discrepancies in the evidence of the witnesses were minor in nature and no way fatal to the prosecution case. Accordingly, the learned trial Court concluded that the prosecution has successfully proved all the charges.

7. On 05.07.2023, when the matter was taken up for hearing, the previously engaged legal aid counsel Ms. Jyotsnarani Sahoo was not present to argue the matter for which Ms. Chandana Mishra was engaged as Amicus Curiae and when she also did not remain present even after receiving the paper book, Mr. Akhaya Kumar Beura was engaged as Amicus Curiae for the appellant and a copy of the paper book has also been supplied to him.

HIGH COURT
सत्यमेव जयते
ORISSA

Contentions of the Parties:

8. Mr. Akhaya Kumar Beura, learned Amicus Curiae appearing for the appellant contended that there is no clinching evidence available on record regarding the age of the victim and the observation of the learned trial Court that the victim was a minor girl at the time of commission of offences against her, is not justified. Learned Amicus Curiae further submitted that the story narrated by the victim in her statement recorded under section 164 Cr.P.C. and her evidence in Court are completely

contradictory to each other and in view of the discrepancies in the evidence, it cannot be said that the victim is a truthful witness and thereby, explicit reliance cannot be placed on her version. Therefore, he vehemently pleaded that it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Manoranjan Mishra, learned Additional Standing Counsel appearing for the State of Odisha, on the other hand, supported the impugned judgment and contended that not only the oral evidence but also the ossification test report indicate that the victim was under sixteen years of age when the occurrence in question took place and her evidence that rape was committed on her repeatedly has not been shaken in the cross-examination and therefore, the learned trial Court was quite justified in convicting the appellant of the offences charged.

HIGH COURT
सत्यमेव जयते
ORISSA

Age of the victim:

8. Specific charge has been framed against the appellant for commission of offence under section 376(2)(i)(n) of the I.P.C. so also under section 6 of the POCSO Act on the accusation that the appellant committed rape on the victim repeatedly, who was aged about sixteen years at the time of occurrence.

At the outset, having regard for the aforementioned charges, it is imperative for this Court to make a detailed discussion on the age of the victim. This becomes even more important when this Court takes into account the statutory mandate under section 34(2) of the POCSO Act which reads as follows:

> "34(2). If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination."

The High Court of Patna has recently delved into the discussion on the importance of determination of age of the victim in cases under the POCSO Act in the case of **Sakindar Yadav –Vrs- The State of Bihar [Criminal Appeal (DB) No.945 Of 2017**, judgment dated 14.07.2023**]**. While relying on the landmark decision of the Hon'ble Supreme Court in the case of **Jarnail Singh -Vrs- State of Haryana reported in (2013) 7 Supreme Court Cases 263**, it held:

> "In view of the authoritative pronouncement of the Hon'ble Supreme Court in the case of ***Jarnail Singh -Vrs.- State of Haryana*** **reported in (2013) 7 SCC 263**, it is clear that the word 'person' in Section 34(2) of the POCSO Act includes not only a child who is accused of committing an offense but also a child who is a victim of the offense. **The legislative intent behind using the word 'person' cautiously has to be paid proper homage by**

<u>interpreting the word 'child' in a broader manner to include even a 'child victim'. Thus, Section 34(2) of the POCSO Act casts a positive duty on the Special Court to satisfy itself with recorded reasons as to whether the 'person' is a child or not. Establishing the minority of the victim child is a condition precedent to proceeding with a case under the POCSO Act</u>." (Emphasis supplied)

In the instant case, it appears that the I.O. (P.W.15) had visited the school where the victim was prosecuting her studies i.e. Barada Primary School and seized the school admission register from the headmistress vide seizure list Ext.4 and the same was given in Zima of the headmistress. The headmistress (P.W.8) has also stated about such seizure of the school admission register by the I.O. However, she stated that the admission of the victim was done on 21.04.2015 and therein the date of birth of the victim was mentioned as 18.05.2005.

It is the submission of Mr. Akhaya Kumar Beura, learned Amicus Curiae for the appellant that the headmistress (P.W.8) has stated that she joined the school on 20.06.2014 and she was working in the said school when the victim got admitted in the year 2015 and the date of birth of the victim was mentioned on the version of the father of the victim. The father of the victim had given his Left Thumb Impression (L.T.I.) in the school admission register. It is the further submission of the

HIGH COURT ORISSA

learned Amicus Curiae that when the father of the victim himself is not aware about the date of birth of the victim, the entry in the school admission register made on his version cannot be said to be correct.

The headmistress (P.W.8) has stated that the school admission register indicates the date of birth of the victim to be 18.05.2005. If this date of birth is taken into account, then on the date of occurrence, which is stated to have taken place on 29.09.2017, the victim was of thirteen years. It is correct that the father of the victim being examined as P.W.2 was silent about the date of birth of the victim but in the cross-examination, the defence has elicited that he got married to his first wife about twenty years ago and was blessed with two daughters and the victim is the daughter of the second wife, to whom he married about sixteen years ago and from the second marriage, there were two issues and the victim was the second issue who was born after four years of his marriage. P.W.2 has denied the suggestion given by the defence that the victim is the daughter from his first wife and also that the victim is more than eighteen years of age, rather he has stated that the victim was aged about fifteen years on the date of occurrence. Nothing further has been elicited from the cross-examination of P.W.2 relating to the age of the victim.

HIGH COURT
सत्यमेव जयते
ORISSA

P.W.1 is the victim and her evidence was recorded on 28th November 2018 and she stated her age to be fifteen years and the occurrence in question took place the previous year. Suggestion was given to the victim that she was more than twenty years of age which she out-rightly negated. Nothing has been brought on record in the cross-examination to disbelieve the age of the victim which she deposed in the Court.

The doctor (P.W.3) stated that on 06.10.2017, she examined the victim and prepared the report (Ext.1). She further stated that as per the report of the radiologist vide Ext.2, the age of the victim was more than fifteen years and less than sixteen years. Thus, not only from the school admission register of Barada Primary School where the date of birth of the victim was mentioned to be 18.05.2005, but also from the evidence adduced by the victim, her father and moreover from the evidence of doctor (P.W.3), it appears that the prosecution has successfully proved that the victim was less than sixteen years of age as on the date of occurrence. In my humble view, the finding of the learned trial Court on this score that the victim was a minor at the time of commission of offence against her is quite justified.

HIGH COURT ORISSA सत्यमेव जयते

<u>Whether evidence of the victim (P.W.1) can be acted upon</u>:

9. The victim (P.W.1) has stated that the appellant took her to witness *jatra* and in the mid of *jatra*, he called her and took away to his friend's house but she did not know the name of that friend of the appellant. The appellant kept her for two days in the house of that friend and committed rape on her forcibly. After two days, the appellant brought her to Balasore and kept for three days and also committed rape on her and she further stated that after three days, when she along with the appellant was going out of the State, her brother and father saw them on the road and rescued her. She disclosed about the incident before her father, basing upon which her father lodged the first information report in the police station. Suggestion has been given to the victim by the learned defence counsel that she was in love with the appellant and on being called by him, she voluntarily went away with him, to which the victim denied. The victim has specifically stated in her cross-examination that she had no prior acquaintance with the friend of the appellant. She also deposed that she did not know the name of the appellant's friend and she had never visited his house before. The victim further stated that on the date of occurrence, the friend of the appellant and his wife were present in the house where the

HIGH COURT ORISSA

appellant kept her, but she did not discuss with them about the overt act committed by the appellant nor did she raise any hue and cry.

It is the submission of Mr. Akhaya Kumar Beura, learned Amicus Curiae for the appellant that the friend of the appellant and his wife were vital witnesses and they should have been examined to corroborate the victim's evidence. However, law is well settled that in criminal trial, number of witnesses does not matter but it is the quality of evidence which matters. The friend of the appellant and his wife might not have been supportive of the victim's statement and that might be the reason for which the prosecution decided to exclude them from the list of prosecution witnesses but for non-examination of those two witnesses, the evidence of the victim cannot be doubted or discarded. More particularly, law is well settled that in case of this nature, where the evidence of the victim is cogent, trustworthy and above board, the same can be acted upon. I find that the evidence of the victim (P.W.1) is not only trustworthy, but it also gets corroboration from other witnesses and circumstantial evidence.

HIGH COURT
सत्यमेव जयते
ORISSA

Mr. Beura, learned Amicus Curiae further submitted that the 164 Cr.P.C. statement of the victim is contrary to the evidence given in the Court where she stated that rape was

committed on her in the house of her grandmother situated in village Patrapada and on that night itself, her brother came and took her away. Leaned counsel further argued that the victim has admitted in her cross-examination that the appellant invited her to witness *jatra* and accordingly, she went with him who took her to his grandmother's house and this she deposed in her earlier statement. However, she further stated that earlier she deposed in the Court on the direction of police.

Law is well settled that the statement of a witness recorded under section 164 Cr.P.C. is not substantive evidence. Substantive evidence is one which is given by witness in Court on oath in presence of the accused. Statement of a witness under section 164 of the Code is recorded in absence of accused and as such it is not substantive evidence. The statement of a witness under section 164 Cr.P.C. is recorded being sponsored by the investigating agency. During course of trial, if the witness does not support the prosecution case and declared hostile by the prosecution then the prosecution with the permission of the Court can confront his previous statement made before the Magistrate to him. A statement recorded under section 164 Cr.P.C. can be used either for corroboration of the testimony of a witness under section 157 of the Evidence Act or for

HIGH COURT ORISSA

contradiction thereof under section 145 of the Evidence Act. The mandate of law is that there should be substantial compliance of the requirements under section 145 of the Evidence Act and the purpose of second part of section 145 is to give reasonable opportunity to the witness to explain the contradictions after his attention is drawn to them in a fair and reasonable manner. The Court must ensure that if there is contradiction between the previous statement in writing and statement made in the Court then that portion is brought to the attention of the witness and he is given reasonable opportunity to explain the contradictions.

In the case in hand, when the previous statement of the victim (P.W.1) recorded under section 164 of Cr.P.C. has not been confronted to her in terms of section 145 of the Evidence Act, this Court cannot take into consideration the contradictions as canvassed through the 164 Cr.P.C. statement. The aforesaid position of law was appositely discussed by the Hon'ble Supreme Court in the case of **R. Shaji -Vrs.- State of Kerala reported in (2013) 14 Supreme Court Cases 266** in the following words:

> "15. So far as the statement of witnesses recorded under section 164 is concerned, the object is two fold; 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

HIGH COURT ORISSA सत्यमेव जयते

> 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 & Ors. v. State of Orissa & Ors., AIR 1999 SC 2565**; and **Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. & Ors., AIR 2000 SC 2901**).
>
> 16. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C., can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to contradict the same."

The doctor (P.W.3) examined the victim on 06.10.2017 and thus, by that time a number of days had passed from the date of occurrence. Nevertheless, the doctor stated that the possibility of sexual assault on the victim cannot be completely ruled out. The brother of the victim being examined as P.W.6 has stated not only about the kidnapping but also stated that when the victim was rescued and was asked, she disclosed that the appellant took her away and kept her in a place at Balasore and committed sexual assault on her and was trying to take her away out of the State. P.W.7 is another brother of the victim who deposed in identical manner about the disclosure made by the victim regarding commission of rape on her by the appellant and his attempt to take her away out of the State. Thus, in my considered view, the evidence of the victim

HIGH COURT ORISSA सत्यमेव जयते

(P.W.1) regarding commission of rape on her and her rescue gets corroboration from her family members and the same can be acted upon.

Defence Plea:

10. The appellant denied to every question put to him under section 313 Cr.P.C. by the learned trial Court, however, in the last question, he answered that he had come to her grandmother's house and there was a quarrel between the families of the victim and of his uncle, for which a false case has been foisted against him for wreaking vengeance. On the other hand, the appellant examined himself as D.W.1 and stated that the victim came with him due to love affair on her own volition and forced him to get married to her, but he refused such proposal of the victim due to lack of income.

The defence plea is quite inconsistent. If the uncle's family quarreled with the victim's family, the F.I.R. would have been lodged against them and not against the appellant excluding them. The defence plea that there was a love affair between the victim and the appellant and when the victim asked the appellant to marry her, the appellant denied the same for which a scandalous false case has been foisted upon him, is not acceptable to this Court. It is correct that the defence is not required to prove its plea by the highest standard of proof, i.e.

HIGH COURT ORISSA सत्यमेव जयते

beyond all reasonable doubts, but when inconsistent pleas have been taken by the defence, the same cannot be accepted.

Conclusion:

11. The learned trial Court has found the accused guilty under section 366 of the I.P.C. which reads as follows:

> "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 also be punishable as aforesaid."

सत्यमेव जयते
ORISSA

Therefore, section 366 of the I.P.C. prescribes punishment for a person who kidnaps or abducts any woman with intent that she might be compelled, or knowing it to be likely that she would be compelled, to marry any person against her will, or in order that she might be forced or seduced to illicit intercourse, or knowing it to be likely that she would be forced or seduced to illicit intercourse. In view of age the victim, as has already been held to be below sixteen years, and the conduct of

the appellant in taking the minor girl from the lawful guardianship and committing rape on her repeatedly, I am of the humble view that the learned trial Court has righty convicted the appellant under section 366 of the I.P.C. so also under section 376(2)(i)(n) of the I.P.C.

The learned trial Court, while convicting the appellant under section 366 of the I.P.C., has also convicted him under section 363 of the I.P.C. which provides as follows:

> "363. Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

The substantive offence as provided under section 363 of the I.P.C. is squarely covered under section 366 of the I.P.C., which is a higher offence. Therefore, in view of the mandate under section 71 of the I.P.C., there is absolutely no need to award separate sentence under section 363 of I.P.C. as it has merged in the sentence imposed under Section 366 I.P.C.

The sentence imposed on the appellant under section 376(2)(i)(n) of the I.P.C by the learned trial Court is the minimum sentence prescribed for such offence and so far as section 366 of the I.P.C. is concerned, since the maximum punishment prescribed for such offence is for ten years and the appellant has been awarded R.I. for five years and to pay a fine

HIGH COURT ORISSA सत्यमेव जयते

of Rs.5,000/-(rupees five thousand), in default, to undergo further R.I. for three months under section 366 of the I.P.C., I am not inclined to interfere with the order of sentence as handed down by the learned trial Court.

Accordingly, the conviction of the appellant under sections 363/366/376(2)(i)(n) of the I.P.C. and section 6 of the POCSO Act as per the impugned judgment stands confirmed. No separate sentence is awarded under section 363 of the I.P.C. for the reasons already assigned. No separate sentence is also required to be passed for the conviction of the appellant under section 6 of the POCSO Act in view of section 42 of the POCSO Act as rightly done by the learned trial Court.

Accordingly, the JCRLA being devoid of merit stands dismissed.

Trial Court records with a copy of this judgment be communicated to the concerned Court forthwith for information and necessary action.

Before parting with the case, I would like to put on record my appreciation to Mr. Akhaya Kumar Beura, learned Amicus Curiae for the appellant for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional

HIGH COURT
सत्यमेव जयते
ORISSA

fees which is fixed at Rs.7,500/- (rupees seven thousand five hundred only).

....

S.K. Sahoo, J.

Orissa High Court, Cuttack
The 19th July 2023/Sipun