

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

THE HON'BLE MR. JUSTICE MOHAMMAD NAWAZ

CRIMINAL APPEAL No.36/2019 DATED 03-02-2020

SRI. N.M.PREMKUMAR VS STATE OF KARNATAKA, REP. BY SUB-INSPECTOR OF POLICE, SRINIVASPURA POLICE, KOLAR DISTRICT.

JUDGMENT

The accused has preferred this appeal against the Judgment and Order dated 10.12.2018 passed in S.C. No.31/2017 on the file of the Court of II Additional Sessions Judge, Kolar [Special Court for POCSO], convicting and sentencing him for the offences punishable under Sections 363, 376(2)(i) of IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 [hereinafter referred to as 'POCSO Act' for short].

2. I have heard Sri. Veeranna G.Tigadi, learned counsel appearing for the accused/appellant and Sri. K.Nageshwarappa, learned HCGP., appearing for the respondent/State.

3. It is the case of the prosecution that;

On 02.12.2016 at about 4.00 a.m., at Neelatur village, within the jurisdiction of Srinivasapura Police Station, the accused induced and kidnapped the victim girl [P.W.2], aged about 17 years, from her house, intending to marry her and took her to Srinivasapura and then to Madanapalli and from

there to the house of C.W.11-Nagaraj at Angallu village of Tambalapalli, Andhra Pradesh and committed rape on her and thereby committed the offences punishable under Section 363, 376(2)(i) of IPC and Section 6 of the POCSO Act.

Charges were framed against the accused for the aforesaid offences, to which the accused pleaded not guilty and claimed to be tried.

In order to establish its case, the prosecution in all examined P.Ws.1 to 17 and got marked P.Ws.1 to 26 and M.Os.1 to 14.

The accused denied all the incriminating evidence appeared against him. However, he has not chosen to lead any evidence.

The learned Special Judge after considering the evidence and material on record proceeded to convict the accused for the charged offences and sentenced him as under:

“The accused is sentenced to undergo simple imprisonment for a period of 7 years with fine of Rs.2,000/- for the offence punishable under Section 363 of IPC. In case of default of payment of fine, to undergo further imprisonment of one month.

The accused is sentenced to undergo

simple imprisonment for a period of 7 years with fine of Rs.5,000/- for the offence punishable under Sections 376(2)(i) of IPC. In case of default of payment of fine, to undergo further imprisonment of one month.

The accused is sentenced to undergo simple imprisonment for a period of 10 years with fine of Rs.5,000/- for the offence punishable under Section 6 of the POCSO Act. In case of default of payment of fine, to undergo further imprisonment of one month.”

Aggrieved by the aforesaid Judgment and Order of conviction and sentence passed by the trial Court, the accused has preferred this appeal.

4. It is the contention of the learned counsel appearing for the appellant that there is absolutely no material against the accused to hold that he is guilty of the offences charged against him. He submits that the trial Court has erroneously convicted and passed the sentence and the same has resulted in miscarriage of justice. He contends that the trial Court has relied upon the statement of the victim marked as Ex.P3 and 5, which were recorded during the course of investigation. The statement recorded under Section 161 of Cr.P.C. could not have been marked in evidence and therefore, he submits that the trial Court has proceeded to convict the accused by placing reliance on the said statements, which is not admissible in evidence. He contends

that when the victim herself has completely denied the case of the prosecution and medical evidence also being negative and does not support the case of the prosecution, the trial Court was not justified in convicting the accused. He submits that even the statement recorded under Section 164 of Cr.P.C. marked as Ex.P4 does not implicate the accused and even otherwise the said statement is not a substantive evidence and in the absence of any corroborative evidence, the same cannot be relied upon.

It is his contention that even if the case of the prosecution that the victim was a minor at the time of incident, is accepted, in the absence of any cogent evidence to establish the guilt of the accused, the trial Court could not have convicted the accused and therefore, seeks to set aside the Judgment and Order of the trial Court.

In support of his contention, the learned counsel has placed reliance on the following decisions:

- 1) AIR 1965 Supreme Court 942;  
S.Varadarajan Vs. State of Madras.
- 2) AIR 2010 Supreme Court 1894; Utpal  
Das and Anr. Vs. State of W.B.

Per contra, the learned HCGP contends that the prosecution has proved that the victim was aged about 16 years and therefore, she was a minor at the time of incident.

The same is established from the evidence of P.Ws.11 and 13 and documents at Exs.P9 to 11 and 15. The parents of the victim were examined as P.Ws.1 and 8 and they have clearly stated in their evidence that the accused kidnapped the victim girl by inducing her and even on an earlier occasion, he had kidnapped her. He submits that the evidence of P.Ws.1 and 8 is further corroborated by the evidence of P.Ws.3 and 9. He submits that the history given before the doctor also confirms that it is the accused who kidnapped the victim and thereafter, committed rape on her and hence, he submits that the prosecution has been able to establish the guilt of the accused beyond all reasonable doubt. Accordingly, seeks to dismiss the appeal.

5. At the outset, it is to be noted that the trial Court after convicting the accused/appellant for the offence punishable under Sections 363, 376(2)(i) of IPC and Section 6 of the POCSO Act, sentenced him for both the offences under Section 376(2)(i) of IPC as well as Section 6 of POCSO Act. In view of Section 42 of the POCSO Act, when the offender is found guilty of such offence punishable under the POCSO Act as well as under IPC., then he shall be liable to punishment either under the POCSO Act or under IPC., which is greater in degree. Therefore, the trial Court was not proper in passing sentence against the accused for both the offences under Section 376(2)(i) of IPC and Section 6 of POCSO Act.

6. The case of the prosecution is that, on 02.12.2016 at 4.00 a.m., the accused induced and kidnapped P.W.2, a minor, from her house situated at Neelatur village, intending to marry her and after kidnapping her, took her to Srinivasapura and then to Madanapalli and from there to the house of one Nagaraj [C.W.11] at Angallu village of Tambalapalli in Andhra Pradesh and committed aggravated penetrative sexual assault on her and hence committed the charged offences.

7. To prove that the victim girl was a minor, the prosecution has got examined P.W.11-Vice Principal of Government P.U. College for Girls, Srinivasapura. She has issued documents viz., Exs.P9 to 11. Ex.P9 is the Age Certificate of the victim. Ex.P10 is the copy of the admission register and Ex.P11 is the copy of the admission extract.

8. In Ex.P9, certificate issued by P.W.11, it is stated that as per School records, the date of birth of the victim is 18.01.2000. In Ex.P10, the name of the victim is at Sl. No.22, wherein her date of birth is mentioned as 18.09.2000. In Ex.P11, the date of birth is mentioned as 18.09.2000. P.W.11 has stated that in the Age Certificate, by mistake the date of birth is mentioned as 18.01.2000 instead of 18.09.2000. She has stated that the date of birth of the victim girl is 18.09.2000. She has denied that the said Certificate is issued at the instance of the Police and that she

has issued a false Certificate as per the say of Police.

9. The prosecution has examined P.W.13-Doctor, who has subjected the victim for medical examination and issued Certificate as per Ex.P15 stating that the victim was aged about 16 to 18 years at the time of examination i.e., on 28.12.2016. If the age of the victim girl is taken as 18.09.2000 or as 18.01.2000, still she is a minor at the time of incident. The defence has not seriously disputed the age of the victim. From the evidence of P.Ws.11 and 13, the prosecution has been able to establish that the victim was aged below 18 years and that she was a minor at the time of incident.

10. The victim is examined as P.W.2 before the trial Court. According to the prosecution, the accused kidnapped the victim on 02.12.2016 at about 4.00 a.m. from her house by inducing her. Thereafter, took her to Srinivasapura and then to Madanapalli and from there to the house of C.W.11-Nagaraj of Angallu village of Tambalapalli in Andhra Pradesh and committed aggravated penetrative sexual assault on her. However, P.W.2 has categorically denied the case of the prosecution. In her evidence, she has stated that her date of birth is 18.09.2000. She has stated that no one has kidnapped her. The accused has not kidnapped her and took her to Andhra Pradesh and committed rape on her. She has admitted that she signed the statement at Ex.P3. However,

she has stated that the same was stated by her father. She has stated that the doctor has not examined her and has not collected her clothes. She has stated that her statement was recorded by the Magistrate. However, she states that she has not given any statement as recorded in Ex.P4. She was treated hostile by the prosecution. Nothing is elicited from her cross-examination to show that either the accused kidnapped her by inducing her or committed aggravated penetrative sexual assault on her.

11. The prosecution heavily relies on the evidence of the parents of the victim who are examined as P.Ws.1 and 8 as well as the evidence of P.Ws.3 and 9. It is relevant to note that in Ex.P1, the father of the victim has stated that after everyone slept on the night of 01.12.2016, at about 4.00 a.m., his daughter went out of the house and thereafter, she did not return and therefore, he suspected the accused because even on the earlier occasion that is about 25 days prior to the said date, the accused had kidnapped his daughter. On the basis of the said complaint, a case was registered against the accused by P.W.17.

12. Though P.W.1 has stated that the accused had kidnapped his daughter even on an earlier occasion and that he has lodged a complaint in that regard, nothing is placed on record to show that any such complaint was lodged or registered against the accused. P.W.1 has stated that a

panchayat was convened and thereafter, his daughter was sent with him. In this regard, the prosecution has examined P.W.9. He has stated that when the victim girl was attending tuition, the accused had induced and kidnapped her. On the next day, complaint was lodged in Srinivasapura Police Station and after she was secured, a panchayat was convened. As noted above, though P.Ws.1 and 9 have stated that the accused has kidnapped the victim girl on an earlier occasion and in this regard, a case was registered, however, no document has been produced and marked by the prosecution.

13. P.W.9 has stated that the accused gave an undertaking in writing that he will not trouble the victim girl. However, the said undertaking is also not produced and marked. Hence, it cannot be said that the prosecution has established that even on an earlier occasion, the accused kidnapped the victim girl.

14. P.W.1 has stated that after lodging the complaint against the accused, the Police traced both the victim as well as the accused from Angallu village after about 25 days and in the Police Station, her daughter informed that the accused had forcibly taken her.

15. P.W.8 is the mother of the victim. She has stated that about one week after lodging of the complaint, the victim

was brought to the Police Station. She has stated that on that day, the accused was not brought to the Police Station. The victim informed that the accused took her and kept her in Angallu village and committed rape on her.

16. According to the prosecution, after lodging of the complaint, the Police during the course of investigation traced both the accused as well as the victim girl in Angallu village of Tambalapalli in Andhra Pradesh on 23.12.2016. P.W.16- Investigating Officer has stated that the accused and the victim were produced before him by the PSI and thereafter, he arrested the accused and recorded his voluntary statement as per Ex.P21.

17. P.W.15 is the PSI. He has stated that on 23.12.2016, P.C. 585 and W.C. 709 produced the victim as well as the accused before him and he recorded the statement of the victim as per Ex.P3. The prosecution has not examined the police constable who traced the accused and the victim girl. There is no evidence to show that the victim and the accused were traced together from Angallu village of Tambalapalli in Andhra Pradesh.

18. Learned counsel for the appellant has vehemently contended that the statement of the victim girl which was recorded during investigation could not have been marked and the same could not have been relied upon as a substantive piece of evidence. In the instant case, complaint

was lodged by P.W.1, which is marked as Ex.P1. The subsequent statement which was recorded during the course of investigation could not have been marked. Hence, the statement of the victim girl marked as Exs.P3 and 5 by itself are not admissible in evidence. The said statements are recorded during the course of investigation under Sections 161 and 162 of Cr.P.C. Unless the person who gives such statements corroborates the same in the evidence given before the Court, the averments made in the said statement itself cannot be taken as evidence. Hence, there is considerable force in the argument advanced by the learned counsel for the appellant.

19. As noted supra, the prosecutrix, who is examined as P.W.2 has completely given a goby to the prosecution case. She has stated that her statement was recorded by the Magistrate. The same is marked as Ex.P4. In her evidence though she has stated that her statement was recorded by the learned Magistrate, she has stated that the contents of Ex.P4 are not stated by her. Even otherwise, perusal of Ex.P4 does not indicate that the accused either induced and kidnapped her or he has committed any sexual intercourse against her. In Ex.P4, it is stated that the accused and the victim were in love and they were talking over phone frequently. Coming to know about the same, her family members scolded her. They were not happy and told her that

if she continue loving the accused, she should not stay in the house. On the next day, without the knowledge of her parents, she went to Madanapalli and called the accused over phone, who came to Madanapalli bus stand and took her to his friend's house at Angallu village and they stayed together for about one month. It is stated that the accused has not given any trouble to her and has not committed any sexual intercourse. It is stated that on 22.12.2016, Srinivasapura Police came to Angallu village and took her as well as the accused to Srinivasapura. It is stated that on her own volition she went to Madanapalli and there is no force by any one.

20. In the case of UTPAL DAS AND ANR. VS. STATE OF W.B. [supra] it is held that "the statement recorded under Section 164 of Cr.P.C. can never be used as substantive evidence of truth of the facts but may be used for contradictions and corroboration of a witness who made it. The statement made under Section 164 of Cr.P.C. can be used for cross-examine the maker of it and the result may be to show that the evidence of the victim is false. It can be used to impeach the credibility of the prosecution witness".

21. In the instant case, the prosecution has utterly failed to elicit from P.W.2 that she has either stated as per Ex.P4 or as per Exs.P3 and 5. It is also to be noted that the prosecution has not examined C.W.11-Nagaraj in whose

house the victim and the accused are alleged to have stayed at Angallu village. According to the prosecution, P.Ws.6 and 7 are the panchwitnesses to the mahazar-Ex.P7, which was prepared in the house of Nagaraj. Both these witnesses the have not supported the prosecution case. Hence, the prosecution has failed in its attempt to establish that the accused either kidnapped the victim girl and took her to Angallu village, Tambalapalli in Andhra Pradesh or kept her in the said house and committed aggravated penetrative sexual assault on her.

22. The prosecution has examined P.W.14-Lady Medical Officer, before whom the victim was taken for medical examination. P.W.14 has stated that the victim girl has refused to undergo any medical examination and in this regard, she has issued Ex.P19. Hence, there is absolutely no medical examination ensuring that there was any sexual intercourse committed against the victim girl.

23. The trial Court has relied upon the evidence of P.W.14 and the documents at Ex.P19, wherein it is shown that history given is sexual assault by a person by name Prem Kumar [accused]. Perusal of Ex.P19 or evidence of P.W.14 does not indicate that the said history was given by the victim. P.W.14 has not stated that the victim i.e., P.W.2 has given the history to her. It is seen that the Police brought the victim before P.W.14 with a history of sexual assault by a

person by name Premkumar. Therefore, the said history is not furnished by the victim girl to P.W.14.

24. Learned HCGP would contend that P.W.1 i.e., the father of the victim girl has lodged a complaint on 02.12.2016 stating that the accused has kidnapped his daughter. The victim girl was traced on 23.12.2016. The victim being a minor, by taking her from the lawful guardianship of P.Ws.1 and 8, the accused has committed an offence punishable under Section 363 of IPC.

25. As already held, it is not established by the prosecution that the accused kidnapped the victim girl from the lawful guardianship and thereafter, took her and kept her in a house at Angallu village. Even otherwise, to punish the accused for an offence punishable under Section 363 of IPC., the prosecution has to establish the ingredients of Section 361 of IPC.

26. The Hon'ble Apex Court in the case of S.VARADARAJAN VS. STATE OF MADRAS [supra] has held as under:

*"9. There is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be*

*regarded as meaning the same thing for the purposes of S.361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian."*

27. Having carefully examined the entire evidence and material on record, I find that the prosecution has failed to establish the charges leveled against the accused beyond all reasonable doubt. The reasons assigned by the trial Court for convicting and sentencing the accused is not based on the sound principles of law. Therefore, the impugned Judgment and Order of conviction and sentence passed by the trial Court is not sustainable and the same is liable to be set aside. For the foregoing reasons, the following;

#### ORDER

The appeal is allowed. The Judgment and Order of conviction and sentence dated 10.12.2018, passed in S.C.

No.31/2017 on the file of the Court of the II Additional Sessions Judge, Kolar [Special Court for POCSO] is hereby set aside. The accused is acquitted of the offences punishable under Sections 363, 376(2)(i) of IPC and Section 6 of the POCSO Act. If any amount of fine is deposited by the accused, the same shall be returned. His bail bond stands cancelled.