



CRL.A No. 100515 of 2021

**IN THE HIGH COURT OF KARNATAKA,  
DHARWAD BENCH**



**DATED THIS THE 4<sup>TH</sup> DAY OF NOVEMBER, 2022**

**PRESENT**

**THE HON'BLE MR JUSTICE SURAJ GOVINDARAJ**

**AND**

**THE HON'BLE MR JUSTICE G BASAVARAJA**

**CRIMINAL APPEAL NO. 100515 OF 2021 (A)**

**BETWEEN:**

STATE OF KARNATAKA  
R/BY THE POLICE INSPECTOR,  
YALLAPUR POLICE STATION,  
DISTRICT. UTTARA KANNADA,  
THROUGH THE ADDL.  
STATE PUBLIC PROSECUTOR  
ADVOCATE GENERAL OFFICE  
HIGH COURT OF KARNATAKA,  
DHARWAD BENCH.

...PETITIONER

(BY SRI. V. M. BANAKAR, ADDL SPP.)

**AND:**

BASAVRAJ S/O. YELLAPPA MADAR  
AGE. 21 YEARS, OCC. MASON WORK,  
R/O. INDIRA NAGAR,  
KIRVATTI, YALLAPUR TALUK,  
DIST. UTTARA KANNADA-581359

...RESPONDENT

(BY SRI. RAJA RAGHAVENDRA NAIK, ADVOCATE)





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THIS CRIMINAL APPEAL IS FILED U/SEC.378(1) AND (3) OF CR.P.C. SEEKING TO SET ASIDE THE JUDGMENT AND ORDER OF ACQUITTAL DATED 30.01.2020 PASSED BY THE SPECIAL JUDGE, UTTARA KANNADA, KARWAR IN SPECIAL CASE NO.18/2016 AND CONVICT AND SENTENCE THE RESPONDENT/ACCUSED FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 366 AND 376(2)(j) OF IPC AND SECTION 5(I) AND 6 OF PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012.

THIS APPEAL HAVING BEEN HEARD THE RESERVED FOR JUDGMENT ON 27.10.2022, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **SURAJ GOVINDARAJ J.** PRONOUNCED THE FOLLOWING:

### **JUDGMENT**

1. The State is in appeal being aggrieved by the judgment of acquittal passed by the Special Judge, Uttara Kannada, Karwar, in Special Case No.18/2016 dated 03.01.2020.
2. The facts of the case are:
  - 2.1. It is alleged that the complainant – the mother of the victim was residing at Indira Nagar, Kirvatti, Yallapur Taluk with her husband and two daughters. The accused was their neighbour.



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- 2.2. The victim being aged about 17 years studying in II PUC in Government College, Kirvatti, on 26.12.2015 at about 9.00 am the victim left for college but did not return, the complainant and her family members searched for her everywhere, but did not find her.
- 2.3. It is in that background, that a complaint was lodged with the Yellapur Police Station as regards the missing girl in furtherance of which a case in Crime No.305/2015 was registered and taken up for investigation.
- 2.4. After investigation was complete, the Police Inspector, Yellapur Circle, Yellapur, laid a charge sheet against the accused for the offences punishable under Sections 366, 376(2)(j) of the IPC and Sections 5(1) and 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act', for brevity). Cognizance had been



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taken for the said offences and upon the procedures under Sections 207 and 208 of the Cr.P.C. being complied, the accused was arrested on 04.01.2016 and produced before the Court, where he was enlarged on bail.

2.5. Charges were framed for the offences punishable under Sections 366, 376(2)(j) of the IPC and Sections 5(1) and 6 of the POCSO Act. The accused pleaded not guilty and claimed to be tried.

2.6. In order to prove its case, the prosecution examined 18 witnesses as PWs.1 to 18 and marked 61 exhibits at Exs.P1 to P61. There being no material objects, none were marked.

2.7. Upon completion of trial, the incriminating evidence against the accused was put forward to him and his reply was recorded under Section 313 of Cr.P.C. The accused denied the



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incriminating evidence, but chose not to lead any evidence in the matter.

2.8. The Special Court after hearing the arguments was of the opinion that the evidence led by the prosecution was insufficient to convict the accused of the offences charged and the prosecution had failed to bring home its case successfully beyond all reasonable doubt and as such, acquitted the accused of the aforesaid offences.

2.9. It is being aggrieved by the same that the State is before this Court seeking to set aside the order of acquittal and for conviction of the accused for the aforesaid offences.

3. Sri. V. M. Banakar, learned Addl. SPP would submit that:

3.1. There is a heinous offence which has been committed inasmuch as accused is charged for



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the offences under Section 376(2)(j) as also Sections 5(1) and 6 of the POCSO Act. The victim being a minor girl, the accused having indulged in sexual intercourse with her, the trial Court ought to have appreciated this fact and convicted the accused.

3.2. The evidence on record establishes that the act of sexual intercourse has taken place, which was sufficient enough to drive home the guilt of the accused, the victim was a minor, the age of the minor having been established by the prosecution.

3.3. PW1 – complainant, who is the mother of the victim girl has categorically stated in her evidence that, as on the date of the incident, the victim was 17 years 9 months and was studying in II PUC. However, she turned hostile for the reasons best known to her. When the age of the victim was established and



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the defence has not raised any issue as regards countering the age of the victim, the trial Court has no option but to convict the accused for the offences under the POCSO Act.

- 3.4. In that background, he submits that the order of acquittal passed by the Special Court is required to be set aside and the accused is liable to be convicted.
4. Per contra, Sri. Raja Raghavendra Naik, learned counsel appearing for the accused submitted that;
  - 4.1. All the material witnesses have turned hostile. The prosecution has been unable to prove its case.
  - 4.2. The complainant having resiled from the contents of the complaint and the allegations made therein, the victim having categorically stated that she had married the accused on 11.01.2017 before the Sub-Registrar, Haliyal,



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she having further stated that she was never kidnapped and there never was any forcible sexual assault committed on her, the primary witnesses being the complainant and the victim having not supported the case of the prosecution, the trial Court has rightly acquitted the accused.

4.3. Even the witnesses to the spot mahazer and panchanama have not supported the case of the prosecution.

4.4. The father of the victim was examined as PW15. He has stated that his daughter never went missing. He did not know that his wife had lodged the complaint. He denied that he has given any statement or re-statement before the police and as such, he submits that he being the material witness has not supported the case of the prosecution.





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- 4.5. The sister of the victim was examined as PW16. She has also not supported the case of the prosecution. So also the other witnesses being the neighbors not having supported the case of the prosecution, he submits that the Special Court has rightly acquitted the accused.
- 4.6. It is only Dr.Deepak Bhat, Medical Officer, Taluk Hospital, Yellapur, was examined as PW8 and other official witnesses who have supported the case of the prosecution.
- 4.7. The Victim and the accused got married in the year 2017 and thereafter have had two children, the victim and accused are living happily, if the order of acquittal is overturned the family would suffer untold harm, the accused being the sole bread winner.
- 4.8. He submits that the appeal filed by the State is required to be dismissed.



5. It is in the background of the above submissions that we are called upon to re-appreciate the evidence on record to ascertain if the judgment passed by the trial Court is proper or not.
6. There are two sets of offences which have been alleged against the accused.
  - 6.1. First being the kidnap under Section 366 of the IPC.
  - 6.2. Second being the offence of rape and aggravated penetrated sexual assault.
7. Section 366 of the IPC reads 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



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*that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.*

7.1. For an offence to be committed under Section 366 of the IPC, the person has to kidnap or abduct any woman with an intent to compel her to marry against her will.

7.2. Abduction is defined under Section 362 of the IPC as under:

**362. Abduction.** —*Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.*

7.3. In terms of Section 362 of the IPC, a person has to by force compel by deceitful means any person to go from any place.

7.4. It is the requirement of the above two provisions, which are required to be satisfied by the prosecution to drive home the guilt of the



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accused to convict the accused under Section 366 of the IPC.

8. PW1 – mother of the victim, has in her evidence stated that her daughter never left the house and no one kidnapped her. She has further gone on to say that she has never lodged a complaint with the police. She has stated that the police took her signature on Ex.P1 – complaint, the contents of which she does not know. She is also not aware of the contents of the panchanama. She has not given any further statements before the police and that the police never took her and her daughter to the hospital. She has stated that the police took her signature on Ex.P1 – complaint, Ex.P2 – panchanama, Exs.P3 and P4 being the identification forms, but she does not know the contents of the same. She was treated as hostile, but nothing much is elicited during the course of her cross-examination by the public prosecutor to bring home the



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requirement of Section 366 of the IPC. She denied all suggestions which had been put across to her.

9. The victim, who was examined as PW2, has stated that she married the accused on 11.01.2017 before the Sub-Registrar, Haliyal; the accused never kidnapped her and never sexually assaulted her and that she had never become pregnant. She denied any panchanama being conducted in her presence, though she admits that the police took her blood samples and she does not know reasons for the same. She was also treated as hostile, but nothing much was elicited from her during the course of cross-examination.
  
10. The father of the victim was examined as PW15. He has stated in his evidence that his daughter never went missing. He does not know about the missing complaint. He has not made any statement before the police. He was also treated as hostile, but



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nothing was elicited from him during the course of cross-examination.

11. The sister of the victim was examined as PW16. She has identified the victim as the sister and accused as her brother-in-laws. She has stated she does not know anything about the case and she has not given any statement before the police. She was also treated as hostile. Nothing much was elicited during the course of cross-examination, but she admitted that during the pendency of the case, the accused had married her sister and out of their wedlock, one child was born.

12. The above witnesses are the material witnesses being the family members who have not spoken about the kidnapping and abduction. A perusal of the material part of the evidence considered above indicates that there is complete denial of kidnapping and/or abduction. In fact the witnesses have gone to say that the victim never left the house. If that be



so, none of the ingredients of Section 366 of the IPC has been established by the prosecution.

13. Section 376(2)(j) of the IPC reads as under:

**376. Punishment for rape.—**

(1) xxxxxxxxxxxxxxxxxxxx

(2) *Whoever,—*

(a) xxxxxxxx

(b) xxxxxxxx

(c) xxxxxxxx

(d) xxxxxxxx

(e) xxxxxxxx

(f) xxxxxxxx

(g) xxxxxxxx

(h) xxxxxxxx

(i) xxxxxxxx

(j) *commits rape, on woman incapable of giving consent; or*

(k) xxxxxxxx

(l) xxxxxxxx

(m) xxxxxxxx

(n) xxxxxxxx

*Shall be punished with rigorous imprisonment for a terms which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.*

14. In terms of the above provisions, the prosecution is required to prove that the accused has committed rape of a woman incapable of giving consent to constitute an offence under Section 376 (2)(j) of the IPC.



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15. Rape is defined under Section 375 of the IPC. The said Section 375 of the IPC reads as under:

**375. Rape.**—A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

*First — Against her will.*

*Secondly — Without her consent.*

*Thirdly — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.*

*Fourthly — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

*Fifthly — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.*

*Sixthly — With or without her consent, when she is under sixteen years of age.*

*Seventhly — When she is unable to communicate consent.*

16. Section 5(i) and Section 6 of the POCSO Act read as under:

**Section 5. Aggravated penetrative sexual assault.**

- (a) xxxxxx
- (b) xxxxxx
- (c) xxxxxx
- (d) xxxxxx





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- (e) xxxxxx
- (f) xxxxxx
- (g) xxxxxx
- (h) xxxxxx
- (i) *whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or*
- (j) xxxxxx
- (k) xxxxxx
- (l) xxxxxx
- (m) xxxxxx
- (n) xxxxxx
- (o) xxxxxx
- (p) xxxxxx
- (q) xxxxxx
- (r) xxxxxx
- (s) xxxxxx
- (t) xxxxxx
- (u) xxxxxx

*is said to commit aggravated penetrative sexual assault.*

**Section 6. Punishment for aggravated penetrative sexual assault.—**

*(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.*

*(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.*

17. For an offence under Section 5(i) of the POCSO Act, penetrative sexual assault has to be committed of a child or bodily harm and injury or injury to sexual



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organs of the child has to be committed to constitute an offence under Section 5(i) of the POCSO Act.

18. In the present case, it was therefore required for the prosecution to establish aggravated penetrative sexual assault.
19. PW1 - the complainant in her evidence has not supported the case of the prosecution. She has in fact denied the complaint. On being treated hostile, nothing much was elicited during her cross-examination. PW2 - victim has not spoken of any penetrative sexual assault let alone aggravated. She has gone on to say that she never became pregnant. She has denied of being treated hostile in her cross-examination. She has denied that the accused kidnapped her and took her to Goa, where he had sexually assaulted her. PW15, the father has also turned hostile, but has stated that his daughter is now married to the accused and having one child at that point of time. PW16 - the sister of the victim



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has also not spoken about the sexual assault or supported the case of the prosecution on being treated hostile and during the course of cross-examination, she has admitted that her sister and accused have married and they have a child out of their wedlock. PW17 - the neighbor has turned hostile and denied any knowledge of the case.

20. The panch witnesses, namely, PW3, PW4, PW5, PW6 and PW7 have also turned hostile and not supported the case of the prosecution.
21. PW7 has however, stated that the victim and the accused are already married and leading a happy marital life and out of their wedlock, one child has been born.
22. That leaves only the evidence of PW9 - doctor, who has stated about the victim being pregnant, she was hospitalized for intrauterine fetal demise, when she delivered a dead fetus, about collecting her DNA



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sample of fetus and sending it for examination to Forensic Science Laboratory (FSL). He has further stated that on an earlier occasion, he had subjected the victim to sonography test and found living fetus in the uterus of 21 weeks and two days expecting the delivery to be on 15.05.2016. He has stood test of cross-examination and nothing much has been elicited from him to support the case of the accused.

23. PW10 - the in-charge Principal of Government Junior College, Kirvatti has produced and marked a birth certificate of the victim as per Exs.P32 to P38 and supported the case of the prosecution that the victim was aged 17 years 9 months as on the date of the alleged offence.
24. PW11, who is the clerk at Halur Gram Panchayat has issued the property extract of the accused.



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25. PW12, who is the Secretary of the Bastora village panchayat, Goa has given property extract of the accused in Goa.
  
26. PW14 - the initial Investigating Officer has spoken about his initial investigation and finally PW18 - the Investigating Officer has in detail stated as regards the manner and methodology of kidnap, investigation and in the cross-examination he has denied all allegations. He has stated that the DNA report received from the FSL establishes indicates that the fetus has been fathered by the accused and as such, on that basis, the accused is required to be convicted.
  
27. The evidence led by the prosecution does not in any manner establish any aggravated sexual assault committed by the accused on the victim and/or any offence under Section 376(2)(j) of the IPC. All the material witnesses have turned hostile. There is nothing on record to legally establish the guilt of the



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accused. The only evidence on record is the DNA test result as regards the fetus. But in the absence of any corroborative evidence to the said scientific evidence, we are unable to come to a conclusion that the accused is guilty of the offences alleged against him and/or that the prosecution has proved the same beyond reasonable doubt.

28. In the above background, we do not find any infirmity in the judgment of acquittal passed by the trial Court.

29. **OBSERVATION**

29.1. This Court is coming across several matters alleging offences under Section 376(2)(j) or under the POCSO Act when the girl is 16 years and above, where the girl and the boy are said to be in love with each other and wanted to get married. However, there being opposition to their marriage, the girl and the boy eloped resulting in either the mother or the father of



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the girl filing a complaint. Thereafter, upon investigation the girl and the boy are traced living happily in a different city. However, since a complaint has been lodged, investigation is completed and the girl and the boy when traced, a charge sheet is laid resulting in criminal prosecution of the boy.

29.2.The effect of such criminal prosecution of a minor girl and/or minor boy and/or boy who has attained majority recently, causes severe harm and injury to all the concerned including the families.

29.3.When a criminal prosecution is initiated and the boy is taken into custody, there is also a possibility of misunderstanding occurring between the boy and the girl which could impact their relationship. The parents of boy and girl, the siblings of the boy and girl and if they are married, their respective spouses and



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their respective families would also undergo severe mental trauma apart from being ostracized, severe financial losses are also caused.

29.4. Many a time the complaint is filed in the heat of the moment on account of objection to the marriage, however later on the complainant and the other family members turn hostile and do not support the case of the prosecution.

29.5. The other set of complaints is when the same is filed by an NGO or the doctor on noticing that the girl is pregnant. In such cases the family members turn hostile and do not support the case of the prosecution.

29.6. In the present case, though initially a complaint was filed making various allegations, all the witnesses turned hostile since probably they realized that the minor girl wanted to marry the





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boy. Thus, though the complaint had been lodged no one has supported the same. On the date of hearing before this court, the mother and father of the minor girl along with the boy were present before this Court along with their two children. On enquiry, the girl, who is now a major, has stated that she and the boy got married on 17.01.2017 and thereafter they are living together as husband and wife, the boy has been taking care of her properly and two children have been born, who are also being taken care of by the boy, now her husband, the mother and father of the girl also stated that both of them are living happily and they never wanted to prosecute the case.

29.7.The aim and objective of POCSO Act is to protect the minor children from sexual exploitation and it is made clear that a minor cannot provide consent, the minor under



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POCSO Act being a person under the age of 18 years.

29.8. Having come across several cases relating to minor girls above the age of 16 years having fallen in love and eloped and in the meantime, having had sexual intercourse with the boy, we are of the considered opinion that the Law Commission of India would have to rethink on the age criteria, so as to take into consideration the ground realities.

29.9. The aspect of consent even by a girl of 16 years and above would have to be considered if there is indeed an offence under the IPC and/or or POCSO Act. Normally when evidence is lead the victim is a major and the testimony given then of an act committed while being a minor would have to be given due value.



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29.10. It is also seen that many of the above offences which are deemed offences are deemed to have been committed as a result of or on account of lack of knowledge on the part of the minor girl and the boy. Many a time the boy and girl involved are either closely related and/or very well known to each other being class mates or otherwise. One thing leads to the other and being of an impressionable age, some things are done by a boy and girl, which ought not to have been done and done without knowing the applicability of POCSO Act or certain provisions of the IPC, which make them an offence. Though lack of knowledge of law is no excuse, can minors be presumed to have knowledge of the applicable law would be the question required to be asked in such a situation.



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29.11. In the above background, it is required that students, especially at least of IX standard onwards, are educated on the aspects of POCSO Act, the acts which are criminalized under the POCSO Act as also under the Indian Penal Code.

29.12. The Principal Secretary, Education Department is directed to constitute a Committee to formulate suitable education material in relation to the above and thereafter issue necessary directions to all schools be it Government or private, stating that such students are to be educated and forewarned of the consequence of their action, if in violation of the POCSO Act or the IPC.

29.13. Necessary compliance report as regards initially the formulation of a Committee and the terms of reference of the said Committee to be placed



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before this Court within a period of four weeks  
from today.

30. Hence we pass the following order:

ORDER

- i. Appeal is dismissed.
- ii. Though the above appeal is dismissed, re-list on 05.12.2022 for reporting compliance.
- iii. The Additional Registrar (General) of this Court is directed to forward a copy of the above order to the Principal Secretary, Education Department, Government of Karnataka for necessary action.
- iv. The Additional Registrar (General) is also directed to forward a copy of this order to the Chairman, Law Commission of India for information.

**Sd/-  
JUDGE**

**Sd/-  
JUDGE**