

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 31ST DAY OF AUGUST, 2019

BEFORE

THE HON'BLE MR. JUSTICE MOHAMMAD NAWAZ

CRIMINAL APPEAL No.343 OF 2014

Between:

Anil
S/o. Gopinath
A/a 29 years
R/a Ammaimane
Kutruppady village
Puttur Taluk, D.K.-573 275.

... Appellant

(By Sri. R.Srinivasa Gowda, learned counsel
as Amicus Curiae)

And:

The State
Asst. Commissioner of Police
Puttur Sub-Division, Puttur
Represented by State Public Prosecutor
High Court of Karnataka
Bangalore- 560 001.

... Respondent

(By Sri. M. Divakar Maddur, HCGP)

This Criminal Appeal is filed under Section 374(2) of Cr.P.C. praying to set aside the order dated 20.12.2013 in Special Case No.20/2013 on the file of II Addl. District & Sessions (Spl.) Judge, D.K. Mangalore for the offence p/u/s 376(1), 506 of IPC, 3(1)(xii) of SC & ST (PA) Act, 1989 and Sec. 5(j)(ii) and (1) r/w. 6 of Protection of Children from Sexual Offences Act, 2012 and etc.,

This Criminal Appeal coming on for Hearing this day, the Court made the following:

ORDER

This appeal is filed by the accused- appellant challenging the judgment and order of conviction and sentence in Special Case No.20/2013 dated 20.12.2013 passed by the II Addl.District & Sessions (Spl.) Judge, D.K. Mangaluru.

2. The accused-appellant has been convicted for the offences punishable under Sections 376(1), 506 of IPC and Section 3(1)(xii) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 and Section 5(j)(ii) & (l) read with Section 6 of Protection of Children from Sexual Offences Act, 2012.

3. I have heard the learned counsel Sri R. Sreenivasa Gowda, Amicus Curiae appearing for the appellant and the learned HCGP Sri Diwakar Maddur appearing for the respondent-State.

4. The case of the prosecution in brief is that the victim girl, a minor aged about 14 years was residing with her parents at Ammaimane, Kutrupady village of Puttur Taluk. She was studying in 9th standard in Kadaba Government High School. She belongs to Scheduled Caste. The accused was a neighbour and he was married and living along with his wife and two children. He was a painter by profession. The parents of the victim used to go out for coolie work in the morning and would return to their house in the evening. Whenever there was a holiday for the school, the victim girl would remain alone in the house. When she was alone in the house, the accused was visiting her house and he used to behave intimately with her by holding her hands and hugging etc. She was opposing the act of the accused. In the month of October 2012, when the victim girl was alone in the house at about 2.30 p.m., the accused came to the house and committed forcible sexual intercourse against her will. Even thereafter, when the victim was alone in the house,

the accused committed forcible sexual intercourse for about 3-4 times and even in the month of January 2013 in the morning at about 10.00 a.m., the accused repeated the said act. Later, the victim developed pain in her stomach and she informed the same to her parents. On 19.03.2013, her parents took her to Government Lady Goschen Hospital, Mangaluru and it was revealed that she was 5 months pregnant. An intimation was given to the Police as per Ex.P7 by PW.7- Dr. Poornima.J, Medical Officer. On receiving the said information, PW.9- Assistant Sub Inspector, Kadaba Police Station visited the hospital and recorded the statement of the victim girl as per Ex.P5. A case was registered against the accused. Ex.P10- FIR was sent to the jurisdictional Court. The victim girl was medically examined by PW.7-Dr. Poornima.J and in this regard, medical certificate-Ex.P8 was issued. The study certificate and the caste certificate of the victim were collected during the course of investigation which is marked as per Ex.P4 and Ex.P9 respectively. After

completion of the investigation, charge sheet was filed against the accused.

5. The charges were framed against the accused for the offences punishable under Sections 376(1), 506 of IPC and Section 3(1)(xii) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 and Section 5(j)(ii) & (l) read with Section 6 of Protection of Children from sexual offences Act, 2012.

6. To establish the guilt of the accused the prosecution got examined PW.1 to PW.11 and got marked Ex.P1 to Ex.P11. DW1 and DW2 were examined on behalf of the defence.

7. The learned Special Judge after considering the evidence and the material on record, convicted and sentenced the accused for the charged offences.

8. Aggrieved by the aforesaid judgment and order of conviction and sentence, the accused has preferred this appeal.

9. The learned Amicus Curiae appearing for the accused-appellant would contend that, there is an inordinate delay in lodging the complaint. He submits that though the parents of the victim girl came to know about the incident, when the victim girl was three months pregnant, however, the complaint has not been lodged immediately. On the other hand, the complaint has been lodged when the victim was 5 months pregnant. It is his submission that though the incident has occurred in the month of October 2012, the complaint came to be lodged on 20.03.2013 and there is no satisfactory explanation for the said delay. He submits that the age of the victim is not established. He submits that PW.3 is an Assistant Teacher at Government Composite Pre-University College, Kadaba, who has issued the study certificate of the victim girl as per Ex.P4, however, the victim was studying in 8th standard at the time of incident. Hence, PW.3 is not a competent person to issue Ex.P4. He further submits that there is nothing on record to show that the victim became pregnant and

though, it is the case of the prosecution that the pregnancy was medically terminated, there is no DNA examination conducted. He further submits that there is material contradiction in the evidence of PW.4 and PW.5. He submits that the parents of the victim girl and the accused were not in good terms as there used to be quarrel in connection with some money matter and therefore, a false case has been foisted against the appellant-accused.

10. It is the further contention of the learned Amicus Curiae that the ingredients of Section 3(1)(xii) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, is not at all attracted and therefore, the Trial Court was not proper in convicting the accused for the said offence. Hence, he submits that the judgment and order of conviction and sentence passed by the Trial Court is illegal and accordingly seeks to allow the appeal.

11. Per contra, the learned HCGP would contend that the evidence of the victim girl, who is examined as PW.4 alone is sufficient to establish the guilt of the accused. He submits that PW.4 – victim girl has categorically stated about the heinous act committed by the accused and her evidence is corroborated by her mother-PW.5. He further submits that the victim girl was a minor at the time of incident which is evident from the study certificate issued by PW.3. As per Ex.P4, the date of birth of the victim girl is shown as 20.10.1998 and therefore, the victim girl was a minor aged about 14 years at the time of incident. He further submits that the victim girl belongs to Scheduled caste and therefore, the ingredients of Section 3(1)(xii) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, is also attracted.

12. The learned HCGP further contends that the delay in lodging the compliant is not fatal to the prosecution. He submits that the defence of the accused that the parents of victim girl quarreled with

him and that they have cut the banana plants and flower plants and therefore a false case is foisted cannot be accepted. He submits that the Trial Court after considering the entire evidence and material on record has rightly convicted the appellant-accused and therefore, he seeks to dismiss the appeal.

13. To establish the charges leveled against the accused, the prosecution has in all examined 11 witnesses and got marked 10 documents. PW.1 is the panch witness to the spot mahazar - Ex.P1. He also speaks about the spot sketch marked as per Ex.P2. PW.2 is the Secretary of the Gram Panchayat who has issued the confirmation letter as per Ex.P3 stating that the house numbered as Door No.1/255 of Ammai Kuttrupady village where the incident took place was in the name of the mother of the victim girl. PW.3 is the Assistant Teacher of Government Composite Pre-University College, Kadaba who has issued the study certificate with regard to the victim girl as per Ex.P4. PW.4 is the victim girl. PW.5 is the mother of the victim girl. PW.6 is the Doctor, who

has examined the accused and issued certificate as per Ex.P6. PW.7 is the Medical Officer i.e. Senior Specialist of Lady Goschen Hospital, Mangaluru who has examined the victim girl and issued medical certificate as per Ex.P8. PW.8 is the Tahasildar who has issued the caste certificate of the victim girl as well as the accused. PW.9 is the Assistant Sub Inspector of Kadaba Police Station who after receiving the intimation from the hospital, went to the hospital and recorded the statement as per Ex.P5 and thereafter, registered the case and issued FIR as per Ex.P10. PW.10 is the Dy.SP who has conducted the investigation and filed charge sheet. PW.11 is the Dy.SP, who took over investigation from PW.9 and conducted part of investigation and later handed over the investigation to PW.10.

14. The defence has got examined two witnesses namely DW.1 and DW.2. DW.1 is the mother of the accused and DW.2 is the wife of accused.

15. To appreciate the case of the prosecution, the evidence of PW.4 - victim girl and PW.5 - the mother of victim girl are relevant. PW.4 has deposed that the appellant-accused was a neighbour and he was doing painting work and living along with his wife and children. In the month of October 2012 at about 2.30 p.m., when she was alone in the house, the accused came to the house, touched her body and started talking to her intimately. Thereafter, took her to the room and undressed her and committed forcible sexual intercourse even though she protested. The accused told her that nothing will happen and he is always there. Again in the month of January 2013 at about 10.00 a.m., when she was alone in the house, the accused committed the act of forcible sexual intercourse. On 18.03.2013, she developed pain in her stomach and she informed the same to her mother. When her mother enquired her, she disclosed the act committed by the accused. Thereafter on 19.03.2013, she was taken to the Lady Goschen Hospital and she was admitted in the said

hospital. The doctor examined her and informed that she was 5 months pregnant and that the fetus should be removed immediately otherwise, there is threat to her life. Therefore, the pregnancy was terminated. When she was in the hospital, the Police came and recorded her statement as per Ex.P5.

16. There is nothing elicited in the cross-examination of PW.4 to deny the incident in question narrated by her with regard to the accused committing forcible sexual intercourse with her. PW.4 has categorically denied that a false complaint was lodged against the accused. She has stated that the accused threatened her not to disclose the incident to her parents and therefore, she did not reveal the incident immediately.

17. Mother of the victim girl is examined as PW.5. She has deposed that she came to know about her daughter becoming pregnant and daughter having informed her that it is the appellant-accused, who committed forcible sexual intercourse with her.

Thereafter, she took her daughter to the hospital. The doctor after examining the victim girl informed that her daughter was 5 months pregnant and if the fetus is not removed and the pregnancy was not terminated, then there is danger to her life and therefore, the pregnancy was terminated.

18. In the cross-examination of PW.5, nothing is elicited by the defence so as to deny the incident in question. PW.5 has stated that when her daughter was 5 months pregnant, she was taken to Lady Goschen Hospital, Mangaluru. It is elicited from her that when her daughter was 3 months pregnant, she was taken to the hospital at Kadaba and Uppinangadi.

19. It is the contention of the learned Amicus Curiae appearing for the appellant that PW.5 knew that the victim girl was 3 months pregnant. Even then, no complaint was lodged and therefore, he submits that there is an inordinate delay in lodging the complaint, which is fatal to the prosecution case.

The said contention regarding delay cannot be accepted. In a case of this nature, delay in lodging the complaint is not fatal to the prosecution. It is elicited from PW.5 by the defence that there was some quarrel between PW.5 and the wife of the accused with regard to some money matter. However, it is denied by PW.5 that in this regard, they went and cut the banana plants and flower plants.

20. PW.7- Dr.Poornima.J was working as senior specialist in Lady Goschen Hospital, Mangaluru. She has stated that on 19.03.2013, the victim girl aged about 14 years was brought by her parents to the said hospital for medical examination and for termination of pregnancy. As the victim girl was a minor, she gave intimation to the Police as per Ex.P7. The victim was admitted in the hospital. She has further deposed that on 20.03.2013, Kadaba police visited the hospital and recorded the statement of PW.4 in her presence. She has stated that when she examined the victim girl, she was pregnant of 15-

16 weeks. On 29.03.2013, the pregnancy was aborted spontaneously. The fetus could not be preserved as the pregnancy was terminated when the victim girl went to toilet for passing the motion. The medical certificate issued by PW.7 is marked as Ex.P8.

21. The contention of the learned Amicus Curiae for the appellant is that the fetus was not preserved to show that the victim had in fact become pregnant and there is no DNA examination conducted to hold that the accused is the culprit. However, in the present case, the evidence of PW.4 and PW5 are sufficient to hold that the accused has committed forcible sexual intercourse against the minor girl. Further, the evidence of PW.7 also establishes that the appellant-accused has committed the said offence against a minor girl.

22. The learned counsel for the appellant would contend that the prosecution has failed to establish that the victim was a minor at the time of incident. He would contend that the evidence of

PW.3 and the certificate marked as Ex.P3 are not sufficient to prove that the victim was a minor at the time of incident. In this regard, it is relevant to appreciate the evidence of PW.3. It is the specific case of the prosecution that at the time of incident, the victim was studying in 9th standard. In the First Information Report, it is stated by the victim that she was studying in 9th standard in Kadaba Government High School. PW.3 has deposed that from August 2012 to July 2013, she was working as an Assistant Teacher in Government Composite Pre-University College, Kadaba and she was also working as an in-charge Vice Principal. The Kadaba Police had requested her to give information with regard to study and date of birth of the victim girl. After verifying the records, she issued the study certificate as per Ex.P4. She has stated that in her Institution, the victim was studying in 8th standard during 2011-12 and in 9th standard during 2012-13 and as per the record maintained, the date of birth of the victim girl is 20.10.1998. It is relevant to see that there is no

cross-examination conducted by the defence and the above stated facts by PW.3 is not at all disputed. The date of birth of the victim girl is shown as 20.10.1998 and the incident is said to have occurred during October 2012. Therefore, it can be safely held that the victim girl was a minor at the time of incident, aged about 14 years.

23. PW.8 is the Tahasildar who has issued caste certificate as per Ex.P9 wherein it is stated that the victim girl belongs to Scheduled Caste. The caste of the accused was shown as Malyali Billava, which is not a Scheduled Caste. The said certificate has not been disputed by the defence. It is not the case of the defence that the accused also belonged to Scheduled Caste.

24. Merely because there was some quarrel earlier between PW.5 and the wife of the accused, it cannot be said that a false case was foisted against the accused. There is nothing to show that, immediately before lodging the complaint there was any such quarrel.

25. The learned Amicus Curiae appearing for the appellant would place reliance on the evidence of DW1 and DW2 who are the mother and wife of accused, to contend that there was enmity between the family of the accused and family of the victim girl. DW.1 - the mother of the accused has stated that the victim girl and his parents were their neighbours. The relationship was cordial. She has further stated that PW.4 and PW.5 were constructing a house and in this regard, they had asked a loan of Rs.3,000/- (Rupees Three Thousand Only). The said amount was collected by them from the accused and given to PW.5 on an assurance that after two months, the amount will be returned. However, the said amount was not returned and when she enquired with PW.5, at that time, PW.5 quarrelled with her and they also cut the banana plants and flower plants and threatened them. In the cross-examination conducted by the Public Prosecutor, she has stated that there is no documents to show as to when she had advanced loan to the accused. She has stated that she did not

lodge any complaint against PW.5 for cutting the banana and flower plants.

26. DW.2 is the wife of the accused. She has deposed that a sum of Rs.3,000/- was given to PW.5. When they asked her to return the said amount, she quarreled with her, cut the banana and flower plants and threatened them saying that a criminal case would be registered against them. In this regard, she and her mother-in-law i.e. DW.1 went to Kadaba Police Station. However, the Police did not take any action.

27. In the cross-examination, DW.2 has stated that there are no documents to show that the money was advanced to PW.5 and that she cannot tell as to when the money was advanced.

28. In the cross-examination of PW.5, she has admitted that there was some quarrel with regard to money matter. However, it cannot be said that because of the same a false complaint was lodged against the accused implicating him in a case of this

nature alleging that the accused committed forcible sexual intercourse on minor daughter of PW.5.

29. The evidence of PW7 – the Medical Officer clearly discloses that on 19.03.2013, the victim girl was brought by her parents for examination and for termination of pregnancy. After medically examining the victim girl, a certificate was issued as per Ex.P8 Further, PW7 gave information to the police as per Ex.P7 with regard to the medico legal case. It is clearly mentioned in Ex.P.7 that the victim girl was five months pregnant.

30. It is the contention of the learned counsel appearing for the appellant that Section 3(1)(xii) of the SC ST (PO) Act, 1989 is not attracted. In this regard, he has placed reliance on the judgment passed by this Court in CrI.A. No.2335/2006 and connected matters disposed of on 20.12.2013. The fact of the said case are not applicable to the present case. In the said case, the accused was charged for the offence punishable under Section 376 of IPC and

Section 3(1)(xii) of the SC ST (Prevention of Atrocities) Act, 1989 and he was convicted for the offence punishable under Section 354 of IPC and acquitted of the offence punishable under Section 3(1)(xii) of the SC ST (Prevention of Atrocities) Act, 1989. Both the accused and the State filed respective appeals. In the appeal filed by the State challenging the acquittal of the accused under Section 3(1)(xii) of the SC ST (Prevention of Atrocities) Act, 1989, this Court considering the facts and circumstances, held that the prosecution has not established that the accused had power to dominate the will of the victim girl and held that, the prosecution failed to prove that the accused committed rape on the victim girl. Under such circumstances, it was held that the Trial Court was justified in recording an order of acquittal in so far as the offence punishable under Section 3(1)(xii) of the SC ST (Prevention of Atrocities) Act, 1989.

31. In the present case, the victim was aged about 14 years at the time of incident. The accused was a married person having two children. He was

aged about 28 years. He was a neighbour of the victim girl. The evidence on record clearly establishes that he committed forcible sexual intercourse against the victim girl belonging to a scheduled caste though the victim protested his act. The evidence of PW4 goes to show that when the victim protested, he told her that nothing will happen and not to worry as he is there to take care. It has also come in the evidence that the accused threatened the victim girl not to disclose the incident to others. Hence, the accused was in a position to dominate the will of the victim minor girl belonging to a scheduled caste and thus exploited her sexually. The ingredients of Section 3(1)(xii) of the SC/ST (Prevention of Atrocities) Act, 1989 is therefore attracted in the present case.

32. The accused was convicted for the offence punishable under Section 376(1) of IPC as well as Section 5 (j)(ii) & (l) read with Section 6 of the POCSO Act, 2012. According to Section 42 of the POCSO Act, 2012, when the offender is found guilty of such offences mentioned therein under the IPC as well as

under the POCSO Act, he is liable to punishment for the offence which is greater in degree. The accused has committed aggravated penetrative sexual assault against the minor victim girl, which is punishable under Section 5(j) (ii) & (l) of POCSO Act, 2012 with rigorous imprisonment for a term which shall not be less than ten years and which may also extend and shall also be liable for fine. When the accused has been sentenced to undergo R.I. for a period of ten years for the offence punishable under Section 5(j) (ii) & (l) read with Section 6 of the POCSO Act, 2012, the sentence passed against him under Section 376 (i) of IPC is not warranted.

33. For the foregoing reasons, I pass the following :

ORDER

- (i) The appeal is allowed in part.
- (ii) The judgment and order of conviction passed by the Court of II Addl. District and Sessions Judge in Spl. Case No.20/2003 dated 20.12.2013 for

the offences punishable under Sections 376 and 506 of IPC, Section 3(1)(xii) of the SC ST (Prevention of Atrocities) Act, 1989 and Section 5(j) (ii) & (l) read with Section 6 of the POCSO Act, 2012 are hereby confirmed.

(iii) The sentence imposed against the accused for the offence punishable under Section 376(1) of IPC is hereby set aside.

(iv) The sentence imposed against the accused for the offence punishable under Section 506 of IPC, Section 3(1)(xii) of the SC ST (Prevention of Atrocities) Act, 1989 and Section 5(j) (ii) & (l) read with Section 6 of the POCSO Act, 2012 are hereby confirmed.

(v) All the sentences shall run concurrently.

The accused is entitled for set off as provided under Section 428 of Cr.P.C.

For the able assistance rendered by the learned Amicus Curiae Sri. R. Srinivasa Gowda, he is entitled

for a remuneration of Rs.5,000/- (Rupees Five thousand only) which shall be paid to him.

**Sd/-
JUDGE**

SSD/Snc