

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.167 OF 2018

BETWEEN

MR. MUNEER,
S/O. BABUSAB,
AGED ABOUT 45 YEARS,
R/AT:#1455, 11TH CROSS,
RAGHAVENDRA NAGAR,
MYSURU PIN-570 001.

... APPELLANT

[BY SRI. SURESH H.S., ADVOCATE]

AND

THE STATE BY NAZARBAD
POLICE STATION,
MYSURU CTY,
MYSURU PIN-570 001.

REPTD. BY ITS,
STATE PUBLIC PROSECUTOR,
HIGH COURT OF KARNATAKA,
BENGALURU.

... RESPONDENT

[BY SRI. M.DIVAKAR MADDUR, HCGP]

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THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2)
OF CR.P.C. PRAYING TO SET ASIDE THE JUDGMENT AND
SENTENCE DATED 23.08.2017 PASSED BY THE VI ADDITIONAL
DISTRICT AND SPECIAL JUDGE, MYSURU IN S.C. NO.326/2016-
CONVICTING THE APPELLANT/ACCUSED FOR THE OFFENCE P/U/S

376(2)(i) OF IPC AND SECTION 5(m) R/W 6 OF PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012, ETC.

THIS CRIMINAL APPEAL COMING ON FOR HEARING, THIS DAY THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

The accused/appellant has preferred this appeal against the Judgment and Order of conviction and sentence dated 23.08.2017 passed by the Court of VI Additional District and Special Judge, Mysuru, in S.C. No.326/2016, thereby convicting him for the offence punishable under Section 376(2)(i) of IPC and under Section 5(m) r/w. Section 6 of Protection of Children from Sexual Offences Act, 2012 [hereinafter referred to as 'the POCSO Act' for short].

2. The trial Court has passed the sentence against the accused for the offence punishable under Section 5(m) r/w. Section 6 of the POCSO Act, imposing punishment of rigorous imprisonment for a period of ten years with a fine of Rs.10,000/-, in default of payment of fine, to undergo simple imprisonment for two years.

3. The case of the prosecution is that the victim, a minor girl aged about 7 years is the daughter of the first informant viz., Bibi Khuteja [P.W.2]. The husband of P.W.2 was no more and to eke out her livelihood she was working in a garment factory. She used to go out for work at about 8.30 a.m. and would return at 6.00 p.m. Her son was staying in a 'Madrassa'. The victim girl was going to school and before going for work, P.W.2 used to give food to her daughter and send her to school.

It is the further case of the prosecution that on 19.07.2016, P.W.2 sent her daughter to school and she went to work in the garment factory. After her daughter returned from the school, at about 2.00 p.m., she went to a nearby ground to play. After playing for sometime, when she was tired, she went to the house of the accused which was adjacent to the ground, to drink water. The accused who was present in the house, asked her to come inside the house and he immediately closed the door and with a sexual intent, he hugged her, disrobed her, then made her to lie on the ground and put his hand on her private part and committed penetrative sexual assault on her.

It is the further case of the prosecution that P.W.4 saw the victim-P.W.1 entering the house of the accused and since the victim girl did not come out of the house, went to the house of accused and knocked the door and the accused opened the door. Further, P.W.5-Mujamil, brother-in-law of P.W.2 having come to know about the incident, enquired with the victim girl [P.W.1], who narrated the entire incident to him and thereafter, P.W.5 went to the garment factory and informed the same to P.W.2. When P.W.2 enquired with her daughter, she disclosed about the incident. P.W.2 along with P.W.5 went to Nazarbad Police Station. The minor victim girl was taken to Cheluvamba Hospital, Mysuru. P.W.2 lodged a complaint as per Ex.P2.

After completion of the investigation, charge-sheet was filed and after committal of the case to the Court of Sessions, charges were framed against the accused for the offences punishable under Section 376(2) (i) of IPC and under Section 5(m) r/w. Section 6 of the POCSO Act. The accused pleaded not guilty and claimed to be tried.

In order to bring home the guilt of the accused, the prosecution examined in all P.Ws.1 to 8 and got marked documents at Exs.P1 to 11. The defence of the accused was one of total denial. However, he did not lead any evidence on his behalf.

The trial Court after appreciating the evidence and material on record convicted the accused for the charged offences and passed the sentence as noted supra. Against the Judgment and Order of conviction and sentence passed by the trial Court, the accused has preferred this appeal.

4. I have heard Sri. Suresh H.N., learned counsel appearing for the accused/appellant and Sri. M.Divakar Maddur, learned HCGP., appearing for the respondent/State.

5. It is the contention of the learned counsel appearing for the accused/appellant that the impugned Judgment and Order of conviction and sentence passed by the trial Court is not in accordance with law and the learned Sessions Judge has not appreciated the evidence on record in the proper perspective. He contends that the prosecution evidence is full of inconsistency and the evidence of the

material witnesses are not corroborated with each other. He submits that there is variation in the First Information Report, statement of the victim recorded under Section 164 of Cr.P.C. as well as deposition of P.W.1 before the Court. He submits that the evidence of P.Ws.1, 2, 4 and 5 are not corroborated with each other and there are material discrepancy, which goes to the root of the prosecution case. He submits that the medical evidence is not sufficient to hold that there is penetrative sexual assault committed by the accused. He further submits that there is enmity between the accused and the complainant and therefore, a false case is foisted against him. The complaint is lodged only on suspicious ground and no independent witnesses are examined. He further submits that if the victim was subjected to penetrative sexual assault, then the injury would have been more serious and grave. On the other hand, the medical evidence does not indicate that there is penetrative sexual assault on the victim girl. Hence, he submits that the trial Court has committed a grave error in convicting the accused and accordingly, he seeks to allow the appeal.

Per contra, the learned HCGP contended that the prosecution has established the guilt of the accused beyond all reasonable doubt. He submits that the victim has supported the case of the prosecution and her evidence is further corroborated by the evidence of P.Ws.2, 4 and 5. He submits that P.W.4 is a neighbour who has seen P.W.1 going to the house of the accused and she has also seen the accused committing the heinous act. He further submits that the medical evidence fully supports the case of the prosecution. He further contends that there is nothing elicited in the cross-examination of any of the witnesses to show that there is animosity on account of which a false case has been foisted against the accused. Accordingly, he seeks to dismiss the appeal filed by the accused.

6. Having carefully considered the rival submission, the points that arise for my consideration are that;

- (1) Whether the prosecution has proved beyond all reasonable doubt that on 19.07.2016, the accused has committed rape or aggravated penetrative sexual assault against the minor victim girl?

(2) Whether the Judgment and Order of conviction and sentence passed by the trial Court requires any interference?

(3) What order?

7. It is the case of the prosecution that on 19.07.2016 at about 2.00 p.m., the victim girl [P.W.1] after returning from her school went to Edga ground situated near her house to play and when she was exhausted and became thirsty, went to the nearby house to drink water. The accused was in the said house and when the victim girl asked him for water, the accused by telling her that he will give water, took her inside the house and immediately closed the door, hugged her, disrobed her, then made her to lie on ground and in spite of the victim telling him to leave her, he closed her mouth and put his hand on her private part and thereafter committed aggravated penetrative sexual assault.

8. P.W.1 is the victim girl. According to the prosecution, she was aged about 7 years at the time of incident. The trial Court after putting relevant questions to her and confirming that she is capable of giving evidence,

proceeded to record her evidence. In her evidence, P.W.1 has stated that at the time of incident she was studying in III standard in Jyothinagar Government School and she has been promoted to IV standard. She has deposed that when she was studying in III standard, one day after coming back from her school, she went to the playground to play at about 4.00 p.m. She was tired and became thirsty and therefore, she went to the nearby house to drink water. In the said house, the accused, called her inside the house in the guise of giving water and he closed the door. Thereafter, he removed her panty and committed the heinous act. She shouted. At that time, one aunty came and knocked the door. The accused gagged her mouth and thereafter opened the door. The said aunty informed Mujju Bhayya [P.W.5] about the incident. The said Mujju Bhayya and his friends assaulted the accused and took him to the Police Station. She also informed about the incident to P.W.5 and his friends. She was then taken to the Police Station. After she went to the Police Station, her mother also came to the Police Station. Later she was taken to the hospital and before the doctor, she informed about the incident. She has further stated that her statement was

recorded before the learned Magistrate as per Ex.P1. P.W.1 has identified the accused, who was present before the Court.

9. In the cross-examination of P.W.1, it is elicited that along with her, four more children were playing. However, they did not come along with her to drink water. There are other houses nearby. In the house of the accused, none were present. She does not know the name of the aunty who came when she screamed. Though it was suggested to her that no such incident took place, however she has denied the same. She has also denied the suggestion put to her that she has deposed as per the instruction of her mother [P.W.2] and Mujju Bhayya [P.W.5].

10. P.W.2 is the mother of the minor victim girl and she is the first informant. The complaint is marked as per Ex.P2. She has deposed that when she was working in the garment factory, her brother-in-law Muzamil Pasha [P.W.5] came to the said factory at about 2.00 – 3.00 p.m. and informed her that P.W.1 has sustained some injuries to her leg. He took her to the Police Station. In the Police Station, her daughter and other people were present. The Police took

her, P.W.1 and her brother-in-law Muzamil to the hospital, wherein P.W.1 was medically examined. P.W.1 informed the doctor that one uncle did some bad act near her private part. The doctor informed that P.W.1 has been sexually assaulted. P.W.1 was not able to walk. She lodged the complaint as per Ex.P2.

11. In the cross-examination of P.W.2, she has denied the suggestion put by the defence that there was some enmity between the accused and Mujju Bhayya and therefore, a false case was filed against the accused at the instance of Mujju Bhayya.

12. P.W.3 is the panchwitness to Ex.P3-spot mahazar.

13. P.W.4 has deposed that on the relevant day, P.W.1 went to the house of the accused at around 12.00 noon and since she did not come out, she went to his house and saw him committing the heinous act. When she enquired with P.W.1, she also disclosed about the incident. In the cross-examination, she has stated that her house is after three houses away from the house of the accused.

14. P.W.5 is the brother-in-law of P.W.2. He has deposed that P.W.1 informed about the heinous act committed by the accused and at that time, P.W.2 had gone to work in the garment factory. He along with others took the accused to the Police Station and thereafter informed P.W.2 about the incident.

15. In the cross-examination, P.W.5 has stated that the accused was doing scrap business and he had a cart. He denied the suggestion put by the defence that, there was some quarrel between the accused and himself and in that background a false complaint was lodged against the accused.

16. P.W.6 is the senior resident of Cheluvamba Hospital, Mysuru. She has deposed that on 19.07.2016 at about 4.24 p.m. when she was on duty, P.Ws.2 and 1 came to the hospital along with WPC Vasanthakumari. History was furnished to her about the sexual assault committed on P.W.1. P.W.1 was subjected to medical examination. She has issued provisional certificate as per Ex.P4. The final opinion was furnished, which is marked as Ex.P4(b). She has stated that the RFSL Report was provided to her for issuing

the final opinion and the said document is marked as Ex.P7.

In the cross-examination of P.W.6, it is elicited that normally, there is possibility of tearing of hymen while playing, cycling, swimming and other activities.

17. P.W.7 is the PSI., who recorded the statement of P.W.1 as per Ex.P8.

18. P.W.8 is the Police Inspector who received the written complaint from P.W.2 and thereafter, transmitted the FIR [Ex.P10] to the jurisdictional Court. He has conducted the investigation and filed the charge-sheet.

19. The prosecution mainly relies on the evidence of P.Ws.1, 2, 4 and 5 apart from the medical evidence to prove the charges leveled against the accused. Age of the victim girl is not seriously disputed by the defence. A perusal of the evidence of P.W.1 goes to show that after returning back from the school, she went to the nearby playground to play and when she became tired and wanted to drink water, she went to the house of the accused which was adjacent to the playground and when she asked for water, the accused took her inside the house and closed the door. She has deposed

that the accused removed her underwear and committed some heinous act near her private part. She has deposed that when she screamed, one aunty came and knocked the door. The accused gagged her mouth and then opened the door. The said aunty informed Mujju Bhayya (P.W.5) and thereafter, Mujju Bhayya and his friends assaulted the accused and took him to the Police Station. The said aunty mentioned by P.W.1 in her deposition is none other than P.W.4. On a careful perusal of the evidence of P.W.4, the same goes to show that according to her, she saw P.W.1 entering the house of the accused and since she did not come out of the house, she went and saw the accused committing the heinous act. Thereafter, she enquired with P.W.1 and P.W.1 informed her that the accused committed the bad act. The evidence of P.W.4 clearly establishes that P.W.1 was inside the house of the accused on the relevant day. However, if the evidence of P.Ws.4 and 1 is carefully perused, then it does not indicate that P.W.4 is an eye-witness to the incident as deposed by her. P.W.1 has stated that only when the said aunty [P.W.4] knocked the door, the accused opened the door and therefore, the question of P.W.4 seeing the

accused committing the alleged sexual assault on P.W.1 cannot be believed.

20. Mujju Bhayya is examined as P.W.5. He is none other than the younger sister's husband of P.W.1. According to P.W.5, when he enquired P.W.1, she informed him that the accused touched her body and committed some bad act. Perusal of the evidence of P.W.2-first informant also goes to show that P.W.1 informed before the doctor that the accused committed some bad act near her private part. The entire evidence of P.Ws.1, 2, 4 and 5 if carefully examined, then the same does not establish beyond reasonable doubt that there was penetrative sexual assault committed by the accused against the victim girl. The contention of the learned counsel for the appellant is that the victim being a minor, aged about 7 years and if any such penetrative sexual assault has been committed on her, then there would have been serious injuries on her private part. On the other hand, medical evidence does not suggest such serious injuries. To appreciate the said contention, it is relevant to appreciate the evidence of the doctor, who is examined as P.W.6.

21. P.W.6 on local examination of the victim girl opined that hymen was not intact. Labia minora erythematous, redness present in the labia majora. Tenderness present. Pubic hair absent. Minimal bleeding per vagina present. She has stated that since the victim was suffering from pain in genitalia, samples i.e., vaginal swab, vaginal smear were collected under sedation. Violet colour frock with yellow flowers, white and pink T-shirt, light green colour chudidar pant of patient were collected and sealed. Collected materials and sealed articles and clothes were sent through WPC Vasantakumari to hand over the same to the Investigating Officer for sending them for RFSL examination. Provisional certificate was issued stating that the final opinion can be given after receipt of the FSL report. The said certificate has been marked as per Ex.P4. It is relevant to see that in the final opinion, P.W.6 has stated that there is evidence of physical and genital assault. According to P.W.6 there was minimum bleeding. As contended by the learned counsel for the appellant, if there was penetrative assault, there would have been severe injuries on the private part of the victim. It is elicited in the cross-examination of P.W.6

that there is possibility of hymen being ruptured during cycling, swimming, playing and other activities. The RFSL report which was provided to P.W.6 for getting final report has been marked as Ex.P7. P.W.6 has stated that the final opinion could be given after receiving the said FSL report. A perusal of the said Ex.P7-RFSL Report shows that semen was not detected in item Nos.1, 3, 4, 5, 7, 8 and 9 and spermatozoa was not detected in item No.2.

22. To attract an offence punishable under Section 6 of POCSO Act, the prosecution has to first establish that the accused has committed penetrative sexual assault as defined under Section 3 of the Act. Any one of the ingredients of Section 3(a) to (d) has to be proved.

23. The definition of penetrative sexual assault as defined under Section 3 of the POCSO Act reads as under:

"3. Penetrative sexual assault.-A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus

of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

24. In the case on hand, there is no dispute that the victim was aged about 7 years, hence she was below 12 years. However, to attract the charged offence under Section 5(m) read with Section 6 of the POCSO Act, the prosecution has to establish beyond reasonable doubt that there was penetrative sexual assault on the victim girl, as defined under Section 3 of the POCSO Act. On an over all appreciation of

the evidence and material on record, it is seen that the prosecution has not established beyond all reasonable doubt that the accused committed an act of aggravated penetrative sexual assault against the minor victim girl. However, the contention of the learned counsel for the appellant that a false case is foisted against the accused in view of some enmity, cannot be accepted. The defence has failed in its attempt to convince that a false case was foisted against the accused. The witnesses have denied the suggestion put to them in this connection. In that view of the matter, it has to be seen as to what is the offence committed by the accused.

25. The definition of Section 7 of the POCSO Act reads as under:

"7. Sexual Assault.-*Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."*

Section 9 of the POCSO Act deals with the definition of aggravated sexual assault.

Section 9(i) reads as under:

"9(i). whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child."

Section 9(m) reads as under:

"Whoever commits sexual assault on the child below twelve years;"

The punishment for aggravated sexual assault is provided under section 10 of the POCSO Act which reads as under:

"10. Punishment for aggravated sexual assault. -Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

26. Hence, In the instant case, though it cannot be said that the prosecution has established beyond all

reasonable doubt that the accused has committed penetrative sexual assault against the minor girl, however, from the evidence of P.W.1 and P.W.6 and the medical examination report, it is clearly established that the accused has committed an act falling under Section 9(i) and (m) of the POCSO Act i.e., committing aggravated sexual assault on the victim girl, aged about 7 years and therefore, he has committed an offence punishable under Section 10 of the POCSO Act.

27. For the foregoing reasons, the points raised are answered accordingly. Hence, I pass the following:

ORDER

The appeal is allowed in part.

The Judgment and Order of conviction and sentence passed by the VI Additional District and Special Judge, Mysuru in S.C. No.326/2016, dated 23.08.2007 for the offence punishable under Section 376(2)(i) of IPC and under Section 5(m) r/w. Section 6 of the POCSO Act is hereby set aside.

The accused/appellant is convicted for the offence punishable under Section 9(i) and (m) r/w. Section 10 of the POCSO Act.

The accused is sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.10,000/- [Rupees Ten Thousand only] and in default of payment of fine, to further undergo simple imprisonment for a period of one year.

The other part of the Judgment and order passed by the learned Sessions Judge shall remain intact.

**Sd/-
JUDGE.**

Ksm*