

**IN THE HIGH COURT OF ANDHRA PRADESH:
AT AMARAVATI**

Criminal Appeal No.66 of 2016

Between:

Dasari Sreenu, S/o. Koteswara Rao @ Kotaiah, aged 36 years, Pemula, near Peekalavagu, Backside of Medical Club, Guntur.

.... Appellant/Accused

And

The State of Andhra Pradesh, Rep. by its Public Prosecutor, High Court of Judicature, at Hyderabad.

....Respondent/Complainant

Date of Judgment pronounced on : 30.11.2022.

THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

THE HON'BLE SRI JUSTICE B.V.L.N. CHAKRAVARTHI

1. Whether Reporters of Local newspapers : Yes/No
may be allowed to see the judgments?
2. Whether the copies of judgment may be marked
to Law Reporters/Journals : Yes/No
3. Whether the Lordship wishes to see the fair
copy of the Judgment? : Yes/No

JUSTICE C. PRAVEEN KUMAR

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! Counsel for the Appellant : Sri. S.M. Subhan.

Counsel for the Respondent: Sri S. Dushyanth Reddy,
Learned Addl. P.P.

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>Head Note:

? Cases referred:

1) 2022 SCC OnLine Del 1762

THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR
AND
THE HON'BLE SRI JUSTICE B.V.L.N. CHAKRAVARTHI
CRIMINAL APPEAL No.66 of 2016

JUDGMENT : *(per Hon'ble Sri Justice C. Praveen Kumar)*

Sole accused in Sessions Case No.66 of 2014 on the file of the Special Judge Constituted under Protection of Children From Sexual Offences Act-cum-I Additional Sessions Judge, Guntur, is the appellant herein. He was tried for the offences punishable under Section 376 [2][i] of Indian Penal Code, 1860 [for short, "I.P.C."] and Section 6 of Protection of Children From Sexual Offences Act, 2012 [for short, "POCSO Act"] for causing sexual assault on the victim girl by name Aluri Kavya on 11.07.2014 at about 1.00 a.m. in the fields nearer to Subbareddy Colony, Guntur Rural.

2. By its judgment, dated 13.11.2015 the learned Sessions Judge convicted the accused for the offence punishable under Section 376 [2][i] I.P.C. and sentenced him to suffer Imprisonment for Life, which shall mean,

imprisonment for the remaining period of the natural life of the accused and also to pay fine of Rs.1000/- in default, to suffer Simple Imprisonment for Three Months. But, however, no separate sentence was awarded for the offence under Section 6 of POCSO Act, in view of the Section 42 of the POCSO Act. Apart from that, the learned Sessions Judge directed the Government of Andhra Pradesh to pay compensation of Rs.2,00,000/- from the Victim Compensation Fund [VCF] which is constituted under A.P. Victim Compensation Scheme, 2015 *vide* G.O.Ms.No.43, dated 15.04.2015, within thirty days from the date of receipt of the judgment.

3. The facts, in issue, are as under:-

(a) P.W.1 is the father of the victim girl by name Aluri Kavya. P.W.2 is the mother of victim girl. P.Ws.3 to 7 are the residents of Subbareddinagar, Guntur. The victim girl was aged about nine years at the time of incident. She was a dumb girl. Apart from that the mental age of victim girl was around four years one month, with corresponding I.Q. of 45, suggestive of Moderate Mental retardation.

(b) On 11.07.2014, P.Ws.1 and 2 slept in front of their house, while their children slept inside the house. At about 1.00 a.m. P.W.1 woke up and found the light inside the house switched off. Then, he went inside the house and switched on the light, but found his elder daughter [victim] missing. He informed the same to P.W.2 and asked her to take care of the two children. Thereafter, P.W.1 along with P.W.3 went in search of his daughter. In the vacant site, they heard cries of his daughter from the said land, which is nearer to his house. As such, P.Ws.1 and 3 rushed to the said land and with the help of Torch Light saw the accused about to lie on the victim girl. P.W.1 raised cries and on hearing the same the accused ran away and hide himself in the bathroom of P.W.6. He was chased and apprehended the accused. Information about the same was given to the Police [P.W.16], who came to the said area, where the accused was handed over to the Police. They noticed bite marks on the chest, stomach, lips and private parts of the victim girl. At about 2.00 a.m. P.W.1 went to the Police Station and lodged a report. Basing on which, a case in Crime No.556 of 2014 of

Nallapadu Police Station was registered under Sections 376-F I.P.C. and Section 4 and 8 of POCSO Act. Ex.P14 is the F.I.R.

(c) P.W.17-Inspector of Police, who took up investigation in this case, proceeded to the scene of offence and examined P.W.2, while he examined P.W.1 in the Police Station itself. He prepared a panchanama of the scene in the presence of P.Ws.7 and others which is placed on record as Ex.P2. He also got prepared a rough sketch of the scene which is marked as Ex.P15. He also examined P.Ws.3 to 6 and recorded their statements. He addressed a letter to the Superintendent of Police, Guntur Urban for deputing Woman Sub-Inspector for recording the statement of victim girl. P.W.12-Woman Sub Inspector, who was deputed to record the statement of victim girl, aged about nine years, could not record her statement as the victim girl was unable to give answers, as she is dumb and mentally retarded. P.W.17 got photographs of the victim girl at the Government General Hospital, Guntur through P.W.8-Photographer. He then recorded the confessional statement of the accused, pursuant to which,

M.Os.1 and 2 the dress, worn by the accused at the time of commission of offence was seized. On 13.07.2014, M.O.3 the dress, wore by the victim girl at the time of commission of offence was handed over to him by her mother.

(d) The material on record show that the victim girl was sent to P.W.14-the then Civil Assistant Surgeon on 12.07.2014, who examined her and issued Ex.P11-Wound Certificate. According to the doctor, there is a possibility of sexual assault.

(e) The accused was arrested and was also sent to P.W.13-Assistant Professor in Department of Forensic Medicine, Guntur Medical College, Guntur, on 23.07.2014, who on examination gave Potency Certificate under Ex.P10 and opined that there is nothing to suggest that the accused is not capable of sexual assault. The evidence of P.W.10-Assistant Professor in Department of Obst. and Gynaecology, GGH, Guntur also shows that there is possibility of sexual assault on the victim girl.

4. After collecting all the necessary documents, P.W.17-Inspector of Police filed a Charge Sheet, which was taken

on file as Sessions Case No.66 of 2014 on the file of Special Judge Constituted Under Protection of Children From Sexual Offences Act-cum-I Additional Sessions Judge, Guntur.

5. On appearance of the accused, copies of the documents as required under Section 207 Cr.P.C. were supplied to him.

6. Basing on the material available on record, charges, as referred to earlier, came to be framed, read over and explained to the accused in Telugu, to which, he pleaded not guilty and claimed to be tried.

7. To substantiate its case, the prosecution examined P.Ws.1 to 17 and got marked Exs.P1 to P15 and M.Os.1 to 3.

8. After the closure of Prosecution evidence, the accused was examined under Section 313 Cr.P.C. with reference to the incriminating circumstances appearing against him in the evidence of the prosecution witnesses, to which, he denied. The accused did not adduce any oral or documentary evidence on his behalf.

9. Though, the victim girl was not examined as a witness, but having regard to the evidence of P.Ws.1, 3 and 5 coupled with the evidence of P.W.6 and the medical evidence, the learned Sessions Judge convicted the accused under both the charges. Challenging the same, the present appeal came to be filed.

10. Sri S.M. Subhan, learned counsel for the appellant vehemently submits that when victim herself is not examined, the question of convicting the accused for the offence of rape would not arise. He further submit that the evidence of the doctor and the evidence of P.Ws.1, 3 and 5 only show that there was an attempt to commit rape and as such conviction for committing the offence under Section 376 I.P.C. is illegal.

11. On the other hand, Sri S. Dushyanth Reddy, learned Additional Public Prosecutor, would contend that in view of the presumption under Section 29 of the POCSO Act, the trial Court was right in convicting the accused for the offence punishable under Section 6 of the POCSO Act and also under Section 376[2][i] I.P.C when the medical

evidence on record show that there was a tear and fresh bleeding.

12. The point that arises for consideration is, ***whether the prosecution was able to bring home the guilt of the accused beyond reasonable doubt?***

13. As seen from the record, the accused was tried under two counts, namely under Section 376[2][i] I.P.C and Section 6 of POCSO Act. Before dealing with the Section 6 of POCSO Act, it would be appropriate to refer to Section **29 of the POCSO Act**, which states as under:-

Sec.29:- *“Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3,5,7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”*

A reading of the above said provision makes it clear that where a person is prosecuting for the offences under Sections 3,5,7 and 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempting to commit the offence as the case may be, unless the contrary is proved. Therefore, the argument of

learned counsel for the appellant that the trial Court could not have convicted the accused when there was only an attempt may not be correct. Even accepting the said argument to be true, in view of Section 29 of the POCSO Act, the Court can convict the accused in view of the presumption.

14. The question now is, ***whether there was any act of rape by the appellant/accused?***

15. As seen from the record, the incident in question took place at night time. P.Ws.1 and 2 are the parents of the victim girl, who was aged about nine years and there was mental retardation. A conjoint reading of the evidence of P.Ws.1 and 2 would show that on 11.07.2014 in the night time at about 1.00 a.m. P.W.1 woke up and noticed light inside the house was switched off. Immediately, he switched on the light and found his daughter missing. He woke up his wife P.W.2, and asked her to take care of her two children, thereafter went to the house of P.W.3 and informed him about missing of his daughter. Thereafter, both of them along with P.W.5 started to search the victim

with the help of torch light, in an open place situated behind the house of P.W.1. They heard the cries of the victim girl and immediately focused the torch light and noticed the accused lying on the victim girl. On seeing P.Ws.1, 3 and 5, the accused started running away and after a chase he was apprehended while he was in the bathroom of the house of P.W.6. It appears that at 1.00 A.M/mid night, P.W.6 heard some sounds in her bathroom. She cried loudly which attracted the attention and all of them came and apprehended the accused. The victim as well as the accused were brought to the house of P.W.1 where they were noticed bite marks on cheeks, chest and injuries on the buttocks and her private parts of the victim girl. The law was set into motion on the arrival of Police.

16. From the evidence of these three witnesses, it is very much clear that the accused was found trying to outrage/rape the victim on seeing P.Ws.1, 3 and 5 and was apprehended immediately in the house of P.W.6. Therefore, the presence of accused at the scene and the victim being subjected to sexual assault namely biting on

cheeks, chest, buttocks and private parts stand established.

17. It is no doubt true that the eye witnesses who apprehended the accused near the scene were not in a position to say as to whether they saw the accused committing rape. But, one fact which is to be noted here is that the victim was found missing from the house at 1.00 a.m. on the date of incident and all of them searched for her with the help of torch light in and around the area behind the hut of P.W.1. Therefore, one does not know as to what happened prior to noting the accused and victim. Only on hearing the sounds, they could focus the torch light and see the accused and the victim girl. Having regard to the darkness they would not have been in a position to describe or see the manner in which things were happening at the site. But, it stands established from their evidence, that there were injuries on the body namely the bite marks all over the body. This evidence is now required to be tested with the evidence of the doctor who examined the girl immediately thereafter.

18. P.W.10-Assistant Professor in Department of Obst. and Gynaecology stated that on 12.07.2014 at 3.30 a.m. the victim girl aged about nine years was produced before her, through one Constable. After taking the consent of her mother she examined the victim girl and found the following injuries.

“External Genitalia – Labia major normal, Labia minor normal. Fourchette is normal. Hymen is not intact and there is fresh tear and bleeding present.

I have collected Vagina smears and vulval swabs. I have sent the same to the RFSL, Guntur.”

Though the Labia minor was normal but the Hymen was not intact and there was fresh tear and bleeding present. Unless some sexual assault or the insertion of penis was there, one cannot expect a fresh tear and bleeding. This evidence of the doctor gets fortified with the evidence of FSL report which speaks about Semen and Spermatozoa being detected in items 3 and 4. Item No.3 is nothing but a multi coloured design Punjabi dress of the victim girl. Therefore, the evidence of the doctor coupled with the RFSL report in our view established the offence alleged against the accused.

19. Though, the learned counsel for the appellant tried to contend that there is only an attempt to commit rape, in view of the evidence of P.Ws.1, 3 and 5 coupled with the evidence of doctor, but we are not inclined to accept his argument for the reason that the victim girl was traced at 1.00 a.m. in the fields while the accused was committing the offence and by 3.30 a.m. she was subjected to medical examination, where the doctor found fresh tear and bleeding. Therefore, without hesitation it can be said that the prosecution has established its case beyond reasonable doubt.

20. Now, the question for the trial Court was ***whether the accused is required to be convicted under Section 376[2][i] I.P.C. and Section 6 of POCSO Act?***

21. Learned counsel for the appellant tried to contend that when the victim girl is not examined, the question of convicting the accused for rape is inconsistent we are not in agreement with the same. Here is a case where the victim girl is not only dumb and aged about nine years, but her mental age was found to be four years one month

with corresponding I.Q of 45, suggestive of Moderate Mental retardation. For this reason only the prosecution though that it may not be proper to examine the victim girl and even if she was examined she will not be in a position to give any answers having regard to her moderate mental retardation. Apart from that the evidence of P.W.12-Woman Sub-Inspector, would show that during the course of investigation, she was summoned to record the statement of the victim girl, but, though P.W.12 put some questions, the victim girl was unable to answer or understand the same. In view of the above non-examination of the victim girl in the facts and circumstances, more so when the identification of the alleged victim is not in dispute, may not affect the prosecution case.

22. In ***Mukish vs. State***¹, the Delhi High Court observed as under:-

“20. The contention as raised by the learned counsel for the appellant that the victim child was not examined cannot be fatal to the prosecution case, for the reason that the victim was too young, hardly 4 years old at the

¹ 2022 SCC OnLine Del 1762

time of the incident. Being of such tender age she was not in a position to give any statement. The learned Trial Court has rightly held that the tender age of the victim coupled with her lack of maturity to understand as to what ghastly/wrong act had been committed with her, was the reason why she was not examined, or arrayed as a witness.

21. The learned Trial Court was justified in holding that non-examination of the victim did not prove fatal for the prosecution case in view of the scientific evidence available on record. The evidence on record clearly shows that semen was detected on the blanket Ex.P-1, which, as per the FSL Report, belonged to the accused i.e. the appellant herein. Thus, the learned Trial Court rightly held that this sufficiently proves penetrative sexual assault even in the absence of any direct evidence/testimony of the victim or her parents. This scientific evidence coupled with the other circumstantial evidence unerringly point to the committal of the offence by the accused.”

23. After referring to Section 42 of the POCSO Act and taking into consideration the gravity of the offence and the punishment to be imposed in terms of the Section 42 of the POCSO Act, the trial Court rightly convicted and sentenced the accused for the offence under Section 376[2][i] I.P.C. while maintaining the conviction under both the counts.

24. In the result, the appeal fails and it is accordingly ***dismissed***, confirming the conviction and sentence passed in Sessions Case No.66 of 2014 on the file of learned Special Judge Constituted Under Protection of Children From Sexual Offences Act-cum-I Additional Sessions Judge, Guntur *vide* judgment dated 13.11.2015.

Consequently, miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

JUSTICE B.V.L.N. CHAKRAVARTHI

Date: 30.11.2022

**Note: LR copy to be marked
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THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

AND

THE HON'BLE SRI JUSTICE B.V.L.N. CHAKRAVARTHI

CRIMINAL APPEAL NO.66 OF 2016

(Per Hon'ble Sri Justice C. Praveen Kumar)

DATE: 30.11.2022

MS