

**IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH**

DATED THIS THE 31ST DAY OF OCTOBER, 2022

PRESENT

**THE HON'BLE MRS. JUSTICE K.S. MUDAGAL
AND
THE HON'BLE MR. JUSTICE ANIL B. KATTI**

CRIMINAL APPEAL NO.200020/2019

BETWEEN:

Basavaraj alias Basavantrao S/o Shivalingappa,
Age: 22 years, Occ: Private Work,
R/o Ikkalki Village, Tq. Aland,
Dist: Kalaburagi.

(By Sri Vishal Pratap Singh, Advocate)

... Appellant

AND:
The State of Karnataka
Through Madanahipparga P.S.
Represented by Addl. SPP
High Court of Karnataka, Bench at
Kalaburagi.

(By Sri Prakash Yeli, Addl. SPP)

... Respondent

This Criminal Appeal is filed under Section 374(2) of Cr.P.C., praying to set aside the impugned judgment of conviction and order of sentence dated 11.12.2018 passed by the Hon'ble Court of II Addl. Sessions Judge at Kalaburagi in Special Case (POCSO) No.8/2016, by

allowing this appeal, consequently acquit the appellant of the charges leveled against him.

This appeal coming on for hearing, through physical hearing/video conference, this day **K.S. MUDAGAL, J.,** delivered the following:

JUDGMENT

"Whether the trial Court was justified in convicting and sentencing the appellant for the offence punishable under Section 366-A, 376(2)(i) of IPC and Section 4 of the POCSO Act?" is the question involved in this case.

2. The appellant was prosecuted in Special Case No.8/2016 on the file of the II Additional Sessions Judge at Kalaburagi for the offences punishable under Sections 366-A and 376(2)(i) of IPC and Section 4 of POCSO Act on the basis of the charge-sheet filed by the Madanahipparga Police in Crime No.76/2015 of their Police Station. Crime No.76/2015 was registered against the appellant for the aforesaid offences and for the offences punishable under Sections 5, 17 and 18 of POCSO Act, on the basis of the complaint filed by PW1 - Sridevi as per Ex.P1. PW1 is the

mother of the victim PW2. PW3 is the father of PW1. PW4 and PW5 are the brothers of PW2.

3. The case of the prosecution in brief is as follows:

Appellant was inducing the victim, a minor girl - PW2, aged 15 years in the guise of love. During intervening night of 22-23.11.2015 at 2.00 a.m., he kidnapped PW2 from the lawful custody of her parents and took her to Dudhani and Solapur promising to marry her. On 26.11.2015 at 8.00 p.m., by the side of the railway track situated behind the Railway Station, Dudhani Town, he committed penetrative sexual assault on the victim. PW1 filed complaint as per Ex.P1 alleging that accused kidnapped the victim, later they were traced in Madinahipparaga Village, and the victim revealed to them about the penetrative sexual assault committed by the appellant on her at Dudhani Railway Station.

4. On the basis of the complaint Ex.P1, PW14 registered the FIR as per Ex.P12 on 27.11.2015 at 1:30 p.m., and delivered the same to the Court on the same day at 9:00 p.m. PW16 handed over the investigation to PW17. PW17 conducted the investigation and filed charge-sheet.

5. The trial Court on taking cognizance and hearing the parties framed the charges against the appellant for the offences punishable under Sections 366-A and 376(2)(i) of IPC and Section 4 of POCSO Act. To substantiate its case, prosecution examined PW1 to PW17, got marked Ex.P1 to P14 and MOs 1 to 4. Appellant was examined under section 313 of Cr.P.C. He did not lead any defence evidence. However, during the course of prosecution evidence, he got marked Exs.D1 to D11 by way of contractions and confrontation.

6. The trial Court on hearing parties, by the impugned judgment and order convicted the appellant for the offences punishable under Section 366-A and 376(2)(i)

of IPC and Section 4 of the POCSO Act. Further, by the impugned order the trial Court sentenced the appellant to imprisonment for life and fine of Rs.1,00,000/- for the offence punishable under section 376(2)(i) of IPC and Section 4 of POCSO Act and on default to pay fine amount, to undergo Simple Imprisonment for 2 years. For the offence under Section 366-A of IPC, the trial Court sentenced the appellant to undergo Rigorous Imprisonment for 10 years and fine of Rs.1,00,000/-, in default to pay fine amount, to undergo Simple Imprisonment for a period of 2 years.

7. The appellant is calling in question the said judgment and order of conviction and sentence in the above appeal. Sri Vishal Pratap Singh, learned counsel for the appellant reiterating the grounds of the appeal submits that the prosecution failed to prove beyond reasonable doubt the charges brought against the appellant. He further submits that the prosecution evidence itself shows that it was the victim who forced the appellant to take her

from the village and absolutely there was no evidence with regard to penetrative sexual assault. He further submits that the theory of penetrative sexual assault was not corroborated by the medical evidence. Sofar as the age of the victim he submits that the evidence of PW8, the Headmaster was not based on the primary evidence like, admission register or entries and Ex.P6 - the endorsement issued by the School was not a primary evidence. He submits that the trial court has failed to appreciate the evidence on record in sound and sustainable manner. Therefore he submits that the impugned judgment and order are liable to be set aside.

8. Justifying the impugned judgment and order, Sri Prakash Yeli, learned Additional State Public Prosecutor submits that the fact of the appellant taking away the victim girl from the custody of the parents from 22.11.2015 till 26.11.2015 was proved beyond all reasonable doubt. He submits that though the victim, PW2 turned hostile during the course of cross-examination,

apparently that was under the influence of the appellant as the cross-examination was not conducted on the day of her chief-examination itself. Sofar as the age of the victim her evidence that she is aged 16 years was not challenged by the appellant in her cross-examination. The trial court had no reason to disbelieve that she was aged below 16 years. Sofar as penetrative sexual assault, he submits that the victim in her statement under Section 164 of Cr.P.C. recorded by P.W.9, the Judicial Magistrate, in her examination before the trial court and the statement before the police has categorically stated that the accused committed penetrative sexual assault on her. In the light of such positive evidence even if the medical evidence is not concrete about the sexual assault the court has to take into consideration the evidence of the victim. Moreover, such evidence further confirms the presumption under Sections 29 and 30 of the POCSO Act. He submits that the said presumption was not rebutted by the appellant. Therefore the trial court was justified in convicting and sentencing the appellant.

9. To sustain the conviction and sentence for the charge under Sections 376(2)(i) and 366-A of IPC and Section 4 of the POCSO Act, the prosecution has to prove beyond all reasonable doubt the following aspects:

- i. *That the victim was aged below 18 years;*
- ii. *That the victim was kidnapped from the lawful custody of her parents for the purpose or with an intention to subjecting her to sexual assault; and*
- iii. *The appellant/accused has committed penetrative sexual assault on her.*

Reg. Age of the victim:

10. Right from the filing of the complaint till the trial before the court, the victim, complainant, the Medical Officer, PW12 and Headmaster and PW8 consistently deposed/stated that the victim was aged below 18 years. It is no doubt true that PW8, the Headmaster of Srimanth Dhotre Memorial High School, Mogha(B) did not produce

the original admission register or the extract of the admission register. According to this witness, PW2 studied in Ilkkalki Higher Primary High School upto 8th standard and thereafter she joined Srimanth Dhotre Memorial High School with a transfer certificate issued by Higher Primary School. The transfer certificate was not produced. Ex.P6 is not even the copy of the said transfer certificate, but was only an endorsement allegedly issued by PW8 on the basis of transfer certificate of PW2. Therefore there is force in the submission of the learned counsel for the appellant that evidence of PW8 and Ex.P6 which is not primary evidence was insufficient to hold that the victim was aged below 18 years.

11. However, PW1 and PW2 consistently deposed that PW2 was aged 16 years while tendering her evidence as on 18.02.2017. That evidence was not impeached in the cross-examination of those witnesses. In addition to that, PW12, the doctor who examined PW2 on 27.11.2015 based on the radiological report assessed the age of the

victim within the range of 16-18 years. Having regard to the unimpeached evidence of PW1 and PW2 with regard to age of PW2 it can be said that the evidence of PW12 corroborated their evidence. Therefore Trial Court was justified in holding that the victim was aged below 18 years.

Reg. Kidnapping and penetrative sexual assault:

12. To convict an accused for the offence punishable under Section 366-A of IPC, there should be kidnapping of a minor girl by inducement with an intention or knowledge that she is likely to be forced or seduced for illicit intercourse. If the element or intention or knowledge of subjecting the victim girl for sexual intercourse not established, then Section 366-A of IPC is not attracted. Therefore this court has to see whether there was evidence to show the knowledge or intention of the accused for subjecting the victim to penetrative sexual assault.

13. To prove the penetrative sexual assault on the victim the prosecution relied on the evidence of PW2 the

victim, PW12 the doctor who examined her, PW1 the mother of the victim, PW3 the maternal grandfather of the victim and PW9, the Judicial Magistrate who recorded the statement of P.W.2 under Section 164 of Cr.P.C. Out of them, PW2 is the direct witness and the other witnesses are the hearsay witnesses. According to them, PW2 revealed to them about accused committing penetrative sexual assault on her.

14. It is the specific case of the prosecution itself that the alleged penetrative sexual assault was only once on 26.11.2015 at 8:00 p.m. near the railway track beyond the Dudhani Railway Station. It is not the case of the prosecution that there was repetitive penetrative sexual assault. Though P.W.2 in her chief-examination stated that accused took her from her parental house to Solapur and Solapur to Pune, she does not state that in those places accused committed sexual assault on her. She only states in the chief-examination that after their arrival to Dudhani at 8:00 p.m., the accused took her behind the

railway station saying that they will talk to each other and there he committed rape on her. She says that police came there and apprehended both of them, brought them to the Madanahipparga Police Station. She further says that by that time her family members had given missing complaint. On police enquiring her, her parents, her maternal uncle and grandfather came to the police station and from their police took her to hospital, from hospital they took her before the Magistrate in Kalaburagi and she gave statement there.

15. Neither P.W.1 nor any witnesses/relatives of P.W.1 stated that they had given missing complaint before the police. P.W.1 stated in her complaint that her daughter was missing from 22.11.2015 from 3.00 a.m. and they came to know that the appellant had kidnapped her and on 26.11.2015 at 10.00 p.m. their daughter was traced in Madanahipparga village and they took her to their house, then she took her to the police station and filed the complaint. According to her, PW2 revealed that

the appellant committed rape on her on 26.11.2015 at 8.00 p.m. in Dudhani Railway Station. Therefore there are material inconsistencies/contradictions in the evidence of PW2 and PW1 with regard to herself and the appellant being traced and filing of the complaint.

16. PW2 in her cross-examination gave a total gobyte to the alleged act of penetrative sexual assault. She says that she was in love with the appellant and her parents had decided to perform her marriage with her maternal uncle against her wish. Therefore she forced the appellant to take her away to avoid such marriage. She further stated that though the appellant and herself moved in several places like, Solapur, Pune and Dudhani, the appellant did not behave with her in any offensive manner or inflicted any sexual assault on her.

17. It is true that in her statement under Section 164 of Cr.P.C., Ex.P2 she has stated that, the appellant committed forced sexual intercourse on her on 26.11.2015 at 8.00 p.m. However, in the chief-examination itself she

states that after police brining her and the appellant to the Madanahipparga Police Station, when she was taken to the hospital and before the Magistrate she was escorted by the police, her parents, grandfather and relatives. In the cross-examination she states that she gave such statement before the Magistrate and in the chief-examination at the behest of her family members.

18. The trial court itself has recorded during the course of evidence of PW2 that PW2 insisted that her family members shall not be present during her deposition. She also stated that she has threats from her family members, she has no confidence in them and in their absence she can depose without any fear. It is material to note that accepting such of her statement, the trial court recorded her statement keeping family members away from the court room. While holding that PW2 has changed her version at the behest of the accused, the trial Court overlooked its own finding that PW2 could depose fearlessly only in the absence of her family members.

Since PW2 herself did not adhere to her evidence in the cross-examination with reference to the penetrative sexual assault on her by the appellant, the evidence of witnesses namely, P.Ws.1, 3 and investigating officers has no legs to stand as their evidence was based only on the evidence of PW2.

19. The only other evidence which could be adverted to see whether there was penetrative sexual assault was the evidence of P.W.12, the doctor who examined P.W.2. P.W.12 in her evidence clearly stated that there was old mark of tearing of hymen of P.W.2. She stated that on the physical examination of the victim and the FSL report she did not find any evidence of the victim participating in sexual intercourse, but there was proof of her participating in an act similar to the act of sexual intercourse.

20. According to her, traces of the tearing of the hymen was more than seven days old prior to the examination of P.W.2. As already pointed out, the act of

penetrative sexual assault took place on 26.11.2015 at 8.00 p.m. The victim was examined by P.W.12 on 27.11.2015. Therefore, the said injury was not relatable to the alleged sexual penetration inflicted on 26.11.2015. If really there was such sexual assault on 26.11.2015 at 8.00 p.m., there should have been a fresh injury or fresh scar. Therefore the charge that there was penetrative sexual assault by the appellant on P.W.2 on 26.11.2015 at 8.00 p.m. was not proved beyond reasonable doubt.

21. It is no doubt that Sections 29 and 30 of the POCSO Act confer a statutory presumption with regard to commission of the offences under Sections 3, 5, 7, 9 of the Act or abetment of the same and culpable intention on the part of the accused in a prosecution of such offences. However, even to raise that presumption the prosecution has to discharge its initial burden of proof of such penetrative sexual assault. This view of ours is supported by the judgments of the Supreme Court in **APS Forex Services Pvt. Ltd. Vs. Shakti International Fashion**

Linkers reported in **(2020) 12 SCC 724** wherein the Hon'ble Supreme Court held that that presumption are devices by use of which the courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Presumption does relieve the prosecution of discharging its burden to prove the guilt of the accused with the standard of proof laid down under the general law. It is only when the foundational facts constituting offence charged against the accused are proved by the prosecution, the presumption gets attracted. It is trite law that merely on the basis of presumption, a finding of guilt cannot be recorded against accused facing prosecution for criminal offences.

22. In the light of the above facts and circumstances, the trial court committed a serious error in holding that the prosecution has proved beyond all reasonable doubt that the appellant/accused committed penetrative sexual assault on the victim on 26.11.2015 at 8.00 p.m. nearby Railway Station at Dudhani town.

23. Sofar as the offence under Section 366-A of IPC, in view of the finding of this court with regard to penetrative sexual assault punishable under Section 4 of the POCSO Act, the allegation that the appellant kidnapped the victim with an intention to subject her to sexual intercourse fails. Thereby the charge under Section 366-A of IPC fails. However, the evidence of P.W.2 and the other witnesses clearly show that the appellant took P.W.2 from the custody of her parents during the intervening night of 22/23-11-2015 and moved with her till the police apprehended them on 26.11.2015. The appellant himself in his statement under Section 313 of Cr.P.C. states that at the behest of P.W.2 on 23.11.2015 at 8.00 p.m. he took her to Pune and brought her back to Dudhani Railway Station and there police apprehended them. Therefore there is clear admission on his part that he has taken the victim out of the lawful guardian of her parents.

24. It is contended that the victim was in the risk of forced marriage with her maternal uncle and to help her

the appellant took such steps. It is already held that the victim was minor. Therefore the appellant had the duty to take the consent of her parents before he took her out of the custody. If he wanted to help her to avoid any forced marriage, several other legal recourses like reporting the matter to the police or the Department of Women and Child Development were open to him. The ignorance of law cannot be an excuse to evade the consequences of his act under the law. If not under Section 366-A of IPC, his act falls under the offence punishable under Section 363 of IPC. Therefore, he is liable to be convicted and sentenced for the offence punishable under Section 363 of IPC.

25. The sentence for the offence under Section 363 of IPC is imprisonment of either description upto 7 years and fine. The records show that the appellant was arrested on 27.11.2015 and he was in judicial custody upto 18.07.2016. On 18.07.2016 he was released on bail in view of the bail order granted by this court in Crl.P.No.200759/2016 passed on 12.07.2016. After the

impugned order of conviction and sentence dated 11.12.2018 till this date he is in judicial custody. By this time he has already undergone rigorous imprisonment of 3 years 10 months 20 days post conviction and he has undergone pre conviction detention for a period of 8 months 21 days.

26. At the time of the offence, the appellant was admittedly aged 22 years. He has no other criminal antecedents. As per the records he was eking out his livelihood as an Electrician. Under the circumstance, the interest of the justice would be met by confining the sentence to the period of detention already undergone by him. The impugned judgment and order requires to be modified accordingly. Hence, the following:

ORDER

The appeal is allowed in part.

The impugned judgment and order of conviction and sentence for the offences punishable under Section 376(2)(i) and Section 366-A of IPC and Section 4 of POCSO Act are hereby set aside.

The appellant/accused (Basavaraj alias Basavantrao S/o Shivalingappa) is convicted for the offence punishable under Section 363 of IPC.

For the said offence, the appellant is sentenced to period of detention already undergone by him and fine of Rs.25,000/-. In default to pay the fine amount, he shall undergo simple imprisonment for two months.

Out of the fine amount, a sum of Rs.20,000/- shall be paid to P.W.2/victim as compensation and balance amount of Rs.5,000/- shall be remitted to the State.

Acting under Section 357-A of Cr.P.C., the matter is referred to District Legal Services Authority, Kalaburagi for determination and payment of compensation payable to P.W.2, the victim.

The appellant is entitled to refund of fine amount imposed by the trial court, if already deposited.

The order of the trial court with regard to disposal of the properties is maintained.

The trial court shall issue modified conviction warrant accordingly.

Communicate the copy of this order to the trial court and the concerned prison, forthwith.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

SBS*/BL