



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF JULY, 2023

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BEFORE

THE HON'BLE MR JUSTICE K.NATARAJAN

CRIMINAL APPEAL NO. 150 OF 2020

BETWEEN:

ABDUL KHADAR @ RAFIQ,
S/O LATE USMAN SAAB,
AGED ABOUT 45 YEARS,
R/AT NEAR AAHAT MEDICAL,
3RD CROSS,
7TH MAIN ROAD,
SHAMANNA GARDEN,
BANGALORE CITY – 560 030.

...APPELLANT

(BY SRI. RAJESH RAO K., ADVOCATE)

AND:

1. THE STATE BY
BYATARAYANAPURA P.S.,
BENGALURU,

REPRESENTED BY,
THE GOVERNMENT PLEADER,
HIGH COURT OF KARNATAKA – 560 001.

2. SMT.RUKSANA TAJ,
W/O ABDUL KHADAR @ RAFIQ,
AGED ABOUT 38 YEARS,
R/AT NO.NIL,
NEAR AAHATH MEDICALS,
3RD CROSS, 7TH MAIN ROAD,





SHAMANNA GARDEN,
BENGALURU – 560 038.

...RESPONDENTS

(BY SRI.S.VISHWAMURTHY, HCGP FOR R1;
SMT.GEETA MISHRA, AMICUS CURIE FOR R2)

THIS CRL.A. IS FILED U/S 374(2) OF CR.P.C. PRAYING TO SET ASIDE THE JUDGMENT AND ORDER DATED 25.09.2019 AND SENTENCE DATED 26.09.2019 PASSED BY THE LIV ADDITIONAL CITY CIVIL AND SESSIONS JUDGE CCH-55 SITTING IN CHILD FRIENDLY COURT, BENGALURU URBAN DISTRICT IN SPL.C.C.NO.30/2016, CONVICTING THE APPELLANT/ACCUSED FOR THE OFFENCE P/U/S 376 OF IPC AND SECTON 6 OF POCSO ACT AND SEC.506B OF IPC.

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

JUDGMENT

This appeal is filed by the appellant under Section 374(2) of Cr.P.C for setting aside the judgment of conviction and sentence passed by the Child Friendly Court, Bengaluru in Spl.C.C.No.30/2016 for having found appellant guilty and sentenced to undergo imprisonment of 20 years and pay fine of Rs.5,000/- for the offence punishable under Section 376(3) of IPC read with Section 6 of the POCSO Act, 2012 and in default of payment of fine he shall undergo imprisonment for a period



of 15 days and also sentenced to undergo simple imprisonment for a period of two years for the offence punishable under Section 506(B) of IPC.

2. Heard the arguments of Sri. Rajesh Rao.K, learned counsel for the appellant, Sri. S.Vishwa Murthy, learned HCGP for respondent No.1-State and Ms. Geeta Mishra, learned Amicus curie for respondent No.2.

3. The rank of the parties before the Trial Court is retained for the convenience of the Court.

4. The case of the prosecution is that on the complaint filed by P.W.3 one Ruksana Taj, mother of the victim girl to the police on 13.10.2015 alleging that she has married the appellant/accused which is the second marriage for her as her husband was died and the victim was born out of her first marriage. Subsequent to marrying the accused, she given birth to four children and previously the victim girl stayed in her sister's house-PW.4. Subsequently the accused being the step father of the victim, took the victim to his house and got admitted to the School. It is further alleged by her that her ration card was in Tumkur, she used to go to Tumkur for



buying ration and used to stay in the accused's mother house and come back by next day. It is alleged that accused by taking advantage of absence of the complainant, has sexually assaulted the victim girl who is the stepdaughter of the accused. The accused said to be continuously harassing for last one year and sexually assaulted her and thereafter the victim left the house and went to the house of her uncle and later stayed in the house of her aunt/P.W.4. The relatives of the victim and P.W.3 were proposing the marriage of the victim, but the accused told not to propose the marriage as she is young child and she has to study. But, in fact the accused was not ready to propose the marriage of the victim girl, as he is said to be sexually assaulting her. When the mother of the victim and her relatives called the victim to the house, victim refused to come and on enquiry she has revealed that her step father had sexually assaulted her during the night hours whenever her mother goes out of the house. Therefore, she is not intending to come to the house. When the victim's relatives especially brothers and sisters of the P.W.3 came to the house, the accused tried to escape by jumping from the building and sustained injuries. At that time, the police going for patrolling



found gather and took custody of the accused and later a complaint came to be registered and he was arrested on 13.10.2015. After completion of investigation, the police filed the charge sheet for the offences punishable under Sections 376, 506(B) of IPC and Sections 4, 6 and 8 of the POCSO Act.

5. The charges were framed against the accused and he has denied the charge sheet. Accordingly, the prosecution to prove its case, examined 20 witnesses and got marked 13 documents and after conclusion of prosecution evidence, the statement of the accused under Section 313 of Cr.P.C was recorded and case of the accused is one of the total denial but has not chosen to enter any defence. After hearing the arguments, the Trial Court found the accused guilty and convicted for the offence punishable under Sections 376(3) and 506(B) of IPC and Section 6 of the POCSO Act and it is under challenge.

6. Learned counsel for the appellant contended mainly that there is a delay in lodging the complaint and as per the prosecution witnesses, the accused said to be continuously sexually assaulted the victim for one year but the complaint



was filed on 13.10.2015 and the medical certificate has been marked as Ex.P11 as the Doctor was not examined by the prosecution, there is no cloths of the victim seized by the police. The D.W.1 was examined on behalf of the accused, his evidence has not been properly considered. There was a delay in preparing the complaint and as per the case, the police registered FIR at 4:30 a.m., whereas the accused has been arrested at 5:30 a.m. The appellant is in jail for almost seven years nine months and the Trial Court even though found guilty for the offence punishable under Section 376 of IPC but wrongly convicted for the offence punishable under Section 376(3) of IPC as it was amended before it came into force only in the year 2018 and at the time of incident, 376(3) of IPC was not all in the punishment provision. Therefore, on this ground, it is stated that the Trial Court wrongly convicted the accused for 20 years punishment for offence committed under non-existing law. Hence, prayed for allowing the appeal.

7. Per contra, learned HCGP supported the judgment of the Trial Court and contended that the evidence of the victim especially P.W.1 and her mother-PW.3 are categorically stated about the sexual assault made by the accused being the step



father of the victim girl and knife also has been seized by the police during investigation. All the witnesses supported the prosecution case and there is nothing to interfere in the judgment of Trial Court. Hence, prayed for dismissal of the appeal.

8. Learned amicus curiae for respondent No.2 also contended that the child has undergone tremendous trauma due to the sexual assault made by the step father who is an auto driver. He also threatened her with knife and to commit murder of her and her mother. Therefore, the child escaped from the house and stayed in her aunt's house. All the witnesses have categorically stated that when they proposed the marriage of the victim girl, the accused reacted not to send her out by marrying, as he wanted to sexually assault the victim. It is further contended that, if the accused if at all not committed the offence, why should he jumped out from the building and tried to run away. Ex.P11 and evidence of PW.1 was not at all disputed by the accused by cross-examination. Hence, prayed for dismissal of the appeal.



9. Having heard the arguments and perusal of records, the point that arises for consideration:

"1. Whether the prosecution proves beyond all reasonable doubt that the appellant being the step father of the victim girl-PW.1, he used to sexually harass her in the house when she was slept in the house and when her mother was absent and threatened her with criminal intimidation. Thereby he has committed the offence punishable under Sections 376 of IPC and Section 6 of the POCSO Act apart from Section 506 of IPC?

2. Whether the judgment of the Trial Court call for interference.?"

10. As I stated above, the prosecution to prove its case has examined 20 witnesses. It is worth to mention the evidence of the prosecution witnesses produced before the Trial Court.

11. PW.1-Victim girl has deposed that she is aged about 15 years, she was born to her father and accused was her stepfather. Her mother married the accused and having three male children and female child and all of them stayed in the house and after the death of her grandmother for some time she has stayed in the house of her aunt's house (Sultan Taj-



P.W.4) at Kalasipalyam. Subsequently, about four years back the accused being the stepfather took the Transfer Certificate and got admitted to the nearby school and she was studying 9th standard in the year 2015. Her mother used to go to Tumkur for buying provision through the ration card as the ration card was in Tumkur. She used to stay in the night and come back the next day. During the night the stepfather used to sexually assault her. She has stated that when she was sleeping in the room, the accused used to remove her cloth when she refused she shown the knife and committed sexual assault on her. Subsequently, on 20.09.2015 when her mother had gone to Tumkur to bring ration, the accused once again had sexually assaulted her by showing the knife and she has not disclosed the same to her mother has the accused threatened her. Subsequently, she went to the house of her aunt they proposed her for marriage and the accused did not agree for her marriage. Subsequently, her mother also called her to house but she refused to come due to sexual assault by accused. When enquired she disclosed the same to her aunts and her maternal uncles. After disclosing the same, her uncle and aunt everybody while questioning the accused, the accused at 12:00



a.m. tried to escape by jumping from the building and the patrolling police came and took the accused to the police station. Later, the victim girl and her mother lodged the complaint and thereafter she was taken to the hospital and after the medical examination, Section 164 Cr.P.C Statement was recorded as per Ex.P2. The police also prepared panchanama as per Ex.P1.

12. PW.2-Farhana Taj, aunt of PW.1 and sister of PW.3. She also deposes that she came to know about the sexual assault made by the accused on the stepdaughter through her sister PW.3 and the victim girl.

13. PW.3 Ruksana Taj, is the mother victim as well as wife of the accused. She also given evidence before the Trial Court about marrying the accused after the death her earlier husband and the victim born to earlier marriage and she used to go to Tumkur for the purpose of purchasing the grocery and she used to stay in the accused mother's house and used to come by next day and it was came to know by daughter that the accused sexually assaulted her daughter and she has not disclosed the same to her due to fear of the accused. Later, she



went to the house of her sister and when she questioned the victim she refused to come and thereafter disclosed about the sexual assault and the same was intimated to her brother and sister and all of them came to house. At that time, the accused tried to escape and jumped from the building and he sustained injuries on his legs and the police came and took him to the police station and lodged the complaint as per Ex.P3 and the police prepared the panchanam as Ex.P1.

14. PW.4-Sultana Taj, one of the sister of PW.3 where the victim was stayed in her house. She also deposed has deposed for and on behalf of the PW.1 , 2 and 3.

15. PW.5- Abass who is the spot panch witness to the Ex.P1(c). where the police came to the spot and prepared the Panchama.

16. PW.6-Jameel Ahamed who is another panch witness to the seizure of the knife as per the Ex.P4.

17. PW.7-Kabeerr Ahmed who is another uncle of the PW.3 and he also supported the prosecution case and deposed about the information received form the PWs.1 and 3 about the



sexual assault of victim by her stepfather. He also supported case prosecution.

18. PW.8-Shabeer Ullah Khan who is another panch witness to the seizure of Ex.P4 and he also support the prosecution case.

19. PW.9-Shabeerr Ahamad who is another uncle of the victim and brother of PW.3, he also given evidence for and behalf with the evidence of PWs.1 and 3.

20. PW.10, who is the doctor examined the accused and given the potency certificate as per Ex.P5.

21. PW.11-Women Police Constable who took the victim to the hospital for medical examination.

22. PW.12-ASI who took the accused to the medical examination.

23. PW.13-Head constable who assisted PW.14 for preparing the sketch of scene of offence.

24. PW.14-H.Shivakumar, Assistant Engineer, who prepared the spot sketch as per Ex.P6.



25. PW.15- ASI, who received complaint from the PW.3 as per the Ex.P3 and registered the FIR as per Ex.P7.

26. PW.16-Lingaraju, who is police inspector, who took up the further investigation and prepared the spot panchanama as per Ex.P1 and also seized the knife at the instance of the accused as per Ex.P4 and later he also deposed prior to that he record the voluntary statement of the accused and obtained the medical certificate as per Ex.P5 and conducted further investigation.

27. PW.17 who is another Investigating Officer, who translated the conversation of the victim's statement from urdu to kannnada.

28. PW.18-Roopa Thembad, WPSI, who recorded statement of the victim .

29. PW.19-Dr. Ashok Kumar the additional witness who examined the prosecution as per his evidence he has been summoned to bring the MLC extract of the victim as per the Court order and as per his evidence, he has verified the documents wherein the victim girl was examined by one Dr.Veena and issued certificate on 15.12.2015 and Ex.P11 is



the report and the certified copy of the hospital record has been marked as Ex.P12. The accused not cross examined the said witnesses.

30. PW.20-Hemanth Kumar, Investigating Officer who has completed the investigation and filed the charge sheet.

31. On considering the entire evidence on record, in order to prove the factum of sexual assault, the prosecution relied upon the evidence of PW.1 victim girl and PW.3 her mother and PWs.2 and 4 who are the aunts of the victim girl and PWs.7 and 9 who are uncles of the victim girl. As per the evidence of the victim girl/PW.1, she has categorically stated that the accused is her stepfather and having four children born to her mother out of the marriage with the accused all them were staying in the house and her mother used to go to Tumkur for buying grocery at Tumkur and used to stay in the night in the house of mother of the accused and come back on the next day. Taking advantage of the absence of the mother, the accused used to remove the cloths of the victim in the night hours and sexually assault her. Whenever the mother used to go out the accused used to come and sexually assault the



victim from past one year. The factum of sexual assault has been stated by the victim in the examination-chief and during the evidence she has out burst by weeping and stated that the accused committed rape on her. The absence of the PW.3 as to be spoken by the PWs.1 and 3 that PW.3 used to go out of the house of accused mother for the purpose of purchasing grocery and used to stay there and come by the next day. During her absence the accused used to sexually harass the victim continuously, however, the victim did not disclose the same to anybody. The offence of rape was disclosed by the victim only when the victim left the house along with her uncle and went to stay in the house of PW.4. PW.4 and others proposed the marriage of the victim and the accused did not agree and used to say she has to study and not to propose her marriage. When PW.3 forcefully called the victim to house, she refused to come and on enquiry the victim revealed that she is not interested to come to the house because the stepfather continuously sexually harassing her. Then the factum of sexual assault came to light and to entire family members. PW.3 informed her sisters PWs.2 and 4 and brothers PWs.7 and 9 and then all of them while questioning the accused, the



accused tried to escape by jumping from the building at that time the patrolling police came and took the accused to the police station and thereafter PW.3 went to the police station with the victim and lodged complainant as per Ex.P3

32. It is not in dispute that the victim is born to the PW.3 out of her previous marriage and subsequently married the accused and the child was stepdaughter to the accused and to corroborate the evidence, the evidence of PW.19 Dr. Ashok Kumar, who was summoned to the Court and he has produced Ex.P11. Ex.p11 medical certificate reveals the hymen of the victim was not in-tact and it easily enters two fingers which clearly suggests that the victim was subjected to sexual intercourse or sexual assault. Ofcourse the doctor CW.17 not examined by the prosecution but the medical records available in the hospital as summoned by the Court which was spoken by the PW.19 and the evidence of the PW.19 and the Ex.P11 was not disputed by the accused in the cross examination.

33. Such being the case, the evidence of the PW.19 and the Ex.P11 goes unchallenged and otherwise undisputed documents which is proved and admissible in evidence. The



evidence of the PWs.1 to 4, 7 and 9 had not at all impeached by the learned counsel for the accused in the trial Court. Except denial nothing has been elicited and nothing brought on evidence to show that the accused has not sexually assaulted. Though the accused examined DW.1 in his regard, one inayath, he is not residing with him, he has given a certificate that the accused is a good person and there was quarrel between husband and wife and used to conciliate and also advised the victim girl. But, though there is no cross examination of DW.1, the evidence of the PW.1 is not brought to disclose or discard the entire evidence of PWs.1 to 4 and 7 and 9.

34. On the other hand the evidence of PW.1/victim and evidence of PWs.2 to 4, 7 and 9 corroborates each other in respect of the sexual assault made by the accused on the stepdaughter and same was came to know through PW.1.

35. It is a settled position of law, that no woman use to make a such a false allegation against any person that too he has committed rape if he has not really committed rape. She is aged 15 years and admittedly she was born out of the first



marriage of PW.3 with her husband and subsequent to the death of her husband she married the accused and she has having four children out of the second marriage. The victim girl is grown girl of 15 years and the accused misused the absence of PW.3 in the house and sexually assaulted her. Therefore, considering the entire evidence on record, the prosecution is successful in proving that the accused sexually assaulted her which falls under Section 376 (2) of IPC and Section 6 of the POCSO Act.

36. The trial Court though discussed on the factum of the case and to prove the case of the accused had found guilty for the offence punishable under Section 376 of IPC, but while sentencing the accused, the Trial Court considered the amended IPC Section 376(3) of IPC. It is worth to mention that the amended IPC came into force by adding Section 376(3) is only from 21.04.2018 and prior to that the provisions of 376(3) of IPC was not all in the statute. The Trial Court committed an error in awarding the punishment for offence punishable under Section 376(3) of IPC when the said offence was not at all



statute as on date prior to 13.10.2015. It is worth to mention Article 20 of the Constitution of India which reads as under:

"No one can be convicted for an act that was not an offence at the time of its commission, and no one can be given punishment greater than what was provided in the law prevalent at the time of its commission."

37. In view of the protection given by the Constitution of India under Article 20(1), the Court shall not award punishment or award the sentence only the law which is imposed during the year 2015 but not the amended IPC which was came into force from April-2018 onwards. Therefore, the said sentence of imprisonment awarded by the Trial Court required to be modified to Section 376(2) of IPC and Section 6 of the POCSO Act but not Section 376(3) of IPC.

38. Considering the facts and circumstances, the sentence of 20 years imposed by the Trial Court needs to be reduce to 10 years. Accordingly, I proceed to pass the following:



ORDER

- i. Criminal appeal is allowed in part.
- ii. The findings of conviction under Section 376 and 506(2) and Section 6 of POCSO Act is hereby modified as under:
 - a. The appellant is sentenced to undergo imprisonment of 10 years and to pay fine of Rs.5,000/- and in default of payment of fine he shall undergo imprisonment for 15 days for the offence punishable under Section 376(2) of IPC read with Section 6 of POCSO .
 - b. The sentence to undergo imprisonment for 2 years for the offence punishable under Section 506 (b) is hereby upheld.
 - c. Both the sentence are ordered to run concurrently.
 - d. The appellant is said to be in jail from 13.10.2015 and he is entitled for set off under Section 428 of Cr.P.C.

Sd/-
JUDGE