

THE HON'BLE SRI JUSTICE K.SURENDER

CRIMINAL APPEAL No. 88 OF 2024

JUDGMENT:

The appellant/Accused filed the appeal questioning the conviction recorded by the I Additional Sessions Judge, in POCSO/Sessions Case No.26 of 2022, dated 14.12.2022, for the offences under Sections 452 and 376 AB of Indian Penal Code and Section 5(i)(j)(m) r/w. Section 6 of the POCSO Act and sentenced to undergo Rigorous Imprisonment for a period of five years and to pay a fine of Rs.1,000/- for the offence under Section 452 of IPC; to undergo Rigorous Imprisonment for a period of 20 years and to pay a fine of Rs.10,000/- for the offence under Section 5(i)(j)(m) r/w. Section 6 of the POCSO Act; further, all the sentences shall run concurrently.

2. Heard Ms.P.Krishna Keerthana, learned Legal Aid counsel appearing for the appellant and learned Assistant Public Prosecutor for the respondent State.

3. Briefly, the case of the prosecution is that PW.1 who is the mother of the victim-PW.4, lodged complaint with the police on 31.03.2020 at 10.30 a.m. In her complaint PW.1 stated that on previous day i.e. 30.03.2020 at about 9.00 p.m., after having

dinner her elder son Sai Kumar (PW.2) slept on the cot. Her husband Bagaiah, her daughter XXXXXXXXXX (PW.4)/victim girl, her another son Chanti and grand father of victim Gangaram, slept side by side in a row. PW.1 closed doors around 11.30 p.m. and went outside to the temple that is by the side of her house to chit-chat with neighboring ladies and slept at the temple for some time. The appellant then went to PW.1 and informed that Police were coming and asked her to go inside the house. PW.1 went inside the house and saw her daughter-PW.4 awake. When questioned, PW.4 informed PW.1 that when she was sleeping, the appellant woke up her and threatened her not to make any noise, closed her mouth, removed her underwear and committed sexual intercourse forcibly due to which burning took place in her private parts and blood was oozing from her private parts. There was blood on the private parts of PW.4 and also on her clothes. Immediately, PW.1 woke up her husband, her two sons and father-in-law and also the neighbours and narrated about the incident. Thereafter, the appellant was called and questioned. The appellant having confessed to the rape of PW.4 threatened PW.1 and others and went away.

4. PW.2 is the son of PW.1 who stated similar to the evidence of PW.1. PW.3 who is the neighbor of PW.1 and the appellant stated

that on hearing PW.1 shouting and her family members questioning the accused, he went there and in his presence the appellant confessed to have committed rape on the victim girl. However, he ran away.

5. PW.4 is the victim girl. She stated that;

“About two years back, one day at night time, my father, my brothers, my grant father and myself slept in the house and my mother went to the temple to chit chat my neighbours. After some time accused, came into house, and wake-up me when I was in sleep and threatened that not to make any noise and closed my mouth and removed my drawer and committed sexual intercourse with me forcibly, due to which burning took place in my private part and blood was oozing in my private part, after committing the rape accused went away from the house. After some time my mother came in the house and asked me why I was crying by sitting. Then I informed my mother about the incident committed by the accused and my mother also seen the blood oozing from my private parts and also blood found on the clothes.”

6. The victim girl was sent for medical examination after the complaint was filed. PW.9 examined the victim girl from 11.30 a.m. onwards on the same day of complaint. P.W.9 stated as follows:

“I have examined the victim girl by taking her consent and also her mother. I have noted down the findings of my examination as follows:

i) the victim girl was aged about 9 years and menarche is not attended.

ii) there was no external injuries on her body.

iii) Few blood stains on her frock

iv) Her vital are normal

v) no secondary sexual character developed

vi) no injuries on the breast and back region

vii) no injuries on private parts (bulbal area)

7. PW.9 further collected smears and swabs from the private parts of the victim girl and sent for analysis. Semen and spermatozoa were found from the glass slides cotton swabs and also found on the wearing apparel of the victim girl.

8. The learned Sessions Judge considering the evidence of PWs.1 to 4 found that the appellant was guilty of committing rape on PW.4.

9. Ms.P.Krishna Keerthana, learned Legal Aid counsel appearing for the appellant would submit that the version of the witnesses is highly improbable and unbelievable. If at all five persons were in the house sleeping side by side in one room, the question of the appellant entering into the house and committing

rape on the victim girl does not arise. Further, there was no DNA analysis of the semen and spermatozoa found on the wearing apparel of the victim. The version given by PW.1 and PW.4 regarding forcible rape of the victim girl is negated by the medical evidence. The doctor did not find any injuries on the victim girl.

10. On the other hand learned Public Prosecutor would submit that there is no reason as to why the victim girl, aged around 10 years, would speak against the appellant. Further, no mother would involve her ten year old child into such incidents at the risk of social stigma that is attached to such incidents.

11. The case of the prosecution according to PW.1, 2 and 4 is that PW.2-brother, PW.4-victim, father, another brother and grand-father of the victim, altogether five persons were sleeping in the very same room. The house of PW.1 is a hut having one room which is not disputed. It is further not in dispute that the temple was just outside the house where PW.1 was chitchatting along with other woman.

12. The prosecution failed to examine the father, grand-father and also another brother of the victim girl, who were sleeping in the very same room, beside the victim girl. If the version of PW.1

and PW.4 is to be believed, the appellant had closed the mouth of the girl and committed forcible sexual intercourse resulting in burning of her private parts and blood oozing. According to the scene of offence panchanama-Ex.P3, the house of PW.1-complainant has only one room which is 27 feet length and 17 feet breadth. The temple is a very small place adjacent to the room of PW.1-complainant and an open temple with one statue of the God. Anybody sitting in the temple would be at a distance of hardly 20 feet as seen from the sketch from the door of the PW.1/complainant's house. If one person enters into the house of PW.1, it would be visible to the persons sitting at the temple. None of the women with whom PW.1 was chatting in the night were examined by the Police, nor identified during investigation. As already stated the father of the victim and grand-father of the victim who were sleeping beside the victim girl were also not examined. According to the victim girl, she shouted when the rape was being committed. In the said room of 27x17 size, when five persons are sleeping it appears to be highly improbable that the appellant had entered into the house without being seen by PW.1 and committed rape on the victim girl forcibly resulting in injuries to her private parts and blood oozing from the private parts, without the other persons i.e., P.W.4 father and grand father

waking up. Until P.W.1 entered into the room, all of them were sleeping except P.W.4. After questioning P.W.4, P.W.1 woke up others.

13. The Doctor-PW.9 did not find any injuries on P.W.4's body including breast, back region or the private parts of the victim girl. Though, PW.9 stated that blood stains were found on the frock of the victim girl, however, the FSL report does not reflect that there were any blood stains on the wearing apparel (frock) which was sent. No DNA test was conducted to ascertain the blood group of the semen found.

14. The case of the appellant as stated in his examination under Section 313 Cr.P.C is that the grand-father of the appellant had six sons including father of the appellant. Husband of PW.1 Gangaram who is the father of the victim is the own brother of the father of the appellant. The father of the appellant and Gangaram having a joint family agricultural lands situated at Veerannakatta temple and there were disputes between them. After the death of the father of the appellant, the appellant demanded share of his father from Gangaram (father of the victim). On the said issue several 'galatas'(quarrels) took place in between the family members. On two occasions PW.1 and PW.3 and also Gangaram

beat the mother of the appellant when they demanded for share. In order to avoid his share in the property, false complaint was filed.

15. The relation of appellant is not disputed. However, the suggestion put to P.W.1 and P.W.2 regarding disputes about property was denied. Both the father and grandfather of P.W.4 were not examined. As already discussed, the narration of forcible intercourse and blood being found is not supported by either the examining doctor PW.9 or FSL report. PW.1 states that the appellant went to her house while she was sitting at the temple and asked PW.1 to go inside the house, stating that Police were coming. The version projected by the prosecution that the appellant without being seen by PW.1 entered into the house, forcibly committed rape on the victim girl in the presence of four other family members sleeping side by side and thereafter coming out of the house and asking PW.1 to go into the house appears to be made up and the appellant was falsely implicated.

16. The evidence of a child witness can easily be influenced by the elders in the family. Acceptance of the child witness evidence would be dangerous in the present circumstances of the case as the evidence appears to be a result of tutoring. Not examining the

father and grandfather of the victim, who were sleeping by the side of the victim girl is fatal to the prosecution case. Reference is made to the following judgments:

i). In *Mangoo v. State of M.P*¹ this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

ii). In *Panchhi v. State of U.P*² this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that

“the evidence of a child witness would always stand irretrievably stigmatised. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring” (SCC p. 181, para 11).

¹ AIR 1995 SC 959 : 1995 Cri LJ 1461

² (1998) 7 SCC 177 : 1998 SCC (Cri) 1561 : AIR 1998 SC 2726

iii). In ***State of U.P. v. Krishna Master***³ this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

17. Accordingly, appellant succeeds and Criminal Appeal is allowed setting aside the conviction recorded by the I Additional Sessions Judge, in POCSO/Sessions Case No.26 of 2022, dated 14.12.2022. The appellant is acquitted. Since the

³ (2010) 12 SCC 324 : (2011) 1 SCC (Cri) 381 : AIR 2010 SC 3071

appellant/Accused is in jail, he shall be released, forthwith, if not required in any other case.

Date: 27.12.2024
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K.SURENDER, J