

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL APPEAL No.94 of 2017

JUDGMENT:

The sole accused in POCSO Sessions Case No.103 of 2015 preferred this criminal appeal challenging the conviction and sentence passed by the Special Sessions Judge for Trial of the Cases under the Protection of Children from Sexual Offences Act, 2012-cum-I Additional Sessions Judge, East Godavari District, Rajahmundry, vide judgment, dated 21.12.2016, whereby the learned Sessions Judge found the appellant/accused not guilty for the offences punishable under Sections 376 read with 511 of the Indian Penal Code, 1860 (for short, "I.P.C.") and he is acquitted of the same under Section 235(1) Cr.P.C. and the accused was found guilty of the offence punishable under Section 10 of The Protection of Children from Sexual Offences Act, 2012 (for short, 'the POCSO Act'), convicted and sentenced him to undergo Rigorous Imprisonment for a period of five (5) years and to pay a fine of Rs.1,000/-, in default to suffer Simple Imprisonment for a period of six (6) months, while setting of the remand period already undergone.

2. The brief facts, that are necessary for disposal of the present Criminal Appeal, in nutshell are as follows.

The appellant/accused is resident of Vadapalem Village in Kothapeta Mandal. He is working as a labourer. P.W.1 – P. Srinu is working in a coffee hotel on daily wages and his wife died about seven years ago due to ill-health and he was blessed with three daughters. P.W.1 belongs to fisherman community. He performed the marriage of his elder daughter by name K. Durga (P.W.4) with

one K. Naveen Kumar (L.W.5). The second daughter is the victim (P.W.2), who is aged about 11 years and studying 3rd class. The younger daughter of P.W.1 is aged about 8 years. One Palepu Gangamma is also residing in the house of P.W.1 and she is looking after the victim girl (P.W.2) and her sister. On 10.01.2014 when K. Durga (P.W.4) went to the house of P.W.1 along with her husband K. Naveen Kumar (L.W.5) on the occasion of Pongal Festival, she prepared eatables for her sisters. During morning hours on 14.01.2014 at about 10.30 a.m., K. Durga (P.W.4) gave eatables to the victim girl (P.W.2) and asked her to go to the house of one G. Sooramma (L.W.7) and hand over the same to her. When the victim girl (P.W.2) covered little distance from her house, the accused went near her on his cycle, enquired her as to where she had to go and she told him that she had to go to the house of one G. Sooramma (L.W.7), then the accused got her on his cycle, took her to the plantain tope of one Bandi Suribabu (P.W.3) located adjoining the main road near the locks on the outskirts of Vadapalem Village in Kothapeta Mandal, left his cycle near the bund of the tope, pressed the mouth of the victim girl with his hands to prevent her from crying, forcibly took her into the tope, laid her down, pounced upon her and attempted to rape her. The victim girl resisted him with force and tried to cry loudly, but the accused gagged her mouth. The victim girl tried to resist him again, pushed him aside and raised loud cries. She got herself released from the hands of the accused and ran away from the tope by raising cries. Bandi Suribabu (P.W.3) rushed towards them on hearing the cries of the victim girl, the accused left his cycle there and ran away towards other side of the tope and

escaped. Thereafter, the victim girl went to the house of K. Naveen Kumar (L.W.5) at Vadapalem Village and narrated the incident to L.Ws.5 to 7 and later P.W.1 went there and on receipt of the information from the victim girl, P.W.1 presented a report with the police.

3. On receipt of written report from P.W.2, L.W.12-Sub-Inspector of Police, Kothapeta Police Station, registered the same as a case in Crime No.6 of 2014 under Sections 376 read with 511 IPC and Section 10 of the POCSO Act and took up investigation. During the course of investigation, the police examined the witnesses and collected material and after completion of investigation, filed charge sheet before the Court.

4. After taking cognizance of the charge sheet filed by the investigating agency, the Judicial Magistrate of First Class, Kothapeta, after following the necessary procedure under Sections 207 to 209 Cr.P.C. having found that it is a case exclusively triable by a Court of Sessions or a Special Court for Trial of the Cases under the Protection of Children from Sexual Offences Act, 2012, committed the case to the Principal Sessions Court by committal order, dated 12.05.2014. Later the Principal Sessions Court transmitted the record to the Special Sessions Judge for Trial of the Cases under the Protection of Children from Sexual Offences Act, 2012-cum-I Additional Sessions Judge, East Godavari District, Rajahmundry, by taking into consideration the fact that the charge sheet is also laid under Section 10 of the POCSO Act. In turn, the learned Special Sessions Judge registered the same as POCSO S.C.No.103 of 2015.

5. On appearance of the accused before the learned Special Sessions Judge for Trial of the Cases under The Protection of Children from Sexual Offences Act, 2012-cum-I Additional Sessions Judge, East Godavari District, Rajahmundry, and on following the procedure under Section 228(1)(b) of Cr.P.C., the learned Special Sessions Judge framed the following charges against the accused:

“Firstly,

That you(Accused), on 14.01.2014 at about 10.30 A.M. at outskirts of Vadapalem Village in Kothapeta Mandal tried to commit rape on the victim by taking her forcibly into the plantain tope and thereby committed an offence punishable under Section 376 r/w. 511 of the Indian Penal Code, and within my cognizance.

Secondly:

That you(Accused), on 14.01.2014 at about 10.30 A.M. at outskirts of Vadapalem Village in Kothapeta Mandal took the victim forcibly into the plantain tope, laid her down and pounced up on her and committed aggravated sexual assault on the victim and thereby committed an offence which is punishable under Section 10 of The Protection of Children from Sexual Offences Act, 2012 and within my cognizance.”

6. When the above charges were read over and explained to the accused in Telugu, he pleaded not guilty and claimed to be tried.

7. During the course of trial, on behalf of the prosecution, P.W.1 to 8 were examined and Exs.P-1 to P-10 were marked. After closure of the evidence of prosecution, the accused

is examined under Section 313 Cr.P.C. explaining the incriminating circumstances appearing in the evidence let in by the prosecution for which he denied the incriminating circumstances and reported no defence evidence while stating that a false case is foisted against him.

8. Upon hearing the arguments of both the counsel, the trial Court believed the case of the prosecution and found the accused not guilty for the offence punishable under Section 376 read with 511 of IPC and he is acquitted of the same under Section 235(1) Cr.P.C. and the accused was found guilty of the offence punishable under Section 10 of the POCSO Act, convicted and sentenced him as stated above. Aggrieved by the conviction and sentence, the present appeal is preferred by the appellant/accused.

9. The main contention of the appellant/accused is that the testimony of the victim girl - P.W.2 is not corroborated by any independent witness and P.W.3 - Bandi Suribabu did not support the case of the prosecution. Therefore, the conviction recorded by the trial Court against the accused based on the sole testimony of P.W.2 - victim girl is erroneous in the absence of any corroborative evidence to the testimony of P.W.2, but the trial Court committed a grave error in recording the conviction of the accused for the serious offence punishable under Section 10 of the POCSO Act. The trial Court did not appreciate the evidence regarding time of occurrence and that the delay was not explained by the prosecution. The trial Court still believed the case of the prosecution erroneously and committed an error in finding him guilty for the offence punishable under Section 10 of the POCSO

Act and prayed to set aside the conviction and sentenced imposed by the trial Court against the appellant/accused and to set aside the impugned judgment passed by the trial Court while allowing the present criminal appeal.

10. During hearing, Sri A. Nagendra Rao, learned counsel for the appellant/accused mainly contended that the evidence of P.W.2 - the victim girl is not sufficient to rope the appellant/accused with serious offences punishable under Sections 376 read with 511 IPC and Section 10 of the POCSO Act and in view of the rivalry between the families of the *de facto* complainant and the appellant/accused, there is a possibility of roping the accused unnecessarily with such serious offences. It is further contended that the incident allegedly took place at 11.00 A.M., but the victim girl returned safely by 2.00 P.M. and there is a delay in lodging a complaint which remained unexplained, but the Sessions Court still accepted the case of the prosecution and committed grave error in finding the accused guilty for the said charges and prayed to set aside the conviction and sentence recorded by the trial Court.

11. Learned Public Prosecutor for the State of Andhra Pradesh argued totally in support of the evidence recorded by the trial Court while requesting this Court to dismiss the appeal confirming the conviction and sentence imposed by the trial Court against the appellant/accused.

12. Based on the contentions of both the learned counsel for the appellant/accused and the learned Public Prosecutor the point that is raised for consideration is:

“Whether the appellant/accused made any attempt to commit rape on P.W.2 – victim girl and if so, whether he is liable for punishment for the offences punishable under Sections 376 read with 511 IPC and Section 10 of the POCSO Act?”

13. This Court as a Court of Appeal is under obligation to reappraise the entire evidence and come to an independent conclusion based on the material available on record under Section 374 IPC. Therefore, it is obligatory on the part of this Court to reappraise entire evidence to come to an independent conclusion with reference to the grounds urged before the Court.

14. P.W.2 is the victim girl against whom such an offence is committed by the appellant/accused. According to the contention of the appellant/accused, the accused did commit no offences punishable under Sections 376 read with 511 IPC since there is no penetration. In fact, it was never the case of the prosecution that the accused raped P.W.2 – the victim girl and it is the consistent case from the beginning that he made an attempt to rape her. At this stage, it is relevant to advert to the evidence of P.W.2, who is the victim girl. According to her testimony, on the eve of Pongal festival, while she was taking the eatables to hand over the same to one G. Sooramma, the victim girl started at 11.00 A.M., and while she was going to the house of G. Sooramma, the accused went near her on his cycle, asked her as to where she had to go and when she told him that she had to go to the house of one G. Sooramma (L.W.7), then the accused got her on his cycle, but the accused instead of taking her to the house of G. Sooramma, he took her to the plantain tope of one Bandi Suribabu (P.W.3) located adjoining the main road near the locks on the outskirts of

Vadapalem Village in Kothapeta Mandal, left his cycle near the bund of the tope, pressed the mouth of the victim girl with his hands to prevent her from crying, forcibly took her into the tope, laid her down, pounced upon her and attempted to rape her. When the victim girl resisted him with force and tried to cry loudly, one Bandi Suribabu (P.W.3) rushed towards them on hearing the cries of the victim girl, the accused left his cycle there and ran away towards other side of the tope and escaped. Immediately, P.W.2 rushed to her house and informed about the incident.

15. During cross-examination of P.W.2, the learned counsel for the accused could elicit that P.W.2 stated to the police that on seeing the arrival of Bandi Suribabu (P.W.3) on hearing her cries, the accused went away. P.W.2 further stated that on hearing her cries, the workers in the field came there. Therefore, non-examination of the workers who arrived there is fatal according to the contention of the learned counsel for the appellant/accused and the said Bandi Suribabu (P.W.3) did not support the case of the prosecution. In such case, her statement cannot be accepted as it inspires no confidence. Strangely, a suggestion was put to her that she was not taken to fields and did not beat her and that the accused did commit no offence and got denial of it. If really there were any differences between the families of the *de facto* complainant and the accused, the same would have been suggested to P.W.2 – the victim girl about the disputes or differences, but no such suggestion was put to her during cross-examination, except denying the offence suggesting that he did commit no offence and got denial of it. In the absence of any suggestion that he was falsely implicated due to rivalry, the said

contention is not left open to the appellant/accused at this stage. Therefore, on this ground, this Court cannot acquit the accused holding that he was roped with the offence due to differences or disputes between the families of the *de facto* complainant and the accused.

16. In any view of the matter, it is clear from the testimony of P.W.2 – the victim girl that she was taken to fields and made her to lie down and pounced upon her and made an attempt to rape her. Then she raised cries, but one Bandi Suribabu was examined as P.W.3, who did not support the case of the prosecution and turned hostile, but the learned Public Prosecutor for the State could elicit nothing in the entire cross-examination done by him after obtaining permission from the learned Sessions Judge. Therefore, the evidence of P.W.3 is of no assistance either to conclude or disbelieve the case of prosecution. However, the evidence of P.W.1 is consistent with regard to taking her to the fields i.e., the plantain tope and making an attempt to rape her. Merely because P.W.3 did not support her case, her consistent evidence cannot be brushed aside on the ground that her testimony was not supported by any independent witness or corroboration. P.W.1 is the father of the victim girl, whose testimony is specific about the information he received from P.W.2 regarding attempt made by the appellant/accused to commit rape on her after taking her to plantain tope. P.W.1 admitted that he had a prior acquaintance with the accused as he is the resident of Peddapeta and the distance between Kothapeta and Peddapeta is about a kilometer and he lodged the complaint at about 12.30 P.M. Therefore, the time difference is only short, but the offence of rape

is a serious crime and it not only affects the character of the victim girl, but also affects the reputation of the family and in such circumstances, before lodging a complaint, there is a possibility of consultation, but that by itself is not a ground to disbelieve the case of prosecution in toto. P.W.4 is the sister of the victim girl and the first daughter of the *de facto* complainant, who testified about sending the victim girl to one G. Sooramma's house with eatables on the occasion of Pongal festival and on return of P.W.2 at about 12.00 noon, narrated the incident that took place in the fields, more particularly, the offence made by the appellant/accused to commit rape on her in the cross-examination of P.W.4. Nothing was elicited to disprove the information that disclosed by P.W.2 on her arrival at 12.00 noon. Therefore, the incident of giving information to both P.W.1 & P.W.4 is an immediate act of the victim girl, who is supposed to disclose such an incident. Therefore, her evidence with regard to sending her to the house of one G. Sooramma and her return at about 12.00 noon is consistent and she is not the eye witness to the alleged incident. Therefore, her evidence to the extent of sending P.W.2 to the house of one G. Sooramma with eatables and return of P.W.2 at 12.00 noon is suffice to conclude that P.W.2 was sent to the house of G. Sooramma and returned at 12.00 noon.

17. P.W.6 - Dr.C. Madhukar, who is a Civil Assistant Surgeon, Community Health Centre, Kothapeta, examined the accused and opined that the accused is capable of performing sexual act and issued Ex.P-6 – Potency Certificate.

18. P.W.8 – Guthula Srinivasa Rao is the Head Master of M.P.P. School, Ganesh Nagar, Kothapeta, who issued Ex.P-10 –

Study Certificate of the victim girl and according to the Study Certificate, P.W.2 was born on 16.06.2004 and she was a child as defined under Section 2(d) of the POCSO Act. This evidence remained unrebutted in the entire cross-examination. Nothing was elicited in the cross-examination except suggesting that Ex.P-10 was falsely issued. In fact, in the entire cross-examination of P.Ws.1, 2 & 4, no suggestion was put to them that P.W.2 was a major and not a child. But even in the cross-examination of P.W.8, no suggestion was put to him that P.W.2 was not born on 16.06.2004 and she was a major. In the absence of any suggestion to the witnesses P.Ws.1, 2, 4 & 10, this Court is bound to accept the Study Certificate issued by P.W.8 – Head Master certifying that P.W.2 was born on 16.06.2004 vide Ex.P-10. Therefore, the prosecution established that by the date of incident, P.W.2 was a child as defined under Section 2(d) of the POCSO Act. However, the contention of the appellant/accused is that the sole testimony of P.W.1 is not sufficient to convict the accused for the offence punishable under Section 10 of the POCSO Act.

19. According to the settled law, in a case for the offence punishable under Section 376 IPC, the sole testimony of the prosecutrix i.e., the victim girl, if it inspires confidence and credible, the Court can record conviction of the accused for the offences punishable under Sections 376 read with 511 IPC. The identical question came up before the Apex Court in **State of A.P. Vs. Gangula Satya Murthy¹** and **Nagarajan Vs. State of Tamil Nadu²**. In both the judgments, the Apex Court held that the

¹ (1997)1 SCC 272

² 1995 Criminal Law Journal 3211 (SC)

courts are expected to show gout responsibility while trying an accused on a charge of rape. The Courts should examine the broader probabilities of a case and not get swayed by minor contradiction or insignificant discrepancies in the statement of the witness, which are not of a fatal nature to throw out allegations of rape. In a case of alleged rape, when testimony of the prosecutrix and doctor are found to be trustworthy, the delay is also not a ground. Thus, the main test for placing reliance on the sole testimony of a witness is credibility. The witness is not trustworthy when there is a discrepancy between her statement under Section 164 of Cr.P.C. and before the Court during trial. The Court can ignore such evidence before the Court. However, the Court is under obligation to test the testimony of a witness in the light of probabilities. Here, the evidence of P.W.2 - the victim girl is free from any inconsistencies to doubt her veracity and she is totally a credible witness. In such case, the witness cannot be termed as an incredible witness as nothing has been elicited in the cross-examination of P.W.2 - victim girl. However, she is only a student of 6th class by the time of occurrence and she is a semi-literate and when an illiterate and ignorant woman is a witness, her evidence cannot be rejected for minor discrepancies as held by the Apex Court in **Boya Gangamma and another Vs. State of A.P.**³ and similarly, when a rustic or illiterate lady appeared as a witness, the minor discrepancies can be ignored and minor discrepancy is a guarantee of truth. When the discrepancy is normal and not a material discrepancy, such evidence cannot be brushed aside on the ground of a minor inconsistency in the

³ AIR 1976 SC 1541

evidence. However, in the present case, there is nothing to point out that P.W.2 is not a credible witness. Therefore, the appellant/accused cannot be acquitted for minor discrepancy since the sole testimony of the prosecutrix inspiring confidence can be the basis of conviction, in spite of lapse on the part of the Investigating Agency in not sending the stains of semen for chemical examination vide **Sewak S/o Ram Deen Vs. State of U.P.**⁴ and similarly, in a rape case, a Court must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the evidence of the victim prosecutrix. The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression probabilities are factors relevant to improbabilise the hypothesis of false implication. The tender years of the child coupled with other circumstances may render corroboration unnecessary by that is a question of fact, as held by the Apex Court in **Bijoy Vs. State**⁵ and **Krishan Lal Vs. State of Haryana**⁶ and similarly, in **Gurcharan Singh Vs. State of Haryana**⁷, the Apex Court held that conviction on a charge of rape on an uncorroborated testimony of a prosecutrix is legal. Thus, the plethora to perspective judgments on this issue clearly accord that even an uncorroborated testimony of a prosecutrix, a victim, is suffice to convict the accused for the serious offence punishable under Section 376 IPC. However, in the present facts of the case, it is not the charge against the appellant/accused for the offences punishable under Sections 376

⁴ 1995 Criminal Law Journal 2778

⁵ 1982 Criminal Law Journal 2162

⁶ AIR 1980 SC 1252

⁷ AIR 1972 SC 2661

read with 511 IPC, but it is a charge for the offence punishable under Section 10 of the POCSO Act because the appellant/accused attempted to commit the rape on the prosecutrix i.e., P.W.2 – the victim girl herein and such attempt to commit rape would fall within Sections 376 read with 511 IPC. Section 511 IPC is not meant to cover only penultimate act towards the conclusion of the acts precedent, if those acts done towards commission of offence are also covered. When the appellant/accused made an attempt to commit rape is itself sufficient to attract the offence punishable under Section 511 IPC. Here the appellant/accused made an attempt to commit rape on the victim girl and made her to lie down on the ground in the plantain tope and pounced upon her and attempted to rape her. Such act of the appellant/accused is an attempt to commit rape, which would fall within the ambit of Sections 376 read with 511 IPC. Therefore, based on the evidence on record, the trial Court concluded that the evidence of the prosecutrix is sufficient when her testimony is free from any embellishments. The principal of evidence of a victim girl of a sexual assault stands on par with evidence of an injured witness as he is the best witness as he is not likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding, as held in ***Bhoginbhai Vs. State of Gujarat***⁸ and ***State of Maharashtra Vs. Chendra Prakash Chand***⁹.

20. In the present facts of the case, P.W.2 is the victim and P.W.4 is the person who received immediate information on her

⁸ AIR 1983 SC 753

⁹ AIR 1990 SC 658

arrival after the alleged incident and P.W.1 is the father of the victim girl, who received information on his arrival at his house. Their evidence is consistent with regard to the information they received from P.W.2, which would fall within Section 6 of the Evidence Act. Therefore, basing on the evidence of P.Ws.1, 2 & 4, the trial Court attaching the credibility to their testimony believed the case against the appellant/accused.

21. On the other hand, the accused except denying, no explanation was given for his alleged false implication in the crime in his examination under Section 313 Cr.P.C. Therefore, taking into consideration of the cumulative effect of all the facts, more particularly, the testimony of P.Ws.1, 2 & 4, it can safely be concluded that the appellant/accused made an attempt to commit rape against the victim girl.

22. The appellant/accused was also charged for the offence punishable under Section 10 of the POCSO Act. Section 29 of the POCSO Act deals with the presumption of certain offences and Section 29 of the POCSO Act reads as follows:

“Presumption as to certain offences:- 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.”

23. Section 7 of the POCSO Act defines what is sexual assault, it postulates that 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.

24. So, the act allegedly committed by the appellant/accused i.e., making an attempt to commit rape against the victim girl, P.W.2, would clearly fall within the definition of “sexual assault” under Section 7 of the POCSO Act and presumption under Section 29 of the POCSO Act is a rebuttable presumption, but such presumption can be rebutted by the appellant/accused either by eliciting anything in the cross-examination of prosecution witnesses or by adducing an independent evidence to rebut such presumption, but here, in the cross-examination of the prosecution witness, nothing has been elicited to rebut the presumption or even in his examination under Section 313 of Cr.P.C., nothing was explained to rebut the presumption or by examining any independent witnesses. In such case, the presumption remained unrebutted, thereby the Court shall presume that the act committed by the appellant/accused is with a criminal intention to rape the victim girl - P.W.2. Therefore, based on the unrebutted presumption contained under Section 29 read with Section 7 of the POCSO Act and Section 114A of the Evidence Act, 1872, in a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of Section 376 of IPC where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she stated in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

25. But in the present case, no sexual intercourse took place against the will and in fact, it was only an attempt. Section 114A of the Evidence Act, 1872, has no application to the facts of the case, but only presumption under Section 29 of the POCSO Act is applicable. Hence, I find that the trial Court recorded the conviction of the appellant/accused rightly and I find no illegality in the conviction recorded by the trial Court warranting interference with the judgment of the learned Special Sessions Judge in this appeal while exercising power under Section 374 Cr.P.C. The trial Court imposed sentence of Rigorous Imprisonment for a period of five (5) years for the offence punishable under Section 10 of the POCSO Act, and the minimum punishment prescribed under Section 376 IPC is ten (10) years and when such an attempt is made by accused, such accused is liable for half of the prescribed punishment under Section 376 IPC in view of Section 511 IPC. Therefore, the punishment imposed upon the appellant/accused is in accordance with law. Hence, I find no ground to reduce the punishment imposed against the appellant/accused, which is the minimum prescribed under Section 10 of the POCSO Act. The trial Court also gave set off by exercising power under Section 428 Cr.P.C. and consequently this Court need not pass a separate order setting off the period already undergone. In view of my foregoing discussion, I find no ground warranting interference of this Court and the appeal is liable to be dismissed.

26. In the result, the Criminal Appeal is dismissed by confirming the conviction and sentence imposed against the appellant/accused passed by the Special Sessions Judge for Trial

of the Cases under The Protection of Children from Sexual Offences Act, 2012-cum-I Additional Sessions Judge, East Godavari District, Rajahmundry, in POCSO Sessions Case No.103 of 2015 vide judgment, dated 21.12.2016. Miscellaneous petitions, if any, pending in this criminal appeal shall stand closed.

M.SATYANARAYANA MURTHY, J

Date: 20th March, 2017

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THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY



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