

HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.764 of 2015

JUDGMENT:

Aggrieved by the conviction judgment of learned I Additional Sessions Judge, Mahabubnagar, dated 10.02.2015 in Spl.S.C.No.3 of 2013 outcome of crime No.17 of 2013 registered originally as girl missing and police filed final report in the form of charge sheet after completion of investigation and after arrest of the accused in Sindhu Hotel, Thrissure District, Kerala State on 04.03.2013, by saying there is prima facie accusation against the accused for the offences punishable under Sections 363, 346, 365, 366 and 376 IPC and Section 6 of Protection of Children from Sexual Offences Act (for short 'POCSO Act'). After supply of copies to the accused and after hearing, the learned Sessions Judge framed 4 charges viz., for the offences under Sections 366, 346, 376(2)(i) IPC and Section 5(l) r/w 6 of POCSO Act from which the accused has not pleaded guilty. The trial conducted and evidence on record of PWs.1 to 14 including PW.4 the victim girl and PWs.1 & 3 are parents of victim girl- PW.4, PW.12 is the Doctor who examined her, PWs.13 & 14 are IOs, leave about others circumstantial evidence including the evidence of witnesses to the apprehension of the accused after search and with reference to Exs.P1 to 14 which include the Ex.P7 FSL report with PW.12 final opinion-Ex.P8 without any confirmation of any possibility of sexual intercourse

committed on the victim and with reference to MOs.1 & 2 i.e., Airtel sim card and vodaphone sim card of AP and Kerala States seized from the accused held the charges proved against the accused and find him guilty and after hearing convicted him to undergo 10 years rigorous imprisonment with fine of Rs.5,000/- with default sentence of six months simple imprisonment for the offence under Section 366 IPC, 2 years rigorous imprisonment with fine of Rs.5,000/- with default sentence of six months simple imprisonment for the offence under Section 346 IPC and 10 years rigorous imprisonment with fine of Rs.10,000/- with default sentence of one year simple imprisonment for the offence under Section 5(l) r/w 6 of POCSO Act, by giving set off for the period undergone and to run all the sentences concurrently, the present appeal is maintained. The trial Court no doubt acquitted on the charge under Section 376(2)(i) IPC.

2. The contentions in the grounds of appeal vis-à-vis oral submissions of the learned counsel for the appellant/accused are that the trial Court having held the accused not guilty for the offence under Section 376(2)(i) IPC went wrong in finding the accused guilty for the offences punishable under Sections 366 and 346 IPC and Section 5 (l) r/w 6 of POCSO Act, the trial Court should have seen that the prosecution miserably failed to bring home the guilt of the accused for any of the offences including as to accused earlier involved in crime No.222 of 2004 of Kuppam PS, Chittoor

District and crime No.44 of 2012 of Piduguralla PS, Guntur District, for the offences punishable under Section 366-A IPC respectively. It is also the contention of the accused that the prosecution could not show the version of PW.4 victim girl of different places taken by the accused for no even any tickets collected much less any hotel records to believe including for the stay at Kerala and there is no any evidence much less documentary of victim girl and the accused moved together except the version of the alleged arrest and apprehension by IO, other witnesses and the victim and the father of the victim i.e., PWs.1 & 4 respectively. The trial Court also failed to see that but for allegedly taken the gold ornaments of the victim and sold away there is no evidence to show any sexual intercourse much less forcibly on the victim by the accused and even FSL report not supported any such case to make out and even the version of the victim shows she followed with no resistance the accused and thereby conviction judgment and the sentence imposed by the trial Court are liable to be set aside.

3. The learned Public Prosecutor having drawn attention to the trial Court's conviction judgment with reference to the evidence oral and documentary running in 36 Paras supported the trial Court's judgment on all respects in saying but for no appeal there is offence under Section 376 IPC also and trial Court should not have been acquitted as the trial Court categorically held including in Para 22 reiterated in

Para 26 and the evidence on record shows PW.4 at that time 15 years and to say below 16 years and there is sexual intercourse consent is immaterial and thereby sought for dismissal of the appeal.

4. Heard both sides at length and perused the entire material on record including trial Court's conviction judgment and the evidence placed before the trial Court on record oral and documentary with reference to PWs.1 to 14, Exs.P1 to P14 and MOs.1 & 2.

5. A perusal of the evidence of PW.1 father of the victim, PW.3 mother of the victim including PW.4 victim girl no way shows any sexual intercourse the accused committed irrespective of the consent or not as the case may be including with reference to Ex.P7 and Ex.P8 medical final opinion of PW.12 lady Doctor who examined the victim girl after the victim was removed from the illegal custody of the accused in a hotel in Thrissure District, Kerala State and brought to Narayanapet from the police requisition and sent the MOs to FSL with swabs. What PW.12 stated is there are no traces of any injuries and there is no possibility and any possibility otherwise cannot be ruled out. Once such is the medical evidence with no certainty there must be any direct evidence particularly of the victim. PW.4 no way whispered about any sexual intercourse on her committed by the accused and the observation of the trial Court in Paras 22 & 26 is with clear observation from the close reading of the

entire evidence of PW.4 of there is no little whisper even. Once such is the case the offence under Section 366 IPC much less under Section 366-A IPC no way attracts but for the offence under Section 365 IPC which is no doubt a lesser offence to the charge under Section 366 IPC even the charge sheet filed for the offence under Section 366-A IPC. Once there is no sexual intercourse, the attracting of the offence under Section 5 (1) r/w 6 of POCSO Act is not there to sustain for the offence said conviction with reference to it under charge No.4 along with the conviction under Section 366 IPC under charge No.1 while acquitting under Section 376 IPC under charge No.3 though there is material under charge No.2 of offence made out under Section 346 IPC of wrongful confinement at several places.

6. The evidence on record categorically establishes that the accused lured the victim under the pretence to bring money from her parents and to come to the bus stand by telephoned to the cell number of the mother of the victim in calling her and informed from which she went there and with his promise to give her a book named "Manu Smruthi" has taken her, with a pretence of taking to Mahabubnagar, to the different place i.e., Raichur and several other places including Bangalore, Tamilnadu and ultimately to Kerala and in between to some Christian prayer places at Relangani and other of Kerala State and confined in Sindhu Hotel of Thrissure District, Kerala State where from the PW.1, PW.6,

PW.7 deputed by PW.13 etc., in their search found the victim girl in the illegal custody of the accused and removed from his clutches and brought her.

7. As their evidence is corroborating on all material aspects with the evidence of PW.4 victim girl that the accused who has called with the pretence to come to bus stand on 25.01.2013 taken therefrom as if to Mahabubnagar to give a book called "Manu Smruthi" and instead of Mahabubnagar taken to Raichur and when questioned threatened her and taken via Kadapa to Bangalore and therefrom to Tamilnadu including to Relangini having kept there for few days and including at Welcome Hotel having kept in wrongful confinement there for some more days and ultimately to Kerala State at Chelakudi and therefrom to the lodge Sindhu and that it is there the above witnesses in search of her by traced the moments by tracking the phone etc., reached the lodge and knocked the doors and found the victim in his illegal custody and released and brought back. The witnesses even with stood in their cross examination in this regard for nothing to belie their versions on material aspects even at any cost, from that charge No.2 conviction is sustainable and charge No.1 conviction is sustainable for a lesser offence under Section 365 IPC instead of major offence, as not proved for the offence under Section 366 IPC, but for the offence under Section 365 IPC which prescribes the maximum punishment of 7 years with fine.

8. Taking into consideration of these facts and from the evidence on record even the victim is under disposal of the accused all through for a long time, he did not commit any offence of sexual intercourse on her, for the offence under Section 365 IPC which prescribes the maximum sentence of 7 years, it is just to impose the sentence by altering from the 10 years rigorous imprisonment to 5 years rigorous imprisonment on charge No.1 by enhancing the fine of Rs.5,000/- to Rs.15,000/- and by confirming the sentence of 2 years RI with fine of Rs.5,000/- with default sentence for the offence under Section 346 IPC while acquitting on charge No.4 for the offence under Section 5 (1) r/w 6 of POCSO Act of 10 years rigorous imprisonment. As observed by the trial Court in the operation portion of the judgment on the sentence the accused is entitled to the set off to the period undergone and to run the sentences concurrently.

9. Accordingly and in the result, this Criminal Appeal is partly allowed as indicated above.

Miscellaneous petitions, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 03.10.2018
ska