



**IN THE HIGH COURT OF KARNATAKA AT BENGALURU
DATED THIS THE 22ND DAY OF JANUARY, 2024**

PRESENT

THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL

CRIMINAL APPEAL NO.1335 OF 2017

BETWEEN:

1. STATE OF KARNATAKA
THROUGH THE BALUR POLICE
MUDIGERE TALUK
CHICKMAGALUR
REPT.BY STATE PUBLIC PROSECUTOR
HIGH COURT BUILDING
BENGALURU-01.

...APPELLANT

(BY SMT. K.P. YASHODHA, HCGP)

AND:





...RESPONDENTS

(BY SRI. M.H. PRAKASH, ADV., FOR R1
SRI. C. SADASHIVA, ADV., FOR
SRI. G.S. BHAT, ADV., FOR R2)

THIS CRIMINAL APPEAL IS FILED U/S.378(1)&(3) OF CR.P.C. PRAYING TO GRANT LEAVE TO FILE AN APPEAL AGAINST THE JUDGMENT AND ORDER DATED 30.01.2017 PASSED BY THE I ADDITIONAL SESSIONS AND SPECIAL JUDGE, CHIKKAMAGALURU IN SPL.C.(POCSO)NO.20/2014 ACQUITTING THE ACCUSED/RESPONDENT FOR THE OFFENCE P/U/S 354(A) OF IPC AND SEC.8 OF PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT AND U/S 3(2)(v) OF SC/ST (PREVENTION OF ATTROCITIES) ACT.

THIS APPEAL COMING ON FOR HEARING, THIS DAY, **SREENIVAS HARISH KUMAR J.,** DELIVERED THE FOLLOWING:



JUDGMENT

The State has preferred this appeal challenging the judgment of acquittal dated 30.01.2017 in Special Case (POCSO) No.20/2014 on the file of I Additional Sessions & Special Judge, Chikkamagaluru. The respondent-accused was charge sheeted for the offences punishable under Section 354A of IPC, Section 8 of the Protection of Children from Sexual Offences Act, 2012 [for short, 'the POCSO Act'] and Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, [for short, 'the SC/ST (POA) Act].

2. The prosecution case is that when the victim girl PW-2 was returning from the house of CW-6 Smt.Baby around 11.30 a.m. on 26.10.2014, the accused caught hold of her on the way, kissed her and attempted to commit rape on her. She escaped from the clasp of the accused and returned to her house. Since her mother was not in the house at that time, she informed the same to her mother at 03.00 p.m. after her arrival. PW-1, the



father of the victim girl was informed of this incident. Immediately, he went to the house of the accused and slapped him. Thereafter, a report was given to the police who held investigation and filed charge sheet against the accused.

3. Assessing the evidence of 14 prosecution witnesses, the documents as per Exs.P-1 to P-21 and considering the material objects MOs.1 to 5, the trial court acquitted the accused of the offences finding material contradictions in the evidence of PWs-1 to 3 & 5. It is the opinion of the trial Court that according to PWs-2, 3 & 5, they could not contact PW-1 over the phone as the latter's mobile was not reachable, but PW-1 has given the evidence that he came to know about the incident from PW-3 over the phone. Thus, there is inconsistency in the evidence of PW-1 and other witnesses. It is also observed that in Ex.P-1 it is stated that PW-1 came to know about the incident when PW-3 made a telephone call to him, but PWs-2, 3 & 5 have given contradictory version. Comparing



the evidence of PW-2 with her statement under Section 164 Cr.P.C., it is the finding that the statement of PW-2 before the Court is not consistent with her statement before the Magistrate under Section 164 Cr.P.C. Even in Ex.P-1, the complaint, the trial Court has found a discrepancy which according to it, is irreconcilable. Another aspect noticed by the trial Court is that PWs-1 to 3 & 5 have admitted in the cross-examination that there are houses situated nearby the alleged spot of incident. The day on which the incident is said to have taken place was a Sunday and all the workers were very much present in their respective houses. If that is so, at least any one of them should have heard the shout of PW-2 and should have rushed to her help. PW-2 has stated that nobody came near the incident. So this makes the evidence of PW-2 unbelievable especially in the background that the enmity between the mother of PW-2 and Smt.Rajeshwari, the aunt of accused, as has been admitted by PW-1. PW-2 has stated that she was returning from the house of



Smt.Baby on the date of alleged incident, but Smt.Baby is not cited a witness and therefore, if the entire evidence is assessed, a clear conclusion can be drawn that there is no cogency in the evidence of the witnesses, as a result of which a clear conclusion can be drawn that prosecution case does not get established beyond reasonable doubt.

4. Smt.K.P.Yashoda, learned High Court Government Pleader for the appellant takes us through the entire evidence of prominent witnesses viz., PWs-1, 2, 3 & 5, and argues that the trial Court has erred in assessing the evidence of these witnesses. All the witnesses have clearly given evidence about the incident. If the oral testimony of PW-2 is seen, it becomes evident that the accused tried to molest her when she was returning from the house of Smt.Baby. PW-2 has given narration about the incident when she was taken before the Magistrate for the purpose of obtaining her statement under Section 164 Cr.P.C. Whatever the learned Sessions Judge has observed about the contradiction or the discrepancy is so trivial that



it should have been ignored. Her evidence is very consistent. The spot mahazar shows that near the place of incident there are no houses and they are situated at some distance. If somebody shouts from that place, there is no possibility of anybody hearing it. The trial Court should have given prominence to this evidence. The entire testimony of PW-2 finds corroboration from the testimony of PW-1, the father, and PW-5, the mother. Their evidence clearly indicates that they came to know about the incident on the same day and without lapse of time, PW-1 went to the house of accused, questioned and slapped him. This shows the natural conduct of the father of the victim. Even if it is assumed that there was some rift between PW-5 and Smt.Rajeshwari, the aunt of the accused, it cannot be said that accused has been falsely implicated. Therefore, a clear case punishable under Section 8 of the POCSO Act has been made out. The trial Court should have recorded conviction and punished the accused appropriately in accordance with law.



5. Sri.M.H.Prakash, learned counsel for the accused argues that the findings of the trial Court cannot be disturbed. Rightly the inconsistency in the evidence of prominent witnesses has been noticed by the trial Court. The existence of enmity between PW-5 and Smt.Rajeshwari, the aunt of the accused, is clearly admitted by PW-1 in the cross-examination. The witnesses have also stated that the alleged spot was clearly visible to the quarters of the estate labourers. If PW-2 had shouted, at least one of them would have rushed to her rescue. If nobody went there, obviously it means that the incident did not take place at all and the complaint made by PW-1 against the accused was a result of enmity or ill-will between his wife and Rajeshwari. When the trial Court has come to the conclusion that the accused is to be acquitted, this Court sitting in an appeal should not reverse the judgment unless there are compelling reasons and hence, appeal is to be dismissed.



6. We have perused the entire evidence, especially that of PWs-1, 2, 3 & 5, there is no need to discuss the evidence of other witnesses. The defence does not dispute the age of PW-2, who was a minor at the time of incident. There is no dispute about the caste of PW-2. If we give a look at the evidence of prominent witnesses, it is seen that PW-1, being the father of PW-2, has stated that on 26.10.2014 he had been to his native place viz., Aramane Talaguru, and his wife PW-5 had been to another place called Hirebylu. On that day at about 04.00 p.m. he received a call from his brother PW-3 and came to know about the incident. Immediately, he returned to his house and enquired his daughter PW-2. He came to know that when she was returning from the house of Smt.Baby, the accused intercepted her on the way and dragged her to a place nearby a dilapidated toilet room, knocked her down and attempted to commit rape on her. Coming to know this incident, he went to the house of the accused,



enquired and slapped him. Then, he went to the police station and gave a report of incident as per Ex.P-1.

7. PW-2 is the victim. Her evidence also shows that on 26.10.2014 at about 09.30a.m. she went to the house of Smt.Baby and spent an hour there. When she was returning home, on the way near a dilapidated house, the accused came and held her hands. She tried to escape from the clasp of the accused, but he knocked her down, touched her chest, kissed and tried to commit rape. She screamed, managed to escape and returned home. Around 03.00p.m. her mother came and saw her weeping. She informed about the incident. Then they all went to her uncle's house i.e., PW-3. Her father was not in the house. They made a call to her father from the house of PW-3 but her father could not be contacted. At about 06.30 p.m. her father returned home. She informed everything to her father who immediately went to the house of accused and slapped him. She has stated that there was a scuffle for



sometime and thereafter they went to the police station, made a complaint.

8. PW-3 has given evidence that on 26.10.2014, PW-2 along with PW-5 came and informed him about the incident and immediately he made a telephone call to his brother i.e., PW-1, who had gone to his native place. He could not contact him as the phone was not reachable. PW-1 returned home at 06.00 p.m. Thereafter they all went to police station. He has spoken about the spot mahazar drawn as per Ex.P-3. PW-4 is another witness to Ex.P-3 but he turned hostile.

9. PW-5 is the mother of PW-2 whose evidence shows that when she returned home at 03.00 p.m. she saw the clothes i.e., skirt of her daughter being soiled. When she enquired as to what happened, her daughter narrated about the incident and thereafter she went to the house of PW-3 along with her daughter and informed him about the incident. They made a call to PW-1 who was not



reachable at that time on the phone. After the arrival of PW-1, entire incident was brought to his notice. Thereafter, PW-1 went to the house of the accused and as they said that they could do anything, they all went to police station and filed a complaint.

10. It is true that when PW-1 was subjected to cross-examination, it was elicited that his wife PW-5 had quarreled with Smt.Rajeshwari, the aunt of the accused, in connection with washing of clothes & vessels near the tap and he also admitted that such quarrels used to take place very often. As regards the actual incident, it appears that his evidence in examination-in-chief has not been discredited in any way. In the cross-examination of PW-2, she has stated that the people in the neighbouring houses can easily see anybody walking on the pathway. As regards the incident, the defence failed to discredit her evidence. PW-3 has also not been discredited in the cross-examination, so also PW-5.



11. Ex.P-6 is the statement of the victim girl PW-2 under Section 164 of Cr.P.C. When she made the statement before the Magistrate, she clearly stated that on 26.10.2014, a Sunday, she had been to the house of her uncle and while returning, the accused who was standing near the bathroom pulled her hand and told that he was loving her and also asked whether she would love him and saying so he kissed on her lips and cheek, and touched her chest. She left that place screamingly and returned home. Around 12.00 p.m., her mother came home and seeing her weeping, she enquired her and at that time she narrated the entire incident. After the arrival of her father, all of them went to the house of senior uncle and thereafter her father went to the house of accused and slapped him. She also stated that she carried her soiled clothes to the police station. MO.1 is the white colour petticoat and MO.2 is the T-shirt of the girl.

12. Now if the entire evidence is assessed, we find that PW-2 has very well established the incident. Her



testimony finds corroboration from the evidence of PW-5 to whom PW-2 revealed the incident firstly. PW-1 has also supported the prosecution to the extent he could speak about the incident after coming to know about the same from his daughter. PW-3 has also stated that both PWs-2 & 5 came to his house and informed about the incident and thereafter he tried to contact his brother - PW-1 over the phone. As regards the actual incident, all these witnesses have not at all been discredited. Even we do not find any minor contradictions as has been pointed out by the trial Court. It is true that PW-1 has stated about some kind of a quarrel between PW-5 and Smt.Rajeshwari, the aunt of the accused, but in our opinion it is just a common place act of the female folk and no importance can be given to it. Just because PW-1 has given admission about this quarrel, it is highly impossible to infer that in the background of this kind of a quarrel, there existed enmity between two families which goes to the extent of a false complaint being lodged against the accused causing harm



to her dignity in the society. It is true that PW-2 has stated that the pathway is visible to the houses where the labourers would reside. She has also stated that she screamed when the accused caught hold of her. Merely for the reason that nobody went to the place for her help, no inference can be drawn that the entire incident did not take place at all. Her evidence is that no sooner the accused knocked her down and kissed her, then she immediately escaped from his clasp and ran away towards her house. That means the incident did not last long so that anybody from the quarters could have rushed for her rescue. For this reason, the testimony of PW-2 cannot be disbelieved. If we peruse the spot mahazar as per Ex.P-3 and sketch at Ex.P-8, we do not find existence of houses at nearby place of the incident. Therefore, clear inference can be drawn that an offence falling within the ambit of the POCSO Act and Section 354A of IPC has been made out. The age of the girl is not disputed. However, we are of the opinion that no offence under Section 3(2)(v) of



SC/ST (POA) Act can be said to have taken place. Merely for the reason that the victim girl belongs to that caste, police invoked the offence under the atrocities Act without there being any material for that.

13. Therefore, from the above discussion, we are of the clear view that the trial Court has utterly failed to appreciate the evidence in proper perspective. We do not find any contradiction in the evidence so as to give benefit of doubt to the accused. The trial Court has utterly failed to take notice of believable evidence of PW-2 victim girl. Therefore, we are of the opinion that the judgment of the trial Court has to be reversed to convict the accused for the offences punishable under Section 354A of IPC and Section 8 of the POCSO Act. Accordingly, we pass the following:

ORDER

- i. Appeal is **allowed**. The judgment of the trial Court dated 30.01.2017 passed in Special Case (POCSO) No.20/2014 on the file of I Additional



Sessions & Special Judge, Chikkamagaluru is hereby set-aside and the accused is found guilty of the offence punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 and Section 354A of IPC. The judgment of the trial Court acquitting the accused for the offence under Section 3(2)(v) of SC/ST (POA) Act, 1989 is confirmed.

- ii. Though the accused is found guilty of offence punishable under Section 8 of the POCSO Act and Section 354A of IPC, he can be punished only for offence under Section 8 of the POCSO Act in view of Section 42 of POCSO Act.

14. Sri.M.H.Prakash, learned counsel for the accused now submits that the age of the accused was 18 years as on the date of incident and therefore, he can be released by extending benefit under the provisions of Probation of Offenders Act.



15. At this stage, Smt.K.P.Yashoda and Sri.B.N.Jagadish, learned Addl. SPP. pray for time to examine whether the provisions of the Probation of Offenders Act can be applied to offences under the POCSO Act.

16. In the meantime, we direct the concerned Probation Officer of Chikkamagaluru to give a report about the status, reputation and criminal antecedent, if any, of the accused.

17. List on 08.02.2024 to hear on sentence. Sri.M.H.Prakash, learned counsel for the accused to keep the accused present on the next date of hearing.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

BSR



SHKJ & VAPJ:

15.02.2024

(VIDEO CONFERENCING / PHYSICAL HEARING)

ORDER ON SENTENCE

The accused / convict Prathapa has appeared before the Court. When we question him regarding his background and the family status, he submits that his age is 28 years and earns his livelihood by doing coolie work. He states that his monthly income is around Rs.7000/- to Rs.8000/-. He is married and has two children, a girl aged 7 years and a boy aged 5 years. He asserts that he has not committed any mistake.

On the day when we pronounced the judgment of conviction, Sri.M.H.Prakash, learned counsel for the accused prayed for releasing the accused by extending the benefit under the provisions of Probation of Offenders Act, 1958.

Today, Smt.K.P.Yashodha, learned High Court Government Pleader and Sri.B.N.Jagadish, learned



Additional State Public Prosecutor submit that since Section 8 of the POCSO Act provides for a minimum sentence of 3 years imprisonment, the benefit under the Probation of Offenders Act cannot be given and in support of their submission, they place reliance on the judgments of the Hon'ble Supreme Court in the case of **'SUPERINTENDENT, CENTRAL EXCISE, BANGALORE Vs. BAHUBALI' [(1979) 2 SCC 279]**, **'STATE OF MADHYA PRADESH Vs. VIKRAM DAS' (Crl.A.No.208/2019)** and **'MOHD. HASHIM Vs. STATE OF UP AND ORS.' (Crl.A.No.1218/2016)**. They also place reliance on the judgment of the High Court of Calcutta in **'PRAKASH SHAW Vs. STATE OF WEST BENGAL AND ANOTHER' (2023 SCC ONLINE CAL 1572)**.

While dealing with the applicability of the Probation of Offenders Act vis-à-vis Section 43 of the Defence of India Act, 1962, the Hon'ble Supreme Court in the case of **BAHUBALI** has held as below:



"9. The above observations also clearly show that where there is a statute which bars the exercise of judicial discretion in the matter of award of sentence, the Probation of Offenders Act will have no application or relevance. As Rule 126-P(2)(ii) of the DI Rules manifestly bars the exercise of judicial discretion in awarding punishment or in releasing an offender on probation in lieu of sentencing him by laying down a minimum sentence of imprisonment, it has to prevail over the aforesaid provisions of the Probation of Offenders Act, 1958 in view of Section 43 of the Defence of India Act, 1962 which is later than the Probation of Offenders Act and has an overriding effect."

In the case of **MOHD. HASHIM**, the Hon'ble Supreme Court, making a reference to the earlier decided cases including **BAHUBALI** has taken a view as follows:

"25. At this juncture, learned counsel for the respondents would submit that no arguments on merits were advanced before the appellate court except seeking release under the PO Act. We have made it clear that there is no minimum sentence, and hence, the provisions of the PO



Act would apply. We have also opined that the court has to be guided by the provisions of the PO Act and the precedents of this Court. Regard being had to the facts and circumstances in entirety, we are also inclined to accept the submission of the learned counsel for the respondents that it will be open for them to raise all points before the appellate court on merits including seeking release under the PO Act."

That means when minimum sentence is prescribed, PO Act cannot be applied. This position is made further clear by the Hon'ble Supreme Court in the case of **VIKRAM DAS** where it is held as below:

"8. In view of aforesaid judgments that where minimum sentence is provided for, the Court cannot impose less than the minimum sentence. It is also held that provisions of Article 142 of the Constitution cannot be resorted to impose sentence less than the minimum sentence."

It is pertinent to refer to the judgment of the learned Single Judge of the High Court of Calcutta in the case of **PRAKASH SHA** where it is clearly held that the provisions



of the Probation of Offenders Act cannot be applied whenever an accused is convicted under the provisions of the POCSO Act.

Sri.M.H.Prakash, learned counsel for the accused brings to our notice a judgment of the co-ordinate Bench in the case of **'STATE OF KARNATAKA Vs. KIRAN MAILAREPPA DANDENAVAR' (Crl.A. No. 100442/2019)** where the accused was released under Section 4 of the Probation of Offenders Act. This judgment does not refer to the judgments of the Hon'ble Supreme Court which we have referred above.

Another judgment of the co-ordinate Bench, one of us being a member in the case of **'STATE OF KARNATAKA Vs. SHAFFI AHAMED AND ANOTHER' (Crl.A.No.718/2017)**, extended benefit under Section 4 of the Probation of Offenders Act to the accused. At that time, the judgments of the Hon'ble Supreme Court to which we have made reference above were not brought to



our notice and therefore, we now hold that neither **KIRAN MAILAREPPA DANDENAVAR** nor **SHAFI AHMED** is applicable.

The Prevention of Children from Sexual Offences Act, 2012 is a special enactment which came into force w.e.f. 20.06.2012. This enactment is subsequent to coming into force of the Probation of Offenders Act. In the case on hand the accused is liable to be punished according to section 8 of POCSO Act which prescribes a minimum sentence of 3 years imprisonment in addition to fine.

Therefore, the minimum punishment has to be imposed. The provisions of the Probation of Offenders Act do not have application.

Taking into account the background of the accused, it is enough if minimum sentence is imposed. Therefore, we proceed to pass the following :



ORDER

Accused Prathapa is sentenced to rigorous imprisonment of three years and fine of Rs.10,000/-. In default of payment of fine, he shall undergo simple imprisonment for a period of three months.

He is entitled to set off for the period he has already spent in jail.

Free copy of the judgment and order of sentence be provided to the accused.

Registrar (Judicial) is hereby directed to issue conviction warrant.

**Sd/-
JUDGE**

**Sd/-
JUDGE**