

HONOURABLE SRI JUSTICE K.SURENDER

CRIMINAL APPEAL No.294 of 2020

JUDGMENT:

1. The appellant is convicted for the offence under Section 5(1) r/w 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') and sentenced to undergo rigorous imprisonment for a period of ten years and to pay fine of Rs.2,000/-, in default of payment of fine amount, to undergo simple imprisonment for a period of six months, and further sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.1,000/- and in default of payment of fine amount, to undergo simple imprisonment for a period of three months for the offence under Section 506 of IPC and no separate sentence under Section 376(2)(i)(n) of IPC by judgment dated 19.09.2019 in S.C.PCS No.91 of 2017 passed by the I Additional Metropolitan Sessions Judge-cum-Special Judge for trial of Cases under Protection of Children From Sexual Offences Act, 2012, Hyderabad (for short 'learned Sessions Judge').

2. The case of the prosecution is that P.W.1, who is the mother of P.W.2/victim girl lodged a complaint on 14.12.2016 stating that the P.W.2/victim girl was studying IX Class and her date of birth is 07.02.2003 and the son of P.W.1 who was aged 5 ½ year, both were commuting to school in the auto of the appellant/accused. On 14.12.2016, P.W.2 informed P.W.1 that she does not want to attend school for which reason, P.W.1 persistently questioned. P.W.2 informed that the appellant/accused was misbehaving with her and committing wrong actions. Further, on enquiry, P.W.2 informed that since August, 2016, he used to take children in the auto to the near open places and asked them to play and P.W.2 was taken into nearby vacant quarters and appellant committed rape on her several times. After receiving the complaint, police referred P.W.2/victim girl to Gandhi Hospital for medical examination and the Doctor-P.W.7 confirmed that the victim was pregnant by 16 to 18 weeks.

3. P.W.2 during her examination before the Court stated that since August, 2016, the appellant committed rape on

her regularly by taking her to open places in vacant quarters. Further, he threatened P.W.2 with dire consequences if the matter is disclosed to any one. The foetus of P.W.2 was aborted and later subjected to DNA examination to know about the biological father. However, after FSL examination, no opinion of DNA result could be given, for the reason of there being no amplifiable DNA yield from foetus. The said report is Ex.P19.

4. After concluding investigation, charge sheet was laid for the offences under Section 5(1) r/w Section 6 of the POCSO Act and Sections 376((i)(n) of IPC and Section 506 of IPC and charges were accordingly framed.

5. Learned counsel for the appellant would submit that; firstly, the age of P.W.2/victim girl was not proved and no reliance can be placed upon the school certificate Ex.P6 issued by P.W.9 as it cannot be conclusive proof of the date of birth, for which reason, it cannot be said that P.W.2 is less than 18 years to attract the provisions of POCSO Act. She relied upon the judgment in C.R.A.No.269 of 2019 between **Prasanta Das v. State of West Bengal**, dated

10.03.2022, delivered by High Court of Calcutta. In the said judgment, neither certificate that was collected by the prosecution to determine the age nor the victim girl was sent to the medical board for ascertaining the age. Under the said circumstances, it was held that POCSO Act would not be attracted for the reason of the prosecution failing to prove the age of the victim to be less than 18 years.

6. Secondly, learned counsel for the appellant submits that the P.W.2/victim's evidence does not qualify as a "sterling witness" and for the reason of several contradictions and omissions which are apparent from the evidence on record. Further, she relied upon the judgment of High Court of Delhi in the case of **Hari Mohan Sharma v. State of NCT of Delhi**¹, and drawn the attention of the Court to paras 20 and 21 and argued that the testimony of victim girl cannot be presumed to be gospel truth and unless the quality of the sole testimony of the victim cannot be made basis, unless the quality of "sterling witness" has been satisfied.

¹ 2016 LawSuit(Del)54

7. Learned Counsel also relied upon the judgment of the Hon'ble Supreme Court in the case of **State of Assam v. Mafizuddin Ahmed**², wherein it was held that evidence of child witness is always dangerous unless it is available immediately after the occurrence and before there were any possibility of coaching and tutoring. Further arguing on the same lines, learned counsel would submit that there is no corroboration from any independent evidence to the evidence of P.W.2 and the evidence of P.W.2 cannot be looked into as she failed the test of being "sterling witness" and the prosecution case fails and the accused is entitled to acquittal.

8. The case was instituted when P.W.2/victim girl refused to attend the school and on persistent questioning by P.W.1/mother, the victim girl/P.W.2 informed that she was subjected to rape continuously over a period of time. It was for the first time that P.W.1/mother came to know about the state of P.W.2/victim girl and that she was also threatened

² (1983) 2 SCC 14

by the appellant/accused not to disclose such information to any one.

9. The evidence of P.W.2/victim girl cannot be disbelieved only for the reason of there being no independent corroboration. The circumstances in the present case would clearly go to show that it was the appellant who in fact had indulged in committing rape on the victim girl/P.W.2. The circumstances, apart from the testimony of P.W.2/victim girl, which, in fact corroborate the testimony of P.W.2 are: i) The appellant being auto driver commuting P.W.2 to her school everyday is not disputed; ii) the defence of the appellant is that it was P.W.2 who was calling the appellant and demanding pocket money; iii) it is the case of the accused that P.W.2 was never forced to the abandoned quarters and it was P.W.2 herself who accompanied the appellant/accused on her own. Though denied suggestions, cannot be considered as evidence, however, the suggestions put forth during the course of cross-examination, in fact, suggests the defence of an accused in a criminal trial.

10. In this case, the specific defence of the appellant is that P.W.2 was in fact accompanying the appellant to the quarters independently and it was with the consent of P.W.2 that appellant accompanied her. In the said background of the defence taken, it cannot be said that the accused was falsely implicated when the accused himself admits taking P.W.2 to the abandoned quarters. However, the sole ground urged is that it was with the consent of P.W.2.

11. The prosecution to prove the age of the victim girl/P.W.2 produced Ex.P6, which was marked through P.W.9. As seen from the cross-examination of P.W.1/mother, P.W.2/victim girl and also P.W.9, Principal of the school, who issued Ex.P6 bonafide certificate, it was not even suggested to the said witnesses that the age of the victim girl/P.W.2 is above 18 years and the date of birth is 07.02.2003 as claimed by P.Ws.1, 2 and 9 is incorrect. For the said reason, at the stage of appeal, it cannot be urged that the age of the victim girl/P.W.2 is not what is claimed and that she was above 18 years. The judgment relied upon by the learned counsel for the appellant is of no use for the

reason it was never the defence of the appellant during the course of trial that the age of the victim girl is above 18 years.

12. The evidence of P.Ws.1 and 2 is totally reliable and in fact, their evidence qualifies as 'sterling witness' in the facts and circumstances of the case and corroborated by medical evidence. Further the defence taken by the appellant claiming that the acts of physical relationship with P.W.2 was consensual, cannot be considered for the reason of the age of the girl.

13. For the aforementioned reasons, the Criminal Appeal is devoid of merits and accordingly, the same is dismissed. As a sequel thereto, miscellaneous applications, if any, shall stand closed.

Date: 30.6.2022
kvs

K.SURENDER, J

HONOURABLE SRI JUSTICE K.SURENDER

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kvs

