

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 31ST DAY OF JANUARY 2022

BEFORE

THE HON'BLE MRS. JUSTICE K.S.MUDAGAL



CRIMINAL APPEAL NO. 328/2018

BETWEEN:

SOMASHEKARA @ SOMA

...APPELLANT

(BY SRI SUYOG HERELE.E, AMICUS CURIAE)

AND:

STATE OF KARNATAKA
BY BANASWADI POLICE STATION
BANGALORE, REP. BY SPP
HIGH COURT CAMPUS
BENGALURU - 560 001

...RESPONDENT

(BY SRI. SHANKAR H.S, HCGP)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) OF Cr.P.C. PRAYING TO SET ASIDE THE JUDGMENT, CONVICTION, ORDER AND SENTENCE DATED 27.01.2018 PASSED BY LIII ADDL.CITY CIVIL AND SESSIONS JUDGE, BENGALURU IN SPL. C.C. NO.136/2015 ON THE FILE OF BANASWADI POLICE CONVICTING FOR THE OFFENCES PUNISHABHE UNDER SECTIONS 376, 506, 323 OF IPC AND 5(I) AND 6 OF POCSO ACT.

THIS CRIMINAL APPEAL COMING ON FOR FINAL HEARING THIS DAY, THE COURT THROUGH VIDEO CONFERENCE DELIVERED THE FOLLOWING:

JUDGMENT

Aggrieved by the order of conviction and sentence passed against him for the offences punishable under Sections 376, 506, 323 of IPC and Section 5(!) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act'), the accused in Spl. C.C. No.136/2015 on the file of LIII Additional City Civil and Sessions Judge, Bengaluru, has preferred the above appeal. The appellant was prosecuted in the said case for the aforesaid offences on the basis of complaint of PW-1, Smt.Kolaramma, mother of the victim girl PW-2.

2. The case of the prosecution in brief is as follows:

The appellant and PW.2 the victim are neighbours. The victim girl was aged 14 years. The appellant luring the victim girl of love, took her to a secluded place near Babupalya, Horamavu, and committed penetrative sexual

assault on her. He intimidated her not to reveal the incident to others. Thereafter, threatening the victim that he will disclose the first incident to others and defame her and her mother, he took her to another secluded place several times and raped her. Ultimately, during the last of such act on 23.10.2014, he assaulted the victim. On 26.10.2014, when he again came to call the victim girl, she was scared and revealed the incident to her mother PW-1 and her aunt PW-3.

3. CW-4 is the brother of PWs-1 and 3. PW-1 filed complaint before PW.8. On the basis of the said complaint, PW-8 registered FIR as per Ex.P7 and got the victim medically examined through PW-4 Dr.Nagaraj, conducted spot mahazar, recorded the statement of witnesses and got the statement of the victim recorded through magistrate under Section 164, Cr.P.C. After completing investigation, he filed charge sheet.

4. The appellant was arrested and he was in judicial custody. On framing charges against the

appellant, the Trial Court conducted the trial. During trial, the learned counsel for the appellant failed to conduct cross-examination of PWs-1 to 4 who are the material witnesses. PW-5 who was examined to prove that she found the appellant and PW-2 frequently together and had advised them, did not support the prosecution case.

5. The appellant's counsel cross-examined PW-6 who apprehended the appellant and produced him before the Investigating Officer PW-8. He also cross-examined PW-7 head master who deposed about date of birth of PW.2.

6. The Trial Court recorded the statement of the accused under Section 313 of Cr.P.C. On such examination the appellant submitted defence statement to the effect that the victim was in love with one Bihari boy and he had abused her. He further stated that PW-2 was in a depressed state and at that stage, he consoled her. He claimed that regarding bursting of crackers, a quarrel ensued between PW-3 and himself and to take revenge,

she instigated PW-1 and PW-2 to file the complaint and falsely implicated him in the case.

7. The Trial Court on hearing the parties, passed the impugned judgment and order convicting the appellant for the offences punishable under Sections 376, 506, 323 of IPC and Section 5(I) read with Section 6 of the POCSO Act and imposed the following sentence:

Sl. No.	Convicted for the offence punishable under Section	Sentence of imprisonment	Fine amount in Rupees	Default sentence
1	376 of IPC	S.I. of 7 years	25,000/-	Simple imprisonment of 1 year
2	506 of IPC	S.I. of 2 years	----	-----
3	323 of IPC	S.I. of 1 year	-----	-----
4	5(I) r/w 6 of POCSO Act	R.I. for 10 years	50,000/-	Simple imprisonment for 2 years
5	Rule 7(2) & 7(4) of POCSO Act	Compensation of Rs.1,00,000/-		

8. The Trial Court held that the evidence of material witnesses, PWs-1 to 4 was not controverted and thereby, charges against the appellant stood proved. The

Trial Court further held that despite it granting opportunity, the accused and his counsel did not do the needful, and in view of Section 33(5) of the POCSO Act, it was bound to reject the prayer of the accused for granting further adjournment for cross-examination of the aforesaid witnesses. Thus, the Trial Court justified its action of rejection of prayer for granting time to cross-examine the material witnesses.

9. The appellant preferred the above appeal through his advocate. Unfortunately, the said advocate did not turn up to represent the appellant. He is in judicial custody all along. Therefore, to achieve the object of Articles 21, 22 and 39A of the Constitution of India, this Court appointed Sri Suyog Herele as Amicus Curiae to assist the Court on behalf of the appellant.

10. Heard both sides.

11. The main ground of challenge to the impugned order of conviction and sentence is that though he was in

custody, on his Counsel abandoning him, he was not given legal aid. Thereby the fundamental right of the appellant guaranteed under Articles 21, 22 and 39A of the Constitution of India was violated. He submits that the trial was unfair.

12. Learned HCGP submits that in view of Section 33(5) of the POCSO Act and having regard to the object of the said Act, the Trial Court had no option but to reject the prayer of the accused and proceed with the matter.

13. Having regard to the rival submissions, the point that arises for consideration is:

"Whether the impugned order of conviction and sentence is sustainable in law?"

14. Article 21 of the Constitution of India which deals with fundamental rights reads as follows:

"21. Protection of life and personal liberty:

No person shall be deprived of his life or personal liberty except according to procedure established by law."

The above provision makes it clear that the State can deprive the right and personal liberty of a person only in accordance with the procedure established by law.

15. The procedural law with regard to the trial of a person is enumerated in Sections 303 and 304 of Cr.P.C.

The said provisions read as follows:

"303. Right of person against whom proceedings are instituted to be defended:

Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice.

304. Legal aid to accused at State expense in certain cases:

*(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where appears to the Court that the accused has not sufficient means to engage a pleader, the **Court shall assign a pleader** for his defence at the expense of the State*

(2) The High Court may, with the previous approval of the State Government, make rules providing for,-

(a) the mode of selecting pleaders for defence under sub-section (1) ;

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fees payable to such pleaders by the Government and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may

be specified in the notification the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session."

16. The above provisions show that they give right to an accused before the criminal court to be defended by a pleader of his choice. Above provisions further show that if the Court finds that an accused is not represented by a pleader and has no sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

17. Article 39A of the Constitution of India casts duty on the state not to deny access to justice on the ground of economic or other disabilities. Article 39A of the Constitution reads as follows:

"39A. Equal justice and free legal aid:

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

18. To achieve the object of Article 39A of the Constitution, the Legal Services Authority Act has been enacted. Under the said Act, Legal Services Authorities are constituted right from national level to taluk level. The district courts have District Legal Services Authority and a panel of advocates for rendering legal aid to the unaffordable as contemplated under Section 304 of Cr.P.C.

19. As per the prosecution papers, at the time of filing charge sheet, the appellant was hardly aged 21 years and he was working as a mason. He was in judicial custody. Under such circumstances, when his advocate failed to represent him, in view of Section 304, Cr.P.C and the aforesaid other provisions, it was mandatory for the Trial Court to refer the matter to the District Legal Services Authority for providing free legal aid to the appellant. That is evident from Section 304, Cr.P.C. as the word 'shall' is used in the said provision.

20. The Trial Court says that it was mandated by Section 33(5) of POCSO Act to reject the prayer for

granting time to the accused for cross-examination. On such ground, it had rejected the application filed by the accused under Section 311 of Cr.P.C. to recall PWs-1 to 3. Article 13(2) of the Constitution bars the State from making any law which takes away or abridges the fundamental rights. Therefore such interpretation of Section 33(5) of the POCSO Act by the trial Court runs contrary to Article 13 of the Constitution. The Courts have to strike harmony between two laws. Therefore when the counsel representing the appellant failed to appear, the appropriate action on the part of the Trial Court was to appoint a legal aid advocate to defend the appellant.

21. In similar circumstances, this Court in its judgment in **Govindaraju .v. State of Karnataka**¹ referring to the above provisions and several judgments of the Hon'ble Supreme Court held that conviction without providing an opportunity to the accused to cross-examine prosecution witnesses is nothing but denial of a fair trial

¹ 2021(3) Kar.L.J. 98

therefore liable to be set aside. This matter is fully covered by the aforesaid judgment in the case of **Govindaraju's** case referred to *supra*.

22. For the aforesaid reasons, the impugned order is unsustainable. The appeal is allowed.

The impugned order of conviction and sentence passed against the appellant is hereby set aside.

The matter is remanded to the Trial Court for fresh consideration.

The Trial Court shall assign an Advocate for the defence of the appellant as required under Section 304, Cr.P.C.

The Trial Court shall recall PWs-1 to 4. After the cross-examination of PWs-1 to 4, if found necessary, the Trial Court shall examine the appellant under Section 313, Cr.P.C. and give him an opportunity to file defence statement or lead defence evidence.

In doing so, the Trial Court shall ensure that Section 33(5) of the POCSO Act is complied so far as PW-2 (victim

girl). The Trial Court shall conduct trial as expeditiously as possible in the light of the aforesaid observations and dispose of the matter afresh.

23. This Court places on record the able assistance of Sri Suyog Herele, learned Amicus Curiae in the matter. Registry shall pay him remuneration of Rs.15,000/-.

Registry shall transmit a copy of the order and records to the Trial Court forthwith.

**Sd/-
JUDGE**

vgh*