



IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 23RD DAY OF MARCH 2022

PRESENT

THE HON'BLE MR. JUSTICE H.T.NARENDRA PRASAD

AND

THE HON'BLE MR. JUSTICE RAJENDRA BADAMIKAR

CRL.A.No.100190/2017

BETWEEN:

STATE OF KARNATAKA,
REP.BY THE POLICE INSPECTOR,
KAKATI POLICE STATION, BELAGAVI,
THROUGH THE ADDL. STATE PUBLIVC PROSECUTOR,
ADVOCATE GENERAL OFFICE, HIGH COURT OF KARNATAKA,
DHARWAD BENCH.

.. APPELLANT

(BY SRI.V.M.BANAKAR, ADDL. SPP)

AND:

ASIF RASCOLSAB SANADI,
AGE: 38 YEARS,
R/O LAXMI NAGAR, 1ST CROSS,
KAKATI, BELAGAVI.

.. RESPONDENT

(BY SRI.Z.M.HATTARKI & SRI.MAHANTESH HIREMATH, ADVS.)

THIS APPEAL IS FILED UNDER SECTION 378(1) & (3) OF CR.P.C.SEEKING TO GRANT LEAVE TO APPEAL AND SETTING ASIDE THE JUDGMENT AND ORDER OF ACQUITTAL DATED 03.02.2017 PASSED BY THE III ADDL. DISTRICT AND SESSIONS JUDGE & SPL.JUDGE (POCSO ACT,), BELAGAVI IN S.C.NO.199/2015 AND CONVICT THE ACCUSED FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 376(1), 342, 506 OF IPC AND SECTIONS 4, 8 AND 12 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (POCSO) ACT, 2012.

THIS APPEAL HAVING BEEN HEARD THE RESERVED FOR JUDGMENT ON 09.03.2022 COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **RAJENDRA BADAMIKAR, J.** DELIVERED THE FOLLOWING:

JUDGMENT

The State has filed this appeal under Section 378(1) & (3) of Cr.P.C. challenging the judgment of acquittal dated 03.02.2017 passed by the III Additional District and Sessions Judge & Special Judge (POCSO Act), Belagavi in S.C.No.199/2015.

2. For the sake of convenience, parties shall be referred with the original ranks occupied by them before the trial court.

3. The brief factual matrix leading to the case are as under:

Accused is the father of the victim/complainant and they are residing in Laxmi Nagar bearing House No.1286/A, Belagavi. That the accused being the father of the victim girl aged about 14 years and knowing fully well that she is minor had committed forcible sexual

assault on her since about 9 months and also on 19.05.2015 by wrongfully confining her in the house had forcible sexual act against the victim girl. When the victim girl had been to the house of her maternal grandmother, the accused went there to secure her and at that time, the victim girl refused to go with the accused and disclosed the fact of sexual assault by the accused. It is further case of the prosecution that mother of the victim girl i.e., wife of the accused is deaf and dumb and when the sexual act of the accused was brought to the notice of P.W.6 i.e., maternal grandmother, she took the victim girl to the police station and a complaint came to be lodged. On the basis of the complaint, investigating officer has registered the crime and the victim was subjected to medical examination. Further, her statement under Section 164 of Cr.P.C. before the learned Magistrate was also recorded and the accused was arrested and remanded to judicial custody. The investigating officer has also recorded the statement of the witnesses and collected

medical evidence as well as age proof certificate of the victim and found that there is sufficient evidence as against the accused and as such, he submitted the charge sheet against the accused for the offences punishable under Sections 376(1), 342 and 506 of IPC and Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act' for short).

4. After submission of the charge sheet, as there are sufficient grounds to proceed against the accused, the cognizance was taken and the accused was produced from judicial custody and prosecution papers were furnished to him. Further, the accused was represented by counsel and after hearing both the parties, the charge under Section 376(1), 342 and 506 of IPC r/w Sections 4, 8 and 12 of POCSO Act is framed against the accused and the same is read over and explained to the accused. The accused pleaded not guilty and claimed to be tried.

5. To prove the guilt of the accused, the prosecution has examined in all 11 witnesses and also placed reliance on 13 documents as Exs.P1 to P13 and 3 material objections as M.Os.1 to 3. After conclusion of the evidence of the prosecution, the statement of the accused under Section 313 of Cr.P.C. is recorded to enable him to explain the incriminating evidence appearing against him in the case of the prosecution. The case of the accused is of total denial. However, he himself has got examined as D.W.1.

6. After hearing the arguments, the learned Special Judge has observed that evidence of the victim, P.W.6 and other witnesses including the medical evidence is not at all trustworthy and thereby acquitted the accused for the offences alleged against him. Being aggrieved by this judgment of acquittal, the State has filed this appeal.

7. We have heard the arguments advanced by the learned Additional SPP for the State and learned

counsel for the respondent/accused. Perused the trial court records.

8. The learned Additional SPP would contend that the judgment and order of acquittal passed by the trial court is contrary to law, facts and evidence on record. He would contend that prosecution has placed sufficient materials, but the trial court has ignored the same. He would also submit that P.W.1-victim has clearly supported the case of the prosecution and her evidence is in consonance with the allegations made in the complaint as well as statement under Section 164(5) of Cr.P.C., but the learned Special Judge on assumptions and presumptions has ignored the same. He would also contend that P.W.6-maternal grandmother of the victim and the learned Magistrate who has recorded the statement of the victim under Section 164(5) of Cr.P.C. have also supported the case of the prosecution and P.W.5-Medical Officer has fully supported, but without any proper reasons, the learned Special Judge ignored

the said evidence which has resulted in miscarriage of justice. He would contend that there is no serious dispute regarding age of the victim and tenure of cross-examination if it is noticed, it is evident that after 7 months of examination-in-chief, the cross-examination of the victim and other witnesses were made, by that time certain admissions were taken from the mouth of the victim regarding conduct of the accused. He would submit that those admissions themselves are not sufficient, as there is no specific denial in the entire cross-examination of the victim regarding sexual assault. He would contend that evidence of P.Ws.1, 4, 5, 6 and 8 completely support the case of the prosecution and the evidence of P.W.5 does establish that victim was subjected to sexual assault and the said fact was not disputed by the accused and the accused did not give any reason as to who had committed sexual assault on the victim, who is his daughter. The observation of the learned Special Judge that the victim is tutored is erroneous and hence, he would contend that there is

sufficient evidence to convict the accused and as such, he prayed for convicting the accused.

9. Per contra, learned counsel for the respondent/accused would support the impugned judgment of acquittal passed by the learned Special Judge. He would contend that P.W.1 is tutored witness and considering the animosity between accused and P.W.6 as admitted by P.W.1, it is evident that her evidence is not trustworthy. He would also draw the attention of this court that, just one day prior to recording of statement under Section 164 Cr.P.C. by the learned Magistrate, the victim was subjected to medical examination and it is noticed that she was under depression and on the next day, the statement was recorded and it clearly establishes that she was tutored and further, he would contend that competency of the witness to give statement under Section 164 of Cr.P.C. is not recorded by the learned Magistrate and no statutory rules have been followed. Hence, he would contend that

trial court is justified in acquitting the accused and as such, he would seek for dismissal of the appeal.

10. Having heard the arguments and perusing the trial court records, the following points would arise for our consideration.

- i) Whether the prosecution proves the guilt of the accused for the offence punishable under Sections 376(1), 342 and 506 of IPC and Sections 4, 8 and 12 of POCSO Act as alleged beyond all reasonable doubt?
- ii) Whether the judgment and order of acquittal passed by the trial court is perverse, erroneous and arbitrary?

11. It is to be noted here that victim girl is none other than daughter of the accused. The victim is examined as P.W.1. It is also an admitted fact that the mother of the victim and wife of the accused is deaf and dumb. Further, there is no serious dispute of the fact

that victim is aged about 14 years as on the date of lodging of the complaint. This aspect is again confirmed from Ex.P8 which is a birth certificate issued by the school, which discloses that her date of birth is 20.02.2001. Apart from that, the accused who got himself examined as D.W.1 in his cross-examination has admitted that date of birth of the victim is 20.02.2001. The date of offence is 9 months prior to lodging of the complaint and as on the said date, the victim was aged about 14 years, which is not under serious dispute.

12. The victim is examined as P.W.1 who is also the complainant in this case. In her evidence, she deposed that, she was residing with her father/accused in Kakati and her mother's native is Kittur. She has also deposed that her maternal grandmother is residing in Gandhi Nagar, Belagavi and her mother is deaf and dumb. She has also deposed that 8 months prior to recording her evidence, when she was staying in Kakati, one day accused left her in the house of her maternal

grandmother and four days later, he came back for calling and at that time, her grandmother asserted that she will send her after two days, but the accused insisted for sending her immediately. She has also deposed that she has refused to go with her father, but he took her forcibly to his house and then locked her in the house. She has also deposed that, on the same day in the night at 9.30 p.m. the accused brought food from a hotel and tried to sexually assault her and when she disclosed that she had monthly period, the accused did not commit any sexual assault on that day. She further deposed that, on the next day, he brought her to her grandmother's home in Gandhi Nagar asking them to be ready on the next day. Again on the next day, when the accused insisted for taking the victim and his wife, the maternal grandmother of the victim opposed and the victim has also refused to go and when the reason was enquired by the grandmother, the victim disclosed the fact that accused used to commit sexual assault on her since 8-9 months. She further deposed that, her grandmother took

her to the police station wherein she lodged a complaint as per Ex.P1. She further deposed that, subsequently she has shown the spot to the police and she has also given statement before the learned Magistrate as per Ex.P3 and identified her signature as Ex.P3(a).

13. It is to be noted herein that the defence counsel did not cross-examine this witness and initially the cross-examination was taken as nil. But this witness was recalled after 7 months wherein she has admitted that the accused used to take care of her and used to advise not to move outside the house in the evening and he was strict etc. It is also suggested that relationship between P.W.6-grandmother and the accused was not cordial and he used to advise not to go there and they used to quarrel regularly and there was quarrel between P.W.6 and the accused on the date of lodging of the complaint also. However, P.W.1 in her examination-in-chief at page 2 at the fag end has deposed regarding

sexual assault committed by the accused, which reads as under:

“ಆಗ ನಾನು ಅಜ್ಜಿಗೆ ಆರೋಪಿತನ ಜೊತೆಗೆ ಹೋಗುವುದಿಲ್ಲ ಅಂತಾ ಹೇಳಿ ಅಳುತ್ತಾ ಇದ್ದೆ. ಆಗ ನಾನು ಅಜ್ಜಿಗೆ ಆರೋಪಿ ತನ್ನ ಮೇಲೆ ಜಬದಸ್ತಿ ಮಾಡಿ ನನ್ನ ಹತ್ತಿರ ಮಲಗಿಕೊಳ್ಳುತ್ತಾನೆ ಅಂತಾ ಹೇಳಿಕಳು. ಆರೋಪಿ ನನ್ನ ಎದೆಯನ್ನು ಒತ್ತುತ್ತಿದ್ದ. ವಾಯುಜಾಮ ತೆಗೆಯುತ್ತಿದ್ದ. ಮೈತುಂಬಾ ಮುತ್ತು ಕೊಡುತ್ತಿದ್ದ. ಆ ರೀತಿ ಮಾಡುತ್ತಿದ್ದರಿಂದ ನನಗೆ ತೊಂದರೆ ಆಗುತ್ತಿತ್ತು. ಆರೋಪಿ ಆ ರೀತಿ ನನಗೆ 8-9 ತಿಂಗಳಿಂದ ಮಾಡುತ್ತಿದ್ದ.”

14. It is important to note here that though defence counsel has cross-examined the victim and elicited regarding strained relationship between P.W.6 and the accused and the complaint is being lodged at the instance of P.W.6 etc., but he did not deny the sexual assault during cross-examination of P.W.1. It is simply suggested that allegations were as per the say of the maternal grandmother, but he did not dispute this assertion. However, when a suggestion was made to the witness that accused never behaved indecently with her, the victim has denied this aspect. Hence, it is evident that the accused tried to win over the victim in these 7 months and there was an attempt, but the evidence

discloses that the accused did committed sexual assault on the victim.

15. P.W.2-Sadiq Dadapeer Kazi is the spot mahazar witness and he deposed regarding drawing of mahazar as per Ex.P2. His evidence also discloses that initially he was examined on 22.01.2016 and the accused did not choose to cross-examine this witness and after 7 months, the witness was secured on 24.08.2016 for cross wherein it is elicited that there was dispute between P.W.6 and the accused and he signed as per the request of the police, but there is no denial of the fact of drawing mahazar at the instance of the victim girl. Further, Ex.P2 discloses that at the spot, the victim was present.

16. P.W.3-Saleem Nazeersab Fakali is a mahazar witness for Ex.P5 regarding seizure of M.Os.1 to 3. He was also cross-examined after 7 months, but he denied the suggestion that he signed at the instance of the police.

17. P.W.4-Manjula D. is V ACJ & JMFC, Belagavi who has recorded statement under Section 164 of Cr.P.C. of the victim. She has deposed that on 26.06.2015 she was holding charge of IV JMFC and at that time, the victim girl was brought to the court along with her grandmother by the police and the victim girl was minor and was crying. She further deposed that for 10 minutes, she consoled the victim and victim expressed her willingness to disclose certain facts pertaining to her father and then victim has given her statement and she recorded the same. Interestingly, though the evidence of this witness recorded on 23.01.2016, the cross-examination was held on 08.09.2016 after recalling the witness. It discloses that, defence has developed a tendency not to cross-examine the witnesses on the same day and the conduct is completely against the intention of the legislation in incorporating Section 309 of Cr.P.C. During her cross-examination, it is elicited that she has not disclosed the name of translator, but it is to be noted herein that signature of the translator is

obtained as stated by the witness. The victim is resident of Belagavi and there is no evidence to show that she does not understand Kannada. Further, during the cross-examination of P.W.4, there is no suggestion that this witness does not understand Hindi. Being a Judicial Officer, a simple suggestion is made that statement was not recorded as per law, but what is the procedure and law which is violated is not at all disclosed. Since it is statement under Section 164 of Cr.P.C., administration of oath is permissible as the statement is given by the victim and not by an accused.

18. P.W.5-Dr.Anita Dalal deposed regarding examining the victim girl on 25.05.2015 and her evidence discloses that, hymen was not intact and the victim has undergone sexual assault. In her cross-examination, it is elicited that there was no recent sexual assault on the victim, but the fact that the victim was undergone sexual assault is not at all denied or disputed.

19. P.W.6-Sahajadabi Kazi, is a maternal grandmother of the victim. She has also deposed in terms of the statement given by the victim girl and she deposed that victim girl has disclosed regarding sexual assault committed by the accused on her. Hence, she took her to the police station and got lodged the complaint. She has also specifically deposed that her daughter i.e., mother of the victim girl is deaf and dumb. During the cross-examination, it is elicited that there was a promise to the accused that she will be giving property in case he marries the mother of the victim, as she was deaf and dumb. It is elicited that there was quarrel in recent days and the accused is not leaving the victim girl in her house. She has denied the suggestion that she insisted the victim girl to lodge the complaint and due to personal grudge, she got lodged a false complaint. Interestingly, during the cross-examination of P.W.1, a suggestion was made that P.W.6 was initially insisted to accused to transfer a house property in the name of the mother of the victim, which she denied. But on the

contrary, during cross-examination of P.W.6, a suggestion was made that during the marriage, there was a promise to give property, as the accused is marrying deaf and dumb daughter of P.W.6. But very interestingly, the accused who got examined himself as D.W.1 in his cross-examination admitted that he had the knowledge at the time of marriage that his wife is deaf and dumb and without any enticement, he voluntarily married the daughter of P.W.6. Hence, it is evident that accused has taken inconsistent stands.

20. The evidence of P.W.7 has no relevance, as she has assisted the investigating officer in recording the statement of mother of the victim girl who is deaf and dumb. But the said witness C.W.12 was not examined and as such, the evidence of P.W.7 has no relevance.

21. P.W.8 is the teacher of Government School at Kakati and she has deposed that she worked in the said school from 01.12.2014 to 29.08.2015 as incharge Head Master and the victim had studied in their school and her

date of birth is 20.02.2001. As per the school records, she has issued Ex.P8. Though in her cross-examination it is elicited that the birth certificate received at the time of entry was not produced by her, but interestingly, the accused himself during his cross-examination admitted the date of birth of the victim. Admittedly, Ex.P8 is issued from a Government school and as per Section 35 of the Indian Evidence Act, 1872, entry in public record or an electronic record made during the performance of the duty is a relevant fact. Hence, the said entries have presumptive value unless contrary is proved. But in the instant case, accused himself has admitted the date of birth of the victim and as such, it is not open for the accused now argue regarding age of the victim.

22. P.W.9 is a doctor who deposed regarding examining the accused and his capacity of performing sexual activities, which is not under serious dispute.

23. P.W.10 is the Woman PSI of Kakati police station and she deposed that, from 23.06.2014 to

16.09.2015, she was PSI of Woman Police Station, Belagavi and on 24.05.2015 as per the instructions of C.W.25, she has recorded the statement of the victim girl as per Ex.P1 and also endorsed the same and her signature is marked as Ex.P1(b).

24. P.W.11 is the Investigating Officer and he deposed regarding investigation done by him. He further deposed that, as per his instructions, P.W.10 has recorded the complaint of the victim girl by getting it typed. This witness was also subjected to lengthy cross-examination, but nothing was elicited so as to impeach his evidence.

25. In the instant case, the evidence of P.W.1-victim, P.W.4-Judicial Officer who recorded the statement under Section 164 of Cr.P.C., P.W.5-Medical Officer and P.W.6-grandmother of the victim are relevant and their evidence is consistent. The evidence of P.W.5 discloses that victim did undergone sexual assault. The accused being the father is unable to explain as to under what

circumstances the victim has undergone sexual assault and as per the prosecution case, the accused himself has committed sexual assault on his daughter i.e., the victim. Apart from that, the victim girl and P.W.6-grandmother have supported the case of the prosecution and in the cross-examination there is no denial of sexual assault committed as alleged. There is no reason for these two witnesses to give false evidence.

26. Much arguments have been advanced regarding dispute between P.W.6 and the accused and they influencing the victim girl, but the said ground holds no water. P.W.6 is mother-in-law of the accused and there are no strong circumstances to show that she can go to the extent of risking the life of her granddaughter and daughter. Further, P.W.1-victim girl has no reason for giving false evidence against her own father. The statement of P.W.1 is again corroborated by the evidence of P.W.4, who has recorded her statement of victim under section 164(5) of Cr.P.C. The statement of victim

under Section 164 of Cr.P.C., evidence of victim and complaint are inconsonance with each other. There is no reason to discard this evidence.

27. P.W.1 has not stated regarding accused threatening her or giving life threat though the same was referred in her statement under Section 164 of Cr.P.C. Hence, the evidence is short as regards the offence under Section 506 of IPC is concerned. Accordingly, there is no consistent evidence regarding the accused illegally confining the victim girl in his house so as to attract offence under Section 342 of IPC. However, offence under Section 376(1)(i) is proved which was deleted w.e.f. 21.04.2018 and it reads as under:

"376(1)(i) commits rape on a woman when she is under sixteen years of age, or".

28. But the offence is committed in 2015 itself and as on that date, the provision under Section 376(1)(i) was existing which is punishable with

imprisonment which shall not be less than ten years, but which may extend to imprisonment for life.

29. Section 4 of the POCSO Act deals with punishment for penetrative sexual assault and Section 6 of the POCSO Act deals with punishment for aggravated penetrative sexual assault. Section 5 of the POCSO Act defines aggravated penetrative sexual assault and as per Section 5(l) whoever commits penetrative sexual assault on the child more than once or repeatedly, it is defined as aggravated penetrative sexual assault, which is punishable under Section 6 of POCSO Act. Since Section 6 of POCSO Act is higher offence, the provisions of Sections 4 and 12 of POCSO Act merges in Section 6 of the POCSO Act.

30. On perusal of the judgment of the trial court, it is evident that the trial court did not consider the position of the child and the trauma undergone by the child while facing sexual assault. Further, the trial being conducted by the trial court in such a casual manner that

all the witnesses were recalled after 7 months and such attitude is deprecated by the Hon'ble Apex Court. The reasoning of the trial court does not inspire the consciousness of the court and the trial court on surmises and assumptions presumed certain things and acquitted the accused. The trial court has failed to consider the fact that there was no reason for the victim to give false evidence against her own father and non-denial of sexual assault during cross-examination of the victim. The trial court on its own presumed certain aspects without considering the inhuman nature of the offence regarding father committing sexual assault/rape on his own minor daughter that too when the mother is deaf and dumb. There is no reason for victim girl to give false evidence against her own father. She ought to have undergone lot of mental agony and shock by this act of accused as she was not able to share the same with her mother who is deaf and dumb. It is hard to accept the contention of accused that at the instance of her maternal grandmother a false complaint is filed and she is giving

false evidence. Court cannot ignore trauma undergone by tender aged child by such inhuman act. The courts should be very sensitive in such cases, when evidence of victim is consistent and reliable. Under such circumstances, the entire approach of the trial court is erroneous, perverse, capricious and from the initial stage itself, the trial court has proceeded with biased mind against the victim girl, which cannot be accepted.

31. Learned Additional SPP has placed reliance on the decision of the Hon'ble Apex Court in the case of ***Vinod Kumar Vs State of Punjab*** reported in **(2015) 3 SCC 220**, wherein the Hon'ble Apex Court has laid down the guidelines for conducting criminal trial under Section 309 of Cr.P.C. and duty of Presiding Judge as representative of the collective/society, wherein it is observed as under:

*"A. Criminal Procedure Code, 1973 – S.309
– Criminal trial – Proper manner of conducting –
Duty of Presiding Judge as representative of the
collective/society – Need for expeditious disposal
so that truth is not the victim and accused do not*

get time to win over witness – Adjournments granted for non-acceptable reasons – Calling of a witness for cross-examination after a long span of time, held, is anathema to concept of proper and fair trial – Agony and anguish expressed by Supreme Court in relation to – Duty of court while conducting trial, summarized and directions issued.

Directions issued, to send copies of instant judgment to Chief Justices of all High Courts for circulating the same among trial Judges with a command to follow principles relating to trial in a requisite manner and not to defer cross-examination of a witness at their pleasure or at the leisure of defence counsel – Evidence Act, 1872 – Ss.137, 138 and 165 – Public Accountability, Vigilance and Prevention of Corruption – Trial, Sentencing and Other Issues in Cases re Public Office/Corruption – Adjournment.

B. Criminal trial – Generally – Fundamental purpose of trial – What is – Held, is to arrive at truth on basis of evidence on record.

C. Criminal Trial – Witnesses – Hostile witness – Evidence of – Admissibility – Reiterated, even if a witness is characterised as a hostile witness, his evidence is not completely effaced – Said evidence remains admissible in trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable

evidence, as in present case – Evidence Act, 1872, S.154(2).”

32. In the instant case also, the evidence recorded by the trial court discloses that all the witnesses including the victim as well as Judicial Officer and doctor were called for cross-examination after a long span of time, which is required to be held as anathema to the concept of proper and fair trial. As observed by the Hon’ble Apex Court, the trial court ought to have been diligent in conducting the trial especially in such matters. But the conduct of the trial court discloses that it has taken the things in a mechanical way, which has resulted in miscarriage of justice.

33. Learned Additional SPP has further placed reliance on the decision of the Hon’ble Apex Court in the case of ***Phool Sigh v. State of Madhya Pradesh*** reported in ***AIR 2022 SC 222***, wherein the Hon’ble Apex Court observed as under:

“(A) Penal Code (45 of 1860), S.376 – Evidence Act (1 of 1872), S.118 – Rape – Testimony of prosecutrix – Reliability – When

prosecutrix was alone at home, accused jumped wall, entered into her room and committed rape before fleeing away – Prosecutrix fully supported case of prosecution, being consistent right from very beginning – Accused unable to point out why sole testimony of prosecutrix should not be believed – No reason to doubt credibility and trustworthiness of prosecutrix – Once prosecutrix is found to be reliable and trustworthy – Without any further corroboration, conviction of accused relying upon sole testimony of prosecutrix, sustained.

(B) Penal Code (45 of 1860), Ss.375, 376 – Evidence Act (1 of 1872), S.45 – Rape – Absence of external injuries on body of prosecutrix – Consenting party – Absence of external or internal injuries on body of prosecutrix – Does not mean it may be a case of consent – No such question asked even remotely to prosecutrix – Prosecutrix cannot be said to be consenting party.”

34. In the instant case also, the testimony of the victim girl is consistent and reliable. Further, during the cross-examination there is no denial of sexual assault. Further, mere absence of external injuries cannot be a ground for discarding the medical evidence, as admittedly, just prior to lodging of the complaint there was no sexual assault, but there was an attempt. But the evidence of the victim discloses that when she disclosed the fact that she had period, it was averted. The medical evidence discloses that no sign of recent sexual assault relates only for two days and under these circumstances,

the trial court has committed an error in ignoring the consistent evidence of the victim, P.Ws.4, 5 and 6.

35. Learned Additional SPP has further placed reliance on the decision of the Hon'ble Apex Court in the case of **Radha Mohan Singh Alias Lal Saheb and Others State of U.P.** reported in **(2006) 2 SCC 450**, wherein it is held that, evidence of hostile witness cannot be treated as effaced or washed off the record altogether and it can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof. In the instant case, victim and P.W.6 were not treated as hostile, but during their cross-examination after 7 months to some extent, they admitted good relationship between the victim and accused and strained relationship between accused and P.W.6. But that itself does not discard the entire case of the prosecution and the other evidence supports the case of the prosecution.

36. Hence, the evidence on record clearly establishes that accused has committed a penetrative

sexual assault on the victim girl. Section 42 of the POCSO Act reads as under:

"42. Alternate punishment. - Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB, 376E, section 509 of the Indian Penal Code (45 of 1860) or section 67B of the Information Technology Act, 2000 (21 of 2000), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree."

37. Hence, as per this Section, when the offence under Section 376 and under the provisions of this Act have been committed, then if the accused is found guilty, the higher punishment under this Act or under IPC is required to be given, when both the provisions are incorporated.

38. In the instant case, Section 376(1) is punishable with rigorous imprisonment for a term which shall not be less than 10 years but which may extend to life. Section 6 of POCSO Act prior to 2019 amendment reads as under:

"6. Punishment for aggravated penetrative sexual assault – Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

39. Hence, the minimum sentence prescribed under both the Acts is 10 years with fine. Hence, this court can impose imprisonment under Section 6 of the POCSO Act or under Section 376(1) of IPC. The evidence led by the prosecution clearly establish that accused did committed an offence under Section 376(1) of IPC r/w Section 6 of POCSO Act and he is liable to be punished.

40. The trial court committed a serious error in acquitting the accused and under such circumstances, the judgment of the trial court is perverse and capricious and calls for interference by this court. Accordingly, point No.2 is answered in the affirmative and point No.1 is answered partly in the affirmative insofar as it relates to offence under Section 376(1) of IPC r/w Section 6 of

POCSO Act. Accordingly, we proceed to pass the following:

ORDER

The appeal is allowed in part.

The judgment and order of acquittal dated 03.02.2017 passed by the III Additional District and Sessions Judge & Spl. Judge (POCSO Act,), Belagavi in S.C.No.199/2015 is set aside insofar as it relates to Section 376(1) of IPC r/w Section 6 of POCSO Act.

The accused is found guilty of the offence punishable under Section 376(1) of IPC r/w Section 6 of POCSO Act and accordingly, he is convicted.

The judgment of acquittal for the offence punishable under Sections 342 and 506 of IPC is confirmed.

It is necessary to hear the accused on sentence. Accordingly, the matter stands adjourned for hearing on sentence.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

MBS/-

ORDER ON SENTENCE

Heard the learned counsel appearing for respondent/accused as well as Additional State Public Prosecutor on the sentence.

2. Learned counsel for respondent/accused would contend that respondent/accused is having number of dependants and he is a poor autorickshaw driver and as such, considering his status, minimum sentence may be imposed by giving special or adequate reasons on his poverty.

3. However, learned Additional State Public Prosecutor would contend that considering the act of respondent/accused in committing sexual assault on his own minor daughter, the maximum sentence prescribed under the law may be imposed.

4. We have given our anxious consideration to the submissions made by the learned counsels appearing for both the parties.

5. The evidence on record clearly establishes that accused being the father of the victim girl has committed

aggravated sexual assault by exploiting her situation that too when his wife is deaf and dumb. The act was only to satisfy his lust as well as inhuman. Under such circumstances, there are no special reasons forthcoming to reduce the sentence. Even otherwise, Section 6 of POCSO Act as well as Section 376 of IPC does not give any power to this Court to reduce the sentence on this ground other than the prescribed by the statute.

6. The offence under Section 376(1) of IPC is punishable with imprisonment which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine. Accordingly, the offence under Section 6 of POCSO Act is also punishable with rigorous imprisonment which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine. As per Section 42 and Section 42A of POCSO Act, if the accused is convicted under the provisions of IPC as well under the POCSO Act, the higher punishment is required to be imposed. However, in this case, under both the provisions, minimum sentence prescribed is rigorous imprisonment for ten years with fine which may also extend to life. The accused has

committed aggravated sexual assault on his own daughter while she was minor and his wife was deaf and dumb. Further, the evidence also discloses that the sexual assault continued for almost 8 to 9 months on the victim girl. However, it is submitted that now the victim girl is married and residing with her husband. Though the accused does not deserve any leniency, considering the fact that he enjoyed the liberty after the trial Court has acquitted him and considering the lapse of time and settlement of victim by marriage, we propose to impose the sentence of rigorous imprisonment for ten years with fine of Rs.50,000/- with default clause of simple imprisonment for three years which will serve the purpose. Accordingly, we proceed to pass the following:

ORDER

Accused/respondent herein is convicted and sentenced to undergo rigorous imprisonment for a period of ten years with fine of Rs.50,000/- (Rupees Fifty Thousand Only) in default, simple imprisonment for a period of three years for the offence punishable under Section 376(1) read with Section 6 of POCSO Act.

The entire fine amount shall be paid to the victim girl by way of compensation towards her welfare.

The Trial Court is directed to secure the presence of accused for serving the remaining part of sentence.

Accused/respondent is entitled for set off under Section 428 of Cr.P.C.

Office is directed to furnish a free copy of this judgment to the learned counsel for respondent/accused.

Send back the Trial Court records to the Trial Court along with a copy of the order for compliance.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

Naa