

Irappa Vs. State of Karnataka,

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Court : Karnataka Dharwad

Decided On : Aug-16-2018

Judge : K.Somashekar

Appeal No. : CRL.A 100177/2016

Appellant : Irappa

Respondent : State of Karnataka,

Judgement :

1 R IN THE HIGH COURT OF KARNATAKA DHARWAD BENCH DATED THIS THE16H DAY OF AUGUST 2018 BEFORE THE HONBLE MR. JUSTICE K. SOMASHEKAR CRL. A. No.100177/2016 BETWEEN: IRAPPA S/O BASAPPA KHAJAGAR, AGE:

52. YEARS, OCC: WATERMAN, R/O: SUTAGATTI, TQ: BAILHONGAL, DIST: BELAGAVI. (BY SRI V.M. SHEELAVANT, ADVOCATE) AND: STATE OF KARNATAKA BY SUB INSPECTOR OF POLICE, NESARAGI POLICE STATION, BAILHONGAL.-. APPELLANT - (BY SRI PRAVEEN K. UPPAR, GOVT. PLEADER) RESPONDENT THIS CRIMINAL APPEAL IS FILED UNDER SECTION3742) OF CR.P.C. AGAINST THE

JUDGMENT

OF CONVICTION AND SENTENCE PASSED BY THE LEARNED III ADDL. DISTRICT AND SESSIONS JUDGE, BELAGAVI, IN S.C. No.312/2014

DATED 17.06.2016 FOR THE OFFENCES PUNISHABLE U/S 376(1) OF IPC AND SEC. 4 AND 6 OF POCSO ACT & ETC. THIS CRIMINAL APPEAL COMING ON FOR FINAL HEARING THIS DAY, THE COURT MADE THE FOLLOWING:

2.

JUDGMENT

This appeal is directed against the judgment of conviction and order of sentence passed by the learned III Addl. Dist. & Sessions Judge, Belagavi, in S.C. No.312/2014 dated 17.06.2016 wherein the accused is convicted for the offence punishable u/S 4 of The Protection of Children from Sexual Offences Act, 2012 (for short POCSO Act) and sentenced to undergo simple imprisonment for a period of seven years and to pay a fine of Rs.15,000/-, in default of payment of fine, he shall undergo further imprisonment for six months. The accused is also convicted for the offence u/S 6 of the POCSO Act and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.15,000/-, in default of payment of fine, he shall undergo rigorous imprisonment for a period of six months.

2. I have heard the learned counsel for the appellant- accused and the learned Govt. Pleader for the respondent- State and perused records of the case. 3. It transpires in the complaint that Smt. Gangamma Mallikarjun Lakkundi has filed a complaint before the Nesargi Police Station alleging that, on 07.09.2014 that herself and also her husband had gone to the field for attending coolie work by leaving their daughter Danamma, aged about five years, being the victim, in the house. When the victim girl was playing in front of the house of the accused, he called her by lured the victim took her to his upstairs house and made her to fall on the floor and had a sexual assault on the victim by lifting her inner garments. The complaint was filed by the mother of the victim on 14.09.2014. Based upon her complaint, a case in Crime No.109/2014 came to be registered. Thereafter, the Investigating Officer who has taken up the investigation as wherein he has recorded the statements of the witnesses and so also drew mahazar in the presence of panch witnesses and laid the charge sheet against the accused in S.C. No.312/2014 for the offences punishable u/S 376(1) of IPC besides Sec. 4 and

6 of the POCSO Act. Subsequent to framing of the charge against the 4 accused, the prosecution in all examined 9 witnesses as P.Ws.1 to 9, got marked documents as per Exs.P.1 to 14. Material Objects as per M.Os.1 to 7 are also got marked. Subsequently after recording the incriminating statement against the accused as wherein he has denied the truth of the evidence of the prosecution. Subsequently, the trial Court heard the arguments advanced by the prosecution and the defence counsel for the accused. On appreciation of the evidence on record held conviction against the accused for the offences punishable u/S4 and 6 of the POCSO Act. It is this judgment which is challenged under this appeal.

4. P.W.1 said to be the mother of the victim who has stated in her complaint by narrating the theory by her daughter being P.W.2 that on 07.09.2014 while she was playing in front of the house of the accused, the accused had taken her to upstairs house and had sexual assault on her private part. As a result of that, it was paining to the victim. P.W.5, who being a neighbour, deposed that she heard screaming of the 5 victim. This witness was subjected to examination for the prosecution in order to establish the guilt of the accused. P.W.1 was subjected to cross-examination by the defence counsel. But, she did not give an evidence regarding delay in filing of the complaint against the accused as per Ex.P.1. but the incident said to be committed by the accused on her daughter between 07.09.2014 and 13.09.2014, it is in the knowledge of that P.W.1 as well as her mother-in-law, that means to say, the grandmother of the victim was also aware of that incident said to be committed by this accused on the victim girl, who is aged about five years.

5. Whereas the learned counsel for the appellant during the course of his arguments has taken me through the statement of P.W.1 recorded u/S164 of Cr.P.C. by the concerned Magistrate, which is marked as Ex.P.3. That the evidence of P.Ws.1 and 2 for the prosecution, it is contradicted to the evidence of P.W.5 being the neighbouring witness, who has heard screaming sound of the victim and 6 had been to the scene of crime. But, P.Ws.3 and 4 have been secured by the I.O. during the course of the investigation in the presence of P.W.3, Ex.P.4-spot mahazar has been conducted by P.W.9, being the I.O. who laid the charge sheet against the accused. P.W.4 being the another panch witness relating

to Ex.P.5-seizure mahazar for having seized the clothes belonging to the accused. But, P.Ws.3 and 4 did not withstood the fulcrum of Exs.P.4 and P.5, said to be conducted by P.W.9, the Investigating Officer, who laid the charge sheet against the accused. P.W.6, being the Doctor, who examined the accused and issued report as per Ex.P.7, for having subjected to examination of the clothes of the accused that had been seized during the course of investigation done by the Investigating Officer. P.W.8, being the Doctor, who subjected the victim to medical examination and issued reports as per Exs.P.9 and P.10. Ex.P.10 is the opinion report issued by the Doctor for having subjected to examination the victim. In his opinion report, he opined that, there is no evidence to show sexual intercourse on the 7 victim. Therefore, the counsel for the appellant who has stoutly addressed arguments that, despite of an evidence which is contradicted to the evidence of P.Ws.3 and 4 with the evidence of P.W.9 and so also to contradict the evidence of P.W.7, being the P.S.I, who received the complaint at Exs.P.1 and recorded the FIR as per Ex.P.8, Ex.P.8 is the FIR which is found the substance of the narration of the complaint, but their evidence which contradicted the evidence of P.W.1 relating to the substances at Ex.P.1 and so also contradicted the evidence of P.W.2, being the victim who is aged five years. Despite of it, the trial Court has held conviction u/S4and 6 of the POCSO Act, 2012. Even the accused did not commit the offence as an aggravated penetrative sexual assault as u/S6of the POCSO Act and even as a penetrative sexual assault as u/S4of the Act. But the trial Court has erroneously come to the conclusion and held that the prosecution has proved the guilt of the accused beyond all reasonable doubt. But the trial Court has held acquittal of the offence punishable u/S376of the IPC even though the 8 evidence of P.Ws.1, 2, 6 and 8 have been scanning but the Prosecution did not putforth evidence for having to secure conviction u/S376of IPC. Therefore, the trial Court had held acquittal of the accused but the ingredients relating to Sec. 4 and 6 of the POCSO Act relating to penetrative sexual assault and also aggravated penetrative assault. But the ingredients of these offences have not been established by the prosecution even though subjected to examination the material witnesses P.Ws.1, 2 as well as P.Ws.6 and 8. Despite of it, the trial Court has held conviction and erroneously come to the conclusion that the prosecution has proved the guilt of the accused beyond all reasonable doubt. Therefore, in this

appeal it is required to be intervention of the impugned judgment and order of sentence passed by the trial Court by reappreciating the entire evidence on record as wherein the trial Court has misread as well as misdirected the evidence of P.Ws.1 and 2. Their evidence which contradicted the evidence of P.W.6 in respect of Ex.P.7 and so also the evidence of P.W.8 in respect of Ex.P.9 and Ex.P.10. On all 9 these grounds as urged by the learned counsel for the appellant and seeking for acquittal of the accused by setting aside the judgment of conviction and sentence held against the accused.

6. The second limb of the arguments advanced by the learned counsel for the appellant is that, even though the prosecution has examined in all nine witnesses as per P.Ws.1 to 9, but P.Ws.1 and 2 being the material witnesses for the prosecution, on the part of the prosecution there is no explanation properly relating to delay in filing of the complaint against the accused but the incident was occurred on 07.09.2014 but the complaint was filed on 14.09.2014. During this period the incident occurred on the victim, being P.W.2, who is aged five years. It is only in the knowledge of P.W.1, being the mother of the victim and so also the mother- in-law of P.W.1, none else in their knowledge. But, P.W.5- Gowravva, a neighbour had been subjected to examination and this witness has heard screaming of the victim. Nothing 10 to elicit to worthwhile evidence that P.W.5 being stated as witness and also subjected to examination in order to prove guilt of the accused even to the extent of Sec. 7 of the POCSO Act regarding the sexual assault, even that ingredients were also not established by the prosecution for securing conviction against this accused. On all these grounds as urged by the learned counsel for the appellant and seeking for intervention of the impugned judgment of conviction and order of sentence passed by the Court below against the accused for the offences punishable u/S4and 6 of the POCSO Act.

7. On the other hand, learned Govt. Pleader for the State who has supported the judgment of conviction and order of sentence passed by the Court below by held conviction under Section 4 and 6 of the POCSO Act. On 07.09.2014 wherein the complainants daughter was playing in front of the house, at that time, this accused lured the victim and taken her to the upstairs house and made the victim to fall on the floor by 11 spreading the mat. This is the evidence adduced by P.W.2- victim

before the trial Court as where the accused who had sexually assaulted on the victim who is aged about five years. P.W.2-being the victim who has stated in her evidence relating to the accusation made in the complaint at Ex.P.1 which is in conformity with the evidence of P.W.1 being the author of the complaint. Merely because P.W.6, being the Doctor who examined the accused and issued report as per Ex.P.1, subjected to examination the clothes of the accused and not detected spermatozoa and also P.W.8, who subjected to examination the victim and issued report as per Exs.P.9 and 10. Ex.P.10 is the report issued by the Doctor. It is the opinion as there is no signs of evidence of sexual intercourse on the victim but P.W.2 who is the victim aged about five years, she has stated in her evidence that the accused had taken her to his house and spreading the mat and had sexual assault. Therefore, the trial Court has appreciated the evidence of P.Ws.1 and 2 coupled with the evidence of P.W.9, who is the Investigating Officer, have been conducted the spot 12 panchanama as per Ex.P.4 and seized panchanama as per Ex.P.5 in the presence of P.Ws.3 and 4. But, P.W.2, being the victim girl, who is aged five years, she has stated in her evidence in conformity with the averments made at Ex.p.1 as wherein her mother-P.W.1 have been subjected to examination and give evidence to prove the guilt of the accused. Therefore, the trial Court has rightly come to the conclusion and held conviction against the accused u/S4 and 6 of the POCSO Act. Merely because the complaint was filed by the complaint on 14.09.2014, even after lapse of seven days, it cannot be the ground for seeking acquittal of the accused. On all these grounds as urged by the learned Govt. Pleader for the State seeking for dismissal of the appeal preferred by the accused as devoid of merits.

8. In this appeal is relevant to reappreciate the evidence of P.W.1, who is the mother of the victim as she has given complaint as per Ex.P.1 on 14.09.2014. But the incident was occurred on 07.09.2014 in the house of the accused. As on 13 07.09.2014 wherein the victim was playing in front of her house that this accused lured the victim girl, who is aged about five years and taken her to his house and spreading the mat and made her to fall on it and had sexual assault on her. While the victim-P.W.2 was screaming, that P.W.5 being the neighbouring person, who has heard the screaming sound of the victim and rushed to the scene of crime. The scene of crime is as the house of this accused. But, on 07.09.2014 that P.W.1

as well as her husband had been to the field for attending the filed work but their daughter was left in the house and while she was playing in front of the house, this accused was venturing to the victim by lured her and taken her to his house and had sexual assault on her. The same has been seen in the evidence of P.W.1. The author of the complaint at Ex.P.1 and so also the evidence of P.W.2, aged about five years, on 07.09.2014.

9. P.W.6 is the Doctor who subjected to examination of the accused and also issued report as per Ex.P.7 for having 14 subjected to examination the clothes of the accused. P.W.8 being the Doctor who examined the victim and issued opinion report as per Ex.P.10 wherein he has opined that there is no signs of evidence to having penetrative sexual assault on the victim even in the FSL report as Ex.P.11. Even item nos.1 to 11 have been secured and forwarded to FSL for having subjected to examination but there was no detection made to found spermatozoa on the clothes of the accused. But the trial Court held conviction against the accused u/S4 of the POCSO Act is that the penetrative sexual assault on the victim. Sec. 6 of the POCSO Act is a penal Section for having held punishment against the accused relating to the aggravated penetrative sexual assault on the victim. But, at a cursory glance of the evidence of P.W.1 insofar as the substances at Ex.P.1 and so also the evidence of P.W.2 being the victim who is aged five years. But Sec. 7 of the POCSO Act even without penetration that there was a sexual assault on the victim girl in the instant appeal that P.W.2 who is a victim, aged about five years. This victim was lured by the 15 accused and taken her to his house at first floor and made the victim to fall on the floor by spreading the mat and had sexual assault. Therefore, instead of conviction held against the accused u/S4 and 6 of the POCSO Act as held by the trial Court are concerned, in this appeal it is required to reappraise the entire evidence on record as wherein the trial Court did not appreciate the evidence in a proper perspective. However, the accused who has taken the victim to the scene of crime, which is his house, on 07.09.2014, and had a sexual assault on the victim, who is aged five years, the same has been seen in the evidence of P.W.2 as this victim who has given statement as u/S164 of Cr.P.C. before the concerned Magistrate as this witness have been secured by the Investigating Officer during the course of investigation. Therefore, it is stated that in this appeal it is required to reappraise the entire

material evidence which is put forth by the prosecution to establish the guilt against the accused. However, the prosecution is able to establish the guilt against the accused as u/S7 of the POCSO Act instead of Sec. 4 and 6 of the POCSO Act relating to penetrative sexual assault as well as aggravated penetrative sexual assault. But in this appeal it is stated to be that, on 07.09.2014 this accused has committed sexual assault on the victim. Therefore, the prosecution has established otherwise to say to prove the guilt of the accused u/S7 of the POCSO Act relating to the sexual assault without penetrative act on the victim. Consequently, he is required to be punished u/S8 of the POCSO Act. Accordingly, in this appeal it is required to intervention of the judgment of conviction and order of sentence passed by the trial Court for the offences punishable u/S4 and 6 of the POCSO Act. That the sentences which are held against the accused is hereby set aside. But the accused was being convicted for the offence u/S7 of the POCSO Act as there is evidence put forth by the prosecution for subjecting to examination P.Ws.1 and 2, being the material witnesses for the prosecution. Their evidence has been corroborated with the evidence of P.W.9 being the I.O, conducted seizure panchanama as per Ex.P.4 in the house of the accused as 17 where the incident was occurred on 07.09.2014. Another panchanama that P.W.9 conducted as per Ex.P.5 for having seized the articles which belonged to the victim as well as this accused. In the case on hand, the appellant-accused was convicted for the offences punishable under Section 4 and 6 of POCSO Act, but having gone through the entire evidence available on record in respect of the accused was committed sexual assault on the victim is concerned, in this appeal it is held that the accused is guilt for the offence punishable under Section 7 of POCSO Act, 2012 and not for the offences punishable under Sections 4 and 6 of the POCSO Act, 2012. Therefore, the conviction and sentence held against the accused for the aforesaid offences is liable to be set aside. However, this accused was arrested on 14.09.2014 and since then he is in judicial custody. It is almost three years eleven months and two days, the period in which he has undergone during the course of trial and even after held conviction for 18 the aforesaid period deemed as service of sentence and to meet the ends of justice for the offence punishable u/S8 of the POCSO Act relating to the prosecution has proved the guilt of the accused u/S7 punishable u/S8 of the POCSO Act. Accordingly, I have to proceed to pass the

following order.

ORDER

Appeal filed by the appellant-accused-Irappa son of Basappa Khajagar, is allowed in part. Consequently, the judgment of conviction and order of sentence passed by the learned III Addl. Dist. & Sessions Judge, Belagavi, in S.C. No.312/2014 dated 17.06.2016 is modified. The prosecution has established the guilt of the accused u/S7 of the POCSO Act instead of Sec. 4 and 6 of the POCSO Act. Consequently, the sentence held against the accused is hereby modified as to the aforesaid offence u/S7 of the POCSO Act, as the accused is in judicial custody for a period of three years eleven months and two days. Therefore, the 19 sentence held against the accused u/S8 of the POCSO Act shall be held as the aforesaid period shall be served as service of sentence and to meet the ends of justice. The sentence to pay fine of Rs.15,000/- each for the offences u/S4 and 6 of the POCSO Act, in case deposited by this accused, the same shall be held as to pay the fine amount of Rs.30,000/- for the offence u/s 7 of the POCSO Act as where the prosecution is able to prove the case against the accused for the aforesaid offence. The accused, if deposited the same fine amount of Rs.30,000/-, shall be paid to P.W.2- victim girl on proper identification. In default to pay fine amount, the accused shall undergo further imprisonment for a period of three months. The accused is in judicial custody. Therefore, the concerned jail authorities shall be directed to set him at liberty forthwith, if he is not required in any other case. Accordingly, registry shall be directed to communicate the 20 operative portion of the judgment to the jail authorities as where the accused is lodging, for compliance. SD/- JUDGE bvv

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