

**Eshwar Vs. State By Karnataka**

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**SooperKanoon Citation :** [sooperkanoon.com/1233849](http://sooperkanoon.com/1233849)

**Court :** Karnataka

**Decided On :** Feb-08-2022

**Judge :** K.S.Mudagal

**Appeal No. :** CRL.A 1831/2016

**Appellant :** Eshwar

**Respondent :** State By Karnataka

**Judgement :**

CrI.A.No.1831/2016 1 M IN THE HIGH COURT OF KARNATAKA AT BENGALURU R DATED THIS THE8H DAY OF FEBRUARY 2022 BEFORE THE HONBLE MRS JUSTICE K.S.MUDAGAL CRIMINAL APPEAL No.1831/2016 BETWEEN: ESHWAR S/O LATE KRISHNAPPA AGED ABOUT36YEARS R/AT KERE ROAD, 2ND CROSS NEAR SHANI MAHATMA TEMPLE DEVARA BEESANAHALLI BENGALURU - 560 094 APPELLANT (BY SRI RAKSHITH JOIS, AMICUS CURIAE) AND: STATE BY KARNATAKA THROUGH H.A.L. POLICE REPRESENTED BY S.P.P HIGH COURT CAMPUS BANGALORE - 560 001 RESPONDENT (BY SMT.RASHMI JADHAV, HCGP) THIS CRIMINAL APPEAL IS FILED UNDER SECTION3742) OF CR.P.C. PRAYING TO SET ASIDE THE

JUDGMENT

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ORDER

OF CONVICTION AND SENTENCE DATED 21.09.2016 PASSED BY LIV ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BANGALORE CITY IN SPL.C.C. NO.597/2014 CONVICTING THE APPELLANT/ACCUSED FOR THE OFFENCE PUNISHABLE UNDER SECTION 376 OF IPC AND UNDER SECTION 5(n) READ WITH SECTION 6 OF PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012. THIS CRIMINAL APPEAL COMING ON FOR HEARING THIS DAY, THE COURT THROUGH VIDEO CONFERENCE DELIVERED THE FOLLOWING: CrI.A.No.1831/2016 2 M

## **JUDGMENT**

Heard.

2. Aggrieved by the order of conviction and sentence passed against him for the offence punishable under Section 376 of IPC and Section 5(n) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (the Act for short), the accused in Special C.C.No.597/2014 on the file of LIV Additional City Civil & Sessions Judge, Bengaluru has preferred the above appeal.

3. The appellant was prosecuted in Special C.C.No.597/2014 before the trial Court for the aforesaid offences on the basis of the charge sheet filed by HAL Police, Bengaluru City in Crime No.724/2014 of their police station.

4. The appellant is the father of PW.2 who is aged 13 years. PW.1 is the elder sister of the mother of PW.2. PW.3 is the maternal uncle of PW.2. During September 2014, PW.2s mother Rukkamma was ailing and bedridden. CrI.A.No.1831/2016 3 M5 PW.1 filed the complaint Ex.P.1 before the respondent police alleging that the appellant was alcohol addict and Rukkamma was working to maintain the family. It is further alleged that the house of herself and Rukkamma were close to each other, on 28.09.2014, PW.2 revealed to her that during the night of 27.09.2014, the appellant sexually assaulted her. She alleged that on learning about the incident, she kept PW.2 in her house and the appellant made galata forcing to send PW.2 to his house. She alleged that after discussing with her sister, mother and others, she has filed the complaint.

6. PW.10 Sub-Inspector of police of HAL police station on receiving the complaint registered the first information report as per Ex.P8, conducted the spot mahazar as per Ex.P2. He got the victim medically examined and got recorded her statement through learned Magistrate under Section 164 of Cr.P.C. He handed over further investigation to PW.14. PW.14 after conducting further investigation, filed the charge sheet against the appellant. CrI.A.No.1831/2016 4 M7 The trial Court on conducting the trial, by the impugned judgment and order convicted the appellant for the offence punishable under Section 376 of IPC and Section 5(n) read with Section 6 of the Act. Further the trial Court has sentenced the appellant to rigorous imprisonment of 10 years and fine of Rs.2,000/- for the offence punishable under Section 5(n) read with Section 6 of the Act.

8. The above appeal was preferred by the appellant by engaging Advocate of his choice. However, later his Advocate failed to appear. Since the appellant is in custody, this Court appointed Sri Rakshith Jois, learned Counsel as Amicus Curiae to assist the Court on behalf of the appellant. Submissions of Sri Rakshith Jois, learned Amicus Curiae assailing the impugned judgment and order:

9. There is no explanation for the delay in filing the complaint. There are lot of contradictions in the complaint, the statement of the victim under Section 164 of Cr.P.C. and the evidence of PWs.1 and 2. The evidence CrI.A.No.1831/2016 5 M of PW.1 shows that she tutored PW.2. The evidence of PW.1, PW.2 and PW.7 the doctor with reference to the injuries on PW.2 was totally inconsistent. PW.2 says that she informed the incident to her grandmother and her mother was also present in the house. The Investigating Officer has not examined the mother and the grandmother. Since there was no cogent and consistent evidence to prove the charge beyond reasonable doubt, the trial Court was not justified in convicting the appellant. Submissions of Smt.Rashmi Jadhav, learned HCGP supporting the impugned judgment and order:

10. PW.2 victim who is none else the daughter of the appellant himself has cogently and consistently spoken about the overt acts of the appellant. Her evidence was further corroborated by the evidence of her aunt PW.1 and PW.7 the doctor and the medical evidence. There was no inordinate delay in filing the

complaint. In the cases of this nature, the delay in filing the complaint itself does not demolish the case of the prosecution. The victims mother died on the ninth day of filing of the Crl.A.No.1831/2016 6 M complaint. The evidence of PW.2 shows that her mother was not in a position to speak and the grandmother of the victim also died. Therefore non recording the statements of mother and grandmother is not fatal to the prosecution. PW.2 has no reasons to falsely implicate her father. The appellant has no explanation for the injuries found on his daughter or about the observations in her medical report. Therefore the trial Court has rightly drew presumption under Sections 29 and 30 of the Act. The appellant did not rebut the said presumption. The order of the trial Court does not call for any interference.

11. Having regard to the submissions of both side and the material on record, the point that arises for consideration is whether the impugned order of sentence is sustainable in law?. Analysis 12. To sustain the charge under Section 5(n) read with Section 6 of the Act, the prosecution has to prove the following: (i) The appellant was the father of PW.2; Crl.A.No.1831/2016 7 M (ii) They were living together; (iii) The appellant has committed penetrative sexual assault on PW.2.

13. To sustain the charge under Section 376 of IPC, the prosecution has to establish that the appellant has committed rape on PW.2.

14. The appellant did not dispute the prosecution case that he is the father of PW.2. PW.1 aunt and PW.3 maternal uncle of PW.2 deposed that PW.2 is the daughter of the appellant and Rukkamma. They also deposed that the appellant, Rukkamma and PW.2 were living in their house together. The appellant did not dispute his relationship with PW.2 or PW.1 and PW.3. He also did not dispute that himself, his wife and PW.2 were living together.

15. The evidence of PWs.1 to 3 that the houses of PW.1 and appellant were in close proximity was also not disputed. He did not even dispute that his wife as on the date of the alleged offence was bedridden due to her Crl.A.No.1831/2016 8 M medical condition. PW.1 in her deposition states that his sister Rukkamma was suffering from tuberculosis and she died on the ninth day of filing of the complaint. PW.2 in her chief examination deposed that at the time of incident her mother was bedridden and in vegetative state. Even that fact was not disputed in her cross-

examination.

16. The appellant himself suggests to PW.2 in her cross-examination that her mother and PW.1 were admonishing him on the ground that he was not going to work. Her evidence further shows that her mother was working and looking after the family. She further deposed that after returning from the work, her mother was staying with her in the same house is also not disputed. Therefore the fact of the appellant was the father of PW.2 and they were living together in the house where scene of offence situated stood proved.

17. Further the prosecution is required to prove that the victim was aged 13 years. To prove that fact, the prosecution relied on the evidence of PWs.1 and 2, PW.4 CrI.A.No.1831/2016 9 M Head Mistress and PW.7 the doctor, Ex.P4 the school certificate. As per the evidence of PW.4, the date of birth of PW.2 as per the school records is 06.12.2000. The date of offence is the intervening night of 27.09.2014/28.09.2014. She was not cross-examined. PW.7 the doctor deposed that the victim was aged 13 years. Accused did not dispute the evidence of prosecution witness that the victim was aged 13 years. Therefore the fact of the age of the victim was also proved beyond reasonable doubt.

18. The next question is whether the appellant committed aggravated sexual assault on PW.2. To prove that fact, the prosecution relies on the evidence of PWs.1 and 2 the complainant and the victim, the evidence of PW.7 the doctor who examined the victim and the police officer. The prosecution further relied on Ex.P3 the statement of PW.2 recorded by Magistrate under Section 164 of Cr.P.C. and the medical report Ex.P5.

19. In the complaint Ex.P1, PW.1 has stated that PW.2 revealed to her that during the intervening night of CrI.A.No.1831/2016 10 M2709.2014 and 28.09.2014, when PW.2 was sleeping in her parental house, the appellant sexually assaulted her. She has further stated in the complaint that on 28.09.2014 in the morning the appellant came to her house, made galata insisting PW.1 to send back PW.2 to his house. Apprehending some untoward incident, she did not send PW.2 to her house. She further states that after discussing with her sister, mother and others, she decided to file the complaint. That was first version of sexual assault.

20. The first information report Ex.P8 is said to be registered on 29.09.2014 at 3.00 p.m. It is no doubt true that PW.1 once states she filed complaint at 10.30 a.m., but reference to filing of the complaint in the first information report is at 3.00 p.m. However, that itself does not give rise to any doubt unless the evidence of the victim itself creates doubt or uncorroborated by other evidence.

21. PW.7 the medical Officer has examined the victim on 29.09.2014 at 6.30 p.m. and issued medical CrI.A.No.1831/2016 11 M report as per Ex.P5. He also reported the history of sexual assault by the appellant on 28.09.2014 at 1.00 a.m. in his house and that the appellant was under the influence of alcohol at the time of incident, following that she came to the house of PW.1 informed her grandmother about the incident.

22. After such medical examination, on 01.10.2014, the victim was examined before the learned Magistrate under Section 164 of Cr.P.C. PW.2 has stated that about 3 days back, during the night at 1.00 a.m., the appellant gagging her mouth committed sexual assault on her.

23. Soon after the incident all along there was cogent and consistent assertion that the appellant during the night of 27.09.2014 committed sexual assault on the victim. The evidence of PW.7 and his report Ex.P5 show that there were three external injuries/abrasions on the body of the victim and her hymen was ruptured. The doctor also opined that there was evidence of recent sexual intercourse. CrI.A.No.1831/2016 12 M24 Referring to the statement of PW.2 in her cross-examination that she does not know what rape means, it was argued that she was tutored. At the time of incident, the victim was aged hardly 13 years. It is very disheartening to expect particulars and nomenclatures of such sexual activities from the mouth of tender aged child. She has stated before the police and the learned Magistrate what the appellant has done to her. To explain her statement that she does not know what rape means, she was re-examined by the Public Prosecutor. In re-examination she has stated that the appellant made her to lie down, denuded her and did some bad things to her. Such evidence of PW.2 was corroborated by the evidence of PW.7 and her medical report Ex.P5.

25. Under Section 29 of the Act, the moment the accused is prosecuted for commission of the offences under Sections 3, 5, 7 and 9 of the Act, the Court shall presume that such person has committed offence as alleged against him unless the contrary is proved. Section CrI.A.No.1831/2016 13 M30of the Act imputes presumption of culpable mental state of the offence to the accused. Therefore if there is evidence to raise such presumption and the burden shifts to the accused to rebut the presumption, by evidence of PWs.2, 7 and the medical report, the prosecution discharged its initial burden to raise the presumption under Sections 29 and 30 of the Act.

26. The appellant being father of the victim girl, it was for him to explain how his daughter suffered injuries and how there was rupture of hymen of his daughter. Absolutely, there was no explanation from him either in the cross-examination of the witnesses or by way of his explanation under Section 313 of Cr.P.C. or by way of defence evidence.

27. Only suggestion to PWs.1 to 3 were that he was demanding his wives share in the property of his mother-in-law, therefore they have falsely implicated him in the case. But such explanation was not given in his examination under Section 313 of Cr.P.C. Needless to say that all those suggestions were denied by the witnesses. CrI.A.No.1831/2016 14 M Thereby the appellant failed to rebut the presumption by leading any contrary evidence as contemplated under Sections 29 and 30 of the Act.

28. Under the circumstances, the trial Court was justified in holding that the prosecution has discharged the initial burden of proving the charges and the appellant has failed to rebut the presumption as required under Sections 29 and 30 of the Act.

29. Time and again the Honble Supreme Court has held that the offence of rape casts shame and humiliation on the victim and her family members, there will be hesitation for the family members to take the matter to the police station. Therefore it was held that delay in filing the complaint in such cases should not be blown out of proportion.

30. In this case the victims mother was in vegetative state and the grandmother also died soon thereafter. The parties hail from the poverty stricken background. To crown all these, the father himself was CrI.A.No.1831/2016 15 M the predator. Under the circumstances, the delay in filing the complaint itself does not demolish the case of prosecution.

31. So far as the contents in the complaint lacking the material particulars about sexual assault, it is settled proposition of law that the first information report is not encyclopedia. Therefore non mentioning of meticulous overt acts of the appellant itself does not falsify the prosecution case. The alleged contradictions do not destroy the core of the prosecution case. Therefore that contention is also unacceptable.

32. The trial Court considered the effect of discrepancies and contradictions in the evidence, about the contents of the first information report, delay in filing the complaint, defects in the investigation, in the light of several precedents and ultimately overruled all those contentions. The impugned judgment and order is sound and sustainable. This Court does not find any ground to interfere with the same. Therefore the appeal is dismissed. CrI.A.No.1831/2016 16 M This Court places on record the able assistance rendered by Sri Rakshith Jois, learned Amicus Curiae. Registry shall pay him remuneration of Rs.15,000/-. Sd/- JUDGE KSR

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