CRL.A No. 2097 of 2018

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF MAY, 2023

BEFORE

THE HON'BLE MR JUSTICE K.NATARAJAN

CRIMINAL APPEAL NO. 2097 OF 2018

BETWEEN:

1. SRI SUBRAMANI

...APPELLANT

(BY SRI. K.B. MONESH KUMAR, ADVOCATE)

AND:

1. STATE OF KARNATAKA BY
KOLAR RURAL POLICE,
BENGALURU,
REP BY STATE PUBLIC PROSECUTOR,
HIGH COURT BUILDINGS,
BENGALURU - 560 001.

...RESPONDENT

(BY SRI. S. VISHWA MURTHY, HCGP)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) OF CR.P.C. PRAYING TO SET ASIDE THE JUDGMENT OF CONVICTION AND ORDER OF SENTENCE DATED 02.11.2018 PASSED BY THE II ADDITIONAL SESSIONS JUDGE, KOLAR IN S.C.NO.21/2017 - CONVICTING THE APPELLANT/ ACCUSED FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 363 AND 376 OF IPC AND SECTION 6 OF POCSO ACT AND ETC.

THIS APPEAL, COMING ON FOR FINAL HEARING, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is filed by the appellant/accused under Section 374(2) of Cr.P.C for setting aside the judgment of conviction and sentence passed by the II Additional District and Sessions Judge, Kolar dated 02.11.2018 in SC.No.21/2017 for having found the accused guilty and convicted the appellant for offences punishable under Sections 363, 376 of IPC and section 6 of POCSO Act.

2. Heard the learned counsel for appellant and the learned HCGP for State.

3. The ranks of the parties before the trial Court retained for convenience.

4. The case of the prosecution is that on the complaint of PW1/Roopamma the mother of victim filed complaint to the police as per Ex.P1 alleging that her daughter went to the school on 24.11.2016 and later she was found missing. After receipt of the complaint, during the investigation they traced the victim girl PW2/victim girl and she was taken to the Chintamani police station, later she was handed over to Kolar

Police Station on the point of jurisdiction. Her statement was recorded under Section 164 of Cr.P.C. Thereafter, she was subjected to the medical examination and came to know that the accused had abducted the victim girl in his motorcycle when she was proceeding to home from school and taken her to his relatives house where he sexually assaulted her. After coming to know about the same, complaint was lodged by the mother of the victim. The accused had brought her near Chintamani police station and had left her. Subsequently the accused was arrested on 29.11.2016. After the completion of investigation Police have filed charge sheet against appellant for the offences punishable under sections. 363, 376 of IPC and Section 4 of POCSO Act.

5. The accused was in judicial custody and during the trial the charges were framed for the offences punishable under section 363, 376 of IPC and section 4 of POCSO Act, he has denied the charges. Accordingly, prosecution have called upon to adduce the evidence and the prosecution in all examined 20 witnesses, got marked 29 documents and 11 material objects. After completion of prosecution evidence, the statement of the accused under section 313 of Cr.P.C recorded. The case of the

accused was one of the total denial but he has not chosen to enter into any defence. After hearing the arguments the trial court found the appellant guilty for the offence punishable under Sections 363, 376 of IPC and Section 6 of POCSO Act and sentenced to undergo imprisonment for 7 years with fine of Rs.2000/- for the offence punishable under Sections 363 of IPC and 7 years with fine of Rs.5000/- for the offence punishable under Section 376 of IPC and 10 years with fine of Rs.5000/- for the offence punishable under Section 6 of POCSO Act and in default liable to undergo imprisonment for one month, also awarded compensation to the victim. Being aggrieved with the judgment of conviction of sentence the appellant is before this court.

6. Learned counsel for the appellant has strenuously contended the judgment of the trial Court was not correct for the reasons that the charges were framed for the offence punishable under Sections 363, 376 of IPC and Section 4 of POCSO Act, whereas the trial court found the appellant guilty for the offence punishable under Section 6 of the POCSO Act and convicted for 10 years. The charges were framed for lesser offences of Section 4 of POCSO Act, whereas the conviction was

held for Section 6 of POCSO Act, which is a major offence, which is not permissible under law. Learned counsel further contented that the evidence of PW2 is not sufficient to prove the guilt of the accused for having sexually assaulted the victim. She has turned hostile in her evidence, she has stated that the accused tried to sexually assault her and not stated the accused has committed any sexual assault on her. In the cross examination she has stated that she has given statement before the police like that but absolutely there is no evidence of PW2 to show she has been sexually assaulted by the accused or for having intercourse with her. The medical witness PW9/Dr.Shanthi S. who examined the victim also categorically stated, there is no injury in the private part of the victim. Also opined there is no recent intercourse on her. Even after receipt of the FSL report, there is no semen or any incriminating evidence/articles found on the cloth of the victim and opinion also not clear, that there was a sexually assault on the victim by the accused. Therefore, when the prosecutrix herself is not knowing, clearly opined there is no sexual assault on the victim, the question of convicting the appellant under Sections 376 of IPC and Section 4 of POCSO Act does not arise. The

other witnesses are panch witnesses are official witnesses, they are only formal witnesses. Therefore, prosecution utterly failed to prove the alleged offence charged against the accused. Therefore, prayed for allowing the appeal. In support of his contention, learned counsel for appellant relied upon the judgments of the co-ordinate benches of this court.

7. Per contra, learned HCGP supported the judgment of Conviction of sentence passed by the trial court and contented that the evidence of PW2, though she has turned hostile in the examination chief, but in the cross examination she has supported the case, where she has admitted the accused committed rape on her. In the cross examination the learned counsel for the accused also suggested that there was no rape on her, but she has denied, which clearly goes to show that the evidence of PW2 that there was sexual assault on her. Apart from that, the accused abducted the victim girl in his motorcycle and kept her in his relatives house for 2 days, the victim girl is a minor aged about 15 years, as per the data. The evidence of PW2 also corroborates with the evidence of PW9, the Doctor who clearly stated that the hymen of the victim was ruptured which suggests the sexual assault on the victim. The

Ex.P14, corroborates with the evidence of the PW9 and PW2. Therefore, the trial court rightly found the accused guilty and convicted for the sexual assault for the offence punishable under section 376 of IPC. However, the learned HCGP admits the offence punishable under section 4 of POCSO Act where the trial court committed error in finding guilty and convicting the appellant under Section 6 of POCSO Act without altering and framing of charges as per Section 216 of Cr.P.C. Learned counsel for the appellant also contended that the appellant was in custody for more than 7 years and if at all this court found guilty and sentence will be modified and shall be set at liberty forth with.

8. Having heard the arguments of the parties and perusal of the records, the point that arises for my consideration are;

1) Whether the prosecution proves beyond ail reasonable doubts that on 24.11.2016 the appellant abducted the victim girl who is minor girl from the custody of the parents and taken to the relatives house. Thereby he has committed offence punishable under section 363 of IPC?

2) Whether the prosecution proves beyond all reasonable doubt that the appellant took the victim girl to Cheelampalli village, Andhra Pradesh to the house of CW2 and later took the house of CW5 at Thotli village on 27.11.2016. During the stay, he has sexually assaulted the victim girl, thereby he has committed offence under punishable under section 376 of IPC?

3) Whether the accused committed penetrative sexual assault in the house of CW.5 and 6 thereby he has committed for the offence punishable under Section 6 of POCSO Act?

4) Where the judgment of trial court for having convicted and sentenced the accused call for interference of this court?

9. Prior to the appreciation of the evidence on the record it is worth to mention the evidences of the witnesses examined by the prosecution.

10. PW1/Roopamma, the mother of victim and complainant before police, she has stated that the victim was

found missing from the house when she went to the school on 24.11.2016. Therefore she lodged the complaint to the police. She further deposed that after 2 days, the police informed that they traced her daughter, where she came to know the accused abducted in his motorcycle taken her to Cheelampalli village, Andhra Pradesh later to the Totli village, the relatives house and said to be raped her. The police prepared the panchanama of Ex.P2.

11. The PW2/victim girl aged about 14 years she has deposed in her examination chief that on 24.11.2016 when she was proceeding to the house after the completion of the school, the accused came in his TVS motorcycle and forced her to come to Cheelampalli Village and an attempt to commit rape on her. One day they stayed there and the next day on 25.11.2016, the accused taken her to his brother-in-laws house and there he has abused her stating that he will commit rape on her and tortured her. Later the accused brought her to Chintamani and left near the police station. Then the police took her to the police station and recorded her statement, taken her to the hospital, collected the clothes and she has not supported the case of rape. Subsequently, Public Prosecutor

sought permission to treat this witness as hostile and in the cross examination she has admitted that she has given statement to the police stating that the accused committed rape on her and also stated she has given statement before the Magistrate that the accused committed rape on her and also stated the accused committed rape on her 2 to 3 times.

12. The PW3/Dr.Bayyappareddy who had estimated the age of the victim and also taken the scan of the victim to find out whether she is pregnant or not and issued Ex.P9 and 10 and he is only formal witness.

13. PW4/Thippareddy who is an acquaintance of the village he speaks that he came to know about the incident through the family members of the victim. He is also a hearsay evidence witness.

14. PW5/Navaneetha M., school teacher who issued study certificate and school certificate to show the age of the victim as 15 years in the school record regarding the age of the victim and she is a minor and studying in 8th standard is not seriously disputed by the counsel for the accused.

15. PW6/Bandi Venkataravanappa who is a spot punch witness turned hostile and not supported the case.

16. PW7/Balakrishna another panch witness to the spot where the accused took the victim girl and committed sexual assault. Also identified the photography at ex.P3 to P6 on the police record, however, he supported the case and is a formal witnesses.

17. PW8/Anil Kumar driver and also panch witness to the spot panchnama at Ex.P2 that the victim was abducted.

18. PW9/Dr.Shanthi S, who examined the victim where she has given opinion on the medical examination at Ex.P14 and 16 and as per her evidence she has examined the victim girl at the request of the police on 24.11.2016. As per the history, the accused said to be abducted her and committed sexual assault on her 4 to 5 times. After clinical examination she has not found any injury on the private part of the victim. However, she has stated the hymen was ruptured. She has collected the smear and swab of the victim girl, nail clippings, blood sample, pubic hair, cloth of the victim, slip and pant, chudidhar top and sent to the FSL and gave report as per

Ex.P14. She has received at Ex.P15 and based upon FSL she has given her final opinion that there is no recent sexual intercourse on the victim. However, by looking to the rupture of the hymen she was accustomed to the sexual intercourse. The evidence of this witness will be discussed in detail while appreciating the evidence.

19. PW10/Venakatachalapathi ASI who took the victim girl along with WHC to the medical examination and arrested the appellant, he is only a formal witness.

20. PW11/Ramesh who is pancha witness to Ex.P17 also turned hostile.

21. PW12/Dr.Santhosh Prabha who examined accused and he has opined that the accused is potent.

22. Ex.P13/Hemalatha ASI took the victim to the hospital for medical examination who is formal witness.

23. PW14/Manjunath Reddy who is a pancha witness at Ex.P13.

24. PW15/Eeshwarachari a Municipality office who issued the house extract at Ex.P19 and 20.

25. PW16/Nagaraj, police officer who took the victim from Chintamani police station to Kolar police station a formal witness.

26. PW17/Ramesh ASI, who found the victim girl at Chintamani police station and intimated to Kolar Police Station regarding the tracing of the victim.

27. PW18/Manjula Women Head Constable accompanied victim to the hospital and also carried the articles to the FSL.

28. PW10/Putta Obalareddy police inspector who investigated the matter.

29. PW20/PSI who registered the FIR and handed over the investigation to the police inspector.

30. The star witnesses to the prosecution case are PW.2-the victim girl and PW.9-the Doctor who examined the victim. On appreciation of the evidence of PW.2-victim girl, who

has stated on oath that on the said day i.e., on 24.11.2016 when she was proceeding to the house after completion of her school at 5.00 p.m., the accused approached her by coming in the motorcycle and asked her to come along with him. She had already made a similar complaint in this behalf to her parents and her parents have also advised to the accused and his mother. In spite of it, on the said day, the accused came in the motorcycle and forcefully took her in the motorcycle to the house at Cheelampalli Village of Andhra Pradesh. On the very next day, he has taken her to the Thotli village on 25.11.2016 and she has stated the accused abused her that he will commit rape on her and tortured her. The victim has not stated that the accused committed the sexual assault on her in the night while staying in the Cheelampalli village or Thotli village. Hence, the prosecutor obtained permission from the Trial Court and treated this witness as hostile where, in the cross examination, she admits that she has given statement before the police stating that the accused committed rape on her in Cheelampalli village and further once again, the accused committed rape on her in Thotli village. She has also stated before the Magistrate stating that the accused committed rape

on her. These three statements made by the victim reveals that she has given statement before the police as well as the Magistrate that the accused committed rape on her. However, in further cross-examination, she stated that the accused committed rape on her both at Cheelampallii village and Thotli village. For the convenience, the admission made by PW.2-victim is as under:

"ಆರೋಪಿ ನನ್ನ ಮೇಲೆ ಚೀಲಂಪಲ್ಲಿ ಮತ್ತು ತೊಟ್ಲಿ ಗ್ರಾಮದಲ್ಲಿ ಅತ್ಯಾಚಾರ ಮಾಡಿದ್ದಾನೆಂದರೆ ಸರಿ"

31. The witness no where stated that the accused committed rape on her but she admitted to the suggestion made by the prosecutor that she has made the statement to the police as well as to the Magistrate stating that the accused committed rape on her and also admits, if it is said accused committed rape on her, it is true. Therefore there is no consistency in her evidence to show that the accused sexually assaulted her. In the cross examination, PW.1 has stated that she worn the same cloth prior to the incident and also after the incident and with the same cloth, she came to the Police Station and it was seized by the police and she also stated during the course of sexual assault, she sustained scratch injury on the hand and further admits that there is no semen or

blood fell on the private part. Therefore the evidence of P.W.2 is not trust worthy to say the accused sexually assaulted her or had any inter course. Therefore, it is necessary for corroboration of medical evidence. To corroborate the evidence of PW.1 in respect of the admission made in the cross examination. The prosecution examined the PW.9-Doctor who examined the victim girl has stated that there is no external injury found on the body of the victim and also no blood stain or semen stain found on the body of the victim. Except rupture of hymen, there is no other incriminating material on the victim. She has collected the vaginal smear, swab, nail clipping, blood sample and clothes of the victim i.e., slip, pant, tights, chudidar cloth, sent the same to the FSL and received the report. She has given preliminary opinion as per Ex.P.14 stating that there is **no recent signs of sexual intercourse** on the victim, except the hymen torn with (not clear) margins and admit and one finger without resistance in vagina. Absolutely, there is no material to show that there was a recent intercourse on the victim. Ex.P.15 is the FSL report received by the doctor where the articles sent by the doctor includes cloths of the accused as well as the victim and the nail clipping,

vaginal smear and swab. It does not found any seminal stain and spermatozoa in Article No.1. The article No.1 is the vaginal smear, if there is any recent intercourse within 24 hours when the victim was subjected to the medical examination, absolutely there will be a seminal stain, a spermatozoa must be found in the vaginal smear. Even in the vaginal swab or in the cloth of the victim, there is no seminal stain found, which reveals in the examination-in-chief of PW.2 victim girl, she has not stated about any sexual assault on her and it appears, in the cross examination, though she has admitted that she has given statement before the police as well as the Magistrate stating that the accused committed rape (ಅತ್ಯಾಚಾರ) on her. But the medical evidence is totally negative in the admission made by PW.2 in the cross examination. On the other hand, medical evidence corroborates the evidence of PW.2 where she has stated that the accused tried to assault her sexually and abused her but she has not stated in her evidence as well as in the statement under Section 164 of Cr.P.C. that the accused committed rape on her. The PW.2 admits on the suggestion that she has stated in the statement that the accused sexually assaulted her. Therefore, the Court can draw inference that

during investigation the police recorded statement that the accused sexually assaulted her. In this regard, the learned counsel for the appellant has relied upon the judgment of the Co-ordinate Bench of this Court in the case of ***G.S. Venkatesh vs. State of Karnataka, Chikkaballapura in Criminal Appeal No.845/2017 dated 25.02.2020*** held at paragraph Nos.20 and 21 of the judgment which are as under:

> "20. *This evidence, in my view, falls short of the legal requirements of section 375 of IPC/section 4 of POCSO Act as explained above. There is nothing in her evidence to show that there was any penetration, insertion, manipulation of her private parts, which are the essential concomitants of the offences charged against the accused. No doubt, in her evidence, she has maintained that the accused committed "ಅತ್ಯಾಚಾರ" on her. Whether the expression "ಅತ್ಯಾಚಾರ" by itself is sufficient to make out the ingredients of the above offences is the crucial question that requires to be considered in extenso.*
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> *21. The term "ಅತ್ಯಾಚಾರ" literally means "rape". "Rape" is a legal term or nomenclature of an offence. Needless to say that is the very offence for which the accused is charged. If so, it does not serve the legal purpose if the victim or the witness asserts in his or her evidence that the accused committed the very offence*

for which he is charged without narrating the acts or the facts by which the alleged offence was committed. For example, in a prosecution for the offence of dacoity, if the witness merely states on oath, that the accused committed dacoity, without disclosing the acts by which the said offence was committed, the statement made before the court cannot be treated as evidence leading to the proof of the offence. Likewise, in a prosecution for the offence of murder if the witness asserts in evidence that he or she saw the accused committing the murder without narrating the actual facts that were seen or heard or felt by the witness, the same cannot be characterized as evidence in the eye of law."

32. Here in this case also the victim has stated that in the cross-examination made by the public prosecutor, she has stated before the police and the Magistrate stating that the accused committed rape on her i.e., Athyachara whether the victim knows about the meaning of this word 'Athyachara' or a 'rape' committed on her, simply when the suggestion was made by the prosecutor, she has admitted stating that she has stated before the police and Magistrate that she has been subject to the rape, is not sufficient. On the other hand, it is a stray admission made by the victim in the cross-examination that the accused committed rape on her. Whereas, in the examination-in-chief, she has not categorically stated how the accused

committed rape or assaulted sexually on her. That apart, the medical evidence also not supported the case of the prosecution. PW.9 to obtain FSL report for further opinion she has categorically stated that there is no recent sexual intercourse and there is no sign of recent sexual intercourse. Such being the case, if the victim girl was subjected to the intercourse in the night of 26.11.2016, continuously for two days from 24.11.2016, 25.11.2016 and 26.11.2016, then definitely there will be an internal injury on the parts of the victim as well as there must be spermatozoa found in the vaginal smear of the victim, but no such material found. The Cloth also not found any stains either blood stain or seminal stain on the cloth of the victim as well as the accused. Therefore, the evidence of PW.2 in the cross-examination making some stray admission that the accused committed sexual assault cannot be acceptable as sexual assault on the victim in order to bring under Section 375 of IPC or Section 3 of the POCSO Act.

33. Learned counsel has also relied upon a judgment passed by the Co-ordinate Bench in the case of ***Shekhar vs. State in Crl.A.No.578/2015,*** the Co-ordinate Bench has

acquitted the appellant in the said appeal and has held at paragraph No.37 which is as under:

> *"37. Perusal of Ex.P9 makes it evident that there was no evidence of forcible sexual intercourse and no injuries were found on the person of prosecutrix including her private part. According to the prosecution on 22.07.2014 at around 11.00 p.m. accused committed forcible sexual intercourse with the prosecutrix in the open area outside the Church and during the cross-examination of the police constable who apprehended the accused and the prosecutrix immediately after the incident disclose that the said place consists of rough ground and thorns. The medical evidence also relies the case of the prosecution that few hours prior to the lodging of the complaint, accused committed rape on the prosecutrix against her will."*

34. By considering the evidence on record, especially the evidences of PWs.1 and 2, Ex.P.8, 164 statement of the victim and the evidence of PW.9. Ex.P.14 to 16, the prosecution failed to prove the sexual assault on the victim on 24.11.2016 or till 26.11.2016. Therefore, the judgment of conviction and sentence passed by the Trial Court in respect of Section 376 of IPC and Section 6 of POCSO Act are liable to be set aside.

35. However, the evidence of PW.1-the mother of the victim has stated that the victim girl went to the school, but did not return and found missing. A complaint was filed as per Ex.P.1. Subsequently the victim was traced by the Chintamani Police and sent to the Kolar Rural police at the point of jurisdiction where PW.2 has categorically stated that the accused came in the motorcycle, forcibly abducted her, kept in the house of his relative at Cheelampalli village, Andhra Pradesh. Thereafter, he took her to the Thotli village for two days. As per definition of Section 361 of IPC, if a minor was abducted from the guardian, it amounts to an offence punishable under Section 363 of IPC. The evidence of prosecutrix i.e., PWs.1, 2 and the evidence of the police official witnesses, PW.17 and the Investigation Officer i.e., PWs.19 and 20, the prosecution able to prove that the accused abducted the victim girl and taken to the Andra Pradesh at Cheelampalli village and has taken her to Thotli village and detained her which is an offence punishable under Section 363 of IPC and detaining the victim girl in the house also attracts Section 342 of IPC. Therefore, I am of the view, the prosecution able to prove that the accused abducted the minor girl aged about

below 16 years on 24.11.2016 and detained her in two villages at Cheelampalli village as well as Thotli village for one and two days respectively which attracts Section 363 and 342 of IPC.

36. On perusal of the judgment of the Trial Court especially in respect of holding guilty for the offence punishable under Section 376 of IPC, awarding sentence for 7 years and Section 6 of POCSO Act, awarding 10 years of imprisonment. In my opinion, the trial Court has committed patent illegality and error in passing the sentence for the reasons stated hereunder:

i) The trial Court framed the charges as against the accused for the offence punishable under Section 4 of the POCSO Act. But the trial Court found guilty, convicted and sentenced to undergo 10 years imprisonment for the offence punishable under Section 6 of POCSO Act, where there is no charges framed for the offence punishable under Section 6 of the POCSO Act.

37. The Court has power to find guilty for the lesser offence even though the charges were framed for major offences. But when the charges were framed for lesser offence, the Court cannot convict and sentence for the major offence punishable with the imprisonment more than the offence which were charged without altering the charges as per Section 216 of Cr.P.C. The Trial Court while recording the evidence could have altered the charge by invoking the provisions of Section 216 of Cr.P.C. The charges could have altered into from Section 4 to Section 6 of the POCSO Act and it is duty of the Court to provide right of further examination and cross-examination by the both side, once the charges were altered. The Court has power to alter the charges before passing the judgment. Such being the case, the trial court without framing the charge under Section 6 of POCSO Act, found him guilty and sentenced to undergo imprisonment for 10 years for the offence punishable under Section 6 of POCSO Act, where charges were framed for only under Section 4 are not sustainable under the law. Therefore, on this count, the judgment of the trial is required to be interfered by this Court.

ii) The another reason for interference on the trial Court judgment is when the Court found guilty for both the offence under Section 376 of IPC and either Section 4 or 6 of POCSO Act, the trial Court ought to have pass the sentence either under IPC or POCSO Act which is the greater punishment awarded in any one of the Act. In this regard, it is worth to mention the definition of Section 42 of the POCSO Act which is as under:

> *"42. Where an act or omission constitute an offence punishable under this Act and also under any other law for the time being in force, 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 only under such law or this Act as provides for punishment which is greater in degree."*

38. On bare reading of Section 42, it empowers the Court to give alternative punishment, if the accused found guilty for the offence which are punishable with both the provisions of Section 376 of IPC as well as POCSO Act which is greater in decree. If the accused found guilty under Section 376 of IPC, if the punishment prescribed under Section 376 of IPC which is higher, then the Court required to pass higher

sentence under IPC or if the sentence is prescribed in POCSO Act, if it is more than the sentence awarded in IPC then Court required to provide the higher punishment prescribed under the POCSO Act. Therefore, there was amendment in 2018 which under 42 now amendment. But here in this case, the trial Judge though found guilty for Section 376 of IPC and for POCSO Act, both the offence is nothing but committing a sexual assault on the minor victim girl. Therefore, the Trial Court required to award sentence in one penal provision either under IPC or under POCSO Act which is greater or higher sentence. But, the Trial Court cannot award double sentences for the same offence convicted which are punishable both under Section 376 of IPC and Section 6 of POCSO Act. The Court can find guilty in both the offences but punishment shall be awarded in any one of the offences which is greater in degree.

39. Therefore, on this ground, the sentence and reasoning given by the trial Court is required to be interfered by this Court.

40. In view of the reasons stated above, I am of the view, the appeal filed by the appellant is required to be allowed in-part and the appellant is entitled for acquittal for the offence punishable under Section 376 of IPC and Section 6 of the POCSO Act. But the judgment of conviction for the offences punishable under Section 363 is liable to be upheld and found guilty in Section 342 of IPC.

41. The learned counsel for the appellant submits that the appellant is in custody for more than 7 years 6 months. He was arrested on 29.11.2016. During that time, he was in custody and till day he is in custody and he has completed 7 years 6 months.

42. The punishment prescribed under Section 363 of IPC is 7 years and the offence punishable under Section 342 of IPC is one year with fine.

43. The appellant has already undergone sentence, the maximum punishment prescribed under Section 363 of IPC is 7 years and in addition to that, i.e., the appellant is also sentenced to undergo imprisonment for one year and pay a fine of Rs.500/- in default, he shall undergo one month simple

imprisonment for the offence punishable under Section 342 of IPC that will meet the ends of justice.

44. Accordingly, I proceed to pass the following

ORDER

(i) The appeal is ***allowed in-part***.

(ii) The judgment of conviction and order of sentence dated 02.11.2018 passed in S.C.No.21/2017 on the file of II Additional Sessions Judge, Kolar (Special Court for POCSO) in respect of the offence punishable under Section 376 of IPC and Section 6 of POCSO Act are hereby set aside.

(iii) The appellant is acquitted for the offence punishable both under Section 376 of IPC and Section 4 or 6 of the POCSO Act.

(iv) The judgment of conviction and sentences in respect of Section 363 of IPC is hereby up held.

(v) In addition to that, the appellant is sentenced to undergo imprisonment for a period of one year with fine of Rs.500/- and in default of payment of fine, he shall undergo simple imprisonment for a period of one

month for the offence punishable under Section 342 of IPC.

(vi) Both the sentences are ordered to run concurrently.

(vii) The appellant is in custody for more than 7 years 6 months, he is entitled for set off under Section 428 of Cr.P.C. and adjusted the sentences already undergone.

(viii) The appellant-accused is ordered to set at liberty forthwith, if he is not required in any other cases.

(ix) If any compensation awarded to the victim under Section 357A of Cr.P.C. is hereby confirmed.

Office to send the copy of the judgment to the trial Court along with Trial Court Records.

Sd/-
JUDGE

AKV/GBB