

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

WEDNESDAY, THE 17TH DAY OF NOVEMBER 2021 / 26TH KARTHIKA,
1943

CRL.A NO. 986 OF 2019

APPEAL AGAINST JUDGMENT & SENTENCE IN SC 253/2014 DATED
31.10.2017 OF THE ADDITIONAL SESSIONS JUDGE-I (SPECIAL
COURT), PATHANAMTHITTA

APPELLANT/ACCUSED:

SYAM SIVAN @ ANANDHU
AGED 26 YEARS, S/O.SIVAN, C.NO.2194,
CENTRAL PRISON & CORRECTIONAL HOME,
POOJAPPURA, THIRUVANANTHAPURAM,
AND RESIDED AT KODUVALIL VEEDU,
NEAR R.V.T. TEA FACTORY, ALAMPALLY ESTATE,
PASUPPARA, ELAPPARA VILLAGE, IDUKKI DISTRICT

BY ADV GEORGE RENOY, STATE BRIEF

RESPONDENT/COMPLAINANT:

- 1 STATE OF KERALA, REPRESENTED BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA
- 2 THE INSPECTOR OF POLICE, ADOOR POLICE STATION

BY ADV SMT.AMBIKA DEVI S, SPL.PP ATROCITIES
AGAINST WOMEN & CHILDREN & WELFARE OF W & C

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
11.11.2021, THE COURT ON 17.11.2021 DELIVERED THE
FOLLOWING:

R.NARAYANA PISHARADI, J

Crl.A.No.986 of 2019

Dated this the 17th day of November, 2021

J U D G M E N T

The appellant is the sole accused in the case S.C.No.253/2014 on the file of the Additional Sessions Court-I, Pathanamthitta.

2. The appellant/accused challenges the judgment of the trial court in the above case, convicting and sentencing him for the offences punishable under Sections 366A and 376 of the Indian Penal Code and under Section 3 read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act').

3. The prosecution case, in short, is as follows: The victim girl, who was aged 17 years, was in love with the accused. He was a person working as cleaner in a bus in which she used to travel frequently. On 20.09.2013, the accused induced her to go with him to Mysore on the promise that he would marry her. He took her to Mysore. They resided together in Bharat Lodge at the place Mandiwala in Mysore on 21.09.2013 and 27.09.2013. During the interval, they had gone to Goa and returned to Mysore. At the room in the Lodge, the accused committed forcible sexual intercourse with the victim girl. On the morning of 28.09.2013, they came back and reached their native places.

4. On 21.09.2013, at 11.00 hours, the father of the victim girl went to the police station and gave Ext.P2 statement regarding the missing of his daughter. On the basis of that statement, Ext.P7 F.I.R was registered as Crime No.1685/2013 of the Adoor Police Station under Section 57 of the Kerala Police Act, for 'missing of woman'.

5. On 28.09.2013, when the victim girl came back, her father produced her in the police station. During the investigation of the case it was revealed that the victim girl was sexually assaulted by the accused. PW7 Sub Inspector, who conducted the initial investigation of the case, filed a report in the court for deleting Section 57 of the Kerala Police Act from the F.I.R and for incorporating the offences under Sections 366A and 376 of the I.P.C and Section 7 read with Section 8 of the POCSO Act. PW12 Circle Inspector conducted the further investigation of the case. After completing the investigation, he filed charge-sheet against the accused for the offences punishable under Sections 366A and 376 of the I.P.C and Section 3(a) read with Section 4 of the POCSO Act.

6. The trial court framed charge against the accused for the offences punishable under Sections 366A and 376 of the I.P.C and also under Section 3 read with Section 4 of the POCSO Act. The accused pleaded not guilty and he claimed to be tried.

7. The prosecution examined the witnesses PW1 to PW12 and marked Exts.P1 to P15 documents and MO1 material object. No evidence was adduced by the accused.

8. The trial court found the accused guilty of the offences punishable under Sections 366A and 376 of the I.P.C and under Section 3 read with Section 4 of the POCSO Act and convicted him thereunder. The trial court sentenced the accused to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a period of three months for the offence punishable under Section 376 of the I.P.C. The trial court sentenced the accused to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.25,000/- and in default of payment of fine, to undergo rigorous imprisonment for a period of one month for the offence punishable under Section 366A of the I.P.C. The trial court directed that the substantive sentences of imprisonment imposed on the accused shall run concurrently. No separate sentence was imposed on the accused

by the trial court for the offence under Section 3 read with Section 4 of the POCSO Act.

9. This appeal was filed by the accused from the jail, challenging the conviction entered against and the sentence imposed on him by the trial court as above.

10. Heard learned counsel for the appellant (State Brief) and also the learned Public Prosecutor and perused the records.

Plea of Juvenility, Inquiry and Finding

11. Learned counsel for the appellant submitted that the appellant/accused was a juvenile at the time of commission of the offences alleged against him. Learned counsel for the appellant submitted that it was an omission to raise the plea of juvenility before the trial court.

12. The incident was in the month of September, 2013. Therefore, when the question of juvenility of the accused is considered, Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short "the JJ Act") which was in force at that time comes into play.

13. Section 7A of the JJ Act reads as follows:

"7A. Procedure to be followed when claim of juvenility is raised before any court. --

(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect."

14. Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short 'the 2007 Rules'), reads as

follows:

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining - -

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i),(ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law”.

15. As early as 13.11.2020, the appellant/accused had produced before this Court two documents to prove that he was a juvenile at the time of commission of the offences. These documents are (1) the extract of the school admission register kept in the school in which the accused first attended. (2) photocopy of Standard X equivalency certificate issued from the education department, which is attested by the Welfare Officer of the central prison.

16. Regarding the nature of the inquiry to be conducted by the court in determining the age under Section 7A of the Act and Rule 12, in **Ashwani Kumar Saxena v. State of M.P : AIR 2013 SC 553**, the Supreme Court has held as follows:

“31. The Code lays down the procedure to be followed in every investigation, inquiry or trial for every offence, whether under the Indian Penal Code or under other Penal laws. The Code makes provisions for not only investigation, inquiry into or trial for offences but also inquiries into certain specific matters. The procedure laid down for inquiring into the specific matters under the Code naturally cannot be applied in inquiring into other matters like the claim of juvenility under Section

7A read with Rule 12 of the 2007 Rules. In other words, the law regarding the procedure to be followed in such inquiry must be found in the enactment conferring jurisdiction to hold inquiry.

32. Consequently, the procedure to be followed under the J.J. Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under Section 7A of the Act. Many of the cases, we have come across, it is seen that the Criminal Courts are still having the hangover of the procedure of trial or inquiry under the Code as if they are trying an offence under the Penal laws forgetting the fact that the specific procedure has been laid down in Section 7A read with Rule 12.

33. We also remind all Courts/J.J. Board and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate etc. mentioned in Rule 12 (3) (a) (i) to (iii). The courts in such situations act as a *parens patriae* because they have a kind of guardianship over minors who from their legal disability stand in need of protection.

34.

34. "Age determination inquiry" contemplated under Section 7A of the Act r/w Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

35. Once the court, following the above mentioned procedures, passes an order; that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in sub-section (5) or Rule

12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of the Rule 12. Further, Section 49 of the J.J. Act also draws a presumption of the age of the juvenility on its determination.

36. Age determination inquiry contemplated under the JJ Act and Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, J.J. Board or a Committee functioning under the J.J. Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the J.J. Board or the Committee need to go for medical report for age determination”.

17. Section 7A of the JJ Act gives right to any accused to raise the question of juvenility at any point of time and if such an

issue is raised, the Court is under an obligation to make an inquiry and deal with that claim. What is discernible from the dictum laid down in **Ashwani Kumar Saxena** (supra) is that, in deciding whether an accused is juvenile or not, a hyper technical approach should not be adopted. While appreciating the evidence adduced on behalf of the accused in support of the plea that he is a juvenile, if two views are possible on the same evidence, the court should lean in favour of holding the accused to be juvenile in borderline cases. The inquiry contemplated is not a roving inquiry. The Court can accept as evidence something more than an affidavit i.e. documents, certificates etc as evidence in proof of age.

18. Clause (a) of Rule 12(3) contains a hierarchical ordering, evident from the use of the language "in the absence whereof". This indicates that where a matriculation or equivalent certificate is available, the documents adverted to in (ii) and (iii) cannot be relied upon. The matriculation certificate, in other words, is given precedence. It is in the absence of a matriculation

certificate that the date of birth certificate of the school first attended, can be relied upon. It is in the absence of both the matriculation and the birth certificates of the first school attended that a birth certificate issued by the corporation, municipal authority or panchayat could be obtained.

19. In the instant case, the accused has not produced any matriculation certificate or equivalent certificate to prove his age. What is produced by him is only attested photocopy of Standard X equivalent certificate issued from the education department. This document cannot be accepted as equivalent to matriculation certificate to prove the age of the accused.

20. However, the extract of the admission register kept in the school in which the accused first attended can be accepted in evidence. This document bears the seal of the school. It is signed by the Headmaster of the school which appears above his designation seal. Though this document was produced before this Court as early as on 13.11.2020, the prosecution has not filed any objection to accept this document in evidence on the

ground that it is a fabricated or manipulated document. In these circumstances, the extract of the school admission register produced by the accused is marked as Ext.C1 in this appeal.

21. Ext.C1 document clearly shows that the date of birth of the accused is 12.08.1996. The date of the incident was 20.09.2013. Therefore, as on the date of the alleged incident, the accused had completed seventeen years of age and he was below eighteen years. On the basis of Ext.C1 document, it is found that the accused was a juvenile on the date/dates of commission of the alleged offences.

22. As per Section 7A(2) of the JJ Act, if the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Juvenile Justice Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect. It means that, the question whether the conviction entered against the accused is legally sustainable or not has to be decided by this Court.

Material Witnesses

23. Out of the witnesses examined by the prosecution, the material witnesses are PW1 to PW3, PW5 and PW11. PW3 is the victim girl and PW2 is her father. PW1 was the doctor who examined PW3 at the General Hospital, Adoor and issued Ext.P1 medical certificate. PW5 is the headmaster of the school in which the victim girl was studying. He produced Ext.P4 certificate regarding the date of birth of PW3. PW11 was the Manager of Bharat Lodge in Mysore.

Evidence of PW2

24. PW2 is the father of the victim girl. He has given evidence in examination-in-chief as follows: On 20.09.2013, his daughter was found missing. She was under the care and custody of him and his wife. His daughter used to go to Kayamkulam to attend coaching class for entrance examination. She used to return by 18.00 hours in the evening. On that day, since his daughter did not return at that time, he enquired about her at the house of her friend. Then he came to know that his daughter

had gone with a person who was working as a cleaner in a bus. He went to the police station next day and gave Ext.P2 statement. His daughter returned home on the eighth day.

25. There was only one question asked to PW2 in the cross-examination. He was asked whether he knew that his daughter had any lovers. He answered that he did not know.

Testimony of the Victim

26. PW3 is the victim girl. When she was examined before the trial court, she was aged 21 years.

27. PW3 has given evidence in examination-in-chief as follows: During the year 2013, she used to go to Kayamkulam to attend the coaching class for entrance examination at the institution by name 'Tandem'. She was aged only 17 years at that time. On 20.09.2013, she left her house at 07.30 hours, without telling anybody. She was then in love with the accused. She reached Kayamkulam by bus. The accused was waiting for her. Then her friends were also with her. They went to see a film. After seeing the film, they had food from a hotel.

Thereafter, the accused told her that he had something to talk with her. He told her that they should elope. He told her that, if she did not go with him, he would commit suicide in front of her house. Then they reached Alappuzha by bus. The accused had told her that they were going to his house. But, when they reached Alappuzha, he told her that they were going to Bangalore. The accused obtained the locket of her chain and sold it in a jewellery there. Thereafter they reached Mysore by bus. At Mysore, the accused sold her gold chain and took a room in the Bharat Lodge. At the room, the accused asked her to undress. When she refused, he forcibly undressed her. He also undressed himself and he committed rape on her. When she cried, he closed her mouth with his hand. On the evening of that day, they went to Goa. There also they resided in a hotel and the accused committed rape on her. They returned to Mysore and again took room in Bharat Lodge. At Mysore, the accused sold her gold ring. On that day also the accused committed rape on her. On 28.09.2013, they came back to Kottayam from Mysore.

They reached Kayamkulam in the morning. The accused gave her Rs.50/- and asked her to go home. He promised that he would marry her. When she reached home, she came to know that her father had given a complaint in the police station. She went to the police station and gave statement. PW3 identified the accused who was present in the court.

28. On cross-examination, PW3 would say that she had studied upto Plus Two. She also deposed that when she eloped with the accused she knew that it would create problems. She further stated that she had been in love with the accused for about four months prior to the incident. She could not contact the accused after the incident.

Medical Evidence

29. PW3 was examined by the doctor at the Government Hospital, Adoor on 28.09.2013. PW1 is the doctor who examined PW3 and issued Ext.P1 certificate. PW1 has deposed that PW3 was brought with the alleged history of sexual intercourse with a person by name Ananthu (the accused). On medical examination

of PW3, it was found that the hymen was torn and vagina admitted two fingers. PW1 has given evidence that there was no evidence of recent sexual intercourse but there was evidence of past penetration. She stated on cross examination that there was no evidence of use of force on the person concerned.

Reliability of the Testimony of the Victim

30. There is no reason to disbelieve the evidence of PW3, the victim girl. In fact, her entire evidence in examination-in-chief with regard to the incident practically remains unchallenged. True, PW3 has admitted that she was in love with the accused and that she knew that eloping with him would create problems. But, it does not mean that it was with her consent that the accused took her to Mysore. Her evidence shows that he made a threat that if she did not go with him, he would commit suicide in front of her house. Her evidence in this regard was not challenged in the cross-examination.

31. The evidence of PW3 also shows that, at the room in the hotel, when the accused asked her to undress, she refused

but he forcibly undressed her. She has also stated that, when she cried, he closed her mouth with his hand. The testimony of PW3 clearly shows that it was against her will and without her consent that the accused committed sexual intercourse with her for the first time at the room in the hotel. Even if it is assumed that, on subsequent occasions, she did not resist the act of the accused, it cannot be found that it was with her consent that the accused had sexual intercourse with her. It can only be found that it was a passive submission made by the victim girl under unavoidable circumstances as she had no other option.

32. The evidence of the doctor that there was no indication of recent sexual intercourse is not sufficient to find that the accused did not commit rape on PW3. PW3 was examined by the doctor on 28.09.2013. As already found, forcible sexual intercourse for the first time at the room in the hotel took place on 21.09.2013. The evidence of the doctor that there was no indication of recent sexual intercourse has to be appreciated in this background.

33. Absence of injuries on the person of the prosecutrix does not lead to an inference of consent on her part or falsity of the allegation. It cannot be said that whenever resistance is offered there must be some injury on the body of the victim (See **Balwant Singh v. State of Punjab : AIR 1987 SC 1080**).

34. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would do.

35. In the instant case, since the evidence of PW3 in examination-in chief with regard to the incident practically remains unchallenged in the cross-examination, there is no need for corroboration of her testimony. There is an impression of truth in the evidence of PW3. It can be accepted even without corroboration.

36. The evidence of PW3 proves that the accused induced her to go with him to Mysore and that he took her to Mysore and at a room in the hotel by name 'Bharat Lodge' at Mysore, he had forcible sexual intercourse with her, against her will.

Proof of Age of the Victim

37. PW2, the father of the victim, did not give any evidence regarding the date of birth or the age of his daughter.

38. PW5 was the headmaster of the school in which PW3 had studied. He produced before the court Ext.P4 certificate prepared by him regarding the date of birth of PW3. As per Ext.P4 document, the date of birth of PW3 is 09.02.1996. PW5 has stated that he prepared Ext. P4 certificate on the basis of the

entries in the admission register kept in the school. But, the prosecution did not produce the extract of the school admission register. The entries in Ext.P4 certificate would show that it was not issued from the school in which PW3 first attended.

39. In **Jarnail Singh v. State of Haryana: AIR 2013 SC 3467**, the Supreme Court has held that, proper proof for determining the age of a child, who is a victim of a crime, is the extract of the admission register from the school which was first attended by the victim.

40. Following the above decision, in **Alex v. State of Kerala: 2021 (2) KLD 434**, a Division Bench of this Court has held that, the document produced to prove the date of birth or the age of the child victim, shall be the certificate from the school which the child first attended. This view was reiterated by the Division Bench in **Santhosh v. State of Kerala (2021 (4) KHC 527)**.

41. Ext.P4 certificate produced by the prosecution in this case does not satisfy the above requirement. Even if the accused

had not disputed the age of the victim, the prosecution has the duty to prove her age. In **Alex** (supra), it has been held that the accused has no obligation to invite the prosecution to establish the date of birth of the victim. It is the bounden duty of the prosecution to establish every material fact and circumstance before the trial court.

42. In the above circumstances, it has to be found that the prosecution has not proved the date of birth or the age of the victim girl as on 21.09.2013.

43. The consequence of not proving the age of the victim girl is that the accused cannot be found guilty of any offence under the POCSO Act. The age of the victim is the most significant and basic element to attract the offences under the Act and unless it is established by the prosecution by adducing positive evidence, the provisions under the Act cannot be pressed into service (See **Santhosh v. State of Kerala :2021 (4) KHC 527**).

No Proof of Consent

44. Even if it is assumed that the victim was more than 18 years of age, it cannot be a ground to hold that she was a consenting party to the sexual intercourse (**State of U.P v. Manoj Kumar Pandey : AIR 2009 SC 711**).

45. It is not for the victim to show that there was no consent. The question of consent is really a matter of defence by the accused and it is for him to place materials to show that there was consent. Plea of consent shall be taken or made during cross examination and the statement recorded under Section 313 CrI.P.C (See **State of U.P v. Sree Kant Shekari : AIR 2004 SC 4404**).

46. Explanation 2 to Section 375 of the I.P.C states that, consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act. It is also provided that a woman does not physically resist the act of penetration shall not by the reason

only of that fact, be regarded as a consenting party to the sexual activity.

47. In the present case, the evidence of PW3 clearly indicates that it was without her consent that the accused had sexual intercourse with her for the first time at the hotel. She has stated that, the accused forcibly undressed her, when she refused to undress on his demand.

48. There is gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow. Helplessness in the face of inevitable compulsion cannot be considered to be consent as understood in law. Exercise of intelligence based on the knowledge of the significance and the moral effect of the act is required for consent.

49. Merely for the reason that the victim was in love with the accused, it cannot be presumed that she had given consent for sexual intercourse.

50. In the aforesaid circumstances, the accused could not prove that PW3 had consented to have sexual intercourse with him on 21.09.2013 at the room in the hotel. On the other hand, the testimony of PW3 proves that he had sexual intercourse with her without her consent and against her will.

Offences Proved

51. The trial court has convicted the accused for the offences punishable under Sections 366A and 376 of the I.P.C and also under Section 3 read with Section 4 of the POCSO Act.

52. Since the age of the victim is not legally proved by the prosecution, the conviction of the accused by the trial court under Section 3 read with Section 4 of the POCSO Act will not stand and it is liable to be set aside.

53. Section 366A of the I.P.C deals with the offence of inducing any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person. Since the prosecution

could not prove that the victim was a minor girl aged below 18 years at the relevant time, the conviction of the accused by the trial court under Section 366A of the I.P.C is also liable to be set aside.

54. However, the accused is liable to be convicted for an offence under Section 366 of the I.P.C. The prosecution could very well prove that the accused abducted PW3 with the intention to have sexual intercourse with her.

55. Section 362 of the I.P.C defines abduction. It states that, whoever by force compels, or by any deceitful means, induces any person to go from any place, is said to abduct that person.

56. Section 366 of the I.P.C states that, whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished

with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

57. To constitute an offence under Section 366 of the I.P.C, it is necessary for the prosecution to prove that the accused induced the woman or compelled her by force to go from any place, that such inducement was by deceitful means, that such abduction took place with the intent that the woman may be seduced to illicit intercourse and/or that the accused knew it to be likely that she may be seduced to illicit intercourse as a result of her abduction. Once the prosecution leads evidence to show that the abducting of the woman was with the intention to force/seduce her to have illicit intercourse, the offence under Section 366 of the I.P.C is attracted.

58. In the present case, the prosecution could prove that the accused, by compulsion and by deceitful means, that is, by threatening that he would commit suicide if PW3 did not go with him, took her to Mysore and he made forcible sexual intercourse with her. The act of the accused clearly constitutes the offences

punishable under Section 366 and 376 of the I.P.C.

No Necessity to Forward the Accused to J.J.Board

59. As noticed earlier, as per Section 7A(2) of the JJ Act, if the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Juvenile Justice Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect.

60. As per Section 15 of the JJ Act, 2000, the maximum punishment that can be imposed upon a juvenile is to direct that he shall be sent to a Special Home for a period not exceeding three years. In the instant case, the accused has undergone imprisonment for more than six years.

61. In **Raju v. State of Haryana : AIR 2019 SC 1136**, a three Judge Bench of the Supreme Court passed an order directing release of the juvenile who had already spent six years in prison, on the ground that the maximum period for which a juvenile may be sent to Special Home is only three years. In that

case, the Supreme Court ordered as follows:

"Seeing that the appellant has already spent 6 years in imprisonment, whereas the maximum period for which a juvenile may be sent to a special home is only 3 years as per Section 15(1)(g) of the 2000 Act, we direct that the appellant be released from custody forthwith, if he is not required to be detained in connection with any other case".

62. In the light of the above decision, I find that the accused need not be directed to appear before the J.J.Board for receiving sentence.

63. Consequently, the appeal is allowed in part and it is ordered as follows:

(i) Conviction of the accused by the trial court for the offence punishable under Section 3 read with Section 4 of the POCSO Act is set aside.

(ii) Conviction of the accused by the trial court for the offence punishable under Section 366A of the I.P.C is altered to conviction under Section 366 of the I.P.C.

(iii) Conviction of the accused by the trial court for the offence punishable under Section 376 of the I.P.C is affirmed.

(iv) The sentences of imprisonment and fine imposed on the accused by the trial court are set aside.

(v) The accused shall be released from custody forthwith if he is not required to be detained in connection with any other case.

64. The Registry shall immediately send a copy of this judgment to the Superintendent of the jail in which the accused is detained.

R.NARAYANA PISHARADI, JUDGE

jsr/ltn