

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Crl.A.No.1124 of 2005

JUDGMENT :

This appeal is preferred against the judgment dt.12.07.2005 on the file of V Additional Metropolitan Sessions Judge, Mahila Court, Hyderabad in S.C.No.270 of 2003 convicting appellant under Section 376 IPC and sentencing him to undergo rigorous imprisonment for ten years for the offence under Section 376 IPC and also to pay a fine of Rs.5,000/-.

2. The case of prosecution as set out in the charge-sheet is that PW.2 was abducted and raped on 27.01.2002 between 07:30 pm to 10:30 pm at Secunderabad Grounds.
3. PW.2 was working as a maid servant in the house of one Smt. Laxmi, Flat No.203, Balaji apartments, Hyderguda, Hyderabad. She has an elder sister as well as one younger sister. Her father is working as a Security Guard in Osmania General Hospital, Hyderabad and her mother used to work in some houses and offices. Daily at about 08:00 a.m. PW.2 along with her mother PW.3 and younger sister PW.4 used to go in an auto, work up to 07:00 p.m. and her younger sister used to come daily at 07:00 p.m. to pick her up.
4. The case of the prosecution is that on 27.01.2002, at about 08:00 a.m. she along with PWs.3 and 4 left their house and went to Hyderguda for work. PWs.3 and 4 returned to the house, but PW.2 stayed in the apartments only. At about 06:30 p.m., PW.4 came to pick her up, but PW.4 was asked to stay there for half

an hour. At about 07:00 p.m., when PW.2 came down from apartment she did not find PW.4 there. So she started walking from Chikkadpally towards Baghlingampally. At a turning, two persons came to her and asked her to get into an auto forcibly and they took her towards Secunderabad. After passing Secunderabad, they beat her and asked the names and details of her parents, but she did not give them. They stopped the auto near the trees/wall. In the meantime, two more persons came on a scooter. Out of the four persons, one person previously used to ask her to accompany him to pictures. PW.2 had then scolded him on the road and the public had also beaten him. He was black and tall. PW.2 claimed she can identify these persons if she sees them again. According to prosecution, the four persons took her to a nearby tree and asked her to remove clothes and when she refused to do so, the black person came and removed her clothes forcibly and slept on her. The black person told her that he is a rowdy of Kavadi guda and nobody can take action against him. Thereafter, they went away. At about 10:30 p.m. she reached her house by catching an auto and slept without saying anything to her parents.

5. An FIR was lodged on 28.01.2002 at 08:45 p.m. with the above allegations. Crime No.48/2002 under Sections 365 and 376 IPC was registered.
6. PW.2 was then referred to the Gandhi Medical College to determine the age. The clothes of the victim which she was wearing at the time of incident were washed by PW.3 and so they were not seized. However, smears from the vagina and cervix collected from the victim were taken on glass slides and they were sent to FSL, Hyderabad. Ex.P.2 FSL report showed

the presence of human semen and spermatozoa on two such glass slides and blood group 'O' was detected on MO.2. After arrest, the accused was examined by PW.7 who stated that the accused was not incapable of performing sex and he gave Ex.P.7 certificate.

7. After investigation, charges were framed under Sections 366 and 376 IPC against A.1 and Sections 365 and 376 r/w Section 120-B IPC against A.2 and A.3.
8. After framing the above charges, the matter was committed to the Metropolitan Sessions Judge, Hyderabad.
9. The charges were read over and explained to the accused in telugu but the accused denied the charges.
10. The prosecution examined PWs.1 to 8 and marked Exs.P.1 to P.10 apart from Exs.D.1 to D.4 which are portions of the 161 Cr.P.C. statements of PWs.3 and 4.
11. After closure of the prosecution testimony, the accused nos.1 to 3 were examined under Section 313 Cr.P.C. The incriminating material in prosecution evidence was put to them but they denied it.
12. By judgment dt.12.07.2005, the Court below convicted A.1 for the offence under Sections 376 IPC, but acquitted A.1 under Section 366 IPC. It acquitted A.2 and A.3 of all the charges made against them.
13. Questioning the same, the present Appeal is filed by A.1.
14. The counsel for appellant contended firstly that the court below,

having held that there was no kidnap of PW.2 by the accused, and having acquitted A.2 and A.3 of all the charges, could not have convicted A.1 under Section 376 IPC; that PW.2 had not informed about the alleged incident to her mother on 27.01.2002 when the incident had occurred; the evidence of PW.1, the Medical Officer, who allegedly examined PW.2 cannot be believed and Ex.P.3 certificate issued by her, appears to be fabricated; that while PW.2 claimed that she was beaten up by the accused, and PW.3 stated that there were several injuries on her body such as scratch injuries and contusions on her back and shoulders which were also shown to PW.1, PW.1 stated that except on the genitalia of PW.2, she did not find any external injuries on PW.2's body; and this suggests that the accused was falsely implicated in the cases. He also contended that there was no test identification parade of the accused and except stating that the accused was a tall and black person no descriptive particulars were given. He contended that the appeal be therefore allowed and the accused be acquitted of charge under Section 376 IPC, since the prosecution cannot be said to have proved the said charge against him beyond reasonable doubt.

15. On the other hand, the learned Public Prosecutor contended that the Court below has rightly convicted A.1 under Section 376 IPC and that the said judgment does not suffer from any error or infirmity warranting interference by this Court in appeal. He contended that the evidence on record establishes the guilt of A.1 beyond reasonable doubt, and that merely because accused was acquitted under Section 366 IPC, it cannot be said that automatically the conviction under Section 376 IPC also has to be nullified; that minor discrepancies in the evidence of

prosecution witnesses should not be a ground to acquit accused, and that since the parties were giving evidence long after the incident, there is bound to be some lapse of memory; that Ex.P.2 report of FSL clearly indicated the presence of human semen and spermatozoa in the glass slides on which smears from vagina and cervix of PW.2 were taken, and this also establishes the fact that the victim was subjected to rape.

16. I have noted the submissions of both sides.

17. Admittedly, the incident in question is said to have occurred on 27.01.2002 at about 07:30 p.m. and 10:30 p.m. It is alleged that PW.2 was abducted by all the accused in an auto from Chikkadpally, taken to Secunderabad and then raped there. PW.2, the victim stated in her evidence that thereafter the accused fled away from the spot; that she came out of the compound by climbing a small compound wall and went and then took an auto and came to her house by 10:20 p.m. She stated that when PW.3, her mother asked her why she has come late, she did not say anything allegedly on account of fear of the accused. She stated in the morning also she did not tell anything to her mother; that after taking bath when she was ready to go to her place of work, her mother noticed the bleeding and then she told her that she was having her monthly periods; and since the bleeding could not be controlled, her mother took her to the Osmania General Hospital, where she was examined. She also stated that on that day at about 08:00 p.m. the Police visited the Hospital and enquired her about the incident, but on account of fear she did not tell anything about it to the Police. She further stated that on the next day she was shifted to another Hospital and there she told her mother what had happened to her in the

previous night. It is her case that her mother then informed the police and the police then came and recorded her statement Ex.P.4. The conduct of PW.2 in not informing her mother about the alleged rape immediately after she returned to the house, or the next day morning when she was taken to the Osmania General Hospital, is highly suspicious and unusual.

18. PW.1 is the Doctor who is said to have examined PW.2 on 28.01.2002 at about 08:00 p.m. and gave a report Ex.P.3 wherein she has stated that the victim had been subjected to sexual intercourse. Ex.P.3 is signed on 03.01.2003 by PW.1, almost one year after the incident on 27.01.2002 and her examination of PW.2 on 28.01.2002. The date on the first page of Ex.P.3 at the top was corrected as 03.01.2003 by striking off 30.10.2002, which itself appears to have been altered. Moreover, the writing on Ex.P.3 is with two different inks. There is no mention of Medico Legal Case No. (MLC No.) on Ex.P.3. In the cross-examination of PW.1, she admitted that Ex.P.3 did not contain the MLC number and stated that although Ex.P.1 did contain MLC number she had forgotten to mention it in Ex.P.3. She admitted that the final opinion Ex.P.3 was given by her on 03.01.2003 and that the date 13.10.2002 on top of Ex.P.3 was struck off and corrected as 03.01.2003. No re-examination has been done by the prosecution to explain the discrepancies in Ex.P.3, both with regard to the date, non-mention of the MLC number and the writing on it in two different inks. It is not explained how Ex.P.3 Medical Certificate (with regard to examination by PW.1 of PW.2) done on 28.01.2002 was issued almost one year later on 03.01.2003. Therefore, in my opinion, Ex.P.3 Medical Certificate cannot be given any weight.

19. That apart, it is the case of prosecution that PW.2 was taken to a place at Secunderabad containing bushes and was raped. According to PW.2, she was beaten by the three accused and was also kicked by them with bootlegs on her shoulder and other parts of the body. In her cross-examination, she stated that the surface on which she was subjected to rape was a rough surface, that there were several stones and bushes on the spot, and she sustained injuries on the back of her body. PW.3, her mother, also stated that when PW.2 came back to the house at night on 27.01.2002 there were several injuries on her body and she was suffering with bleeding. She stated that she noticed minor bleeding injuries and also some scratch injuries and contusions on her back and shoulders which she claimed to have shown to PW.1. But PW.1 in her cross-examination stated that except on the genitalia of PW.2, she did not find any external injuries on the body of PW.2. Ex.P.3 also does not mention any external injuries on the body of PW.2, except injuries on her private parts. If the incident is said to have taken place on a rough surface covered with stones and bushes, there would be some injuries on the back of PW.2. When a specific question was put to PW.1 as to whether there is a possibility of receiving of injuries on the back of PW.2 if she was subjected to sexual intercourse on a hard surface forcibly, she gave an evasive answer saying – “sometimes she may receive injuries and sometimes she may not receive injuries”. Therefore, PW.1 does not appear to be a truthful witness. Since PW.1 has said that there were no such injuries, it throws a doubt on the prosecution case that the victim was raped in an area in Secunderabad on a rough surface covered with bushes and

stones.

20. It is no doubt true that the FSL report mentions about the finding of semen and spermatozoa on glass slides on which smear of the vagina and cervix of PW.2 were taken. But the prosecution has not proved that the said sperm and semen belong to A.1.
21. The investigating officer, who has been examined as PW.8, stated that as per Ex.P.4 FIR, it is alleged that four unknown persons participated in the alleged rape. He also stated that when he recorded the victim's statement under Section 161 Cr.P.C the date and month were kept blank. Although he sought to explain that it was on account of oversight, he admitted that Ex.P.4 does not contain specific descriptive particulars of each of the accused and that PW.2 mentioned the descriptive particulars of only one out of the four accused. He also stated that although Ex.P.4 states that one of the assailants was black in colour and claimed to be a Kavadiguda Rowdi, there is no record in the Police Station of Chikkadpally that any CD was opened in the name of A.1. Although he claimed that during investigation, after apprehension of A.1 he came to know that A.1 was a rowdysheeter and a CD was opened in his name at Narayanaguda Police Station, he admitted that he had not collected any documents from Narayanaguda Police Station to show that A.1 was a rowdysheeter.
22. According to PW.8, one Kavita was also present at the time of the incident. PW.2 also spoke about the presence of this person at the time when she was picked up in the auto by A.1 to A.3. PW.4, the sister of PW.2, also stated about the presence of

Kavita at the time when the accused allegedly picked up PW.2. However, PW.8 stated that his investigation disclosed that this person Kavita was earning amounts by doing prostitution. The said Kavita ought to have been examined as a witness. A suggestion was put to him that A.1 to A.3 were proceeding towards the toddy compound, that they were stopped by the Traffic Police and when they misbehaved with the Traffic Police, they were brought to the Police Station and a false case was foisted on them.

23. The non-examination of Kavita who is an important eye-witness to the incident and the manner in which PW.8 conducted the investigation, as set out above, does not inspire confidence in the prosecution case.
24. Admittedly, no test identification parade was conducted for identifying the accused. When no descriptive particulars of the accused are given by victim, just because A.1 in his Section 313 Cr.P.C. examination stated that he had once scolded PW.2, it cannot be said on basis of the evidence of PW.2 that A.1 is the person who committed the offence.
25. The court below appears to have overlooked the discrepancies in the evidence of PWs.1 to 4 and 8.
26. It is also strange that it marked the Section 161 Cr.P.C statement made by PW.2 allegedly before the Police.
27. It is settled law that statement under Section 161 Cr.P.C. is not evidence and portions of it are marked only to highlight the omissions, contradictions and improvements in the evidence of prosecution witnesses.

28. In the light of the testimony of PWs.1 to 4 and the doubtful nature of Ex.P.3, it cannot be said that the prosecution had succeeded in proving the guilt of accused beyond reasonable doubt. Having regard to the above reasons, I hold that the accused is entitled to benefit of doubt and that the Court below has erred in convicting him of the offence under Section 376 IPC.
29. Therefore, the conviction and sentence passed by the V Additional Metropolitan Sessions Judge, Mahila Court, Hyderabad in S.C.No.270 of 2003 on 12.07.2005 against the appellant is set aside; the appellant is found not guilty of the charge under Section 376 IPC.
30. It is stated that the appellant is in jail. Therefore, the bail bonds of the accused shall be cancelled and the accused shall be set free forthwith and the jail authorities are directed to release the accused forthwith. The fine amount if any, paid by him, shall be refunded. Accordingly, the Criminal Appeal is allowed.
31. Miscellaneous applications, pending if any in this Criminal Appeal, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 11-03-2015

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