

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

MONDAY, THE ELEVENTH DAY OF JULY TWO THOUSAND AND SIXTEEN
(11.07.2016)

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

AND

THE HON'BLE SRI JUSTICE G. SHYAM PRASAD

CRIMINAL APPEAL No.1295 OF 2010

Nidigonda Narasimha Rao. --- Appellant (A-2).

And

The State of Telangana,
Rep. by Public Prosecutor,
High Court of Judicature at
Hyderabad. --- Respondent.

CRIMINAL APPEAL No.351 OF 2011

Gadipalli Upender. --- Appellant (A-1).

And

The State of Telangana,
Rep. by Public Prosecutor,
High Court of Judicature at
Hyderabad. --- Respondent.

Counsel for the Appellant (A-2) : Sri S. Chandra Mohan Reddy.

Counsel for the Appellant (A-1) : Smt P. Sujatha.

Counsel for the Respondent : Public Prosecutor (TS)

This Court made the following:

COMMON JUDGMENT: (per Hon'ble Sri Justice G. Shyam Prasad)

1. These Criminal Appeals arise out of the judgment dated 04.10.2010 in Sessions Case No.65 of 2008 on the file of the Court of Special Sessions Judge for Trial of cases under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act-cum-Additional Session Judge at Khammam (for short, 'the trial Court'). The appellants/A-1 and A-2 were convicted for the offence under Section 376(2)(g) read with Section 34 of the Indian Penal Code (for short, 'I.P.C.') and sentenced to undergo life imprisonment and also to pay a fine of Rs.1,000/- each, in default to suffer simple imprisonment for three months each.

2. The brief facts of the case of prosecution are as follows: On 8-5-2007, at about 6.30 p.m., when the prosecutrix-PW-2, a minor girl belonging to Koya-ST, went near Mangalavarre situated on the outskirts of Maddupalli village to attend calls of nature, the appellants/accused, who are non-STs, followed her, caught her from behind, took her to a distance of 250 yards to the field of one Malleboina Venkataramulu, got removed her lower Punjabi pant forcibly and committed rape one after the other. The appellants/accused also caused bite injuries on her face, cheeks and other private parts and of the prosecutrix and left the place. That the prosecutrix reached her house and was silent about the incident on that night. That on the next day i.e., 9-5-2007, when their relatives came to her house to settle marriage alliance to her, the prosecutrix went to the house of her aunt (PW-3), and narrated the incident to her, that PW-3 asked the prosecutrix to keep quiet till their relatives leave, that after their relatives departed at about 6 p.m., PW-3 came to the house of the prosecutrix and revealed the incident to her parents and that the father of the prosecutrix i.e., PW-1, gave complaint on 10-5-2007 in the police station. That on receipt of the complaint, PW-7, the Assistant Sub-

Inspector of Police, Kamepally registered a case in Cr.No.33 of 2007, issued Ex.P-4 printed FIR and sent the original of the FIR to the court and copies thereof to all the concerned.

The Sub-Divisional Police Officer, Yellandu – PW-10, filed charge sheet in Crime No.33 of 2007 for the offences under Section 376(2)(g) of I.P.C. and Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, 'the Act of 1989') of Karepally police station against the appellants/accused. The Judicial Magistrate of I Class Court at Yellandu took the charge sheet on file under Section 376(2)(g) of I.P.C. and Section 3(1)(x) of the Act of 1989 in P.R.C. No.24 of 2008 and, subsequently, committed the case for trial to the Court of the Special Sessions Judge at Khammam, for trial of cases under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989. On committal, the trial Court took the case on file for the offences under Section 376(2)(g) of I.P.C. and Section 3(1)(x) of the Act of 1989 and numbered it as Sessions Case No.65 of 2008.

3. On appearance of the accused, charges 376(2)(g) of I.P.C. and Section 3(1)(x) of the Act of 1989 were framed and read over and explained to them, for which they pleaded not guilty and claimed to be tried.

4. In order to prove its case, the prosecution has examined PWs.1 to 11 and marked Exs.P-1 to P-10 besides MOs.1 and 2. On behalf of the defence, Exs.D-1 and D-2 were marked.

5. After closure of the prosecution evidence, the accused were examined under Section 313 Cr.P.C. and they denied the incriminating evidence appearing against them and stated that due to political rivalry, a false case is foisted against them. They reported that they are having defence evidence on their behalf.

6. The trial Court, having heard the arguments on either side, convicted the accused for the offence under Section 376(2)(g) of I.P.C., as stated above, and acquitted them under Section 235(1) Cr.P.C. for the offence under Section 3(1)(x) of the Act of 1989.

7. Aggrieved thereby, appellants-accused herein preferred these Appeals, separately, raising the following grounds:

a) That there is delay in lodging the F.I.R. and the delay has not been explained by the prosecution;

b) that the conduct of the victim is highly improbable in not informing about the offence to her mother;

c) That the identification of the accused is not proved by the prosecution beyond reasonable doubt;

d) That the prosecutrix had not disclosed the identifying features of the accused either in her statement recorded under Section 161 Cr.P.C. or in her complaint. Therefore, there is no proper identification of the accused at the time, who are alleged to have committed the offence;

e) That the trial Court has not considered the fact brought on record in the cross-examination of the prosecutrix, who stated that she had no previous acquaintance with the accused and that she is not aware whether accused No.2 is of her village and that the alleged offence had taken place around 06:30 p.m., when there was no light and as such it is difficult for her to identify the physical features of the accused;

f) That in the absence of corroborating evidence, the sole testimony of the victim cannot be the basis for convicting

the accused in the instant cases in view of the material contradictions in her evidence.

g) That there is no presence of blood, hair or sperms of the accused on the clothes of the deceased or on the body of the deceased and, therefore, adverse inference has to be drawn against the case of the prosecution and it must be held that the accused has not committed the offence.

8. During the course of arguments, learned counsel appearing for the appellants-accused, submitted that the trial Court has not given any reasons while awarding the maximum punishment to the accused in spite of the mitigating circumstances having been brought to its notice and requested this Court to take into consideration the mitigating circumstances of the case, namely, the social background of the accused, the tender age of the accused, the accused having dependents on them, and the period of sentence of imprisonment already undergone by the accused, for awarding lesser sentence.

9. *Per contra*, learned Public Prosecutor, appearing for the respondents-State, contended that the sole testimony of the prosecutrix is sufficient to convict the accused for the offence of gang rape. That the prosecutrix is a minor girl, who belongs to Scheduled Tribe (Koya), aged about 14 to 15 years, as per the medical report. He has further contended that the relatives of the prosecutrix were to come to her house for her marriage alliance on the next day of the incident and, therefore, she did not inform the incident of rape immediately to her parents. That after their relatives left the house, the prosecutrix first informed the incident to her maternal aunt, who in turn reported the matter to her father, and her father immediately lodged complaint in the Police station and hence the delay in lodging the complaint is not fatal in this case as it is very natural that a

minor girl, belonging to scheduled tribe, having been raped, got scared of informing the same to her parents immediately after the incident and, more particularly, because her relatives were coming to her house on the next day for her marriage alliance. That the victim had informed her father about the incident when he questioned about the marks on her cheek and her worn clothes *i.e.*, paizama, she informed her father that due to thorns, she received injury on her cheek and her clothes were torn. That the discrepancy in the evidence of the prosecutrix are natural as this explanation was given by her due to fear of her parents and also because their relatives were coming to their house in connection with her marriage alliance and she had informed the incident to her maternal aunt after her relatives left and that therefore the evidence of the prosecutrix is cogent, convincing and trustworthy.

10. Learned Public Prosecutor further contended that the grounds urged by the learned counsel for the appellants-accused have no legs to stand as there was no cross-examination in respect of those grounds urged by her. There is no evidence brought on record to show that due to political enmity the accused are falsely implicated in this case and that the alleged political rivalry between the parties has not been established by the defence. It is further contended that the trial Court has considered the evidence of the prosecutrix and other witnesses and arrived at the just and reasonable conclusion and convicted the accused for the offence under Section 376(2)(g) of I.P.C. The learned Public Prosecutor has finally contended that the mitigating circumstances explained by the learned counsel for the appellants-accused do not require any consideration as the accused have committed the offence of gang rape on a minor girl belonging to scheduled tribe.

11. After hearing the learned counsel for both the parties and perusing the material available on record, the points that arise for consideration in these Appeals are:

1) Whether the prosecution proved the guilt of the accused beyond reasonable doubt for the offence under Section 376(2)(g) r/w. Section 34 IPC ?

2) Whether the judgment of the trial Court suffers from any infirmity or illegality?

3) Whether the mitigating circumstances put forth by the appellants/accused can be considered for reducing the sentence?

12. **POINT Nos.1 and 2:** As both these points are interconnected, they go together. According to the prosecution, this is a case of gang rape committed by the accused Nos.1 and 2 on the prosecutrix-PW-2, when she went to attend calls of nature on the fateful evening on 08.05.2007 at about 06:30 p.m.

13. As regards the incident, PW-2 deposed that on the date of the incident in the evening after 6 p.m. she went to Mangalivorru stream near donka, that at that time the accused dragged her and committed forcible sexual intercourse with her, that when she raised cries, the accused closed her mouth and threatened her and that she returned home at 8 p.m. PW-2 further deposed that due to fear she did not inform about the incident to anyone, that on the next day their relatives came for her marriage alliance, that the wife of her senior paternal uncle informed the incident to her parents in the evening after their relatives left; and that her parents also questioned her about the incident. In her cross-examination, PW-2 deposed that she had no previous acquaintance with the accused.

14. PW-1, the father of PW-2, deposed that he came to know about the incident through his sister-in-law in the evening on 9-5-2007 after their relatives left and that on enquiring with PW-2, she stated about the incident to him also. He further deposed that he went to the Police station on the next day i.e., on 10-5-2007 and lodged the complaint, having got drafted the same by PW.4, who is a resident of his village.

15. PW-3 spoke about PW-2 informing her about the appellants/accused committing the offence of rape on her. She further deposed that she informed the parents of PW-2 about the incident after the relatives left the house on the next day. PW-3 denied the suggestion that she is deposing falsely as her husband foisted this case against the appellants/accused.

16. PW-4 stated that as per the instructions of PW-1, he drafted Ex.P-1 complaint. PW-5 deposed that the police observed the scene of offence in his presence and also Bixam (LW-9) and prepared Crime Details Form (CDF) along with rough sketch and that they signed Ex.P-2-CDF. PW-6, Tahsildar, Yellandu, issued caste certificate Ex.P-3 of PW-2 confirming caste as Koya-ST. PW-7, the Assistant Sub-Inspector of Police, Kamepally, deposed that he issued Ex.P-4 printed FIR on receipt of the complaint from PW-1 and sent the original FIR to the court and copies to all concerned. He further deposed that in the printed FIR it was mentioned that there was delay in lodging the complaint as PW-2 had not informed her parents about the incident on the same day. PW-8 is the Civil Assistant Surgeon, Yellandu, who examined the accused on 22-5-2007 and issued Ex.P-5 and Ex.P-6 reports to the effect that both the appellants/accused are potent.

17. On 11.05.2007, PW.10-S.D.P.O., Yellandu took up investigation from PW.7 and had referred the victim PW.2 for medical checkup to

Government Hospital, Khammam. He spoke about his visiting the scene of offence in the presence of PW-5 and D. Biksham (LW-9), preparing the rough sketch of the scene of offence and Ex.P-2-CDF. PW-10 recorded the statements of PW-1 to PW-4 and seized MOs.1 and 2 (pyjama and top of PW-2), arrested the accused and sent MOs.1 and 2 and slides to the Regional Forensic Science Laboratory, Warangal (RFSL) on 21-5-2007. After receiving report from the R.F.S.L., he obtained final opinion from the Medical Officer-PW-9.

18. As regards the delay in lodging the complaint, the evidence of PW-1 to PW-3 inspires confidence. Apart from stating the overtacts of the accused, PW-2 had stated in her evidence that out of fear she has not revealed the incident to her parents immediately after the incident. She had also stated that their relatives were coming to their house on the next day for her marriage alliance. On coming to know about the incident in the evening after their relatives left, PW-1 lodged the complaint on 10-5-2007. It is to be noticed that PW-2 is a minor illiterate tribal girl having been raped by two persons. Therefore, in the circumstances in which PW-2 was placed, her conduct in not reporting the incident to her parents immediately after the incident, is very natural and probable. Therefore, the delay in lodging the F.I.R. is not fatal to the prosecution in this case.

19. PW.9, the Deputy Civil Surgeon, District Hospital, King Koti, Hyderabad on receipt of requisition from PW.7 had examined PW.2 and noted the following injuries:

1. Circular contusion on right and left cheeks about 4 x ¼;
2. Contusion on right and left thigh 1 x 1, which are of two to three years old.

The above injuries found on PW-2 clearly reveal that at the time of rape, she might have received those injuries and the same has been explained

by her. The testimony of PW.2 cannot be doubted in the light of the corroboration of the medical evidence. The Medical Officer stood for cross-examination and stated that the injuries are aged about 2 to 3 days old and he had clearly stated about the absence of hymen and presence of tears at 3 O' clock and 9 O' clock position and opined that there was a positive sign of rape. Ex.P-7 is the RFSL report, Ex.P-8 is the physical examination report and Ex.P-9 is final medical opinion dated 28.07.2007. Ex.P-9 clearly shows that the circular contusions are possible by biting or hitting or pressing the cheeks.

20. The testimony of Medical Officer is cogent and consistent. The direct evidence of PW.2 is totally corroborated by the evidence of Medical Officer, PW.9. Therefore, there is no doubt about the commission of the offence of rape on PW-2 by the appellants/accused on the fateful evening.

21. As regards the identification of the accused, PW-2, the prosecutrix clearly stated the names of the accused though they are not known to her earlier and their names found place in the F.I.R. There is no need for PW-2 or her father to falsely implicate the accused in this case that too in a serious offence like gang rape. The political rivalry alleged to have existed between the parties had not been established by adducing cogent evidence. Nothing is elicited in the cross-examination of PWs.1 and 2 to establish the political rivalry between the parties. There is neither evidence nor any facts were elicited in the cross-examination of investigation officers, PWs.7 and 10 with regard to political rivalry. Therefore, we do not see any force in the contention raised by the learned counsel with regard to the false implication of the appellants/accused in this case by the prosecution.

22. Considering the facts and circumstances of the case, we do not see any valid grounds for interfering with the conviction recorded by the trial Court.

23. **POINT No.3:** The learned counsel for the appellants-accused submitted that there are mitigating circumstances in this case which may be considered for reducing the sentence imposed by the trial Court. He has further contended that there is no material on record to show the correct age of PW-2-prosecutrix and that the prosecution has relied on the medical evidence with regard to her age.

24. As per the medical evidence (Ex.P-9), PW-2 was aged about 14 to 15 years, but the same can be taken either plus or minus two years. Therefore, considering this fact the age of the prosecutrix would be around 17 years, it can be safely concluded that PW-2 prosecutrix has crossed the age of 16 years and the benefit, if any, in this regard, should go to the appellants/accused.

25. Punishment is the consequence of committing an offence. Punishments are imposed on the wrong doers with the object of deterring them from repeating their criminal conduct and to reform them into law abiding citizens. The kind of punishment to be imposed on the criminals depends on the kind of society they live in. There are different theories of punishment i.e., deterrent theory, retributive theory, reformatory theory, preventive theory and expiatory theory. The aim of imposing punishment shall be to transform the law breakers into law abiders. Deterrent and reformatory theories are relevant in the present context. 'Deter' means to prevent or discourage someone from doing something. The main purpose of this theory is to prevent criminals from repeating their criminal conduct. Under this theory, severe punishments are inflicted upon the offenders so that they abstain from committing crimes in future and that it would also be

a lesson to the other members of the society as to what can be the consequence of committing a crime. This theory has proved to be effective, even though it has certain defects.

26. Reformatory theory is the most humane of all the theories of punishments. It aims at reforming the offenders by giving individualized treatment. The idea behind this theory is that no one is a born criminal and that criminals are also humans. Under this theory, it is believed that if criminals are trained and educated, they can be transformed into law abiding citizens. This theory has been proved to be successful and accepted by many jurists.

27. In prisons, the reformatory theory is partly implemented though not fully. Prisoners are being counseled in prisons and taught good conduct. In the process, there is every possibility of the criminals who have undergone incarceration, getting reformed. No doubt, imposition of severe sentence also amounts to deterrence but deciding the quantum of sentence depends upon the facts of each case individually.

28. Before deciding the quantum of sentence in this case, it is appropriate at this stage to refer to Section 376(2)(g) I.P.C., which reads as follows:

“376. Punishment for rape –

(1).....

(2) Whoever –

(a).....

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1 – Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.”

29. Mitigating circumstances in criminal law means the conditions or happenings which do not excuse or justify criminal conduct, but are considered out of emergency or fairness in deciding the degree of the offence while awarding sentence. The quantum of sentence has to be decided depending on the facts and circumstances of each case. Categorical findings should be given on quantum of sentence proposed to be imposed considering the various circumstances of the case, background of the accused and mitigating circumstances, otherwise it violates the fundamental rights of the individuals of their life and liberty and equality before law under Articles 21 and 14 of the Constitution of India.

30. In this case, the trial Court, while convicting the appellants/accused of the charge under Section 376(2)(g) r/w. Section 34 IPC, acquitted them of the charge under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The appellants/accused have been serving the sentence imposed by the trial Court and having preferred these Appeals in the year 2010, they are waiting for the result. If they are convicted and the sentence imposed against them is confirmed, there would not be any prejudice to the accused, but if they are acquitted of one of the charges and sentence is not reduced, the loss caused to them cannot be compensated appropriately as they suffer incarceration.

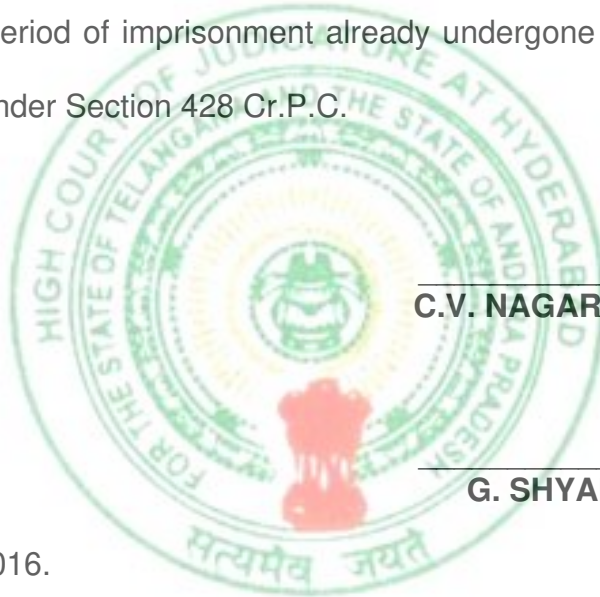
31. The Court has to invariably give cogent reasons while awarding the quantum of sentence considering the gravity of the offence committed, background of the accused, their age and other relevant circumstances. In this case, the trial Court did not record any reasons while imposing the

sentence and it appears that considering the fact that this is a case of gang rape, it has imposed imprisonment for life. Every case of gang rape may not attract and require imposition of imprisonment for life. It depends upon facts and circumstances of each case. The proviso to Section 376(2)(g) IPC conferred discretion on the courts for imposing a lesser punishment, by recording adequate and special reasons in the particular facts and circumstances of a case. If the legislative intent were to invariably impose life imprisonment or imprisonment for ten years for the offence of gang rape, no such discretion would have been conferred on the courts to impose a lesser sentence.

32. The evidence on record does not disclose that this is a case of premeditated or cold blooded act of the appellants/accused in committing the offence. The mitigating circumstances in this case are the accused are of tender age *i.e.*, 25 and 30 years respectively, they are married and having children and dependants on them, there is no material on record to show that the accused have any past criminal record and that they are habitual offenders. Further, they have already undergone the substantial sentence imposed against them. It is submitted across the Bench by the learned counsel for the appellants-accused and the learned Public prosecutor that the victim girl had married, begotten children and is living with her husband. If the appellants/accused are confined in prison for a longer period, there is every possibility of their becoming hardened criminals due to mingling with several other hardcore criminals with various backgrounds in the prison. Considering all the above mitigating circumstances and keeping in view the reformatory theory, we are inclined to consider the request of the learned counsel for the appellants/accused for modifying the sentence. Under these circumstances, we are of the opinion that the ends of justice would be met if the sentence imposed on

the appellants/accused by the trial Court is modified to that of imprisonment for seven years.

33. In the result, both the Criminal Appeals are partly allowed. The conviction recorded against the appellants/accused Nos.1 and 2 in judgment, dated 04.10.2010, in Sessions Case No.65 of 2008, on the file of learned Special Sessions Judge for Trial of Cases under SCs and STs (POA) Act-cum-Additional Sessions Judge, Khammam for the offence punishable under Section 376(2)(g) r/w. Section 34 I.P.C. is confirmed. However, the sentence imposed on them is reduced to Rigorous Imprisonment for seven (7) years each, besides confirming the sentence of fine. The period of imprisonment already undergone by them shall be given set off under Section 428 Cr.P.C.



C.V. NAGARJUNA REDDY, J

G. SHYAM PRASAD, J

Date: 11-07-2016.

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THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

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CRIMINAL APPEAL No.1295 OF 2010

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CRIMINAL APPEAL No.351 OF 2011

(Common Judgment of the Division Bench delivered by
Hon'ble Sri Justice G. Shyam Prasad)

DATE: 11-07-2016

DSH