

HONOURABLE SRI JUSTICE RAJA ELANGO

CRIMINAL APPEAL Nos.499, 671 & 1344 of 2008

COMMON JUDGMENT:

These Criminal Appeals are filed by the appellants/A-1, A-2 & A-3 by invoking the provision under Section 374(2) of the Criminal Procedure Code (for short 'Cr.P.C.), against the judgment, dated 17.03.2008, passed in S.C.No.377 of 2007, by the Assistant Sessions Judge, Machilipatnam, Krishna District, whereunder and whereby the learned Sessions Judge found the appellants/A-1 to A-3 guilty for the offence under Section 376(2)(g) IPC and convicted and sentenced them to undergo rigorous imprisonment for a period of ten years each and to pay a fine of Rs.1,000/- each, in default to suffer simple imprisonment for a period of four (4) months each.

2. Learned counsel for the appellants in CrI.A.No.499 of 2008 represented that the first appellant/A-2 is no more and the CrI.A.No.499 of 2008 may be dismissed as abated as against the first appellant/A-2. Hence, the CrI.A.No.499 of 2008 is dismissed as abated as far as the 1st appellant/A-2 is concerned.

3. CrI.A.Nos.671 of 2008 & 1344 of 2008 are filed by the same appellant/A-1 by two different counsels. Therefore, all the criminal appeals are disposed of by this Court by a common order.

4. The case of the prosecution is as follows:

The complainant-cum-victim Smt. Kalavalapalli Shakeela is a resident of Vadderanga Rao Colony, Sarada Nagar, Machilipatnam. She is an innocent woman. According to the Prosecution, Smt. Shakeela got married one Usman as per the customs prevails in Muslim community. She lived with her husband Usman for some time and later, she was deserted by her

husband. Her marriage with Usman was performed about five years back to the date of filing of this charge sheet. In the meantime, the victim Shakeela lost her parents and left with no relatives to look after her. Hence, she again married P.W.2 – Kalavalapalli Appa Rao, a rickshaw puller by his profession and lived together in a rented house at Javvarpet for some time. Later on, they shifted their family into a hut located in Vadde Ranga Rao Colony, Machilipatnam. There is one abandoned house belonging to Maddula Rama Krishna Rao at D.No.1/1089/124, Plot No.254 nearer to the hut of Shakeela in Vadde Ranga Rao Colony, Sarada Nagar. The exact scene of offence is the said abandoned house. It is the case of prosecution that Smt. Shakeela and her husband occupied the hut of one Mani Kumari, the daughter of P.W.3 – Doddi Parvathi for rent.

It has been alleged that three days prior to the date of offence, A-1 approached P.W.3 asking her to arrange the victim to fulfill his sexual desire and promised to pay Rs.100/- for which, P.W.3 scolded A-1 and warned him not to approach with such proposal. While so, on the intervening night of 7/8.05.2004, P.W.2 went for attending his profession as usual. While P.W.1 slept in front of her hut alone, A-1 to A-3, having waited for quite some time to enjoy the victim, confirmed themselves that P.W.1 alone slept at her hut. Then, all the accused came to P.W.1's hut. Then, A-1 lifted the victim. In the meantime, A-2 closed her mouth and A-1 to A-3 took the victim into the abandoned house referred supra, laid her on the ground. Then, A-2 & A-3 caught hold of her hands and legs. In the meantime, A-1 committed rape on the victim against her will. Then, A-2 and A-3 also raped the victim

one after one while caught holding the hands and legs by other accused. Then, all the accused, having committed heinous crime on victim, escaped from the scene of offence. Then, the victim, having unable to move on her foot to their hut due to her lifelessness, reached the hut by way of crawling. Then, the victim informed about the incident to her husband on 09.05.2004 when he returned the hut. Then, P.W.2 took the victim to Inaguduru police station where P.W.1 gave a statement before P.W.10, the Sub-Inspector of Police, who in turn reduced the same into writing in between 8.00 p.m. and 8.30 p.m.

Later, P.W.10 registered the same in Crime No.105 of 2004 under Section 376(g) IPC and submitted the copies of express FIRs to all concerned. Then, P.W.10 informed about the registration of case to their Inspector of Police (P.W.11) on phone and then, the Inspector took up investigation. He examined the victim and recorded her 161 Cr.P.C. statement. Then, he visited the hut of the victim and seized the cloths in the presence of P.W.5 and P.W.10 under a cover of Ex.P-2 Mediator Report. He also secured P.Ws.2 & 3 and L.W.4 – Kodali Samrajyam, examined them and recorded their 161 Cr.P.C. statements at the scene. As it was night, he posted one Constable as a guard to the scene of offence. Then, on 10.05.2004, at 7.00 a.m., P.W.11 observed the scene of offence in the presence of P.W.5 and L.W.10 and prepared Ex.P-3 mediator report. He also drawn rough sketch of the scene. He took photographs of the scene of offence through a skilled photographer (P.W.7). He also secured P.Ws.4 and 8 and L.Ws.5 to 7 at the scene of offence, examined them and recorded their 161 Cr.P.C. statements.

On 16.05.2004, at about 11.00 a.m., on credible information, P.W.11 proceeded to Mangaleru drain culvert, Sarada Nagar followed by P.W.5 and L.W.10 and enquired the accused and drafted mediator report cum confession statement marked as in Ex.P-4. Then, he arrested A-1 to A-3 informing the grounds and brought them to police station and then, produced before the II Additional Judicial Magistrate of First Class for judicial remand. On 08.06.2004, the Investigating Officer forwarded the material objects to R.F.S.L. by way of letter of advice through Sub-Divisional Police Officer for analysis. Then, P.W.9-Dr. A.Ankamma, after examining the victim clinically, expressed her difficulty to give opinion as the victim refused to give cervical swab and vaginal swab. P.W.6 – Dr.L.Surya Prakasa Rao, Civil Assistant Surgeon, attached to Government Head Quarters Hospital, Machilipatnam, examined A-1 to A-3 medically and opined that there are no findings to suggest that the accused are incapable to perform the sexual intercourse. Then, after receiving of analysis report and medical reports and after completion of entire investigation, the Inspector of Police laid charge sheet.

5. The II Additional Judicial Magistrate of I Class, Machilipatnam, took cognizance against A-1 to A-3 under Section 376(g) IPC vide P.R.C.No.9 of 2005. Then, he found that the entire case is exclusively triable by Court of Sessions at Krishna, committed the entire case to the District and Sessions Court directing all the accused to face trial before the Sessions Court. Then, the District and Sessions Court assigned the S.C.No.377 of 2007 and made over the case to the Assistant Sessions Judge,

Machilipatnam, with a direction to dispose of the same in accordance with law.

6. On appearance of the accused, the trial Court framed the charge under Section 376(2)(g) IPC against A-1 to A-3, read over and explained to them in Telugu, for which they pleaded not guilty and claimed for trial.

7. To prove its case, the prosecution examined PWs.1 to 11 and marked Exs.P-1 to P-17 besides M.Os.1 to 3. On behalf of the accused, no oral or documentary evidence was adduced.

8. After evaluating the entire evidence available on record, the trial Court found A-1 to A-3 guilty of offence under Section 376(2)(g) IPC and sentenced them as stated above. Aggrieved by the conviction and sentence imposed by the trial Court, the appellants/A-1 to A-3 filed the present criminal appeals.

9. Heard and perused the material available on record.

10. P.W.1 categorically stated in lower Court Chambers, while proceedings held in camera that two days prior to the incident, A-1 came to her and offered money asking her to fulfill his sexual lust. She further asserted that A-2 and A-3 stood very nearer to A-1 while she came to the bore well to fetch water. She refused to fulfill the demand of accused and therefore, all the accused were waiting for an opportunity to fulfill their sexual lust with the victim. Her evidence indicates that all the accused came to her in mid night at about 1.00 a.m., while she slept in front of hut and taken her into an abandoned house nearby closing her mouth and then, A-1 committed rape against her while A-2 and A-3 caught hold of her hands and legs. She repeatedly says that A-1 committed rape against her consent while A-2 and A-3 caught

hold of her hands and legs and then, A-2 and A-3 took their turn one after one by committing rape with the assistance of the other accused. Her evidence is very clear that after committing rape by A-1, then A-2 fell on her and committed rape while A-1 and A-3 caught hold of her hands and legs. Likewise, A-3 committed rape on her while A-1 and A-2 caught hold of her hands and legs. She reveals the fact that A-1 to A-3 made her to fall on the floor in abandoned house and committed gang rape as a result, she sustained bodily pains. According to her, she was forced to reach her hut immediately after the offence by way of crawling as she could not able to stand on her foot on account of severe bodily pains.

11. P.Ws.3 and 4, being the permanent residents of Vadde Ranga Rao Colony, stated in one voice that P.Ws.1 and 2 came and joined in a hut of Mani Kumari as tenants just one or two months prior to the date of offence. P.W.3 further supports the prosecution case that A-1 came to her three days prior to the date of offence and offered Rs.100/- with a request to arrange P.W.1 for fulfilling their sexual lust for which, she scolded the accused. In fact, she admits facial acquaintance with the accused by contending that all the accused are residing in the same colony. The evidence of P.W.3 further indicates that all the accused had intention to enjoy the victim if time permits them and in that way, A-1 to A-3 might have gone to the hut of P.W.1 and carried her in abandoned house nearby. P.Ws.3 and 4 further speaks about the bodily pains suffered by P.W.1 immediately after the incident. It has come in his evidence that P.W.2 brought some tablets for her bodily pains and then, regained energy after consuming the

tablets. Therefore, it was the main reason for the victim to disclose the entire incident on the next day of the incident after regaining the strength.

12. P.W.6 – Dr. L. Surya Prakasha Rao, Civil Assistant Surgeon attached to Government Head Quarters Hospital, Machilipatnam, speaks about his examination on A-1 to A-3 on 16.05.2004 for issuance of medical certificates. It has come in his evidence that on 16.05.2004 at 4.00 p.m., he examined A-1 to A-3 one after one in respect of their potency and on examination, he issued certificates as in Exs.P-5 to P-7 opining that they are capable to perform sexual intercourse. He further claims that Exs.P-8 to P-10 are final reports pertaining to A-1 to A-3.

13. P.W.9 – Dr. A.Ankamma deposed that she examined the victim on 09.05.2004 in the Government Head Quarters Hospital at Machilipatnam and found one contusion on left side breast with 1 cm x 1 cm. She also found one abrasion on back side of lumbar region with size 2 cms x 2 cms.

14. P.W.11, being the Investigating Officer, claims to have recorded the confession statement of accused in the presence of P.W.5 and L.W.1- as in Exs.P-4 on 16.05.2004. He also seized M.Os.1 to 3 i.e., saree, blouse and petticoat respectively at the instance of victim. P.W.11 noticed the symptoms of human syment on petticoat and as such, seized the same in the presence of P.W.5 and L.W.10 under a cover of mediator report on 09.05.2004 at 9.00 p.m. so as to send the same for clinical examination. On clinical examination, the R.F.S.L. authorities specifically noted in their report about the detection of human syment on petticoat.

15. The evidence of the prosecutrix, P.W.1, and the doctor, P.W.9, gains importance to decide the issue whether such an offence can be tried or not. In the evidence of the prosecutrix, she alleges that on the date of occurrence by 1.00 a.m., the appellants herein carried her on their shoulder from her house to a nearby dilapidated house where two persons caught hold of her hands, the other person committed rape, as such all the three appellants committed rape upon the victim lady P.W.1. The pleading of the entire evidence adduced by the P.W.1 affirm with the following infirmities that P.W.1 was not able to substantiate the fact that she knows the accused, who have committed rape upon her, even prior to the incident. The investigation agency has also not taken any steps to prove the identification of the accused persons by way of conducting identification parade. The time of occurrence by 1.00 a.m., being in the mid night, the availability of light and also identifying the persons by P.W.1 was not explained by the prosecution. Apart from that, in the entire reading of evidence adduced by P.W.1, she has nowhere stated in her chief examination that she resisted such an act of the accused and also she made any cry to rescue herself from the hands of the accused concerned and further she has not co-operated with the Medical Officer, which certainly caused breach to the case of the prosecution. P.W.9 - the doctor, in her evidence, stated since the prosecutrix refused to co-operate, she could not able to give any opinion regarding forcible sexual intercourse on the victim lady P.W.1. In the absence of co-operation, even though a doctor examined the victim, it is highly unsafe to come to a conclusion that she was subjected to sexual assault. The evidence adduced

by P.W.1 is highly improbable and also highly unbelievable and suffered with self-contradictions and also contradicts with the evidence of other witnesses. Further, there is a delay in lodging the complaint. Even though the delay is not fatal to the case of the prosecution, the same has to be decided in each and every case according to the nature of the offence concerned. P.W.1 stated that on the date of occurrence, her husband was not in house, but she admits in the cross-examination that he was sleeping in the house on the date of occurrence. Further, she proceeded to state that on the next day evening at 5.00 p.m., her husband came to house and she has not informed the said occurrence and she had asked some tablets for her ill-health. Thereafter, she slept till the next day morning. The said evidence is also highly improbable and unbelievable. If such an act and sufferings by P.W.1 was not stated to the husband immediately also creates a doubt to the case of the prosecution. Hence, this Court is of the view that on the basis of the available evidence, it is highly unsafe to convict a person that too an offence which is punishable with minimum sentence of ten years.

16. Hence, this Court is of the view that the conviction and the sentence imposed by the trial Court are liable to be set aside and the appellants/A-1 & A-3 are entitled for acquittal.

17. In the result, all the Criminal Appeals are allowed by setting aside the conviction and sentence imposed by the Assistant Sessions Judge, Machilipatnam, against the appellants/A-1 & A-3 for the offence under Section 376(2)(g) IPC, vide judgment, dated 17.03.2008, rendered in Sessions Case No.377 of 2007. The appellants/A-1 & A-3 are acquitted for the above said offence.

Fine amount paid, if any, shall be refunded to the appellants/A-1 & A-3. Bail bonds shall stand cancelled and the sureties are discharged. Miscellaneous petitions, if any, pending in these criminal appeals shall stand closed.

RAJA ELANGO, J

Date: 1st September, 2016

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