

HON'BLE Dr. JUSTICE SHAMEEM AKTHER

CRIMINAL APPEAL No.96 OF 2017

JUDGMENT:

This Criminal Appeal, under Section 374(2) of the Code of Criminal Procedure, 1973 (for brevity, 'Cr.P.C.'), is filed by the appellant-accused questioning the judgment dated 20.08.2014, passed in Sessions Case No.226 of 2013 by the Assistant Sessions Judge, Tanuku, West Godavari District (for brevity, 'the trial Court'), whereby the trial Court convicted the accused under Section 235(2) Cr.P.C. and sentenced him to undergo rigorous imprisonment for a period of ten (10) years and to pay fine of Rs.5,000/- (Rupees five thousand only), in default, to suffer rigorous imprisonment for three (3) months for the offence under Section 376(2)(f) of the Indian Penal Code, 1860 (for brevity, 'I.P.C.') and also sentenced him to undergo rigorous imprisonment for a period of six (6) months for the offence under Section 506(ii) I.P.C. with a further direction that both the sentences shall run concurrently.

2. Heard the learned counsel for the appellant-accused, learned Additional Public Prosecutor appearing for the respondent-State and perused the material available on record.

3. The case of the prosecution, in brief, is as follows:

P.W.1-S.Nookalu is the *de facto* complainant in this case.

P.W.1 is the wife of the accused and mother of the victim girl-

P.W.3. P.W.2-S.V.Durga Prasad is the brother of the victim and son of the accused. Three months prior to giving the report, in the evening time, the accused took his daughter-P.W.3 and roamed in town. During night time, he took her to a tree in Court area and committed rape on her, against her will and consent, and satisfied his lust. Later, the accused took her to the house and threatened her to kill her and her mother, if she discloses the same to her mother. Due to fear, the victim girl did not disclose the same to her mother. Few days thereafter, the accused took P.W.3-victim and his two sons to Duvva village to the house of younger brother of P.W.1. There also, the accused committed rape on P.W.3 forcibly and later they went to Tanuku. On one day, the accused took P.W.3-victim and his son-P.W.2 to chakali cheruvu, situated by the side of NH-16 road, and asked P.W.2 to stay outside and took P.W.3 into the bushes and committed rape on her. Again on 22.09.2012 in the after noon at about 03:30 p.m., the victim girl went to her maternal aunt's house and while returning from there, the accused saw her and took her to banyan tree near Sub-Court area in Tanuku and committed heinous act of rape on her. Due to fear, P.W.3 escaped from the clutches of the accused, ran away and reached the house by weeping and narrated the incidents to her mother-P.W.1, who in turn, took her to Tanuku Police Station and gave a report against the accused. The Police registered the same as a case in Crime No.190 of 2012 for the offences under Sections 376(2)(f) and 506(ii) I.P.C., conducted investigation and filed charge sheet

against the accused before the II Additional Judicial Magistrate of Class, Tanuku.

4. The learned Magistrate committed the case to the Court of Principal District and Sessions Judge, West Godavari at Eluru. The learned Sessions Judge made over the case to the Assistant Sessions Judge, Tanuku, *i.e.*, trial Court. The trial Court framed charges against the accused for the offences under Sections 376(2)(f) and 506(ii) I.P.C., for which he pleaded not guilty and claimed to be tried. The prosecution to substantiate its case examined P.Ws.1 to 12 and marked Exs.P.1 to P.17 and M.Os.1 and 2. On behalf of the defence, none were examined, but Exs.D.1 and D.2 were marked. When the accused was examined under Section 313 Cr.P.C. explaining the incriminating evidence appearing in the prosecution witnesses, he denied the same. The trial Court, on appreciation of the entire evidence on record, convicted and sentenced the accused as stated above.

5. Learned counsel for the appellant-accused would submit that the findings of the trial Court are contrary to law and evidence; there are two views, one is guilty of the accused and the other is innocence; in the circumstances of the case, the view favourable to the accused is required to be taken; there is no medical evidence to support the prosecution case; as per the F.S.L. report, there is no sexual intercourse; the findings of the trial Court are based on presumptions and assumptions; the *de facto* complainant, who is none other than the wife of the

accused and mother of the victim girl, and P.W.3-victim girl tendered their apology in the Court for deposing false against the accused when they were examined in chief; and ultimately, prayed to set-aside the conviction and sentence recorded against the accused.

6. On the other hand, learned Additional Public Prosecutor appearing for the respondent-State would contend that the trial Court rightly convicted and sentenced the accused for the aforementioned offences; there is evidence of P.Ws.1 to 3, *i.e.*, wife, son and daughter of the accused to prove the guilt of the accused; the victim was 7 years old; the findings of the trial Court are based on evidence on record; there is nothing to take a different view; and ultimately, prayed to uphold the conviction and sentence recorded against the accused.

7. In view of the contentions put forth by both sides, the following points have come for determination:

(1) Whether the prosecution proved the guilt of the accused beyond all reasonable doubt for the offences under Section 376(2)(f) and 506(ii) I.P.C. ?

(2) Whether the conviction and sentence recorded against the accused is sustainable?

8. **POINT Nos.1 and 2:** The *de facto* complainant-P.W.1 is the wife of the accused. P.W.2 is son and P.W.3-victim is daughter of the accused and P.W.1. The evidence of P.W.1 reveals that P.Ws.1 and 3 and the accused were living in a hut at

Duvva village. P.W.4 is a circumstantial witness. P.Ws.1 to 3 are the direct witnesses to the alleged incident. The trial Court held that the evidence of these witnesses is helpful to the prosecution case. P.W.5 is the photographer, who took photographs of the scene of offence. P.W.6 is the Village Revenue Officer, who acted as a mediator of the scene of observation. P.W.7 is the Medical Officer, who examined P.W.3-victim and issued medical certificate. P.W.8 conducted potency test over the accused and opined that the accused is capable of performing sexual intercourse. P.Ws.9 to 11 are the investigating officers. P.W.12 filed charge sheet in this case. P.W.1 and P.W.2 are circumstantial witnesses. Their evidence reveals that the accused used to take P.W.3-victim outside often and spend time with her.

9. After putting questions to P.W.3-victim girl, the Court satisfied that P.W.3 is capable of giving rational answers and recorded her testimony. The evidence of P.W.3 is that P.W.1 is her mother, P.W.2 is her brother and the accused is her father. She is only daughter in the family. She has completed 3rd standard and studying in Missionary school. On one day, her father took her outside on the pretext that he was taking her to a movie. He took her to a shop and purchased one chain, ear-studs and one sweet and took her to the Court premises, where there were bushes. Her father asked her to go deep into those bushes; when she objected, he slapped her on her cheek and forced her to go inside. Thereafter, he made her to lay on the

ground and put his penis into her mouth and into her vagina. When he kept his penis into her mouth, she could not breathe because it has gone deeply into her mouth. Thereafter, he put his penis into her vagina and did the said act for long time. Thereafter, he took her to house around 12 midnight and committed the same act for some time by putting his penis into her vagina and, later, slept separately. She could not bear the act of her father when he is putting his penis into her vagina. On the next day, she got bleeding from her mouth, nose, ears and vagina. Her mother observed the same and asked to clean it. She did not disclose the incident to her mother or anybody, as her father threatened her to kill her and her mother, if she discloses the same to anybody. On the next day, there were quarrels between her mother and father. Thereafter, the accused took her brothers and P.W.3 to a village. There the accused asked P.W.2-brother of victim to collect waste bottles and waste material. There was a hill at that place. Then P.W.3 was taken by her father to an isolated area into bushes and committed the act of rape by putting his penis into her vagina deeply for long time. She felt very inconvenience due to the acts committed by her father; as there was sticky substance and urine, she cleaned her vaginal area with water. Her brother-P.W.2 asked her why their father took her only for such a long time into the bushes, she falsely stated to him that she was collecting waste bottles and material, on the threat given by her father that he would kill her and her mother. She suffered severe pain when her father

had committed such acts. Her father committed the said act, subsequent to those acts. Thereafter, the accused took them to Duvva and kept in a thatched hut. There her father used to send her brother outside by keeping her inside, committed sexual acts for about five days. Her father used to send her brother outside to get food. P.W.3 has given number of other sexual acts committed by her father repeatedly. In cross-examination, she reiterated the same. She gave elaborate details of the sexual assault, when she was examined in chief and cross on 05.06.2013. Thereafter, on 06.12.2013, *i.e.*, after six months, when P.W.3 was recalled and further cross-examined on behalf of the accused, she stated that what she deposed in her chief-examination was at the instance of her mother and her father never committed such act against her. As per the material placed, P.W.3 is 7 years old on the date of commission of the offence. There is also evidence of P.W.1 about P.W.3 informing her about the commission of the rape on P.W.3, many occasions, by her father. P.W.3 has also deposed that the accused used to take her outside the house. P.W.2 also supported the case of the prosecution and corroborated the circumstances narrated by P.W.3. A report (Ex.P-1) was lodged by P.W.1 on 22.09.2012. P.W.3-victim was examined by P.W.7-doctor.

10. The evidence of P.W.7-doctor reveals that on examination, she did not found any external injuries over pelvic cots and other parts of the body; per vaginal examination cervix

admits 1/3rd finger. P.W.7 has collected vaginal smear from vulva, smear from vagina, swab from vulva and swab from vagina and sent them to F.S.L. and the examination was conducted on the consent given by mother of P.W.3. On receipt of F.S.L. report, spermatozoa and blood was not detected. P.W.7 opined that there was no sexual intercourse. Her evidence is based on clinical examination and the F.S.L. report. Ex.P.8 is the F.S.L. report and Ex.P.9 is her opinion. The evidence of P.W.8 reveals that he is Civil Assistant Surgeon, Area Hospital, Tanuku, on 24.09.2012, he examined the accused and opined that the accused is capable of performing sexual act. Ex.P.11 is his opinion. P.W.8 was not cross-examined.

11. The contention of the learned counsel for the accused is that the medical evidence is not supporting the case of the prosecution and the oral evidence is required to be thrown out. As per the evidence of P.W.7-doctor, she opined that there was no sexual intercourse. Her opinion is based on Ex.P.8-F.S.L. report, Ex.P.9 is her opinion. As per the medical evidence on record, there was no rupture to the vagina and there was no penetration.

12. At this stage, it is apt to refer Section 375 I.P.C. and the same is extracted hereunder:

“375. Rape:- A man is said commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following description:

First:-Against her will.

Secondly:-Without her consent.

Thirdly:-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly:-With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly:- With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly:-With or without her consent, when she is under sixteen years of age.

Explanation:- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception:- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

13. As per the evidence, the age of P.W.3-victim girl was 7 years, on the date of commission of the sexual acts. Under Ex.P-1 report, there is specific mention that the accused has been indulged in sexual acts 3 months prior to lodging the report threatening the victim that he would do away with her life and the life of her mother, if she discloses the sexual acts to anybody. P.W.3 has specifically stated the manner how the accused has

put his penis in her mouth, in vagina on several occasions. The same was also found place in Ex.P-1 report, lodged with the Police. P.W.3 is the daughter of accused; she has no reason to speak falsely against her father. The specific mentioning in the evidence of P.W.3 as well the recitals in Ex.P-1 report constitutes 'rape' as defined under Section 375 I.P.C. There need not be any tear or rupture to the hymen of the victim girl, P.W.3. As per the medical evidence no spermatozoa or blood was found. The evidence of P.W.7-doctor is that there was no sexual intercourse. As seen from the definition given under Section 375 I.P.C., a man is said to commit rape if he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person.

14. The evidence of P.W.3-victim girl as well as the recitals in Ex.P-1-report exhibits that the accused penetrated his penis in the mouth and vagina on many occasions; the victim girl felt pain and inconvenience. She found sticky substance in her private parts and complained bleeding from mouth, nose etc., Merely because after 6 months, P.W.3 deposed in her further cross-examination that her statement earlier given was false and it was given at the instance of P.W.1, her mother, cannot be taken as a true statement; it can easily be culled out that the accused has pressurized his wife-P.W.1 as well as the victim-P.W.3 to make such statement before the Court. No credibility can be given to the evidence given by P.W.3 in her further cross-examination. The trial Court while dealing with the subject matter

had elaborately dealt with all the contentions as well as the submissions made by both sides and delivered a reasoned judgment holding that the accused is guilty of the offences under Sections 376(2)(f) and 506(ii) of I.P.C.

15. The trial Court has convicted and sentenced the accused to suffer rigorous imprisonment for a period of ten (10) years and to pay fine of Rs.5,000/- (Rupees five thousand only), in default, to suffer simple imprisonment for three (3) months for the offence under Section 376(2)(f) I.P.C. and also sentenced him to undergo rigorous imprisonment for a period of six (6) months for the offence under Section 506(ii) I.P.C. There are no omissions and contradictions in the evidence of prosecution witnesses; the evidence of P.Ws.1 to 3 is reliable and they are trustworthy witnesses. The offence against the accused is a heinous one, indulging in sexual acts with his daughter, which deserves no consideration to reduce the sentence of imprisonment. There is no infirmity in the impugned judgment and there is nothing to take a different view and vary the impugned judgment. Under these circumstances, the conviction and sentence recorded against the accused for the offences under Sections 376(2)(f) and 506(ii) I.P.C. are liable to be confirmed.

16. In the result, the Criminal Appeal is dismissed confirming the conviction and sentence recorded against the accused for the offences under Sections 376(2)(f) and 506(ii) I.P.C. in Sessions Case No.226 of 2013, dated 20.08.2014.

17. As a sequel, miscellaneous petitions, if any, pending in this Criminal Appeal shall also stand dismissed.

Dr. SHAMEEM AKTHER, J

Date: 30-11-2017
Siva/Dsh



HON'BLE Dr. JUSTICE SHAMEEM AKTHER

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Date.30.11.2017

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