

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

CRIMINAL APPEAL No. 1223 OF 2008

JUDGMENT:

This Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, 1973 (for brevity, 'Cr.P.C.') questioning the judgment dated 09.09.2008, passed by the learned Special Judge for trial of the cases under S.Cs. and S.Ts. (POA) Act, 1989, at Srikakulam (for brevity, 'the trial Court'), in Sessions Case No.14 of 2008 (Old S.C. No.18 of 2006), whereby the trial Court convicted the appellant-accused under Section 235(2) Cr.P.C. for the offences under Section 376 of the Indian Penal Code, 1860 (for brevity, 'I.P.C.') and sentenced him to undergo rigorous imprisonment for a period of Three Years and to pay fine of Rs.1,000/- (Rupees one thousand only), in default, simple imprisonment for a period of three (3) month of the charge under Section 376 I.P.C.

2. Heard Sri Aravala Rama Rao, learned counsel for the appellant-accused and the learned Additional Public Prosecutor appearing for the State, apart from perusing the material available on record.

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

P.W.1-Peyyala Santhoshi Laxmi is the victim in this case; she belongs to a scheduled caste. The accused belongs to Kalinga caste (BC-A). The accused promised P.W.1 that he would marry her and had sexual intercourse on several times. P.W.1 became six months pregnancy. Thereafter, the accused

refused to marry P.W.1. When P.W.1 along with her parents- P.W.2 and P.W.3 raised a dispute before the elders, the accused agreed to marry P.W.1, but some time thereafter, again, the accused refused to marry P.W.1 on the ground that she belongs to a scheduled caste. The accused married another girl. P.W.1 lodged Ex.P.1-report to P.W.8-Sub Inspector of Police, who in turn, registered the same in Crime No.106 of 2006 of Ponduru Police Station, against the accused for the offences punishable under Sections 417 and 376 I.P.C. and Sections 3(1)(xii) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, 'SCs and STs (POA) Act') and investigated the case. After completion of investigation, charge sheet was filed against the accused before the learned Judicial Magistrate of First Class, Rajam.

4. The learned Magistrate committed the case to the Court of Special Judge for trial of the cases under the SCs and STs (POA) Act, Srikakulam (i.e., the trial Court). The trial Court framed charges against the accused for the offences under Sections 417 and 376 I.P.C. and Sections 3(1)(xii) and 3(2)(v) of the SCs and STs (POA) Act. To substantiate its case, the prosecution examined P.Ws.1 to 11 and got marked Exs.P.1 to P.9. On behalf of the defence, none were examined but Ex.D.1 was marked. The accused was examined under Section 313 Cr.P.C. explaining the incriminating evidence appearing in the prosecution witnesses, for which he denied the same. The trial

Court, on appreciation of the entire evidence on record, convicted and sentenced the appellant-accused as stated above.

5. Learned counsel for the appellant-accused would submit that there was consensual sex between the accused and the victim-P.W.1; the other offence, such as, Section 417 I.P.C. was compounded by the accused with P.W.1 and the accused was acquitted of the said charge; a false criminal case was filed against the accused for the offence under Sections 3(1)(xii) and 3(2)(v) of the SCs and STs (POA) Act; the trial Court recorded acquittal for those offences; the finding of the trial Court with regard to conviction recorded for the offence under Section 376 I.P.C. is not based on the evidence on record and also not in accordance with law; and ultimately, prayed to set aside the conviction and sentence recorded against the accused for the offence under Section 376 I.P.C. by allowing this appeal.

6. On the other hand, learned Additional Public Prosecutor would submit that the accused was a married person; he obtained consent of P.W.1 by promising to marry her; the consent obtained is not a free consent; the trial Court had elaborately dealt with this issue and rightly convicted and sentenced the accused for the offence under Section 376 I.P.C.; and ultimately, prayed to dismiss the appeal.

7. In view of the contentions put forth by both sides, the point for determination is, whether the conviction and

sentence recorded by the trial Court against the accused for the offence under Section 376 I.P.C. is sustainable?

8. **POINT:** The evidence of P.W.1 reveals that the accused was a private bus conductor; she was traveling by the said bus to go to college when she was studying intermediate; the accused promised to marry her and had sexual intercourse; she then became pregnant. There is also evidence of P.W.2- mother of P.W.1 that P.W.1 became six months pregnant. When P.W.2 questioned P.W.1 with regard to pregnancy, P.W.1 informed that the accused caused the pregnancy by promising her to marry her. There is also evidence of P.Ws.3 and 4-elders to the effect that they questioned the accused at R&B Bunglow and requested the accused to marry P.W.1, then the accused sought four days time, thereafter, the accused refused to marry P.W.1. The accused also admitted before the Court that there was a love affair between him and P.W.1 and he promised to marry her in the guise of the love. The accused had sexual intercourse on 14.01.2006 at old dilapidated railway quarters at Ponduru. P.W.1 gave birth to a female child by name Thanuja. There is also medical certificate under Ex.P.9 which shows the pregnancy of P.W.1. There is also evidence of the doctor to that effect. The contention of the accused is that he was already a married man and he did not promise P.W.1 to marry her. As per the evidence, the accused married in the year 2002 with one Roja and he begot a son and a daughter. P.W.1 in her chief-examination stated that the accused promised to marry her and

thereafter, sexually assaulted her. She was not aware of the marriage of the accused which took place with Roja in the year 2002. When P.W.1 was recalled for further cross-examination on 06.08.2008, she has clearly stated that the accused did not abuse her in the name of her caste and the accused did not promise her to marry. The evidence of P.W.1 is inconsistent with regard to the accused abusing her and promising to marry her. It is also born by the record that the trial Court has permitted the accused to compound the offence under Section 417 I.P.C. and the offence being compoundable was compounded by the parties.

9. It is appropriate to refer the provisions of Section 375 I.P.C. which reads as hereunder:

"375. Rape: A man is said to commit "rape" if he:

- (a) 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; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:

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 eighteen years of age.

Seventhly – When she is unable to communicate consent."

10. There is no mention in the evidence of P.W.1 that the sexual intercourse was committed either against the will of the victim or without her consent. The victim was major on the date of the alleged offence. There is no doubt that P.W.1-victim became pregnant through the accused herein and begot a female child. In view of the contradictory statements of P.W.1 with regard to her consent in the alleged sexual act, it cannot be held that the sexual acts were committed by the accused against her will or without her consent. When the offence under Section 417 I.P.C. has been compounded and the accused is acquitted

for the said offence, the requirements of Section 375 I.P.C. are not being satisfied. Consequently, the conviction recorded against the accused for the offence under Section 376 I.P.C. is unsustainable and liable to be set aside.

11. In the result, the conviction and sentence recorded against the appellant-accused for the offence under Section 376 I.P.C., *vide* judgment dated 09.09.2008 in Sessions Case No.14 of 2008 by the trial Court, are set aside; and consequently, he is acquitted for the charge under Section 376 I.P.C.

12. The Criminal Appeal is allowed accordingly. As a sequel, miscellaneous petitions, if any pending in this appeal, shall stand closed.

Date: 25-01-2018
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Dr. SHAMEEM AKTHER, J

