

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL APPEAL NO.776 OF 2008

JUDGMENT:

The accused No.1 in Sessions Case No.352 of 2007 on the file of the V Additional Metropolitan Sessions Judge (Mahila Court) at Hyderabad, preferred this criminal appeal under Section 374(2) Cr.P.C, challenging the conviction and sentence passed in calendar and judgment dated 14.03.2008, whereby the accused No.1/appellant herein was convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.20,000/- for the offence punishable under Section 376 of Indian Penal Code (for short "I.P.C."), in default of payment of fine, he is sentenced to suffer rigorous imprisonment for six months. Out of the said amount, Rs.10,000/- was ordered to be paid to P.W.1. Accused No.1 was further sentenced to undergo rigorous imprisonment for a period of two years and to pay fine of Rs.2,000/- for the offence punishable under Section 6 of Indecent Representation of Women (Prohibition) Act (for short "the Act") and in default of payment of fine, he has to suffer rigorous imprisonment for two months. Accused No.1 was further sentenced to undergo simple imprisonment for a period of two years for the offence punishable under Section 501 of I.P.C. and also to pay fine of Rs.1,000/- and in default of payment of fine, he has to suffer simple imprisonment for a period of one month. Accused No.2 was found not guilty for the offences punishable under Sections 376 read with 109, 501 of I.P.C. and Section 6 of the Indecent Representation of Women (Prohibition) Act and she was acquitted.

The appellant herein is the accused No.1 and accused No.2 is his wife. Accused No.1/appellant is working as a car driver and developed intimacy with the victim girl. Her family members and the family members of the accused started visiting each other's houses and they also watched movies together. Taking advantage of the closeness, in the month of October, 2004 at about 08.30 a.m. while the victim girl was standing at SVS bus stop, the accused came there in their car and got down from the car and asked the victim girl to come along with them for shopping. When she refused, they requested and made her to sit in the car and took her to their house. She was made to sit in the bed room while they were getting ready for shopping. In the meantime, accused No.1 came into bed room and forcibly had sexual intercourse against her will by gagging her mouth to prevent her from raising cries. Later, the appellant/accused No.1 called his wife/accused No.2 and asked her to pacify the complainant.

Both the appellant and his wife/accused No.2 threatened the complainant not to cry. The accused also showed photographs belonging to accused No.1 and the cousin sister of accused No.2 by name Swapna and threatened that they would also take photographs of her and show it to all the people. On account of threat, the victim girl was dam afraid of and did not disclose the incident to anyone. Since the date of incident, accused No.2, wife of the appellant, used to visit the house of victim girl and take her to their house for every two or three days and accused No.1 used to enjoy her sexually against her will. On one day, the photographs of the victim girl and accused No.1 while they were in compromising position were taken and shown to the victim girl and

threatened her not to disclose anything to anyone with threat to exhibit the photographs to everyone. They used to beat her whenever she refused to go with them.

On 25.02.2005 at about 11.00 a.m. while the victim girl was suffering from fever, accused No.2 came to their house and took her to their house. She asked her to stay with accused No.1 in a room and when the complainant expressed that she was suffering from fever and menstrual period, requested to leave her, but they threatened her and caught hold of her hand, then her sister Rama Devi came there searching for her and on hearing her cries, she took her to their house and informed about the incident to her mother. On that her mother enquired about the incident and the complainant informed everything to her mother, in turn her mother informed to her father. Later, they went to the police station and lodged written report. Inspector of Police, Chilkalguda Police Station, Secunderabad registered the same as a crime No.122 of 2005 for the offences punishable under Sections 376 and 501 of I.P.C. and Section 6 of Indecent Representation of Women Act, and issued F.I.R.

During the course of investigation, Inspector of Police examined the witnesses and recorded their statements, visited the scene offence, referred the victim girl for medical examination and the accused No.1 was also referred to the hospital for potency test after his arrest. Police recorded the confessional statement of accused No.1, based on which the photographs and camera was seized. After completion of investigation, police filed charge sheet before the X Additional Chief Metropolitan Magistrate, Secunderabad for the offences punishable under Sections 376 and

501 of I.P.C. and Section 6 of Indecent Representation of Women Act against both the accused.

The Metropolitan Magistrate concerned registered the same as PRC No.20 of 2007 and having concluded that the case is exclusively triable by the Court of Sessions, committed the same to the Metropolitan Sessions Judge by following the procedure laid down in Section 209 of Cr.P.C. after complying with Section 207 of Cr.P.C. In turn, Metropolitan Sessions Judge registered the same as Sessions Case No.352 of 2007 and made over the same to V Additional Metropolitan Sessions Judge (Mahila Court) at Hyderabad for trial and disposal in accordance with law.

The Metropolitan Sessions Judge took cognizance of the offence and to secure appearance of the accused, who were on bail, issued summons and secured their presence, framed charges under Section 376 of I.P.C. against accused No.1 and charge under Section 501 of I.P.C. and Section 6 of the Indecent Representation of Women (Prohibition) Act against accused Nos.1 and 2, read over and explained to them in Telugu, they pleaded not guilty and claimed to be tried.

After framing charges, additional charge was framed against accused No.2 for the offence punishable under Section 376 read with 109 of I.P.C., read over and explained to her in Telugu, she pleaded not guilty and claimed to be tried.

During trial, on behalf of the prosecution P.Ws.1 to 11 were examined and got marked Exs.P.1 to P.13, M.O.1 to substantiate the case of the prosecution. Ex.D.1 was marked on behalf of the accused. After closure of prosecution evidence, the accused were examined under Section 313 of Cr.P.C, explained the incriminating

material that appeared against them in the testimony of prosecution witnesses, but they denied the same and reported no defence.

Upon hearing argument of learned Prosecutor and Defence Counsel, the trial Court below found the accused No.2 not guilty for the offence punishable under Section 376 read with 109, 501 of I.P.C. and Section 6 of the Indecent Representation of Women (Prohibition) Act and acquitted her for the said charges, while finding accused No.1 guilty for the offence punishable under Sections 376 and 501 of I.P.C. and Section 6 of the Indecent Representation of Women (Prohibition) Act, convicted and sentenced him as stated supra in the first paragraph of this judgment.

Aggrieved by the conviction and sentence passed on 14.03.2008 by the V Additional Metropolitan Sessions Judge (Mahila Court) at Hyderabad in Sessions Case No.352 of 2007, the present appeal is preferred under Section 374 (2) Cr.P.C.

The gist of main grounds urged in the grounds of appeal is as follows:

- a) The trial Court committed an error in finding the appellant/accused No.1 guilty for the offence punishable under Sections 376, 501 of I.P.C. and Section 6 of Indecent Representation of Women (Prohibition) Act though accused No.2 was acquitted for the charge under Section 376 read with 109 and 501 of I.P.C. having found no incriminating evidence against her, in such case the appellant herein is also liable to be acquitted.

- b) The trial Court based on fake complaint lodged with ulterior motive against the appellant, recorded finding that the appellant/accused No.1 is guilty for the offences punishable under Section 376 and 501 of I.P.C. and under Section 6 of the Act.
- c) The appellant/accused No.1 is a car driver blessed with two daughters and eking out his livelihood as a driver and not in a position to pay even school fee of his children and also not in a position to pay fine of Rs.20,000/- and the fine amount imposed against him is excessive and prayed to set aside the conviction and sentence imposed by the trial Court by finding the accused No.1 not guilty for the charges framed against him.

During hearing, Sri P.Giri Krishna, learned counsel for the appellant/accused No.1 contended that the medical evidence is clear that the victim girl was not subjected to any sexual harassment by the appellant and in the absence of any material that the appellant had sexual intercourse with the victim girl forcibly or against her will, the conviction recorded by the trial Court against the appellant is erroneous, that apart the victim girl appearing in the positive photographs with negatives marked as Exs.P.2 to P.5 are not that of the victim girl and the appellant and the woman appearing in compromising position, whose face is not visible, is not the victim girl and the trial Court also accepted the said fact, but still recorded conviction against the appellant for the charge punishable under Section 376 of I.P.C. and sentenced him erroneously. It is also contended that Ex.P.9 – medical opinion and Ex.P.10 – F.S.L. report are suffice to hold that the appellant is not

guilty for such offence punishable under Sections 376 of I.P.C. Viewed from any angle, it is the duty of the prosecution to prove that the appellant/accused No.1 herein raped the victim – girl or had sexual intercourse against her will or without her consent, beyond reasonable doubt and when two views are possible, view favourable to the accused is to be accepted and the Court ought to have acquitted the appellant/accused No.1 for such offence finding him not guilty, but committed error in finding him guilty for the offences punishable under Sections referred above.

Learned Public Prosecutor for State contended that the evidence of victim girl is suffice to conclude that she was subjected to sexual assault against her will if it inspires confidence of the Court and mere continuance of sexual intercourse against her will is not sufficient to conclude that she is consenting party and the sex between the victim girl and the appellant is not consensual sex as she was subjected to sexual intercourse under threat to exhibiting photos to the public and forced her to participate in the sexual intercourse and the photos marked as Exs.P.2 to P.5 are sufficient to conclude that the woman appearing in compromising position is the victim girl. Therefore, the finding recorded by the trial Court cannot be disturbed reversing the conviction and sentence passed against the appellant and prayed for dismissal of the appeal.

Considering rival contentions, perusing the material available on record, the point that arises for consideration is:

“Whether the appellant/accused No.1 had sexual intercourse with the victim girl, P.W.1 – prosecutrix against her will under the threat of

exhibiting photos to the public taken while in compromising position, if so, does it constitute offence of rape punishable under Sections 376 and 501 of I.P.C. and under Section 6 of Indecent Representation of Women (Prohibition) Act, if not whether the conviction and sentence recorded against him and finding him guilty is liable to be set aside?”

P O I N T:

The trial Court recorded a finding that the prosecution failed to establish that the victim girl was less than 16 years and that the appellant had sexual intercourse with the victim girl against her consent and will, thereby found the appellant/accused No.1 guilty for the offence punishable under Section 376 of I.P.C. and sentenced him as stated supra.

Before advertng to the evidence available on record, to decide the complicity of the appellant, it is appropriate to extract the definition of rape. Section 375 of I.P.C. defined the offence of rape as follows:

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.

Explanation 1 - For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2 - Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act;

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Exceptions

Exception 1 - A medical procedure or intervention shall not constitute rape.

Exception 2 - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Clauses (1) (3) and 6th exception are relevant for deciding the present controversy.

Any of the acts under clause (a) to (d) of Section 375 of I.P.C. are performed against her will without her consent or 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, would constitute an offence punishable under Section 376 of I.P.C. 6th exception deals with consent. Even if the victim girl gives consent when she is under the age of 18 years, it is rape. 6th exception was introduced by Act 13 of 2013. But this exception has no application since the incident took place prior to 2013 i.e. in the year 2005. Therefore, 6th exception as it stood prior to amendment alone is applicable. When man performed any of the acts referred to in clauses (a) to (d) of Section 375 of I.P.C. with or without consent when the victim girl is under '16' years of age, it would constitute an offence.

The defence set up by the appellant is total denial. But put certain suggestions that the victim girl is in love with the appellant and used to move freely with him, she flatly denied those suggestions. Therefore, nothing has been elicited in the cross-examination of P.W.1 – victim girl about the love affair between the appellant and the victim girl. Even otherwise, the age of the victim girl is relevant to decide the issue i.e. whether the consent, if any, given by the victim girl is free consent or not in view of explanation to 6th exception as it stood prior to amendment by Act 13 of 2013.

As per the material available on record, the age of the victim girl is 15 years as on the date of filing of the charge sheet. As on the date of her examination before the Court, she was aged 17 years i.e. on 08.10.2017. According to the examination-in-chief of P.W.1, she developed acquaintance with the appellant about 2 ½

years prior to her examination before the Court and they were her neighbours. In the cross-examination of P.W.1, nothing was suggested that the victim girl is aged more than 16 years and in fact nowhere disputed the age of the victim girl in the cross-examination of P.W.1, so also in the evidence of P.W.2, mother of the victim girl.

P.W.2, mother of the victim girl, testified that the incident took place while the victim girl studying intermediate in Andhra Youvathi Mandali, Barakathpura. In the cross-examination of P.W.2 also, no suggestion was put to her that the victim girl was aged more than 16 years by the date of incident. P.W.3 is the elder sister of victim girl. In her testimony, she disclosed that the victim is her younger sister and she was a last child in the family of P.W.2 and her husband. Similarly, no suggestion was put to P.W.3 about the age of victim girl.

Coming to the evidence of Doctor, P.W.6, who examined the victim girl and issued Exs.P.9 and P.10, in the cross-examination of P.W.6 also no suggestion was put to her that victim girl was aged more than 16 years. In Exs.P.9 and P.10 medical opinion and F.S.L. report, the age of the victim was not mentioned. But the question of mentioning the age of victim in Ex.P.10 would not arise.

In the statement of P.W.1 recorded by police under Section 161 of Cr.P.C. during investigation, the age of victim girl was mentioned as 16 years. Thus, the evidence on record is consistent that the victim girl was aged 16 years by the date of incident. Since the appellant/accused No.1 did not dispute her age by putting any suggestion to the prosecution witnesses, no necessity arises for

prosecution to produce any proof of age of the victim girl. Therefore, the finding of the Court that the prosecution failed to prove that the victim girl was aged less than 16 years is not based on any material; in fact no such question was raised during cross-examination. However, requirement under 6th exception as to consent arises if the victim is under the age of 16 years, the act of sexual intercourse is with the consent, it cannot be said to be free consent. Therefore, 6th exception regarding consent has no application to the present facts of the case as the victim girl was aged 16 years even if the material produced before the Court is accepted in toto. Such exception would apply only when the victim girl is under the age of 16 years, which means she must be less than 16 years old. Therefore, the age of the victim more or less becomes academic and it is irrelevant for the purpose of deciding the present controversy.

The trial Court found the accused No.1 guilty for the offence punishable under Section 376 of I.P.C. on the strength of the testimony of victim girl, P.W.1 and medical evidence on record. In the present appeal, the challenge is only against the finding of Sessions Court about proof of sexual intercourse of appellant with the victim girl without consent or against her will. The grounds urged in the appeal are mostly general in nature and contended that the complaint is fake complaint with ulterior motive against the appellant besides other ground of failure of trial Court to appreciate the evidence.

Based on the general grounds, learned counsel for the appellant Sri P.Giri Krishna contended that the oral evidence of P.W.1 read with the evidence of P.W.6, Ex.P.9 and Ex.P.10 it is

difficult for the Court to conclude that the appellant had sexual intercourse with the victim girl without her consent or against her will, but the trial Court failed to appreciate the evidence in proper perspective and committed serious error in finding the accused guilty for the offence punishable under Section 376 of I.P.C.

Reverting to the evidence of P.W.1 – victim girl, it can be said that her evidence is consistent as to how she was forced to participate in the sexual intercourse with the appellant. The victim girl testified that about 2 ½ years prior to her examination on 08.10.2017 before the Sessions Court in the month of October, 2004, on one day while she was standing at the bus stop to go to college, both the accused came to the bus stop along with their daughter aged one year at that time and asked the victim girl to accompany them for shopping, she refused to accompany them on the ground that she had to go to college, but they persuaded her saying that the shopping is meant for the birthday of their child, even then she refused to accompany them on the ground that without informing her parents, she cannot accompany them. Accused No.1 told her that he already informed her parents. When she expressed her disinclination to accompany them, they persuaded her that they already informed their parents and she boarded the car and the car was straightaway taken to the house of accused on the pretext that accused No.2 has to change her clothes to go for shopping. After entering into the house, she was made to sit in the bed room, after sometime accused No.1 alone entered into the room and slept on her gagging her mouth with towel and had sexual intercourse against her will. Later, accused No.2 entered into the room and took photographs while accused

No.1 is having sexual intercourse with the victim girl and both the accused threatened while saying that if she informed about the incident to anyone, they would publish photographs and further threatened that they would see that the marriage of her sister would not be materialised. Accused Nos.1 and 2 continued to do the same everyday under the threat.

Thus, it is clear from the facts narrated by victim girl in her examination-in-chief, under threat to exhibit or publish the photographs taken by accused Nos.1 and 2 while the victim girl and accused No.1 in compromising position, despite her unwillingness and they would see that the marriage of her sister would not be materialised, the appellant/accused No.1 had sexual intercourse with victim girl. Therefore, it is clear that under threat to publish or exhibit the photos taken while in compromising position, they made the victim girl to participate in sexual intercourse frequently and accused No.2 used to take her to their (accused Nos.1 and 2) house and forced her to participate in sexual intercourse under threat, with accused No.1. More curiously on one day, when the victim girl was suffering from fever and in menstrual cycle, accused No.2 came to her house and asked the victim girl to come to the house of accused, but she refused, then accused No.2 beat her, thereupon she started crying, on hearing the same, her sister Rama Devi came and questioned as to the reason for crying, then she revealed everything to his sister as her mother was not available at home at that time. Thus, it appears from the testimony of P.W.1, she was forced to participate in the sexual intercourse under threat of publishing or exhibiting

photos taken while accused No.1 having sexual intercourse with her against her will.

In the cross-examination of P.W.1, she admitted that their families were moving closely and they were in visiting terms.

Prosecution produced photographs along with negatives, which are 16 in number. Exs.P.3 and P.4 are the photographs taken by accused No.2 when the appellant/accused No.1 having sexual intercourse with her against her will. In the cross-examination, she admitted that she was wearing blue coloured dress on the date of incident. Exs.P.3, P.4 and P.5 are her photographs and the rest of the photographs are not her photographs. In Exs.P.3 and P.4, the face of the person is not visible and a suggestion was put to her that Exs.P.3 and P.4 do not pertain to her and also made an attempt to elicit where Ex.P.5 was taken. She admitted that Ex.P.5 was taken in Chikkadapally. She admitted that she was not liking the accused and Ex.P.5 photograph was taken under threat, followed by a suggestion that accused never threatened her and that she was in love with the accused No.1 and that she got photographs with the accused.

From these suggestions, the defence of the appellant appears to be that the victim girl was in love with the appellant/accused No.1.

The prosecution also examined the Doctor, who examined and issued potency certificate of appellant/accused No.1 as P.W.5 – Dr.Ravinder Reddy. P.W.5 after conducting necessary tests, issued Ex.P.8, potency certificate certified that the appellant/accused No.1 is potent. Dr.Madhu Latha, who examined the victim was examined as P.W.6 and issued Ex.P.9 based on

physical examination and also based on Ex.P.10 F.S.L. report. Though no spermatozoa was found on the item sent to F.S.L., the opinion of the Doctor is clear that Hymen was not intact and vagina admitted two fingers easily.

P.W.6, in her evidence, stated that she did not find any external injuries on the body or genetalia, but the Hymen was not intact and vagina admitted two fingers easily and she collected smears from vagina and forwarded them to F.S.L. for analysis. After receiving F.S.L report, she issued a final opinion that the possibility of sexual assault cannot be ruled out. In the cross-examination of P.W.6, the defence counsel elicited that no semen, spermatozoa and foreign hair are detected and the rupture of Hymen is possible by external force. It is also possible by Masturbation. Even if facts elicited in the cross-examination are accepted there is every possibility of rupture of Hymen by external force or due to Masturbation. No suggestion was put to P.W.1 that the rupture of Hymen was due to any external force or Masturbation. If such suggestion was put to P.W.1 that the rupture of Hymen was due to external force or due to Masturbation as elicited in the cross-examination of P.W.6, then such possibility can be accepted.

In the cross-examination of P.W.1, nothing suggested to P.W.1 that she had sexual intercourse with any other person or rupture of Hymen was due to any other reason and the finding of semen, spermatozoa and foreign hair would arise only when the sexual assault was recent in point of time. Even according to the prosecution, from the material available on record, when the victim girl complained about the incident to her sister, P.W.3 and her

parents, she was on menstrual cycle and refused to go to the house of the accused at the demand of accused No.2, then she beat the victim girl. But the actual incident of sexual intercourse of appellant/accused with P.W.1, victim girl was long prior to the incident complained to P.W.2 by P.W.1. In such case, the question of finding foreign hair, semen and spermatozoa in the samples collected by P.W.6 would not arise. Hence, non-finding of semen, spermatozoa and foreign hair alone cannot be a ground to conclude that the sexual assault by the appellant is untrue.

More curiously, in the grounds of appeal except raising general or formal grounds, no specific ground is raised with regard to consent or forcible sexual intercourse as contended by the prosecution and the finding recorded by the Sessions Court based on such evidence. Thus, the appellant/accused No.1 had sexual intercourse with P.W.1, victim girl as per the evidence available on record.

When sexual intercourse is proved; whether it is with or without consent is another question to be decided.

P.W.1, victim girl, testified that she was taken to the house of accused when she was waiting for bus to go to the college on the pretext of shopping on the occasion of birthday of their children. When she was asked to sit in the bedroom, the appellant/accused No.1 entered into the bedroom and gagged her mouth with a towel and had sexual intercourse forcibly, but she was threatened not to disclose the incident to anybody with the help of photos taken when she was raped by the appellant/accused No.1.

Photos were allegedly taken by accused No.2, but she was acquitted. P.W.1 admitted that the photos marked as Exs.P.2 to

P.5 are her photos. Ex.P.3 is the photo taken while accused No.1 and another woman were in compromising position (may be cousin of accused No.2), so also Ex.P.4. Ex.P.5 is the photograph taken in photo studio as admitted by P.W.1 along with the appellant/accused No.1. It is a normal photo. Thus, the person appearing in Ex.P.5 is the person appearing in Exs.P.3 and P.4 is the question. The trial Court based on the photos concluded that the girl appearing in the photos Exs.P.3 and P.4 is a grown-up woman, but not a child. But the watch worn by the person found in Exs.P.3 and P.4 and the girl in Ex.P.5 is one and the same. But the other photos are not of use, but basing on such watch, it is difficult to identify the woman or girl as there is possibility of wearing identical watches by more than one person. Even assuming for a moment, woman or girl appearing in Exs.P.3 and P.4 is different, the reason for taking Ex.P.5 photo is that family of victim girl and accused are moving closely and they are on visiting terms till the date of incident. The suggestion put to P.W.1 that she was in love with the appellant/accused No.1 and the same may be one of the reasons for taking photos and forcing her to participate in sexual intercourse. In such circumstances, the consent, if any, obtained by the appellant/accused No.1 cannot be said to be free consent, but it was due to putting her in fear or threatening her to exhibit or disclose the photos taken, to the public when she was raped by the appellant/accused No.1.

As per the explanation 2 to Section 375 of I.P.C. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the

specific sexual act, and who does not physically resist to the act of penetration shall not by the reason only of the fact, be regarded as consenting to the sexual activity.

The word 'free consent' is not defined in I.P.C., but the explanation 2 to Section 375 of I.P.C. is exhaustive, it covers everything.

When a woman, who allegedly suffered sexual assault against her will and appeared before the Court and testified that she did not give consent to such sexual intercourse, the presumption under Section 114-A of Indian Evidence Act can be applied only for the offence punishable under Section 376 (2) of I.P.C.

Earlier, the rule was that corroboration of the victim's version was not essential for a conviction, but as a matter of prudence, it would have to be established if the mind of the judge, unless circumstances were strong enough to make it safe to convict the accused without such corroboration. In "**Sk. Zakir v. State of Bihar**"¹ the Apex Court held that although the victim of a rape cannot be treated as an accomplice, her evidence is to be treated almost like accomplice evidence, requiring corroboration.

In the present case, the appellant/accused No.1 though denied the alleged sexual intercourse with the victim girl, it was proved that the appellant/accused No.1 had sexual intercourse with the victim girl by threatening to exhibit or disclose the photos taken at the time of rape, to the public.

¹ 1983 Cri. L.J. 1285

This amendment was introduced in 1983 only with a view to treat the prosecutrix, victim of rape on par with injured in the incident and to protect the victim from sexual assault cases.

By the date of alleged sexual assault, the victim girl was aged 16 years and when she was subjected to such sexual assault; her evidence can be treated on par with injured witnesses, who normally would not venture to implicate any other person. When the victim girl was aged 16 years and repeatedly raped by the appellant/accused No.1, the trial Court convicted and duly sentenced him. The only question before this Court is that based on solitary statement of victim, without corroboration on material particulars, the conviction can be sustained.

An identical question came up before the Apex Court in “**Gurucharan Singh v. State of Haryana**”² where a girl was, under age of 16 years, repeatedly raped by three accused, the trial Court convicted and duly sentenced them, which was upheld by the High Court. The Apex Court dismissed the appeal preferred by one of the accused. In paragraph No.2, the Court observed, dealing with the contention that the solitary statement of victim without corroboration in material particulars is not enough to sustain conviction, as follows:

“It is well-settled that the prosecutrix cannot be considered as an accomplice and, therefore, her-testimony cannot be equated with that of an accomplice in a criminal case. As a rule of prudence, however, court normally looks for some corroboration of her testimony so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated.”

² AIR 1972 SC 2661

The facts of the present case are identical to the facts of the above judgment. In any view of the matter, it is not the case of the appellant that she had sexual intercourse with any other person. On the other hand, insistence of corroboration in cases of sexual assault is unwise for the reason that the sexual offences normally would take place in a secret places and they would take care that the commission of offence would not be seen by any third party, except in a rarest of rare cases. In the present facts of the case, the incident took place in a bed room, which is not accessible to any other person, ordinarily. That too, when the wife of the appellant herein is the person, who cooperated with her husband/appellant herein to have sexual intercourse with the victim girl, P.W.1. Therefore, it is possible for the accused No.2 alone to witness sexual assault, but not by others. When the wife of the appellant herein is arrayed as accused No.2, she will not support the case of the prosecution in any event.

The testimony of P.W.1 is worthy of credence and the appellant herein made a vain attempt by setting up a defence that due to financial transactions between his family and the family of the victim, he was falsely implicated. But no parents of young girl implicate any person in a serious crime punishable under Section 376 of I.P.C. since it would affect the family prestige and esteem in the public at large and there will not be any possibility to perform the marriage of victim girl in future. Therefore, the alleged defence set up by the appellant herein cannot be accepted. Hence, the trial Court rightly believed the testimony of P.W.1, which inspired confidence of the trial Court as she deposed true version of the incident and the trial Court rightly found that the

appellant/accused No.1 guilty and convicted him for the offence punishable under Sections 376 and 501 of I.P.C.

Courts must bear in mind human psychology and behavioral probability when assessing the testimonial potency of the evidence of the victim-prosecutrix. The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of the masculine sexual aggression are factors relevant to improbabilise the hypothesis of false implication.

In “**State of Orissa v. Damburu Naiko**”³ the Apex Court held that it is not necessary that there would be corroboration to the evidence of the victim of rape. If her evidence inspires confidence to be truthful that itself would be sufficient to convict the accused.

In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. (Vide: In “**Bharwada Bhoginbhai Hirjibhai v. State of Gujarat**”⁴)

In “**State of Maharashtra v. Chandraprakash Kewalchand Jain**”⁵ the Apex Court was of the opinion that “the nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of

³ AIR 1992 SC 1161

⁴ AIR 1983 SC 753

⁵ AIR 1990 SC 658

full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. They further stated that, there should be no doubt that ordinarily the evidence of a prosecutrix who does not lack of understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness."

The families of both victim and accused were close to one another and they were on visiting terms till the date of incident and the victim girl, though refused to accompany the appellant initially, they persuaded her on the pretext that they already informed her parents about taking her to shopping, then she accepted to accompany them for shopping on the occasion of birthday of their child.

Due to close moments between two families, she was asked to sit in the bedroom of the appellant/accused No.1 by his wife, accordingly she was sitting in the bedroom, but suddenly the appellant/accused No.1 entered into the bedroom, gagged her mouth and had sexual intercourse. When her mouth was gagged, the question of raising cries or alarm would not arise normally and when well built male person made sexual assault, who was close to her family, it is a sudden incident and the victim girl aged 16 years may not be in a position to resist such sudden sexual assault. That apart, when the victim girl was put to threat to exhibit or disclose the photos taken when she was raped, normally she would not

disclose the incident to her family members or any other person, but taking advantage of the photos, the accused No.1 had sexual intercourse with her more than once. In such case, when the victim girl appeared before the Court and testified that she was not a consenting party and the sex with the accused is not consensual, her evidence has to be accepted.

When the evidence of P.W.1 is accepted, Indian Evidence Act places reverse burden of proof on the appellant/accused No.1 to prove that the consent was free consent. In the entire cross-examination of P.W.1, the appellant/accused No.1 did not suggest anything that she gave consent, but denied the very offence itself. On the other hand, suggestions put to the witnesses lead to an inference that P.W.1, victim girl had love affair with the appellant/accused No.1 and participated in the sexual intercourse, but the same was denied by the witnesses. Therefore, putting a suggestion and denial of it would not form any basis to the defence set up by the appellant/accused No.1 and on the other hand, in the examination of accused under Section 313 of Cr.P.C., the accused did state nothing about the consent given by P.W.1, victim girl. Apart from that it is not the case of the appellant/accused No.1 that she had sexual intercourse with any other person, and as she was closely moving with him, they took photographs and they were in visiting terms. Because of her tender age and due to threat to disclose the photographs taken while the appellant/accused No.1 had sexual intercourse with her, to the public, she kept quiet maintaining silence for few days after the incident, but the same does not amount to consent. When the prosecution proved that the appellant/accused No.1 had sexual

intercourse with P.W.1, victim girl, the case of the prosecution is to be accepted since there is no possibility of implicating a person, who is moving with her family very closely. A story is invented during the course of cross-examination that due to financial transactions between two families, the appellant/accused No.1 was implicated falsely in the above crime. But this was not substantiated by any amount of evidence, elicited in the cross-examination of any of the witnesses.

Coming to the probabilities of the case, the photos produced before the Court would show that the appellant is a man of sadomasochism and enjoying sex with a small child to elder in different ways and the possibility of appellant/accused No.1 enjoying sex with the victim girl forcibly or under threat cannot be ruled out.

The cumulative effect of entire evidence on record established that the appellant/accused No.1 had forcible sexual intercourse with the victim girl/P.W.1 and the said fact was testified by P.W.1 before the Court. When P.W.1 categorically stated that she did not give consent, but under threat he enjoyed sexual intercourse with the victim. Therefore, testimony of P.W.1 corroborated by the testimony by P.W.3, elder sister of P.W.1 and the medical evidence available on record cumulatively established that the appellant/accused No.1 committed rape on the victim girl, P.W.1. Therefore, the trial Court rightly concluded that the appellant/accused No.1 committed rape against the victim girl, thereby rightly convicted and sentenced him under Section 376 read with 109, 501 of I.P.C. and under Section 6 of the Indecent Representation of Women (Prohibition) Act.

The trial Court found the appellant/accused No.1 guilty for the offence punishable under Section 6 of the Indecent Representation of Women (Prohibition) Act based on Exs.P.2 to P.5 photographs with negatives collected by the investigating agency and M.O.1 is the camera.

The word “indecent representation of women” is defined under Section 2 (c) of the Act. It means “the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals.”

Section 4 of the Act deals with prohibition of publication or sending by post of books, pamphlets, etc., containing indecent representation of women. Section 4 of the Act is relevant for deciding the controversy in this matter.

According to Section of the Act no person shall produce or cause to be produced, sell, let or hire, distribute, circulate or send by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form.

Thus, the photographs marked as Exs.P.2 to P.5 were taken while the appellant/accused No.1 was participating in sexual act with a different women including school going child. Taking such photographs i.e. films is in contravention of Section 4 of the Act, which is punishable under Section 6 of the Act. Therefore, the trial Court rightly recorded a finding that the appellant committed acts punishable under Section 6 of the Act; hence the said finding cannot be disturbed in the appeal as it is directly supported by real

evidence i.e. positive photographs with negatives marked as Exs.P.2 to P.5. Therefore, I am not inclined to interfere with the conviction and sentence passed by the trial Court in this appeal.

Though, learned counsel for the appellant raised several contentions with regard to absence of semen, spermatozoa and foreign hair as per the report Ex.P.10, it is not a ground to disbelieve the case for the simple reason that the sexual intercourse took place long prior to her examination by the Doctor. P.W.6 issued Ex.P.9, which proved that the victim girl (P.W.1) was subjected to sexual intercourse. Therefore, the finding of the trial Court convicting the appellant/accused No.1 cannot be disturbed by this Court as the judgment of the trial Court is free from any illegality or irregularity. Hence, the finding of the trial Court is hereby confirmed holding that the appellant/accused No.1 had forcible sexual intercourse with P.W.1 – victim girl, aged 16 years by then and against her will, thereby the conviction and sentence recorded against the appellant is hereby confirmed.

In the result, the appeal is dismissed, confirming the judgment passed on 14.03.2008 in Sessions Case No.352 of 2007 by the V Additional Metropolitan Sessions Judge (Mahila Court) at Hyderabad.

Consequently, miscellaneous applications pending if any, shall stand closed.

JUSTICE M. SATYANARAYANA MURTHY

02.05.2018
Ksp