

JUSTICE T. RAJANI

CRIMINAL APPEAL No.833 of 2009

JUDGMENT:

The judgment of the Assistant Sessions Judge, Mahabubnagar in SC.No.517 of 2008 dated 16.06.2009 is brought to question by way of this appeal. The Assistant Sessions Judge found the accused guilty for the offence under Section 376 of the Indian Penal code and convicted him for the same and sentenced him to undergo rigorous imprisonment for a period of ten years and also to pay fine of Rs.500/- in default to undergo simple imprisonment for a period of two months.

2. The facts of the case, briefly, as per the charge sheet are as follows:

The victim hails from Kakarlapahad village of Nawabpet Mandal and her husband died about nine years back. She had eight children and her elder son also died. She has been looking after her children by making her earnings. On 07.03.2008, she came to Mahabubnagar along with her son and while she was in the new bus stand, in a mood of deep grief, by remembering her elder son, one person by name Gopal came to her and introduced himself as a well-wisher and dragged her into conversation. He purchased a cool drink and gave it to her son. Her son fell asleep. While she went to attend calls of nature, the accused came there and dragged her and when she fell on the ground, he committed rape on her. She received severe bleeding on her private parts and raised hues and cries. On hearing the cries, the accused escaped. L.Ws.5 and 6 shifted the victim to the hospital. Based on the report given by the victim, a case was registered in

Cr.No.46 of 2008 for the offence under Section 376 IPC. The case was committed for trial to the Sessions division and the Sessions division, in turn, made over the case to the Assistant Sessions Judge, Mahabubnagar. The learned Judge, conducted the trial of the case, during the course of which, P.Ws.1 to 14 were examined, Exs.P1 to 18 and M.Os.1 to 8 marked. By considering the material on record, the Court convicted the appellant as aforesaid.

3. Against the said judgment, the present appeal is preferred on the ground that the Court below ought to have seen that the independent witness, who was examined as P.W.3, is not an eyewitness and that he is only a pampered witness. The Court below ought to have seen that there are lot of omissions pointed out in the evidence of the witnesses.

4. Heard the counsel for the appellant and the Public Prosecutor appearing for the respondent.

5. Based on the arguments of the counsel and the material on record, the following points are framed for determination:

1. Whether the identity of the accused is proved beyond all reasonable doubt and whether the prosecution proved the alleged rape committed against the victim.
2. Whether the judgment of the Court below is sustainable.
3. To what relief.

POINT Nos.1&2:

6. The counsel for the appellant, firstly, contended that there is no identification made by the victim, with regard to the accused and the FSL report did not show any presence of semen and spermatozoa on the sample taken, which included smears taken from the vagina of the victim.

7. The evidence of P.W.1, who is the victim, shows that she has been referring the accused as the person, who committed rape against here. But the Magistrate, who conducted test identification parade, examined as P.W.8, states that the victim could not identify the culprit in the test identification parade and instead she identified another person by name Srinivasulu, who is a non-suspect. The Court below considering the evidence of other witnesses, who saw the accused taking P.W.1 in the auto, came to the conclusion that the offence, as stated by P.W.1 occurred. P.W.1's evidence shows that on the date of the incident, she got down at Mahabubnagar bus stand at about 11.00 PM. She was along with her son. The accused came to her and gave cool drink and after consuming cool drink, her son fell asleep and she went to attend the calls of nature. She was taken by the accused and she was pushed into the auto. The accused took her to a place where there were godowns and bushes. By keeping her neck by his legs, she was thrown on the ground and cash of Rs.5,000/-, two tulas of gold, two silver bangles, one silver chain of two tulas was taken away by the accused. She stated that the auto driver did not commit any offence against her but it was the accused, who raped her. She did not have strength to get up, after the accused left the place and

hence, she crawled on to the road. Two persons called for ambulance and she was taken to the hospital.

In the cross-examination, she stated that she did not give written complaint to the police, though she gave an oral statement. She stated that she saw the accused prior to the date of her giving evidence.

8. The statement of P.W.1, on the basis of which the crime was registered, can also be looked into to see whether there is corroboration between the facts stated by her before the Court and the said statement. According to the said statement, while she was at the bus stand at about 11 PM, a person approached her and enquired her as to where she was going and he offered cool drink. The said person asked her to come to a place. She made her son sit there and she accompanied the said person. There, he got her into an auto and took her to Nawabpet. There he stopped the auto and took her into bushes and committed rape on her. She stated that she can identify the said person, if she sees him again. The improvements, if any, in her evidence are with regard to the two persons calling for ambulance and taking her to hospital and her son falling asleep at the bus stand.

9. The fact that the accused asked her to come to a place and he took her in an auto, is stated in a different way, that when she went to attend the calls of nature, the accused took her in an auto. The above fact may not be a serious contradiction. Her evidence, nevertheless, show that two persons came to her rescue and took her to the hospital.

10. The evidence of P.W.2 shows that the accused engaged the auto of his uncle and that he himself was an auto driver. He stated that he saw the accused and one woman, who boarded the auto and he does not know what had happened later. The above evidence of P.W.2 would show that the accused and the P.W.1 went together in the auto and that there was no resistance offered by P.W.1, while she was being taken in the auto.

The cross-examination of P.W.2 projects some improbabilities with regard to the identification of the accused and P.W.1. He stated that there were persons present at the bus stand during that time and he can identify them, though he cannot give the details of the passengers that boarded the auto and that he did not see the accused and P.W.1 prior to the said date and time and also thereafter.

11. P.W.3 is the witness, who saw one woman, who came to the main road and fell down. They called for the ambulance and shifted her to the hospital. P.W.4 stated that about one year back at about 11.00 PM, one male and female person boarded his auto and he left them near Boyapally Godown. He identified the accused as the person, who boarded his auto.

12. PW.4 is the uncle of PW.2 and the driver of the auto in which the accused travelled along with a woman. He stated the same. The cross-examination of P.W.4 brings out interesting facts, wherein he stated that the male and female casually came and boarded his auto and there was no force or any quarrel between them and the woman, who boarded the auto, did not resist or raise any cries while

getting into the auto. He admitted that he saw the accused in the Court, when he was shown by the police for the purpose of identification. P.W.2, however, denied the similar suggestion made to him.

13. P.Ws.5 and 6 are the witnesses for the seizure of clothes of P.W.1. P.W.9 is the Doctor, who examined P.W.1. Her evidence also can be considered as important, as P.W.1 was taken to the hospital immediately after the incident and if there was any rape, as alleged, the traces of the said act would be available. P.W.9 stated that vaginal smear taken from P.W.1 was sent for FSL. She also stated that perennial tear was present and it was bleeding profusely. The evidence of P.W.10 is that of a Doctor, who examined the accused and he opined that the accused was sexually potent. P.W.11 is the witness for the confession of the accused. P.W.12 is the witness for the confession panchanama and the scene of offence panchanama. P.W.13 is the S.I. of Police, who received a phone call from 108 Ambulance informing that P.W.1 was admitted in the hospital. P.W.14 is the Investigating Officer, who conducted investigation and filed the charge sheet.

14. The evidence of P.Ws.2 and 4 would throw any amount of doubt with regard to the commission of rape on P.W.1. There was no resistance offered by P.W.1, which implies that there was consent on her part, at least for her travel in the auto. The accused was not seen thereafter by P.Ws.2 and 4. It is only when they dropped the accused and P.W.1 near Boyapally godown, that they saw them lastly. The evidence of P.W.1, to the extent that the accused is the person, who took her in the auto, need not be doubted, as the same receives

corroboration from P.Ws.2 and 4, but, with regard to rape, her evidence does not show that there was any reason for her to accompany the accused to the godown at Boyapally. The same would imply consent on her part, at least to accompany him, without any reason. Hence, in the light of the said consent, her evidence, that she was pushed into the auto and she was taken to a place where there is a godown and bushes, gets dented in terms of credibility, requiring a close scrutiny of her evidence. As to what happened between the accused and P.W.1 has to be gathered only from the evidence of P.W.1, which is already found to be not wholly trustworthy. The report shows that she left her son at the bus stand and went along with the accused. The development in her evidence that her son fell asleep after consuming the cool drink, has to be considered as only to make the act of the accused grave. She does not say so in the statement given in the first instance.

Coupled with the above aspects, which throw doubt on the credibility of P.W.1, the FSL report does not show that any sperm or spermatozoa were detected in the vaginal smear, though the evidence of the Doctor shows that there was profuse bleeding. The evidence of P.W.1 does not bring out any circumstance, which could have caused such bleeding and whether it is result of the alleged rape committed by the accused. Her evidence also does not show that she made any struggle to escape from the accused, in the process of which she could have sustained the said injury and bleeding. There is absolutely no reason stated for the said injuries. Hence, by virtue of the above, the testimony of P.W.1, which is the sole basis for concluding the guilt of the accused, cannot be relied upon.

Hence it can be concluded that though the identity of the accused is proved beyond doubt, the alleged rape committed by the accused, on PW1 is not proved beyond doubt and hence, the judgment of the Court below cannot be sustained.

The points are answered accordingly.

POINT NO.3:

In the result, the criminal appeal is allowed. The conviction and sentence imposed on the accused in SC.No.517 of 2018 dated 16.06.2009 by the Assistant Sessions Judge, Mahabubnagar are set aside and the appellant/accused is acquitted of the offence under Section 376 IPC. The fine, if paid, shall be refunded to him. The appellant/accused shall be set at liberty if he is not required in any other crime. The material objects are ordered to be destroyed as per the direction of the trial Court.

As a sequel, the miscellaneous applications, if any pending, shall stand closed.

March 19, 2018
DSK

T. RAJANI, J