

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

CRIMINAL APPEAL No.896 OF 2010

JUDGMENT:

This appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C'), is filed by the appellant/accused aggrieved by the judgment, dated 16.07.2010, rendered in Sessions Case No.393 of 2009 on the file of I Additional Metropolitan Sessions Judge, Hyderabad, whereunder and whereby, the learned Sessions Judge found the appellant/accused guilty for the offences punishable under Sections 376 and 506 IPC and accordingly, he was convicted and sentenced to undergo rigorous imprisonment for a period of eight years and to pay fine of Rs.10,000/-, in default to suffer simple imprisonment for three months for the offence punishable under Section 376 IPC and further, he was sentenced to undergo rigorous imprisonment for three years for the offence punishable under Section 506 IPC.

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

3. Learned counsel for the appellant/accused would contend that the victim (P.W.1) was aged more than 16 years on the date of alleged offence; that the appellant/accused is not responsible for the alleged sexual acts on P.W.1; that even as per the prosecution case and the evidence on record, the sexual acts were with the consent of P.W.1; that P.W.1 was above 16 years of age on the date of Ex.P.1-report; that P.W.6—the Doctor, who examined P.W.1, had

admitted in his cross-examination that the age determination by the medical examination varies, one to two years on either side; that P.W.4, who is the mother of P.W.1, is an uneducated woman and could not give the correct age of her daughter P.W.1; that P.W.5—father of P.W.1, did not speak anything about the age of P.W.1; that though P.W.1 was studying 10th class as on the date of alleged offence, no school record was produced showing her age; that the prosecution failed to prove that P.W.1 was under 16 years of age as on the date of alleged offence; that P.W.1 and her sister—P.W.2 did not speak anything about the commission of alleged rape on P.W.1. Furthermore, the first instance of alleged rape on P.W.1 said to have been taken place in the month of June, 2008, however, report with the police was lodged on 06.12.2008 with a delay of six months; that under these circumstances, no offence is made out against the appellant/accused under Sections 376 and 506 IPC and ultimately, prayed to allow the appeal and set aside the conviction and sentence recorded against the appellant/accused for the aforesaid offences.

4. Learned Additional Public Prosecutor appearing for the respondent-State would contend that P.Ws.1 and 2 have clearly and categorically deposed about the commission of rape on P.W.1; that there is also medical record to substantiate the same; that the Court below had analyzed the whole evidence and rightly convicted and sentenced the appellant/accused for the offences punishable under Sections 376 and 506 IPC; that there is no infirmity in the impugned judgment and ultimately, prayed to dismiss the appeal by confirming the impugned judgment.

5. In view of the submissions made by both sides, the following points have come up for determination:

- 1) Whether the alleged sexual act committed by the appellant/accused was against the will or without the consent of PW.1—victim?
- 2) As per the Criminal Law (Amendment) Act, 2013 (Act No.13 of 2013), which came into force w.e.f. 03.02.2013 vide Gazette of India dated 02.04.2013, the age of victim is mentioned as under 18 years in the sixth description to Section 375 IPC. In the subject case, since the alleged offence under Section 376 IPC is said to have been committed during the year 2008, the question that falls for determination is whether the PW.1—victim was under 16 years of age as on the date of alleged sexual act?

POINT No.1:

6. The specific case of the prosecution is that the appellant/accused is neighbour of the victim (P.W.1). He developed acquaintance with the family of P.W.1. In the month of June, 2008, on one day around 12:00 noon when P.W.1 and her sister P.W.2 were present in house, the appellant/accused knocked the door and P.W.2 opened the door. The appellant got into the house and beat P.W.2 and asked her to go out of the house. Then, P.W.2 went outside of the house. Thereafter, the appellant/accused bolted the main door from inside and then forcibly took P.W.1 into the bedroom and committed rape on her by gagging her mouth and also threatened her with a knife. Thereafter also, the appellant/accused threatened P.W.1 not to disclose the incident to

anybody. Two weeks thereafter, again the appellant/accused committed rape on P.W.1 under threat and dire consequences to kill the family members etc.

7. It is stated that as father of P.W.1 was a heart patient, P.W.1 did not inform the incident to him. On 05.12.2008, the appellant/accused himself informed to P.W.3—cousin of P.W.1, with regard to the commission of rape by him on P.W.1 and nobody would marry P.W.1 and that if the father of PW.1 gives two storied building to him, he would marry PW.1. P.W.3 informed the said incident to P.W.8, who in turn informed the same to parents of P.W.1. The subject report was lodged with the police on 06.12.2008. Thereafter, this case is investigated into. The evidence of P.W.1 corroborated with the prosecution case, as indicated above and so also, the evidence of P.W.2.

8. As per the First Information Report lodged with the police, P.W.1 was studying 10th class in St.Mary's High School during the academic year 2008-2009 and she used to stay in the hostel. Now and then she used to come to her house and during that time sexual assaults were committed against her by the appellant/accused. P.W.1 did not state about her age in the evidence given by her before the Court. P.W.2 sister of P.W.1 also did not say about the age of P.W.1. P.W.4 is mother of P.W.1. She supported the case of the prosecution. P.W.4 was examined by the Court on 24.02.2010 and she gave the age of P.W.1 as 15 years on that day.

9. In the First Information Report lodged by P.W.1, she stated that she was studying 10th class in St. Mary's High School and her age was 14 years. P.W.1 is not the right person to state the age. To

prove the sexual assault etc., P.W.1 was subjected to medical examination. P.W.5 is father of P.W.1. He did not give the age of P.W.1. P.W.6 is the Doctor, who conducted medical examination of the appellant/accused and stated that he did not find anything to suggest that the appellant/accused is not capable of performing sexual intercourse. Ex.P.2 is the potency certificate issued by him. P.W.6 also stated that he subjected P.W.1 to medical examination to determine her age. He examined her in general, physical, dental and radiological examinations. Based on the results of his examination, he gave the age of the victim as about 15 years as on the date of his deposition i.e, by 25.02.2010. He issued Ex.P.3-Age determination certificate of P.W.1. In the cross-examination, P.W.6 admitted that the age of the P.W.1 can vary one to two years on either side. He also stated that he advised the police to collect the date of birth certificate as he was informed that PW.1 was studying 10th class. As per the First Information Report lodged with the police, P.W.1 was studying 10th Class as on the date of report given to the police i.e., on 06.12.2008 and she was 14 years old. It is also pertinent to state that either P.W.1 or P.W.2—her sister, did not reveal the alleged incident to anybody. When the appellant/accused himself informed the commission of sexual act to P.W.3—cousin of P.W.1, who in turn informed the same to P.W.8, PW.8 informed the same to parents of P.W.1 and then Ex.P.1-report was lodged. Had there been sexual act either forcibly or without consent of P.W.1, then either P.W.1 or PW.2—her sister would have immediately lodged a report with the police. There is no convincing and cogent evidence on record to believe that the sexual acts were without the consent or against the will of P.W.1.

Under these circumstances, it is appropriate to extract the provisions of Section 375 IPC, which reads as under:

“Section 375 Rape : A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following 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 sixteen years of age”.

In view of the above discussion and evidence on record, it is concluded that the alleged sexual act was not against the will or without the consent of the victim—PW.1. Accordingly, this point is answered.

POINT No.2:

10. There is no explanation from the police and the parents of P.W.1 as to why they did not obtain the date of birth certificate of

P.W.1 from St.Mary's High School, where she was studying 10th Class during the period in question. P.W.4—mother of P.W.1, gave the age of P.W.1 as 15 years as on the date of her deposition i.e., on 24.02.2010. When she was questioned with regard to the age of her other relatives, she stated that she did not exactly know as she is an illiterate. P.W.7 is the Doctor and she stated that she examined P.W.1 and issued Ex.P.4-final opinion and Ex.P.5-initial examination report in this case. She gave opinion that hymen was not intact and it is admitting two fingers.

11. P.W.4 is an illiterate woman. Therefore, it is not safe to rely on her evidence with regard to the age of P.W.1. P.W.6-Doctor's evidence is also fluctuating with regard to age of P.W.1 on the date of alleged offence by two years. So according to the evidence of P.W.6, the age of P.W.1 can be 17 years also as on the date of incident. The prosecution did not collect any school record to establish the age of P.W.1 as 16 years as on the date of alleged offence. Absolutely, there is no such evidence on record. There is no explanation why school records were not obtained to establish the age of P.W.1. The school record is the best evidence to determine the age of P.W.1 coupled with other evidence on record. In the absence of documentary evidence with regard to the age of P.W.1, the report given by P.W.6-Doctor is not sufficient to hold that P.W.1 was 15 years of age on the date of alleged offence. It can be 17 years also. Under these circumstances, the prosecution failed to establish that P.W.1 was under 16 years of age on the date of alleged offence. The learned Sessions Judge did not advert to the determination of age of the victim in the impugned judgment which was necessary in the given circumstances.

12. As seen from the record, the report was lodged with the police more than six months after the incident took place. So, there is also no evidence of criminal intimidation to convict the appellant. Therefore, the trial Court had not evaluated the evidence in a right perspective with regard to the age of P.W.1 on the date of alleged offence and thus the conclusion reached with regard to the age of P.W.1 is erroneous. Under these circumstances, the conviction and sentence recorded against the appellant vide judgment, dated 16.07.2010, in Sessions Case No.393 of 2009 on the file of I Additional Metropolitan Sessions Judge, Hyderabad, is liable to be set aside.

13. Accordingly, the appeal is allowed setting aside the judgment, dated 16.07.2010, in Sessions Case No.393 of 2009 on the file of I Additional Metropolitan Sessions Judge, Hyderabad, and the appellant/accused is acquitted for the offences punishable under Sections 376 and 506 IPC. The appellant/accused shall be set at liberty forthwith, if he is not required in any other case. The bail bonds, if any, shall stand cancelled.

Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

FEBRUARY 15th, 2019.
YVL

Dr. SHAMEEM AKTHER, J