IN THE HIGH COURT FOR THE STATE OF TELANGANA AT HYDERABAD

THURSDAY, THE NINETEENTH DAY OF DECEMBER
TWO THOUSAND AND TWENTY FOUR

PRESENT

THE HONOURABLE SRI JUSTICE K.SURENDER
AND
THE HONOURABLE SRI JUSTICE ANIL KUMAR JUKANTI

CRIMINAL APPEAL NO: 561 OF 2017

Appeal under Section 374 (2) of Cr.P.C. against the Judgment dated 02-03-2017 made in Spl.S.C.No.19 of 2014 on the file of the Court of the Special Judge for Trial of Cases under Protection of Children from Sexual Offences Act-cum-I Additional Sessions Judge, Adilabad.

Between:

Pallavenkatesh, S/o. Bapu, Hindu, Aged about 40 years, O/c. Hamali, R/o. Nennela Village and Mandal, Mancherial Zilla, Adilabad

...Petitioner / Accused

AND

The State of A.P., Represented by the Public Prosecutor, High Court, at Hyderabad

...Respondent / Complainant

Counsel for the Appellant : **Sri Y.V. Chalapathi Rao**

Counsel for the Respondent : **Sri Arun Kumar Dodla**
Additional Public Prosecutor

The Court delivered the following Judgment :

THE HON'BLE SRI JUSTICE K.SURENDER

AND

THE HON'BLE SRI JUSTICE ANIL KUMAR JUKANTI

CRIMINAL APPEAL No.561 OF 2017

JUDGMENT: (*per Hon'ble Sri Justice* ***K.SURENDER***)

This criminal appeal is preferred by the appellant-accused questioning the judgment dated 02.03.2017 passed by the Special Judge for Trial of cases under Protection of Children from Sexual Offences Act-cum-I Additional Sessions Judge, Adilabad in Spl.S.C. No.19 of 2014.

2. Heard Sri Y.V.Chalapathy Rao, learned counsel for the appellant and Sri Arun Kumar Dodla, learned Additional Public Prosecutor appearing for Respondent State.

3. Brief facts of the prosecution case are that, PW1 is the defacto complainant and mother of the victim girl who lodged a complaint on 25.08.2013 at 19:30 hours. In the complaint PW1 stated that she, along with her husband, left from the house to attend cooli work. Her minor daughter, who is a mentally unsound and partially dumb, remained in the house.

By the time she returned at 5:30 PM, the victim girl was crying and PW1 asked her as to what happened. PW2 is the uncle of the victim girl and an eyewitness. He stated that when he went to the house, he noticed that one Abbarla Chandu (A3) was guarding by standing in front of the house of the victim girl. A1 and A2 were inside the house, and he heard the voice of the victim girl uttering words in pain. PW2 then went into the house asking who was there, and by that time, A1 and A2 opened the door, pushed him, and ran away along with A3. Immediately PW2 went into the house and found the victim girl crying, and as per the signs made by the victim girl/PW3, he came to know that A1 and A2 committed sexual assault on the victim girl. Complaint was filed, narrating the incident. On receipt of the said complaint, case in Crime No.86 of 2013 was registered for the offences punishable under Sections 376 (2) (g) of IPC and 6 of the Protection of Children from Sexual Offences Act, 2012.

4. The police sent the victim girl for medical examination. PW8 examined the victim girl and observed that her hymen was not intact and there was redness and tenderness present,

and the age of the injury was one day. After receiving the FSL report, PW8 gave a final opinion stating that recent sexual intercourse cannot be ruled out.

5. Since PW8 was not competent to assess the mental condition of the victim girl, she was examined by PW11, who is a psychiatrist. According to PW11, the victim girl was not totally retarded, and she can understand to some extent and can express herself by way of signs.

6. Accordingly, a charge sheet was filed for the aforesaid offences after completion of investigation. The evidence of the victim girl PW3 was recorded in the Court. The Court found that the victim girl was mentally unsound and partially dumb, and the assistance of the mother was taken as a translator. During the course of evidence in the Court, victim cried, stating that the appellant had spoiled her. She communicated through sign language and informed the Court that A1 touched her stomach and other private parts of the body, removing her skirt.

7. On the basis of the evidence recorded by the learned Sessions Judge, the learned Judge convicted A1 for the offences punishable under Section 6 of the POCSO Act and A2 and A3 for abetting the commission of the offence and convicted them for the offence punishable under Section 17 of the POCSO Act.

8. On account of the grant of remission and completion of imprisonment, both A2 and A3 were released from jail. They did not pursue their appeal on facts, and their appeals were closed on account of their release.

9. Learned counsel for the appellant would submit that according to the age determination by PW13, the victim girl's age was 17 or 18 years when she was examined. Even considering the opinion of Doctor PW13, a margin of error of + or - 2 years has to be considered in accordance with the judgment of the Hon'ble Supreme Court. Further, the learned counsel submits that even admitting that accused were present at the scene, looking into the facts and circumstances of the case, the medical evidence, utmost the offence under Section

376 read with 511 of IPC is made out. There is no evidence to attract the offence under Sections 5 and 6 of the POCSO Act.

10. Learned Public Prosecutor would submit that the appellant-A1 had perpetrated the act of raping a girl who is mentally retarded. Though during the course of investigation, no semen or blood was found, however, in order to prove an offence under Section 6 of the POCSO Act, presence of semen and spermatozoa are not required.

11. As rightly argued by the learned counsel for the appellant, in accordance with PW13's evidence, the margin of error of + or – 2 years should have been taken into account after the victim girl's age was determined as 17 or 18 years based on the age determination test. Furthermore, according to PW11, the victim girl was able to comprehend things and was not completely retarded.

12. As seen from the medical evidence, PW8, the victim girl, had redness and tenderness present on her private part. The said injury would indicate that the victim was sexually assaulted, amounting to rape.

13. The argument of the learned counsel that admitting assault, it amounts to an attempt to rape, cannot be accepted. The presence of semen or spermatozoa is not essential to prove a case of rape.

14. Section 375 of the Indian Penal Code (IPC), 1860 reads as follows:

> ***Rape:-*** *A man is said to commit "rape" if he—*
>
> 1. *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*
> 2. *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*
> 3. *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*
> 4. *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 descriptions1:*
>
> 1. *Against her will.*
> 2. *Without her consent.*
> 3. *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.*
> 4. *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.*
> 5. *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.*
> 6. *With or without her consent, when she is under eighteen years of age.*
> 7. *When she is unable to communicate consent.*
>
> ***Explanations***
>
> 1. *For the purposes of this section, "vagina" shall also include labia majora.*

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

1. *A medical procedure or intervention shall not constitute rape*
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.*

15. Section 3 of the Protection of Children from Sexual Offences Act (POCSO), 2012 reads as follows:

Penetrative sexual assault. *A person is said to commit "penetrative sexual assault" if –*

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

16. Keeping in view the assessment of age of victim by PW13 as 17-18 years vide Ex.P13 and applying the margin of error of + or - 2 years, the conviction under Section 6 of the POCSO Act is set aside. However, the appellant is convicted under Section 376 of IPC. He is sentenced to undergo imprisonment of 10 years.

17. Accordingly, the appeal is partly allowed.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

Sd/- K. SRINIVASA RAO
JOINT REGISTRAR

//TRUE COPY//

SECTION OFFICER

To,

1. The Special Judge for Trial of Cases under Protection of Children from Sexual Offences Act-cum-I Additional Sessions Judge, Adilabad (with records, if any)
2. The Judicial Magistrate of First Class, Bellampally, Mancherial District
3. The Member Secretary, High Court Legal Services Committee, High Court for the State of Telangana at Hyderabad
4. The Station House Officer, Bellampally PS, Mancherial District
5. The Superintendent, Cherlpally Central Prison, Ranga Reddy District
6. Two CCs to the Public Prosecutor, High Court for the State of Telangana, Hyderabad [OUT]
7. One CC to Sri Y.V. CHALAPATHI RAO, Advocate [OPUC]
8. Two CD Copies

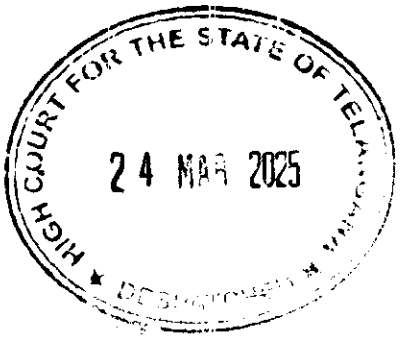
VA/gh

HIGH COURT

DATED:19/12/2024

JUDGMENT

CRLA.No.561 of 2017



PARTLY ALLOWING THE CRLA

11 copies
KL
6/3/25