

(2022) 06 TEL CK 0073
In the Telangana High Court
Case No : Criminal Appeal No. 200 Of 2022

Mohd. Ali Iqbal Miya Mohammed Yousuf	APPELLANT
Vs	
State Of Telangana	RESPONDENT

Date of Decision : 21-06-2022

Acts Referred:

Indian Penal Code, 1860 — Section 363, 366, 376(1)(i)
Protection Of Children From Sexual Offences Act, 2012 — Section 3, 4

Citation : (2022) 06 TEL CK 0073

Hon'ble Judges : K.Surender, J

Bench : Single Bench

Advocate : P Prabhakar Reddy

Final Decision : Allowed

Judgement

1. Aggrieved by the conviction for the offences under Section 376(2)(i) of IPC and Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') recorded by the Special Sessions Judge for trial of cases under Rae and Protection of Children from Sexual Offences Act, 2012 (for short 'Sessions Judge') and sentenced to undergo Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.1,000/- and in default, to undergo further simple imprisonment for a period of one month, present appeal is filed by the sole appellant.
2. The appellant was charged for the offences under Sections 366, 376(2)(i) of IPC and also under Sections 3 r/w 4 of POCSO Act.
3. After examination of the witnesses produced by the prosecution and after completion of trial, the learned Sessions Judge convicted the appellant for the offences as stated above.
4. Briefly, the case of the prosecution is that a complaint was lodged on 02.05.2017 by P.W.1, who is the mother of P.W.2/victim stating that she took her daughter to her mother's place at Ramanthapur. However, in the evening, she

received a phone call from her mother stating that P.W.2 was missing. The family members of P.W.1 searched for P.W.2/victim girl and when they did not find her, complaint was lodged on 02.05.2017 suspecting the appellant herein, as their enquiries during search revealed that both the appellant/accused and P.W.2/victim went to Zaheerabad. The said complaint was taken on file by the Kharkana Police and registered a case in Crime No.94 of 2017 for the offence punishable under Section 363 of IPC. On 03.05.2017, P.W.1 took P.W.2 to the Police Station and informed the Police that she returned to her house on 02.05.2017. P.W.2/victim girl was examined by the Police and since her statement made out an offence of rape against the appellant, Section of law was altered to Section 376(2)(i) of IPC and also for the reason of P.W.2 being a minor, the provisions of POCSO Act were also added.

5. The prosecution case as narrated by P.W.2/victim girl in her chief examination is as follows:

"I know the accused from March, 2017. Accused proposed me love and I accepted his love and gave me one mobile phone and SIM Card. On 01.05.2017, I went to my grandmother's house along with my mother at Kharkhana. On that day at around 10.00 am I called the accused over phone and informed him that I was going to my grandmother's house. After having lunch, my mother left to our house by leaving me with my grandmother in her house. Thereafter I went to the house of my aunt/LW-5/Sahida Begum by informing to my grandmother/LW4. At around 4.00 pm while I was returning from the house of LW-5 to the house of LW- 4, on the way accused came to me and asked me to come along with him but I refused to go with him. On that the accused caught hold my hand and forcibly boarded me in his auto. I tried to raise cries but the accused closed my mouth with kerchief. He took me to tank bund and we spent half an hour on tank bund and thereafter we went to Zaheerabad and on the way of Zaheerabad we had dinner at Sangareddy. Thereafter we went to the forest area of Zaheerabad and there the accused kissed me and forcibly had sexual intercourse with me. In the morning of 02.05.2017 we left the auto with mechanic as the gas was exhausted and went to Bidar in RTC bus and the accused took me to Manneli Police Station and on the advise of police we came back to Hyderabad in RTC bus. On reaching home, I informed the matter to my mother and she took me to police station. Police send me to Bharosa Center and my statement was recorded there. Police also referred me to hospital for medical examination. My statement was also recorded by a Judge earlier."

6. Learned counsel for the appellant/accused submits that the conviction has to be reversed on the following grounds; i) the age of the victim is not proved by proper evidence that she was 17 years when the incident took place and the school certificate was marked by the Investigating Officer; ii) the victim was not subjected to any ossification test to know her age, though they claim that she was 17 years at the time of incident, for which reason benefit of doubt has to be given for the reason of not giving exact date of birth particulars of the victim.

7. Counsel further argued that from the conduct of P.W.2, it is clear that P.W.2 accompanied the appellant on her own use of any force cannot be inferred. The medical evidence does not support the case of rape as no semen or spermatozoa were found on the seized wearing apparel. The entire case of the prosecution appears to be false for the reason of P.W.2 admitting that in fact she had been to the police station on 2.05.2017 whereas the prosecution case is that she was taken to the police station on 03.05.2017, i.e., next date. Police case has been made up for the reason of P.W.1 taking hand loan of Rs.10,000/- and failure to repay when the appellant insisted, the present false case is filed. There are several omissions and contradictions in the evidence of P.W.2, which go to the root of the case and make the entire prosecution case unbelievable. He also relied on the judgment of Hon'ble Supreme Court in the case of Santosh Prasad @ Santosh Kumar v. State of Bihar in Criminal Appeal No.264 of 2020 arising out of SLP (Criminal) No.3780 of 2018. Their Lordships in the circumstances of the case found that delay in the FIR, medical report not supporting rape and disputes between the prosecution witnesses and accused therein, the allegation of rape was not believable and consequently acquitted the accused. Further, their Lordships have found that after going through the evidence of the victim the evidence fails the test of being a 'sterling witness'.

8. On the other hand, the learned Assistant Public Prosecutor would submit that the prosecution has filed Ex.P14 and P15 date of birth certificates, which shows that she was just above 17 years. Though the conduct of P.W.2 gives rise to the suspicion that she had voluntarily followed the accused, for the reason of her incapacity to give consent, the appellant has to be convicted and there cannot be any intervention in the finding of the trial Court, which are based on reasons recorded and which are probable.

9. From the evidence of P.W.2, it is apparent that P.W.2 and the appellant were in love and the appellant had given a mobile phone to P.W.2 to converse with her. She left the house of her grandmother after P.W.1 left after dropping her. PW2 thereafter accompanied the appellant to Tankbund (a place to hang out), which is the crowded place and spent half an hour and from there went to Zaheerabad which is at a distance of 70 to 75 kms. She further admits that they had dinner at a hotel in Zaheerabad. In the said circumstances, it cannot be said that P.w.2 was in any way forced to accompany the accused. Both P.W.2 and the appellant had been through public places and spent time in different places and had dinner in a restaurant, which itself indicates that P.W.2 willingly accompanied the accused to Zaheerabad. One glaring aspect which has not been not investigated and no explanation given as to why P.W.2 and the appellant went to Minnelly Police Station near outskirts of Bidar. Further P.W.2 states that Minnelly police have advised them to approach the Hyderabad police, then they came back to Hyderabad in a RTC bus. The examination of the Minnelly police would in fact reveal the reason for P.W.2 and the appellant approaching them. It is logical to conclude that P.W.2 and the appellant have eloped and sought help of Minnelly police, however, they have asked them to return to Hyderabad. The said fact can

further be inferred in the back ground of P.W.2 admitting that she was in love with the appellant.

10. The admission of P.W.2 in her cross-examination that she went to the police station on 02.05.2017 around 11.30 p.m along with her mother, again casts a doubt on the prosecution case being correct. The prosecution insists that P.W.2/ victim was brought to the police station for the first time on 03.05.2017 which is the next date. In the said circumstances, the love between P.W.2 and the appellant and also the mother accompanying the victim girl to the police station on 02.05.2017 and 03.05.2017 giving statement against the accused on 03.05.2017, it can be safely inferred that due to pressure from the family members, P.W.2 has given statement alleging rape against the appellant. The said allegation of rape is not supported by medical evidence and the wearing apparel, though seized, which were worn during her visit to Zaheerabad did not contain semen and spermatozoa neither did the vaginal swabs.

11. The age of the victim girl/P.W.2 is alleged to be 17 years and it was argued by the learned Assistant Public Prosecutor that though from the facts it can be said that P.W.2 had voluntarily gone with the appellant but the consent to involve in sexual intercourse is not a consent recognized as per law. The consent of a minor in the facts of the case is of no consequence. The only evidence placed before the Court to say that the age of the victim girl is under 18 years is the certificate of the school, which was marked through investigating Officer and cannot be taken into consideration for the reason of proving its contents. However, the certificate Ex.P15 is birth certificate dated 18.06.2021, which is on the basis of affidavit issued by the concerned. In the said circumstances, when there is no positive evidence regarding the age of the victim girl/P.W.2 showing less than 18 years, no credibility can be attached to EX.P15.

12. In the judgments of Hon'ble Supreme Court in the case of State of Madhya Pradesh v. Munna (2016) 1 SCC 696 and in Rajesh Patel v State of Jharkhand (2013) 3 SCC 791, the Hon'ble Supreme Court held in the facts and circumstances that when the age of the victim girl was not proved conclusively, benefit of doubt was extended to the accused.

13. For the foregoing reasons, the prosecution has failed to make out an offence of rape punishable under Section 376(2)(i) of IPC against the accused/appellant and accordingly, the judgment of the Sessions Judge in SC PCS No.24 of 2018, dated 28.02.2022 is set aside. The appellant/accused shall be released forthwith, if he is not required in any other case.

Accordingly, the Criminal Appeal is allowed. As a sequel thereto, miscellaneous applications, if any, shall stand closed.