STATE OF KARNATAKA

v.

BANTARA SUDHAKARA @ SUDHA & ANR.

(Criminal Appeal No. 288 of 2001)

JULY 18, 2008

[DR. ARIJIT PASAYAT, P. SATHASIVAM AND AFTAB ALAM, JJ.]

Penal Code, 1860; s. 376:

Rape of minor girls – Certificates produced by Headmaster of School showing age of the prosecutrix less than 16 years – Trial Court found the accused guilty of committing offence of rape and sentenced them accordingly – Acquitted by High Court holding the age of the prosecutrix more than 16 years and that there was consent – Correctness of – Held: Incorrect – Accused persons did not plead that there was consent – High Court erred in taking the age of victims more than 16 years and in discarding the evidence of Head master showing the age of the victim less than 16 years – Conclusions arrived at by the High Court are not only fallacious but contrary to the evidence on record – Hence, judgment of the High Court not sustainable.

According to the prosecution, accused persons-tailors by profession had taken the victim-sisters to their residence on the pretext of giving delivery of the blouses which were given by them for stitching. Accused allegedly committed rape on the victims and threatened them of dire consequences if they disclose the incident. When the victims did not return home, PW-17, elder brother of victims, went to the house of the relatives and found both of them. He brought them back and then filed a complaint against both the accused persons. Police investigated the matter and submitted the charge-sheet against them. Trial Court found them guilty of committing the offence of rape

A and sentenced them accordingly. On appeal, the High Court acquitted them holding that the age of the victims was more than 16 years and that there was consent. Hence the present appeal.

B Appellant-State contended that the High Court erred in holding that the age of each of the victims was more than 16 years; and that there was no plea regarding consent and therefore the High Court on its own could not have made out a case of consent.

C Respondents submitted that the factual scenario clearly shows consent and the High Court's conclusion about the age and consent cannot be faulted.

Allowing the appeal, the Court

D HELD: 1. PW 16-the teacher referred to the certificates, which indicated that the date of birth of PW 1 was 5.3.1974 and the date of birth of PW2 was 1.2.1974. The High Court referred to the evidence of the lady doctor PW 24 with reference to the X-Ray report which indicated that the age of PWs. 1 & 2 fell between 14 to 16 years. The E High Court observed that there was possibility of two years variation and therefore it was to be taken that the victims were more than 16 years of age. So far as the reasonings of the High Court are concerned they border on absurdity. All types of surmises and conjectures have F been arrived at. Strangely, it was observed by the High Court that PW16 the Head Master's evidence was to be discarded on the ground that the date of birth may not have been recorded on the basis of any medical certificate or other documentary evidence to show that these G two girls, the victims, were born on the date as mentioned. The High Court's conclusions in this regard are not only fallacious but contrary to the evidence on record. The High Court recorded a further finding that the two certificates may not relate to the victims though it specifically re- H corded that there was no such challenge raised by the

accused. Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 and 16, to conclude that two years age has to be added to the upper age limit is without any foundation. There was no basis for coming to such a conclusion. In any event, the accused persons did not take the stand that there was any consent. (Para 7) [1166-C,D,E,F, 1167-A,B]

State of H.P. vs. Shree Kant Shekari **(2004) 8 SCC 153 – relied on.**

2. In the facts and circumstances of the case, judgment of the High Court is clearly unsustainable and set aside. The judgment of the trial Court is restored. (Para – 8) [1168-E,F]

Case Law Reference

(2004) 8 SCC 153 relied on. Para 7

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 288 of 2001

From the Judgment and final Order dated 7.9.2000 of the High Court of karnataka at Bangalore in Criminal Appeal No. 202 or 1995

Sanjay R. Hegde, Amit Kr. Chawla and A. Rohan Singh for the Appellant.

D.K. Singh and Rajesh Mahale for the Respondents.

The Judgment of the Court was delivered by

Dr. ARIJIT PASAYAT, J. 1. State of Karnataka is in appeal against the judgment of the learned Single Judge of the Karnataka High Court directing acquittal of the respondents who were charged for commission of offence punishable under Section 376 of the Indian Penal Code (in short the 'IPC').

2. Background facts as projected by prosecution in a nutshell are as follows:

A P.W.1 and PW2 were residing alongwith their respective parents at Madenadu and they were working as coolies in the coffee estate of Pudiyenda Palangappa, Appellant No.2 (accused no. 2) is a tailor by profession having his tailoring shop at Aatekere, On 16-9-1989 at about 9.00 a.m., PWs, 1 & 2 went B to the tailoring shop of A-2 and requested him to stitch their blouses. At that time they gave two blouses of theirs for the purpose of measurement along with new clothes. It is alleged that A-2 asked them to come on the following day to take delivery of the blouses if they were stitched. Accordingly, on 17.9.1989 C they both went to the tailoring shop to take delivery of the clothes when A-2 informed them that the stitching was not over, upon which both of them asked him to return the blouses given for measurement. In response to that, A-2 asked them to go to his house as the blouses were left in his house. Accordingly, both D of them accompanied by A-1 & A-2 went to the house which was nearby. A-1 & A-2 went inside the house and as they did not come out of the house for about 15 minutes, both PWs. 1 & 2 who were waiting outside entered the house. As soon as they entered the house, A-2 bolted the door and held P.W.2 and A-1 also held PW-I. They were taken to separate rooms and A-1 E committed rape on P.W.1 and A-2 committed rape on PW2, Thereafter, they threatened both of them that they would be murdered if the incident was revealed to anyone, Therefore, they kept quiet, On18-9-1989 they went to Madikeri to the house of Chandrakala (P.W.14). Having stayed in the house of F Chandrakala on that night, they went to Sulia to the house of the uncle of P.W.2. As the PWs 1 & 2 were not found in their houses, parents of PWs. 1 & 2 sent Seshappa (PW17) who is the elder brother of PW 2 to his maternal uncle's house at Sulia. Accordingly, he went to the house at Sulia and found both of them and G brought them back to Madenadu, Thereafter, they went to Madikeri Rural Police Station on 21-9-1989 and presented a written complaint Ex-P-I signed by P.W.1 which was received by P.W.26 at 6.45 p.m. On that day, PW 26 registered a case in Madikeri Rural Police Station in Cr, No.233/89 and submitted H FIR as per Ex-P.33. On the next day he sent them for medical

examination to the District Hospital, Madikeri. PWs. 1 & 2 also produced clothes which they were wearing at the time of incident which were seized. P.W.26 went to the scene of occurrence which is the house of A-2 where the alleged rape was committed on PWs. 1 & 2, He drew up mahazar Ex-P4 in the house of PW2 in the presence of panchas and seized broken bangles MOs. 8 & 9, He also drew mahazar in the shop of A-2 as per Ex-P3 and seized the clothes given for stitching by PWs. 1 & 2. On 23-9-1989 A-1 was arrested. PW-26 recorded the statement of A-1 who led them to his house where he drew a mahazar as per Ex-P.33. Thereafter, further investigation was taken up by P.W.24, the Circle Inspector of Police. On 13-11-1989 A-2 appeared before him with order of anticipatory bail. His statement was recorded after arresting him. He also produced clothes that he was wearing at the time of incident from his house which were seized as per Ex-P.29. Both A-1 & A-2 were subjected to medical examination, Dr. G. Marulasiddappa (P.W 25) issued certificate of A-1 as per Ex-P.27 and Dr. Suryakumar (PW-3) issued certificate of A-2 as per Ex P.6. After receipt of the FSL report, he filed a charge sheet. Thereafter, the case was committed to the Court of Sessions, as the offence alleged against these accused persons is in respect of offence punishable under Section 376 exclusively triable by the Court of Sessions. On receipt of this committal order, the Court of Sessions, Kodagu District, registered a case (S.C. No.45/90) and framed charges against the accused for the offence punishable under Sec. 376 IPC, and both the appellants denied the charges and claimed to be tried. To substantiate the case of the prosecution, it examined 27 witnesses and got marked Exs-P1 to P.34 and also MOs. 1 to 24.

3. The case of the respondents was that in view of some property dispute, PWs. I & 2 filed a false case against them and they are innocent.

4. The trial Court found with reference to the evidence on record, more particularly the documents exhibited by the teacher of the school (PW 16) that the age of the victims in each case

A was less than 16 years. Therefore the trial Court held that the question of consent was irrelevant and immaterial. In appeal, the High Court held that the age was more than 16 years and there was consent and accordingly directed acquittal.

5. Learned counsel for the appellant-State submitted that
B the High Court has fallen into grave error by holding that the age of each of the victims was more than 16 years. Further there was no plea regarding consent and therefore the High Court on its own could not have made out a case of consent.

C 6. Learned counsel for the respondents on the other hand submitted that the factual scenario clearly shows consent and the High Court's conclusion about the age and consent cannot be faulted.

7. It is to be noted that the teacher-PW 16 referred to the
D certificates which indicated that the date of birth of PW 1 was 5.3.1974 and the date of birth of PW2 was 1.2.1974. Exhibits P.16 & P.17 are the certificates. The High Court referred to the evidence of the lady doctor PW 24 with reference to the X-Ray report which indicated that the age of PWs. 1 & 2 fell between
E 14 to 16 years. The High Court observed that there was possibility of two years variation and therefore it was to be taken that the victims were more than 16 years of age. The High Court accepted that there was sexual intercourse and rejected the plea of false implication. Thereafter it went on to examine the
F question of consent. So far as the reasonings of the High Court are concerned they border on absurdity. All types of surmises and conjectures have been arrived at. Strangely, it was observed that PW16 the Head Master's evidence was to be discarded on the ground that the date of birth may not have been recorded
G on the basis of any medical certificate or other documentary evidence to show that these two girls were born on the date as mentioned. The High Court's conclusions in this regard are not only fallacious but contrary to the evidence on record. The High Court recorded a further finding that the two certificates may not relate to the victims though it specifically recorded that there
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was no such challenge raised by the accused. Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 and 16, to conclude that the two years age has to be added to the upper age limit is without any foundation. There was no basis for coming to such a conclusion. In any event, the accused persons did not take the stand that there was any consent. On the contrary, they pleaded that they were falsely implicated. In *State of H.P. v. Shree Kant Shekari* [2004 (8) SCC 153] it was observed as follows:

> "The factors which seem to have weighed with the High Court are (i) the age of the victim, which according to the High Court was more than 16 years; (ii) no evidence has been placed by the prosecution to show that the victim had not consented to the act; and (iii) the time of alleged rape as given by the victim and her mother was improbabilised by the medical evidence. A particular reference was made to the fact that a child was born on 10.4.1979 and if the alleged rape has been committed during the period indicated by the victim and her mother the same would have been altogether different periods. The delay in lodging the first information report was also highlighted to attach vulnerability to the prosecution case.
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> We shall first deal with the question of age. The radiological test indicated age of the victim between 15 to 16½ years. The school records were produced to establish that her date of birth was 10.4.1979. The relevant documents are Ex.PW6/A to PW6/C. The High Court was of the view that these documents were not sufficient to establish age of the victim because there was another document Ex.PW7/A which according to the High Court did not relate to the victim. Merely because one document which was produced by the prosecution did not, according to the High Court relate to the victim that was not sufficient to ignore the evidentiary value of Ex.PW6/A to Ex.PW6/C. These were records regarding admission of the victim to the school and her period of study. These documents

A unerringly prove that the date of birth of the victim as per official records was 10.4.1979. Therefore, on the date of occurrence and even when the FIR was lodged on 20.11.1993 she was about 14 years of age. Therefore, the question of consent was really of no consequence.

B Even otherwise the High Court seems to have fallen in grave error in coming to the conclusion that the victim has not shown that the act was not done with her consent. It was not for the victim to show that there was no consent. Factually also the conclusion is erroneous right from the C beginning that is from the stage when the FIR was lodged and in her evidence there was a categorical statement that the rape was forcibly done notwithstanding protest by the victim. The High Court was therefore wrong in putting burden on the victim to show that there was no consent. D The question of consent is really a matter of defence by the accused and it was for him to place materials to show that there was consent. It is significant to note that during cross examination and the statement recorded under Section 313 of the Code of Criminal Procedure, 1973 (in E short the 'Code') plea of consent was not taken or pleaded. In fact in the statement under Section 313 of the Code the plea was complete denial and false implication."

8. Above being the position, judgment of the High Court is clearly unsustainable and set aside. The judgment of the trial F Court is restored. The respondents shall surrender to custody to suffer remainder of sentence, if any.

9. Appeal is allowed.

S.K.S. Appeal allowed.