

**HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD**

Criminal Appeal No.167 OF 2022

Between:

Mekala Shiva

... Appellant

And

The State of Telangana,
rep. by its Public Prosecutor,
High Court for the State of Telangana,
Hyderabad.

... Respondent.

DATE OF JUDGMENT PRONOUNCED: 30.06.2022

Submitted for approval.

THE HON'BLE SRI JUSTICE K.SURENDER

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| 1 | Whether Reporters of Local newspapers may be allowed to see the Judgments? | Yes/No |
| 2 | Whether the copies of judgment may be marked to Law Reporters/Journals | Yes/No |
| 3 | Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? | Yes/No |

* THE HON'BLE SRI JUSTICE K.SURENDER

+ CRL.A. No.167 of 2022

% Dated 30.06.2022

Mekala Shiva

... Appellant

And

\$ The State of Telangana,
rep. by its Public Prosecutor,
High Court for the State of Telangana,
Hyderabad.

...Respondent.

! **Counsel for the Appellant:** Smt.Allampalli Rupa Devi

^ **Counsel for the Respondent:** Public Prosecutor

> **HEAD NOTE:**

? **Cases referred**

(1982) 2 Supreme Court Cases 538

HONOURABLE SRI JUSTICE K.SURENDER**CRIMINAL APPEAL No.167 of 2022****JUDGMENT:**

1. The present appeal is filed questioning the conviction of the appellant for the offences under Section 5(1) r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') and sentenced to undergo rigorous imprisonment for a period of 20 years and also to pay fine of Rs.2,000/-, in default, to undergo simple imprisonment for a period of six months and also sentenced to undergo rigorous imprisonment for a period of three years and to pay fine of Rs.1,000/- in default, to undergo simple imprisonment for a period of three months for the offence under Section 363 of IPC vide judgment dated 23.02.2022 in P/Sessions Case No.135 of 2019 passed by the Special Judge for Trial of Cases under POCSO Act-cum-II Additional District & Sessions Judge, Nizamabad.

2. The case of the prosecution is that P.W.1, the father of the victim girl (P.W.5) filed a complaint under Ex.P1 on 27.12.2018 stating that on 25.12.2018 when they woke up, they did not find P.W.5 and she was missing, for which

reason, police registered a crime for 'girl missing'. Thereafter, on 15.02.2019, P.W.5/victim girl was rescued and on seeing the police, the appellant/accused managed to escape. However on 17.02.2019, the appellant was apprehended by the police.

3. After examination of the victim, P.W.5, the section of law was altered to Section 366(A), 376(2)(i) IPC and Section 5(1) r/w Section 6 of POCSO Act, 2012. The accused was also charged for the said offences.

4. During the course of examination, the witnesses P.W.1-father, P.W.2-mother and P.W.3-brother of P.W.5 stated that P.W.5/victim girl went out of their house by saying that she wanted to attend nature call, but she did not return, for which reason, they went to the police station and filed a complaint.

5 P.W.5/victim girl during her examination in the court stated that she knew the accused, who is aged around 19 years doing mason work. She was acquainted with the accused for the past four years and they fell in love. They used to frequently chat with one another in the absence of

their parents. As the parents of the accused started searching for marriage alliance, P.W.5 and the appellant decided to elope and marry. Accordingly, on 25.12.2018, when the parents were asleep, P.W.4 and the appellant went to Bus Stand of Bellal and stayed in Kotagiri bus stand till 6.00 a.m and at 6.00 a.m, they boarded the bus to Deglur village and they have taken room on rent basis in the house of P.W.7 and stayed there. On 27.12.2018, both got married in Anjaneya Swamy temple in Deglur village. It is further the statement of P.W.4 that from the date of marriage, they participated in the sexual intercourse and daily routine was that the appellant/accused was attending to agricultural labour work and P.W.5 used to stay at home. After one and half month, when the appellant/accused was attending to his labour work, he suffered a snake bite, for which reason, P.W.5 called P.Ws.1 and 2 on 14.02.2019 and informed about their staying at Deglur village. Thereafter, the police arrived and took PW.5 and her statement was recorded before the Magistrate.

6. P.W.5 is aged around 17 years and in proof of the same, Ex.P3, bonafide certificate is filed, which shows her

date of birth as per record as 25.08.2001. On medical examination by P.W.14-Doctor, P.W.5 was found to be pregnant. P.W.14 further stated that the pregnancy test of P.W.5 was positive with six weeks gestation. P.W.9/Doctor, who conducted dental examination and also radiological examination of P.W.5, opined that P.W.5 was aged more than 16 years, however less than 18 years. To that effect, Ex.P4, age determination certificate of the victim girl/PW.5 was given. P.W.9 also examined the appellant and issued a certificate of potency.

7. Learned counsel for the appellant argues that by virtue of explanation 2 to Section 375 of IPC i.e., “sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”, as such, assuming that the age of the victim girl/P.W.5 was 17 years, as stated by the witnesses still it would not amount to rape. The said ground cannot be considered in view of the judgment of the Hon’ble Supreme Court in Independent thought v. Union of India and another in Writ Petition (Civil No.382 of 2013) dated 11.10.2017, wherein the Hon’ble Supreme Court has amended explanation-2 to Section 375

and the age which was 15 years was made as 18 years. However, the Hon'ble Supreme Court made it clear that the judgment would have prospective effect. The said Judgment is dated 11.10.2017 and the offence in the present case is in the year 2018, for which reason, the said ground raised is not available to the appellant/accused.

8. Learned Assistant Public Prosecutor submits that the age of the victim girl/P.W.5 is less than 18 years, as proved through Ex.P3, bonafide certificate. According to the certificate, the date of birth of P.W.5/victim girl is 25.08.2001. Further, PW.9 conducted ossification test and gave an opinion that P.W.5 was aged more than 16 years and less than 18 years, as such, even assuming that P.W.5 has consented to live with the appellant/accused had sexual intercourse, the said consent has no legal sanctity and for the said reason, the finding of the trial Court that PW.5 was a minor, cannot be interfered with and conviction has to sustain.

9. It is an admitted fact that P.W.5 has voluntarily gone with the appellant/accused, who was aged around 19 years. In the chief examination before the Court, P.W.5 stated that

since the parents of the appellant/accused were searching for bride to perform marriage of the appellant/accused, both the appellant and P.W.5/victim girl have decided to marry and accordingly, without intimating P.Ws.1 to 3, the family members of P.W.5, P.W.5 along with the appellant/accused got married on 27.12.2018 at Anjaneya Swamy Temple at Deglur village. Thereafter, even according to the admission of P.W.5/victim girl, there was never any kind of force either to accompany the accused/appellant or to participate in the sexual intercourse with P.W.5. The reason for informing the parents was after snake a bit the appellant/accused, and the villagers insisted that their parents should be informed. During the course of cross-examination, P.W.5 admits that she was in deep love with the appellant/accused.

10. The entire case of the prosecution rests upon the age of P.W.5/victim girl. The prosecution has relied upon Ex.P3, the bonafide certificate, wherein the date of birth of P.W.5 is given as 25.08.2001. According to P.W.3 and Ex.P3, the victim girl/P.W.5 was studying X standard when the incident happened. In the normal course, the students of X class would be aged around 15 years. In the present

case, neither the hospital records nor the municipal records are produced regarding the exact date of birth of P.W.5. It is apparent that on the basis of the declaration given by the parents of P.W.5/victim girl, the date of birth of P.W.5 is stated as 25.08.2001.

11. The Doctor/P.W.9, who conducted ossification test, formed an opinion that the victim girl/P.W.5 was more than 16 years, but less than 18 years. The reason for giving such an opinion that she was less than 18 years is not specified in the age determination examination Ex.P4. Neither did the Doctor in the witness box substantiate as to how the Doctor can give such an opinion that P.W.5 was more than 16 years and less than 18 years.

12. The Hon'ble Supreme Court in the case of **Jaya Mala v. Home Secretary, Government of Jammu & Kashmir**¹ has observed that one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. The said judgment is not overruled. Further, the Doctor has not specified what

¹ (1982) 2 Supreme Court Cases 538

is the meant by more than 16 years and if it is accepted that the victim as more than 16 years, applying the judgment of Hon'ble Supreme Court regarding the margin of error, adding two years to it, the age of the victim girl/P.W.5 would be more than 18 years.

13. In the said circumstances, there is no conclusive proof regarding the age of the victim girl/P.W.5 by producing hospital record or municipal record, which was taken at the time of birth. Ex.P3 is bonafide certificate, it is not known on what basis or whose declaration date of birth is recorded as the parents are illiterates since thumb impression is put on deposition. Ex.P4 is ossification test, which states that the victim/P.W.5 is more than 16 years and taking judicial notice that the margin of error may be two years on either side, the age of P.W.5/victim girl would be more than 18 years. P.W.5 has voluntarily gone along with the appellant/accused, who is aged 19 years, married him and stayed together for nearly one and half month. Further, only for the reason of snake bite, the whereabouts of P.W.5 were informed to her parents. In the said circumstances, the benefit of doubt has to be extended to the

appellant/accused since the prosecution has failed to prove the age of the victim girl/P.W.5 is less than 18 years.

12. For the aforementioned reasons, the appeal has to be allowed and accordingly allowed setting aside the impugned judgment dated 23.02.2022 in P/Sessions Case No.135 of 2019. The appellant/accused is directed to be set at liberty forthwith, if he is no longer required in any other case. As a sequel thereto, miscellaneous applications, if any, shall stand closed.

Date: 30.6.2022
kvs

K.SURENDER, J

HONOURABLE SRI JUSTICE K.SURENDER

Criminal Appeal No.167 of 2022

Date:30.06.2022

kvs

