K. Venkateshwarlu vs State Of A.P on 17 August, 2012

Equivalent citations: AIR 2012 SUPREME COURT 2955, 2012 (8) SCC 73, 2012 AIR SCW 4747, AIR 2012 SC (CRIMINAL) 1542, 2012 (3) SCC(CRI) 795, 2012 (118) ALLINDCAS 258, 2012 (7) SCALE 397, (2012) 3 RECCRIR 990, (2012) 3 DLT(CRL) 558, (2012) 3 CURCRIR 549, (2012) 53 OCR 443, (2012) 4 BOMCR(CRI) 488, (2012) 7 SCALE 397, (2012) 4 ALLCRILR 251, (2012) 79 ALLCRIC 327, 2012 (4) AIR JHAR R 500, 2012 CRI. L. J. 4388, (2012) 118 ALLINDCAS 258 (SC), (2012) 4 CRILR(RAJ) 1073, 2012 CALCRILR 3 519, (2012) 3 CHANDCRIC 200, (2012) 1 RAJ LW 176, (2013) 1 MH LJ (CRI) 636, (2013) 1 ALD(CRL) 297

Bench: Ranjana Prakash Desai, Aftab Alam

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 500 OF 2011

K. VENKATESHWARLU … APPELLANT

Versus

THE STATE OF ANDHRA PRADESH … RESPONDENT

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. This appeal by special leave is directed against the judgment dated 20/10/2009 passed by the High Court of Andhra Pradesh in Criminal Appeal No.1037 of 2001 whereby the High Court has reversed the judgment and order of the Additional Sessions Judge, Miryalguda acquitting the appellant of the offence punishable under Section 376 of the Indian Penal Code (for short, 'the IPC'). The High Court has sentenced the appellant to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs,1,000/-, in default, to suffer simple imprisonment for a period of one month.

2. In short the prosecution case is that PW-1 Anjaiah and PW-3 Padma, father and mother respectively of PW-2 Aruna are residents of Vepalasingaram village of District Nalgonda. PW-2 is

physically handicapped due to Polio. On 30th August, 1998, PWs 1 and 3 who work as coolies left for their work leaving PW-2 Aruna in the house. PW-2 Aruna and other children played for sometime on the terrace of the house of the appellant who was working as police constable. At about 4.00 p.m., all the children decided to go down. It was, however, difficult for PW-2 Aruna to go down due to her physical handicap. At that time the appellant came there, PW-2 requested him to help her to go to the ground floor. According to the prosecution the appellant lifted her, took her in his house, laid her on a cot and committed rape on her. The children, who were present there, saw the incident by peeping from the side of the door curtain. They informed PW1 about the incident after he returned from his work. Thereafter PW-1 went to the police station and lodged FIR (Ex. P.1). PW-16 G. Madhusudan Rao, Sub-Inspector of Police, Huzurnagar Mandal, registered a crime against the appellant for the offence punishable under Section 376 of the IPC. PW-15 Dr. M. Lalitha Rao, Civil Assistant Surgeon of the Nalgonda District Headquarters Hospital examined the prosecutrix on 1.9.1998 at about 12.10 p.m. Vaginal slides were sent to the Forensic Science Laboratory. The appellant was arrested on 4.9.1998. He was examined at the Government Hospital, Huzurnagar. After completion of the investigation the appellant was charged under Section 376 of the IPC. In support of its case the prosecution examined as many as 18 witnesses. The appellant contended that he was falsely implicated. He claimed to be tried.

3. The trial court acquitted the appellant basically on the ground that the victim and her mother did not speak anything about the rape and the child witnesses stated that they were kept by the police in police station prior to giving evidence and therefore, their evidence cannot be relied upon. The trial court observed that the appellant is entitled to benefit of doubt. An appeal was carried by the State of Andhra Pradesh to the High Court. The High Court came to a conclusion that there was no appreciation of evidence at all by the trial court. The High Court re- appreciated the evidence and recorded a finding that the prosecution has proved its case beyond reasonable doubt. The High Court set aside the trial court's order and convicted the appellant as aforesaid, which has led to this appeal.

4. We have heard learned counsel for the appellant. He submitted that the High Court erred in setting aside the order of acquittal which was based on a correct appreciation of evidence. Counsel submitted that by no stretch of imagination the order of acquittal passed by the Sessions Court can be characterized as perverse warranting interference by the High Court. Counsel submitted that PW-1 Anjaiah and PW-3 Padma, father and mother of the victim have not supported the prosecution case. PW-2 Aruna the victim has also not stated that she was sexually assaulted by the appellant. The child witnesses have admitted that they were at the police station for considerable period before they were brought to the court. It is evident, therefore, that they were tutored by the police. Counsel submitted that though medical evidence suggests that PW-2 Aruna had been sexually assaulted, there is no evidence on record to conclude that it is the appellant who had committed the heinous crime. Counsel submitted that the view taken by the trial court is a reasonably possible view which ought not to have been disturbed by the High Court. Learned counsel for the State supported the impugned order.

5. The High Court has set aside order of acquittal. This court has repeatedly stated what should be the approach of the High Court while dealing with an appeal against acquittal. If the view taken by

the trial court is a reasonably possible view, the High Court cannot set it aside and substitute it by its own view merely because that view is also possible on the facts of the case. The High Court has to bear in mind that presumption of innocence of an accused is strengthened by his acquittal and unless there are strong and compelling circumstances which rebut that presumption and conclusively establish the guilt of the accused, the order of acquittal cannot be set aside. Unless the order of acquittal is perverse, totally against the weight of evidence and rendered in complete breach of settled principles underlying criminal jurisprudence, no interference is called for with it. Crime may be heinous, morally repulsive and extremely shocking, but moral considerations cannot be a substitute for legal evidence and the accused cannot be convicted on moral considerations. The present appeal needs to be examined in light of above principles.

6. There can hardly be any doubt that PW-2 Aruna was sexually assaulted. PW-15 Dr. M. Lalita, who had examined Aruna, has stated in her evidence that Aruna is affected by polio on the right side. She described the internal injuries suffered by Aruna as under:

> "1. Abrasion on the right labia majora ½"x¼" (inches) (scratch marks). Pergina vagina examined. Hymen intact. Tip of the little finger admitting. Congestion present." She stated that according to FSL report dated 6.11.1998 (Exhibit P-20) there was semen spermatozoa detected on the skirt of Aruna, which was suggestive of sexual assault on the victim girl. But, we find that there is no medical evidence on record to establish that the spermatozoa detected on the skirt of PW-2 Aruna was that of the appellant. The appellant was arrested on 4.9.1998. His lungi was seized. As per FSL report blood found on the lungi was human but the blood group could not be identified.

Besides, the panchas to seizure panchanams have turned hostile. Positive FSL report would have provided a clinching circumstance against the appellant. The appellant's delayed arrest has added to the weakness of the prosecution case.

7. PW-1 Anjaiah, father of the victim, has narrated how the children residing in the neighbourhood told him after he and his wife came from work at about 4.00 p.m. that the appellant had ravished their daughter Aruna. He stated that he took this matter to the caste elders, who asked him to go to the police station, Huzurnagar. He stated that accordingly he went to Huzurnagar police station and lodged the FIR, which is Exhibit P-1. However, in the cross examination he has not supported the prosecution case. He stated that the police kept him, his wife and the child witnesses in the police station at Garidepally without allowing them to go to their village and they were brought to the court directly from the police station to give evidence. He further stated that he was illiterate and could only sign and he did not know the contents of his statements recorded by the police. Surprisingly, in the cross-examination he stated that the children of the neighbourhood did not inform him that his daughter was ravished. Though, PW-1 turned hostile, curiously, the prosecution did not declare him hostile. What is more shocking in the fact that mother of PW-2 Aruna, PW- 3 Ch. Padma has also turned hostile.

8. Evidence of PW-2 Aruna also does not take the prosecution case any further. It is apparent from her evidence that she was extremely traumatized by the incident. When she was asked by the court whether she knew the appellant, she nodded her head indicating she knew him. When she was questioned as to why she had come to the court, she looked at the appellant. The trial court then sent the appellant out. When she was again asked why she had come to the court, she hesitantly looked around and with tears in her eyes she got down from the witness box and went outside inspite of the warning given by the court attendant not to do so. Her parents brought her inside. When she was questioned whether she was ravished by the appellant, she nodded her head approvingly. The court then put to her that the appellant did not ravish her. She nodded indicating that she was not ravished by the appellant. The court then asked her whether she wants to speak anything, she nodded her head negatively. Observing that the witness lacked mental maturity, the trial court discharged her. The tears in PW-2's eyes, her mental condition and the helpless look on her face, which the trial court has noted together with medical evidence establish beyond doubt that PW-2 Aruna was sexually assaulted.

9. Several child witnesses have been relied upon in this case. The evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers (see Section 118 of the Evidence Act). A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the evidence of a child witness in the background and context of other evidence on record is a must before the court decides to rely upon it.

10. Evidence of child witnesses PW-4 D. Marry, PW-5 Swapna, PW-6 Ch. Vijaya and PW-7 Ch. Borraiah have made prosecution case suspect. It must be mentioned here that statements of these witnesses were recorded by PW-14 K. Prasad Rao, JFCM, Kodad, under Section 164 of the Code. But, these statements also cannot be relied upon because there is intrinsic evidence to show that all these witnesses were under the pressure of the police. PW- 4 D. Marry did not say anything about the appellant. She stated that she gave a statement before the Magistrate at Kodad but she could not state what statement she had given. Because she was unable to answer the questions she was discharged. PW-5 Swapna also admitted that she was at the police station at Garidapalli for six days along with PWs 1 to 3 and others and she gave a statement before the Magistrate at the instance of the police. The defence has produced a certificate (Annexure-P/8) from RCM High School, Vepalasingaram, where PW-4 and PW-5 were studying, which states that they did not attend the school from 30.10.2000 to 7.11.2000 and 27.10.2000 to 06.11.2000 respectively. PW-6 Ch. Vijaya Kumar and PW-7 Ch. Borraiah narrated the incident in the examination-in-chief, but the similarity in their narration suggests tutoring by the police. PW-6's effort to disown that he was detained at the

police station along with others is belied by evidence of other witnesses. PW-7 Ch. Borraiah stated in the cross-examination that all of them were at the police station since last Tuesday. From the evidence of the child witnesses it is clear that they were detained by the police at the police station. Once this is established, the inevitable conclusion that they were tutored by the police must follow.

11. Having perused the evidence of all the witnesses, we find it difficult to rely on them. We feel that the trial court had rightly discarded their evidence as unworthy of reliance and the High Court erred in taking it into consideration. This, in our opinion, is a case where neither the evidence of parents of victim PW-2 Aruna nor the evidence of PW- 2 Aruna, nor the evidence of child witnesses, who claim to have witnessed the incident, nor the medical evidence supports the prosecution case. Besides, all the pancha witnesses have turned hostile, a fact which we have noted with some anguish. A needle of suspicion does point out to the appellant because he is a police constable and in a small village where the incident took place, witnesses may be scared to depose against him because of his clout. There are certain circumstances which do raise suspicion about the appellant's involvement in the crime. The children were playing on the terrace of the appellant. The appellant was not arrested by police till 4.9.1998. The demeanour of PW-2 Aruna, the tears in her eyes, her walking out of the court after looking at the appellant, pricks the judicial conscience. But convictions cannot be based on suspicion, conjectures and surmises. We are unable to come to a conclusion that the trial court's judgment is perverse. For want of legal evidence we will have to set aside the appellant's conviction and sentence. But we make it clear that we are doing so only by giving him benefit of doubt.

12. In view of the above, we set aside the impugned judgment and order of the High Court dated 20.10.2009. The appellant is in jail. He is directed to be released forthwith, unless required in some other case.

13. In R.P. Kapur v. Union of India and Anr. (AIR 1964 SC 787) the Constitution Bench of this court has held that if the trial of a criminal charge results in conviction, disciplinary proceedings are bound to follow against the public servant so convicted, but even in case of acquittal departmental proceedings may follow, when the acquittal is other than honourable. We are not aware whether any disciplinary proceedings are pending against the appellant. But, if they are, the concerned authority shall proceed with them independently, uninfluenced by this judgment and in accordance with law.

14. The appeal is disposed of in the afore-stated terms.

.....J. (AFTAB ALAM) .....J. (RANJANA PRAKASH DESAI) NEW DELHI, AUGUST 17, 2012
