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Crl.A.No.779 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[Reserved on : 30.06.2023]

[Pronounced on : 29.09.2023]

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

Crl.A.No.779 of 2016

L.Kumar

... Appellant/accused

.. Vs ..

State

Inspector of Police

Karipatti Police Station

Salem.

Cr.No.617/2010

... Respondent/complainant

PRAYER: Criminal Appeal filed under Section 374(2) of Cr.P.C., to set aside the order of conviction in S.C.No.328 of 2014 passed by the learned Sessions Judge, Mahila Court, Salem by convicting the appellant for the offences under Section 376(1), 306 and 506(i) of IPC dated 10.11.2016 in the interest of equity and justice.

For Appellant : Mr.A.Natarajan, Senior Counsel
for M/s.Dr.S.R.Kalyani

For Respondent : Mr.L.Baskaran
Government Advocate (Crl.Side)



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JUDGMENT

Convicted sole accused is the appellant herein. This Criminal Appeal is against the judgment in S.C.No.328 of 2014 dated 10.11.2016 passed by the learned Sessions Judge, Mahila Court, Salem by convicting the appellant for the offences under Sections 376(1), 306 and 506(i) of IPC.

2. For the offence under Section 376(1) of IPC the appellant is sentenced to undergo rigorous imprisonment of 7 years and to pay a fine of Rs.10,000/- in default of payment of fine amount to undergo simple imprisonment for another 6 months. For the offence under Section 306 of IPC the appellant is sentenced to undergo rigorous imprisonment of 10 years and to pay a fine of Rs.10,000/- in default of payment of fine amount to undergo simple imprisonment for another 6 months. For the offence under Section 506(i) of IPC the appellant is sentenced to undergo rigorous imprisonment of 2 years and to pay a fine of Rs.2,000/- in default of payment of fine amount to undergo simple imprisonment for another 6 months.

3. The respondent police has filed final report in Crime No.617 of



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2010 alleging that the accused has committed offence under Sections 364, 376(1), 306 and 506(i) of IPC. The case of the prosecution before the trial Court is that, the deceased Janaki was married 15 years ago and gave birth to three children. The deceased Janaki was working as a coolie. Three months prior to 26.11.2010 at about 10.00 A.M. in the Uppu Odai situated on the way to Villampatti, lies within the limits of Karipatty P.S. The accused, under the false pretext of தேங்காய் தூக்கும் கூலி வேலை செய் in his kadu kidnapped the deceased Janaki from her house in the bicycle. In the above said place, the accused raped the deceased Janaki against her will and further the accused intimidated the deceased Janaki by saying இந்த விசயத்தை உன் புருசனிடம் சொன்னால் அவனையும் உனது பிள்ளைகளையும் கொன்றுவிடுவேன் and thereby the accused has committed the offence and liable to be punished under Section 364, 376 and 506(i) of IPC.

4. After completing the investigation, the above final report has been filed. The accused appears to have obtained anticipatory bail from this Court in Crl.O.P.No.29380 of 2010 dated 20.12.2010 subsequently. The deceased died on 02.12.2010 and hence, offence under Section is



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altered into Section 306 IPC.

5. After filing of the charge sheet, the case was taken as P.R.C.No.1 of 2014 and committed to the Sessions Mahila Court, Salem and renumbered as S.C.No.328 of 2014. During the trial, prosecution examined PW1 to PW12 and marked 16 exhibits from P1 to P16. No material objects were marked.

6. After trial, the trial Court by its judgment in S.C.No.328 of 2014 dated 10.11.2016, the petitioner/accused is found guilty and convicted for the following offences:

U/s. 376(1) IPC	Sentenced to undergo 7 years R.I. and imposed a fine amount of Rs.10,000/- I/d. 6 months S.I.
U/s. 306 IPC	Sentenced to undergo 10 years R.I. and to pay a fine amount of Rs.10,000/- I/d. 6 months S.I.
U/s. 506(i) IPC	Sentenced to undergo 2 years and to pay a fine amount of Rs.2,000/- I/d. 2 months S.I.

The trial court has acquitted the accused under Section 364 of IPC and convicted under Sections 376(1), 306 and 506(i) of IPC only.

7. Pending this appeal, the sentence was suspended by this Court in Crl.M.P.No.12371 of 2016 in Crl.A.No.779 of 2016 and the accused was released on 10.01.2018. On perusal of the Order passed by the trial Court, I find that learned Sessions Judge, Mahila Court, Salem convicted



the accused on the ground that he has committed rape against Janaki and he also threatened that he would do away her husband and her children and due to the rape committed by the accused person only she committed suicide. Hence, the accused person only abetted her to commit suicide.

8. Mr.A.Natarajan, learned Senior Counsel appearing for the appellant/accused would contend that,

(i) The main witness Selvaraj(LW1), husband of the Janaki was not examined and on the side of the prosecution, he was dispensed with, who is a material witness. Non-examination of the material witnesses is fatal to the prosecution.

(ii) Coming to the existence of the Ex.P1 complaint is surrounded with suspicion.

(iii) Dying declaration was not came into existence as stated by the prosecution, since the deceased had 75% of burn injuries on her face, neck and fore-arms and hence, dying declaration is doubtful.

(iv) Presence of the concerned Investigation Officer Viz., Mr.Sivalingam, Inspector of Karipatti Police Station, during the recording of the dying declaration creates suspicion.

(v) The so called Ex.P1., observation mahazar does not indicate



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the scene of the crime, no materials were collected from the scene of the crime in regard to the charge under Section 306 of IPC and there is absolutely no investigation on the part of the Investigation Officer with regard to the inspection of the scene of the crime. With regard to the alleged offence under Section 376 of IPC, no material evidences in connection with charges under Section 376 of IPC has been made which is relied in Jayamma and others Vs.State of Karnataka reported in Crl.A.Nos.758 of 2010 and 573 of 2016.

9. Mr. L.Baskaran, learned Government Advocate (Crl.side) made his submission in support of the judgment of the Trial Court.

10. Points for consideration are:-

- i. Whether the Order of conviction passed by the learned Special Sessions Judge under Section 306 IPC is sustainable in Law?
- ii. Whether the Order of conviction passed by the learned Special Sessions Judge under Section 376(1) IPC is sustainable in Law?
- iii. Whether the Order of conviction passed by the learned Special Sessions Judge under Section 506(i) IPC is sustainable in Law?
- iv. Whether the quantum of sentence awarded for the respective charges is exorbitant?

11. The case of the prosecution as could be seen from the



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prosecution witnesses is that, one Mr.Selvaraj and Janaki, who are husband and wife, had three children, are residents of Nehru Colony within the jurisdiction of Karipatti Police Station, Salem.

12. The Criminal law was set into motion when the Special Inspector of Police had received intimation from the Government Hospital, Salem on 27.11.2010, at about 2.00 p.m., that a person with burn injuries was admitted in the burn ward. He went to the said hospital and recorded the statement of the *de-facto* complainant (deceased Janaki, aged 30 years).

13. As per the Ex.P.4 complaint, the case of the prosecution is that on 27.11.2010 at about 2.00 PM the respondent police received an intimation from the Government Hospital, Salem based on that, the Special Sub Inspector of Police went to the said hospital and recorded the statement of the *de-facto* complainant/deceased Janaki, aged 30 years. In her complaint, she had stated that she got married 15 years back and gave birth to three children and she was working as coolie. Three months prior to 26-11-2010 at about 10-00 a.m., in the Uppu Odai situated on the way to Villampatti, lies within the limits of Karipatty P.S., the accused



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noted above under the false pretext of தேங்காய் தூக்கும் கூலி வேலை செய் in his Kadu kidnapped the deceased Janaki from her house in the bicycle. In the above said place, the accused raped the deceased Janaki against her will and further the accused intimidate the deceased Janaki by threatening that not to disclose this matter to anybody. Fifteen days prior to 26.11.2010 due to the pricking of conscience deceased Janaki told her husband about the above said rape. The husband of the deceased Janaki questioned the act of the accused, but he also threatened him with dire consequences. Due to the above said act of the accused, the deceased Janaki felt ashamed and due to the mental agony, on 26.11.2010 at about 12.00 p.m., inside the house of the deceased near outer varanda, Janaki had committed suicide by pouring kerosene to herself and set fire to herself. And hence, after investigation, the charge sheet has been filed as stated supra.

14. From the medical evidence of Doctor P.W.8 and P.W.9 coupled with the Post-Mortem Certificate, Ex.P7 and final opinion Ex.P8, this Court comes to the conclusion that the deceased Janaki died due to the burn injuries. This Court is consciously observed that the alleged place of



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crime could not be fixed for the reason that no rough sketch showing the place of the alleged occurrence, wherein the deceased set herself fire in the absence of any rough sketch or observation mahazar prepared and filed by the Investigation Officer and hence, this Court finds that the deceased died due to burn injuries and except that nothing has been placed before the Court as observed supra for the reasons discussed, infra.

15. PW.1 Saravanan, PW.3 Samidurai are the younger brothers of deceased Janaki. PW.2 Chinnaponnu is the mother of deceased Janaki. On 26.11.2010 the husband of Janaki one Mr. Selvaraj and PW1 Saravanan went to collect loan amount from one person and they returned at 1.30 p.m. At that time, the front door of his house was closed without locking. Selvaraj pushed and opened the door and saw that her wife was burning. He called PW.1 Saravanan. PW.1 ran inside the house and saw her sister Janaki in a burning condition. The husband of Janaki tried to set-off the fire by using bed sheet but the flame was not set-off. Hence, PW1 poured some water on her and set off the fire and brought Janaki through 108 Ambulance to the Salem Government hospital. PW.2 Chinnaponnu, also came to know about the incident and went to her



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daughter's house and she also accompanied with her daughter to Salem Government Hospital. PW.3 Samidurai came to know about the incident and went to Salem Government Hospital and saw his sister Janaki at Salem Government Hospital.

16. PW.1 Saravanan, who is projected as the person said to have accompanied the injured (now deceased) have stated in the chief examination that he along with Selvaraj (husband of the victim) has broke open the door, went inside and rescued the Janaki. PW.2, mother of the victim Janaki also spoken about the presence of the Selvaraj. For the reasons best known, the prosecution has not examined him. In this regard, arguments of the learned Senior Counsel for the appellant and the learned Government Advocate is discussed infra.

17. The case of the prosecution entirely rests upon the Ex.P.10 dying declaration recorded by learned Judicial Magistrate No.II, Salem PW.9, in the presence of PW.5/Dr.K.Vijayakumar, who had issued Ex.P2 & Ex.P3 fitness certificate at the time of commencement of the dying declaration and after completion of dying declaration, respectfully.

18. With regard to the examination of the said Doctor PW.5, this Court has noticed a material contradiction between the version of the



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PW.5 Doctor who has attested Ex.P.10 dying declaration, with the PW.13 Investigation Officer. This Court has taken note of the judgment Jayamma case cited supra by the learned Senior Counsel with regard to the recording of the evidence from the person who has suffered 80% of the burn injuries on the face, wherein the Hon'ble Supreme Court has held that when a person is having 80% of the burn injuries on the face, it is unlikely that they could depose and disbelieved the dying declaration.

19. As per the death intimation, the deceased Janaki has suffered 80% of burn injuries and as per Ex.P7, Post-mortem certificate issued by PW.8 Dr.Paneer Selvam, it is 75% of the burn injuries. It is not disputed by the prosecution that the deceased has suffered 75% of the burn injury on the face, neck, chest, arm-pit and fore-arms. The PW.5 Dr.K.Vijayakumar had attested the dying declaration (attestation is marked as Ex.P.2 & Ex.P.3 respectively), in the cross examination has admitted that,

“அப்போது காரிப்பட்டி ஆய்வாளர் இருந்தார். மரண வாக்குமூலம் பதிவு செய்யும் போது நான், நீ.ந.எண்.2 ஸ்டாப் நர்ஸ், ஆய்வாளர் இருந்தோம். ஜானகிக்கு முகம் வெந்து காணப்பட்டது.”



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20. The post-mortem Doctor PW.8 Dr.G.Paneerselvam in the chief examination admitted that,

“இடது கையின் முன்பகுதி மற்றும் பின்பகுதி, இடது முள்ளங்கை, வலது மேற்கையின் முன்புறம் மற்றும் பின்புறம், வலது முன்கையின் மேற்புறம், காணப்பட்டது. துர்நாற்றத்துடன் கூடிய மஞ்சள் நிற சீல் படிந்து காணப்பட்டது. தலைமுடி, அக்குள்முடி பிறப்புறுப்பின் முடி கறுகி காணப்பட்டது. தலையை ஆய்வு செய்தபோது கபாலத்தின் மேற்புறமுடனான தோலின் அடிப்பகுதி, கபால எலும்பு, புரூரா மென்படலம், ஆகியவற்றை நல்ல நிலையில் இருந்தது.”

and in the cross examination that,

அவருக்கு 75% தீக்காயங்கள் இருந்தது. வலது கையின் முன்புறமும் பின்புறமும் தீக்காயம் இருந்தது. முகத்தில் தீக்காயம் காணப்பட்டது. கண் இமைகள், இமையில் இருந்த முடிகள் கறுகி இருந்தால் அவை என் அறிக்கையில் குறிப்பிட்டிருப்பேன். முகத்தில் முழுமையாக தீக்காயங்கள் இருந்தன. தலைமுடி கறுகி காணப்பட்டது.”

21. PW.9, the Judicial Officer who had recorded the Ex.P10 dying declaration has stated that dying declaration has took one hour. During



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the recording, he finds that the Janaki (Now died) was always shouting as 'Burning! Burning!'. In the cross examination, a specific question was put to the PW.9 that due to the burn injuries, he could not have obtained any signature and the same was denied.

22. PW.11 is Dr.Saravanan, who had admitted the injured in to the burning ward, has issued Accident Report Ex.P.12. He has specifically admitted that he had sent the intimation to the concerned police station, however, the intimation sent by the PW.11 Doctor was not placed before the Court by the Investigation Officer.

23. From the evidence of the Doctor, who had attested the Post-Mortem report, I find that during the recording of the dying declaration, apart from the Judicial Magistrate and Staff nurse, the Inspector, who is doing the Investigation Officer was also present and hence, this Court entertains a doubt.

24. With regard to the recording of statement from the Doctor associated with this investigation, I find that there is a material contradiction between the version of the Medical witnesses with that of the police witnesses. PW.12, 1st Investigation Officer in his cross examination has categorically stated that,



“இந்த வழக்கு சம்மந்தமான தகவல்களை சிறப்பு காவல் உதவி ஆய்வாளர் பூபதி என்பவர் பெற்று இருக்கிறார் நேரம் சரியாக தெரியவில்லை. நான் தான் அப்போது இந்த வழக்கின் விசாரனை அதிகாரி. எத்தனை மணிக்கு மருத்துவமனையில் இருந்து தகவல் கிடைக்கப்பெற்றது என்று எனது புலன் ஆய்வு அறிக்கையில் நான் குறிப்பிடவில்லை என்றால் சரி. மேற்படி சம்பவ இடத்தில் உள்ள வீடு நான் பார்க்கும் போது கதவு பூட்டப்படாமல் சாத்தப்பட்டுயிருந்தது. ஜானகி வீடு எது என்று கேட்டு தெரிந்துகொண்டேன். அங்கு கூட்டமாக இருந்தது. சம்பவ இடத்தில் இருந்து வழக்கு சொத்துக்கள் ஏதும் கைப்பற்றப்படவில்லை. மேற்படி சம்பவ இடத்தில் வீட்டில் இருந்த பொருட்கள் மாதிரி வரைபடத்தில் காண்பிக்கப்படவில்லை, பார்வை மகஜரில் வீட்டிற்குள் இருந்த பொருட்கள் குறிப்பிடப்பட்டுள்ளது. நான் சம்பவ இடத்திற்கே செல்லவில்லை என்றாலும், மாதிரி வரைபடம் பார்வை மகஜர் காவல்நிலையத்தில் வைத்து தயாரிக்கப்பட்டது என்றாலும், சரியல்ல. சம்பவ இடத்திற்கு சென்றுயிருந்தால் வழக்கு சொத்துக்களை கைப்பற்றியிருப்பேன் என்றால் சரியல்ல. சம்பவ இடத்தில் மண்ணெண்ணை கேன் பெட்சீட், ஆகியவை இல்லாததால் கைப்பற்றவில்லை. மேற்படி சம்பவத்தை அமராவதி, சுரவணன், முற்றும் ஈஸ்வரன் ஆகியோர்



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சத்தம் கேட்டு ஜன்னனில் பார்த்த நபர்கள். சரவணன் தன் முதல் விசாரணையில் தானும், செல்வராஜ் ம் தான் முதலில் சம்பவ இடத்திற்கு சென்று சென்றதாகவும், செல்வராஜின் வீட்டின் கதவு சாத்தப்பட்டுயிருந்ததாகவும், செல்வராஜ் கதவை தட்டி திறந்துவிட்டதாவும், உள்ளே பார்த்தபோது அவருடைய மனைவி எறிந்து கொண்டுயிருப்பதாக தன்னை கூப்பிட்டதாகவும், சொல்லியிருக்கிறார்கள் என்றால், எனது விசாரணையில் அவ்வாறு சொல்லவில்லை.

..... அ.சா.1 சரவணன் தனது சாட்சியத்தில் தனது மாமா செல்வராஜ் புகார் கொடுத்தாக சொல்லியிருக்கிறார் என்றால் சரியல்ல. செல்வராஜ் கொடுத்த புகாரின் அடிப்படையில் நான் வழக்கு பதிவு செய்தேன் என்றால் சரியல்ல.

அ.சா.3 சாமிதுரை தனது சாட்சியத்தில் தனது மாமா செல்வராஜ் புகார் கொடுத்த பிறகு போலிஸ்சார் தன்னை விசாரித்தாக கொல்லியிருக்கிறார் என்றால் செல்வராஜ் புகார் ஏதும் கொடுக்கவில்லை.”

25. The investigation officer has admitted that they are going to examine the husband of the deceased Janani Viz., Senthil Kumar (LW1) and he has also stated that he is an important witness in the cross examination. He further stated that,

“ கற்பழிப்பு நடந்ததாக சொல்லப்படும் உப்பு ஓடை



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பகுதிக்கு நான் செல்லவில்லை காரணம் மூன்று
மாதத்திற்கு முன்பு கற்பழிப்பு நடந்ததாக
சொன்னதால் நான் செல்லவில்லை.

இந்த வழக்கு சம்மந்தமாக வேறு சாட்சிகளிடம்
ஆவணங்கள் ஏதும் நான் கைப்பற்றவில்லை.

..... அ.சா.2 சின்னப்பொன்னு தனது
சாட்சியத்தில் தான் ஜானகி இறக்கும் வரை உடன்
இருந்ததாவும், யாரும் வந்து வாக்குமூலம் எதுவும்
பெறவில்லை என்று சாட்சியம் அளித்திருக்கிறார்
என்றால் சரியல்ல. இதச பிரிவு 364
என்பது இந்த ஆவணம். அந்த இரண்டு
மையும் வேறு வேறாக உள்ளது என்றால் சரி.
கடத்தப்பட்டதிற்காக 364 இதச சேர்க்கப்பட்டுள்ளது.
..... சிறப்பு காவல் ஆய்வாளர் பூபதியிடம்
கொடுத்த வாக்குமூலத்திலோ தன்னை
கடத்திக்கொண்டுபோனதாக குறிப்பிடவில்லை, ஏமாற்றி
கூட்டிக்கொண்டு போனதாக சொல்லவில்லை.
..... நீதிமன்றத்தில் உள்ள EX.P15
ஆவணத்தில் பிரிவு 364 யாரால் சேர்க்கப்பட்டது
என்று எனக்கு தெரியாது. 364 பிரிவு
அருகில் உள்ள சைடு இன்சியல் என்னுடையது
அல்ல. 506(1) பிரிவு சம்மந்தமாக ஜானகியோ,
செல்வராஜ்யோ என்னிடம் புகார் ஏதும்
கொடுக்கவில்லை. ”



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26. So also the 2nd investigation Officer PW13 has admitted that,

“ஜானகி எதிரி தன்னை கற்பழித்தது குறித்து தான் கொளுத்திக் கொள்வதற்கு 15 நாட்களுக்கு முன்பு தான் தனது கணவரிடம் தெரிவித்துயிருக்கிறார் என்பது தான் சரி..... ஆனால் ஜானகி தன்னை எதிரி கற்பழித்தது குறித்து தன் கணவரிடம் மட்டும் தான் சொல்லியிருக்கிறார் என்றாலும், பொது மக்கள் யாருக்கும் இந்த சம்பவம் தெரிய வாய்ப்பில்லை என்றால் சரி. மருத்துவர் பன்னீர் செல்வம் அவர்களை நான் தான் விசாரித்தேன்”

27. As stated supra, the learned Sessions Judge has convicted the accused for the offence under Section 376 IPC also. From the medical evidence produced before this Court, PW5, PW8, PW11 coupled with the Ex.P2, Ex.P3 and Ex.P8, this Court finds that there is no iota of evidence for the charge under Section 376. None of the prosecution witnesses has whispered about the alleged rape by the accused assumes significance.

28. At this juncture, it remains to be stated that even as per the dying declaration, though this Court finds it unsafe to rely upon the same for the reasons discussed supra and the reason finding rendered infra, this Court finds that in the dying declaration Ex.P10 she had stated that "நான்



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எனது கணவருக்கு துரோகம் செய்து விட்டேன் என்று வெறுப்பு அடைந்து" I have betrayed husband and hence, this Court finds that the words uttered by the deceased Janaki under Ex.P3 cannot be termed as that the accused had physical intercourse against her wish which is essential ingredients of Section 375 of I.P.C punishable under Section 376 of I.P.C.

29. Both the investigation officer, PW.12 & PW.13 has categorically admitted in the cross examination as extracted supra, that they have not even inspected the scene of crime 'Uppu Odai' wherein the accused is alleged to have committed the rape against her willingness. They have not collected any information or conducted any investigation with any of the neighbours. They solely rest upon the said sentence in Ex.P10 dying declaration that the accused had committed rape against the willingness of the deceased. At this juncture, the answers illustrated during the cross examination of the PW1, PW2 and PW3, assumes significance.

30. I find that there is no iota of evidence to substantiate the charges under Section 376 of IPC. Police have not carried out any investigation in support of the charges under Section 376 IPC.

31. From the evidence of PW.5 Dr.Vijayakumar and PW.11



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Dr.Saravanan, the percentage of the burn injuries on the face and the description of the injured at the time of the admission and at time of the time of dying declaration also caused serious doubts, as to the contents of the dying declaration said to have been recorded by the PW.9 Judicial Officer. It remains to be stated that both the Doctors have admitted that at the time of recording of the dying declaration, the Investigation Officer was admittedly present.

32. The case of the prosecution is that the accused person has committed rape against the will of the deceased Janaki prior to two months to the date of commission of the suicide. On the point of commission of the suicide, the trial Court has stated that she died due to the self immolation and accordingly, held that it is a suicide. At this juncture, it remains to be stated that the Ex.P1 observation mahazar and Ex.P13, rough sketch does not indicate the place of the alleged occurrence of the offence under Section 306 IPC.

33. This Court pain to note that the investigation has been done in such a lackadaisical manner. In the rough sketch, the house where she has committed suicide was noted. For the reasons best know, the investigation officer has not entered into the alleged place of the



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occurrence Viz., the room where the said Janaki is said to have committed suicide by self-immolation. During the cross examination, PW.12 & PW.13 have categorically admitted that they have not seized any material that is alleged to have been used for setting herself ablaze.

34. In a normal circumstances, a cane containing balance of the kerosene or kerosene or match stick or burnt saree could be placed and seized by the investigation officer for the appreciation of the evidence. For the reasons best known, no such materials have been placed before this Court. The evidence of the Medical Officer does not indicate that a smell of kerosene was found on the body of Janaki at the time of admission also assumes significance.

35. The elder brother and younger brother of the deceased Viz., PW.1 & PW.3 respectively and her mother PW.2 has categorically admitted in the cross examination that there is a previous enmity between the accused and husband of the deceased, Selvaraj. The PW.12 & PW.13 have not collected any material objects related to rape as well as to alleged suicide assumes significance.

36. Going by the books on the medical jurisprudence, the rule as per the corroboration must be kept in the mind of the judge and ordinarily



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be required in the case of the women having obtained majority. In the instant case, there is no positive evidence to give an indication that the victim was subjected to the alleged offence of rape. No doubt in the prosecution case that she committed suicide by pouring kerosene. No material has been seized from the scene of crime. The scene of crime was not placed before the Court by way of rough sketch. What was placed before the Court is the topography of the house where she said to have committed suicide. The Doctors have also not indicated any smell of the kerosene or petrol as the case may be. Hence, I find that in the absence of such indication it is hard to believe that the accused has committed the offence of rape as defined under Section 375 of IPC, which is punishable under Section 376 of IPC.

37. In view of the discussions in the preceeding paragraphs, this Court entertains a doubt as to the line of the investigation as projected before this Court. The said investigation appears to be fault on many aspects as indicated supra. This Court also noticed that the learned Public Prosecutor before the Sessions Court has stated that the husband of Janaki (Selvaraj (LW.1)) was not examined on the side of the prosecution due to the reason that the accused threatened him and further



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seems to have stated that at the time of the trial, he was present before the Court, however, due to threatening of the accused, he went off without giving evidence and also vacated the house along with his children and his whereabouts is not known.

38. Per contra, learned Senior Counsel appearing for the appellant would contend that the main witness Selvaraj was not examined on the side of the prosecution and he was dispensed with by the prosecution.

39(a) In view of the controversy surrounding on the non-examination of the said Selvaraj, this Court has called for the report from the learned Sessions Judge. On perusal of the material papers produced by the learned Sessions Judge, I find that there is no such memo being filed by the learned Public Prosecutor before the Sessions Judge as could be seen from the endorsement made by the concerned Sessions Judge on 07.05.2015.

(b) Witness summons were ordered to be issued to LW1 to LW.9 for scheduling the date of recording evidences on 01.06.2015. LW.10 to LW.18 scheduled for evidence on 02.06.2015. On 01.06.2015, PW1 was examined and Ex.P1 was marked. On 02.06.2015, PW.5 to PW.7 were examined and Ex.P2 to Ex.P.5 were marked. On the subsequent hearing



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on 16.06.2015, PW.8 to PW.10 were examined and Ex.P6 to Ex.P11 were marked and thus, I find that there is no such endorsement or memo for non examination of the said Selvaraj being filed before the learned Magistrate. When the recording of evidence is in the month of June 2015, arguments were taken on October 2016 and thus, I find that the contention raised by the learned Senior Counsel appearing for the appellant/accused found to have force.

40. In the immaterial papers of the lower Court records sent by the learned Sessions Judge, I find that, a report was issued by the VAO that the person is not residing in the said place, the period referred to was even before the recording of the evidence of PW.1 and hence, I find that the observations made by the learned Sessions Judge at paragraph No.21 in S.C.No.328 of 2014 that, at the time of trial, the said Selvaraj was present before the Court, but due to the threatening of the accused, he went off without giving an evidence, is only an oral assertion by the learned Public Prosecutor without any substance and it appears that the learned Sessions Judge has got swayed by the submissions and erroneously laid the conviction.

41. It remains to be stated that even as per the VAO report, he has



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already vacated the said place before the commencement of the Trial.

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Hence, the reason assigned by prosecution for the non-examination of the material witnesses, the said assertion made by the said learned Public Prosecutor for non-examination of the Selvaraj, it appears to be only an after thought adopted by the Investigation Officer at the time of the argument. On the submissions made by the then learned Public Prosecutor before the Sessions Court without any substance, even without verifying the back records, it appears that the learned Sessions Judge got swayed by the submissions and proceed to lay the conviction, erroneously.

42. Whether the said Selvaraj is a material witness and non-examination of the material witness is fatal to the prosecution is yet another point which is discussed here below.

43. The said Selvaraj is the husband of the Janaki. It was a love affair between the parties and they begotten three children. It is the specific evidence of the PW.1/brother of the victim that he along with Selvaraj went out for taking some amount on interest. While returning home, they found smoke coming out of the house of the victim and the PW.1 and the said Selvaraj broke open the door and went inside to rescue



the victim.

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44. When PW.1 brother of the victim reached the victim's home, the neighbours who attended the victim doused the fire. Contradictory to this statement, PW.1's deposition stated that the victim's husband was inside the house attempting to douse the fire with bed-sheets and PW.1 has also poured water to douse the fire. However the prosecution failed to secure the victim's husband, the complainant, as a witness who was present at time of the occurrence.

45. PW.1 has stated that the victim is his sister whose husband Selvaraj has given complaint before the Police. Contradictory to this, the complaint was recorded by the prosecution from the victim as per prosecution. The PW.1's stated that the signature of the PW.1 was obtained by the police in blank papers at the Hospital and the police station and the police officials drafted as per their wishes. PW.1 further stated that there were differences of opinion between the victim and her husband.

46. At this juncture, I find that, in view of the evidences of the private prosecution witnesses, who are the relatives of the deceased (PW.1, PW.2 and PW.3) and the specific evidence of PW1/brother and



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PW.5 Dr.K.Vijayakumar that the Selvaraj accompanied the victim to the hospital, is a material witness to speak about the alleged fact. The private prosecution witnesses have categorically admitted that there is a strain relationship between the victim and the said Selvaraj. PW.2/Mother has further stated that there was difference of opinion between the victim and her husband. PW.2 was attending the victim till the death of the victim in the hospital. It remains to be stated that she has not whispered anything regarding the alleged occurrence. The victim has never revealed anything about the appellant/accused regarding any occurrence assumes significance.

47. It is the further evidence of PW.2 that during the treatment, no persons have come and recorded any statement also assumes significance and creates a great doubt on coming into the existence of the dying declaration. It is her specific evidence that when her daughter got treatment at Government Hospital as inpatient, she has not spoken to any body. The evidence of PW.5 Dr.K.Vijayakumar and the investigation officer and the alleged recording of the statement of the investigation officer with regard to the Dr.K.Vijayakumar PW.5 and various material contradiction that has been elicited in the cross examination by the



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Investigation officer extracted supra in Paragraphs.22 & 23 appears to have been totally over-looked by the learned Sessions Judge.

48. Recording of the answers elicited in the cross-examination of PW.5 Dr.K.Vijayakumar, with PW.13 Investigation Officer, I find that coming into the existence of the dying declaration, which is said to have been recorded in the presence of the investigation officer causes serious doubt as to the genuineness of the Ex.P10 dying declaration and hence, in view of the several suspicious circumstances surrounding Ex.P10 dying declaration, I find that it is totally unsafe to rely upon the same.

49. In the decision rendered in *State of Himachal Pradesh Vs. Gian Chand* reported in (2001) 6 SCC 71, the Hon'ble Apex Court has held that:

(a) non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be.

(b) The charge of withholding a material witness from the Court levelled against the prosecution should be examined in the background of facts and circumstances of each case so as to find whether the witnesses were available for being examined in the Court and were yet withheld by



the prosecution.

(c) The Court has first to assess the trustworthiness of the evidence adduced and available on record. If the Court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be other witnesses available who could also have been examined but were not examined.

(d) However, if the available evidence suffers from some infirmity or cannot be accepted in the absence of other evidence which tough available has been withheld from the Court then the question of drawing an adverse inference against the prosecution for non-examination of such witnesses may arise.

50. From the above said judgment, I find that the said Selvaraj, husband of the victim is a material witness and non-examination of the said material witness is fatal to the prosecution in view of the fact that there are so many suspicions theory and as an after thought, submissions appears to have been made by the learned Public Prosecutor for the non-examination of the said Selvaraj also assumes significance.

51. And hence, this Court holds that the prosecution has not proved coming into the existence of the Ex.P.10, material contradiction



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between the medical witnesses and the investigation officer, material contradiction between the private prosecution witnesses PW1, PW2, PW3, PW4 with the PW.13 Investigation officer.

52. In view of the discussions in the presiding paragraphs, this Court finds that even going by the statement made by the deceased Janaki, she has stated that, she developed an apprehension that as the returning of the husband and her brother is getting delay that they might have been attacked at the hands of the accused and hence, she committed suicide. It reflects that she is a hyper sensitive women and it remains to be stated that even under Ex.P3 complaint, which was recorded at the earliest point of time. It is her own action not at the instance of the accused assumes significance.

53 (a). This Court is of the considered view that the prosecution has not proved the charges beyond reasonable doubt, besides there is no positive evidence for the alleged fact that she has committed suicide and no material has been seized from the alleged scene of crime.

(b) No rough sketch was placed before the Court to give details about the place of occurrence for the offence under Section 306 IPC and the alleged scene of occurrence for the offence under Section 376 IPC



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Viz., Uppu odai.

(c) No observation mahazar and no rough sketch have been placed before the Court. No material objects said to have been seized from the alleged scene of occurrence for the offence under Section 306 of IPC.

(d) Material contradiction between the medical witnesses with the police witnesses and also material contradiction between the private prosecution witnesses with the investigation officer. Hence, I find that it is totally unsafe to believe the prosecution theory and hence, the theory of the prosecution has not been proved beyond reasonable doubt, by operation of law, benefit of doubt goes to the accused.

54(a). The defence theory that has been projected during the cross examination of the prosecution witness is that there is a previous enmity between the accused person and the Selvaraj/husband of the Janaki. Selvaraj sold his property to one Annamalai on condition that, if he wants to dispose of the property, it should be sold to him only. But contrary, the purchaser Annamalai sold the property to accused and hence, the Selvaraj demanded Rs.50,000/- from the accused, however, the accused gave only Rs.5,000/- as a commission for the real estate and hence, there was a previous enmity between the Selvaraj and the accused person. Due to the



said previous enmity, a police case has been foisted against Selvaraj, husband of the deceased.

(b)The existence of the said previous enmity has been admitted by PW.1 to PW.3 as extracted supra. It is also to be noted that they admitted that the Selvaraj often picked up quarrel with Janaki and due to the quarrel only, she committed suicide and the accused has nothing to do with the alleged crime.

55. The only evidence that prosecution is relying upon is the disclosure statement of the deceased regarding alleged rape against the accused is that the victim has disclosed the same to her husband Selvaraj. However, Selvaraj was not examined. Though, PW1 & PW3, brothers of the deceased and PW2, mother of the deceased have accompanied and stayed with her for the five days of treatment, nothing was whispered by the victim to the relatives assumes significance, especially, PW2 mother has not whispered about any alleged rape on the body of the said Janaki. It remains to be stated that, even as per the complaint and the dying declaration, her brother PW1 along with her husband (non-examined witness Selvaraj) went to gather some amount from the general public. As there was a delay in their returning home, she entertained an



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apprehension that they must have suffered some kind of assault in the hands of the accused and she got hurt by the feeling that she was not faithful to her husband, who got married after a period of love and hence, she committed suicide and hence, whether the accused abetted her to commit suicide is not been established.

56. In view of the above findings, this Criminal Appeal is allowed and the conviction and sentence passed in S.C.No.328 of 2014 dated 10.11.2016 on the file of learned Sessions Mahila Judge, Salem is hereby set aside and the appellant/accused is set at liberty and they are exonerated from the charges framed against them and the bail bond executed by them shall stand cancelled.

29.09.2023

mpl

Index:Yes/No

Speaking Order:Yes/No

Neutral Citations: Yes/ No

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1. The Sessions Judge, Mahila Court, Salem.
2. The Inspector of Police
Karipatti Police Station
Salem.
3. The Public Prosecutor,
High Court, Madras.



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RMT.TEEKAA RAMAN,J.

mpl/nvi

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29.09.2023