



Crl.R.C.(MD)No.543 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.03.2023

CORAM

THE HON'BLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.R.C.(MD)No.543 of 2016

Selvam

... Petitioner

Vs.

State: The Inspector of Police
Sivagangai All Women Police Station,
Sivagangai District.
(Crime no. 7/ 2009)

... Respondent

PRAYER : Criminal Revision filed under Section 397 and 401 of the Criminal Procedure Code, to call for the records to set aside the order passed in C.A.No.3 of 2012 dated 27.07.2016 on the file of the learned Fast Track Mahila Court, Sivagangai in S.C.No.390 of 2009 on the file of the Asst. Sessions Judge / Chief Judicial Magistrate, Sivagangai.

For Petitioner : Mr.C.Senthil Murugan

For Respondent : Mr.K.Sanjai Gandhi
Government Advocate (Crl. Side)



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ORDER

This Criminal Revision Case has been filed to set aside the order passed in C.A.No.3 of 2012 dated 27.07.2016 on the file of the learned Fast Track Mahila Court, Sivagangai, confirming the judgment in S.C.No.390 of 2009 on the file of the Asst. Sessions Judge / Chief Judicial Magistrate, Sivagangai.

2.The case of the prosecution is that on 14.09.2009 at about 02.00 pm., when the victim, who is mentally retard woman, was in her house, the petitioner entered into her house and raped her. On receipt of the complaint, the respondent police registered a case in Cr.No.7 of 2009 for the offence punishable under Sections 294(b), 323, 376 IPC. After completion of investigation, the respondent filed the final report and the same has been taken on file in S.C.No.390 of 2009 by the learned Assistant Sessions Judge/Chief Judicial Magistrate, Sivagangai. Before the trial Court, the prosecution had examined P.W.1 to P.W.13 and marked Ex.P.1 to Ex.P.9. On the side of the accused, D.W.1 was



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examined and Ex.D1 to Ex.D3 were marked. On perusal of oral and documentary evidence, the trial Court found the petitioner guilty for the offence punishable under Section 376 IPC and sentenced him to undergo 7 years rigorous imprisonment and to pay a fine of Rs.500/- in default to undergo 6 months simple imprisonment. Aggrieved by the same, the petitioner preferred an appeal and the same was also dismissed by confirming the conviction and sentence imposed by the trial Court. Hence, the present revision.

3.The learned counsel appearing for the petitioner would submit that there was no eye witness to the alleged occurrence and a false case has been foisted as against the petitioner due to the previous enmity. Already P.W.5 lodged complaint as against the petitioner and he admitted his guilt and paid fine. Even according to the case of the prosecution, there was no evidence to prove the offence punishable under Section 376 IPC. The Doctor, who examined the victim, was examined as P.W.6 and she was categorically deposed that there was no injury on victim's private part and there is no sign of sperm. Therefore, the prosecution failed to prove the offence punishable under Section 376



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IPC. The petitioner can be convicted only for the offence punishable under Section 376 r/w 511 IPC, since there was an attempt to commit rape on the victim. He would further submit that only due to previous enmity, the present complaint foisted as against the petitioner.

4.The learned Government Advocate(Crl.side) appearing for the respondent police would submit that the father and mother of the victim was examined as P.W.1 and P.W.3 and when the heard the shout of P.W. 2, who is the neighbor and had seen the occurrence, immediately went to the house, where the occurrence had taken place. When P.W.2 entering her house, the petitioner laid on the victim and committed rape. She also stated that there was bite mark on the victim's breasts. It is also corroborated by the evidence of Doctor, who is examined as P.W.6. The occurrence had taken place on 14.09.2009 and the victim was subjected to medical examination on 16.09.2009. Therefore, there was no indication of availability of any sperm. Hence, both the Courts below rightly convicted the petitioner for the offence punishable under Section 376 IPC and it does not warrant any interference by this Court.



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5.Heard both sides and perused the materials available in the record.

6.According to the prosecution, on 14.09.2009 at about 02.00 pm., when P.W.2 entered into her house, she had seen that the petitioner was lying on the victim, who is mentally retard women aged about 32 years. Immediately after seeing P.W.2, the accused came out from the house and quarreled with her. It was informed to the parents of the victim, who are examined as P.W.1 and P.W.3. The petitioner is close relative of the victim. The father and mother of the victim were examined as P.W.1 and P.W.3. The son of the P.W.1 was examined as P.W.5. P.W.13 is the sister-in-law of the victim woman. Already there was previous enmity between both family members, in which, P.W.5 lodged complaint as against the petitioner herein. He admitted his guilty and paid fine, which were marked as Ex.D.1 to Ex.D3 by the petitioner. He also made statement under Section 313 Cr.P.C. It is necessary to extract the evidence of P.W.2, which read as follows:

“அ.சா.1ன் மகள் முத்துலட்சுமி மூளை வளர்ச்சி இல்லாத
பெண் அவரையும் தோரியும். 14.09.2009ம் தேதி திங்கள் கிழமை



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மதியம் 2 மணி இருக்கும் எனது 3 வயது குரந்தையை வீட்டில் விட்டுவிட்டு பக்கத்தில் முள் ஒடித்துக்கொண்டிருந்தேன். என் கணவர் கடைக்கு போய்விட்டார். என் மகள் வீட்டிற்குள் இருந்ததால் எனது வீடு திறந்தே இருந்தது. கொஞ்ச நேரம் கழித்து அழுதுகொண்டே ஓடிவந்தது. நான் உடனே என் வீட்டிற்கு வந்து உள்ளே போனேன். அங்கு சேல்வமும் முத்துலெட்சுமியும் இருந்தனர். முத்துலெட்சுமி கீழே படுத்தபடியே இருந்தார். அவருக்கு பாவாடை கழன்றிருந்தது. சேல்வமும் முத்துலெட்சுமியும் நேரடியாக படுத்துருந்தது மாதிரி இருந்தது. என்ன கண்டதும் சேல்வம் எழுந்துவிட்டார். முத்துலெட்சுமி எதுவும் தெரியாமல் படுத்துக்கிடந்தார். எனக்கு திக் என்றாகிவிட்டது. நான் மூளை வளர்ச்சி இல்லாத பிள்ளை என்ன செய்வது என்று ஓடிவந்துவிட்டேன்.”

In her cross-examination she also deposed that when she was entered into the house, the victim girl coming out from the house. In her chief examination, she has stated that when she was entered into the house, the petitioner was committed the offence of rape on the victim. In order to corroborate this allegation, the prosecution examined the Doctor as P.W. 6, who deposed as follows:-

“பரிசோதனைக்கு உட்படுத்த பெண்ணுடன் வந்த இன்னொரு பெண் பக்கத்துவீட்டுக்கார பெண் அவரை பக்கத்து வீட்டு நபர் மதியம் 2 மணிக்கு வன்புணர்ச்சி கொண்டதாக என்னிடம் சொன்னார். நான் பரிசோதித்த போது நான் பார்த்தபோது குட்டையாக சத்து கம்மியாக சிந்திக்கும் திறன் குறைவாக பார்வைக்கு தென்பட்டார். உடல் வலிமை இழந்தும் காணப்பட்டார். நான் பரிசோதித்து பார்த்த போது 2



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மார்பகங்களிலும் பற்களால் கடிக்கப்பட்ட காயங்கள் தென்பட்டன. நிழலில் என்ற பகுதியை சுற்றி காயங்கள் காணப்பட்டன. (முளை காம்பு) அவ்வாறு கடிக்கப்பட்ட காயங்கள் மனித பற்களால் கடிக்கப்பெற்றது என்று காணப்பட்டது. அந்த பெண்ணை கீழே படுக்கவைத்து பரிசோதித்த போது வயிற்று பகுதியை பரிசோதித்த போது பிரச்சினை ஒன்றும் தெரியவில்லை. பெண்ணுறுப்பை பரிசோதித்தபோது பெண் உறுப்பு இயல்பான நிலையில் இருந்தது. கண்ணித்திரை இல்லாமல் இருந்தது. பெண் உறுப்பை பரிசோதிக்கையில் 2 விரல்கள் நுழையக்கூடிய நிலை இருந்தது. மற்ற பெண் உறுப்புகள் யூட்டரஸ் சாதாரண நிலையில் அளவும் சாதாரண நிலையில் இருந்தது. கற்பப்பையில் இருந்து (வெஜினேல்) எம்மியர் எடுக்கப்பட்டது. விந்து எதுவும் காணப்படவில்லை. பஜ்ஜெல் எரித்திலியல் செல்கள் காணப்பட்ட உடலில் மற்ற பகுதிகளில் எந்த காயங்களோ தனம்போ இல்லை”.

7. Therefore, there was no injury on the victim's private part and there was no evidence for availability of any sperm. However, there was bite mark on her breasts. Now, reading of evidence of P.W.2 and P.W.6 cumulatively clear that there was an attempt by the petitioner to commit rape on the victim. When P.W.2, entered into the house, immediately the accused got up and ran away from the house. At this juncture, P.W.1 and P.W.3 also seen him. That apart, already there was previous enmity between both family members. Further, medical evidence did not support the charge for the offence under Section 376 IPC. However,



there was an attempt and as such, the petitioner can be convicted for the offence punishable under Section 376 r/w 511 IPC. It is relevant to extract Section 511 IPC, which read as follows:-

511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment —

Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both.

8.The Honourable Supreme Court of India held in a case of ***State of Madhya Pradesh Vs. Mahendra alias Golu (Criminal Appeal No. 1827 of 2011)***, that “in every crime, there is first, *mens rea* (intention to commit), secondly, *preparation to commit it* and thirdly, *attempt to*



commit it. If the third stage, that is, 'attempt' is successful, then the crime is complete. If the attempt fails, the crime is not complete, but the law still punishes the person for attempting the said act. 'Attempt' is punishable because even an unsuccessful commission of offence is preceded by mens rea, moral guilt, and its depraving impact on societal values is no less than the actual commission". Further, the Honourable Supreme Court of India held that "sexual intercourse with a woman below 16 years, with or without her consent, amounted to 'rape' and mere penetration was sufficient to prove the such offence. The expression 'penetration' denotes the ingress of the male organ into the female parts, however slight it may be. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little".

9. In the case on hand, the prosecution failed to prove the penetration. However, the prosecution proved that the petitioner had attempted to commit rape on the victim. Before amendment of offence



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punishable under Section 375 IPC, the conviction cannot be sustained for the offence punishable under Section 376 IPC and punishable for the offence under Section 375 IPC for attempt to commit rape. Therefore, both the Courts below erred in holding that the petitioner had committed rape on the victim and sentenced him to undergo 7 years rigorous imprisonment and it is liable to be modified for the offence punishable under Section 376 r/w 511 IPC.

10.In the result, this criminal revision case is partly-allowed and the conviction and sentence imposed by both the Courts below for the offence punishable under Section 376 IPC is set aside. The petitioner is convicted for the offence punishable under Section 376 r/w 511 IPC. The petitioner is sentenced to undergo three years rigorous imprisonment for the offence punishable under Section 376 r/w 511 IPC. The respondent is directed to secure the petitioner for the remaining period of sentence.

21.03.2023

NCC : Yes / No
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To

- 1.The Fast Track Mahila Court,
Sivagangai.
- 2.The Asst. Sessions Judge / Chief Judicial Magistrate,
Sivagangai.
- 3.The Inspector of Police,
Sivagangai All Women Police Station,
Sivagangai District.
- 4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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G.K.ILANTHIRAIYAN,J.

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