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IN THE HIGH COURT OF JUDICATURE AT MADRAS

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CORAM

THE HON'BLE DR.JUSTICE S.TAMILVANAN
and
THE HON'BLE MR.JUSTICE C.T.SELVAM

Criminal Appeal No.13 of 2013
and
M.P.No.1 of 2015

Ayyanar
S/o.Elumalaiyan

... Appellant/Accused

-Vs-

State represented by
The Inspector of Police,
R-6, Kumaran Nagar Police Station,
Chennai.
Crime No.72 of 2009

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Criminal Procedure Code against the judgment dated 19.12.2012 in S.C.No.181 of 2010 on the file of learned Sessions Judge, Mahalir Neethi Mandram (Mahila Court), Chennai.

For Appellant : Mr.P.Kumaresan

For Respondent : Mr.V.M.R.Rajentren
Additional Public Prosecutor

J U D G M E N T

(Judgment of the Court was made by C.T.SELVAM, J.)

This appeal arises against judgment of the learned Sessions Judge, Mahalir Neethi Mandram (Mahila Court), Chennai, in S.C.No.181 of 2010 dated 19.12.2012, convicting the appellant for offences under Sections 448, 506(i) and 376 (2)(f) IPC and sentencing him to undergo 1 year R.I. and fine of Rs.1,000/- i/d 2 months S.I. for offence u/s.448 IPC, 2 years R.I. and fine of Rs.2,000/- i/d 2 months S.I. for offence u/s.506(i) IPC and life imprisonment and fine of Rs.10,000/- i/d 6 months S.I. for offence u/s.376(2)(f) IPC.



2. The case of the prosecution is that on 25.01.2009, PW-1, mother of the victim/PW-2, went to work along with her elder daughter leaving PW-2 and her brother/PW-3 at home. At about 06.00 p.m., while PW-2 was alone in her house, the accused forced himself upon her and raped her. PW-3, who was playing outside, on hearing PW2's screams, rushed home. On seeing PW-3, the accused threatened him and PW-2 of doing away with them if they dared to inform anyone. On coming to know of the incident, PW-1 questioned the accused, but he did not respond. Since PW-4/ father of the victim was out of station on the date of occurrence, PW-2 preferred a complaint [Ex.P1], after his return, before the respondent police on 30.01.2009 at 06.00 a.m. Case in Crime No.72 of 2009 for offences u/s.341, 448, 506(i) and 376(2)(f) IPC on the file of the respondent was registered. PW-10, Inspector of Police, took up investigation on the same day. He went to the place of occurrence and prepared observation mahazar [Ex.P4] and rough sketch [Ex.P14] in the presence of PWs.6 and 7. He examined PWs.1 to 3 and recorded their statements. Thereafter, he constituted a special team to search for the accused. At about 08.00 a.m., he arrested the accused near Rathina Bhavan Hotel Bus Stop, Kasi Theatre, Chennai and recorded his confession statement in the presence of PW-5 and another. On the basis of the confession statement of the accused, he went to the house of the accused's brother and recovered a jeans pant and full-hand shirt [M.Os.1 and 2] in the presence of the same witnesses and prepared seizure mahazar [Ex.P3]. He intimated the arrest of the accused to his relatives. Thereafter, he took the accused to the police station, conducted physical search and then produced him before XXIII Judicial Magistrate, Saidapet. On the same day, he sent a requisition [Ex.P15] to Judicial Magistrate seeking permission to send both the accused and PW-2 for medical examination. Obtaining permission, he forwarded the accused for medical examination to the Government Hospital on 31.01.2009. He forwarded PW-2 for medical examination through women Inspectors. He forwarded the clothes recovered from the accused to Court under Form-95. He examined PWs.4 to 9 and three others and recorded their statements. On his transfer, the succeeding Inspector of Police filed a charge sheet informing commission of offences u/s.341, 448, 506(i) and 376(2)(f) IPC.

3. To substantiate its case, the prosecution examined PWs.1 to 10, and marked Exs.P1 to P15. None were examined on behalf of the appellant/accused. However, two exhibits were marked. On questioning under Section 313 Cr.P.C., the accused denied the charges.



4. Learned trial Judge, on appreciation of the evidence adduced by the prosecution, has found the accused guilty, convicted him for offences under Sections 448, 506(i) and 376 (2) (f) IPC and sentenced him to undergo 1 year R.I. and fine of Rs.1,000/- i/d 2 months S.I. for offence u/s.448 IPC, 2 years R.I. and fine of Rs.2,000/- i/d 2 months S.I. for offence u/s.506(i) IPC and life imprisonment and fine of Rs.10,000/- i/d 6 months S.I. for offence u/s.376(2) (f) IPC. Hence, the present appeal.

5. Heard Mr.P.Kumaresan, learned counsel for appellant and Mr.V.M.R.Rajentren, learned Additional Public Prosecutor. Perused the materials available on record.

6. Learned counsel for appellant submitted that appellant/accused wrongly had been implicated owing to enmity. To support such contention, learned counsel submitted that though the prosecution has alleged an occurrence of 25.01.2009, the complaint had been preferred with very much delay on 30.01.2009. Learned counsel submitted that none of the neighbours nor the persons to whom the occurrence earlier was informed by PW-1/mother of the victim, had been examined. Though PW-1 had spoken to taking PW-2/victim to hospital upon noticing her suffering bleeding, the Doctor, who examined PW-2 at Saidapet Government Hospital, had not been examined. The blood stained clothes of PW-2/victim had not been marked. Learned counsel also made an attempt to bring into application the Tamil Nadu Borstal Schools Act contending that appellant/accused fell within the applicable age group i.e., 16 to 21, since the confession statement of the appellant/accused [Ex.P2], seizure mahazar [Ex.P3], letter addressed by learned XXIII Metropolitan Magistrate, Saidapet, Chennai, to the Professor and Police Surgeon, Government General Hospital, Chennai [Ex.P6], Certificate of age issued by PW-8, Dr.Vedanayagam [Ex.P8] and requisition letter of the Inspector of Police, R-6 Kumaran Nagar Police Station, Chennai [Ex.P15], all inform the age of appellant/accused to be 20 at the time of occurrence. Submitting as above, learned counsel contended that the prosecution has failed to prove its case beyond reasonable doubt.

7. Heard learned Additional Public Prosecutor on the above submissions.

8. PW-2/victim, though a child, clearly has deposed to the traumatic experience undergone by her. PW-3/brother of the victim, has also spoken to rushing to his house upon hearing



the screams of PW-2 and of having witnessed the occurrence. They both have deposed to threat issued by appellant/accused against their disclosing his wrongful act. PW-1/mother of the victim, had spoken to finding PW-2 suffering bleeding and of having taken her to hospital. She has explained that out of shame, she had informed the Doctor that PW-2 was suffering from fever. PW-1 had explained the delay in preferring the complaint by stating that as her husband was away, she waited his return. Given the nature of the case, such conduct is quite natural. The prosecution case finds support in the evidence of PW-9, Dr.Geethanjali, who examined PW-2/victim. She has informed that PW-2 sexually was abused.

9. We are unable to appreciate the contention of learned counsel for appellant on the applicability of the Tamil Nadu Borstal Schools Act. Learned counsel relies on random entries regards age in the prosecution exhibits. That Ex.P8, issued by PW-8, Dr.Vedanayagam, informs the age of appellant/accused to be between 20 and 22 as on 02.02.2009, is neither here nor there. It is for the appellant/accused to positively establish the applicability of Tamil Nadu Borstal Schools Act by adducing acceptable evidence regards his age. The appellant/accused has failed to do so.

10. The prosecution case suffers from no infirmities and the conviction of appellant/accused is well-founded. However, the trial Court has convicted appellant/accused for offence u/s.376(2)(f) IPC. The occurrence was of the date 25.01.2009 and the law prior to amendment under Act 13 of 2013, which came into force on 03.02.2013 is applicable. 376(2)(f) IPC made punishable an offence of rape on a woman when she is under twelve years of age. Except for adequate and special reasons which were required to be mentioned in the judgment, the offence was punishable with rigorous imprisonment for a term which 'shall not be less than ten years but which may be for life and shall also be liable to fine'. To constitute an offence u/s.376(2)(f) IPC, the victim would have to be proved to be under 12 years of age. The evidence of PW-1/mother of the victim, only informs that at the time of occurrence PW-2/victim was studying in the third standard. PW-2/victim, herself had deposed to her having been in the third standard and being of seven years of age as on the date of occurrence. Doctor, PW-9, had, under EX.P11, opined that the age of the victim was between 8 and 10 as on 02.02.2009. This Court only has the opinion of PW-9, unsupported by an ossification test. There is no material to inform why PW-9 was of such opinion. In the absence of any document such as a birth or school certificate in support of PW-2/victim's age, it would be



erroneous to accept the victim's age as 7 at the time of occurrence merely on her say so. Again, to inform that PW-2/victim would have been under 12 years of age on the date of occurrence since she was then a student of third standard, would be in the realm of presumption. It is the requirement of the law that the age of the victim be proved to be under 12 years as on the date of occurrence to attract the application of Section 376(2)(f) IPC (as earlier stood). However much we may be tempted to do so, judicial discipline would require us not to presume a factual position on probabilities. Doing so in the instant case would visit the appellant, who merely was 22 years of age as on the date of occurrence, with grave consequences. We hold that the prosecution has failed to prove the commission of offence u/s.376(2)(f) IPC (as earlier stood) and would hold the appellant/accused guilty of offence u/s.376 simpliciter.

11. While upholding the conviction of appellant/accused for offences u/s.448 and 506(i) IPC, we would convict the appellant/accused of offence u/s.376 simpliciter instead of offence u/s.376(2)(f) IPC and impose a sentence of seven years R.I. and fine of Rs.10,000/- i/d. 3 months S.I. in respect of such offence. The sentence of imprisonment and fine imposed by trial Court in respect of offences u/s.448 and 506(i) IPC shall stand confirmed. Sentences to run concurrently.

This Criminal appeal, accordingly, is ordered. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

gm

To

1. The Sessions Judge,
Mahalir Neethi Mandram (Mahila Court),
Chennai.
2. The Inspector of Police,
R-6, Kumaran Nagar Police Station,
Chennai.



3. The XXIII Judicial Magistrate,
Saidapet.

4. The Chief Judicial Magistrate,
Saidapet.

5. The Superintendent,
Central Prison, Puzhal.

6. The Public Prosecutor,
High Court, Madras.

+1cc to Mr.P.Kumaresan, Advocate, S.R.No.62406

Criminal Appeal No.13 of 2013

AR CO
CA(23/11/2015)