

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 15.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE **S.NAGAMUTHU**
and
THE HONOURABLE MR.JUSTICE **V.BHARATHIDASAN**

Crl.A.No.750 of 2015

Vanangamudi ... Appellant

vs.

The State,by
The Inspector of Police,
Karamadai Police Station,
Coimbatore District.
(Crime No.383 of 2013)
Respondent

...

Criminal appeal preferred under Section 374(2) Cr.P.C.,
against the judgement dated 20.03.2015 passed by the learned
Sessions Judge, Magalir Court, in S.C.No.23 of 2014.

For Appellant : Mr.A.R.Nixon

For Respondent : Mr.M.Maharaja,Addl.P.P.

JUDGMENT

(Judgement of the Court was delivered by **V.Bharathidasan, J.**)

The appellant in this appeal is the sole accused in
Sessions Case No.23 of 2014, on the file of the learned Sessions
Judge, Magalir Court. He stood charged for offence punishable

under Sections 376(i) of IPC and Section 3(a) r/w 4 of the Protection of Children from Sexual Offences Act, 2012. The Trial Court, by Judgement dated 20.03.2015, convicted the accused for offence under Section 376(i) IPC and sentenced him to undergo life imprisonment and also imposed a fine of Rs.10,000/-, in default, to undergo simple imprisonment for six months and convicted him for the offence under Section 506(ii) IPC and sentenced him to undergo rigorous imprisonment for seven years and also to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for six months. Challenging the above said conviction and sentence, the appellant/accused is before this Court with this appeal.

2. The case of the prosecution, in brief, is as follows:

(i) The victim girl one Saraswathi is a mentally retarded and her mental maturity at the time of occurrence was only comparable to a girl aged six years. She could not able to speak properly. She was residing at a Mentally Retarded Home at Kuttaiyur. She was working as Cook Assisting the accused for preparing food. P.W.1 was the President of a People Welfare Society. On 06.10.2013, around 40 members of the said Society went to the Mentally Retarded Home to distribute food and other accessories to the children housed there. At the time, the victim girl informed by sign to P.W.3 one of the members of the Society,

that the accused has sexually assaulted her. The person who was in charge of the home was not willing to give a complaint, hence, P.W.1 being the president of the said Society has given a complaint (Ex.P1) before the respondent police.

(ii) P.W.11, Special Sub Inspector of Police attached to the respondent police station, on receipt of the complaint, registered a case in Crime No.382 of 2013 for the offence under Section 376 of IPC r/w Section 3(a) of the Protection of Children from Sexual Offences Act, 2012, prepared FIR (Ex.P10) and sent the copy of the same to the higher officials.

(iii) P.W.12, Inspector of Police, working in the respondent police, on receipt of the FIR commenced the investigation, proceeded to the scene of occurrence, prepared Observation Mahazar Ex.P2, drew Rough Sketch Ex.P12, examined the witnesses and recorded their statements. He sent the victim girl to the Government Hospital for medical examination. On 09.10.2013, he arrested the accused and on such arrest, he voluntarily gave a confession, thereafter he sent him for medical examination. P.W.5, psychiatrist, on examination of the victim girl and assessed her age, and placed her at 6 years and obtained the IQ of 40 which fall into the category of moderate Mental retardation. Hence, the victim girl was sent to the Government Hospital, Mettupalayam for medical examination. P.W.9, Doctor,

examined the victim girl and he has given a certificate stated that hymen not intact and vagina easily admits two finger and she also found no external injuries. He has given a certificate Ex.P8. P.W.10, Doctor, working in the Medical College Hospital, Coimbatore, examined the victim girl, where, the victim girl told that the accused had intercourse with her for 4 or 5 times and on examination she also found the hymen was not intact and vagina easily admits two finger, she also found there is no evidence of external injuries in thighs and breast. He issued certificate Ex.P9. P.W.8, Doctor, working in the Medical College Hospital, Coimbatore examined the accused and issued report Ex.P7 and given certificate that he is potent. P.W.13 has examined the witnesses and recorded their statements and after completion of investigation, he filed the charge sheet.

3. Based on the above materials, the Trial Court framed charges as detailed above and the accused denied the same as false. In order to prove the case of prosecution, as many as 13 witnesses were examined and 12 documents exhibited and no material object was marked.

4. Out of the said witnesses examined, P.W.1 was the President of one People Welfare Society. He along with 40

members went to the Mentally Retarded Home, where the victim girl was working, to distribute the food and accessories. At the time, the victim girl informed P.W.3 by sign that the accused had sexually assaulted her many times. Immediately, P.W.1 contacted the authorities of the said home, but they refused to give any complaint. Hence, he himself went to the police station and lodged a complaint. P.W.2 is one of the members of People Welfare Society. He was witness to the Observation Mahazar Ex.P2. P.W.3 is also a member of the People Welfare Society and he was also the President of Women Self Help Groups. She along with other members of the Society went to the Home for distributing the food and accessories for children. At the time, the victim girl called her and informed by sign that the accused had sexually assaulted her. At the time, the accused threatened the victim. So, the victim girl was taken by P.W.3 to the place where the victim girl was sexually assaulted. When they requested the Home authorities to take necessary action, they refused to do so. Hence, they have lodged a complaint before the respondent police. P.W.4 is the victim girl. According to her, the accused has sexually assaulted her 4 or 5 times. P.W.5, the doctor, working in the hospital, ascertained the age of the victim girl between 20 and 22 years. P.W.6, Psychiatrist, examined the victim girl and given a certificate Ex.P5. He was of the opinion that on the IQ assessment, her mental age

was assessed at 6 years and arrived at the IQ of 40, which fall into the category of moderate Mental retardation. P.W.7 was witness to the observation mahazar and recovery of cloths worn by the victim girl. P.W.8, Doctor, examined the accused and gave a certificate that the accused is Potent. P.W.9, Doctor, working in the Medical College Hospital, Coimbatore, examined the victim and given his report Ex.P8. P.W.10, another Doctor, working in the Medical College Hospital, Coimbatore has examined the victim girl and given a certificate stating that the hymen was not intact and vagina easily admits two finger. She also found no external injuries. She has given a certificate Ex.P8. P.W.11 was the Sub Inspector of Police, attached to the respondent police, who registered the case, prepared FIR (Ex.P10) and sent the copy of it to the higher officials. P.W.12, Inspector of Police continued the investigation, examined the witnesses and recorded their statements and after completion of investigation, laid the charge sheet.

5. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. His defence was a total denial. The accused did not examine any witness and no document was marked on his side.

6. Having considered all the above materials, the Trial Court convicted the accused for the offences as stated in first paragraph of this judgment. Challenging the above conviction and sentence, the accused is before this Court.

7. We have heard Mr.A.R.Nixon learned counsel appearing for the appellant and Mr.M.Maharaja, learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

8. The learned counsel appearing for the appellant would submit that the accused is innocent and one Ramesh, who has promised to marry the victim, has only sexually assaulted the victim girl. He further submitted that there is a long delay in filing the first information report, and he further contended that that only in order to defame the name of the home, the present complaint has been lodged by P.W.1. He further submits that there was a contradiction between the certificate issued by the Doctors about the mental condition of the victim girl, and contended that as per the medical report, there was no external injury on the body of the victim, hence no symptoms for rape has been found. In such circumstances, he prays for allowing this appeal.

9. Per contra, the learned Additional Public Prosecutor would submit that the victim girl is a mentally retarded girl and she was also working under the accused, who exploited her dependency, sexually assaulted her. The victim herself clearly deposed to that extent and the medical evidence also corroborate the version of the prosecution. Hence, the prosecution clearly established the guilt of the accused and sought for dismissal of the appeal.

10. In the instant case, the victim is a mentally retarded girl. She was staying in the home for the mentally retarded and working as Assistant under the accused for cooking foods for the inmates. The victim was at the mercy of the accused. As per the evidence of victim girl, when P.Ws.1 to 3 and other members of the society went to the home for distributing food and accessories, the victim girl in her own way pointed out the acquisition figure on the accused and informed them that he has sexually assaulted her 4 or 5 times. They approached the authorities of the home for lodging a complaint, but they refused. Hence, P.W.1, the president of the People Welfare Society, lodged the complaint before the respondent police. The victim girl herself examined as P.W.4. In her evidence, she clearly stated that it is only the accused who

sexually assaulted her. In the cross examination, when it was put to her as to whether she was having an affair with one Ramesh, she categorically denied it. The evidence of the victim girl is also corroborated by the medical evidence. P.W.9, Doctor, working in the Government Hospital, Mettupalayam, examined the victim girl and given a certificate stating that the hymen of the victim girl was not intact and vagina easily admits two fingers and she also found no external injuries. P.W.10, another Doctor, working in the Government Hospital, Coimbatore also given the same opinion. So far as the mental condition of the victim girl is concerned, P.W.6, the psychiatrist, examined the victim girl and given a certificate Ex.P5 stating that the mental age was placed at 6 years, her IQ is also only 40 which fall into the category of Moderate Mental Retardation. A girl whose mental faculties are under developed cannot be said in law, have sexual intercourse with consent, as a mentally retarded person, she cannot legally give consent as held by the Hon'ble Supreme Court in **TULSHIDAS KANOLLKAR Vs. STATE OF GOA** reported in **[2003 (8) SCC 590]**, has held as follows:-

“Non-examination of some persons per se does not corrode vitality of prosecution version, particularly when the prosecutrix has, notwithstanding her mental deficiencies, withstood incisive cross-examination and pointed to the appellant as the perpetrator of the crime. The plea of consent is too shallow to even need detailed analysis or consideration. A

mentally challenged girl cannot legally give a consent which would necessarily involve understanding of the effect of such consent. It has to be a conscious and voluntary act. There is a gulf of difference between consent and submission. Every consent involves a submission but the converse does not follow, and mere act of submission does not involve consent. An act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in when the faculty is either clouded by fear or vitiated by duress or impaired due to mental retardation or deficiency cannot be considered to be consent as understood in law. For constituting consent, there must be exercise of intelligence based on the knowledge of the significance and the moral effect of the act. A girl whose mental faculties are undeveloped, cannot be said in law, to have suffered sexual intercourses with consent.

11. So far as the delay is concerned, the victim was in the home and she was not in a position to inform the same to any body. P.Ws.1 to 3 and other members of the People Welfare Society went to the Home and distributed food and accessories and at that time she informed them about the acts committed by the accused. Thereafter, P.Ws.1 and 2 requested the Home authorities to lodge a complaint, but they refused, hence they have given a complaint. Hence the question of delay in filing the complaint does not arise and the delay is also properly explained by the prosecution. At any event, the delay is not a mitigating circumstances for the accused when he involved himself in an offence of rape. When the victim girl herself has clearly pointed

out the accusing figure towards the accused and the medical evidence also corroborated the testimony of the victim girl, who is residing in the mentally retarded home and at the mercy of the accused, he exploited the vulnerable position of the victim and sexually assaulted her. Hence, we are of the considered view that it is this accused who has committed the offence of rape and the prosecution has clearly established that only this accused has committed the rape on P.W.4.

12. So far as the quantum of punishment is concerned, the accused is more than 60 years old and a poor man and he was working as Cook in the home and he is not able to pay the fine amount. Taking into consideration of the said circumstances, we are of the considered view that sentencing the accused to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.1000/- in default, to undergo rigorous imprisonment for four weeks for the offence under Section 376(i) IPC and sentencing him under go one year rigorous imprisonment and to pay a fine of Rs.500/- for the offence under Section 506(ii) IPC would meet the ends of justice.

13. In the result, the Criminal Appeal is partly allowed and the conviction and sentence imposed on the appellant in S.C.No.23 of 2015 dated 20.03.2015 on the file of the learned

Sessions Judge, Magalir Court, Coimbatore for an offence under Section 376(i) IPC is conformed however, the sentence is modified sentencing him to undergo rigorous imprisonment for 7 years and pay a fine of Rs.1000/- in default, to undergo rigorous imprisonment for four weeks for the offence under Section 376(i) IPC, and sentencing him undergo one year rigorous imprisonment and to pay a fine of Rs.500/- in default, to undergo rigorous imprisonment four weeks for offence under Section 506(ii) of IPC. Both the sentences are ordered to run concurrently. It is directed that the period of sentence already undergone by the appellant/accused shall be set off as contemplated under Section 428 Cr.P.C.

(S.N.J.,) (V.B.D.J.,)

15.07.2016

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To

- 1.The Sessions Judge,
Magalir Court,
Coimbatore.
- 2.The Inspector of Police,
Karamadai Police Station,
Coimbatore District.
- 3.The Public Prosecutor,
High Court, Madras.

S.NAGAMUTHU.J.,

and

V.BHARATHIDASAN.J.,

rrg

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