

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.08.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

and

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.272 of 2016

Aswath .. Appellant

- Vs -

State rep by Inspector of Police,
All Women Police Station,
Sathyamangalam,
Erode District.
(Cr.No.36 of 2015) .. Respondent

Prayer:- Appeal filed under Section 374 of the Code of Criminal Procedure against the judgment passed by the learned Sessions Judge, Magalir Neethi Mandram, Fast Track Mahila Court, Erode in Spl.S.C.No.12 of 2015 dated 31.08.2015.

For Appellant : Mr.A.Raghunathan,
SC for Mr.Ma.P.Thangavel

For Respondent : Mr.E.Raja
Additional Public Prosecutor

J U D G M E N T
सत्यमेव जयते

(Judgment of the Court was delivered by S.Nagamuthu, J.)

The appellant is the sole accused in Spl.S.C.No.12 of 2015 on the file of the learned Sessions Judge, Magalir Neethi Mandram, Fast Track Mahila Court, Erode. He stood charged for offence under Section 376(2) I.P.C. By Judgment dated 31.08.2015, the trial Court convicted him under the said charge and sentenced him to undergo imprisonment for life and pay a fine of Rs.5,000/- in default to under simple imprisonment for two years. Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

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

2.1. The accused approximately aged about 27 years is a resident of Thiginari village in Sathyamangalam Taluk at Erode District. P.W.2 a young girl aged 17 years is also a resident of the same village. The house of P.W.2 is situated five houses away from the house of the accused. The accused is already married, but he got no issues. P.W.2 claims that she had no relationship with the accused prior to 28.02.2015. According to her, on 28.02.2015, around 02.30 p.m. she was alone in her house watching the T.V. Programme. At that time, according to her, the accused entered into her house and bolted the doors from inside. Then, he pushed her down and removed her dress and then had sexual intercourse with her by force. She has further stated that when she did not cooperate with him, he slapped her on her cheek. He bite her on her lips and back of her chest but she did not sustain any injury at all. Shortly thereafter, her brother (P.W.5) arrived. She started sobbing out of pain both physically and mentally. On seeing P.W.5, the accused fled away from the scene of occurrence. P.Ws.2 and 5 did not disclose about the occurrence to anyone. Her father returned home on 02.03.2015 and then P.W.2 informed the same to him. P.W.2 thereafter took her to the police station where she made a complaint on 02.03.2015 at 01.00 p.m.

2.2. P.W.11 the then Sub Inspector of Police, on receipt of the said complaint (vide Ex.P1) registered a case in Crime No.36 of 2015 under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (vide Ex.P9). She then forwarded both the documents to Court and the same was received by the learned Magistrate at 09.05 p.m. on 02.03.2015.

2.3. P.W.13 the then Inspector of Police took up the case for investigation. He went to the place of occurrence at 02.00 p.m. and prepared an observation mahazar and a rough sketch in the presence of witnesses. Then, he examined P.Ws.1 to 5 and recorded their statements. Earlier, P.W.11 had recorded the statements of P.Ws.1 and 2 therefore, P.W.13 did not record any further statement from these two witnesses. He forwarded P.W.2 for medical examination. P.W.6 Dr.Senthilkumar examined P.W.2 on 04.03.2015. He opined that P.W.2 had completed 17 years of age but not completed 18 years of age. P.W.7 Dr.Thangachitra examined P.W.2 on 03.03.2015 at 10.15 a.m. and she found that the sexual organs of P.W.2 were fully grown up and matured. There were no external injuries on her body including her private parts. She collected the public hair for chemical examination. She found the hymen in the vaginal cavity of P.W.2 ruptured. Uterus was normal. She collected discharge from vagina for chemical examination. Such chemical examination revealed that there were no spermatozoa found both in the

vaginal discharge as well as in the public hair. P.W.7 finally opined that since the hymen was ruptured, she would have been subjected to sexual intercourse. Ex.P5 is her final opinion.

2.4. P.W.13 arrested the accused on the same day at 05.00 p.m. and forwarded him to Court for judicial remand. On 03.03.2015, the investigation was taken over by P.W.14. She again examined some witnesses. At her request, the learned Judicial Magistrate, Sathyamangalam recorded the statement of P.W.2 under Section 164 Cr.P.C. On completing the investigation, she laid chargesheet against the accused under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and under Section 376(2) of I.P.C.

2.5. The trial Court however chose to charge the accused only for offence under Section 376(2) I.P.C. The trial Court has assigned the reason for not framing charge under Section 4 of the Protection of Children from Sexual Offences Act, 2012 that the punishment prescribed for offence under Section 376(2) I.P.C. is higher than the punishment prescribed for offence under Section 4 of the Protection of Children from Sexual Offences Act, 2012. In this regard, we have to state that the approach of the trial Court, is not appreciable as the same is not legal. In our considered view, the trial Court ought to have framed an alternative charge under Section 4 of the Protection of Children from Sexual Offences Act, 2012 also. The accused denied the said charge under Section 376(2) of I.P.C.

2.6. In order to prove the case, on the side of the prosecution as many as 15 witnesses were examined and 14 documents were marked. X-rays taken to assess the age of P.W.2 has been marked as M.O.1 series.

2.7. Out of the said witnesses, P.W.1 is the uncle of P.W.2. He has stated about the preparation of the observation mahazar and the rough sketch at the place of occurrence. P.W.2 the victim has stated that on the date of occurrence, when she was alone at her house, the accused entered into the house bolted the door from inside, removed her dress, made her nude and had sexual intercourse with her by force. Then P.W.5 her brother came to the house. According to her, the accused fled away from the scene of occurrence. She has further stated that she disclosed about the occurrence to her father only on 02.03.2015. She has further stated about the complaint made by her to the police.

2.8. P.W.3 is the father of P.W.2. He has stated that on 02.03.2015 at 08.00 p.m. he returned home and at that time, P.W.2 informed him that she has been raped by the accused. Thereafter, according to him, he took P.W.1 to the police station and P.W.2 in turn made a complaint to the police.

According to him, the date of birth of P.W.2 is 07.07.1997. P.W.4 is the brother-in-law of P.W.3. He has stated that he heard about the occurrence later and he has not stated anything incriminating against the accused.

2.9. P.W.5 is the brother of P.W.2, he is a young boy aged about 15 years at the time of occurrence. He has stated that on the day of occurrence, around 01.00 p.m. when he returned home, he found that the door was bolted from inside. He has further stated that when he knocked at the door, there was no immediate response from inside. Repeatedly, he knocked at the door. The door was opened and the accused ran away from the house. When he entered into the house, he found P.W.2 in nude condition. He has further stated that on the same day at 07.00 p.m. his father returned home and he informed him about the occurrence.

2.10. P.W.6 Dr.Senthilkumar has stated that he examined P.W.2 medically and gave opinion that P.W.2 had completed 17 years of age but not completed 18 years of age. P.W.7 Dr.Thangachitra has stated that she examined P.W.2 on 03.03.2015. She has further stated about her opinion that P.W.2 would have had sexual intercourse. P.W.8 forensic expert who examined the vaginal discharge and public hair of P.W.2 has stated that there were no spermatozoa found. P.W.9 is the Headmistress of the St.Annal High School at Thiganarai Village. According to her, P.W.2 was studying in the said school and as per the school records, her date of birth was 07.07.1997. Ex.P8 is the certificate issued by her.

2.11. P.W.10 is a constable who has stated that he took the accused to the hospital for medical examination. P.W.11 has stated about the registration of the case on the complaint of P.W.2 on 02.03.2015 at 01.00 p.m. She has further stated that she examined P.Ws.1 to 3 and recorded their statements and then handed over the case diary to P.W.13 for investigation. P.W.12 has stated that she took P.W.2 to the hospital for medical examination. P.W.13 has spoken about the investigation done by him. P.W.14 has spoken about the further investigation done. P.W.15 Dr.Vijayraj has stated that he examined the accused on 05.03.2015 at 11.30 a.m. He found that the accused was sexually potential and capable of performing sexual intercourse with a woman. Ex.P14 is the certificate issued by him.

3. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. However, he did not choose to examine any witness nor to mark any document. Having considered all the above, the trial Court convicted the accused under Section 376(2) I.P.C. and that is how, he is before this Court with this appeal.

4. We have heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the State and also perused the records, carefully.

5. In this case, in order to prove the allegation that the accused raped P.W.2, the prosecution mainly relies on the evidences of P.Ws.2 and 5. P.W.2 the alleged victim has stated that prior to the date of occurrence, she had no acquaintance with the accused. She had further stated that around 01.00 a.m. when she was at her house alone, the accused suddenly entered into the house bolted the doors from inside, removed her dress and had sexual intercourse with her.

6. The learned counsel for the appellant would submit that she cannot be believed. The learned counsel would point out that had it been true that the accused suddenly trespassed into the house and had shown animal behaviour in sexually exploiting P.W.2, she would have raised alarm and struggled.

7. We find some force in this argument. P.W.2 has stated that when the accused entered into the house and when he undressed her, she does not resist though she has stated that the accused bit on her lips and the back of the chest, there was no injuries sustained by her. Had it been true that the accused had suddenly entered and tried to molest her, quite naturally she would have resisted and in such an event she would have sustained some injuries like abrasion. She would have cried for help. There are houses by the side of her house. But even according to her own admission, she did not raise any alarm. Apart from that, P.W.5 has stated that when he came to the house, the door was found locked from inside and when he knocked at the door, there was no response from inside. When he repeatedly knocked at the door, the accused opened the door and ran away. He has further stated that he found P.W.2 sitting in nude condition. Had these things be true, certainly, they would have raised alarm, at least after the accused had left the scene of occurrence. They did not choose to do the same. These two witnesses have further claimed that they did not disclose the occurrence to anybody.

8. The learned Additional Public Prosecutor submitted that in order to protect her modesty, P.W.2 had not chosen to inform the same to anybody. But, to the contrary, P.W.5 has stated that on the same day around 07.00 p.m. their father (P.W.3) returned home and he informed him about the occurrence. But P.W.2 has not stated as to when her father returned home. P.W.3 has stated that he returned home only on 02.03.2015. Had it been true that P.W.5 informed P.W.3 on the day of occurrence itself, why P.W.3 had not gone to the police to make a complaint

has not been explained. The medical evidence also does not support the case, as not only there was any injury on the body of P.W.2 but there was no seminal smears found either in the public hair or in the vaginal discharge. The doctor has opined that from the only fact that hymen was ruptured, she would have undergone sexual intercourse. When P.W.2 was enquired by the doctor about the rupture of hymen, P.W.2 had told that she had undergone sexual intercourse with an unknown person. This contradictory statement of P.W.2 in respect of the rupture of the hymen has not been explained by the prosecution. This also creates enormous doubt in the evidence of P.W.2.

9. Above all, in the complaint, P.W.2 has stated that six months prior to the date of occurrence, her mother died and therefore she stopped going to school and she was staying at her house. She has further stated that for about two years, she was very closely moving with the accused. She has further stated that because the accused has no issues through his wife, out of the wedlock, he wanted to marry her as his second wife. She has further stated that prior to 28.02.2015 on three different occasions, she had sexual intercourse with the accused. In the complaint, she has further stated that on 28.02.2015, she was alone at her house, the accused came to the house and invited for sexual intercourse. Though she has stated that she declined, according to the complaint, he had sexual intercourse with her. This admission in Ex.P1 is completely contrary to the case of the prosecution and the evidence spoken by P.W.2. P.W.2 has been contradicted by Ex.P1 in respect of the above former contradictory statements. She has no explanation to offer. When it is the positive case projected by the prosecution that before 28.02.2015, she had no acquaintance with the accused and that only on one occasion i.e. On 28.02.2015 for the first time the accused had sexual intercourse with her, her former statement in Ex.P1 is quite contradictory, according to which, for about two years they were closely moving towards each other, the accused wanted to marry her and that she had sexual intercourse with the accused on three different occasions prior to 28.02.2015. These material contradictions create further doubt in the veracity of the evidences of P.Ws.2 and 5. Though as on 28.02.2015, P.W.2 was less than 18 years of age and thus she was legally incapable of giving consent for sexual intercourse, from the above contradictions, we are unable to believe her to hold that the accused had sexual intercourse with her. Thus, in our considered view, the prosecution has failed to prove the case beyond reasonable doubts and therefore the appellant is entitled for acquittal.

10. In the result,

(i) The appeal is allowed, the conviction and sentence imposed on the appellant by the learned Sessions Judge, Magalir

Neethi Mandram, Fast Track Mahila Court, Erode in Spl.S.C.No.12 of 2015 dated 31.08.2015 is set aside and he is acquitted.

(ii) The fine amount, if any paid, shall be refunded to him.

(iii) Since the appellant is in jail, he is directed to be set at liberty forthwith, unless his detention is required in connection with any other case.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

- 1.The Judicial Magistrate,
Sathyamangalam.
- 2.The Chief Judicial Magistrate,
Erode.
- 3.The Sessions Judge,
Magalir Neethi Mandram,
Fast Track Mahila Court, Erode.
- 4.-Do-Thro The Principal District and Sessions Judge,
Erode.
- 5.The Inspector of Police,
All Women Police station,
Sathyamangalam, Erode District.
- 6.The Superintendent of Central Prison,
Coimbatore.
- 7.The District Collector,
Erode.
- 8.The Director General of Police,
Mylapore, Chennai-4.
- 9.The Public Prosecutor,
Madras High Court.

+1cc to M/S.Ma.P.Thangavel, Advocate SR.44714

CrI.A.No.272 of 2016

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srg 17/11/2016