

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04 .11.2016

(Reserved on :17.10.2016 ; Pronounced on : 04 .11.2016)

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.387 of 2013

Hiraman Sharma ...Appellant/Accused

Vs.

State Rep by  
Inspector of Police,  
K-3, Aminjikarai Police Station.  
(Crime No.1426 of 2011) ...Respondent /complainant

Prayer: Criminal Appeal filed to set aside the conviction and sentence passed against the appellant on 31.05.2013 in S.C.No.343/2012 on the file of the Mahila Court, Chennai.

For Appellant : Mr.S.Hemanand  
For Respondent : Mr.M.Govindarajan  
(Additional Public Prosecutor)

J U D G M E N T

The Criminal Appeal arises against the Judgment dated 31.05.2013 in S.C.No.343/2012 passed by the Mahila Court, Chennai.

2. The appellant herein is the accused in S.C.No.343/2012 on the file of the Mahila Court, Chennai. The Trial Court had framed the charges against the accused for the offences under Section 376(f) of IPC. By Judgment dated 31.05.2013, the trial court convicted him under Section 376 (f) of IPC and sentenced him to undergo rigorous imprisonment for a period of 7 years and to pay a fine of Rs.10,000/- and in default thereof to undergo a further imprisonment for 6 months. Challenging the said conviction and sentence passed by the Trial Court, the appellant is before this Court with the present Criminal Appeal.

3. The case of the prosecution, in brief, are as follows:

The accused and the family of the victim girl belong to the State of Uttar Pradesh. The accused was residing in No.12/44, Kathiravan colony, Chennai. On 04.12.2011 at 15.00 hrs, when the victim girl, aged about 3 years, was playing near the house of the accused. By showing two rupee coin, the accused called her into his house and when the victim went to his house, he removed the dress, embarrassed her and gave a sexual torture. After hearing the crying sound of the victim, her mother went to the place of occurrence. When she saw the accused embarrassed the victim and gave sexual torture to the victim, she brought the child back to her house and asked her child what had happened in the house of the accused. The victim shown by removing panty that there was a pain in her private part. Immediately, PW1/mother of the victim went to the house of the accused and asked about the occurrence. He denied the same. PW2 is the husband of the accused as well as the father of the victim. When he had gone for his work, PW1 called him and informed him about the occurrence. After his return from his duty, they went to the police station along with Pws.4 and 5 and gave the Complaint. The Special Sub- Inspector of Police, K-3, Aminjikarai Police Station(PW11), received the complaint from the PW1. Since she does not know Tamil, she told to PW5 in Hindi and he translated into Tamil. Since PW5 does not know to write in Tamil, PW6 had written her statement in Tamil and FIR was registered in Cr.No.1426/2011 against the accused for the offences u/s.376 (f). He recovered the dress of the victim which was handed over by PW1. He handed over the file to the then Inspector of Police PW12. He took the case for investigation and proceeded to the place of occurrence at 09.30 a.m., on the same day. He prepared observation mahazar and rough sketch in the presence of PW7 and another witness. One Ashraf Ali, examined and recorded the statement from witness PWs.1 to 6. Since Gayathri and Sampooran/ Pws.1 and 2 do not know Tamil and they knew only Hindi, they explained about the occurrence to one Pradeep/PW5, who in turn, translated the same in Tamil. He recorded the translated version on 05.02.2011. On information, the police proceeded to Thiru.Vi.Ka., park and arrested the accused at 7.00 p.m., Since he knows only Hindi and not Tamil, he called PW5/ Pradeep and recorded the translated version. He recorded the confession statement and based on which, he arrested and brought the accused to the police station. Then, he sent the accused to the Court. Further he examined PW9/ Dr.Sugandi who examined the victim girl and recorded her statement. Then he examined PW10/Doctor who examined the accused and issued a medical report of potentiality/Ex.P9 and recorded his statement. After completing the investigation,

PW12/Inspector of Police, laid the charge sheet against the accused for the offences U/s.376(f) of Cr.P.C., on 15.06.2012.

4. Based on the above materials the trial court framed the charges against the accused for the offences u/s.376(f) and the accused denied the same. In order to prove the case of the prosecution on the side of prosecution as many as 12 witnesses were examined, 13 documents were exhibited and 2 material objects (MO1 and MO2) were marked.

5. Out of the said witnesses, PW1 is the mother of the victim. She has spoken about the occurrence and given the complaint before the Sub-Inspector of Police(PW11). PW3 to PW6 have spoken that immediately after the occurrence, when the mother asked the victim, she has shown by sign what had happened to her, at that time, they were also present. PW6 has spoken about the written of complaint in Tamil. PW7 has spoken about the preparation of Observation Mahazar (Ex.P4) and PW8 has spoken about the arrest and recovery of dress of the accused. Ex.P1 is the complaint and PW9 is the doctor who had given treatment to the victim and she has spoken about the examination of the victim and medical opinion given by her. PW10 has spoken about the potentiality of the accused. PW11 has spoken about the registration of the FIR and placed the copy of the FIR to PW12 for further investigation. PW12-investigating Officer, has spoken about the investigation and laid a charge sheet.

6. When the above incriminating materials were put to the accused under Section 313 of Cr.PC, he denied the same as false. However, he has chosen to examine one witness. But, has not marked any document.

7. Having considered all the above oral and documentary evidences, the trial court has convicted the accused for the offence u/s.376 (f) of IPC and was sentenced to undergo rigorous imprisonment for a period of 7 years and to pay a fine of Rs.10,000/- and in default thereof to undergo a further imprisonment for 6 months. Aggrieved by the said conviction and sentence passed by the trial court, the appellant is before this court with this appeal.

8. I have heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the State. I have also perused the available records carefully.

9. The learned counsel for the appellant would submit that there are certain contradictions between the witnesses that would make their evidence untenable. He would further submit that the allegation made in the complaint(Ex.P1) was not true. Though PW1, the mother of the victim girl has stated in the complaint that she has seen the occurrence, during the

examination before the trial court she has not stated that she had seen the occurrence. Further, the learned Mahila Court Judge, Chennai, has not properly appreciated the evidence of the prosecution and also the defence taken by the accused that due to prior enmity, they had lodged a false complaint against the accused. The prosecution has not properly investigated the matter and laid the charge sheet against the accused and foisted a false case against him. Further, he would submit that the learned Mahila Court Judge, Chennai, has given the reason in the Judgment for the conviction that he would have bitten with teeth or in some other manner and caused injury in the private part of the victim girl. The learned Trial Judge has erroneously come to the conclusion, without any substance that the accused has committed the offence and convicted him. The prosecution has failed to prove the case and hence, the accused is entitled to acquittal.

10. Learned Additional Public Prosecutor vehemently opposed the Appeal as PW1/ mother of the victim clearly spoken about the occurrence and the medical evidence corroborated with the evidence of PW1. According to the learned Additional Public Prosecutor, the conviction of the appellant does not require any interference at the hands of the court.

11. I have considered the above submissions made by both the learned counsel appearing on either side and perused the materials available on record. PW1 is the mother of the victim. She has deposed that when her daughter came from the house of the accused by crying, she enquired the victim girl what had happened in the house of the accused. Since the victim was aged about 3 years, she removed her panty, showed her private part and stated that the accused had bitten her in the private part. Immediately she went to the house of the accused, and asked about the occurrence and he denied the fact. With the help of PW5 and PW6, PW1 gave complaint to the Special Sub-Inspector of Police, K-3, Aminjikarai Police Station, Chennai. Then, they have produced the victim girl before PW3 for treatment and medical examination. The Doctor(PW9), who has examined the victim girl has deposed that on examination of the victim girl, she found that there was pain, reddishness and swelling on her private part. PW2 to PW5 have deposed that on 04.12.2011 at 15.00hrs, the PW1 was holding her female baby, who was aged about 3 years, said that the accused had given sexual torture to the victim and when the mother of the victim enquired her, the victim girl had stated that the accused removed her dress and gave sexual torture. Their evidences seems to be corroborated with the evidence of PW1.

12. From the evidences of PW1, 3 to 6 and also from the evidence of PW9/ Doctor, who has examined the victim girl, it is

seen that there was pain, reddishness and swelling on the private part of the victim girl, but no bite mark. The victim girl was a 3 years old girl and even does not know to explain the occurrence. But, the medical examination of the Doctor found that there was a swelling in the private part. Under the said circumstances, it is held that the accused one who had caused injury to the victim.

13. With regard to the above, it is note-worthy that the occurrence, in the present case, took place on 04.12.2011, i.e., at the time, when Section 375 of the Indian Penal Code had not undergone amendment, which has come into force, with effect from 3.2.2013, by the Act 13 of 2013. In terms of the definition of rape, as stood embodied in Section 375 of the Indian Penal Code, prior to its amendment, with effect from 3.2.2013, by the Act 13 of 2013, no offence of rape could have been held to have been proved until penile penetration by an accused into the vagina of the victim was proved; whereas penile penetration is, in the light of the amended definition of rape, no longer the only means of committing rape as embodied in Section 375 of the Indian Penal Code, with in Section 375 of the Indian Penal Code, with effect from 3.2.2013, by the Act 13 of 2013.

14. The present case is a case, which arose prior to the amendment, which Section 375 of the Indian Penal Code has undergone.

15. In the complaint, mother of the victim girl has stated that he committed the offence of sexual intercourse with her daughter but whereas, in the court, during the examination, she has deposed that she has not seen the occurrence. The victim girl told her that the accused had bitten on the private part of the victim. Her evidence does not show that there is a penetration but only the injury caused by biting with teeth. In this case at hand, when there is, admittedly, nothing to show penile penetration by the accused into the vagina of the victim girl. Therefore, Section 376 of IPC is not made out as on date of commission of offence. The Trial Court has failed to note the date of occurrence which is prior to the amendment of the Act 13 of 2013 of Section 376. Therefore, as stated by them, it falls u/s.375 of IPC and the offence committed by the accused is not punishable u/s.376 of IPC. In such circumstances, the conviction and sentence passed by the trial court u/s.376 (f) of IPC, is liable to be set aside. The accused could not have been held to have committed an offence punishable u/s.376 (f) of IPC.

16. However, from the available evidence on record, this court has come to the conclusion that the accused has committed some offence against the victim. Having come to the said

conclusion, now I have to examine, as to, " what was the offence that was committed by the accused by the said act". In this regard, it is relevant to refer the deposition of PW1 and evidence of Doctor (PW9) and also in the judgement of the trial court, it has been stated that either by biting with teeth or some other manner, he would have caused injury to the victim.

17. With regard to the above, it needs to be noted that according to Section 350 of IPC, whoever, intentionally uses force to any person, without that person's consent, knowing it to be likely that by such use of force, he will cause annoyance to the person to whom the force used is said to use criminal force.

18. In this case on hand, the appellant/accused according to the evidence on record, had intentionally used force to the victim girl without the consent of the parents (consent of the victim girl being immaterial) knowing it to be likely that by the use of such force, he will cause annoyance to the victim and her family.

19. It is a well settled preposition of law that to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 of IPC. Hence, in this case, penile penetration by the accused into the vagina of the victim was not proved by the prosecution.

20. I have already pointed out above that whoever assaults or uses criminal force against any woman intending to outrage or knowing to be likely that he will thereby outrage her modesty, commits an offence under Section 354 of the Indian Penal Code.

21. From the available records and also the evidence of PW9/Doctor there was a swelling in the private part of the victim girl. Even the trial court has also given a finding that the injury would have been caused by biting with teeth or using some other objects. Therefore, as already stated on the date of occurrence the act committed by the accused will not fall u/s.376 of IPC. Since the victim is a girl and injury caused in the private part of the victim shows that the injury has been caused by biting with teeth, it falls u/s.354 of IPC.

22. In the present case, when the accused/appellant used criminal force to the victim girl knowing it to be likely that he would thereby outraged her modesty offence u/s.354 of IPC

can be safely held to have been committed by the accused/appellant. Therefore, as already stated, that the accused has not committed any offence u/s.376 of IPC and he has committed the offence u/s.354 of IPC. Under the above said circumstances, the conviction and sentence passed by the trial court u/s.376 (f) of IPC is hereby set aside and modified that the accused/appellant has committed the offence u/s.354 of IPC. Having regard to the aggravating circumstances, I am of the view that sentencing the accused to undergo R.I., for 2 years and to pay fine of Rs.1,000/- would meet the ends of justice.

23. In the result, the appeal is partly allowed and the conviction and sentence imposed on the appellant for the offence u/s.376 (f) of IPC is set aside and instead, he is convicted u/s.354 of IPC and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for three months. It is directed that the period of detention already undergone shall be set off.

Sd/-  
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

- 1 The Judge, Mahila Court, Chennai
- 2 The Inspector of Police,  
K3, Aminjikarai Police Station, Chennai
- 3 The Public Prosecutor,  
High Court, Madras
- 4 The Superintendent, Central Prison, Puzhal, Chennai
- 5 The District Collector, Chennai

+1cc to Mr.S. Hemanand, Advocate, S.R.No.63188

scd (CO)

md (17/11/2016)

Cr1.A.No.387 of 2013