



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 26.10.2016

DELIVERED ON : 21.11.2016

WEB COPY

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

AND

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl.A.[MD].No.229 of 2015

and

Crl.M.P.(MD).No.2985 of 2016

Sethuraman @ Ramanathan

.. Appellant/
Sole accused

Vs.

State rep. by
the Deputy Superintendent of Police,
Tiruparankundram Sub Division,
Madurai City,
Oomatchikulam Police Station.
(Crime No.354/1997)

: Respondent/
Complainant

PRAYER: Criminal Appeal filed under Section 374 of Cr.P.C. against the judgment, dated 17.12.2013, made in Spl.S.C.No.108 of 2001, by the learned III Additional District and Sessions Judge (PCR), Madurai.

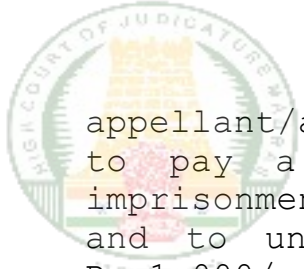
For appellant : Mr.P.Krishnasamy

For respondent : Mr.C.Ramesh,
Additional Public Prosecutor

JUDGMENT

(Judgment of the Court was made by **S.NAGAMUTHU, J.**)

The appellant is the sole accused in Special S.C.No.108 of 2001 on the file of the learned III Additional District and Sessions Judge (PCR), Madurai. He stood charged for the offences under Sections 363, 376 IPC r/w 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. By judgment dated 17.12.2013, the trial Court convicted the appellant/accused under Sections 363 and 376 IPC and acquitted him from the charge under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The trial Court sentenced the



appellant/accused to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.1,000/-, in default to undergo simple imprisonment for six months for the offence under Section 363 IPC and to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default to undergo simple imprisonment for one year for the offence under Section 376 IPC. Challenging the 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;

(a) The victim in this case was an young girl aged 14 years at the time of occurrence. She has been examined as PW3 in this case. (Her name and other identifying details are omitted in this judgment consciously to protect her modesty). PWs.1 and 2 are the father and mother respectively. They were all residing at a Village in Madurai District. They belong to Hindu Paraiyar community which is a Scheduled Caste. PW3 was then studying 9th standard in a local school. The accused belongs to a community which is neither a Scheduled Caste nor a Scheduled Tribe. The accused was closely known to PW1. He used to visit the house of PW1 frequently.

(b) On 16.10.1997, the accused had come to the house of PW1, PW1 and the accused had some talk about laying tiles. The accused, stating that it was too late for him to go to his house, stayed at the house of PWs.1 and 2 overnight. The accused, PWs.1 and 2 and the children were all sleeping in one and the same hall in the house. It is alleged that during night hours, the accused touched the hands of PW3 and tried to misbehave. PW3 informed the same to PW2. Therefore, PW2 took PW3 and her other children to the house of her neighbour and stayed there. Early in the morning, PWs.2 and 3 returned home. By that time, the accused left the house of PW1.

(c) Thereafter, PWs.1 and 2 in the morning as usual went for working. PW3 proceeded to the Bus stop to go to her school. Her friend PW8 also was there in the bus-stop. It was around 9.00 a.m., when they

were waiting for the bus, the accused came there. He told PW3 that he would purchase a wrist watch and present the same to her. He took PW3 in a bus to Andipatti and then, he took PW3 to the house of one Nallammal at Kutladampatti and made her to stay. The accused around 9.00 p.m., on the same day, at the house of Nallammal removed her dress, made her nude and then, had sexual intercourse with her by force. After some time, the accused started sleeping. PW3 escaped from the said place early in the morning, came to a nearby house and after raising money for her

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(d) PW1, immediately, went to Oomatchikulam Police Station and



made a complaint vide Ex.P1. One Head Constable No.465 received the said complaint and entered the same in the General Diary without registering any case on the same. PW16, yet another Head Constable of Oomachikulam Police Station, on perusing the said complaint, which was entered as Petition No.543 of 1997, registered a case in Crime No.354 of 1997 under Section 363 IPC. Ex.P12 is the FIR. (The Head Constable No.465, who received the complaint, has not been examined as a prosecution witness). It is stated that one Mr.Narayanasamy, the then Inspector of Police, took up the case for investigation. (Mr.Narayanasamy has not been examined as the prosecution witness). It appears that Mr.Narayanasamy visited the place of occurrence on 20.10.1997 at 10.00 p.m. and prepared an observation mahazar and a rough sketch in the presence of witnesses, based on the statement of PW3. Then, he examined PW3 and forwarded her for medical examination.

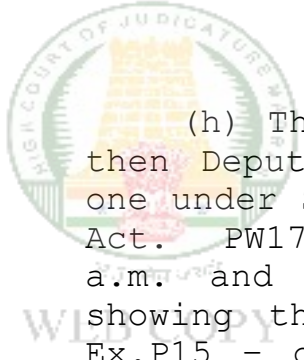
(e) PW13, Dr.Yazhini Selvaraj, examined PW3 on 22.10.1997 at the Government Hospital. PW3 told PW13 that she was raped by a known person. PW13 found the following:

"Axillar Public hair - normal. No injuries.
External Genitalia - small laceration in the
part aspect of vulva orifice with bloodstained
discharge PV Hymen torn vagina admits 1 finger
easily and pointing downward uterus anti-verted
normal size fornices (NC) Rectum loaded."

Ex.P11 is her report. She opined that PW3 has the sign of recent sexual intercourse. According to PW13, vaginal smear were taken and sent for chemical examination to find out the presence of fermtosa or any other foreign material on the vagina of the victim. The chemical examination report is not available on record.

(f) The details of the further investigation done by the Inspector of Police - Mr.Narayanasamy are not available. The investigation was thereafter taken over by PW15. On 14.11.2000 at 3.30 p.m. at Kadachanenthal bus stop, he arrested the accused in the presence of witness. On such arrest, he gave a voluntary confession. Then, he forwarded the accused for medical examination.

(g) One Dr.Thiyagarajan, who was a professor at the Government Medical College Hospital, Madurai, examined the accused on 16.11.2000 and opined that the accused was sexually potential to have sexual intercourse with a woman. He assessed his age approximately as 51 years. Dr.Thiyagarajan issued Ex.P17 certificate. (Dr.Thiyagarajan has not been examined, instead PW18 ~~Dr.Narayanaraj~~ has been examined. It is not explained as to why Mr.Thiyagarajan has not been examined).

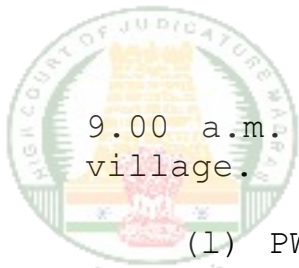


(h) Thereafter, the investigation was taken over by PW17, the then Deputy Superintendent of Police. The case was altered into one under Section 363, 376 and 3(1)(ii) and 3(2)(v) of the SC & ST Act. PW17 visited the place of occurrence on 08.12.2000 at 8.00 a.m. and prepared an observation mahazar and a rough sketch showing the place of occurrence. Ex.P13 - rough sketch and Ex.P15 - observation mahazar are prepared by him. Ex.P14 is the rough sketch prepared by the Inspector of Police Mr.Narayanasamy. Mr.Narayanasamy died before the commencement of the trial and therefore, he was not examined (vide the evidence of PW17). On completing the investigation, PW17 laid charge sheet against the accused.

(i) Based on the above materials, the trial Court framed charges as detailed in the first paragraph of this judgement. He denied the same. In order to prove the charges, on the side of the prosecution, as many as 18 witnesses were examined and 17 documents were marked and no material object was marked on the side of the prosecution.

(j) Out of the said witnesses, PWs.1 & 2, the father and mother respectively of PW3 has stated that on the night intervening 16.10.1997 and 17.10.1997, the accused stayed in their house. PW2 has further stated that since the accused had attempted to misbehave with PW3, she took PW3 and the other children and stayed overnight in the house of the neighbour. It is the further evidence of PWs.1 and 2 that on 17.10.1997, in the early morning, the accused had left their house and they also left the house leaving PW3 alone at the house as PW3 had to go to school in the morning. PW3, the victim girl, has stated about the occurrence that took place on the night intervening 16.10.1997 and 17.10.1997 and she has further stated that around 9.00 a.m. when she was standing in the bus-stop to go to the school, the accused, under the guise of getting her a wrist watch, took her to Kutladampatti hills, where in the house of one Nallammal around 9.00 p.m. on the same day, he removed her dress and made her nude and had sexual intercourse by force. She has further stated that after the accused slept, she escaped from the scene of occurrence.

(k) PW4 is the neighbour of PWs.1 and 2. She has stated that on 16.10.1997 PW2, PW3 and other children had come to her house and slept during night hours. On the next day, she came to know that PW3 was missing. PW5 has stated that on one day, during the month of October 1997, the accused came to his tea shop at Andipatti along with PW3. He kept the school bag of PW3 on his shop and took PW3 with him in a bus. PW6 has turned hostile and he has not supported the case of the prosecution in any manner. PW7 is a resident of Kutladampatti. She had a hut near Kutladampatti hills. The accused was already known to her. She has further stated that the accused came to her house along with PW3 and stayed in her house and on one next day, around 8.00 to



9.00 a.m. PW3 came to her house and wanted money to go to her village. She gave Rs.15/- to her and thereafter, PW3 left.

(1) PW8 is a friend of PW3. According to her, on the day of the occurrence, she was standing in the bus stop, where PW3 was also standing and thereafter, she came to know that an old man took PW3 along with him. As she has not stated anything about the further occurrence, she was treated as hostile. PW9 has spoken about the arrest of the accused and the confession made by him. PW10 has spoken about the preparation of observation and rough sketch by the Inspector of Police. PW11, the then Tahsildar, has spoken about the community of the accused as well as PW3. He has further spoken about the community certificate issued by him. PW12, a Head Constable, has stated that he took the accused to the hospital as directed by the Inspector of Police for medical examination. PW13 has spoken about the medical examination conducted on PW3 and about her opinion. PW14 has turned hostile and he has not supported the case of the prosecution in any manner.

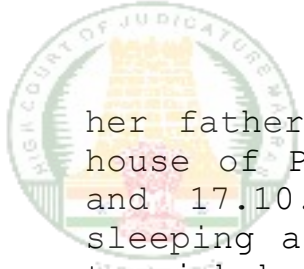
(m) PW15, the Inspector of Police, has stated that he took up the case for investigation and arrested the accused on 14.11.2000 at 3.30 p.m. He has not stated anything further about the investigation done. PW16, the then Head Constable, has stated that on going through the complaint made by PW1 to yet another Head Constable, who had already entered the complaint into the general diary, registered a case in Crime No.354 of 1997 under Section 363 IPC. PW17, the then Deputy Superintendent of Police, has stated that after the case was altered into one under Sections 363, 376 and 3(1)(ii) and 3(2)(v) of the SC & ST Act, he took up the case for investigation on 08.12.2000. He has spoken about the preparation of observation mahazar and rough sketch by him. He has further stated that he examined many other witnesses and finally, laid charge sheet against the accused. PW18 has spoken about the medical examination conducted on the accused by one Dr.Thiyagarajan.

(n) When the above incriminating materials were put to the accused under Section 313 of Cr.P.C., he denied the same as false. However, he did not choose to examine any witness nor to mark any document on his side. The defence of the accused was a total denial. Having considered all the above, the trial Court convicted him, as detailed in the first paragraph of this judgment. That is how he is before this Court with this appeal.

3.We have heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the respondent and we have also perused the records carefully.

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4. As we have already stated, in the instant case, PW3 is the victim. The accused was already known to her. He was a friend of

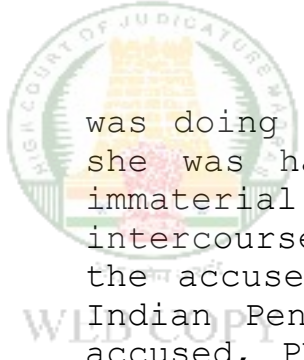


her father viz., PW1. According to PW3, the accused came to the house of PW1 and made a stay on the night intervening 16.10.1997 and 17.10.1997. She has further stated that while she was sleeping along with his brother and mother, the accused attempted to misbehave with her and therefore, she informed the same to her mother viz., PW2. PW2 took her to a house of a neighbour and stayed there overnight. PW4, who is the neighbour of PWs.1 and 2, has categorically stated that PW2, PW3 and other children stayed in her house. The evidence of PW3 about the earlier occurrence has been spoken by PWs.1 and 2 also. Thus, the evidence of PW3 is duly corroborated by the evidences of PWs.1, 2 and 4.

5. On 17.10.1997, in the early morning, PW2 and PW3 returned to the house of PW1. By that time, the accused was left the house of PW1. PWs.1 and 2 left the house for work. PW3 was, thus, alone at her house. She, with a view to go to her school, went to the nearby bus stop, from where she was taken by the accused to Kutladampatti, where it is alleged that by force the accused had a sexual intercourse with her. PW3 has vividly spoken about the same. Though PW3 was examined at length, nothing can be elicited to even remotely create any doubt in her veracity. Her evidence was duly corroborated by the medical evidence. PW13 had opined that the vaginal cavity of PW3 was ruptured. She had further opined that there was sign of recent sexual intercourse. Thus, the medical evidence also duly corroborates the evidence of PW3.

6. Apart from that, PW5 has stated that the accused came to his tea shop along with PW3 and the accused requested to keep the school bag of PW3 on his shop and took PW3 with him in a bus. PW7 - Mrs. Nallammal has stated that the accused came to her house along with a girl and on the next day morning, around 8.00 to 9.00 a.m. she came to her house and at that time, she was weeping and that she requested money to go to home and accordingly, she gave Rs.15/- and then, she left. Thus, the evidences of PW5 and PW7 also duly corroborate the evidence of PW3 that she was taken by the accused to Kutladampatti. From these evidences, the prosecution has clearly established that PW3 was taken by the accused and at Kudladampatti she had sexual intercourse with her against her will.

7. At the time of occurrence, PW3 was doing 9th standard. According to her, she was hardly aged 14 years. Unfortunately, the school certificate or birth certificate for PW3 was not obtained by the investigating officer in order to clearly prove the age of PW3 with reference to her date of birth. Fortunately, the certificate issued by the doctor in Ex.P16 speaks that her age was between 14 to 16 years. But, unfortunately, the doctor, who issued the said certificate, also has not been examined by the prosecution. Though this is a serious flaw, since the age of PW3 has not been seriously disputed by the accused, we hold that she was aged 14 years. This conclusion is based on the fact that she



was doing 9th standard. Once such a conclusion is arrived at that she was hardly 14 years at the time of the occurrence, it is immaterial whether she was a consenting party for sexual intercourse. The so called consent given by PW3, as projected by the accused, cannot be a valid consent under Section 375 of the Indian Penal Code. Contrary to the said projection made by the accused, PW3 has categorically stated that the accused had sexual intercourse by force and not with her consent. Thus, in our considered view, the act of the accused is a rape in terms of Section 375 IPC and therefore, he is liable to be punished under Section 376 IPC. Since he had kidnaped PW3, he is liable to be punished for the offence under Section 363 IPC also.

8. Now turning to the quantum of punishment, the minimum punishment provided for rape is 7 years rigorous imprisonment, as per Section 376 IPC stood on the date of occurrence. Having regard to the mitigating as well as aggravating circumstances, we are of the view that sentencing the appellant/accused to undergo 7 years rigorous imprisonment under Section 376 IPC and to direct him to undergo 3 years rigorous imprisonment for the offence under Section 363 IPC would meet the ends of justice, besides fine.

9. Before parting with this case, we would like to express our anguish and shock for the following :

(a) The complaint was lodged by PW1 on 18.10.1997 and it was received by one Head Constable by name R. Balan, vide endorsement on Ex.P1. It is not explained to the Court as to why the case was not immediately registered on the said complaint, though the allegations made out cognizable offences.

(b) The endorsement made by the Inspector of Police as found in Ex.P1 would go to show that the Inspector of Police - Mr. Narayanasamy issued a direction to register the case. It was only in accordance with the same PW16 registered the case at 8.30 p.m. on 20.10.1997. It is not explained to the Court as to why the Head Constable, who received the complaint from PW1, has not been examined.

(c) Of-course, it is in record that Mr. Narayanasamy, who investigated the case initially, died subsequently and therefore, he could not be examined. But, the details of the investigation done by him have not been spoken by any witnesses.

(d) Ex.P2 is yet another complaint given by PW1 to the Sub Inspector of Police on 20.10.1997. It is a statement mentioning about the returning of the victim on 20.10.1997. The trial Court has marked the said statement of PW1 as though it is an admissible evidence. It is common knowledge that any statement made by a witness, during the course of investigation either orally or in writing, fall within the scope of Section 161 Cr.P.C. and the same cannot be used as evidence and the same can be used only for the limited purpose as provided in the said provision itself.



It is not known as to how the trial Court could mark the said statement of the witness as a substantive piece of evidence.

(e) Similarly, Ex.P3 is yet another statement given by PW3 during the course of investigation. It was handed over to the investigating officer on 21.10.1997 after the report of PW3 to her house. This statement also would squarely fall within the ambit of Section 161 Cr.P.C. and therefore, the same is also not admissible in evidence. It is really shocking to see that the trial Court, fully unaware of such legal position, has marked this statement also as a substantive piece of evidence.

(f) The accused was caught by PW1 and others and produced before the Police on 20.10.1997 and then, the accused was taken to the hospital, as he had number of injuries on his body. But, the medical records pertaining to the same have not been produced in Court. The injuries found on him have not been explained away and the Doctor, who treated him, also has not been examined. It is not in evidence as to how the accused was allowed to leave the hospital.

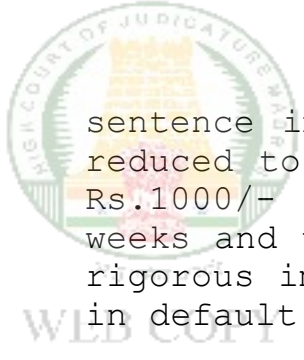
(g) Between 21.10.1997 and 13.11.2000 virtually there was no investigation at all in this case. Suddenly, on 14.11.2000 it is stated that the accused was arrested and he was sent for medical examination. It is stated that he was examined by one Dr.Thiyagarajan. Though there is no evidence as to whether Dr.Thiyagarajan was alive or not, the trial Court recorded in the judgment as though Mr.Thiyagarajan was no more.

(h) Though it is in the evidence of PW13 that the smear taken from vaginal cavity of PW3 was sent for chemical examination, the fate of the said examination is not known. Neither the certificate issued by the Forensic Lab has been marked in evidence. The investigating officer had not taken care to collect the record and mark the same.

(i) PW17, the investigating officer, has not taken care to do the investigation meticulously. In a casual manner, without bestowing his attention, he has simply laid charge sheet against the accused. Absolutely, there is no explanation as to why it took three years for the police to lay the charge sheet.

10. Though these are all the lapses in the case of the prosecution, on that score, we are unable to acquit the accused, because the evidence of PW3 which draws corroboration from other sources, would clearly go to prove the offence committed by the accused.

<https://hcservices.courts.gov.in/hcservices/> result, this Criminal Appeal is partly allowed and the conviction and sentence imposed on the appellant/accused for the offence under Section 376 and 363 are confirmed, however, the



sentence imposed on him for the offence under Section 376 IPC is reduced to rigorous imprisonment for 7 years and to pay a fine of Rs.1000/- in default to under go rigorous imprisonment for four weeks and the sentence imposed under Section 363 IPC is reduced to rigorous imprisonment for 3 years and to pay a fine of Rs.1,000/-, in default to undergo rigorous imprisonment for four weeks.

12. It is directed that the sentences shall run concurrently. The sentence already undergone by the appellant/accused shall be given set off under Section 428 Cr.P.C. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CSI)

/True Copy/

Sub Assistant Registrar

gcg

To

- 1.The III-Additional District and Sessions Judge (PCR),
Madurai.
- 2 The Judicial Magistrate No.II,
Madurai
- 3.The Deputy Superintendent of Police,
Tiruparankundram Sub Division,
Madurai City.
- 4 The District Collector,
Madurai
- 5 The Superintendent of Police,
Madurai
- 6 The Superintendent of Prison.
Central Prison, Madurai
- 7.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

+1cc to Mr.P.Krishnasamy Advocate Sr.No. 70912

JAM/21.12.16/SS 3 /SAR 1/9p-9c