



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated:16.11.2016

Coram:

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THE HONOURABLE Mr.JUSTICE S.NAGAMUTHU
and
THE HONOURABLE Mr.JUSTICE M.V.MURALIDARAN

Crl.A.(MD)No.328 of 2015

Pathamuthu, S/o.Nanthavana Nadar

... Appellant/
Sole Accused

vs.

State, rep.by Inspector of Police,
Mamsapuram Police Station,
Virudhunagar District.
(Crime No.59/2008)

... Respondent/
Complainant

Criminal Appeal under Section 374 of the Code of Criminal Procedure against the judgment of conviction and sentence, dated 22.07.2015, made in S.C.No.5 of 2009 on the file of the learned Mahila (Fast Track) Court, Virudhunagar District at Srivilliputtur.

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

The appellant is the sole accused in S.c.No.5 of 2009 on the file of the learned Mahila (Fast Track) Court, Virudhunagar District at Srivilliputtur. The trial court framed as many as four charges as detailed below:

Charge No.1	U/s.376(f) I.P.C.
Charge No.2	U/s.377 IPC
Charge No.3	U/s.506(i) IPC
Charge No.4	U/s.379 (NP) IPC

After trial, the trial court, by judgment dated 22.07.2015, convicted the accused and sentenced him as detailed below.

Conviction under	Punishment
Section 376 I.P.C. read with Section 3(e) and 4 of Protection of Children from Sexual Offences Act, 2012	Rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/-, in default to undergo six months simple imprisonment.



Section 377 IPC	Imprisonment for Life and to pay a fine of Rs.20,000/-, in default to undergo simple imprisonment for one year.
Section 506(i) IPC	Rigorous Imprisonment for one year and to pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for three months.
Section 379 IPC	Rigorous imprisonment for three years and to pay a fine of Rs.2000/-, in default to undergo simple imprisonment for three months.

Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

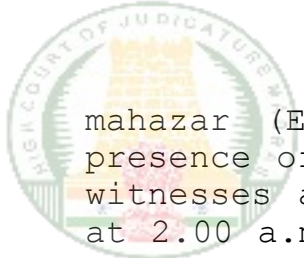
2.The case of the prosecution, in brief, is as follows:

(a)P.W.1 is a resident of Mamsapuram Village in Srivilliputtur Taluk, Virudhunagar District. P.W.3 is his elder daughter, hardly aged about 7 years, during the year 2008. The accused also hails from the same village. According to the prosecution, on 08.04.2008, around 6.30 p.m., the accused took P.W.3 into his house, bolted the doors from inside, intimidated her, criminally and by force, had sexual intercourse with her. Further, in the same transaction, the accused made P.W.3 to lay down nude and touched her private parts and he wanted her to suck his penis. When P.W.3, out of pain, was about to weep and cry, the accused intimidated her and made her to be silent. He removed a pair of silver anklets worn by P.W.3.

(b)P.W.1 and other family members went in search of P.W.3, as she was missing from 6.30 p.m. onwards. For the whole night, they could not locate P.W.3. On the next day morning, around 7.00 a.m., P.Ws.4 and 5 informed P.W.1 that the child (P.W.3) was taken around 6.30 p.m. by the accused. Therefore, P.W.1 and other family members went to the house of the accused around 7.00 a.m. In his house, the accused was very much available. P.W.3 was also available. There were bloodstains on the thighs and other parts of P.W.3. The silver anklets worn by P.W.3 were also found missing. When P.W.1 enquired P.W.3, she told as to what was done by the accused to her. P.W.1 took P.W.3 to his house and then went to the Police Station and lodged a complaint (Ex.P-1).

(c)At 9.00 a.m. on 09.04.20-08, P.W.1 made a complaint to P.W.13, the then Sub-Inspector of Police, Mamsapuram. Based on the said complaint, P.W.13 registered a case in Crime No.59 of 2008 under Sections 376, 511 and 379 (NP) IPC and prepared Ex.P-14, FIR and sent the same to the Court. He also sent the victim girl to the hospital, with a police memo.

(d) P.W.14, the then Inspector of Police, Mamsapuram Police Station, took-up the case for investigation. He visited the place of occurrence, made an observation, prepared an observation



mahazar (ExP-3) and also drew a rough sketch (Ex.P-15), in the presence of P.Ws.7 and 16. He examined P.Ws.1 to 6 and some other witnesses and recorded their statements. He arrested the accused at 2.00 a.m. on 10.04.2008, near M.B.K.Puthupatti diversion, in the presence of P.Ws.8 and 17. On enquiry, the accused gave a voluntary confession and P.W.15 recorded the same. Pursuant to the disclosure statement made by the accused, he took the police party and the witnesses to the place where he had hidden the clothes worn by him at the time of occurrence. He took and produced a full hand shirt (M.O.5), a pant (M.O.6), a jatti (M.O.7) and a pair of anklets (M.O.1). P.W.15 recovered the same under a cover of mahazar (Ex.P-4). M.O.1 was later on, found to be that of P.W.3. Thereafter, he forwarded the accused to the Court, with a requisition to subject him to medical examination. He also forwarded the material objects to the Court, under Form 95.

(e) P.W.11, Dr.K.R.Rajkumar, Radiologist, Government Rajaji Medical College Hospital, Madurai, took X-Ray of the accused's waist bone and on examination, he certified that the accused was aged more than 21 years. P.W.18, Dr.Allauddin, examined the accused and issued Ex.P-17, Certificate, opining that the accused was sexually potential to perform sexual intercourse with a woman.

(f) On 09.04.2008 around 02.00 p.m., P.W.14 enquired P.W.1 and recovered M.Os.2 to 4, the garments worn by P.W.3, namely, midi, colour shirt and jatti, under Ex.P2 - mahazar, attested by P.Ws.6 and another. He forwarded M.Os.2 to 4 to the Court. He also gave a requisition to the Court to subject P.W.3 to medical examination. Investigation was then continued by P.W.15, his successor.

(g) P.W.12, Dr.V.Meenambal, Assistant Surgeon, Government Headquarters Hospital, Virudhunagar, examined P.W.3 at 2.00 p.m. on 10.04.2016 and found the following:

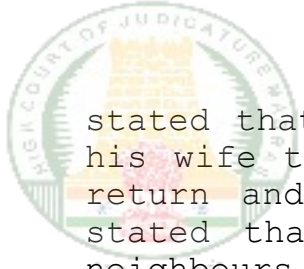
"Patient conscious/oriented, febrile temp.99.4 F, CVS-RS - none breast bud not developed. Public hair & anamoly hair absent. No external injuries in the body. Local exam.: small abrasion in the vagina present. Hymen not intact, irregularly torn, infected and fowl smell discharged."

Ex.P-13 is the Accident Register issued by P.W.12. Vaginal smear taken from P.W.3 was subjected to Chemical Examination, which revealed that there was no spermatozoa.

(h) P.W.15 examined P.W.12, the doctor who examined P.W.3 and recorded her statement. He also examined Radiologist (P.W.11) and the doctor (P.W.18) who examined the accused and recorded their statements. On completing the investigation, P.W.15 laid charge sheet against the accused.

3. Based on the above materials, the trial court framed charges against the accused, as detailed in the first paragraph of this Judgment. The accused denied the same. In order to prove the charges, the prosecution examined as many as 18 witnesses, exhibited 17 documents and marked 7 material objects.

4. Out of the witnesses examined on the side of the prosecution, P.w.1, the father of the victim girl - P.W.3, has



stated that when he returned home around 7.00 p.m., on 08.04.2008, his wife told him that P.W.3, who had been to the temple, did not return and therefore he went in search of her. He has further stated that on the next day, around 7.00 a.m., P.Ws.4 and 5, neighbours, told that P.W.3 was taken by the accused to his house. He has further stated that when he went to the house of the accused, the accused was very much available and P.W.3 was also available and he found bloodstains on her thighs and other parts and when enquired, P.W.3 told what had happened to her at the hands of the accused. P.W.2 is the mother of P.W.3. She has also spoken the same facts as spoken by P.W.1. P.W.3 is the victim. She has categorically stated that the accused took her to his house, bolted the house from inside, made her nude and asked her to suck his penis and he also had sexual intercourse with her. She has further stated that when, out of pain, she was about to cry, the accused intimidated her, criminally. She has further stated that she told everything to her father on the next day morning around 7.30 a.m. P.Ws.4 and 5, neighbours, have stated that they found the accused leading P.W.3 to his house around 6.30 p.m. They have further stated that next day they told the same to P.W.1. P.W.6 has spoken about recovery of M.Os.2 to 4, the clothes of P.W.3, under Ex.P-2, mahazar. P.W.7 and P.W.16 have spoken about the preparation of observation mahazar and rough sketch by P.W.14, the Investigation Officer. P.Ws.8 and 17 have spoken about the arrest of the accused and consequential recovery of material objects, including silver anklets. P.W.9, the Headmaster of the School where P.W.3 was studying, has stated about the date of birth of P.W.3. As per School Records, according to him, the date of birth of P.W.3 is 23.07.2001. P.W.10, Scientific Expert, has stated that she examined the clothes of P.W.3 and found that there was no spermatozoa. She has further stated that she found smears on the jatti worn by the accused and blood in the half-skirt of P.W.3. According to her, examination revealed that the blood found in the half-skirt of P.W.3 was human blood, but grouping test was inconclusive. P.W.11, Dr.Rajkumar, has stated that he conducted radiological examination on the accused and on such radiological examination, he opined that the accused was aged 21 years. P.W.12, Dr.Meenambal, has spoken about the medical examination conducted on P.W.3. P.W.13, has spoken about the registration of the case on the complaint made by P.W.1. P.W.14 has spoken about the initial investigation done by him. P.W.15 has spoken about the investigation continued by him and filing of final report. P.W.18, Dr.Allauddin, has spoken about the medical examination conducted on the accused and he has opined that the accused was sexually potential to have sexual intercourse with a woman.

5. When the above incriminating materials were put to the accused under Section 313 of the Code of Criminal Procedure, he denied the same as false. However, he did not examine any witness and no documents were marked on his side. Having regard to all the above, the trial court found the accused guilty, convicted and sentenced him as detailed in the first paragraph of this judgment.



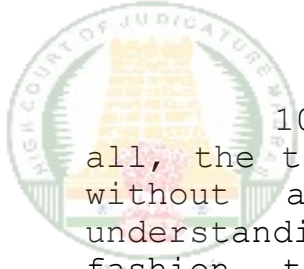
Aggrieved by the same, the appellant has come forward with this appeal.

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

7. At the outset, we are unable to restrain ourselves, without expressing our shock over the way in which the trial court was so careless in convicting the accused under Sections 3(e) and 4 of the Protection of Children from Sexual Offences Act, 2012, which, in our considered view, is unsustainable. As we have already pointed out, the alleged occurrence in this case was on 08.04.2008; whereas the Protection of Children from Sexual Offences Act, 2012, came into force only with effect from 04.12.2012. Unfortunately, the learned trial judge was ignorant of Article 20 of the Constitution of India, which guarantees that no person shall be convicted for any offence, except for violation of any law in force at the time of commission of the act charged as an offence. In the instant case, on the date of alleged occurrence, Protection of Children from Sexual Offences Act, 2012, was not in force and therefore, invoking the penal provisions of the said Act to punish the accused is contrary to Article 20 of the Constitution of India and thus it is unsustainable. Further, as we have already stated in the first paragraph of this judgement, there was no charge at all framed alleging that any offence had been committed by the accused, punishable under the provisions of Protection of Children from Sexual Offences Act, 2012. When that be so, it is not understandable as to how the trial court convicted the accused, by invoking the penal provisions of the said Act also. This action would go to show that the learned trial judge was ignorant of the legal mandate that no one could be condemned/punished without there being a charge and by affording a fair trial.

8. The trial court convicted the accused under Section 376 of the Indian Penal Code read with Sections 3(e) and 4 of the Protection of Children from Sexual Offences Act, 2012. Since there is no separate conviction for the offence under Sections 3(e) and 4 of the Protection of Children from Sexual Offences Act, 2012, we proceed to examine the legality and correctness of conviction under Section 376 IPC and the other penal provisions.

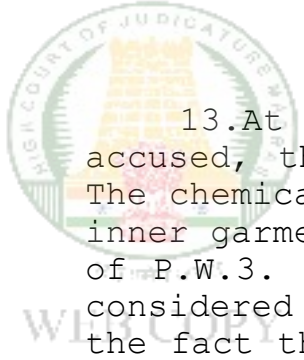
9. In the instant case, P.W.3, the victim child, has categorically stated that the accused took her into his house, bolted the house from inside, made her nudge, asked her to suck his penis and had sexual intercourse with her, by force. Learned counsel for the appellant would submit that the evidence of P.W.3 should be eschewed from consideration, because the trial court has not complied with Section 118 of the Indian Evidence Act, inasmuch the trial court has not recorded its opinion as to whether P.W.3 was competent to give evidence or not.



10. We have gone through the evidence of P.W.3. First of all, the trial court ought not to have administered oath on P.W.3, without ascertaining as to whether P.W.3 was capable of understanding the consequences of such an oath. In a mechanical fashion, the trial court has administered oath on P.W.3, without complying with the above legal requirement. This, in our considered view, is not only an irregularity but also an illegality. Secondly, though the trial court had asked few questions from the witness, it did not record its opinion as to whether P.W.3 was competent to give evidence, as enshrined in Section 118 of the Indian Evidence Act. In our considered view, the trial court ought to have expressed its satisfaction about the competence of the witness and that should have reflected in the recording made by the trial court. The trial court has miserably failed to do so. But, on that score, we are not persuaded to reject the evidence of P.W.3. The answers given by P.W.3 to the queries put to her before the examination and the very narration of events made by her during the chief examination as well as cross-examination would go to show that she was competent enough to depose as a witness.

11. It is also too well settled that every witness is competent, unless the Court is satisfied that the witness is incompetent. A witness cannot be prevented from deposing. Here, in this case, though the trial court had failed to record that P.W.3 was competent to depose, from the nature of deposition made by P.W.3 and the answers given by her to the queries made by the Court, we are of the view that she was competent to depose and thus the argument of the learned counsel for the appellant, on this score, is rejected.

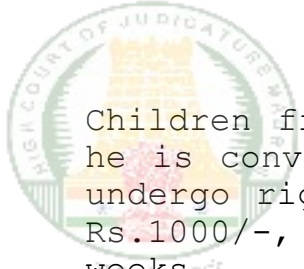
12. It is also too well settled that the evidence of prosecutrix, if inspires the confidence of the Court, would be sufficient to base conviction even in the absence of any corroboration. Here, in this case, though P.W.3 was cross-examined at length, nothing has been elicited from her evidence to create even a little doubt of tutoring. She has given a very cogent evidence, which certainly inspires the confidence of the court. Evidence of P.W.3 also draws corroboration from other sources. According to P.Ws.4 and 5, around 6.30 p.m., the accused led P.W.3 into his house. This, they informed P.W.1 on the next day by 7.00 a.m. This has been spoken by P.W.1 also. Thus, from the evidence of P.Ws.1, 4 and 5, it has been clearly established that the accused, at or around 6.30 p.m., has led P.W.3 into his house. After 6.30 p.m., P.W.3 did not return home. P.Ws.1 and 2 went in search of P.W.3. On the next day, around 7.00 a.m., P.Ws.4 and 5 have informed P.W.1 that it was this appellant/accused who took P.W.3 into his house. Therefore, they went to the house of the accused and found the accused as well as P.W.3, there. This fact stands proved from the evidence of P.Ws.1 and 2. The presence of P.W.3 in the company of the accused in his house would further corroborate the evidence of P.W.1.



13. At the time when P.W.3 was found inside the house of the accused, there were bloodstains on her thighs and dress materials. The chemical analysis report has proved that there were semen on the inner garment (jatti) of the accused and bloodstains on the in-skirt of P.W.3. Though the blood grouping remained inconclusive, in our considered view, the presence of semen on the jatti is indicative of the fact that there was sexual intercourse by a man. The doctor who examined P.W.3 had found rupture of her hymen and there was also inflammation. Rupture of hymen of a young girl, at the age of 7, would not have occurred due to any natural cause. The rupture, coupled with the presence of bloodstains on her in-skirt would go to prove that she was subjected to sexual intercourse. P.W.3, at the earliest point of time when P.Ws.1 and 2 met her, has narrated what had happened to her. She has stated categorically that the accused made her to suck his penis and also inserted his penis into her vagina. Though she did not use any 'penis' and 'vagina', she has stated that the accused put his organ with which he passes urine into her organ through which she passes urine. This is the language of a child. From and out of this, we are able to understand that the accused had intercourse with P.W.3. Thus, from the evidence of P.W.3, which is duly corroborated by the evidence of P.Ws.1, 2, 4 and 5 and the medical evidence, we are of the view that the prosecution has clearly proved that the accused had criminally intimidated P.W.3 and had sexual intercourse with her, by force and also committed unnatural offence by making her to suck his penis. Silver anklets worn by P.W.3 were also found in the possession of the accused. This gives rise to the presumption that he had stolen away the same from P.W.3. There is no explanation from him, rebutting the said presumption, to the satisfaction of the court. Thus, the act of the accused in committing an offence punishable under Section 379 IPC also stands proved.

14. Now turning to the quantum of punishment, the accused, a bachelor, aged 21 years at the time of occurrence, driven by his lust and sexual urge, had taken the young girl into his house and committed these offences. There are lot of chances for him for reformation. He has got no bad antecedents. Having regard to these mitigating and aggravating circumstances, we are inclined to impose minimum punishment and accordingly sentencing him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.1000/- for the offence under Section 376 IPC, to undergo rigorous imprisonment for five years and to pay a fine of Rs.1000/- for the offence under Section 377 IPC and confirming the conviction and sentences imposed under Sections 506(i) and 379 IPC would meet the ends of justice.

15. In the result, the appeal is partly allowed, modifying the conviction and sentences as under:



Children from Sexual Offences Act, 2012 are set aside and instead, he is convicted under Section 376 IPC simpliciter and sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.1000/-, in default to undergo rigorous imprisonment for six weeks.

(ii) While confirming the conviction of the appellant/accused under Section 377 IPC, he is sentenced to undergo five years rigorous imprisonment and to pay a fine of Rs.1000/-, in default to undergo rigorous imprisonment for six weeks, instead of life sentence and to pay a fine of Rs.20,000/- in default to undergo simple imprisonment for one year.

(iii) The conviction and sentence imposed under Sections 506 (i) and 379 IPC are confirmed.

(iv) All the sentences are directed to run concurrently. The period of sentence already undergone by him shall be given set-off, as required under Section 428 Cr.P.C.

(v) If the appellant/accused is on bail, the bail bonds executed by him shall stand cancelled and the trial Court is directed to secure his presence and commit him to jail to undergo the remaining period of sentence.

Sd/-

Assistant Registrar (AS)

/True Copy/

Sub-Assistant Registrar

To:

1. The Principal Sessions Judge,
Virudhunagar District at Srivilliputtur.
2. The Mahila (Fast Track) Court,
Virudhunagar District at Srivilliputtur.
3. The Judicial Magistrate No.II,
Srivilliputtur, Virudhunagar District.
4. The Inspector of Police,
Mamsapuram Police Station,
Virudhunagar District.
5. The Superintendent of Central Prison, Madurai
6. The District Collector,
Virudhunagar District at Srivilliputhur
7. The Director General of Police, Mylapore, Chennai
8. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+One cc to Mr.D.Ramesh Kumar, Advocate, SR.No.69665

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RL/10C/8P/KM/SARI/11.1.2017

Judgment in
Crl.A. (MD) No.328 of 2015

Dated:16.11.2016