

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12..06..2017

DELIVERED ON: 13..07..2017

CORAM

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

Crl.Appeal No.347 of 2010

Eswaran
S/o Madhesh
Jalakandapuram
Alagapuram
Salem District

.. Appellant/accused

Vs

The State by Inspector of Police
All Women Police Station
Omatur, Salem District

.. Respondent/complainant

Prayer:- Criminal Appeal filed under Section 374 (2) of Cr.P.C., against the order of the Sessions Judge, Mahila Court, Salem in S.C.No.181 of 2007 dated 11.01.2010 convicting the accused for the offence under Section 366 and 376 IPC against the accused to undergo Rigorous imprisonment for 5 years and to pay a fine of Rs.1000/- in default Rigorous Imprisonment of 3 months under Section 366 IPC and also sentenced to undergo Rigorous

Imprisonment for seven years and to pay a fine of Rs.1000/- in default rigorous imprisonment for one year under Section 376 IPC.

For Appellant : Mr. R.Murugabharathi

For Respondent : Mr. E.Raja
Additional Public Prosecutor

J U D G M E N T

The accused was prosecuted for the offences punishable under Section 366 and 376 of Indian Penal Code. He was found guilty on all counts. Therefore, he was convicted and sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.1,000/- with a default sentence of rigorous imprisonment for three months for the offence under section 366 of I.P.C. and also sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs.1,000/- with a default sentence of rigorous imprisonment for one year for the offence under section 376 of I.P.C. Substantive sentences were directed to run concurrently. Set off as per law was allowed.

2. P.W.1 is the victim in this case and P.W.s 2 and 3 are her parents. They are the resident of Nachiyampatty, Alagapuram village. On 15.5.2005, at about 3.00 p.m., P.W.1 left the home for purchasing rice and sugar from Selevadi ration shop. After purchase, she handed over the things to her brother. When she returned home at 4.00 p.m, the accused Easwaran, Selvam and Natarajan, who came behind her, covered her face with kerchief and took her in a car to Rajapalayam and kept her in the house belonging to the person known to the accused. P.W.1 stayed there for three months, where the accused illtreated and harassed her and had sexual intercourse with her. He also caused burn injuries on her using cigarette and beat her with ladle. In view of the repeated sexual intercourse had by the accused with her, she became pregnant for 8 weeks.

2 (i) On 21.8.2005, P.W.1 escaped from the custody of the accused and sold her gold nose stud and thereby got money and came to Nachiyampatti, Alagapuram and informed P.W.2 and P.W.3 that the accused kidnapped her. Thereafter, Ex.P1, complaint, was laid before the Superintendent of Police on

22.8.2005, who forwarded the same to P.W.9, the then Inspector of Police at Omalur. P.W.9, on receipt of compliant, registered a case in Cr.No.32 of 2005 for the offence under Section 341, 366 and 376 IPC. (Ex. P12). She took up further investigation and visited the place of occurrence and prepared Observation Mahazar (Ex.P2) and Rough sketch (Ex.P13) and recorded the statement of Witnesses and arrested the accused and sent him to the Judicial Magistrate for remand. She also gave requisition to the court for sending both the accused and the victim girl P.W.1 to the Government hospital for medical examination (Exs.P5 and P8). She also examined one Chinnasamy, (P.W.5), Head Master of the Government Girls Higher Secondary School, Madhanaickanpatty, who issued certificate stating that her date of birth is 15.06.1987. P.W.6 treated the victim on 15.11.2005 and found that four months fetus was aborted. She issued Ex.P2 certificate in that regard.

2 (ii) P.W.7, Director Forensic Science Department, based on the requisition from the Judicial Magistrate, conducted potency test and stated that nothing to suggest that the accused

was potent and issued Ex.P7, medical certificate. He also issued age certificate Ex.P6 stating that the accused was aged about 18 years and below 20 years. P.W.8, Assistant Professor of Forensic Science Department of Government MohanKumaramangalam Medical College Hospital, Salem, based on the requisition, examined P.W.1 and took ultra sound and confirmed 8 weeks pregnancy of P.W.1 and finally issued Ex.P11 certificate stating that no fresh external injuries over genitalia, lips, cheeks, mammal and thighs. It is also stated that vaginal admits one index finger and Hymen ruptured posteriorly. It is further stated that vaginal examination revealed 8 weeks grand uterus with healthy cervix. In the meanwhile, P.W.9 had completed the investigation and laid charge sheet before Court.

3. Learned Judicial Magistrate No.2, Mettur took cognizance of the offence and finding that the offences are exclusively triable by a court of Sessions committed the case to Sessions court (Mahila Court) at Salem. The said Court, on receipt of records and on appearance of the accused, framed charges for the offences punishable under Section 366 and 376 of I.P.C. He

pleaded not guilty to the charge and claimed to be tried. The prosecution, therefore, had P.Ws. 1 to 9 examined and had Exs.P1 to P13 marked. During the examination of the prosecution witnesses, M.Os. 1 to 5 were got identified and marked. After the close of the prosecution evidence, the accused was questioned under Section 313 Cr.P.C. in which he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He however chose to adduce no evidence.

4. The court below on an appreciation of the evidence in the case found that the accused had kidnapped the victim girl and subjected her to forced sexual intercourse and also that the victim was below the age of 18 at the relevant time. Consequently, the accused was found guilty on all counts and conviction and sentence as already mentioned followed. The said conviction and sentence are assailed in this appeal.

5. Learned counsel appearing for the appellant/accused assailed the finding of the court below on several grounds. The

learned counsel went on to point out that the evidence of P.W.1 is highly improved version and absolutely, there is no evidence, whatsoever for the alleged kidnapping and rape. It is contended that she had love affair with the accused. It is also contended that the evidence discloses that the victim had voluntarily gone along with the accused and there was no kidnapping and rape as alleged by the prosecution. She resided with the accused on her own volition in different places for three months and the evidence of P.W.8, the doctor, who had examined P.W.1, and Exs.P9 to P11 would clearly show that the claim of rape is not substantiated. No external injuries are noticed by the doctor while examining the victim and the same would prove that there was no forcible sexual intercourse. The learned counsel appearing for the accused also pointed out that by no stretch of imagination Section 366 of IPC can be attracted to the facts of this case.

6. The learned counsel for the appellant / accused also assailed the finding of the lower court that the girl was aged below 16 years at the relevant time. It was pointed out that the said finding has been wrongly given. Even as per the evidence of

P.W.5, the Headmaster of the School, the victim is more than 17 years and almost nearing 18 years. The above vital aspects, according to the learned counsel, have been omitted to be noticed by the court below and that has resulted in an erroneous decision. In short, learned counsel pointed out that none of the offences is made out by the evidence on record.

7. Learned Additional Public Prosecutor on the other hand vehemently supported the finding of the court below. It was pointed out by him that the criticism levelled by the learned counsel for the appellant had no basis or foundation. A reading of the evidence of P.W.1 would show that the accused had kidnapped her and had sexual intercourse forcibly which resulted in pregnancy. She has clearly spoken about the specific overt act against the accused how she was ravished and became pregnant. Therefore, it appears that she had not voluntarily gone along with the accused. The entire evidence adduced would go to show that the victim was subjected to sexual intercourse. The evidence of P.W.1 will clearly show that the sexual intercourse was against the will of the victim and at any rate, since the victim is below

the age of 18 at the relevant time, the question of consent is irrelevant. Learned Public Prosecutor very vehemently argued that Ex.P3 is sufficient to prove the age of the victim.

8. Learned Public Prosecutor went on to point out that even assuming that the offence of rape is not made out, for a moment conceding that the age of the victim was above 16 and was with her consent, the act of the accused cannot escape from falling within the ambit of Section 366 of I.P.C. Therefore, the finding of the Trial Court need not be interfered with.

9. After having heard learned counsel for the appellant and the learned Additional Public Prosecutor, it appears that the points that actually arise for consideration are:

(i) Was there forced sexual intercourse by the accused on P.W.1?

(ii) Is it proved by the prosecution that the age of P.W.1 was below 16 years as on the date of commission of offence?

(iii) What, if any, is the offence committed? and

(iv) Do the sentence call for any interference?

Points (i) to (iv)

10. As regards the question whether there was forced sexual intercourse or not, the court below seems to have relied on the version given by P.W.1 that she was raped. But, on going through the judgment of the lower court, it is seen that Lower Court has proceeded on the premises that consent of girl below 18 years is irrelevant. In fact the Lower Court did not consider the provision of Section 375 IPC before its amendment in the year 2013. Therefore, the court below thought it was unnecessary to give importance or significance to the question of consent.

11. Before this court, the age of the victim is seriously challenged and it is contended that the conclusion drawn by the court below is erroneous and contrary to law.

12. It will be useful to recollect the prosecution case. On 15.5.2005, the victim, P.W.1, went to Selevadi ration shop to purchase groceries and after purchase she handed over the same to her brother. At that time, the accused Eswaran, Selvam and Murugesan followed her and wanted to speak with her. Since she refused, she was forcibly taken by them in a car by covering her face with kerchief and kept in a house known to the accused and she was in their house for three months, where the accused tortured and raped her and also caused burn injuries on her by using cigarette. Due to continuous intercourse by the accused, she became pregnant. After three months, she escaped from Rajapalayam and lodged the present complaint.

13. P.W.2 and P.W.3 are the parents of P.W.1. They would say that on 15.5.2005, P.W.1 was missing and they made search. However, they could not find her. Therefore, they gave information to Jalagandapuram police station. After three months, P.W.1 came to home and informed that the accused kidnapped her and raped her. Thereafter, they are residing separately at Vanasaiyur. While so, P.W.1 fell down while

climbing upstairs and due to which, the fetus was aborted. Except P.W.1's evidence, no other evidence available on record to corroborate the version of prosecution.

14. No doubt, it is well settled that the evidence of Prosecutrix is more reliable as that of the injured witness. Further, the testimony of the victim for the sexual assault is a vital unless there are compelling reasons which necessitate looking for corroboration of her statement. It is also well settled that the Court may not always insist upon the corroborative evidence to sustain conviction of the accused for the offence of sexual assault particularly, when the victim evidence inspires confidence and is found to be reliable.

15. In the background of the above settled position of law, when the evidence of P.W.1 is carefully read, she has stated in her evidence that the accused and two other persons, namely, Selvan and Murugesan took her forcibly in a car and accused kept her in Rajapalayam, where she stayed for three months and at that time, the accused not only tortured her but also caused burn

injuries on her by using cigarette and raped her and beaten her with ladle and she became pregnant for 8 weeks. However, she escaped from the custody on 21.8.2005 and informed her parents and lodged complaint (Ex.P1). It is the further case of P.W.1 that after 15 days, while she was climbing upstairs, she fell down as a result, fetus was aborted.

16. On a careful analysis of the entire evidence of P.W.1 and her formal statement, Ex.P1 as well as the first information lodged with the Superintendent of Police on 22.8.2005, it is seen that in the First information, it is the specific allegation of the prosecutrix that the accused along with 7 others came in a car and kidnapped her and kept in the house of Rajapalayam near Madurai and raped her. In the First information, absolutely, there is no whisper, whatsoever about the alleged version of causing burn injuries on her by using cigarette and beating her with ladle. The said aspect was silent in the FIR. Of course, these are all minor discrepancies. But important aspect with regard to the age of the victim mentioned in the information assumes significance. It is specifically stated by P.W.1 in her first

information that she was aged only about 16 years. Whereas, P.W.5, Head Master of the school, where she last studied, deposed that her date of Birth is 15.06.1987. If that being so, the victim was 17 years and 11 months on the date of occurrence. Though, she has named 8 accused in the complaint, the prosecution is silent about 7 other persons either in the charge sheet or in the materials produced by them before the Trial Court.

17. Be that as it may, the court below has found that the victim is below the age of 18. In Ex.P1 which is the first information, the statement given by P.W.1, the victim, the age is shown as 16. The prosecution has produced Ex.P3, which shows that the date of birth of the victim is 15.6.1987 which is said to have been issued by P.W.5, Headmaster, Government Girls Higher Secondary School, Jalagandapuram and the same proves that she is almost eighteen year one month short.

18. Much significance is seen attached to the age of the victim in this case. It may be recollected here that the court

below was mainly persuaded to take the view that P.W.1 has been raped on the basis that she was below the age of 18. Of course, the court below has placed reliance on the stray statement of the victim as discussed above.

19. In the above background when the evidence of P.W.1 is carefully perused, it is seen that her evidence is highly improved one. In the First Information, she has never stated anything about the accused using kerchief in her face and took her in the car. This version has been introduced for the first time in her evidence.

20. It is to be noted that in the re-examination before the police officer, P.W.1 has categorically stated that she had love affair with the accused and she had voluntarily went with the accused. This contradiction has been elicited through the evidence of the investigation officer, P.W.9. P.W.9, in her evidence, has admitted that during re-examination, P.W.1 has stated before her that she was in love affair with the accused and she voluntarily went with the accused without the consent of her

parents and was residing separately for three months and, therefore, she became pregnant. When such material contradiction is brought on record, the evidence of the prosecutrix that she was forcibly taken by the accused and kept in the unknown place for three months, where the accused raped her is highly improbable and the same creates some doubt about her version.

21. On reading of the evidence of P.W.8, Medical Officer, it is seen that the prosecutrix had repeated sexual intercourse and she became pregnant about 8 weeks at the relevant time. There was no external injuries in the genitalia or other parts of the body. This fact would clearly indicate that, in fact, P.W.1 was a consenting party and in fact she was living with the accused for three months in different places. M.O.1 and M.O2 series, photographs exhibited would also show that the accused and the victim were taken a photographs after marriage. This fact clearly indicate that the victim in fact had affair with the accused and eloped with him. A statement of P.W.6 also would go to show

that she treated her after abortion and issued Ex.P4 certificate in that regard.

22. Yet another important aspect to be seen in this case is that even after P.W.1 was missing, P.W.2 and P.W.3, parents, have not taken any steps to secure her. Even though they pleaded that they have given complaint before the Jalagandapuram Police station, the said complaint has not seen the light of the day.

23. The material contradiction of P.Ws.1 to 3 and the evidence of investigating officer with regard to the voluntarism of the victim girl, who fall in love with the accused and was residing with him for three months, would clearly falsify P.W.1's evidence that she was kidnapped and forcibly raped by the accused. Though P.W.1 would say that she was taken in a car from village, none of the witness spoken about the kidnapping of P.W.1 in a car by the accused. Further, as stated supra, the prosecution is totally silent about the other named accused. Even the

Investigating Officer's evidence is also totally silent about this aspect.

24. Another material contradiction elicited through P.W.9 investigating officer, during cross examination is that the father of the victim has clearly narrated the fact that the accused and the victim were in love affair and the accused also wanted to marry the victim. This material contradiction creates serious doubt about the version of P.W.1 with regard to forcible rape and kidnapping.

25. That apart, the prosecution has not at all conducted any investigation with regard to the place where the accused and victim stayed for three months. No one was examined in this aspect. Admittedly, the prosecution has not even produced any materials as regards the owner of the house, where the victim and accused stayed and under what capacity the accused and the victim were living in the said house. All these facts also would create serious doubt about the case of the prosecution.

26. In any event, though the age of the victim at the time of occurrence was 17 years 11 months, and the contradiction elicited would go to show that the victim had voluntarily gone with the accused, and she had consented to sexual intercourse and since P.W.1's evidence, is not in a sterling quality, this Court is not in a position to accept the evidence of P.W.1 alone. At any rate, in view of the serious contradiction in the entire evidence of P.W.1 to P.W.3 and P.W.9 with regard to the alleged rape and kidnapping, this Court is unable to accept the version of prosecution in the absence of any corroborative evidence on that regard.

27. Prior to the Criminal Law Amendment Act, 2013, to bring the offence under Section 375 IPC it must be established by the prosecution that the act was committed against her will, without her consent, or with or without her consent when victim is below 16 years of age . When her consent has been obtained by putting her or any person in whom she is interested, in fear of death or hurt. In this regard, it would be useful to extract the

descriptions mentioned in Section 375 of IPC (Prior to amendment) by Act 13 of 2013, which reads as follows:

“S.375.Rape.- A man is said to commit “rape”who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First.- Against her will.

Secondly.-Without her consent.

Thirdly.-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.-With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome

substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under sixteen years of age.

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape”

Admittedly, as per the evidence of PW-5, the age of the victim on the date of alleged occurrence is 17 years and 11 months. The evidence shows that she was consenting party. Therefore, the charge under Section 375 is not attracted before the amendment by Act 13 of 2013. When the victim was more than 16 years of age and she was consenting party to the sexual intercourse, the offence under Section 375 IPC would not be attracted.

28. Nowhere in her evidence, P.W.1 has stated that when the accused had sexual intercourse with her, she attempted to

resist his move or that she had expressed her unwillingness to have sexual intercourse. It is therefore not possible to accept the finding of the court below that merely because the victim has stated that she was raped, it follows that there was forced sexual intercourse against the will of the victim and overpowering her resistance.

29. Similarly, to establish charge under Section 366, it must be established by the prosecution that the accused kidnapped P.W.1 with intention that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse. But none of the ingredients have been established by the prosecution by convincing and cogent evidence for the alleged offence of kidnapping also. The evidence of P.W.1 does not inspire confidence of this Court in view of the serious material contradiction as stated above. The alleged prior complaint referred in Ex.P1 also not seen the light of the day and the prosecution is unable to explain the court with regard to the

prior complaint given by the parents. Suppression of the above complaint is also fatal to the case of the prosecution.

30. More so, FIR has also been reached to the Court with delay. This aspect has also not been explained by the prosecution. Of course, the delay in sending FIR to Court is immaterial, particularly, the matter of this nature. But as discussed above, the evidence of P.W.1 is not convincing nor inspires confidence of this Court to accept her version.

31. In the light of the above fact, the finding of the court below that offence under Sections 366 and 376 of IPC has been established cannot be accepted. Hence this Court is of the view that the prosecution has miserably failed to establish the guilt against the accused beyond all reasonable doubt. Therefore, the accused is entitled to a benefit of doubt and a consequent acquittal. The judgment of the trial Court convicting the accused under Section 366 and 376 IPC is liable to be set aside.

32. In the result, this appeal is allowed, the conviction and sentence passed by the court below are set aside and it is held that the prosecution had failed to prove the case against the accused beyond reasonable doubt. The accused stands acquitted of the offences under Sections 376 and 366 of I.P.C. His bail bond shall stands cancelled and he is set at liberty. If he had paid the fine amount, the same shall be refunded to him.

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Index : Yes/No

Internet : Yes/No

Speaking/Non Speaking Order

To

1. The Sessions Judge, Mahila Court, Salem-1.

2.The Special Public Prosecutor,
High Court, Madras.

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N.SATHISH KUMAR, J

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Pre Delivery Judgment in

CrI.A.No.347 of 2010

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