

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.01.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

AND

THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

Criminal Appeal No.715 of 2016

Kumar

..Appellant/Accused

Vs

The State represented by
The Deputy Superintendent of Police,
Arakkonam Division,
Vellore District.

(Cr.No.127/2005 on the file
of Nemili Police Station)

..Respondent/Complainant

Prayer:- Criminal Appeal filed under Section 374 r/w 382
Cr.P.C., against the judgment dated 19.09.2016 passed by the
learned Principal Sessions Judge, Vellore, Vellore District.

For Appellant : Mr.R.Shanmugasundaram, Senior Counsel
for Mr.P.Krishnan

For Respondent : Mr.P.Govindarajan,
Additional Public Prosecutor

JUDGEMENT

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

The appellant is the sole accused in Special Sessions
Case No.5/2006 on the file of the learned Principal Sessions
Judge, Vellore. He stood charged for offences under Sections
376 r/w 511 I.P.C., Sections 3 (1)(xi), 3(1)(xii) and 3 (2)
(v) of the SC/ST Act, 1989. By judgment dated 07.12.2006, the
trial Court convicted him under all the charges and sentenced
him to undergo rigorous imprisonment for 10 years and to pay a
fine of Rs.10,000/- in default to undergo rigorous
imprisonment for one year for the offence under Section 376
r/w 511 I.P.C.; to undergo rigorous imprisonment for one year
and to pay a fine of Rs.2,000/- in default to undergo simple
imprisonment for three months for the offence under Section
3 (1)(xi) of the SC/ST Act; to undergo rigorous imprisonment
for one year and to pay a fine of Rs.2,000/- in default to

undergo simple imprisonment for three months for the offence under Section 3 (1)(xii) of the SC/ST Act and to undergo rigorous imprisonment for ten years and to pay a fine of Rs.2,000/- in default to undergo rigorous imprisonment for six months for the offence under Section 3 (1)(v) of the SC/ST Act. The trial Court ordered the above sentences to run concurrently. Challenging the same, the appellant filed an appeal in CrI.A.No.23 of 2007 before this Court.

2. During the course of argument, a grievance was expressed by the learned counsel for the appellant/accused that many of the incriminating materials against the accused were not put to him under Section 313 Cr.P.C. Having accepted the same, a learned Single Judge of this Court by judgment dated 22.09.2015, set aside the conviction and sentence imposed on the appellant/accused and remanded the matter back to the trial Court for fresh disposal.

3. Thereafter, the trial Court questioned the accused further under Section 313 Cr.P.C., and allowed the accused to examine witness in defence. Thereafter, the trial Court by judgment dated 19.09.2016 convicted the accused for offence under Section 376 r/w 511 I.P.C., and Section 3(2)(v) of SC/ST Act, 1989 and sentenced him to undergo imprisonment for life and to pay a fine of Rs.5,000/- in default to undergo simple imprisonment for three months. The trial Court, however, acquitted the accused from the charges under Sections 3 (1)(xi) and 3 (1)(xii) of SC/ST Act. Challenging the above conviction and sentence, the appellant is before this Court with this Criminal Appeal.

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

P.W.1, a young girl, aged about 14 years at the time of occurrence was a resident of Vazhiyur Village in Dharmapuri District. On 17.06.2005, she was proceeded to Vadakandigai village to the house of her uncle. When she was nearing Vadakandigai Village, the accused intercepted her and by force took her to a nearby place inserted a cloth into her mouth and attempted to rape her. P.W.1 however, escaped from the said attempt. She returned to her house and informed her family members about the occurrence. Thereafter, a complaint was made to the Police Station on 19.06.2005 upon which, the present case was registered.

5. During the course of investigation, P.W.1 was sent for medical examination which revealed that there was rupture of hymen in her vaginal cavity indicating that she had undergone sexual intercourse. The vaginal smear taken from her, which was sent for medical examination, revealed that there was no spermatozoa. Thus, there was no evidence of immediate sexual intercourse. The accused was sent for medical examination which revealed that he is capable of performing sexual intercourse with a woman.

6. Based on the above materials, the trial Court framed charges as stated in the first paragraph of this judgment. The accused denied the same as false. In order to prove the case, on the side of the prosecution as many as 14 witnesses were examined and 22 documents were exhibited, besides 5 Material Objects.

7. Out of the said witnesses, P.W.1 is the victim and she has vividly spoken about the entire occurrence. She has further stated that she informed the occurrence to her family members and she has also further spoken about the complaint made to the Police. P.W.2 is the grand mother of P.W.1. She has stated that P.W.1 informed her about the occurrence. P.W.3 is the Aunt of P.W.1. She was the resident of Vadakandigai Village. According to her case, it was to her house P.W.1 was proceeding and at that time, the occurrence took place. P.W.3 has stated that on the day of occurrence, when she was in the field, P.W.1 came and told that the accused made an attempt to rape her. P.W.4 is the father of P.W.1. He has stated that on returning home, he came to know about the occurrence through P.W.1 and thereafter, he took her to the Police Station to make complaint. P.W.7 has spoken about the arrest of the accused. P.W.8, the Tahsildar has stated that P.W.1 belongs to Scheduled Tribe. Ex.P.6 is the certificate issued by him. P.W.9, Dr. Malliga has stated that she examined P.W.1 on 19.06.2005 and found the following on her:-

1. Breast - minimal redness over the upper aspect of right breast
2. c/o pain over the right breast and neck
3. c/o pain over the genitalia
4. minimal hair of growth - over the genitalia no matting seen
5. Introitus admits - one index finger freely
6. swab from - vagina-postusion"

Ex.P.7 is the certificate issued by P.W.9. She opined that there was no sign of recent sexual intercourse. P.W.10 has stated that she took x-ray on P.W.1 and gave opinion that P.W.1 was aged between 17 and 18 years. P.W.11 has stated that he examined the accused and opined that he was sexually potential to have sexual intercourse with a woman. P.W.12 has spoken about the registration of the case on the complaint of P.W.1 and the investigation done. P.W.13, the Revenue Officer has stated that P.W.1 belongs to Scheduled Tribe. P.W.14 has spoken about the further investigation done by him and the final report filed.

8. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. On his side, he examined two witnesses. D.W.1 is the then Village Administrative Officer of Sayanapuram. He has

stated that the distance between Vadakandigai and the place of occurrence is 1 ½ kilo meters. D.W.2 is the resident of Vadakandigai Village. He has not stated anything in favour of the accused except stating that the complaint against the accused is a false one. However, no document was exhibited on the side of the defence.

9. Having considered all the above, the trial Court found the accused/appellant guilty under the said charges and accordingly, sentenced him as detailed in the second paragraph of this judgment. That is how the appellant is before this Court with this Criminal Appeal.

10. We have heard the learned Senior Counsel appearing for the appellant/accused and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

11. At the outset, we should say that in this case, the first charge framed against the accused is only for offence under Section 376 r/w 511 I.P.C., and there was no charge framed for offence of rape under Section 376 simplicitor. The trial Court has also convicted the accused only for an offence of 'attempt of rape' and not for 'actual rape'. P.W.1, the victim, in her evidence has stated that when she was proceeding to the field, the accused intercepted and took her to a nearby place and committed sexual assault on her. Though, the evidence of P.W.1 indicates that the accused had penetrative sexual intercourse, it is not in consonance with the charges framed.

12. As we have already pointed out, the charge is only for an attempt to rape. From the evidence of P.W.1, the prosecution, in our considered view, has clearly and clinchingly proved that there was an attempt made by the accused on P.W.1 to commit rape.

13. The learned counsel for the appellant would submit that the evidence of P.W.1 cannot be believed because, she was tutored by her relatives to make a false case against the accused. This argument finds no material at all on record, by way of evidence. Though, P.W.1 has been cross examined at length, nothing has been elicited to create even remotely a doubt in the veracity of P.W.1.

14. P.W.2, the grand mother of P.W.1 has stated that immediately after the occurrence, P.W.1 told her about the above occurrence. P.W.3 has also stated so. This statement of P.W.1 made at the earliest point of time to P.Ws.2 & 3 would corroborates the evidence of P.W.1 in respect of the attempt of rape on her by the accused.

15. The medical evidence as spoken by P.W.9 also supports the evidence of P.W.1. P.W.9 has stated that there was no sign

of any recent sexual intercourse. But P.W.9 has stated that the hymen in the vaginal cavity of P.W.1 was found ruptured and her vaginal cavity allowed one finger to move freely into it. This would certainly indicate that P.W.1 would have had sexual intercourse some time before and not immediately before the occurrence. This would only go to show that there was no actual rape committed by the accused but there was only an attempt made on her.

16.The age of P.W.1 at the time of occurrence was hardly 14 years. P.W.10, the Doctor who conducted examination on P.W.1 based on x-ray report and other studies has opined that P.W.1 was aged above 17 years and below 18 years. The Investigating Officer has not chosen to collect any other evidence such as school certificate or the birth certificate. In order to precisely prove the date of birth of P.W.1, the opinion of P.W.10 being approximate, cannot be taken as a conclusive proof. P.W.10 has spoken only about the range of the age of P.W.1 at the time of occurrence. It is true that two years margin on either side should be normally given. If that yardstick is applied, it can also be said that P.W.1 had completed 18 years of age. Assuming that she had completed 18 years of age, it is immaterial because, it is not a case of consensual sexual intercourse. As spoken by P.W.1, she was taken by force by the accused to the nearby field, a cloth was inserted into her mouth thereby preventing her from raising alarm and then he attempted to have sexual intercourse with her. Thus, it is quite obvious that there was no consent on the part of P.W.1 and therefore, her age becomes immaterial. P.W.11, Dr.Panneerselvam had examined the accused and found that he was sexually potential to have a sexual intercourse with a woman. This opinion of P.W.11 also corroborates the evidence of P.W.1.

17.According to Ex.P.20, P.W.1 belongs to Scheduled Tribe community. There is no denial of the said fact. But absolutely, there is no evidence that the accused was aware of the community of P.W.1. There is nothing on record even to indicate that the accused had knowledge that P.W.1 belongs to Scheduled Tribe community and that he attempted to commit rape on her, on account of her community. Simply because P.W.1 belongs to Scheduled Tribe community, it cannot be concluded that an atrocity in terms of Scheduled Caste/Scheduled Tribe was committed by the accused on P.W.1. The trial Court has convicted the accused under Section 376 r/w 511 I.P.C., r/w Section 3(2)(v) of SC/ST act. Section 3(2)(v) of SC/ST Act states that if any offence has been committed on a person belongs to Scheduled Caste or Scheduled Tribe, for an offence punishable for 10 years and above, then the accused shall be liable for punishment of imprisonment for life. In other words, if the offence had been committed on an individual, who belongs either to Scheduled Caste or Scheduled Tribe and if it amounts to atrocity in terms of the act, then, the accused is liable for enhanced punishment. In the instant case, we have

already concluded, there is no evidence to show that the accused committed any offence in terms of Section 3 (2)(v) of the Act. Therefore, he is liable to be punished only for offence under Section 376 r/w 511 I.P.C.

18.Now, turning to the quantum of punishment, at the time of occurrence, the accused was hardly aged about 28 years. After the occurrence, he has got married and has got two children born out of the same also. There is no allegation that the accused had any other bad antecedent. After this occurrence also, he has not committed any other crime or any misconduct. There are lot of chances for reformation. The learned counsel for the appellant having noticed the plight of P.W.1 and also the economic status of the accused, offered to pay a sum of Rs.3,00,000/- as compensation.

19.Having regard to the above stated aggravating as well as mitigating circumstances, having regard to the economic status of the accused as well as P.W.1 namely the background of both and all the other attending circumstances, we are of the view that sentencing the accused to undergo rigorous imprisonment for five years and to pay a fine of Rs.3,00,000/- for the offence under Section 376 r/w 511 I.P.C., would meet the ends of justice. We are also of the view that the entire amount of fine, on realisation, should be paid to P.W.1 as compensation.

20.In the result, the criminal appeal is partly allowed and the conviction and sentence imposed on the appellant for offences under Sections 376 r/w 511 I.P.C., r/w Section 3(2) (v) of the SC/ST act are set aside and instead he is convicted for offence under Section 376 r/w 511 I.P.C., and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.3,00,000/- as compensation in default to undergo rigorous imprisonment for three months. On realising the said amount, the trial Court shall pay the entire amount of Rs.3,00,000/- to P.W.1 as compensation without reference to this Court. It is further directed that the period of detention already undergone shall be set off as required under Section 428 Cr.P.C.

WEB COPY

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1.The Principal Sessions Judge,
Vellore, Vellore District.

2. The Deputy Superintendent of Police,
Arakkonam Division,
Vellore District.

3. The Superintendent, Central Prison,
Vellore.

4. The Judicial Magistratee,
Arakkonam.

5. -do- Thro the Chief Judicial Magistrate
Vellore.

6. The Principal Sessions Judge,
Vellore.

7. The District Collector,
Vellore.

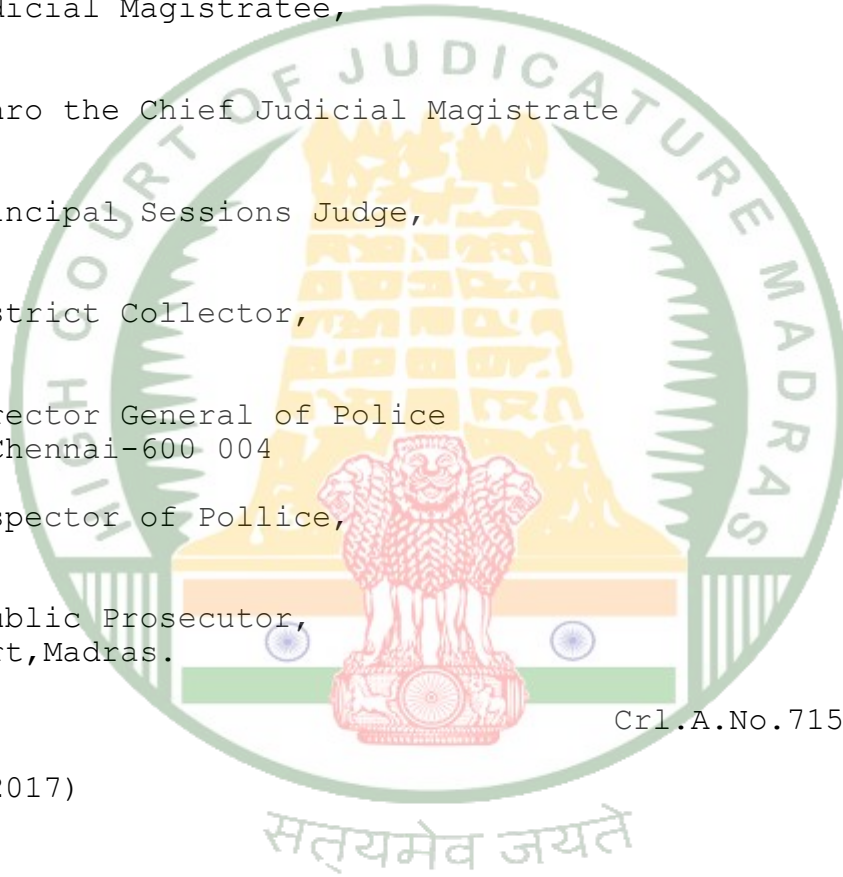
8. The Director General of Police
Mylapore Chennai-600 004

9. The Inspector of Pollice,
Vellore.

10. The Public Prosecutor,
High Court, Madras.

Tm(CO)
VR(16/02/2017)

Crl.A.No.715 of 2016



WEB COPY