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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.10.2017
Pronounced on : 07.11.2017

CORAM:

THE HONOURABLE MR .JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CrI.A.[MD].No.242 of 2017

K.Sundararajan .. Appellant/Sole accused

Vs.

State rep. by the Inspector of Police,
Thanjavur All Women Police Station,
Thanjavur District.
(Crime No.175 of 2013)

.. Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of Cr.P.C. against the judgment, dated 05.05.2014, made in S.C.No.01 of 2013, by the learned Sessions Judge cum Fast Track Mahila Court, Thanjavur.

For appellant : Mr.A.Haja Mohideen
For respondent : Mr.R.Ramachandran
Additional Public Prosecutor

JUDGMENT

[Judgment of the Court was made by R.SUBBIAH, J.]

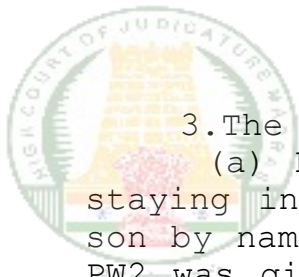
This appeal has been filed by the appellant / sole accused as against the conviction and sentence, dated 05.05.2014, made in S.C.No.1 of 2013 by the learned Sessions cum Fast Track Mahila Court, Thanjavur.

2.The appellant stood convicted and sentenced to undergo imprisonment as detailed hereunder:

Conviction U/s.	Sentence	Fine amount
376(2F) IPC r/w 4 of the Protection of Children from Sexual Offences Act, 2012	To undergo imprisonment for life.	
506(i) IPC	To undergo rigorous imprisonment for 2 years	To pay a fine of Rs.5,000/-, in default to undergo six months rigorous imprisonment.

<https://hcservices.ecourts.gov.in/hcservices/>

(All the sentences were ordered to run concurrently.)



3. The case of the prosecution is consciously narrated below:

(a) PW1 and her husband viz., PW15 were doing coolie work by staying in Vijay Farm at Suriyapatti. PW1 and PW15 are having one son by name Senthilkumar and one daughter by name Tamilselvi (PW2). PW2 was given in marriage to one Chandrasekar about five years ago and she gave birth to a female child by name Suriya (PW9), now aged about 4 years. Due to misunderstanding between PW2 and her husband, PW2 and her daughter (PW9) were staying along with her parents viz., PW1 and PW15. The accused used to play with the child. On 05.05.2013 at 10.30 a.m. the accused carried PW9. PW1, who was grazing the goats, watched the same and questioned him. The accused replied that he is taking the child to go around mango trees. After some time, when PW1 was going towards pump-set room, she saw the accused lying on PW9, after removing his dress and the dress of PW9, and attempting to commit penetrative sexual assault on PW9. On seeing this, PW1 rushed there and attacked the accused with stick. The accused threatened and pushed away PW1 by his hands. At that time, due to the hue and cry raised by PW1, PW2 to PW6 and PW19 came to the place of occurrence. On seeing them, the accused ran away from the scene of occurrence. Immediately, PW1 went to the Thanjavur Taluk Police Station and gave a complaint.

(b) PW17 - the then Sub Inspector of Police, has recorded the statement of PW1 and registered a case in Crime No. 376(2) and 506 (i) r/w Section 4 of the Protection of Children from Sexual Offences Act, 2012 and forwarded the FIR through PW18 - Head Constable to the Court. Thereafter, she recovered the underwear of PW9 under form 95 and sent the child to the hospital for examination through PW19 - Constable. Then, as per the instruction of the Deputy Superintendent of Police, she forwarded the complaint - Ex.P1 and FIR - Ex.P11 to PW21 - the Inspector of Police, Thanjavur All Women Police Station, for investigation.

(c) PW8 - Dr. Meenambigai, attached to the Thanjavur Government Hospital, has examined PW9 and she was informed that on 05.05.2013 at 10.00 a.m. at Suriyampatti Mango grove, a 60 years old man attempted to rape PW9. After examination, she found the following marks in the private part of PW9:

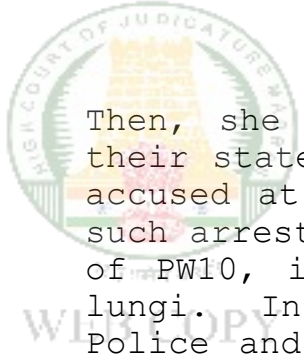
"1. Nail marks seen over mons pubis, inner aspect of both thighs.

2. Linear laceration of size 0.3 x 0.2 x 0.1 cm seen in the skin in between the labia majora & labia mino (NC) left side and it appears fresh red in the surrounding edema. No active bleeding from that injury. Hymen appears intact.

Smears for spermatozoa take and sent. Pubic hair absent. No (NC) present."

Ex.P3 is the wound certificate.

(d) PW21 took up the investigation on the same day and went to the place of occurrence and prepared an Observation Mahazar (Ex.P2) and Rough Sketch (Ex.P13) in the presence of PW7 and one Saravanan.



Then, she examined PW3, PW4, PW7 and one Saravanan, and recorded their statements. On the same day, at 6.00 p.m., PW21 arrested the accused at Nanjikottai Bye-pass Road in the presence of PW10. On such arrest, the accused gave a voluntary confession in the presence of PW10, in which he disclosed the place where he had hidden the lungi. In pursuance of the said disclosure statement, he took the Police and witnesses to the place of hide out and produced lungi (MO.2). PW21 recovered the same under a mahazar. On returning to the Police Station, PW21 forwarded the accused to the Court for judicial remand and handed over the material objects under Form 95 to the Court. At her request, the material objects were sent for chemical examination through Court. The forensic report (Ex.P15) and chemical examination report (Ex.P16) disclosed that there are no spermatozoa or semen and blood on both MOs.1 and 2.

(e) On a request made by PW-21, the accused was forwarded for medical examination. PW-11 - Dr.K.Tamilmani examined the accused on 06.05.2013 and found that the accused was not an impotent. He found the following injuries on the backside of the accused :

"1.Abraded contusion of size 7 x 2 cm seen over back of upper part of right chest.

2.Abraded contusion of size 6 x 2 cm seen over back of lower part of right chest.

3.Abraded contusion of size 6 x 2 cm seen over back of upper part of left chest."

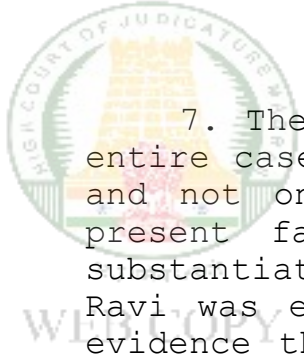
Ex.P6 is the medical examination report.

(f) On 13.05.2013, PW21 produced PW1 and PW9 before the learned Judicial Magistrate No.III, Thanjavur (PW14). PW14 recorded the statements of PW1 and PW9 (Exs.P10 and P9 respectively) under Section 164 Cr.P.C. During the course of investigation, PW21 collected the medical records and examined medical witnesses and few more witnesses, and recorded their statements. After completion of investigation, she laid charge sheet against the accused.

4.Based on the above materials, the trial Court had framed as many as two charges against the accused. When the accused was questioned in respect of the charges, he pleaded innocence. In order to prove the charges, on the side of the the prosecution as many as 21 witnesses were examined as PWs.1 to PW21 and Exs.P1 to P16 were exhibited, besides two Material Objects (MOs.1 and 2).

5. When the accused was questioned under Section 313 of Cr.P.C. with reference to the incriminating materials adduced by the prosecution, the accused denied his complicity in the crime and pleaded innocence. On the side of the accused, one Ravi was examined as DW1. However, no document was marked.

6.The trial Court, after considering the oral and documentary evidence, has found the accused guilty of both the charges and accordingly, convicted and sentenced the accused, as stated supra. Challenging the said conviction and sentence, the appellant/accused has come up with this appeal.



7. The learned counsel for the appellant would submit that the entire case of the prosecution rests only on artificial allegations and not on material evidences. Only due to previous motive, the present false complaint has been lodged by PW1. In order to substantiate the same, on the side of the appellant/accused, one Ravi was examined as DW1 and DW1 has categorically stated in his evidence that on the date of occurrence ie., on 05.05.2013 in the early morning at 5.30 a.m. there was a quarrel between the accused and PW15 about missing of cell phone of PW15 and after some time, the cell phone was traced out by PW15 and that there was also a dispute with regard to missing of mangoes between them. Thus, according to the learned counsel for the appellant, only pursuant to the said quarrel, the present false complaint has been lodged against the accused. But, the Trial Court has failed to properly appreciate the evidence of DW1.

8. The learned counsel for the appellant would further submit that PW2 to PW6 and PW15 are close relatives of PW1 and the prosecution has failed to examine independent witnesses.

9. The learned counsel for the appellant would next submit that the prosecution has failed to establish the ingredients of Section 376(2F) of the Indian Penal Code r/w Section 4 of Protection of Children from Sexual Offences Act, 2012. Hence, the conviction and sentence passed by the trial Court is liable to be set aside.

10. The learned counsel for the appellant would further submit that the forensic report (Ex.P15) and chemical examination report (Ex.P16) have clearly disclosed that there are no spermatozoa or semen and blood on both MOs.1 and 2 and thus, the occurrence has not been proved. When the occurrence itself has not been proved, the entire case of the prosecution falls to the ground and the appellant/accused is to be acquitted. Thus, the learned counsel for the appellant/accused prayed to set aside the conviction and sentence passed by the trial Court and to acquit the accused.

11. Per contra, the learned Additional Public Prosecutor submitted that the prosecution has clearly proved the case of the prosecution by examining PW1 and the victim girl PW9, and their evidences have also been corroborated by PW2 to PW6. The evidence of PW1 is that on seeing the accused attempting to commit penetrative sexual assault on PW9, she attacked the accused by stick on his backside. The same has been clearly proved through medical examination report of the accused - Ex.P6. Thus, the prosecution has categorically proved the guilt of the accused beyond reasonable doubts. Under such circumstances, no infirmity can be found on the conviction and sentence passed by the trial Court. Thus, he prayed for dismissal of the appeal.

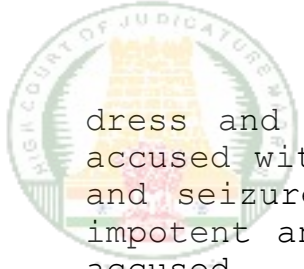
12. We have given our anxious considerations to the rival submissions made on either side and perused the materials available on record.



13. In this case, PW1, who is the grandmother of the victim girl - PW9, aged about 4 years, is the defacto complainant. PW1 has stated in her evidence that she along with her husband (PW15), daughter (PW2) the granddaughter (PW9) were residing in Vijay Farm at Suriyapatti and doing coolie work. The accused, who was working as a watchman in the said farm, used to play with the child. On 05.05.2013, PW15 was at home due to ill-health and at 10.30 a.m. the accused carried PW9 stating that he is taking the child to go around mango trees. After some time, when PW1 was searching for child, she saw PW9 was lying on a towel without any dress and the accused was lying on PW9 without any dress and attempting to commit penetrative sexual assault on PW9. On seeing this, she rushed there and attacked the accused with stick on his backside. The accused threatened to kill her and pushed her away by his hands. Thereafter, due to the alarm raised by her, PW2, PW15, PW5, PW6, PW4 and others came to the place of occurrence.

14. PW15, who is the grandfather of the victim girl - PW9 and who was available in the house at the time of occurrence, has stated that due to ill-health, he took leave and stayed at home and PW9 was with him. PW1 went to graze the goats. PW2 went to coolie work. At 9.30 a.m., the accused was playing with the child. Due to stomach pain, he went inside the house. After some time, when he called the child (PW9), she did not come. Then, he informed to PW2 that the child (PW9) was with the accused. In order to give feeding to PW9, PW1 and PW2 went to search the child. At that time, PW1 raised an alarm that the accused raped the child.

15. PW2, who is the mother of PW9, has stated that on 05.05.2013 at 10.30 a.m. the child was playing in the house and at that time, the accused came there, spoke with the child and carried the child stating that he will give mango to her. PW2 had further stated in her evidence that since PW9 was not found for some time, PW1 went in search of the child PW9. After seeing the occurrence, PW1 raised alarm. The accused ran away from the place of occurrence, after pushing away PW1. On hearing the alarm raised by PW1, PW2 and others rushed to the place of occurrence and took PW9 to the hospital. Thus, PW2 has corroborated the evidence of PW1. PW3 has also corroborated the version of PW1 and he has further stated that when they tried to catch the accused, the accused ran away after pushing them away. PW4 to PW6 are also corroborated the evidence of PW2. PW13 and PW16 are hearsay witnesses. PW7 has stated about the preparation of observation mahazar by the investigating officer. PW8 - Dr.B.Meenakbigai, who examined the victim girl, has stated that nail marks were seen over mons pubis, inner aspect of both thighs of PW9 and there was also linear laceration of size 0.3 x 0.2 x 0.1 cm seen in the skin in between the labia majora & labia minora (NC) left side. She has further stated that the above said injuries might have been caused at the time of sexual assault. PW9, who is the victim girl, has also categorically stated in her evidence that the accused removed her

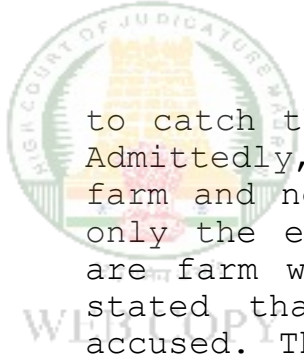


dress and the accused was not wearing dress and PW1 attacked the accused with stick. PW10 has stated about the arrest of the accused and seizure of Lungi. PW11 has stated that the accused is not an impotent and also stated about the injuries on the backside of the accused. PW12, who is the member of the Child Welfare Board, has stated that the statement given by PW9 (Ex.P8) before the Board. PW14 - the Judicial Magistrate No.III, Thanjavur has stated about the preparation of 164 Statement under Exs.P9 and P10 and also the categorical versions of PW1 and PW9. PW17 has stated about the registration of FIR. PW18 has stated about forwarding of FIR to the learned Magistrate. PW19 has stated about production of PW9 before the doctor for medical examination. PW20 has stated about the production of the accused before the doctor (PW11) for medical examination. PW21 has stated about the investigation done.

16. From the above categorical evidences of PW1, PW9, PW2, PW15, PW3 coupled with the medical witnesses PW8 and PW9, and the documents, the prosecution has clinchingly proved that this accused has committed the above offences.

17. The first and foremost submission of the learned counsel for the appellant is that the motive suggested by the accused through the evidence of DW1 has not been properly considered by the trial Court. DW1 has simply stated in his evidence that on the date of occurrence ie., on 05.05.2013 in the early morning at 5.30 a.m. there was a quarrel between the accused and PW15 about missing of cell phone of PW15 and after some time, the cell phone was traced out by PW15 and that there was also a dispute with regard to missing of mangoes between them. DW1 has further stated that in the evening, he came to know that the police arrested the accused as he had behaved wrongly with PW9, and he does not know as to what extent that would be true. According to the appellant, in order to wreak vengeance for the incident that occurred in the morning, the present false complaint has been lodged by PW1 and her husband (PW15). But, DW1 did not state that for the occurrence that happened in the early morning, the present false complaint has been lodged. Absolutely, there is no material to connect both the occurrences. This Court is of the view that for the simple occurrence that happened in the morning, PW1 and PW15 might not have falsely given a complaint, that too by involving their granddaughter (PW9), who was aged about only 4 years. More over, the accused has nowhere stated anything about the incident stated to have taken place in the morning. Hence, this contention is rejected.

18. The next submission of the learned counsel for the appellant is that there was no independent witness examined to speak about the occurrence. On perusal of the record, it is seen that PW2, PW9 and PW15 are the family members of the defacto complainant / PW1. Except their evidences, the prosecution has examined PW3 to PW6, who were working in the farm. PW3 has categorically stated that on hearing the alarm raised by PW1, he along with others came to the place of occurrence and when he tried



to catch the accused, the accused escaped after pushing them away. Admittedly, the occurrence is stated to be happened in a private farm and not in a public place. Therefore, the witnesses would be only the employees or owner of the farm. Further, PW3 to PW6, who are farm workers, are not related to PW1. They have categorically stated that they knew the defacto complainant as well as the accused. Therefore, they are not related to PW1, but they are independent witnesses. Therefore, this contention is also rejected.

19. The next submission of the learned counsel for the appellant is that the prosecution has failed to establish the ingredients of Section 376(2)(f) of the Indian Penal Code r/w Section 4 of Protection of Children from Sexual Offences Act, 2012. Hence, the conviction and sentence passed by the trial Court is liable to be set aside. Before going into the said question, this Court is inclined to extract Section 375 IPC hereunder:

"375. Rape - A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or

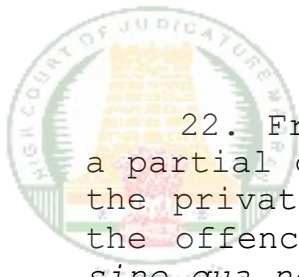
(b) inserts, to any extent, any object or a part of the body, no being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-....."

20. The Hon'ble Supreme Court has in the decision in **State of U.P. v. Babulnath**, reported in (1994) 6 SCC 29 has held that to constitute the offence of rape, it is not at all necessary that there should be complete penetration with the male organ with the emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ in the labia majora or the vulva or pudenda with or without any emission of semen and even an attempt of penetration into the private parts of the victim would be quite enough for the purpose of Sections 375 and 376 IPC. That being so, it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains.

21. The above dictum has been reiterated by the Hon'ble Supreme Court in **Aman Kumar v. State of Haryana** reported in AIR 2004 SC 1497.



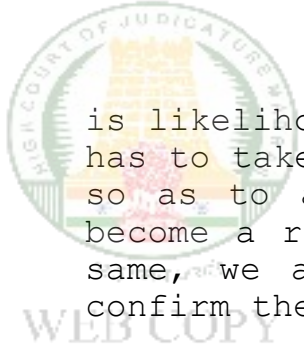
22. From the above provision and dictum, it is clear that even a partial or slightest penetration or an attempt of penetration into the private parts of the victim is sufficient enough to constitute the offence under Section 376 IPC, for which ejaculation is not a *sine qua non*.

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23. In this case, the victim girl - PW9 has categorically stated that the accused removed her dress and the accused himself removed his dress and then the accused put her in a towel and then, the accused lied on her. PW9 has further stated that PW1 attacked the accused with stick. However, PW9 was not able to say what the accused did thereafter, because she was only a child, hardly aged about 4 years. But, she has stated that the accused pushed her. PW1 has stated in her evidence that the accused and PW9 were without any dress and the accused was attempting to commit penetrative sexual assault on PW9 by nudely lying over her. She shouted at him and attacked him with stick and then, the accused threatened her and pushed her away. PW1 has stated in her cross examination that PW9 was given treatment for three days. PW8 has categorically stated in her evidence that she found nail marks and small laceration in the private parts of PW9 and the same could have been caused by the sexual assault. More over, PW11, who examined the accused, has stated that the accused is not an impotent and that the accused had sustained three injuries on his backside. PW14 - learned Judicial Magistrate No.III, Thanjavur has categorically stated that he has recorded the statements of PW1 and PW9 under Section 164 Cr.P.C. and that they have categorically stated that this accused has committed the offence of rape. From the categorical evidences of PW1 and PW9 coupled with the evidences of PW8, PW11 and PW14, the prosecution has clearly established that the accused has committed the offences beyond reasonable doubts. In view of all the above, we have no hesitation to hold that the accused has committed the offence punishable under Sections 376(2)(f) IPC r/w Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Section 506(i) IPC.

24. Yet another submission of the learned counsel for the appellant is that the forensic report (Ex.P15) and chemical examination report (Ex.P16) have clearly disclosed that there are no spermatozoa or semen and blood on both MOs.1 and 2, and thus, the occurrence has not been proved. As stated earlier, the *sine qua non* of the offence of rape is penetration and not ejaculation and therefore, this contention is also rejected.

25. Now, turning to the quantum of punishment, it is an important task of the Court to measure the gravity of the offences, to have regard to the mitigating circumstances and then, to impose appropriate punishment on the accused. It involves an adjudication and the same cannot be decided in a mechanical fashion. The accused, at the time of occurrence, was 54 years old. The accused has got no bad antecedents. It is stated by the learned counsel for the appellant/accused that he has to take care his big family and there



is likelihood of his reformation. Therefore, we find that this Court has to take a lenient view, while deciding the quantum of punishment so as to afford an opportunity for the accused to reform and to become a responsible citizen of this Country. Having regard to the same, we are inclined to reduce the sentence to 10 years and to confirm the fine amount imposed on him by the Trial Court.

26. In the result, this criminal appeal is partly allowed and the conviction passed by the learned trial Court in S.C.No.1 of 2013 under Section 376 (2)(f) IPC r/w Section 4 of the Protection of Children from Sexual Offences is confirmed. However, the sentence imposed by the trial Court alone is modified as 10 years. The conviction and sentence passed by the trial Court under Section 506 (i) IPC are confirmed. The sentences shall run concurrently.

Sd/-
Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar

To

1. The Sessions Judge, Fast Track Mahila Court, Thanjavur.
2. The Principal District Judge, Thanjavur.
3. The Superintendent, Central Prison,
Trichy.
4. The Inspector of Police,
Thanjavur All Women Police Station,
Thanjavur District.
5. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
6. The Section Officer, Criminal Section,
Madurai Bench of Madras High Court,
Madurai.

+ 1 CC TO Mr.A.HAJA MOHIDEEN, ADVOCATE IN SR No. 85552

GCG

TE/SKN-RSK/SAR-2 : 22/11/2017 : 9P/8C

Judgment made in
Cr1.A.[MD].No.242 of 2017
Dated: 07.11.2017