

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.03.2018

DELIVERED ON : 19.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.152 of 2010

Karuppusamy

...Appellant/Accused

Vs

State By:

Inspector of Police,
All Women Police Station,
Kondalampatty, Salem District.
(Crime No.14/2007)

...Respondent/Complainant

Appeal filed under Section 374(2) of the Code of Criminal Procedure, against the judgment sentencing the appellant/accused to undergo R1 for 5 years and to pay a fine of Rs.1000/- in default to undergo R.I. for 3 months under Section 366 IPC and also sentenced to undergo R.I. for 7 years and to pay a fine of Rs.1000/- in default to undergo R.I. for 3 months under Section 376 IPC and the above sentences shall run concurrently passed by the Sessions Judge, Mahila Court, Salem made in S.C.No.1 of 2009 dated 03.02.2010.

For Appellant : Mr.B.Kumarasamy

For Respondent : Mrs.T.P.Savitha
Government Advocate (Crl.Side)

JUDGMENT

This criminal appeal is preferred by the Appellant/Accused against the order passed by the learned Sessions Judge, Mahila Court, Salem made in S.C.No.1 of 2009 dated 3.2.2010 wherein the learned trial Court convicted and sentenced the appellant/accused to undergo rigorous imprisonment for 5 years and to pay a fine of Rs.1000/- in default to undergo rigorous imprisonment for 3 months under section 366 IPC and sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.1000/- in default to undergo rigorous imprisonment for 3 months under section 376 of IPC.

2. Brief case of the appellant/accused

The prosecution case is that the appellant /accused Karuppusamy is residing at Chinnasalem Pakkampatty, husband of Tmt. Vanitha, prior to the marriage, the appellant/accused asked the daughter of PW 1 for marriage, where PW1 refused to give her daughter to the appellant/accused and due to this, there was an enmity between PW1 and the appellant/accused. The victim girl Selvi aged 17 years was studying 11th std at Yercaud Naseareth Girls Higher Secondary school. On 1.12.2007 at 12.30PM, the appellant/accused kidnapped the victim girl Selvi from the school to Sivakasi and the appellant/accused married the victim girl against her willingness and stayed at the PW7 elder aunty Rani's house which was at Sivakasi and during this period the appellant/accused had also sexual intercourse, with the victim girl Selvi against her willingness and the appellant/accused has committed an offence punishable under sections 366 and 376 of IPC.

3. On 6.12.2007 PW3 lodged a complaint before the police station and PW12 respondent police registered the FIR in Cr.No.14 of 2007 under Sections 366-A and 506(2) of IPC. FIR is marked as Ex.P11. The respondent police visited the place of occurrence and examined the witnesses Hasina, Asirvatham, Raja, Jayakrishnann, Selvaraj, Vanitha and Periyasamy and recorded their statement and also prepared an observation mahazar and rough sketch before PW6 and PW7 Rani marked as Ex.P12 and Ex.P13 respectively and signature of PW7 is marked Ex.P3.

4. On 10.12.2007 at 10.00 am, the respondent police arrested the appellant/accused and recorded the confessional statement given by him before PW6 and PW7. The confession statement marked as Ex.P14. The respondent police made requisition to the Court for sending the appellant/accused and victim girl to the Government Hospital for examination.

5. PW9 Doctor Panneerselvam working as Assistant Professor in Forensic medicine department of Salem GKMHC Hospital examined the appellant/accused and issued his report marked as Ex.P6 and Ex.P7 respectively. PW9 Doctor stated in Ex.P7 that there was nothing to suggest that the appellant/accused was impotent.

PW 10 Dr. Santhi at GKMHC Hospital, Salem examined PW 11 Selvi and issued her opinion in the chemical examination report which are marked as Ex.P8, Ex.P9 and Ex.P10 respectively.

6. PW8 Ravishankar Assistant Director and Assistant Chemical examiner of Forensic Science Department received 2 microscope slides each with whitish smear of Selvi for examination and he did not detect any spermatozoa smear of about 2 slides and his chemical examination report is marked as Ex.P5.

7. On 12.12.2007, PW12 respondent police sent alteration report changing the provision of law from section 366A, 506(2) of IPC to 366A, 376, 506(2) of IPC. The alteration report is marked as Ex.P.15.

8. On committal, the learned trial Court framed the charges against the appellant/accused under section 366 A and 376 of IPC. The appellant /accused denied the charges.

9. During the trial, the prosecution examined PWs-1 to 12, marked Exhibits-P1 to P16 and DW1 was examined on the side of the appellant/accused.

10. After trial, on appreciating the material available on record, the trial Court convicted the appellant/accused for the offences under section 366 and 376 of IPC. Aggrieved over the same, the appellant/accused preferred this criminal appeal.

11. I have heard Mr.B.Kumarasamy, learned counsel for the appellant and Mrs.T.P.Savitha, learned Government Advocate (Criminal Side) for the respondent and perused the entire materials available on record.

12. The learned counsel for the appellant/accused submits that the learned Judge failed to note that the PW 2 (sister in law of the victim) and PW 3 have categorically admitted during their respective cross examination that the PW3 has lodged the complaint immediately with the Yercaud police station and the very said fact has been suppressed in the second complaint with the complainant/respondent for the reason that there was no kidnapping by the accused/appellant as alleged in the complaint and as an afterthought with an intention to bring the appellant /accused into the criminal clutches, the PW 3 has pick and choose the respondent police to lodge a complaint for the alleged offences u/s 366 A, 506(ii) with the influence of PW 3's close relative, who is in service of police department.

13. The learned counsel for the appellant/accused submits that the learned Judge failed to note that the investigating authority has not examined the teaching head of the school wherein the victim girl was studying to prove that she was present on the particular day i.e, 1.12.2007 in the school till 12.30 PM. The absence of these vital witnesses would greatly suffers the prosecution and arise genuine doubt against the prosecution in the investigation and the benefit of doubt has to be given to the appellant/accused who is innocent.

14. The learned counsel for the appellant/accused submits that the learned Judge failed to note that the prosecution has not produced either the birth certificate or the school T.C. to prove the victim girl is a minor. Though the learned Judge has given a finding that since no document is produced to prove the

age of the victim the Court became a conclusion that she is a major. The non production of the age proof certificate would prove the prosecution behavior and attitude in the criminal charges of grave in nature would raise genuine doubt in the prosecution.

15.The learned counsel for the appellant/accused submits that the learned Judge failed to appreciate that the final opinion of the Ex.P.10 Doctor spermatozoa not detected in the smear and on examination of the Pt P/V not able to insert Index Finger easily, there is no possibility of intercourse would clearly indicates that no offence of section 376 of IPC is committed as alleged in the complaint and the charge sheet for the offence under Section 376 ought not to have been laid.

16.The learned counsel for the appellant/accused submits that the learned Judge failed to note that the Ex.P10 the final opinion of the Doctor is conclusive evidence as PW 11 is not involved in sexual life but during the ocular evidence the doctor has deposed that the PW 11 has involved in sexual life. The different between the documentary evidence and the ocular evidence has not been properly explained by the Doctor and she has not stated in the ocular evidence that she has examined the PW11 after issuing the final opinion and before the ocular evidence. The evidence of PW 10 doctor ought not to have considered in rendering the judgment and the final opinion of the PW 10 has alone been considered.

17.The learned counsel for the appellant/accused submits that the learned Judge failed to note that the prosecution story was the victim was kidnapped in a car driven by the appellant/accused and the alleged car was a material object in the alleged crime. In these circumstances, it is the material fact that the alleged vehicle has to be ceased in the crime but no such vehicle was ceased. Further the PW11 has stated during her cross examination that the appellant/accused alone driven the car from Yeacaud to Sivakasi. But the appellant/accused has no knowledge of driving and he does not possess driving license and in other words the prosecution has not recovered any driving license of the appellant/accused.

18.The learned Government Advocate (Criminal Side) appearing for the respondent supported the findings of the trial Court and sought for dismissal of the appeal.

19.In the case on hand, the learned trial Court miserably failed to note down the under mentioned infirmities which affects the substratum of the prosecution.

- i) Both PW 2 and 3, sister-in-law and mother of the victim girl deposed in their evidence that they lodged the complaint immediately with the Yercaud Police Station and their first complaint has been suppressed by the

respondent police.

- ii) Non examination of the material witnesses such as, watchman of the school wherein the PW 11 victim was studying, through whom the last scene theory alleged by the prosecution. The Headmaster of the school and the teaching head were also not examined to prove that the PW11 victim was present on the particular day i.e., on 1.12.2007 in the school till 12.30PM.
- iii) Non explanation of the delay in lodging the complaint before the respondent police.
- iv) Non production of the birth certificate or the school transfer certificate to prove that the PW 11 victim was minor at the date of occurrence.
- v) Non consideration of the final opinion of the doctor in his report Exhibit P10 that there is no possibility of sexual intercourse and there were no external injuries.
- vi) Material contradictions in the evidences of the PW1, PW2 and PW11 regarding the alleged kidnapping and the stay of the PW11 victim from 2.12.2007 to 10.12.2007. No neighbours were examined to corroborate the testimony of PW11.
- vii) Non seizure of the vehicle which was used for kidnapping PW 11 the victim by the appellant/accused.
- Viii) The first information report speaks about two persons and the final report reduced only against the appellant/accused. The reason was not explain by the prosecution.

20.The learned trial Court failed to appreciate the aforesaid infirmities reflex from the deposition of the witnesses. Therefore, the conviction of the appellant/accused is not proper and the prosecution is absolutely failed on their part to prove the case.

21.In the result:

a) This criminal appeal is allowed and thereby the conviction and sentence imposed on the appellant/accused in S.C.No.1 of 2009, dated 3.2.2010, on the file of the learned

Sessions Judge, Mahila Court, Salem, is set aside;

b) The appellant/accused is acquitted from all the charges and the fine amount if any paid by the appellant/accused shall be refunded by the trial Court;

c) The bail bond if any executed by the appellant/accused is stands cancelled.

vs

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Sessions Judge,
Mahila Court, Salem.

2. The Inspector of Police
All Women Police Station,
Kondayampaty, Salem Dist.

3. The Judicial Magistrate-V,
Salem.

4. The Chief Judicial Magistrate
Salem.

5. The Public Prosecutor
High court, Madras.

6. The Superintendent, सत्यमेव जयते
Central Prison,
Salem.

Kak (22/03/2019)

Criminal Appeal No.152 of 2010