

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.10.2018

CORAM:

THE HONOURABLE MR.JUSTICE C.T.SELVAM
AND

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Criminal Appeal No.704 of 2017

Palani
S/o.Kuppan

... Appellant/Accused

Vs

State by the
Inspector of Police,
Chennimalai Police Station,
Erode District.
Crime No.112/2015

... Respondent/Complainant

Criminal Appeal filed u/s.374(2) Cr.P.C. against the judgment of learned Sessions Judge, Mahila Court (Mahila Fast Track Court) Erode, Erode District, passed in S.C.No.17 of 2016 on 28.04.2016.

For Appellant : Mr.K.Shanmugam,
Legal Aid Counsel

For Respondent : Mr.R.Pratap Kumar,
Additional Public Prosecutor

JUDGMENT

[Judgment of the Court was made by C.T.SELVAM, J]

This appeal arises against judgment of learned Sessions Judge, Mahila Court (Mahila Fast Track Court) Erode, Erode District, passed in S.C.No.17 of 2016 on 28.04.2016.

2. Case of the prosecution is that PW-3/victim, aged 12, at the time of occurrence was residing with her grandmother at Kuppachipalayam Village, Chennimalai. Appellant/accused was also resident there. On 28.02.2015 as PW-3/victim was suffering from fever, did not attend school and was taking rest. PW-4/grand mother of victim gave her some tablets and went out for work. At

about 09.30 a.m., when PW-3/victim was alone, appellant/accused entered the house of PW-4 and forced PW-3/victim to lie down. As PW-3/victim did not oblige, appellant/accused threatened her stating that he would murder her parents, if she refused to act as per his wishes. Appellant/accused prevented PW-3/victim from raising an alarm by stuffing her mouth with her clothes, forced himself upon her and raped her. Appellant/accused threatened PW-3/victim of doing away with her parents if she dared to inform anyone and left. Finding PW-3/victim uncomfortable, PW-4 took her to her mother PW-2 after 20 days of occurrence to whom PW-3 narrated the occurrence. PW-1, father of PW-3, preferred Ex.P1, complaint, 4 days thereafter and a case was registered in Crime No.112 of 2015 on the file of respondent for offence u/s.4 of POSCO Act. The case was tried in S.C.No.17 of 2016 on the file of learned Sessions Judge, Mahila Court (Mahila Fast Track Court) Erode, Erode District.

3. Before trial Court, prosecution examined 14 witnesses and marked 16 exhibits and 1 material object. 1 witness was examined on the side of defence but no exhibits were marked.

3.1. PW-1, father of PW-3/victim, spoke to his daughter being in the custody of PW-4, when the occurrence took place, of PW-3 informing PW-2/her mother 20 days thereafter and of his preferring Ex.P1, complaint, 4 days thereafter. PW-2/mother of victim has also spoken on the same lines.

3.2. PW-3/victim was examined by adopting the 'Question and Answer' format. PW-3 spoke about the occurrence, preference of complaint by PW-1/her father, of her being examined by Doctors and of tendering Section 164 Cr.P.C. statement.

3.3. PW-4, grandmother of PW-3/victim, spoke to her having gone out for work on the date of occurrence after giving PW-3 tablets, finding the victim uncomfortable on her return and questioning her and PW-3 stating that she was not well. As PW-3 continued to be morose over 20 days, PW-4 took her to PW-2 to whom PW-3 opened up. PW-1 preferred Ex.P1, complaint, 4 days thereafter.

3.4. PW-5, a neighbour of PW-4, spoke to her having seen appellant/accused coming out of the house of PW-4 on the date of occurrence. On the evening of the same day, she found PW-3 weeping and enquired PW-3 informed that appellant/accused raped her. PW-5, in cross, stated that as it was a sensitive issue she chose to inform anybody and for the first time informed police when enquired.

3.5. PW-6, a resident of Kuppachipalayam, spoke to attesting Ex.P3, Observation Mahazar.

3.6. PW-7, Doctor, spoke to forwarding PW-3 for examination towards ascertainment of her age. PW-7 also spoke to marking notings (Ex.P4) on the Accident Register.

3.7. PW-8, Doctor, who examined the victim girl on 26.03.2015 deposed to finding the hymen torn and that there was possibility of her having been subjected to sexual intercourse. PW-8 also deposed that the victim girl was not pregnant. PW-8 spoke to marking Ex.P6 on the reverse of Accident Register and tendering Ex.P7, final opinion.

3.8. PW-9, Doctor, who examined appellant/accused, spoke to conducting examination and issuing Ex.P9, final opinion on the potency of appellant/accused.

3.9. PW-10, Doctor/Radiologist, spoke to issuing Ex.P11, age certificate, informing the age of PW-3 to be between 15 and 17.

3.10. PW-11, Teacher, spoke to producing school certificates of PW-3 on the requisition of Police. PW-11 spoke to informing police that the certificates of PW-3 were in order.

3.11. PW-12, Head Constable, spoke to recording the statement of PW-3/victim.

3.12. PW-13, Special Sub-Inspector of Police, spoke to registration of case in Crime No.112 of 2015 for offence u/s.4 of POSCO Act on the complaint of PW-1 and of forwarding the same to Court and higher officials. Ex.P12 is the First Information Report.

3.13. PW-14, Deputy Superintendent of Police, who conducted investigation in the case, spoke to visiting the scene of occurrence, preparation of mahazars, examining witnesses, recording statement of victim girl, arrest of accused, recording confession of appellant/accused, forwarding victim girl and accused for medical examination, forwarding victim girl to Judicial Magistrate II, Erode, towards recording Section 164 Cr.P.C. statement, sending the objects for chemical examination, obtaining various reports and on completion of investigation, altering the First Information Report to reflect offences u/s.376(2)(i) and 506(ii) IPC and filing of charge sheet informing the above said offences.

4. On questioning u/s.313 Cr.P.C., appellant/accused denied charges. On appreciation of evidence, oral and documentary, trial Court, under judgment dated 28.04.2016, convicted appellant for offences u/s.450, 376(Part I) and 506(ii) IPC and sentenced him to 10 years R.I. and fine of Rs.10,000/- i/d 2 years S.I. for offence u/s.450 IPC, life imprisonment and fine

of Rs.10,000/- i/d 2 years S.I. for offence u/s.376 (Part I) IPC and 7 years R.I. and fine of Rs.5,000/- i/d 1 year S.I. for offence u/s.506(ii) IPC. Hence, the present appeal.

5. Heard learned counsel for appellant and learned Additional Public Prosecutor for respondent. Perused the materials on record.

6. Learned counsel for appellant submitted that there admittedly was a delay of 25 days in preference of complaint. While prosecution has alleged that the accused had used the clothes of the victim to stuff her mouth towards preventing her from raising an alarm, the same had not been seized. Learned counsel submitted that PW-2, mother of victim, had denied the defence submission that a false case has been foisted against appellant/accused owing to family enmity. The falsity could be gathered from the fact that while the First Information Report in Ex.P12 in the case had been registered on 25.03.2015 at 12.00 p.m., Ex.P4 - Accident Register, revealed that PW-3, alleged victim, had been sent for examination by Gynaecologist even at 08.30 a.m. on 25.03.2015. Learned counsel submitted that PW-8, Doctor, had admitted that rupture of the hymen could take place other than through intercourse. Learned counsel referred to the judgment of the Supreme Court in State of Madhya Pradesh v. Munna [2016 (1) SCC 696] wherein it had been held that where it had not been established beyond reasonable doubt that the victim was below the permissible age u/s.375(6)(d) IPC and consensual intercourse had been proved, the acquittal of accused was to be confirmed.

7. Learned Additional Public Prosecutor submitted that a reasoned finding had been arrived at by trial Court and the same did not call for any interference. Trial Court has reasoned that since PW-8, Doctor, had deposed to PW-3 having been produced before him on 26.03.2015 at 02.00 p.m., Ex.P4, Accident Register, reflecting the time as 08.30 a.m. must be erroneous. Learned Additional Public Prosecutor submitted that the radiologist report in Ex.P11 makes clear that PW-3/alleged victim indeed was below 17 years of age and thus subjecting her to sexual intercourse forced or otherwise would amount to an offence u/s.375(6)(d) IPC punishable u/s.4 of the POCSO Act.

8. Considered the rival submissions.

9. This Court is to consider whether in the circumstances of the case, it can definitely conclude that PW-3 was subjected to sexual intercourse and if so, by appellant/accused. As rightly submitted by learned counsel for appellant the production of PW-3 for examination at hospital by 08.30 a.m. on 25.03.2015 as revealed by Ex.P4, Accident Register, even prior

to registration of the case in Crime No.112 of 2015 at 12.00 p.m. taken together with the fact that the complaint has been preferred 25 days after the alleged occurrence i.e. very much after the period when medical examination of PW-3 would have been of use, casts much doubt on the veracity of the prosecution case. A perusal of Ex.P13, rough sketch, reveals the presence of houses immediately adjacent to the occurrence house and the prosecution version of PW-3 having been rendered silent by appellant/accused stuffing her mouth with her clothes is unbelievable. So is the evidence of PW-5 who speaks to having seen the appellant/accused coming out of the house of the victim, of having found her weeping and of having questioned her when PW-3 victim told her that appellant/accused had raped her. PW-5's contention of having not informed anybody till police questioned her since the issue was a sensitive one, totally is unbelievable. Section 161(3) Cr.P.C. statement of PW-5 has been recorded on 28.03.2016 and the conduct informed by her totally is opposed to the normal conduct expected of a neighbour. As a neighbour, we would expect that PW-4 would have shared her concern over her grand daughter, PW-3's conduct i.e. of her being morose over a period of 20 days with PW-5, which in turn would have prompted PW-5 to inform what she knew to PW-4, were she speaking the truth. Merely because PW-2, mother of victim, has denied the defence suggestion of the case being a foisted one owing to family enmity, the same, in the circumstances of the case, cannot easily be discarded. If a finding of conviction is to flow on evidence such as that projected in the present case, none would be safe from the scourge that is false accusation.

The Criminal Appeal shall stand allowed. The conviction and sentence passed by learned Sessions Judge, Mahila Court (Mahila Fast Track Court) Erode, Erode District, passed in S.C.No.17 of 2016 on 28.04.2016, are set aside and appellant is acquitted of all charges. Fine amount, if any, paid shall be refunded to him. Bail bond(s), if any, executed by him shall stand cancelled. Appellant is directed to be released forthwith, if his detention is not required in any other case.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

gm

To

- 1.The Sessions Judge,
Mahila Court (Mahila Fast Track Court) Erode,
Erode District.
- 2.The Chief judicial Magistrate,
Erode.
- 3.The Judicial Magistrate No.III,
Erode.
- 4.The Inspector of Police,
Chenniamalai Police Station,
Erode District.
- 5.The Superintendent,
Central Prison,
Coimbatore.
- 6.The Public Prosecutor,
High Court, Madras.
- 7.The Secretary, Legal Service Committee,
High Court, Madras.

Copy to
The Section Officer,
Criminal Section,
High Court, Madras.(2Copies)

+1cc to Mr.K.Shanmugam, Advocate, S.R.No.6894

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RSI (CO)
GSP (20/02/2019)

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