

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 09.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

Criminal Appeal No.929 of 2007

State rep. by
The Inspector of Police
CBCID, Villupuram
Valathi P.S.
Cr.No.306/2002 ... Appellant

... Vs ...

Senthilkumar ... Respondent

PRAYER: Criminal Appeal filed under Section 378 Cr.P.C., to set aside the order of acquittal with respect to offence under Section 376(2) (g) IPC passed in C.A.No.7 of 2004 dated 18.03.2004 on the file of the learned Additional District Sessions Judge, (FTC No.I), Tindivanam and convict the accused as charged.

For Appellant : Mr.R.Ravichandran
Government Advocate (Crl. side)

For Respondent : Mr.P.Saranath

JUDGMENT

This Criminal Appeal has been filed by the State against the order of acquittal of the petitioner herein/A.2 dated 18.03.2004 passed by the learned Additional District Sessions Judge (Fast Track Court No.1) Thindivanam made in C.A.No.7/2004 and prayed this Court to convict the accused for the offence under Section 376(2) (g) IPC.

2.The petitioner herein is A2. The trial Court convicted the A1 and A2 for the offence under Section 376 (2) (g) IPC and sentenced them to undergo Rigorous Imprisonment each for seven years with fine of Rs.5,000/- in default to undergo Rigorous Imprisonment for three months.

3. Aggrieved by the said order of conviction, A1 and A2, preferred appeals before the learned Additional District Sessions Judge (Fast Track Court No.1) Thindivanam, in Criminal Appeal Nos.3 and 7 of 2004 respectively. After elaborate trial, the lower Appellate Court came to the conclusion that A1 and A2 are not liable to be punished under Section 376(2)(g) I.P.C. Accordingly, the lower appellate court altered the convicted A1 and A2 as 354 I.P.C., instead of 376(2)(g) I.P.C., and sentenced both A1 and A2 to undergo two years Rigorous Imprisonment with fine of Rs.2,000/-.

4. Aggrieved by the said order of acquittal, the State has preferred the present appeal before this Court against the 2nd accused. However, Appeal against the 1st accused was preferred with a delay of 161 days in CrI.OP.No.9520 of 2005 and the same was dismissed on 03.07.2012 by this Court. Hence, as of now, no appeal was preferred as against A1.

5. The brief facts of the prosecution case are as follows:-

P.W.2 is the victim girl. P.Ws.1 and 6 are the parents of the victim girl. P.W.3 is the grand-father of the victim girl. On 18.08.2002, P.W.2 (victim girl) had went to her grand-father's (P.W.3) house on Sunday evening. Her grand-mother (P.W.10) asked her to fetch water from the bore-well adjacent to the house of one Govindan.

6. Accordingly, P.W.2, the victim girl has gone to bore well to fetch water. She had taken two pots of water and during the 3rd time, she was called by A1-Ezhil and A2-Senthil Kumar with a bad intention, for which, P.W.2 replied to them that she will beat them with slippers. Following which, the accused persons by closing her mouth taken away the victim girl to the abandoned house of one Kuppan and there, she was completely undressed by the accused persons and they committed rape one by one. On hearing the noise of the victim girl from Kuppan's house, P.W's.4, 5 and one Muniyammal went to the scene of occurrence and knocked the door. The victim girl, with petticoat, opened the door and informed about the occurrence to P.W's.4, 5 and one Muniyammal. They taken P.W.2 to her house and informed about the incident to her grandfather, P.W.3. Immediately he rushed to the abandoned house of Kuppan, there, he asked both the accused about their act towards victim girl. For which, the accused persons tried to hit P.W.3 and scolded him with filthy language. Thereafter, all of them were went to P.W.15's house for panchayat. There he conducted panchayat and advised P.W.3 to lodge complaint before the Police since, the parents of the victim girl was not in station.

7. After hearing information, P.W.1, mother of the victim girl, came to village of Illodu and lodged complaint (Ex.P.1) before the police on 20.08.2002. P.W.16, the Sub-Inspector of Police received the complaint and registered a case in Crime No.306 of 2002, under Sections 376, 352 and 294 IPC. FIR is marked as Ex.P.14. On the day of complaint itself, P.W.2 was sent to the Government Hospital, Gingee for medical examination. P.W.8, Doctor Kalasri attached with the Government Hospital, Gingee conducted medical examination on the victim girl and issued Ex.P.4, Medical Certificate.

8. The Investigating Officer took up the case for investigation and went to the place of occurrence. He prepared Observation Mahazar (Ex.P.16) and Rough Sketch (Ex.P.17). Further, no material objects were recovered. Thereafter, the Investigating Officer enquired P.Ws.3,4 & 5 and recorded their statements. P.W.20, the Inspector of Police, took up further investigation and arrested the accused persons and sent them for medical examination on 30.08.2002.

9. The Assistant Medical Officer, Government Hospital, Sathiyamangalam conducted medical examination over the 1st and 2nd accused in order to find out the potency of them and issued Ex.P.7/ Potency Certificate opining that the accused persons are capable of having sexual intercourse. Thereafter, the Investigating Officer marked the Transfer Certificate issued by the Headmaster, Illodu Government school, in which, the victim girl was studying, in support of her age. Further, the Investigating Officer, P.W.20 recorded the statements from the remaining prosecution witnesses and laid final report against the accused for the offences punishable under Sections 376(2)(g), 352 and 294 IPC before the Judicial Magistrate, Gingee. The case was committed to the Court of Sessions before the learned Additional District Sessions Judge, (FTC-I), Tindivanam and made over to the Trial Court.

10. Based on the materials produced before the Trial Court, the Trial Court framed charges as against the accused persons for the offences under Sections 376(2)(g), 352 and 294 IPC.

11. When the incriminating materials were put to the accused, they denied the same as false. Further, when the accused were questioned under Section 313 of Cr.P.C., they denied the same as not true. Thereafter, the trial was proceeded against the accused persons.

12. On the side of the prosecution, 20 witnesses were examined as P.W's.1 to 20 and 33 documents were marked as exhibits Exs.P.1 to 33. The defence side neither choose to examine any witness nor to mark any document. Neither the prosecution nor the defence marked any material object.

13. After conducting trial, the Trial Court convicted both the accused for the offence under Section 376 (2)(g) IPC and sentenced them to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.5,000/- in default to undergo 3 months Simple Imprisonment. The Trial Court acquitted the accused from the charges under Sections 352 and 294 IPC, on the ground that the prosecution has not proved the case beyond all reasonable doubt.

14. Aggrieved by the said conviction and sentence, the appellants/accused have filed individual appeals before the learned Additional District Sessions Judge, (FTC No.I), Tindivanam in C.A.Nos.3 and 7 of 2004.

15. The lower Appellate Court, after considering the oral and documentary evidences let in by the prosecution, came to the conclusion that A1 and A2 are not liable to be punished under Section 376(2)(g) and accordingly acquitted both the accused under Section 376 (2) (g) and convicted them under Section 354 IPC and sentenced them to undergo two years Rigorous Imprisonment with fine of Rs.2,000/-.

16. As against the said Judgment of the lower appellate court in C.A.No.7 of 2004 dated 18.03.2004, the State has preferred the present Criminal Appeal in respect of A2.

17. Mr.R.Ravichandran, learned Government Advocate (Criminal Side) appearing for the State would submit that the learned trial Judge has rightly convicted the accused persons under Section 376 (2)(g) IPC, but, the lower appellate Court acquitted both the accused under Section 376 (2)(g) and only convicted them under Section 354 IPC, which is error in law. According to him, the prosecution has proved the case by way of examining the prosecution witnesses P.W's.2, 3, 4, 5, 8, 9 and 15. The evidence of all prosecution witnesses corroborate with each other. Moreover, P.W.2 - the victim girl has clearly deposed before the trial Court and narrated the entire the scene of occurrence. Hence, the judgment of the lower appellate Court has to be set aside and the conviction and sentence passed by the trial Court in S.C.No.32 of 2003 dated 16.12.2003 needs to be confirmed.

18. The learned counsel appearing for the respondent/A2 would submit that there is no material evidence whatsoever available on record to prove the charge under Section 376(2)(g) I.P.C., against the respondent/A2. He would further submit that even Ex.P14 (F.I.R.,) is totally contrary to the evidences of P.W's.2, 3, 4 and 5. There has occurred a delay in filing the F.I.R. Even the said delay was not explained properly. P.W.8 - the Doctor, who conducted medical examination over the victim girl has clearly stated that the victim girl has not sustained any external injuries over the body. Hence, the statement made by P.W.2-victim girl that she was raped by A1 and A2 forcibly could not be believed as if the statement is true, there had occurred external injuries on the victim girl as defence at the time of alleged rape, as alleged by the victim. He would further submit that though the lower Appellate Court based on the evidences and documents has rightly acquitted the respondent/A2 from the charge under Section 376 IPC, had convicted and sentenced him for the offence under Section 354 IPC. Hence, the well considered judgment passed by the lower appellate court need not be interfered with by this Court. Hence, the learned counsel prays for dismissal of this Criminal Appeal. In support of his submissions, the learned counsel has relied on a judgment of the Hon'ble Supreme Court in the case of Arulvelu and another Vs. State represented by the Public Prosecutor and another reported in (2009) 10 SCC 206 it has been held as follows:-

"34. In Ghurey Lal v. State of U.P. 30 a two-Judge Bench of this Court of which one of us (Bhandari, J.) was a member had an occasion to deal with most of the cases referred to in this judgment. This Court provided guidelines for the appellate Court in dealing with the cases in which the trial Courts have acquitted the accused. The following principles emerge from the cases above:

1. The Accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial Court. The trial Court's acquittal bolsters the presumption that he is innocent.

2. The Power of reviewing evidence is wide and the appellate court can reappraise the entire evidence on record. It can review the trial Court's conclusion with respect to both facts and law, but the appellate Court must give due weight and consideration to the decision of the trial Court.

3. The appellate Court should always keep in mind that the trial Court had the distinct advantage of watching the demeanour of the witnesses. The trial Court is in a better position to evaluate the credibility of the witnesses.

4. The appellate Court may only overrule or otherwise disturb the trial Court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached—one that leads to acquittal, the other to conviction—the High Courts/appellate courts must rule in favour of the accused.

35. This Court in a recently delivered judgment *State of Rajasthan v. Naresh* again examined judgments of this Court and laid down that: (SCC p.374, para 20)

"20An order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out that finger towards the accused. This Court had dealt with the scope of interference with an order of acquittal in a number of cases."

36 .Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence or record that the judgment of the trial court is either perverse or wholly unsustainable in law.

37. In *State of U.P. v. Banne* a two-Judge Bench of this Court of which one of us (Bhandari, J.) was a member had an occasion to deal with this controversy in detail had laid down some of the circumstances in which this Court would be justified in interfering with the judgment of the High Court. The circumstances discussed in the judgment are illustrative not exhaustive: (SCC p.286, para 28)

"(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal."

38. The appellate Courts must keep in view these aforementioned observations in dealing with the appeals where the trial court has acquitted the accused.

39. In *Dhanapal v. Public Prosecutor, State of Madras* this court again examined the aforementioned decisions and analyzed the principles emerging out of the said decisions. It seems to us that despite a series of judgments, the High court has not clearly appreciated the legal position.

40. Unquestionably, the appellate court has power to review and re appreciate the entire evidence on record. The appellate court would be justified in reversing the judgment of acquittal only if there are substantial and compelling reasons and when the judgment of the trial court is found to be a perverse judgment. Interfering in a routine manner where other view is possible is contrary to the settled legal position crystallized by the aforementioned judgments of this Court. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent. This fundamental principle must be kept in view while dealing

with the judgments of acquittal passed by the trial court."

19. Heard the learned Government Advocate (Criminal Side) appearing for the State as well as the learned counsel appearing for the respondent/A2 and also perused the materials available on record.

20. From the materials available on record, it is seen that the evidence of P.W.2 is crucial evidence since, P.W.2 is the victim girl. Admittedly, P.W.2 was a minor girl and not even attained her puberty on the date of occurrence. P.W.1 - mother of the victim girl, who lodged complaint before the respondent police, clearly deposed about the incident. During the time of said occurrence, P.W.1 went to her sister's house in Chennai and her husband also went to Kanyakumari for work. On receiving information, she came to the Illodu village and immediately lodged Ex.P.14 - complaint before the respondent police. But, P.W's.1, 6 and 3, who are the mother, father and grand father of the victim girl are not an eye witnesses and only a hearsay witnesses. On a close perusal of the P.W.2 evidence, the accused persons dragged the victim girl into the abandoned house, belonging to one Kuppan and they completely un-dressed her and thereby, they forcibly committed rape one by one. P.W.2, in her statement has narrated the entire incident and deposed that on hearing her voice, P.W's.4, 5 and one Muniyammal were immediately came to the place of occurrence and knocked the door. Thereafter they rescued the victim girl. During the said occurrence, P.W.2 in her evidence clearly stated that she sustained with blood injuries in her private part. But, P.W.4, in her evidence deposed that the door of the Kuppan's house is not having lock and the same is opened immediately they knocked. Per contra, P.W.5, in her evidence stated that she heard the sound of knocking the door and immediately she rushed to the abandoned house. There, she seen the victim girl standing with petticoat. Therefore, both the evidences of P.W's.4, 5 and 2 are contrary in nature. Further, owner of the abandoned house, Kuppan was examined as P.W.7 and he deposed that no one is residing in the abandoned house and no window is available in his house. Further, he deposed that window jolly is fixed in the group house and there is no lock is available. When such being the position, the evidence of P.W.2, the victim girl, is unbelievable one, as if that P.W's.4,5 and one Muniyammal knocked the door. In all the above, the evidences are contrary in nature. Further, the Doctor, who conducted medical examination on the victim girl was examined as P.W.8 denied the statements made under Section 166(3) Cr.P.C., in the charge sheet, before the law enforcing agency and deposed that she is

not confirm about whether the victim girl had sexual intercourse or not and also deposed that the victim girl does not sustained with any external injuries and stated that she lost her virginity. From the evidences it is clear that there are material contradictions as well as oral contradictions.

21. On perusal of the decision cited supra, the Hon'ble Apex Court clearly held that the appellate Court has power to review and re appreciate the evidence on record. The appellate court would be justified in reversing the judgment of acquittal only if there are substantial and compelling reasons and when the judgment of the trial court is found to be a perverse judgment. Interfering in a routine manner where other view is possible is contrary to the settled legal position crystallized by the aforementioned judgments of this Court. The accused is presumed to be innocent until proven guilty. Though the trial Court has convicted the accused for offence under Section 376(2)(g) I.P.C., the lower Appellate Court has considered the materials available on record and has come to the conclusion that the prosecution has not proved the offence under Section 376(2)(g) I.P.C., foisted against the accused and has acquitted the accused under the said charge and further, convicted the accused under Section 354 I.P.C. The medical evidence does not corroborate the evidences of the prosecution witnesses.

22. This Court is of the opinion that the prosecution has not proved the guilt of the accused/A2 for offence under Section 376(2)(g) I.P.C., and rightly the lower appellate Court has acquitted the accused/A2 under this charge and also rightly convicted the accused only under Section 354 I.P.C. Hence, the judgment passed by the lower appellate Court needs to be confirmed.

23. In the result, the Criminal Appeal is dismissed thereby confirming the judgment of the lower appellate Court in C.A.No.7 of 2004 dated 18.03.2004.

Sd/-
Assistant Registrar(CS-VI)

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Sub Assistant Registrar

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To

- 1.The Additional District Sessions Judge,
(FTC No.I), Tindivanam.
- 2.The Principal Assistant Sessions Judge, Tindivanam, Villupuram.
- 3.The Inspector of Police
CBCID, Villupuram
Valathi P.S.
- 4.The Public Prosecutor
High Court of Madras.
- 5.The Section Officer
Criminal Section, High Court of Madras.

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