

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.07.2019
Pronounced on : 25 .10.2019

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.A.No.197 of 2016 and
Crl.M.P.No.2443 of 2017

Pazhani

... Appellant/Accused-I

Vs.

State rep. by,
The Inspector of Police,
P-4, Basin Bridge Police Station,
Chennai.

... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, to set aside the conviction and sentence made in the Judgment dated 25.01.2016 in S.C.No.404 of 2013 on the file of the Mahalir Neethimandram/Sessions Judge at Chennai.

For Appellant : Mr.A.Swaminathan
For Respondent : M/s.T.P.Savitha
Government Advocate [Crl.Side]

JUDGMENT

This appeal arises out of the conviction and sentence imposed by the learned Sessions Judge, Magalir Neethimandram, Chennai in S.C.No.404 of 2013 dated 25.01.2016, wherein the appellant was tried for the offence punishable under Sections 363, 341 and 376(2)(f) r/w 511 of IPC. The learned trial Judge has convicted the appellant for offence under Section 363 of IPC and sentenced him to undergo 3 years rigorous imprisonment and to pay a fine of Rs.1,000/-, in default sentenced to undergo three months rigorous imprisonment and for the offence under Section 341 of IPC, a fine amount of Rs.500/- is imposed, in default sentenced to undergo one week simple imprisonment and for the offence under Section 376(2)(f) r/w 511 of IPC sentenced to undergo 5 years rigorous imprisonment, in default, to undergo six months rigorous imprisonment. All the sentences were ordered to run concurrently.

2.The background facts, as projected by the prosecution are as follows:

2.1.The defacto complainant/PW1 was residing at Guruswamy Nagar, Pulianthope, Chennai along with her husband and two female children. The victim is the elder child of PW1. On 11.12.2011, when the victim was playing in street, at about 04.30 p.m, the appellant kidnapped the victim to his house and confined her. When PW1 and her mother-in-law Kuppabai went in search of the victim to the appellant's house, the appellant was inserting his male organ into the private parts of the victim by lifting her dress. On seeing this, PW1 shouted and the appellant ran away. On examination of the victim, PW1 found that the private parts of the her minor child was inflated and she cried in pain. Thereafter, she went to the respondent Police and lodged a complaint [Ex.P1]. On receipt of the same, PW14 registered a case in Crime No.1306 of 2011 [Ex.P12] for the offence under Section 376 of IPC. On completion of the investigation, charge sheet came to be filed for the offence under Sections 363, 341 and 376 of IPC.

3.Before trial Court, prosecution examined 14 witnesses, marked 12 exhibits and collected three material objects. None were examined and nor any exhibits were marked on the side of the defence.

3.1.PW1, the mother of the victim has stated that she along with her husband and two minor children were residing at Guruswamy Nagar, Pulianthope, Chennai. The appellant was residing along with his mother three houses away from the house of PW1. On 11.12.2011, at about 04.30 p.m her elder child was playing in the street. After some time, she was not there and found that the appellant has taken her to his house. PW1 and PW2 went to the house of the appellant. At that time, the appellant had undressed the victim and indulged in sexual act with her. The victim complained about the pain in her private parts. On examination it was found that the inflation and reddish color were found on her private parts. Thereafter, the appellant was dragged out from the house and produced before the police and complaint [Ex.P1] was lodged. The victim was admitted in the Baby Hospital, Egmore for treatment for three days.

3.2.PW2, the grand mother of the victim has stated that she accompanied PW1 in search of her grand daughter/victim and found the sexual act of the appellant. Thereafter, they shouted at the appellant public gathered and beat the appellant. Further, PW2 stated that the victim complained about the pain on her private parts. The appellant was dragged out from his house and

handed over to the police station.

3.3.PW3, the father of the victim has stated that on 11.12.2011 at about 03.45 p.m, he saw a crowd near his house. Thereafter, his Junior Mother informed about the act of the appellant. Getting agitated he assaulted the appellant and produced him before the Police.

3.4.PW4, the neighbour has stated that the appellant was residing in that area and he does not know anything about the happenings. PW5 is the resident of the area, states that PW1 and PW3 have two female minor children. PW6, another neighbour has stated that she knows both PW1 and PW3 and their children and the appellant was residing in the same neighbourhood. On 11.12.2011, PW6 has seen the appellant assaulted by some others. As far as PW4, PW5 and PW6 are concerned, they has not stated about anything about the occurrence.

3.5.PW7, who was previously residing in Guruswamy Nagar, Pulianthope stated that he knows PW1 and PW3 and the appellant. PW3 had called him to write the complaint [Ex.P1] and written the complaint [Ex.P1] as instructed by the victim's parents. Further, PW7 is also witness to the arrest and confession [Ex.P2] of the appellant and seizure mahazars [Ex.P3 and Ex.P4] for the articles recovered from the appellant and the victim.

3.6.PW8 local resident has not supported the case of the prosecution and hence he was treated hostile.

3.7.PW9, the Doctor attached to the Government Children Hospital, Egmore has examined the victim, issued medical examination report [Ex.P5]. PW10, Doctor attached to the Government Children Hospital, Egmore examined the victim and treated as in-patient from 12.12.2011 to 14.12.2011, issued wound certificate [Ex.P6] and case sheet [Ex.P7]. PW11, the Doctor attached to the Rajiv Gandhi Government Hospital, Chennai examined the victim on 11.12.2011 at about 10.10 p.m, issued Accident Register [Ex.P8].

3.8.PW14, the Sub-Inspector of Police received the complaint [Ex.P1] registered F.I.R [Ex.P12] in Crime No.1306 of 2011 for the offence under Section 376 of IPC. Thereafter, he sent the F.I.R to PW12 and to higher officials.

3.9.PW12, the Inspector of Police on receipt of F.I.R, visited the scene of occurrence, prepared observation mahazar [Ex.P9], rough sketch [Ex.P10]. Thereafter, he examined the witnesses PW1 to PW6 and one Kamesh, who were present in the

scene of occurrence and recorded their statements. On 11.12.2011 at about 08.30 p.m, PW12 arrested the appellant near Basin Bridge Railway Station, Platform No.1 in the presence of PW7. The appellant gave a confession and marked as Ex.P2. Further, PW12 recovered the material objects [MO1 to MO3] and sent for Forensic Study. Thereafter, PW12 sent the victim and appellant for medical examination. On his transfer, he handed over the case to PW13.

3.10.PW13, the Inspector of Police took up investigation from 04.01.2012 and examined the witnesses. Since, the witnesses have reiterated earlier statement given to PW12, no separate statements recorded. On completion of the investigation, charge sheet filed.

4.The contention of the learned counsel for the appellant is that the appellant was residing along with his mother at Guruswamy Nagar, Pulianthope, PW1 and PW3 were residing in the same locality. All are known to each other. The appellant did not indulge in any of the acts as alleged by PW1, PW2 and PW3. Other than these witnesses, no other witnesses have not spoken against the appellant. All the neighbours witnesses/PW4, PW5 and PW6 have not mentioned witnessing such incident having taken place and their evidence are only hear-say. The evidence of PW1 to PW3 are contradictory to each other. Admittedly, PW3 reached the scene of occurrence after the incident and he came to know about the incident through his junior mother, who is not examined as witness in this case. Initially PW1 and PW2, the mother and grand mother of the victim stated that they saw the appellant taking away the victim to his house. PW1 admitted that the appellant normally plays with her daughter. She did not see the appellant taking away her daughter to his house. The victim informed her that she was taken by the appellant to his house. Further, PW1 admitted that she has not seen the occurrence proper. PW2 the grandmother of the victim admitted that she was informed about the incident by the younger sister of the victim, who informed that the victim was in the appellant's house. When, PW2 went in search of the victim along with PW1, she found that the appellant was sitting in the cot and the appellant sitting on him. The evidence of PW1 does not corroborate and it is contradictory.

5.He further contended that the specific case is that the private parts of the victim was found inflated and reddish in colour and the victim was complaining of pain. PW9, PW10 and PW11 are the Doctors attached to Government Hospital, who examined and treated the victim. PW11, Doctor attached to Rajiv Gandhi Government Hospital, Chennai examined the victim on

11.12.2011 at about 10.10 p.m and issued Accident Register [Ex.P8]. PW9, Doctor attached to the Children Hospital, Egmore examined the victim and issued the medical examination report [Ex.P5]. PW10, the Doctor attached to the Children Hospital, Egmore examined the victim and stated that the victim was treated as in-patient from 12.12.2011 to 14.12.2011, issued wound certificate [Ex.P6] and case sheet [Ex.P7]. From the medical records as well as the evidence of PW9, PW10 and PW11, it is found that there was no inflation and reddish colour or any other marks on the private parts and over the body of the victim. Further, the medical witnesses have categorically opined that the victim was not sexually assaulted. The Accident Register version was given by PW1 and PW2. It is also to be found that the victim was not examined as witness and no reason has been given for the same.

6.No potency test materials produced to show that the appellant was capable of such acts, the prosecution neither examined any witness nor marked any document. PW1 version is that the complaint [Ex.P1] was written by the police on her dictation and she signed the same. PW7 version is that he has written the complaint [Ex.P1] on dictation of the parents of the victim. Thus the manner in which Ex.P1 came into existence is highly doubtful. Likewise, PW1 to PW3 have stated that the appellant was present in the scene of occurrence and was beaten and taken to the police station. PW6 stated that the appellant was available in his house and the police came and arrested him from there. The investigating officer/PW12 evidence is that the appellant was arrested near the Basin Bridge Railway Station Platform No.1 at about 08.30 p.m on 11.12.2011. Thus, the arrest of the appellant is clouded with mystery.

7.Hence, the manner in which the complaint was lodged, arrest of the appellant, recovery of the materials, preparation of mahazars are all stage mannered in this case, forfeited by the medical evidence. Therefore, he prayed for acquittal of the appellant from all charges leveled against him.

8.Per contra, the learned Government Advocate [Cr1. Side] appearing for the respondent Police would submit that non-examination of the victim, who is of tender age will not affect the case of the prosecution. PW1 stated that victim was in the house of the appellant and was abused by him. The sexual abuse of minor girl must not be doubted merely on technicalities or formalities when the evidence of PW1 and PW2 are certain that they have seen the victim with the appellant on the cot. The victim had complained about pain in her private parts. Hence, taking advantage of the tender age and acquaintance, the victim

was abused sexually by the appellant. It is natural that when the incident had taken place inside a room away from the public view, there cannot be any other witnesses. The neighbours/PW4, PW5 and PW6 have categorically stated that the appellant being present and he was beaten and taken to the police station.

9.The learned Government Advocate would further submit that PW7, the mahazar witness has supported the case of the prosecution. The infirmities in the prosecution would not affect the case. In view of the categorical evidence against the appellant the prosecution had proved the case by examination of all the witnesses. PW9, PW10 and PW11, the doctors have treated and examined the victim as in-patient from 12.12.2011 to 14.12.2011 and issued Ex.P5 to Ex.P8. Hence, the trial court rightly convicted the appellant on the evidence let-in by the prosecution.

10.This Court considered the rival submissions and perused the materials available on record.

11.PW1 stated that the complaint [Ex.P1] was written by the police on her dictation, on the other hand it is seen that PW7 has gone along with PW3 and written the complaint [Ex.P1]. PW14, the Sub-Inspector of Police, who registered the complaint [Ex.P1] is silent about the same. Further PW1, PW2, PW3 and PW4 have stated that the appellant was beaten and taken to police station. PW7, the witness for arrest and confession [Ex.P2] stated that PW12 arrested the appellant from a different place of a latter time. From evidence of PW12, it is seen that the appellant was arrested on 11.12.2011 at about 08.30 p.m at Basin Bridge Railway Station Platform No.1.

12.Initially, PW1 and PW2 stated that they have seen the appellant forcibly taking the victim to his house. But on their evidence it is found that both PW1 and PW2 have not seen the appellant taking the victim to his house. PW1 was informed about the happening by the victim and PW2 was informed by the sister of the victim. Further, the neighbourhood witnesses/PW4, PW5 and PW6 have not seen the appellant forcibly taking the victim and the actual happenings, PW1 stated that she was informed by the victim. PW2 states that when she entered the house of the appellant, the appellant was sitting in cot and victim was sitting on him. Further PW1 and PW2 stated that they have seen inflation and reddish color in private parts of the victim and victim complained pain. PW11, the Doctor attached to Rajiv Gandhi Government Hospital, Chennai has first examined the victim at about 10.10 p.m on 11.12.2011 and has recorded the

version given by the mother of the victim/PW1 only and no injuries found. PW9 the doctor attached to Children Hospital, Egmore issued Ex.P5 in certain terms that the private parts was normal and no external injury and on internal examination he found no changes. PW10, another doctor attached to Children Hospital, Egmore has issued the wound certificate [Ex.P6] and case sheet [Ex.P7] stated that no injuries were found in the private parts of the victim and on the body. The scan report is normal and stated that there could have been some symptoms if the victim was subjected to physical/sexual assault.

13.In this case all the three doctors [PW9, PW10 and PW11] on examination of the victim had categorically stated that there was no injuries or any mark to show that the victim was sexually abused. Hence, there is nothing to show that the victim was sexually assaulted by the accused and medical reports [Ex.P5 to Ex.P8] are in conformity to the same. PW7 the witness to Ex.P2 to Ex.P4 admitted that all the documents were signed by him in the police station.

14.Thus looking the case in any angle, it could be seen that the prosecution failed to produce sufficient cogent material to prove the guilt of the appellant. The finding of lower Court is without any basis.

15.In the result, the case as projected by the prosecution is not safe to sustain conviction of the appellant. In such view of the matter, the conviction and sentence imposed by the trial Court against the appellant cannot be sustained in the eye of law. Accordingly, the prosecution has failed to prove the case beyond reasonable doubt. As such, the conviction and sentence imposed on the appellant in S.C.No.404 of 2013 by the learned Sessions Judge/Mahalir Neethimandram, Chennai are set-aside and this Criminal Appeal is allowed. The appellant is acquitted of all the charges levelled against him and the fine amount, if any paid, shall be refunded to him. The appellant is directed to be released forthwith, unless his custody is required in connection with any other case. Consequently, the connected miscellaneous petition is also closed. No costs.

WEB COPY

Sd/-

Assistant Registrar(CS VIII)

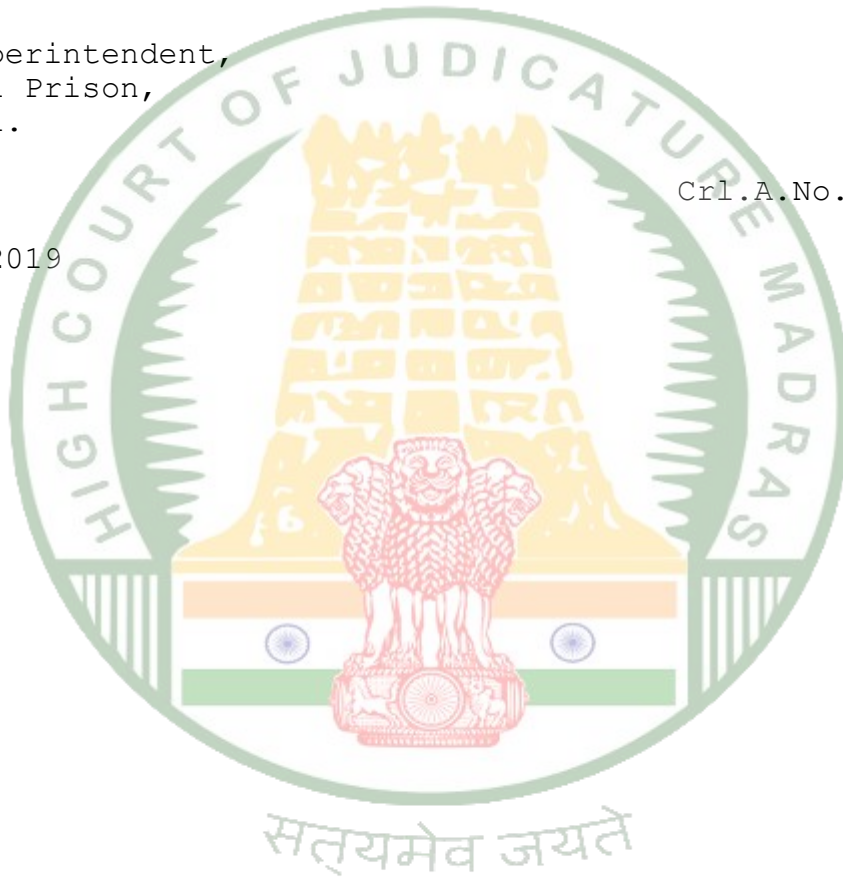
//True Copy//

Sub Assistant Registrar

- 1.The Sessions Judge/
Mahalir Neethimandram,
Chennai.
- 2.The Inspector of Police,
P-4, Basin Bridge Police Station,
Chennai.
- 3.The Public Prosecutor,
High Court, Madras.
4. The Superintendent,
Central Prison,
Chennai.

Crl.A.No.197 of 2016

nr 31/10/2019



WEB COPY