

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 31.08.2019
Pronounced on : 04.11.2019

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.A.No.260 of 2016

Govinda Ramanujam

... Appellant/1st Accused

Vs.

The State, Rep. by,
Inspector of Police,
Tharamangalam Police Station,
Tharamangalam,
Salem District.

... Respondent

PRAYER: Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to allow this appeal by setting aside the Judgment of the Mahila Court Salem in S.C.No.352 of 2010, dated 19.11.2015 by acquitting and discharging the appellant.

For Appellant : Mr.A.Raghunathan,
Senior Counsel for Mr.K.Balaji

For Respondent : M/s.P.Kritika Kamal
Government Advocate [Crl.Side]

JUDGMENT

This appeal arises out of the conviction and sentence imposed by the learned Sessions Judge, Mahila Court, Salem in S.C.No.352 of 2010 dated 19.11.2015, wherein the appellant was tried for the offence punishable under Sections 323 and 376 (1) of IPC. The learned trial Judge convicted the appellant for offence under Section 376 (1) of IPC and sentenced him to undergo ten years rigorous imprisonment and to pay a fine of Rs.1,00,000/- in default to undergo 6 months rigorous imprisonment and for the offence under Section 323 of IPC, the appellant has to pay a fine of Rs.1,000/- in default, sentenced to undergo one months of simple imprisonment. The appellant was acquitted for the offence under Sections 498(A) and 307 of IPC.

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

2.1.The defacto complainant/PW1 got married with the appellant on 14.12.1988, who was working as JCB operator in Chennai. Out of their marriage, they had two sons aged about 10 and 14 years respectively and one daughter Janaki/victim aged

about 12 years. After the marriage, PW1 and her children were living along with the appellant and 2nd and 3rd accused at Pavalathur. During that time, the parents of the appellant/A2 and A3 had started demanding dowry. In the meanwhile, the appellant had developed illegal relationship with one Meena and living with her in Chennai. During 2004, when PW1 questioned the same, she was beaten by the appellant. She took treatment at Omalur Government Hospital and gave the complaint before the Tharamangalam Police. On the intervention of the family members, the said complaint was not pursued. Thereafter, the appellant, PW1 and their children were living in Chennai. On one such occasion on 20.12.2004, it was a chilly day, PW1 switched off the fan and was sleeping along with her daughter/victim. At late night, she found the night lamp being switched off. When PW1 attempted to switch on the night lamp, PW1 found the appellant and her daughter/victim in a compromising position without any dress. When PW1 enquired her daughter, it revealed that three to four occasions earlier also the appellant had abused the victim sexually. PW1's daughter further stated that she was threatened not to divulge this happenings, otherwise her life and her mother's life would be put to danger. Thereafter, on 21.12.2004 PW1 reached her parents house at Palaniyapuram, Salem. At the earlier hours, the appellant had come there and questioned PW1 for taking children and she was thrashed by the appellant. After two months i.e., on 26.02.2005, the complaint came to be lodged before the Superintendent of Police in Public Grievance Day hearing, PW1 and her daughter had narrated the same. Thereafter, the case came to be registered in Crime No.74 of 2005 for the offence under Sections 498(A), 323, 376 and 307 of IPC by PW12. On completion of investigation and filing of charge sheet, the case was tried against the appellant in S.C.No.352 of 2010 by the file of the Sessions Judge, Mahila Court, Salem.

3. PW1, mother of the victim lodged a complaint [Ex.P1] that the marriage between PW1 and appellant was conducted on 14.12.1998 and the demand of dowry by the parents/A2 and A3 of the appellant. PW1 was physically assaulted by them. PW1 was left without any financial support. With great difficulty, PW1 brought up her children and provided education. PW1 further stated that the appellant was working as JCB Operator in Chennai, developed relationship with one Meena and was residing with her. When PW1 questioned the same, she was beaten by the appellant. On 02.07.2004, the parents of the appellant had demanded dowry of Rs.2,00,000/- and also assaulted her. Thereafter on 03.07.2004, PW1 took treatment at Omalur Government Hospital, lodged the complaint before Tharamangalam police. On the intervention of her family members, the appellant and PW1 started living in Chennai. During such time

on 20.12.2004, she saw her daughter and the appellant in a compromising position without any dress. When PW1 questioned the same, she was assaulted by him. Thereafter, she came to her parents house. On coming to know about the same, the appellant followed PW1 and again assaulted her physically. After two months, the appellant came to his native PW1 along with PW2 and PW3 went to the house of the appellant, seeking redressal for her grievance. At that time, PW1 was again assaulted by the appellant and PW1's parents admitted her in the Government Hospital, Attur and there she lodged a complaint [Ex.P1].

3.2.PW2, father of PW1 stated about the marriage between PW1 and the appellant. The appellant did not take care of his children. The 2nd accused and 3rd accused demanded dowry of Rs.2,00,000/-. Further, PW2 stated that PW1 was physically assaulted at the hands of the appellant and his parents/A2 and A3 and the victim informing about the sexual assault of his father/appellant.

3.3.PW3, the elder brother of PW1 stated that PW1's daughter was studying 12th std in hostel. On completion of her studies she was taken to his house at Coimbatore, where she joined computer class and thereafter she had come back to her parents house and stayed with her mother/PW1 and maternal grand parent/PW2. The appellant was constantly calling and threatening the victim not to depose against him. Unable to bear the trauma, the victim had self-immolated and died on 13.03.2012.

3.4.PW4 and PW5, the local residents at Pavalathur are the witnesses to the Observation Mahazar [Ex.P3].

3.5.PW6, Doctor attached to the Government Hospital, Attur stated that on 21.12.2004 at about 06.50 a.m, PW1 had taken treatment in the hospital. The Accident Register issued by PW6 was marked as Ex.P4. In Ex.P4, it is found that the police had been intimated that PW1 was brought up thereby PW2 and she stated about being assaulted by known person on 21.12.2004 at about 04.00 a.m at her residence and she had brushers on her shoulder, contusion on her back and complained of pain all over the body.

3.6.PW7, Doctor attached to Government Hospital, Omalur examined the victim on 27.02.2005 and the issued report [Ex.P5]. On examination, PW7 found that the hymen was not intact and vagina admits two finger and opined that the victim is used to have sexual intercourse. Through PW7, Ex.P6 forensic report has been marked.

3.7.PW9, Headmaster of Jothi Higher Secondary School,

Tharamangalam issued school certificate of the victim [Ex.P8]. As per Ex.P8, the date of birth of the victim is 07.09.1993. PW10, Doctor attached to Government Hospital Salem examined the appellant on 03.03.2005 and issued potency certificate [Ex.P9].

3.8.PW11, Sub Inspector of Police on receipt of the complaint [Ex.P1], registered F.I.R in Crime No.74 of 2005 and forwarded the same to higher officials.

3.9.PW12 is the Investigating Officer to whom the case was entrusted. On receiving the case in Crime No.74 of 2005, visited the scene of occurrence, prepared rough sketch [Ex.P12], examined the witnesses, arrested the accused on 28.02.2005, sent the victim and the accused for medical examination and made request for recording the 164 Cr.P.C statement of victim, PW1 and PW3. On completion of the investigation charge sheet filed.

4.The contention of the learned counsel for the appellant is that PW1 is the wife of the appellant and they were married in the year 1988. After the marriage, PW1 was residing with the parents of the appellant. The appellant was working as JCB Driver in Chennai and used to visit his family regularly. Out of their marriage they had three children. There was a stormy relationship between the appellant and the PW1. Due to the marriage discord, PW1 was residing with her parents at Pavalathur Village. Hence, PW1 fabricated a false case against the appellant. Due to the matrimonial discord, the earlier occurrence in which PW1 is said to be assaulted by the appellant and taken treatment at Omalur Government Hospital is false and no materials produced for the same.

5.It is an admitted case that PW1 for the past seven years was living separately and the appellant was living with one Meena. In such circumstances, the story of PW1 that she and her daughter were living in Chennai is false. Likewise, on the night of 20.12.2012, the appellant had sexually assaulted his daughter is a got up story by PW1 and the minor girl had been tutored and compelled to say the false story against the appellant. The appellant's brother was in the JCB business. PW3 elder brother of PW1 and his friend intended to join the appellant's brother in the business. They had some misunderstanding and the business could not be continued. It is another reason for the appellant being falsely implicated in this case.

6.The learned counsel for the appellant would further submit that the story of PW1 being assaulted on 21.12.2004 and taken treatment at Government Hospital, Attur are highly artificial as could be seen from Ex.P4 [Accident Register]. PW6, the doctor as well as Ex.P12, the investigating officer admitted that there

are corrections in the time and date of occurrence in the Accident Register [Ex.P4. Further, no reason is given for lodging the complaint after lapse of 66 days. PW1 admitted that she don't know to write in Tamil. But the complaint [Ex.P1] runs to four pages and there is no mention of who had written the complaint. PW1 as well as PW11 are silent about the same. It is admitted that during Public Grievance Day, the entire case has been got up against the appellant. The medical examination of the victim by PW7 and Ex.P5 revealed that there is no external injuries to prove that there was forcible sexual assault. In this case the victim could not be examined as she had self immolated on 13.03.2012. The evidence of DW1 had not been considered by the lower Court in its proper perspective and Ex.D1 and D2 exposes the hollowness in the case of the prosecution.

7.From the evidence of PW1 to PW3, the death of victim girl under the suspicious circumstances on 13.03.2012 is admitted and a case in Crime No.140 of 2012 registered under Section 174 of Cr.P.C., on the complaint of the Village Administrative Officer. PW1 and PW2 have not given any complaint in this regard, despite the occurrence had taken place in their house and no allegation is made against the appellant that the cause of death is due to the appellant threatening and forcing the victim not to depose against him. Further, the evidence of PW1 to PW3 are contradictory to each other. PW2 admitted that for the past seven years PW1 was separated from the appellant and she was living with her children. PW3 stated about demand of dowry and assault on PW1 and she getting treatment at Government Hospital, Omalur, Salem and no materials have been produced. Further it is admitted that in Ex.P4, there is a correction in the date and time and no explanation has been given by PW6. It is further submitted that according to PW1 the alleged occurrence had taken place on 20.12.2004 at Chennai at about 10.00 p.m. On the same breath she stated that on 21.12.2004, she reached her parents house at Palaniyapuram Vazhapadi at about 04.00 a.m. PW1's statement that she was accosted and assaulted by the appellant as found in Ex.P4 is highly improbable. Further, PW12 admitted that the alleged occurrence according to the prosecution is said to have taken place at Chennai and the house owner is residing in the first floor, no investigation has been conducted at Chennai and no witnesses have been examined. PW12, the Investigation Officer admitted that she had not visited Chennai and carried out any investigation. It is a specific case of the appellant that for the past seven years PW1 and her children were living separately and the appellant was living at Chennai.

8.The lower Court placed reliance on 164 Cr.P.C statement of the victim [Ex.P13] as a dying declaration, which is not correct and proper and further it had also given a finding as though PW1

is an eye witness. On the facts and materials, it is improbable that PW1 and the victim stayed at Chennai and in the absence of any evidence to prove the same, it cannot be said that PW1 is an eye witness. Ex.P13 has been recorded on 07.03.2005 and the victim had committed self immolation on 13.03.2012 and there is no immediate cause of death. Further, the lower Court failed to consider the alleged occurrence is said to have taken place on 20.12.2004 and the complaint came to be lodged only on 26.02.2005 after delay of 76 days.

9.The learned counsel for the appellant submitted that the case was registered on 26.02.2005 and referred the bail order and stated that till 28.04.2005 the victim was not sent for medical examination. He placed reliance on the Judgment of this Court in the case of R.Murugesan Versus the State in Criminal Appeal No.393 of 2012 dated 05.02.2014 reported in 2014-LW(Crl) 339, wherein it is held that 164 Cr.P.C statement is not a substantial evidence and it can be used for the purpose of corroboration and contradiction. Hence, the learned counsel prayed for acquittal.

10.Per contra, the learned Government Advocate [Crl. Side] appearing on behalf of the respondent would submit that based on the complaint of PW1 to the Superintendent of Police, Salem on a Public Grievance Day, PW11 registered the case, visited the scene of occurrence, prepared observation Mahazar [Ex.P4], recorded the statement of witnesses PW1, PW2 and PW3 have stated about the stormy, strained relationship between the appellant and the victim, the demand of dowry, physical assault by the appellant and further the victim girl sexually assaulted by the appellant is a minor aged about 14 years. When PW1 questioned the act of the appellant, she was assaulted and thereafter left to her native and got treatment in the Government Hospital, Athur. Hence, there is nothing to doubt about the veracity of the evidence of PW1 to PW3. The untimely death of the victim will no way affect the case of the prosecution. Further, the victim has given a 164 Cr.P.C. statement [Ex.P13] recorded by PW13/Judicial Magistrate, Salem, which has been duly proved. The evidence of PW7 and Ex.P5 proved that the victim's hymen was not intact and vagina admits two fingers. The delay in lodging the complaint, small corrections in the accident register [Ex.P4] and some lapses in investigation will not affect the case of the prosecution. The lower Court on appreciating both oral and documentary evidence had rightly convicted the appellant.

11.The learned Government Advocate relied upon the following decisions:-

(i). "Gajoo Versus State of Uttarkhand reported in (2012) 9 SCC 532."

19. Now, we turn to the last submission on behalf of the accused that no serologist report was obtained in relation to the Daranti, Ext. 2 and blood stained pyjama, Ext. Ka 5, and therefore, the prosecution case should fail. This argument does not impress us at all. No doubt both these exhibits were not sent to the laboratory for obtaining serologist report, but the absence thereof per se would not give any advantage to the accused. This is merely a defect in investigation. A defective investigation, unless affects the very root of the prosecution case and is prejudicial to the accused, should not be an aspect of material consideration by the court. PW5 has duly proved the recovery of Daranti, Ext. 2 and the blood stained pyjama, Ext. Ka 5 and has duly stood the test of cross-examination in court. Both these articles were recovered by the investigating officer Brahma Singh, PW6 and the recoveries have been duly established before the court. The recoveries having been proved and the case of the prosecution being duly supported by two eye-witnesses, PW2 and PW3 and two witnesses, PW4 and PW5 who were present immediately after the occurrence, have proved the case of the prosecution beyond any reasonable doubt.

21. The present case, when examined in light of the above principles, makes it clear that the defect in the investigation or omission on the part of the investigating officer, cannot prove to be of any advantage to the accused. No doubt the investigating officer ought to have obtained serologists report both in respect of Ext. 2 and Ext. 5 and matched it with the blood group of the deceased. This is a definite lapse on the part of the investigating officer which cannot be overlooked by the Court, despite the fact that it finds no merit in the contention of the accused."

12. The learned Government Advocate [Cr1. Side] contended that Ex.P13/164 Cr.P.C statement of the victim has to be taken as Dying Declaration as per Section 32 of the Indian Evidence Act and relied the case of "Sharad Birdhichan Sarda Versus State of Maharashtra reported in (1984) 4 SCC 116."

"21. Thus, from a review of the authorities mentioned above and the clear language of s.32(1) of the Evidence Act, the following propositions emerge:-

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of

time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under s.32.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of s.32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant."

13.The learned Government Advocate [Crl. Side] for the corrections and entries found in Ex.P4/Accident Register relied upon the following citation:-

"B.Bhadriah and Others Versus State of A.P. Reported in 1995 Supp (1) SCC 262."

"The casual way of filling up the column in the medical certificate does not in any manner amount to recording a statement of the injured witness."

14.The learned Government Advocate [Crl. Side] submitted that absence of injury or mark of violence and relied on an private part on the person of the prose which is of no consequence the following citation:-

4."Vijay Alias Chineer Versus State of Madhya Pradesh reported in (2010) 8 SCC 191."

"25.In the case of Gurcharan Singh Vs. State of Haryana AIR 1972 SC 2661, this Court has held that "the absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix. Further absence of

violence or stiff resistance in the present case may as well suggest helpless, surrender to the inevitable due to sheer timidity. In any event, her consent would not take the case out of the definition of rape"

26. In *Devinder Singh & Ors. Vs. State of Himanchal Pradesh* AIR 2003 SC 3365, a similar issue was considered by this Court and the court took into consideration the relevant evidence wherein rape was alleged to have been committed by five persons. No injury was found on the body of the prosecutrix. There was no matting on the pubic hair with discharge and no injury was found on the genital areas. However, it was found that prosecutrix was used to sexual intercourse. This Court held that the fact that no injury was found on her body only goes to show that she did not put up resistance."

15. This Court considered the rival submissions and perused the materials available on records.

16. It is an admitted fact that the marriage between the appellant and PW1 had taken place on 14.12.1998, the appellant was residing in Chennai and PW1 was residing with her in-laws in Salem. The appellant was working as a JCB operator in Chennai and used to visit his wife and children on occasions. After the birth of the third child, PW1 came to know that the appellant had developed a relationship with one Meena at Chennai and they were living as husband and wife. The matrimonial relationship between the appellant and PW1 collapsed and they had a stormy matrimonial life. Further, it is admitted that for the past seven years, PW1 along with her children were residing with PW2. DW1 also confirms the same. Apart from this, the appellant's brother who is also in JCB business had joined along with PW3 and his friend to run a partnership business, which could not be continued and there was a misunderstanding between them. The lower Court had given a finding that PW1 was living separately and there was no demand of dowry and acquitted the parents/A2 and A3 of the appellant from charges of dowry.

17. It is admitted by PW12 that the alleged occurrence is said to have taken place on 20.12.2004 and prior, the complaint came to be lodged only on 26.02.2005 with a delay of 76 days. No reason has been given for the delay. It is admitted by PW12 that she had not visited Chennai/scene of occurrence of rape and made any enquiry in this case. PW12 had only gone by the statement of PW1 and the victim. In this case PW1 had strong motive against the appellant for having illegal relationship

with one Meena in Chennai. PW1 and her children including the victim were living with her father at Palaniyapuram, Vazhapadi, Salem and hence, tutoring of the victim is probable. Further, the children of the PW1 were animus on the conduct of the appellant. From the materials it cannot be conclusively said that PW1 along with her daughter had stayed in Chennai with appellant on 20.12.2004 or prior. The version of PW1 is clouded with suspicion and creates doubt. Further, PW1 has not informed the happenings in Chennai immediately, which would be a normal conduct. Hence, the evidence of PW1 is highly artificial, which does not inspire confidence to be acted upon. The evidence of PW2 and PW3 are irregular witness and contradictory and cannot be relied on. The 164 Cr.P.C statement of the victim [Ex.P13] at the most could be used for corroboration or contradiction and it cannot form basis for conviction. Further, in view of Ex.P13 recorded on 07.03.2005 and the victim had committed self immolation on 13.03.2012 and there is no immediate cause of death and it cannot form a basis to convict the appellant.

18. In the case of "Arjun V. State of Assam [2005 CRI.L.J. 554]", a Division Bench of Gauhati High Court has considered the scope of the Statement of the witnesses recorded under Section 164 Cr.P.C and held as follows:-

"A witness's statement made under Section 164, Cr.P.C. can be treated as relevant and admissible under Section 33 of the Evidence Act if the witness, whose statement has been so recorded, does not appear or whose presence cannot be procured by the Court and/or kept out of the Court by adverse party. One of the prime requisites for making a statement admissible in evidence by taking recourse to Section 33 of the Evidence Act is that the adversary must have had a right and opportunity to cross-examine the witness, whose statement is sought to be admitted into evidence. During the course of investigation, when the statement of a witness is recorded under Section 164, Cr.P.C, the accused neither has any right nor is he given opportunity to cross-examine such a witness. For non-fulfillment of this condition precedent alone, it is sufficient to hold that a statement of a witness recorded under Section 164, Cr.P.C. is not a statement, which can be admitted into evidence at the trial under Section 33 of the Evidence Act."

19. In "R.Shaji V. State of Kerala [AIR 2013 SC 651]", the Hon'ble Supreme Court has considered the object behind recording the statement under Section 164 Cr.P.C and in paragraph No.16, it was observed as follows:-

"16. Section 157 of the Evidence Act makes it

clear that a statement recorded under Section 164 Cr.P.C., can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or event to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC., such statements cannot be treated as substantive evidence."

20.The Division Bench of this Court placing reliance of the above principle has held the case of "Selvam Vs. The Inspector of Police, Velagoundampatti, Namakkal reported in CDJ 2019 MHC 1730":-

"48. In the light of the settled position of law that the statement recorded under Section 164 CrPC is not a substantive evidence and therefore, it cannot be treated as relevant especially for the reason that it is open to the accused to confront the said witness by putting questions in cross examination."

21.Thus, the evidences let in by the prosecution with so much infirmities has not lend any support for the purpose of proving the criminal acts on the part of the appellant and as a consequence, the appellant is entitled to the benefit of doubt.

22.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.352 of 2010 by the learned Sessions Judge, Mahila Court, Salem 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.

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Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Sessions Judge, Mahila Court,
Salem District.

2. The Principal Sessions Judge,
Salem

3. The District Munsif cum Judicial Magistrate,
Omalur, Salem.

4. The Chief Judicial Magistrate,
Salem.

5. The Superintendent,
Central Prison, Coimbatore.

6.The Inspector of Police,
Tharamangalam Police Station,
Tharamangalam,
Salem District.

7.The District Collector,
Salem.

8.The Director general of Police
Mylapore, Chennai -4.

9.The Public Prosecutor,
High Court, Madras.

10. The Judicial Magistrate, No.1,
Salem.

Copy to:-

The Section Officer,
Criminal Section,
High Court, Madras - 104.

+1cc to Mr.K.Balaji, Advocate, SR.No.91210

Cr1.A.No.260 of 2016

Kak(04/11/2019)