

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 20.12.2018

Delivered on: 04.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

Criminal Appeal No.822 of 2016

N.Gurunathan

... Appellant/Accused

vs.

State, rep.by
The inspector of Police
Singarapettai Police Station,
Krishnagiri District

... Respondent/Complainant

Criminal Appeal filed under Section 374 of Cr.P.C., against the judgment dated 04.05.2016 made in S.C.No.182 of 2014, by the Sessions Judge, Fast Track Mahila Court, Krishnagiri.

For appellant : Mr.L.Rajasekar

For Respondent : Mrs.V.Saradha Devi
Government Advocate (Crl.Side)

JUDGMENT

The appellant herein is the sole accused in Sessions Case No.182 of 2014, on the file of the Sessions Judge, Fast Track Mahila Court, Krishnagiri. He stood charged for the offence under Section 323 and 376 of the Indian Penal Code. After trial, by judgment dated 04.05.2016, the trial Court acquitted the appellant for the offence under Section 323 of IPC; however, convicted him for the offence under Section 376 IPC and sentenced him to undergo Rigorous Imprisonment for seven years and to pay a fine of Rs.25,000/-, in default, to undergo Simple Imprisonment for six months. Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

2.The case of the prosecution in brief is as follows:

The appellant/accused is the resident at Shasanoor, Mittapalli Post, Uthangarai Taluk. The victim is one Murugammal, who is a resident of Kutlanoor Mittapalli Post, Uthangarai

Taluk. On 5.12.2011 at about 3.00 p.m., the victim girl was grazing cow in her land at Thuvarai Kollai. At that time, the appellant/accused came and misbehaved with her and forcibly had sexual intercourse, without her consent. While committing sexual assault, the appellant/accused has also inflicted injuries on the victim girl-Murugammal. On the basis of the complaint lodged by the parents of the victim girl-Murugammal, an investigation was conducted and final report was filed and the appellant/accused was charged with for the offence punishable under Sections 323 and 376 of IPC.

3. During trial, on behalf of the Prosecution 13 witnesses were examined as P.Ws.1 to 13 and eleven documents were exhibited as Exs.P1 to P11, apart from four Material Objects. On behalf of the defence, no witness or any document was examined or marked.

4. According to the prosecution, after the commission of offence by the appellant/accused, the victim girl-Murugammal had informed about the incident to her aunt Lalitha, since her parents, at that time, had gone to her relatives marriage. Later, her parents have returned from the marriage on receipt of information from the victim girl and took her to Uthangarai Government Hospital and subjected her to medical examination. Thereafter, Singarapettai Police had enquired the victim girl and also obtained statement from her. The parents of the victim girl had lodged a complaint before the police, which is marked as Ex.P1. The Police had also seized the clothes worn by the victim girl-Murugammal, which were marked as Material Objects M.O.1 to M.O.4. P.W.1-the victim girl, who was examined in the trial, had narrated the incident as to how the appellant/accused had committed sexual assault on her without her consent, when she was grazing her cow at Thuvarai Kottai at around 3.00 p.m. on 05.12.2011. According to her, thereafter, she started running towards her home and on the way she met her aunt Lalitha and informed her about the incident. Later on, the incident was narrated to the parents of the victim girl, who were examined as P.Ws.3 and 4.

5. The testimony of the main witness P.W.1 has supported the case of the prosecution in full that she was subjected to rape by the appellant/accused. She affirmed her testimony, which supported the case of the prosecution even in the cross-examination by the defence. P.W.2 is the aunt of the victim girl-P.W.1, to whom the victim girl appears to have narrated the incident immediately on the date of occurrence. P.Ws.3 and 4 are the parents of P.W.1. P.W.5- Mr. Shanmugam was a witness to the Observation Mahazar, which is marked as Ex.P3. P.W.6-one Srinivasan was a witness to the confession statement given by the appellant/accused and he had also signed in the Seizure Mahazar. The Seizure Mahazar was marked as Ex.P4. P.Ws.7 to 13 are all official witnesses. P.W.7-Manickam is a Forensic

Expert, who had examined the Material Objects, viz., M.Os.1 to 4. P.W.8-Gokularamanan was a Doctor, who examined the appellant/accused and gave certificate, which is marked as Ex.P6. P.W.9-Dhanalakshmi, was a Sub-Inspector of Police, who registered the First Information Report. P.W.10-Ms.Malathy is a Doctor, who examined the victim girl and gave certificate, which is marked as Ex.P8. P.W.11, is a Sub-Inspector of Police, who conducted investigation in the case, on the basis of the FIR received from Singarapettai Police Station. P.W.12-Vimali Thiagarajan is a Forensic Expert, who examined the lungis worn by the accused and gave report under Ex.P10 and P.W.13-Dhatchinamoorthy is an Inspector of Police, who continued the investigation in the case and filed the final report. Except P.W.1, the other non official witnesses, including the parents of P.W.1, have given evidence on the basis of hearsay. The first person, to whom the incident was narrated, was the aunt of P.W.1, who was examined as P.W.2. However, in her evidence, she did not support the case of the prosecution and unfortunately the prosecution did not treat her as hostile and cross-examine her. P.Ws.7 to 13 are all official witnesses, who deposed in respect of the task assigned to them with reference to the case of the prosecution.

6.The trial Court, on the basis of the evidence tendered by the witnesses, has come to the conclusion that the case as against the appellant/accused for offence under Section 323 IPC was not established, but however, the offence under Section 376 IPC was held to be established and accordingly convicted the appellant/accused and imposed a sentence of seven years Rigorous Imprisonment, which is subject matter of challenge in the present appeal.

7.The trial Court, while considering the evidence as made available, had reasoned that the evidence of P.W.1 was cogent and inspiring and the other evidence given by non-official witnesses would cogently corroborate the accusation of P.W.1 against the appellant/accused. According to the trial Court, the time and date of occurrence, the medical examination and the complaint lodged had been corroborated without any contradiction by all the witnesses. Therefore, the trial Court held that there was sufficient material evidence to establish the case of rape under Section 376 of the Indian Penal Code and accordingly punished the appellant/accused as mentioned above.

8.According to the trial Court, it was a clear case of prosecution that the incident had occurred on 05.11.2012 and there was absolutely no contra evidence adduced on behalf of the defence side. The trial Court, while coming to the said conclusion, has also reasoned that despite the medical certificate, which did not fully support the case of the prosecution for offence under Section 376 IPC, the circumstantial evidence would point to the fact that the

incident had occurred as narrated by P.W.1. The evidence of P.W.2, the aunt of P.W.1, did not make any impact on the case of the prosecution in the overall circumstances of the case. In any event, it was not the case of the defence that the appellant/accused was not there in the scene of occurrence nor was any defence put forth by the appellant/accused contradicting the case of the prosecution. Therefore, the trial Court, despite the medical certificate, which was to the effect that semen could not be seen in the clothes worn by the victim girl and the blood, which was found in the lungi worn by the appellant/accused was a human blood, but the matching of the blood could not be conclusively established, since the reports (Ex.P10 and Ex.P11) of the Forensic Department were inconclusive on that aspect, found the appellant/accused guilty under Section 376 of IPC. In the absence of any contra evidence to upset the prosecution case, the trial Court has come to the conclusion about the guilt of the appellant/accused for offence under Section 376 of IPC. Above all, the trial Court has held that there was no sufficient material in order to establish the case against the appellant/accused for offence under Section 323 IPC.

9.The learned counsel appearing for the appellant/accused would, at the outset, submit that this is a case, which can attract at worst only Section 354 of the Indian Penal Code and not Section 376 IPC. Section 354 IPC reads as follows:

"354.Assault or criminal force to woman with intent to outrage her modesty-Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both." (Substituted by the Criminal Law (Amendment) Act, 2013 (13 of 2013) w.e.f. 3.2.2013)

According to the learned counsel for the appellant, the medical report did not support the case of the prosecution for offence under Section 376 IPC. He would draw the attention of this Court to Ex.P8, which report reads as follows:

"Alleged H/o.of rape by one known male person at 3.00 p.m. On 05.12.2011 at the farm land.

O/e Pt. Conscious. Oriented.

Breast - skin congested.

Scratch marks seen on the body

Hymen - Absent

Vagina - congested

Vaginal smear slide result:

Forensic Department (Government of Tamil Nadu)

Salem (Regional Forensic Science Laboratory)

Report: Did not dated spermatozoa in the smear of the above two slides.

Final report:

Evidence of sexual assault present as the vaginal was congested, Hymen absent, breast skin congested and scratch marks seen on body. Since vaginal smear showed no spermatozoa reveals ? Ejaculation has not occurred (or) reasons reserved."

10.Although the Doctor, who was examined as P.W.10, had given her opinion that there could have been sexual assault on the victim girl, nevertheless, if the entire report is taken into consideration, it could be seen that there was no sperm found on the clothes worn by the victim girl at the time when the medical examination was conducted. Even the blood, which was found in the lungi worn by the appellant/accused, was not conclusively established by the Forensic Department, as the report indicates that the examination was inconclusive, which could be seen from Ex.P10, dated 16.10.2012.

11.The learned counsel would also point out that there are holes in the prosecution case, since according to the evidence of P.W.3, the mother of the victim girl P.W.1, the police complaint was lodged before the victim girl was taken to the hospital. But the actual complaint was given to the police only after the girl was subjected to medical examination. According to the learned counsel the first complaint was not made available, as the same could reveal the true nature of incident, which happened. He would also point out that in the evidence of P.W.2, the aunt of the victim girl has stated that the victim girl had only told her that the appellant/accused had chased her and not about the alleged commission of any sexual assault. P.W.2 in her evidence never said about the commission of offence at all. The medical reports did not show any penetrative assault. Therefore, the learned counsel would submit that the case for offence under Section 376 IPC was not attracted at all. He would implore this Court that the maximum punishment that was provided under Section 354 IPC was two years and the appellant/accused had already served more than two years sentence. If the appellant/accused is convicted under the said Section, since he having served out the sentence as provided under the said Section, he can be set at liberty as on today. According to the learned counsel, except the statement of P.W.1,

all other witnesses have deposed only on hearsay and on the basis of solitary evidence of P.W.1, not effectively corroborated by other witnesses, including the evidence of Doctors and medical reports, the appellant/accused could not be convicted under Section 376 IPC. He would therefore submit that the judgment of the trial Court is liable to be interfered with to the extent that the appellant/accused can be convicted under Section 354 IPC and not under Section 376 of IPC.

12. Per contra, the learned Government Advocate appearing for the respondent/State would submit that the evidence of P.W.1 alone is sufficient enough to convict the appellant/accused for offence under Section 376 IPC. She would submit that in this type of matters one cannot have any other independent witness and all the prosecution has to prove is that the entire evidence tendered by all witnesses put together is cogent and inspiring. She would submit that the minor contradictions in evidence does not take away the case of the prosecution, since it was not the case of the defence that the appellant/accuse was not in that place of occurrence on 05.12.2011. She would submit that the ingredients of Section 376 are attracted even if there is no penetrative assault and therefore, it is not open to the appellant/accused to dilute the commission of offence and get away with minor sentence. According to the learned Government Advocate for prosecution, the trial Court has dealt with all the materials and the evidence placed before it and came to the right conclusion, which does not require any interference from this Court. According to her, the evidence of P.W.10, the Doctor and the medical report, would suggest that there could have been sexual assault on the victim girl on the date of occurrence, coupled with the fact of cogent evidence given by P.W.1, which would clearly clinch the case in favour of the prosecution. Therefore, the trial Court was right in convicting the appellant/accused, since there was sufficient material available for coming to such conclusion. She would therefore pray to dismiss the appeal.

13. Heard the learned counsel for the appellant/accused as well as the learned Government Advocate for the respondent/State.

14. The conclusion of the trial Court is entirely on the basis of the evidence given by the victim girl, who was examined as P.W.1. No doubt, her deposition was clear and cogent, nevertheless, her evidence has to be tested with reference to the ingredients required for attracting Section 376 IPC. No doubt, on the defence side there was no contra evidence made available that the appellant/accused was not involved in the occurrence said to have taken place on 05.12.2011, however, it has to be seen as to whether the act of the appellant/accused would attract the commission of offence punishable under Section 376 IPC or there was a commission of offence punishable

under Section 354 IPC, in the facts and circumstances of the case.

15.While analyzing the evidence which was let in before the trial Court, the evidence of P.W.2, assumes significance. P.W.2 is the aunt of the victim girl, to whom she narrated the incident immediately after the occurrence. Unfortunately P.W.2 did not support the case of the prosecution in the trial and she merely said in the trial that P.W.1 has been chased by the appellant/accused. Therefore, there was a possibility of an attempt to molest or outrage the modesty of P.W.1 by the appellant, which fact cannot be ruled out at all even on the basis of the submissions made on behalf of the appellant/accused himself.

16.The other important factor that needs to be considered by this Court is the evidence of P.W.10, the Doctor and the medical report. As rightly contended by the learned counsel for the appellant/accused, the Doctor-P.W.10 herself has deposed that there was no sperm found in the Material Objects seized by the police. Moreover, the matching of the blood, which was found in the lungi worn by the appellant/accused, could not be conclusively established. Although P.W.10 has given evidence that there could have been a likelihood of sexual assault on the victim girl, such submission alone cannot be considered to be a conclusive one for convicting the appellant/accused under Section 376 IPC. As regards the reasoning of the trial Court about the evidence of P.W.1, the appellant/accused does not disown the incident, but what has to be seen is as to whether there was a penetrative sexual assault which will attract punishment under Section 376 IPC or such assault would attract any other Sections of the Indian Penal Code.

17.In the case of penetrative sexual assault, the prosecution has to establish a detailed case against the appellant/accused with supporting materials like medical reports. The crucial evidence being that the sperm was admittedly not found in the clothes (M.Os.1 to 4) worn by the victim girl, which show that there was no force inflicted on the victim girl and the said point is in favour of the defence and therefore, at worst, the assault by the appellant/accused on the victim girl would attract only Section 354 IPC. It was also possible that in such circumstances, the victim girl could have exaggerated the event without understanding the implications, unknowingly. In such circumstances, time and again the Courts have held that the benefit of doubt should always go in favor of the accused.

18.In the case on hand, both the parents of the victim girl were not available in the village at the time of occurrence and their evidence is only on the basis of hearsay and the other witnesses are happened to be from the same village, but they are

either Observation Mahazar or Seizure Mahazar witnesses, who had narrated on the basis of what they have been told. In such circumstances, the evidence of P.W.2 assumes larger significance in order to prosecute the appellant/accused. Unfortunately, as rightly held by the trial Court itself, P.W.2 was not treated as hostile despite her evidence being against the prosecution. It is not the case of the defence that the appellant/accused was not available at the scene of occurrence. The defence was that the act of the appellant/accused on that particular day would not attract Section 376 IPC and at worst, the same would attract only Section 354 IPC. Therefore, the evidence of P.W.1 regarding the incident, which took place on 05.12.2011, has to be accepted as cogent and inspiring, but while accepting her evidence, this Court has to see as to whether the appellant/accused could be convicted under Section 376 IPC or under Section 354 IPC, by taking into consideration the other circumstances of the case.

19.The entire prosecution against the appellant/accused for charge under Section 376 IPC was built only on the evidence of P.W.1 and all other non-official witnesses have deposed only on the basis of the incident narrated by P.W.1 herself and nobody else. While premising the prosecution case based only on the statement of the victim girl, sometimes it is possible that the prosecution can bring the commission of any offence within the ambit of more severe Section under the Indian Penal Code or it was possible that the victim girl could have given her statement, unwittingly, by giving exaggerated version of the incident. This Court is forced to come to such a conclusion about the possibility of exaggerated version of assault on the basis of the fact that the medical report did not fully support the prosecution theory for the offence under Section 376 IPC. While confronting with such nebulous situation, this Court has to extend the benefit of doubt in favour of the defence, however, the appellant/accused is not going to be let off without any punishment, but going to be punished under a different Section of Indian Penal Code, viz., Section 354 IPC. The circumstances of the case would point to the fact that there could not have been a sexual assault attracting punishment under Section 376 IPC, but conclusively establish that there was an assault on the victim girl (P.W.1) on 05.12.2011, in which event, the proper course is to convict the appellant/accused under Section 354 IPC and not under Section 376 IPC. In the opinion of this Court, the prosecution has not come forward with a case against the appellant/accused for the offence under Section 376 IPC. While holding so, this Court has no hesitation in coming to a conclusion that the assault by the appellant/accused on the victim girl could very well be brought within the ambit of Section 354 IPC.

20.In the result, the Criminal Appeal is partly allowed; the conviction and sentence imposed on the appellant

under Section 376 of the Indian Penal Code are set aside and instead he is convicted under section 354 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two years.

21.This Court is informed that the appellant/accused has been imprisoned for more than two years. In such circumstances, since the maximum punishment, as provided under Section 354 IPC, is only two years, the appellant/accused is ordered to be released forthwith by the jail authorities.

Sd/-
Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

msk

To :

1.The Sessions Judge, Fast Track Mahila Court,
Krishnagiri.

2.The inspector of Police
Singarapettai Police Station,
Krishnagiri District.

3.The Superintendent of Prison,
Central Prison,
Vellore.

4.The Public Prosecutor, High Court, Madras

5. The Judicial Magistrate, Uthangarai.

6. The Chief Judicial Magistrate, Uthangarai.

7.The District Collector, Vellore.

8.The Director General of Police,
Mylapore, Chennai 600 004.

+1cc to Mr.L.Rajasekar, Advocate, S.R.No. 709

Crl.A.No.822 of 2016

JP(CO)
GN(08/01/2019)