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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30.01.2020
Pronounced on : 21.02.2020

C O R A M

THE HON'BLE MR.JUSTICE R.SUBBIAH
AND
THE HON'BLE MR.JUSTICE R. PONGIAPPAN

Criminal Appeal No.132 of 2018
&CMP No.3256 of 2018

Krishnamoorthy ... Appellant/Accused

-vs-

State rep. By
The Inspector of Police,
All Women Police Station,
Tiruvannamalai ... Respondent/Complainant

Criminal Appeal filed under Section 374 (2) of the Code of Criminal Procedure, to set aside the conviction and sentence passed by the learned Sessions Judge, Fast Track Mahila Court, Tiruvannamalai dated 29.11.2017 in S.C.No.49 of 2014.

For Appellant : Mr.S.Silambu Selvan

For Respondent : Mrs.M.Prabhavathi,
Additional Public Prosecutor.

J U D G M E N T

R.PONGIAPPAN, J.

The present appeal has been filed by the appellant against the judgment passed in S.C.No.49 of 2014 dated 29.11.2017 on the file of the learned Sessions Judge, Mahila Court, Tiruvannamalai. The appellant is the sole accused in the abovesaid case. The accused stood charged for the offence under Section 376 IPC. The accused denied the charge and opted for trial. Therefore, he was put on trial of the charge. After full fledged trial the learned Sessions Judge, Mahila Court, Tiruvannamalai, found the accused guilty for the offence under Section 376 IPC. Accordingly, the accused was convicted and



sentenced to undergo life imprisonment and to pay a fine of Rs.5,000/-, in default of payment of fine, to undergo rigorous imprisonment for three years.

2. Challenging the conviction and sentence, the accused is before this Court, with the present criminal appeal.

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

(i) PW2 is the victim, aged about 8 years at the time of occurrence. On 18.07.2010 at about 11.00AM, when at the time PW1-Savithri, who is the mother of PW2, is in her agricultural land, PW2 attended the domestic works in her house. At that time, one Rajeswari, who is residing near to the house of PW2, invited the PW2, for riding the bicycle. When at the time PW2 and Rajeswari riding the bicycle, the accused, who is also a neighbour to PW2 came and requested the PW2 to take the key which was negligently fallen down inside his house. Since the efforts made by PW2 ended in failure, the abovesaid Rajeswari has given the long stick to PW2 for taking the key. After giving the long stick, the said Rajeswari again returned to the street for riding the bicycle.

(ii) After seeing the same, accused opened the door and pushed the victim girl inside and while the victim was questioning the accused, the accused took the pillow from the shelf and pressed the same on her face. Thereafter, he lifted her frock, removed her underwear and kept his private part on her private part. The victim girl cried of pain, kicked the accused and ran away from the scene of occurrence. Blood was oozing from her private part. Thereafter, PW2 went to the stage of unconscious and fell down in pial (தீண்டாமை). After seeing the same, her friends Viji, Rajeswari and one Revathi, questioned her as to what she was doing in the accused house for the past half an hour. Since PW2 kept silent, Deivanai, who is the neighbour, called PW2 for taking lunch. Immediately, PW2 complained the pain to the said Deivanai and also shown the blood oozing out from her from private part.

(iii) Immediately, the said Deivanai by using an Auto went to the field of PW1 and brought PW1 to her house. In turn, PW1 brought PW2 to the lady Doctor, who is practising in Tiruvannamalai. Thereafter, all of them went to the police station. In the police station, PW1-Savithri lodged a complaint under Ex.P1. Further, she produced the birth certificate of the PW2-victim, which was marked as Ex.P2.

(iv) PW8-Tmt.Selvi, the then Inspector of Police, Tiruvannamalai-All Women Police Station on 18.07.2010 at about 8.00PM received the complaint from PW1 and registered a case in Crime No.15 of 2010 under Section 376 IPC. The printed FIR is Ex.P8. Immediately after the registration of the case, she



referred PW2 for medical examination vide a police memo.

(v) PW6-Dr.Malarvizhi, attached to Government Hospital, Tiruvannamalai, on 19.07.2010 at about 2.15AM examined the PW2 and found the following injuries.

(i) a reddish injury viz., nail prick in the right thigh 1x1/2 cm; and

(ii) the Hymen was not intact.

She had opined that PW2-victim had been raped. The Accident Register copy is marked Ex.P5 and the Discharge summary is marked as Ex.P6.

(vi) In continuation of the investigation, PW8 rushed to the scene of occurrence and in the presence of PW3-Murugan and one Dievanai, she prepared an Observation Mahazar under Ex.P9. She had drawn the rough sketch under Ex.P10. In the presence of the same witnesses, she recovered M.O.1 - a blue colour frock under the cover of Mahazar, Ex.P11. She examined the witnesses and recorded their statement.

(vii) In the meantime, PW8 received intimation that the accused was assaulted by public and thereafter, he admitted in the Government Hospital for treatment. After receiving the said message, on 19.07.2010 at about 2.00AM she reached the Government Hospital and arrested the accused. In turn the accused was remanded to the judicial custody.

(viii) Thereafter, PW8 submitted an application before the Magistrate for examining the accused in respect to his potency. Based on the said request, PW7-Dr.Arulanandam, attached with Tiruvannamalai Government Medical Hospital, on 20.07.2010 at about 11.00AM examined the accused and found the following injuries.

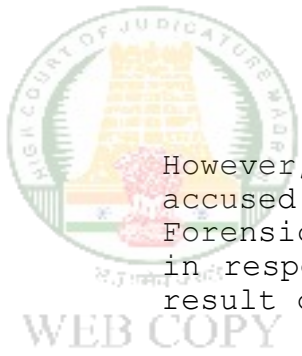
"(i) Subconjunctival haemorrhage both eyes congetion both lower lids+

(ii) Three sutured laceration over forehead 3cm length, another two each 2.5cm length

(iii) IInd degree burls involving, front of chest, left forearm medial aspect Anterior abdomen wall, inner aspect of both thigh, legs, dorsum or both foot, scrotum and penis."

In respect to the injuries sustained by the accused, he has issued the Accident Register copy under Ex.P7. He collected the blood of the accused for identifying the blood group.

(ix) Similarly, as per the letter sent by the learned Judicial Magistrate, Tiruvannamalai, PW5-Thiru.B.Ravishankar, the then Assistant Director, Forensic Science Department, Chennai, while he was on duty on 10.01.2011, examined the sky blue frock [M.O.1] which was recovered from the victim and examined the same. On examination, the semen was not found out.



However, it was found out that the blood collected from the accused belongs to 'A' group. The serology report issued by the Forensic Science Department is Ex.P12. The report issued by PW5 in respect to the examination of frock [M.O.1] is Ex.P3 and the result of the blood group was marked as Ex.A4.

(x) In continuation of investigation, PW8 submitted an application before the Judicial Magistrate, Polur, for recording the Section 164(5) Cr.P.C. Statements from PW1 and PW2. On receipt of the same, Judicial Magistrate, Polur, recorded the Section 164(5) Cr.P.C. Statements under Ex.P13 and P14.

(xi) After the receipt of certificates issued by the Doctor and copy of the statement recorded by the Judicial Magistrate, PW8, completed the investigation and came to the positive conclusion that the accused had committed an offence of rape and hence, she filed a charge sheet against the accused under Section 376 IPC.

4. Based on the materials available, the trial Court framed the charge under Section 376 IPC. The accused denied the charge and opted for trial. Therefore, the accused was put on trial.

5. During the course of trial proceedings, on the side of the prosecution, in order to prove their case, 8 witnesses have been examined as PW1 to PW8 and 14 documents were exhibited as Ex.P1 to Ex.P14. Besides, one material object, which has been marked as M.O.1.

6. Out of the said witnesses, PW1, Savithri is the mother of victim. She has spoken about the information given by the Deivanai, now deceased and about the details in respect to the admission of PW2 in the hospital. She has also spoken about the lodging of the complaint before the All Women Police Station, Tiruvannamalai. PW2 is the victim in this occurrence. She has spoken about the occurrence and about the injury sustained in the occurrence. PW3, Murugan and PW4-Shobana are the neighbours to PW2. Both of them have stated about the enquiry made towards PW2 about the occurrence.

7. PW5-Thiru.B.Ravishankar, was working as Deputy Director, Forensic Science Department, Chennai. He has spoken about the examination of M.O.1 and about the issuance of reports in respect to the examination made by him. According to him, the blood group of accused is "A" and there was no semen found in the frock, which was recovered from the occurrence place.

8. PW6-Dr.Malarvizhi, was practising in Tiruvannamalai Government Hospital. She has spoken about the injuries sustained by the PW2. She has issued Accident Register copy and discharge summary for PW2-victim. PW7-Dr.Arulanandam, was



practising in Government Hospital, Tiruvannamalai. He has spoken about the examination of the accused and about the issuance of Accident Register copy, in respect to the injury sustained by the accused.

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9. PW8-Selvi, the then Inspector of Police, All Women Police Station, Tiruvannamalai has stated about the registration of the case, manner of investigation conducted, and about the filing of the final report.

10. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C., he denied the same as false. However, he did not chose to examine any witness or mark any document on his side.

11. Having considered all the above, the learned Sessions Judge, Fast Track Mahila Court, Tiruvannamalai, found the accused guilty for the offence of rape. Accordingly, the accused was convicted for the offence under Section 376 IPC and sentenced, as stated in the 1st paragraph of this judgment.

12. Aggrieved over the conviction and sentence, the accused is before this Court with the present Criminal Appeal.

13. We have heard Mr.S.Silambu Selvan, learned counsel appearing on behalf of the accused and Ms.M.Prabhavathi, learned Additional Public Prosecutor. We have also perused the records carefully.

14. The learned counsel appearing on behalf of the accused would contend that before the trial Court, in respect to the alleged offence, except PW2, nobody was examined and since the victim in this case is aged about 8 years, at the time of occurrence, the evidence given by the said witness, cannot be accepted fully. Hence, for accepting the case of the prosecution, some corroboration in respect to the evidence given by PW2, is very much necessary.

15. Per contra, the learned Additional Public Prosecutor would contend that in respect to these type of offences, the Court cannot expect a number of eye witnesses. Infact the accused committed this offence inside the four corners. Further, since the victim is aged about 8 years, at the time of occurrence, it is very easy for understanding the act committed by the accused. Accordingly, she prayed to reject the contentions raised by the learned counsel appearing on behalf of the accused.

16. On considering the rival submissions, it is true as per Ex.P2, PW2-victim was born on 01.07.2002. On the other hand,



the alleged offence was happened on 18.07.2010. So, it is not in dispute that at the time of occurrence, PW2 is aged about 8 years. In the said circumstances, the question of admissibility in respect to the evidence given by PW2 is subject to the following 3 conditions.

- (i) A witness should be competent enough
- (ii) Must understand the question put before;
- (iii) Must comprehend and give pragmatic and rational answers to the same.

After testifying as above, the final discretion lies on the Court to comprehend and determine whether the testimony shall be permissible or not, keeping in mind the account to the given facts and situation.

17. In a landmark case, in Suresh Vs. The State of Uttar Pradesh, it is established that a testimony from a five year old child shall also be admissible, so long as the child is able to comprehend and understand the question of the given issue. Hence, it declared that that there is no minimum required age for a person to legally testify the Court of law.

18. Section 118 of the Indian Evidence Act mentions who is considered as competent enough to testify in the Court of law; "All persons shall be competent to testify unless the Court considers that they are prevented to understanding the questions put to them, or from giving rational answers to those questions, by tender years."

19. In the case on hand, on going through the entire testimony given by PW2, her evidence is cogent and convincing one. Since the accused committed an offence of rape, we are not in a position to expect other eyewitness for this type of offence. More than that, before recording the evidence, the learned trial Judge has put so many questions towards her and only after satisfying that the child witness is having the capacity to understand the question put before her, and then only, he recorded the evidence. So we cannot come to the conclusion that the testimony given by PW2 is insufficient to accept the case of the prosecution.

20. The other aspect, which is to be considered in this case is whether the testimony of PW2 is corroborated by some other materials or not. As per the case of the prosecution and also as per the evidence of PW1, immediately after the occurrence, she was brought to the hospital and examined by PW6-Dr.Malarvizhi. While at the time of giving evidence as PW6, the said Doctor, gave the evidence in a convincing manner that there was an abrasion in the left thigh and also the hymen was not intact. Though, there was no semen found in the seminal fluid, she has categorically stated that there was oozing of blood from



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the private part of PW2. She gave a firm opinion that PW2 has been raped. So the said evidence given by PW6 is in narrow and also in the form of supporting the evidence given by PW2. Therefore in the said circumstances, we cannot expect some more evidence for corroborating the evidence given by PW2.

21. Yet another aspect to be decided in this case is to prove the occurrence, only evidence of PW2 alone is available in this case. In this regard, in the case of Dola alias Dolagobinda Pradhan and Another Vs. State of Odisha, reported in (2018) 18 SCC 695, our Hon'ble Apex Court has held as follows:

"Conviction on basis of sole testimony of prosecutrix, general rule and exceptions thereto:

If the version of the prosecutrix is believed, basic truth in her evidence is ascertainable and if it is found to be credible and consistent, the same would form the basis of conviction. Corroboration is not a sine qua non for a conviction in a rape case. The evidence of a victim of sexual assault stands at par with the evidence of an injured witness and is entitled to great weight, absence of corroboration notwithstanding. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration, except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. When a women gives evidence on oath in court that she was raped, it is not the proper judicial approach to disbelieve her outright. If, however, the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

22. So, applying the above principle set out by our Hon'ble Apex Court, in this case also as already observed, the time and the manner of offence committed by the accused, which was stated by PW2, also inspire confidence of this Court. There is no necessity for PW2 to give evidence against the accused that he has committed the offence of rape. Further, the observation made by the Doctor, is very clear and also is in support of PW2's evidence. Therefore, the submission made by the learned counsel appearing on behalf of the accused is negatived.



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23. Yet another submission made by the learned counsel appearing on behalf of the accused before this Court is that the prosecution has not proved the potency having by the accused and therefore, it cannot be said that the prosecution has proved their case.

24. Now, on considering the submission made by the learned counsel appearing for the accused, it is true, PW7-Dr.Arulanandan, who has examined the accused, immediately after the occurrence has not stated anything about the potency of the accused. He has stated that during the time of examination, there was a burn injuries on the testicles and in the private parts of accused. In otherwise, he has specifically stated that due to the said injuries, he is not in a position to testify the potency of the accused. So, in the said circumstances, we have to decide that the said lapse found in the case of the prosecution, is sufficient to disbelieve the case of the prosecution.

25. However, on going through the entire evidence given by the witnesses, who are examined on the side of the prosecution, there was no suggestion putforth on the side of the accused that the accused was impotent. In otherwise, PW7-Doctor has clearly stated that at the time of examining the accused, he is aged about 50 years. The said evidence is not disputed on the side of the witnesses. So, considering the fact that at the time of examining the PW2, blood was oozing from her private part, it is appropriate to hold that only due to the act committed by the accused, the said child sustained the said injury. More than that, the other circumstances in this case is that the accused was residing in the neighbour house of PW2. Before occurrence, both PW2 and the accused are well acquainted with each other. So, the circumstances prevailing in this case is well within the purview that the case of prosecution is a genuine one. Therefore, we are of the firm opinion that the offence committed by the accused was proved on the side of the prosecution, beyond reasonable doubt.

26. In respect to the question of punishment, the learned counsel appearing on behalf of the accused would contend that as of now the accused attained the age of 65 years and hence, some leniency may be shown on him.

27. On considering the fact that the age of the accused is 65 years and also the amendment made in Section 376 IPC, had come into force only after the alleged occurrence, we are of the opinion that it is appropriate to award 10 years of rigorous imprisonment and to impose fine of Rs.5,000/-.



28. In fine, the criminal appeal is partly allowed. We are of the considered opinion that the accused committed the offence under Section 376 IPC. For the said offence, he is convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/-, in default of payment of fine, to undergo rigorous imprisonment for three years. Since the appellant/accused is in jail, he shall undergo the remaining period of sentence, if any. Fine amount already paid is directed to be adjusted. Further, the sentence already undergone by the accused shall be set off under Section 428 Cr.P.C. Consequently, connected CMP No.3256 of 2018, is closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

- 1.The Sessions Judge,
Fast Track Mahila Court,
Tiruvannamalai.
- 2.The Principal Sessions Judge,
Tiruvannamalai.
- 3.The Director General of Police,
Mylapore, Chennai-4.
- 4.The District Collector,
Tiruvannamalai.
- 5.The Inspector of Police,
All Women Police Station,
Tiruvannamalai.
- 6.The Judicial Magistrate No.I,
Tiruvannamalai.
- 7.The Chief Judicial Magistrate,
Tiruvannamalai.
- 8.The Superintendent
Central Prison, Vellore.
- 9.The Public Prosecutor,
High Court, Madras.



+1cc to Mr.S.Silambuselvan, Advocate SR.15078

Criminal Appeal No.132 of 2018

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