

IN THE HIGH COURT OF JUDICIATURE AT MADRAS

Reserved on : 23.11.2020

Pronounced on : 03.12.2020

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Crl.A.No.562 of 2013

Sellan alias Selvaraj,
S/o.Subban

...

Appellant /
Sole Accused

versus

The State of Tamil Nadu,
Rep. by the Inspector of Police,
All Women Police Station,
Udumalpet.



Respondent /
Complainant

Prayer: Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, to set aside the conviction and sentence passed by the learned Principal Sessions Judge, Tiruppur dated 22.01.2013 in S.C.No.50 of 2012.

For Appellant : Mr.B.Kumarasamy

For Respondent : Mr.S.Karthikeyan
Additional Public Prosecutor

J U D G M E N T

The present Criminal Appeal has been filed by the appellant to set aside the judgment of conviction and sentence passed by the learned Principal Sessions Judge, Tiruppur dated 22.01.2013 in S.C.No.50 of 2012.

2. The appellant herein is the sole accused in the above referred case. He stood charged for the offences under Sections 354 and 376 r/w 511 of IPC. By a judgment dated 22.01.2013, the learned Principal Sessions Judge, Tiruppur, convicted the appellant under Section 354 of IPC and sentenced to undergo Rigorous Imprisonment for one (1) year and to pay a fine of Rs.1,000/-, in default to undergo Simple Imprisonment for 15 days. Further, he was convicted under Section 376 r/w 511 of IPC and sentenced to undergo eight (8) years Rigorous Imprisonment and to pay a fine of Rs.10,000/-, in default to undergo Simple Imprisonment for 3 months. The trial Court also ordered the sentences to run concurrently.

3. Challenging the said conviction and sentence, the accused

is before this Court, by way of filing the present Criminal Appeal.

4. The case of the prosecution, in brief, is as follows;

4.1. P.W.2-victim girl is the daughter of P.W.1-Indirani. At the time of occurrence, P.W.2 was aged about 7 years. P.W.1 and her husband used to go for coolie work. They will go to work at 8.00a.m. and return by 3.00p.m. Since there was nobody to look after the child when they go for work, they will leave P.W.2 alone in the house after keeping her food. On 06.03.2010, the mother of P.W.2 went for work at 8.00 a.m. and thereafter, P.W.2 collected water from the street pipe. By that time, the shirt worn by her got wet, so she changed her dress and thereafter, worn a frock.

4.2. At about 4.30 p.m., P.W.2 went to play with the children of Maheswari, who is the daughter-in-law of the accused. By that time, Maheswari was sleeping in the kitchen room with her children but at the same time, the accused was watching the T.V. After seeing the victim girl (P.W.2), the accused told her not to sit there and asked P.W.2 to come inside, then the accused lifted P.W.2 and laid her on the cot,

after stretching her legs, he lifted the frock of P.W.2 and pressed his male organ in her female organ, P.W.2 cried saying that it causes pain and the accused kissed on her mouth. In the meantime, since P.W.2 did not return till 5.30p.m., P.W.1 went to call her. When P.W.1 went to the house of the accused, the door of his house was slightly open, P.W.1 heard the crying sound of her daughter. When P.W.1 opened the door, the accused came out by opening the door. P.W.1 asked P.W.2 as to what happened and P.W.2 told her about what was done by the accused. The accused ran away from the scene of occurrence and P.W.1 took P.W.2 to her house. Further, she noted semen in the female organ of P.W.2 and thereafter, P.W.1 washed the dress of P.W.2.

4.3. Immediately, P.W.1 along with the elder brother of her husband, her mother-in-law and P.W.2 went and gave a complaint before the Udumalpet All Women Police Station under Ex.P.1. On receipt of the same, P.W.10-the then Sub-Inspector of Police, All Women Police Station, Udumalpet, registered F.I.R. in Crime No.6 of 2010 for an offence punishable under Section 376 r/w 511 IPC. The printed F.I.R. was marked as Ex.P.8.

4.4. P.W.11-the then Inspector of Police, Udumalpet, took

up the case for investigation. She examined the victim girl and recorded her statement. She sent the victim girl for medical examination with memo through P.W.7-Grade 1 constable to the Government Hospital, Udumalpet.

4.5. P.W.5-Dr.Mariamammal, examined the victim girl at 9.30p.m., and told that one aged person has attempted to commit rape on the victim, and she found that there was no external injuries on the victim girl. P.W.5 further stated that the female part of the victim girl was in a good state, hymen was intact, there was no contusion or reddishness and the victim did not complain of pain and there was no semen on the dress of the victim. In this regard, she issued Accident Register Entry under Ex.P.4.

4.6. In continuation of investigation, P.W.11 went to the scene of occurrence and prepared the observation mahazar and rough sketch under Ex.P.2 and Ex.P.9 respectively. P.W.11 examined the witnesses viz. P.W.3-Murugan, Nagaraj and Perumal in the scene of occurrence and recorded their statements. She examined P.W.1 and her

husband Arumugam at the Government Hospital, Udumalpet and recorded their statements.

4.7. The dress worn by the victim at the time of occurrence was marked as M.O.1, which was produced by P.W.1 on the next day before P.W.11 and she seized it under Form-95. P.W.11 examined the witnesses Murugathal and P.W.4-Palaniammal and recorded their statements.

4.8. On 08.03.2010, the accused surrendered before the Judicial Magistrate No.1, Udumalpet. Upon knowing the same, P.W.11 gave requisition to the Magistrate on 12.03.2010 for taking the accused to police custody and as per the order of the Court, she took the accused to police custody on 17.03.2010. On the same day, at 15.30 hours, the accused gave a confession voluntarily at the police station in the presence of the witnesses, P.W.9-Shanmugasundaram and Selvaraj. Upon the confession statement, she seized the lungi and panty of the accused, which were marked as M.O.2, by giving another dress to him under Form-95.

4.9. P.W.9-Shanmugasundaram has signed in Form-95 and the confession of the accused, which have been marked as Ex.P.6 and Ex.P.7 respectively.

4.10. P.W.11 sent the accused for medical examination through P.W.7-Poongodi and P.W.8-Sivakumar to the Government Hospital Udumalpet. P.W.6-Dr.Annamalai examined the accused on 19.03.2010 at 9.45a.m., and said that the accused was found to be fully potent and he has issued certificate to that effect under Ex.P.5. Thereafter, the accused was sent to judicial custody.

4.11. Since P.W.11 was transferred, P.W.12-Ameena, Inspector of Police took up the case for further investigation on 16.08.2010. She went to the scene of occurrence and examined P.W.1, her husband and P.W.2 and recorded their further statements. She completed the investigation and filed final report against the accused for the offences punishable under Sections 354 and 376 r/w 511 IPC.

5. Based on the above materials, the trial Court framed

charges under Sections 354 and 376 r/w 511 of IPC and the accused denied the same. In order to prove their case, on the side of the prosecution, as many as 12 witnesses were examined as P.W.1 to P.W.12 and 9 documents were exhibited as Exs.P.1 to P.9. Besides, 2 Material Objects, which were marked as M.O.1 and M.O.2.

6. Out of the said witnesses, P.W.1-Indirani is the mother of the victim girl has stated as on the date of occurrence, when at the time she was searching her child, she heard hue and cry of her child from the accused house and immediately, she went to the house of the accused and there which, the victim girl has stated before her as the accused herein committed an offence as narrated in the earlier paragraphs.

7. P.W.2-Patteeswari, is the victim girl, she has narrated the occurrence as at the time of occurrence, the accused lifted and laid her on the cot, after stretching her legs, he lifted her frock and attempted to penetrate his male organ into her private part.

8. P.W.3-Murugan is the resident of the occurrence village,

he has stated about the preparation of observation mahazar and rough sketch by the Investigating Officer.

9. P.W.4-Palaniammal is also residing in the same village, she has not given evidence in support of the case of prosecution and hence, she treated as a hostile witness.

10. P.W.5-Dr.Mariamammal attached with Government Hospital, Pollachi, speaks about the examination of the victim girl and about the injuries and the symptoms found on the victim girl.

11. P.W.6-Dr.Annamalai, attached with Government Hospital, Udumalai, speaks about the examination of the accused and about the issuing of report under Ex.P.5. According to him, there was no symptoms available for saying that the accused is impotent one.

12. P.W.7-Poongodi, the then Head Constable, All Women Police Station, Udumalai, speaks about the production of the victim girl before the Doctor for medical examination.

13. P.W.8-Sivakumar has stated about the production of

accused before the Doctor for medical examination.

14. P.W.9-Shanmugasundaram has stated before the trial Court as he did not know about the arrest of accused and about the recovery made from him and hence, he also treated as a hostile witness.

15. P.W.10-Sivashankari, the then Sub-Inspector of Police, has stated about the receipt of complaint from P.W.1 and about the registration of the present case.

16. P.W.11 and P.W.12 are the police officers speak about the investigation made in this case and about the arrest of accused and also about the filing of the final report.

17. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. On his side, he examined one witness as D.W.1.

18. D.W.1-Maheshwari is the daughter-in-law of the accused, she did not say anything about the alleged occurrence.

19. The learned Principal Sessions Judge, Tiruppur, after perusing all the above materials and on considering the arguments advanced by either side, convicted and sentenced the appellant as stated supra. Aggrieved over the said conviction and sentence, the appellant is before this Court with this appeal.

20. I have heard Mr.B.Kumarasamy, learned counsel appearing for the appellant and Mr.S.Karthikeyan, learned Additional Public Prosecutor appearing for the State. I have also perused the records carefully.

21. The learned counsel appearing for the appellant would contend that the evidence given by the victim girl is nothing but a tutted evidence. The said evidence is not in accordance with the evidence given by P.W.5-Dr.Mariammal, who medically examined the victim girl. Further, the evidence given by the said Doctor is clear that there was no

symptoms found in the body of the victim girl in respect to attempt of rape alleged against the accused. According to him, due to previous enmity, P.W.1 foisted a false case against the appellant.

22. On the other hand, the learned Additional Public Prosecutor appearing for the respondent police would submit that the evidence given by P.W.1 and P.W.2 is very clear that at the time of occurrence, the appellant herein committed an offence as alleged by the prosecution. Nothing was indicated on the side of the appellant for disbelieving the evidence given by P.W.2. Accordingly, he prayed to dismiss the appeal.

23. I have considered the rival submissions made on either side and perused the records carefully.

24. In respect to the first submission made by the learned counsel for the appellant is that, in the F.I.R., it was mentioned by P.W.1 as during the time of occurrence, her daughter came from the accused house and saying that the appellant after lifting her frock pressed his male organ in her female organ. Further, it was stated that the victim girl

complained of pain in her private part. In order to corroborate the same, when at the time of giving evidence as P.W.1, she has clearly narrated the entire occurrence as narrated in the complaint. Further, the victim girl particularly said that there was oozing of blood from the vagina. In this regard, P.W.1, in her chief examination, improved her version as immediately after the occurrence, she made arrangements for taking bath to the victim girl and washed the dress, which worn by P.W.2.

25. In the said circumstances, it is necessary to find out whether the evidence given by P.W.5-Doctor is in support of the evidence given by P.W.1 and P.W.2. In this regard, P.W.5-Doctor says that she has examined the victim girl on the same day, at about 9.30p.m. and found that there was no external injuries. Further, there was no contusion or any other type of injuries on the vagina of the victim girl. More than that, the victim girl did not complain anything about the pain having by her. Now, on comparing the evidence of P.W.1 and P.W.2 with the evidence given by the Doctor. If really the victim girl sustained the pain definitely she would inform the same to the Doctor. But in this case no such complaint was made by the victim girl to P.W.5. The said aspect

create a doubt whether the alleged occurrence had happened as stated by P.W.1 and P.W.2 or not. The Doctor, who examined the victim girl gave opinion under Ex.P.4 as there was no symptoms found on the victim girl in respect to the attempt of rape.

26. Though the appellant herein being the potent man that alone is not sufficient to hold that he committed an offence as alleged by the prosecution. At this juncture, now on going through the evidence of P.W.11 and P.W.12, Investigating Officers, they had categorically mentioned that during the time of examination, P.W.1 has not stated about the washing of dress worn by the victim girl and about the taking of bath immediately after the occurrence. Therefore, no doubt in respect to the offence of attempt of rape, P.W.1 improved her version and gave evidence before the trial Court.

27. Therefore, all the said circumstances reveals the fact that there was an inconsistency found between the evidence of P.W.1, P.W.2 and P.W.5. At this juncture, in the judgment of **RAJ PAL vs. STATE OF HARYANA** reported in **2007 CRI. L. J. 2926** our Hon'ble Apex Court

has held that "inconsistency between the ocular version and the medical evidence is fatal to the prosecution". Therefore, this Court is not in a position to say that the version of P.W.1 and P.W.2 is necessarily correct, it certainly throws a reasonable doubt upon the entire prosecution version when it is coupled with other circumstances (such as major discrepancies between the ocular version and the medical evidence) which have already been referred to above. Therefore, in the above discussion, I am of the considered opinion that the charge under Section 376 r/w 511 of IPC is not at all proved beyond reasonable doubt.

28. In respect to offence under Section 354 IPC, during the time of cross examination, nothing was suggested on the side of the accused, denying the occurrence in respect to giving kiss to the victim girl. Further, in this regard, the evidence given by P.W.1 and P.W.2 is very clear that after seeing P.W.1, the appellant ran away from the scene of occurrence. Therefore, the subsequent contact of the accused is also taken into account for considering the case of prosecution. Here, it is a case, after the occurrence, the victim girl was identified by P.W.1 only in the house of the accused. Further, the entire evidence given by P.W.1 and

P.W.2 reveals the fact that the victim girl regularly went to the house of the appellant for playing with other children. In the said circumstances, if really the accused has not committed any offence, there was no necessity for P.W.2 for complaining about the virtuous activity committed by the appellant.

29. In general, for the offence under Section 354 IPC, the prosecution must prove (a) the victim concerned belonged to fair sex be her age whatever may; (b) the accused (male or female) subjected her to assault as defined in Section 351 IPC or to criminal force as defined in Section 350 IPC; (c) the accused while committing assault or using criminal force intended to outrage the modesty of the woman.

30. Here, it is a case, the evidence of P.W.2 is very clear that while at the time of occurrence, without any reason, the appellant lifted the dress worn by the victim. Further, he laid the victim girl on the cot and gave a kiss without any reason. As far as this act is concerned, the same amounts to outrage modesty of the victim girl. Therefore, the evidence given by P.W.1 and P.W.2 is clear that at the time of

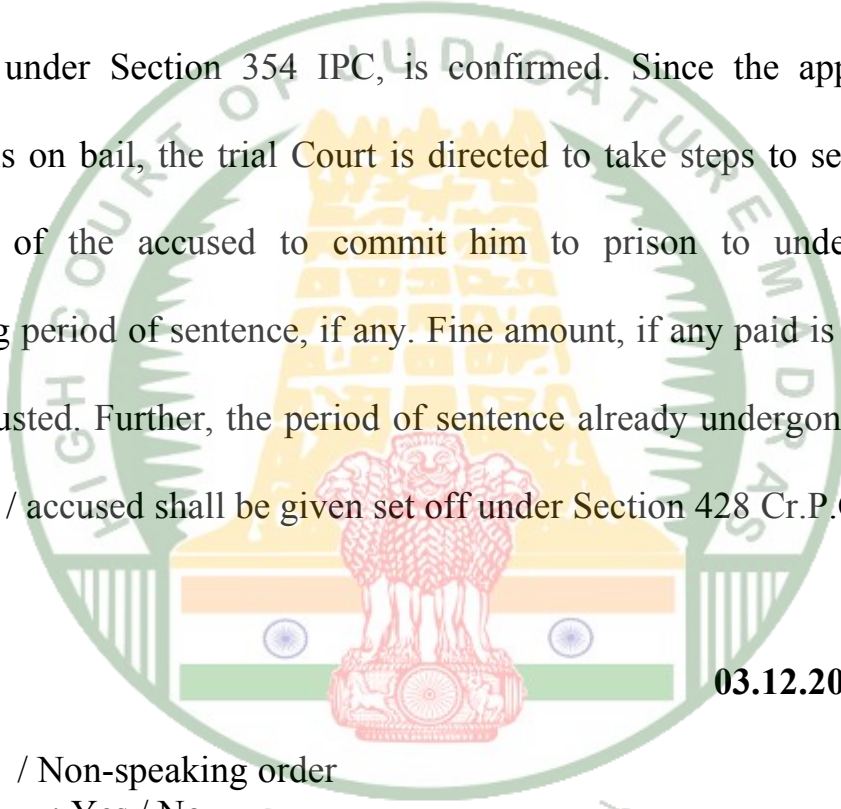
occurrence, the appellant uses the criminal force on P.W.2 to outrage her modesty and thereby, he committed an offence under Section 354 IPC.

31. Accordingly, in the light of the above discussions, this Court has held that the prosecution has proved that the accused committed an offence under Section 354 IPC and in respect to offence under Section 376 r/w 511 of IPC, the same has not been proved beyond reasonable doubt.

32. Now, coming to the point of sentence, the trial Court has sentenced the accused for a period of one year Rigorous Imprisonment and to pay a fine of Rs.1,000/-, in default to undergo Simple Imprisonment for 15 days for an offence under Section 354 IPC, I am also in the same proposition that the said punishment is sufficient to meet the ends of justice and accordingly, I am uphold the sentence awarded by the trial Court in respect to Section 354 IPC.

33. In the result, this Criminal Appeal is partly allowed. The

conviction and sentence imposed upon the appellant / accused by the learned Principal Sessions Judge, Tiruppur dated 22.01.2013 in S.C.No.50 of 2012, for an offence under Section 376 r/w 511 of IPC alone is set aside and on the other hand, the conviction and sentence awarded under Section 354 IPC, is confirmed. Since the appellant / accused is on bail, the trial Court is directed to take steps to secure the presence of the accused to commit him to prison to undergo the remaining period of sentence, if any. Fine amount, if any paid is directed to be adjusted. Further, the period of sentence already undergone by the appellant / accused shall be given set off under Section 428 Cr.P.C.



03.12.2020

Speaking / Non-speaking order

Index : Yes / No

Internet : Yes

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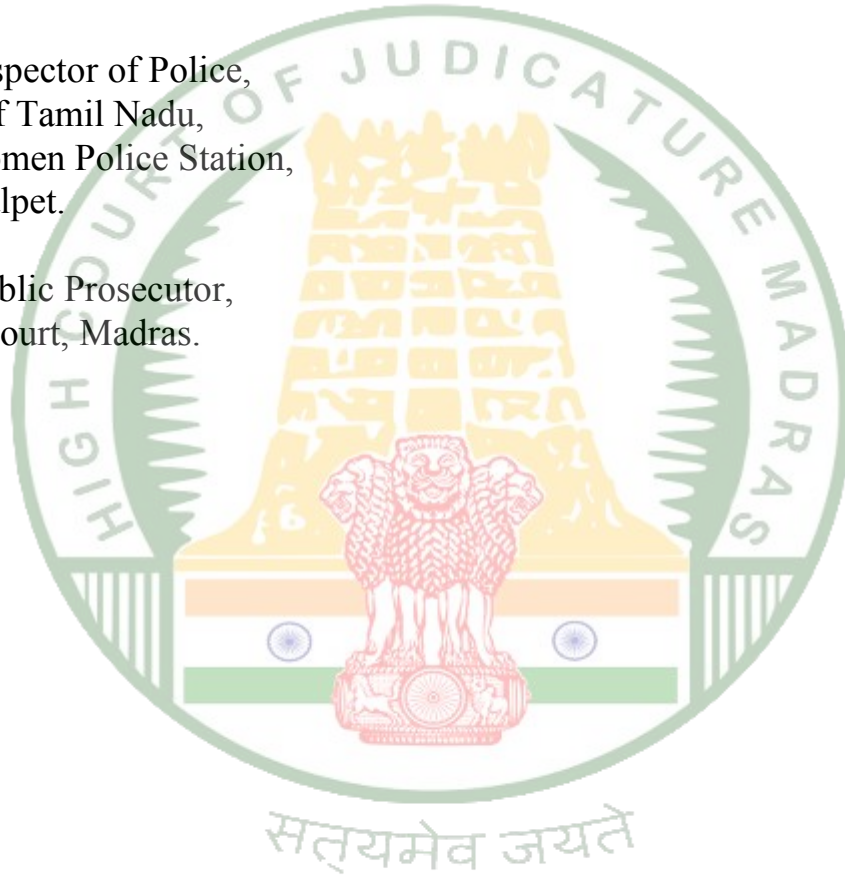
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To

1.The Principal Sessions Judge,
Tiruppur.

2.The Inspector of Police,
State of Tamil Nadu,
All Women Police Station,
Udumalpet.

3.The Public Prosecutor,
High Court, Madras.



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R.PONGIAPPAN, J.

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Pre-delivery Judgment in
Crl.A.No.562 of 2013

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03.12.2020