

IN THE HIGH COURT OF JUDICIATURE AT MADRAS

Reserved on : 14.12.2020

Pronounced on : 23.12.2020

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

CrI.A.No.617 of 2014

K.Balu,
S/o.Late Karuppanan

... Appellant /
P.W.1

versus

1.Govindaraj @ Govindan,
S/o.Perumal @ Ramasamy

... Respondent /
Accused

2.State by:
Inspector of Police,
Karumalaikoodal Police Station,
Salem District - 636 403.

... Respondent /
Complainant

Prayer: Criminal Appeal filed under Section 372 of the Code of Criminal Procedure, to set aside the judgment of acquittal passed by the learned District and Sessions Judge (Mahila Court), Salem dated 30.05.2014 in S.C.No.128 of 2012.

For Appellant : Mr.P.T.Geotom

For Respondent No.1 : Mr.V.Perarasu

For Respondent No.2 : Mr.S.Karthikeyan
Additional Public Prosecutor

J U D G M E N T

Aggrieved over the judgment dated 30.05.2014 passed by the learned District and Sessions Judge (Mahila Court), Salem in S.C.No.128 of 2012, the appellant, who is the de facto complainant in the above referred case has filed this Criminal Appeal, praying to set aside the judgment of acquittal and for convicting the first respondent for the offences punishable under Sections 366 and 376(1) of IPC.

2. The first respondent herein is the sole accused in the above referred case. He stood charged for the offences under Sections 366 and 376(1) of IPC. By a judgment dated 30.05.2014, the learned District and Sessions Judge (Mahila

Court), Salem, after elaborate trial, acquitted the accused for the charges and thereby, the present appeal has been filed for the relief stated supra.

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

3.1. P.W.6-Priyadharshini is the victim girl. P.W.1-Balu and P.W.2-Selvarani are her parents. The victim girl was born on 22.12.1993. On 05.11.2009, at about 2.30p.m., when at the time P.W.6 went to her uncle's house, near to Mariamman Temple, the present accused and one another known person by showing the knife threatened the victim girl. Further, they brought the victim girl to the forest area. When she was questioned the same, a car came there and thereafter, the accused pulled the victim girl inside the car. The other person, who accompanied with the accused informed him as he join in Tharamangalam, after parking his Two Wheeler.

3.2. During the time, the driver of the car refused to go to Erode, the accused told to the driver, as he will ready to pay extra Rs.10,000/-. In the meantime, the person, who accompanied with the accused, at the time of occurrence has joined with the accused in Tharamangalam and thereafter, the accused purchased one cool drink in Tharamangalam and compelled the victim girl to drink the same. After drinking the said cool drink, the victim girl went to the unconscious stage. When at the time she wake up, she was in Erode Railway Station. Both the accused and one Sasi, gave one another cool drink and compelled her to take the same. Thereafter, both the victim girl and the accused were travelled in a train and on 06.11.2009, when at the time, the train was stopped in an unknown place, the accused poured water on the face of the victim girl and thereafter, both of them joined with one Devaraj and went to the house of Devaraj. In the house of Devaraj, his wife Subha is also there.

3.3. Immediately, after reaching the said place, both Devaraj and his wife gave food to the victim girl. Further, they gave one cool drink and after drinking the same, again the victim girl went to the unconscious stage. On 07.11.2009, at about 6.00a.m., after made threatening, the accused herein tied Thali (M.O.1) to the victim girl. Before that the accused assaulted the victim girl. On the same day, both Devaraj and his wife left the home and afterwards by threat, the accused had sexual intercourse with the victim girl.

3.4. Further, on 11.11.2009, the said Devaraj threatened the victim girl as she would say the occurrence as stated by them. He gave instructions for telling as she alone voluntarily came with the accused. On 17.11.2009, at about 3.00p.m., victim girl's aunt, namely, Shantha, Rajini, Raikumar, Selvaraj and Karumalaikoodal Police are came there

and brought the accused and the victim girl to Karumalaikoodal Police Station. In the Police Station, the victim girl gave statement as instructed by the said Devaraj and she removed her Thali and Metti and handed over the same to the Police.

3.5. In the meantime, P.W.1 after knowing the fact that her daughter was missing, on 06.11.2009 gave a complaint before the Karumalaikoodal Police Station under Ex.P.1. Subsequent to that, on 18.11.2009 after made enquiry, the learned Magistrate handed over the victim girl to P.W.1.

3.6. P.W.11-Ardhanareeswaran, the then Special Sub Inspector of Police, Karumalaikoodal Police Station, on 06.11.2009, at about 14.00 hours, received the complaint from P.W.1 and registered a case in Crime No.334 of 2009 for an offence under Section 363 IPC. The printed First Information Report was marked as Ex.P.12. He took up the same for investigation and visited the scene of occurrence. On the same day, in the presence of witnesses, he examined P.W.1-Balu, P.W.2-Selvarani, P.W.3-Rajendran, Mayilsamy, Maheswari and recorded their statements.

3.7. On information, P.W.11 along with one Shantha and P.W.5-Rajini, who are Telugu knowing persons, travelled in a Car bearing Registration No.TN-54-6235 and reached Hyderabad on 17.11.2009 at about 12.00 noon. He came to know that both the accused and the victim girl are stayed near to Hyderabad. He identified the victim girl in Pellavaram Village, Venkatesh Colony.

3.8. Immediately, after seeing the P.W.11 and others, the victim girl is prepared to return to her home and reached the Police Station, on 18.11.2009, at about 10.00a.m. along with the accused. On the same day, at about 12.00 noon, the accused gave a confession statement and the same was recorded in the presence of P.W.8-Selvaraj and Elango. The statement of the victim girl has been recorded and also P.W.11 recovered the Thali through Form 95. He produced the victim girl before the Court and submitted requisition for conducting medical examination. He also submitted a requisition for conducting medical examination to the accused.

3.9. Upon the requisition given by P.W.11, the learned Magistrate issued proceedings and thereupon, P.W.7-Dr.Paneer Selvam, examined the accused and issued a Certificate as there is nothing to suggest that the accused is impotent. The said Certificate has been marked as Ex.P.5. He also issued Age Certificate to the accused under Ex.P.6 stating that the age of the accused is more than 16 and below 18.

3.10. Similarly, P.W.9-Dr.Chitra examined the victim girl and found the following symptoms;

"Breast normal, No injuries over cheeks, lips, breasts, thighs and external genitalia. Hymen absent admits 2 fingers. No tear PV Cx ut RV exact size could not be made out smear not taken she was menstruation."

3.11. She collected vaginal smear and sent the same for chemical examination. On examination, it was identified that there is no sperm found in the vaginal smear. In this regard, she issued a Certificate under Ex.P.10. The Chemical Examination Report was marked as Ex.P.11.

3.12. In continuation of investigation, P.W.11 collected the Birth Certificate of the victim girl and thereafter, he handed over the case records to the Inspector of Police for further investigation.

3.13. P.W.13-Baskar, the then Inspector of Police, examined the witnesses. Since the witnesses stated the same story before P.W.13, he has not recorded a separate statement. However, he handed over the case records to P.W.14 for further investigation.

3.14. P.W.14-M.Natarajan, after receiving the case records from P.W.13 examined the Doctors and recorded their statements. He collected the Medical Certificates and came to the positive conclusion that the accused committed the offences under Sections 366 and 376 of IPC. He altered the Section of Law as above. He sent the Alteration Report to the learned Judicial Magistrate under Ex.P.16 and after completing the investigation, he filed a Final Report.

4. Based on the above materials, the trial Court framed charges under Sections 366 and 376(1) of IPC. The accused denied the charge and opted for trial. In order to prove their case, on the side of the prosecution, as many as 14 witnesses were examined as P.W.1 to P.W.14 and 16 documents were exhibited as Exs.P.1 to P.16. Besides, 1 Material Objects, which was marked as M.O.1.

5. Out of the said witnesses, P.W.1-Balu, is the father of the victim girl. He speaks about the occurrence as on 05.11.2009, when he was returned to his home, her daughter was missing. He searched his daughter in nearby places and ultimately, he came to know that the accused herein kidnapped her daughter. In this regard, he lodged a complaint before the Police. After registration of the case, on 18.11.2009, he identified his daughter at Karumalaikoodal Police Station. He has given a copy of the Transfer Certificate pertains to the victim girl and a copy of the 10th Standard Mark Sheet. According to him, the date of birth of the victim girl is 22.12.1993.

6. P.W.2-Selvarani is the mother of the victim girl. She stated the occurrence similar to the evidence given by P.W.1.

7. P.W.3-Rajendran is the brother of P.W.1. He deposed as after registering the case, all his relatives searched the victim girl in the nearby area.

8. P.W.4-Devaraj, is the friend of the accused, did not support the case of prosecution and hence, he treated as a hostile witness.

9. P.W.5-Rajini, is the resident of Mettur. He knows Telugu. He speaks about the occurrence as during the time of occurrence in order to find out the victim girl, the Police Officers attached with Karumalaikoodal Police Station brought him to Hyderabad. In Hyderabad, both the victim girl and the accused were secured and all of them returned to Karumalaikoodal Police Station.

10. P.W.6-Priyadarshini, is the victim girl. She narrated the occurrence as during the time of occurrence after showing the knife, both the accused and one another person threatened her and after giving a cool drink, both of them kidnapped her from Erode to Hyderabad. In Hyderabad, she stayed along with the accused in a house, which belongs to Devaraj. She has specifically stated on 07.11.2009, at about 6.00p.m., the wife of the said Devaraj, namely, Subha assaulted and threatened her for wearing a new saree. Further, on the day itself, the accused tied a Thali and thereafter, in the night hours, the accused had sexual intercourse against her will. On 17.11.2009, the Police came to Hyderabad with a team and brought her to Mettur along with the accused.

11. P.W.7-Dr.Panner Selvam, speaks about the medical examination of the accused and also in respect to the issuing of the Age Certificate.

12. P.W.8-Selvaraj, is residing in the same locality wherein the occurrence had happened. He has also travelled with Police officers to Hyderabad. He speaks about the securing of victim girl with the accused. On examination, the victim girl has stated before him as the accused herein kidnapped her from Mettur to Hyderabad. Further, at the time of seeing the victim girl, she wearing a Thali and Metti.

13. P.W.9-Dr.Chitra, attached with Government Mohan Kumaramangalam Medical College Hospital, speaks about the examination of the victim girl. According to her, there were symptoms of having sexual intercourse.

14. P.W.10-Narasimhan, deposed that through Devaraj, he knows the accused at the relevant point of time. He saw the accused along with the victim girl.

15. P.W.11-Ardhanareeswaran, is the Police Officer speaks about the receipt of the complaint from P.W.1, registration of the F.I.R., examination of the witnesses, securing of the accused in Hyderabad.

16. P.W.12-Periyasamy, the Executive Officer in Tharamangalam Town Panchayat, has stated when at the time, he was working as Executive Officer, upon request from the Karumalaikoodal Police, has given a copy of the Birth Certificate in Serial No.1737 wherein the birth of child born to one Balu and Selvarani was registered on 22.12.1993. According to him, the date of birth of the victim girl was 22.12.1993.

17. P.W.13 and P.W.14 are the Police Officers speaks about the further investigation made in this case.

18. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. However, he did not choose to examine any witness nor did he mark any documents on his side.

19. The learned District and Sessions Judge (Mahila Court), Salem, after perusing all the above materials and on considering the arguments advanced by either side, came to the conclusion that the accused is found not guilty and thereby, acquitted the accused from the charges under Sections 366 and 376(1) IPC. Aggrieved over the same, the appellant, who is the de facto complainant has filed this Criminal Appeal, praying to set aside the order of acquittal and for convicting the accused.

20. I have heard Mr.P.T.Geotom, learned counsel appearing for the appellant, Mr.V.Perarasu, learned counsel appearing for the first respondent and Mr.S.Karthikeyan, learned Additional Public Prosecutor appearing for the second respondent. I have also perused the records carefully.

21. The learned counsel appearing for the appellant would contend that the evidence given by P.W.6-victim girl is very clear and inspires confidence of this Court in respect to the offence of kidnapping and rape. But the trial Court without considering the evidence given by the victim girl perspectively came to the wrong conclusion and thereby, acquitted the accused, which is erroneous in law.

22. On the other hand, the learned counsel appearing for the first respondent would contend that the findings arrived at by the trial Court is within the four corners of law and therefore, interference of this Court is unnecessary and praying to dismiss the appeal.

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

24. Initially, on going through the judgment rendered by the trial Court, it was concluded by the trial Judge as, it appears that the evidence given by the victim girl is different from the statement given before the Police under Section 161 Cr.P.C. and therefore, the said evidence cannot be taken into account. Further, it was observed that the entire alleged occurrence had performed by the accused only as per the request made by the victim girl, due to which, it cannot be said that the accused committed an offence as alleged by the prosecution.

25. In this regard, the evidence given by the victim girl alone is a crucial document for deciding the issue raised in this appeal. She gave evidence as on the date of occurrence, both the accused by showing the knife took her to Erode and thereafter, they travelled in a train and reached Hyderabad wherein the accused herein against her will tied a Thali and made sexual intercourse forcibly. On the other hand, Investigating Officer of this case gave evidence as during the time of examining the victim girl under Section 161 Cr.P.C., she did not make any allegation against the accused, as he is alone kidnapped her. It is the specific statement given by the victim girl before the Police is that she only requested the accused to take her from the custody of her parents. Therefore, as rightly observed by the learned trial Judge, the evidence given by the victim girl before the trial Court is entirely different from the statement which has been recorded by the Investigating Officer under Section 161 Cr.P.C. Therefore, the same is nothing but a clear contradiction. Hence, in respect to the offence of kidnapping, the evidence given by the victim girl shows some suspicious circumstances.

26. In the said circumstances, it is seen that the witness could be categorised in 3 categories namely, (a) wholly reliable, (b) wholly unreliable, and (c) neither wholly reliable nor wholly unreliable. The question of corroboration arises only in the case of witness of last category, in which, the Court is called to be circumspect witness, neither wholly reliable nor wholly unreliable, it needs corroboration. Here it is a case, in respect to the charges framed against the accused and in respect to the evidence given by the victim girl, the witnesses examined on the side of the prosecution did not support the version given by the victim girl. Naturally, except the victim girl none have known the occurrence.

27. Though the witnesses, who are all went to Hyderabad had stated as at the time of seeing the victim girl, she was tying with Thali. It is necessary to find out whether the same was tied by the accused, after getting consent from the victim girl or not. In respect to the same, the evidence

given by the victim girl is very clear that only against her will, the accused tied Thali to her and made sexual intercourse. In this area, she specifically stated before the marriage, the wife of one Devaraj, Subha had compelled and assaulted her for wearing a new saree for the purpose of marriage. But in this regard, during the time of cross examination, she has stated as only for the first time she had stated about the said Subha.

28. Therefore, in respect to the marriage also, the evidence given by the victim girl in her chief examination is created a doubt whether the marriage solemnised between the accused and the victim girl is true or not. However, the witnesses went to Hyderabad are all gave evidences before the trial Court as when at the time they were seeing the victim girl, she was tied with Thali. Though the said evidences are in support of the prosecution, whether the accused tied Thali after getting consent from the victim girl or not is a question.

29. In this regard, as already observed, the evidence given by the victim girl is not wholly reliable. Therefore, without any corroborative piece of evidence, the evidence given by the victim girl cannot be accepted with entirety. But here it is a case, to corroborate the evidence of the victim girl, no prosecution witnesses had stated the occurrence in support of the evidence given by the victim girl.

30. More than that, the evidence given by P.W.9-Doctor, who examined the victim girl is also not in support of the evidence given by the victim girl, since the victim girl was menstruation, the Doctor was not in a position to collect the necessary material to prove the offence of rape. In this regard, the Police Officers had not taken any steps to produce the victim girl after completion of the said period. The Doctor, herself admitted that the victim girl has not produced as a second time for confirming the query raised by the prosecution.

31. Therefore, I am of the considered opinion that the evidence given by the victim girl is in the form of neither wholly reliable nor wholly reliable. As already observed, since there is no prosecution witnesses to corroborate the evidence given by the victim girl, we cannot conclude that the evidence given by the victim girl is wholly relevant in support of the case of prosecution.

32. At this juncture, it is necessary and useful to see the judgment of our Hon'ble Apex Court in UNION OF INDIA AND OTHERS vs. SEPOY PRAVAT KUMAR BEHURAI reported in (2019) 10 SCC 220, wherein it has held as follows;

"14. It is trite law that judgments of acquittal should not be disturbed unless there are substantial or compelling reasons. The substantial

or compelling reasons to discard a judgment of acquittal were examined by this Court in Ghurey Lal v. State of Uttar Pradesh¹ which are as follows:

" 1.....

i) The trial Court's conclusion with regard to the facts is palpably wrong;

ii) The trial Court's decision was based on an erroneous view of law;

iii) The trial Court's judgment is likely to result in "grave miscarriage of justice";

iv) The entire approach of the trial Court in dealing with the evidence was patently illegal;

v) The trial Court's judgment was manifestly unjust and unreasonable;

vi) The trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.

vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial Court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts /appellate Courts must rule in favour of the accused."

15. Applying the law laid down by this Court as stated above, we are of the opinion that the judgment of the Tribunal should not be interfered with. (2008) 10 SCC 450."

33. Now, applying the ratio laid down in the above referred judgment, herein also, the contradiction indicated by the accused found in the evidence of P.W.6-victim girl is nothing but a material contradiction. If the Court neglects the said contradiction, there would be a possibility for convicting the accused. In otherwise, due to the said contradiction, this Court is not in a position to accept the case of prosecution as true one. In the said circumstances, it is a settled position that if two views are possible, the appeal filed against the order of acquittal cannot be entertained.

34. In the light of the above discussions, this Criminal Appeal is dismissed.

Sd/-
Asst. Registrar

//True Copy//

Sub Asst. Registrar

sri

To

1.The District and Sessions Judge (Mahila Court),
Salem.

2. The Inspector of Police,
Karumalaikoodal Police Station,
Salem District - 636 403.

3.The Public Prosecutor,
High Court, Madras.

+2 C.C.to MR.S.SATHIA CHANDRAN, ADVOCATE, SR.NO.43093

+1 C.C.to MR..V.Perarasu ADVOCATE, SR.NO.42930

Pre-delivery Judgment in
Crl.A.No.617 of 2014

LN(CO)
VC (22/01/2021)

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