

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

CRIMINAL APPEAL NO.289 OF 2017

AND

CRL.M.P.NO.6977 OF 2017

M.Gunasekaran

..Appellant/Solo Accused

Vs.

State represented by
Inspector of Police,
Thevoor Police Station,
Salem District.
Crime No.220 of 2010

..Respondent/Complainant

Prayer : Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code praying to call for the records pertaining to S.C.No.226/2015 on the file of the Sessions Judge, Mahila Court, Salem and set aside the judgment and order of conviction recorded therein against the appellant herein for the offences under Sections 376(1) IPC.

For Appellant : Mr. K.Shanmugam
Legal aid counsel

For Respondent : Mr.Charles Prem Kumar,
Govt.Advocate (Crl.side)

JUDGMENT

This criminal appeal is directed against the judgment dated 04.02.2017 passed by the learned Sessions Judge, Mahila Court, Salem in S.C.No.226 of 2015, holding that the appellant is found guilty of the offence under Section 376(1) of IPC and sentencing him to undergo R.I for 7 years and to pay fine of Rs.50,000/-; in default, to undergo 3 months S.I. Questioning the same, this appeal came to be filed.

2.The appeal was filed through a counsel, but when the matter was taken up for disposal, there was no representation on the side of the appellant. The appellant's counsel had reported no instructions. Therefore, this Court directed the Registry to appoint a legal aid counsel to canvas the case of the appellant.

Accordingly, Mr. K.Shanmugam was nominated by the Legal Services Authority.

3.Heard Mr.K.Shanmugam, learned counsel for the appellant and Mr.Charles Prem Kumar, learned Government Advocate (Crl.side) for the respondent.

4.The case of the prosecution is that the appellant perpetrated the offending sexual act on the victim girl, who was aged about 13 years as on 13.09.2010. She was then studying in 8th standard in Smile Special school. When she went to the school on 14.09.2010, her face and lips were swollen. Her teachers enquired about the same. When the victim revealed what happened to her, her teacher (PW.4) took her to Thevvoor Police Station and lodged Ex.P1 complaint. Based on the same, Crime No.220 of 2010 was registered for the offences punishable under Section 323, 376 r/w 511 of IPC. The case was investigated by as many as three police officers (i.e., PW.11, PW.12 & PW.13) and final report was filed before the Judicial Magistrate I, Sankari. It was taken on file in PRC No.20/2012 dated 12.02.2013. Thereafter, it was committed to the Sessions Court. The learned Principal District Judge, Salem assigned the case in S.C.No.226 of 2015 to the file of the Sessions Judge, Mahila Court.

5.Charges were framed against the appellant under Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, 1998 and Section 376 (1) of IPC. The appellant denied the charges and pleaded not guilty. The prosecution examined as many as 13 witnesses and marked Ex.P.1 to Ex.P14. On the side of the defense, no evidence was adduced.

6. During the examination under Section 313 Cr.P.C., the accused characterized the prosecution case as wholly false. The learned trial Judge, while acquitting the appellant under Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, 1998, found him guilty and convicted him under Section 376 (1) of IPC and sentenced him as mentioned above.

7.The learned counsel appearing for the appellant reiterated all the contentions set out in the Memorandum of Appeal and wanted this Court to set aside the impugned judgment and allow the appeal and acquit the appellant.

8.Per contra, the learned Government Advocate(crl.side) submitted that the impugned judgment does not call for any interference.

9.I carefully considered the rival contentions and perused the evidence on record. The foremost contention urged by the learned counsel appearing for the appellant is that even if one

assumes that the prosecution case as projected in chief examination of PW.1/victim as true, still the offence under Section 376(1) of IPC is not made out. The occurrence had taken place on 13.09.2010. Though in Ex.P1 complaint, there is an allegation that the appellant/accused pressed his private part into the private part of the victim, still in the chief examination, even though the other sexual acts committed by the appellant have been narrated, she has not spoken of sexual penetration as such. Yet the Court below has come to the conclusion that the acts attributed by the appellant in the chief examination of PW.1 would also fall within the definition of the term "rape".

10. Section 375 of IPC was amended vide Criminal Law Amendment Act 2013 (13/2013) dated 02.04.2013. The amendment has come into force with effect from 03.04.2013. The amended Section 375 reads as follows:-

"Section 375 of IPC-Defines- A man is said to commit rape if he-

(a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus urethra of a woman or makes her to do so with him or any other person,

Explanation: For the purpose of this vagina shall also include labia majora;"

11. But the case on hand pertains to the period prior to the amendment of Section 375 of IPC when the provision read as follows:-

"375. Rape -A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First -Against her will.

Secondly - Without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly- With or without her consent, when she is under sixteen years of age.

Explanation - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

12.It is beyond dispute that as per the pre amended Section 375, a man is said to commit rape only if there has been sexual intercourse. As per the explanation, penetration was sufficient to constitute sexual intercourse, necessary to the offence of rape. Admittedly going by the testimony of the prosecutrix, there was no sexual penetration. Therefore the trial court ought to have necessarily come to the conclusion that the very framing of the charge under Section 376 of IPC was not justified. As rightly pointed out by the learned counsel appearing for the appellant, that is why even when the FIR was registered, it was only for the offence under Section 376 r/w 511 of IPC.

13.The learned counsel appearing for the appellant would contend that PW.1 had turned completely hostile in her cross examination. He would also point out that PW.2, mother did not support the prosecution case. PW.3, brother also did not support the prosecution case. PW.4, the teacher who had taken the victim to the police station also did not fully support the prosecution case in her cross examination. Therefore, he wanted this Court to set aside the impugned judgment on this sole ground.

14.I am not in a position to agree with this contention urged by the learned counsel appearing for the appellant. The learned Government Advocate drew my contention to the fact that the appellant Gunasekaran who was arrested on 14.09.2010, was released on statutory bail on 14.12.2010, thus, till the impugned judgment was passed, he was out on bail. Even according

to the appellant, he was having live-in-relationship with PW.2, the mother of the victim. Throughout the period PW.1 as well as PW.3, were under the care, control and custody of PW.2 who, in turn, was under the influence of the appellant. More than anything else, these witnesses were examined on 18.03.2016. On the said day, the learned counsel for the accused had reported "no cross examination". They were recalled for cross examination only on 19.08.2016. Thus, there was a gap of more than 5 months between the date of chief examination and the date of cross examination. Failure to cross examine the victim on the same day when she tendered her chief examination is highly significant. Therefore taking note of these two circumstances namely, the fact that the victim was very much under the influence of the accused and the fact that she was not cross examined on the date when she was subjected to chief examination, I cannot reject the testimony of these witnesses in toto.

15. This Court takes note of the fact that the victim was hardly in her 7/8th standard during the relevant time. There is absolutely no motive for her teacher PW.4, who caused registration of the impugned complaint. On a careful reading of the testimony of PW.4, I am of the view that it is quite natural and convincing. It has come out in her evidence she found injuries on the face of the victim girl. The physical condition of the student was not normal. When the teachers enquired her, the student revealed that she suffered sexual torture at the hands of the partner of her mother. Thereupon, they took her to the local police station.

16. The learned Government Advocate (crl.side) drew my attention to the testimony of the PW.8 Dr. Bharathi, who deposed that there was a healed wound on her chest measuring 0.05 cm, but the medical examination was done only on 18.09.2010. The occurrence had taken place on 13.09.2010.

17. The learned counsel appearing for the appellant would contend that when the victim was examined, there was no trace of any semen residue. This has no relevant because, according to PW.1 on the occurrence day, she was not subjected to any penetration. The learned counsel appearing for the appellant would strongly contend that the appellant has been falsely implicated. But then except putting certain formal suggestions during the cross examination of PW.1, the appellant has not come out with any real defense. When he was examined under Section 313 of Cr.P.C., also, the appellant has not come out with anything substantial.

18. Now coming back to the testimony of PW.1, as rightly pointed out by the learned Government Advocate, this Court will have to necessarily examine the stand taken by the PW.1 as well as PW.3 in their cross examination and hold that their original testimony during chief examination is true and correct. PW.3 is the younger brother of PW.1. During the material time he was aged hardly 10 years. He was also physically challenged. The circumstances of the victim family will have to be taken note of. The mother of the victim was working in a spinning mill. She has lost her right hand. Therefore, taking advantage of the economic circumstances, the appellant had illicit relationship with the mother of the victim. Reading the entire evidence on record, I have no hesitation to come to the conclusion that the learned trial judge approached the evidence from a correct perspective and rightly held that the prosecution has established the case beyond the reasonable doubt. But then as observed earlier, the charge of rape as such is not at all made out.

19. On carefully going through the testimony of PW.1 once again, it is seen that when she was sleeping on 13.09.2010, the appellant committed the offending acts. When the victim resisted, the appellant slapped her. In the process, the victim suffered injuries in her lips. PW.3, the brother of the victim, also protested. Hence, I come to the conclusion that the appellant could not proceed further. Therefore, while acquitting the appellant for the charge under section 376 of IPC, I have to hold that the appellant committed the offence under Sections 376 r/w 511 of IPC.

20. The learned counsel for the appellant pointed out that this was not the charge though this was the offence that was originally registered.

21. I am of the view that non framing of charges under Section 376 r/w 511 of IPC is not fatal. It has also caused any prejudice to the accused. The learned Government Advocate states that this is a case in which Section 224 of Cr.P.C., can be invoked. Section 224 reads as under:

"224. Withdrawal of remaining charges on conviction on one of several charges

When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent, of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges and such withdrawal shall have the effect of

an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into, or trial of, the charge or charges so withdrawn."

The offence under Section 376 r/w.511 of IPC is very much included. The judgment of the Court below is modified and the appellant is found guilty under Section 376 r/w. 511 of IPC instead of 376(i) IPC.

22.Now coming to the question of sentence, this court is of the view that the sentence imposed on the appellant shall be reduced from seven years rigorous imprisonment, to three and half years rigorous imprisonment.

In the result,

(i) the appeal is partly allowed .

(ii) the conviction of the appellant is modified to section 376 r/w. 511 of IPC instead of 376(1) of IPC.

(iii) the appellant is sentenced to undergo three and half years rigorous imprisonment and to pay a fine of Rs.50,000/-; in default, to undergo 3 months Simple Imprisonment. (iv) the period of imprisonment already undergone by the appellant shall be set off. The learned trial judge shall take steps to enforce this judgment.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Sessions Judge, Mahila Court, Salem.
- 2.The Inspector of Police, Thevoor Police Station, Salem District.
- 3.The Judicial Magistrate I, Sankari.
- 4.The Superintendent, Central Prison, Coimbatore.
- 5.The Public Prosecutor, High Court, Madras.

+1cc to Mr.K.Shanmugam, Advocate, S.R.No.15536

Crl.A.No.289 of 2017

VBA (CO)
KKV/06/08/2020