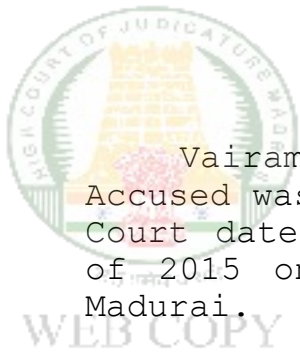




**Bail Slip**

Vairamuthu, Male, Age 42 years, S/o.Andi, the Appellant/Single Accused was directed to be released on bail as per the order of this Court dated 16.12.2015 made in MP(MD)No.1 of 2015 in Crl.A(MD).357 of 2015 on the file of the Madurai Bench of Madras High Court, Madurai.

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**Dated : 01.10.2020**

**CORAM:**

**THE HONOURABLE MR.JUSTICE B.PUGALENDHI**

**Crl.A(MD)No.357 of 2015**

Vairamuthu

... Appellant /Sole Accused

Vs.

State represented by  
The Women Inspector of Police,  
All Women Police Station,  
Manamadurai, Sivagangai Distirct.  
[Crime No.02 of 2009]

... Respondent / Complainant

**PRAYER:** Appeal filed under Section 374(2) of the Code of Criminal Procedure, to call for the records in S.C.No.123 of 2010, dated 25.11.2015 on the file of the learned Sessions Judge, Mahalir Neethimandram, District Fast Track Mahila Court, Sivagangai, set aside the same and acquit the appellant/accused.

For Appellant : Mr.N.Mohideen Basha  
For Respondent : Mr.A.Robinson,  
Government Advocate (Crl. side)

**JUDGMENT**

This appeal is filed as against the conviction and sentence imposed on the appellant in S.C.No.123 of 2010, dated 25.11.2015 by the learned Sessions Judge, District Fast Track Mahila Court, Sivagangai.

2.Based on the complaint of PW1, the respondent Police filed a final report before the learned Judicial Magistrate, Manamadurai and the same was taken on file in PRC No.30 of 2009, committed to the Court of Sessions and was tried by the learned Sessions Judge, District Fast Track Mahila Court, Sivagangai in S.C.No.123 of 2020 by framing charge under Section 376 of the Indian Penal Code [In short 'IPC']. But the trial Court found the appellant not guilty for the offence under Section 376 IPC, but found him guilty for the offence under Section 377 r/w 511 IPC, convicted and sentenced him to undergo five years rigorous imprisonment with a fine of five thousand and in default of payment of fine amount, sentenced to



undergo six months rigorous imprisonment. As against the judgment of the trial Court in S.C.No.123 of 2010, dated 25.11.2015, the appellant has filed the present appeal.

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

3.1.The victim [PW4] is a partially deaf and completely dumb. She was aged about 37 years at the time of occurrence and also unmarried. PW1 is the father of the victim girl [PW4]. PW2 and PW7 are the sister and brother of the victim girl. On the date of occurrence, i.e., on 09.01.2009, PW1 was out of station due to some work and his wife also went for some medication. On 09.01.2009 around 10.00am, the victim girl went to the nearby pump set to wash her clothes and to take bath. One Indira [PW2] sister of the victim girl was in their house. PW3 Nagan, a friend of PW1 went to the house of PW1 to meet him. When PW2 and PW3 were chatting in the house of PW1, the accused has also come in search of PW1, verified his whereabouts and PW2's whereabouts and then left the house.

3.2.While PW4 was taking bath in the pump set, the accused went behind and hugged her with an intention to commit rape. However, PW4 protested the accused, bit his hands, escaped from the accused and ran to her house. PW2 and PW3 have witnessed the victim girl [PW4] returning home crying. On questioning her, PW4 informed PW2 and PW3 that the appellant / accused had attempted to rape her.

3.3.PW1 after knowing the occurrence, on the same day around 12.00 noon, went to the All Women Police Station, Manamadurai, lodged a complaint [Exp1], which was received by a Woman Police Constable Grade-I, 1640 on 09.01.2009 at about 12.00 pm. She also registered the same in C.S.R.No.6 of 2009, issued a receipt dated 09.01.2009. Thereafter, she placed the complaint before Kalavathi, Inspector of Police [PW17]/ Investigation Officer [In short IO]. The IO, on perusing the complaint registered a case, in Crime No.2 of 2009, on 11.01.2009 at 3.00pm as against this appellant for the offence under Sections 354, 376 and 511 IPC and forwarded the same to the learned Judicial Magistrate concerned, who received the FIR [Exp8] at about 9.00pm on 11.01.2009 and the printed FIR is marked as Exp8.

3.4.The IO [PW17] proceeded to the place of occurrence around 3.45pm on the same day, prepared observation mahazars [Exp3 & Exp4] and a rough sketch [Exp9] in the presence of witnesses PW9 and PW10. The IO also arrested the appellant/accused on 01.11.2009 at 5.00pm in the presence of PW9 and PW10 and subjected him to medical examination on 13.01.2009. The IO also sent the victim girl for medical examination through the Constable [PW14] on 20.01.2009.

3.5.The Doctor [PW8], who examined the victim girl, in her certificate of examination for sexual offences in Exp2 has noted down the external and internal injuries and gave her final opinion



"1.பாதிக்கப்பட்ட பெண்ணின் பிறப்பு உறுப்பிலும், பெண் புணர்ச்சி செய்ததற்கான தடயமோ, காயமோ உள்ளதா?"

No injuries in the external genitalia & Hymen intact.

2.பாதிக்கப்பட்ட பெண்ணின் கன்னித்தன்மை குறித்து அறியும் சோதனை - Hymen intact."

WEB COPY

3.6.The accused was also subjected to medical examination through Police Constable [PW15] and the Doctor [PW16], who examined the appellant/accused in his certificate [Exp7] has stated as follows:

"1.எதிரி ஆண்மைத் தன்மை உடையவர்

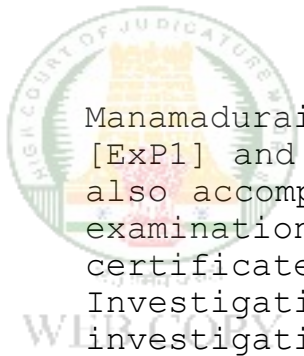
All secondary sexual characters are well developed.

2.எதிரி பாதிக்கப்பட்ட பெண்ணுடன் வன்புணர்ச்சி ஈடுபட்டதற்கான காயங்கள் பிறப்புறுப்பில் இல்லை."

3.7. The IO examined the victim girl with the help of one Thamburaj, Teacher from the CSI Blind School, Manamadurai. After completing the investigation, she filed a final report before the learned Judicial Magistrate, Manamadurai, as against the appellant/accused for the offence under Sections 354, 376 and 511 IPC and the same was taken on file in PRC No.30 of 2009, committed to the Court of Sessions. It was taken on file by the learned Sessions Judge, District Fast Track Mahila Court, Sivagangai in S.C.No.123 of 2020.

4.On the side of the prosecution 17 witnesses were examined and 10 documents were marked.

5.PW1 is the father of the victim [PW4]. PW2 sister of the victim and PW7 younger brother of the victim have stated about the returning of the victim girl to their house with a shock and cry and also stated about the lodging of complaint [Exp1]. PW3 is the friend of PW1, who also witnessed the return of the victim from the place of occurrence; PW4 is the victim, who is a partially deaf and completely dumb and her evidence was recorded by the trial Court with the assistance of one Special Teacher Deehnal Arul Selvi and PW4 has stated about the occurrence and the injury sustained by her in the course of the incident. PW5 and PW6 villagers were examined as hearsay witnesses and they speak about the investigation by the Police. PW8 is the Doctor of the Government Hospital at Manamadurai, who examined the victim girl on 22.01.2009 and issued a certificate of examination [Exp2]. She has noted down the partially healed abrasion of 3cm x 1cm in the left shoulder of the victim. However, she did not note down any injury on her private parts. According to her, the hymen was intact. PW9 to PW11 are the villagers, who accompanied PW1 for lodging the complaint, though they were treated as hostile, they have stated that the entire villagers went in support of PW1 to the Police Station to lodge the complaint [Exp1]. PW12 and PW13 were examined as witnesses for the observation mahazars [Exp3 and Exp4]. PW14 is the Police Constable, who took the victim for medical examination to the Government Hospital at



Manamadurai. PW15 is the Constable, who received the complaint [Exp1] and issued the receipt in CSR No.6 of 2009 on 10.01.2009 and also accompanied the accused to the Government Hospital for medical examination. PW16 is the Doctor, who examined the accused and issued certificate of potency [Exp7] to the accused. PW17 is the Investigation Officer, who registered the complaint, conducted investigation and filed the final report in this case.

6.The incriminating materials were put to the accused under Section 313 CrPC and the accused denied the same. Though the appellant/accused has stated that there are witnesses on his side, he neither examined any witness nor had marked any document.

7.The trial Court after conclusion of the trial, found this appellant guilty for the offence under Section 377 r/w 311 IPC and convicted and sentenced him as stated supra. As against the conviction and sentence, the present appeal is filed.

8.Heard Mr.Mohideen Basha, learned Counsel for the appellant and Mr.Robinson, learned Government Advocate [Crl Side].

9.Mr.Mohideen Basha, learned Counsel submitted that even according to the prosecution's case, the overt act is attributed only for an attempt, but the trial Court without any materials on record and without even framing any specific charge under Section 377 IPC, convicted the appellant under Section 377 IPC.

10.The learned Counsel further submitted that according to the victim [PW4], the appellant hugged her, pushed the shoulder and laid her down and the PW4 bit the hands of the appellant, raised an alarm and ran away from the place of occurrence. He further submitted that according to the Medical Certificate [Exp2], there was no injury in any of the private parts of the victim. Therefore, it is clear that the appellant has not committed any unnatural offence and therefore, he cannot be convicted under Section 377 IPC. Therefore, the learned Counsel prayed for allowing this appeal.

11.Mr.A.Robinson, the learned Government Advocate [Crl Side] submitted that the evidence of the victim [PW4] is very clear and her evidence is supported by the evidence of the Doctor [PW8]. In preventing the accused from committing the rape, the victim girl also suffered injury. The Doctor [PW8] has noted down a 3cm X 1 cm abrasion on the left shoulder of the victim girl, which would clearly expose the attempt of the appellant to commit rape on the victim girl. However, the learned Government Advocate [Crl Side] fairly conceded that as per the evidence of the Doctor, no injury was noted in any of her private parts of the victim girl. Therefore, there is no reason to interfere with the orders of the trial Court.

12.This Court paid its anxious consideration to the rival submissions and also perused the materials placed on record.



13.It is not in dispute that the victim girl [PW4] is a partially deaf and completely dumb. She was aged about 37 years at the time of occurrence, i.e., on 09.01.2009 and she was also an unmarried woman. The appellant in the cross examination raised a defence that he constructed a house for PW1, but PW1 did not pay the full amount and there was a due by PW1 to him. Therefore, in order to evade the payment of the balance amount, PW1 foisted a false complaint against this appellant. Though the appellant has raised such a defence, in support of the same, he has not placed any material before the Court.

14.The available evidence of PW2 and PW3 would show that on the date of occurrence, the accused came to their house, enquired the whereabouts of PW1 father of the victim and the whereabouts of the victim [PW4]. After knowing that the father of the victim was out of station and the victim girl was taking bath lonely in the nearby pump set, went to the place of occurrence, hugged the victim girl from behind, when she was taking bath wearing inskirt and also removed her dress. However, the victim girl managed to prevent the sexual assault of the appellant, escaped from him, ran away to her house and informed her sister PW2.

15.They waited for the arrival of PW1 and as per the available evidence, the villagers went to the Police Station in support of the victim and PW1 to lodge the complaint [ExP1]. The complaint was received by a Police Constable Grade I and without even knowing the seriousness of the complaint, she issued only a receipt and placed the same before the Inspector of Police [PW17] / the IO. The IO after perusing and verifying the complaint registered a case and proceeded with the investigation.

16.The victim was also subjected to medical examination. The Doctor [PW8], who examined the victim has noted down a 3cm X 1cm injury sustained by the victim on her left shoulder. However, she has issued a certificate of examination for sexual offences that there was no injury in the external genitalia of the victim and the hymen was intact. Apart from this injury on her left shoulder, she has not noted down any other injury.

17.Since the victim [PW4] is a partially deaf and completely dumb, she was examined by the trial Court with the help of a Teacher from the CSI Blind School. During her evidence, PW4 has stated about the occurrence and as pointed out by the learned Government Advocate, the injury sustained by the victim girl corroborates that the victim girl managed to escape from the attempt made by the accused to rape her.

18.Though the accused attempted to rape the victim girl, she escaped from such an attempt. Considering the evidence of the Doctor [PW8] that there was no external injury, other than the injury noted



the Doctor [PW8] and the certificate [Exp2] issued by the Doctor, this Court is of the view that the said act of the appellant would fall under Section 354 IPC and not under Section 377 IPC.

19. There is no material to show that the accused committed an unnatural offence. Though the victim has stated that the accused had intercourse, the Doctor [PW8] in her certificate clearly stated that there is no injury in any of the private parts of the victim and the hymen was also intact. In the absence of the medical evidence, it is not safe to arrive at a conclusion that PW4 had really meant that the appellant had intercourse. PW4 an innocent victim thwarted on the accused, the moment he hugged her from back and therefore, she did not suffer any injury on her private parts. However, she recorded in her evidence that the accused raped her.

20. At this juncture, it would be appropriate to refer to Section 375 IPC, which reads as follows:

*"Section 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."*

21. Section 377 deals with the unnatural offence. The available medical evidence shows that the victim girl though suffered an abrasion on her shoulder in the scuffle to protect her from the accused, she did not suffer any injury in her private parts. Whether this act of the accused would amount to the commission of offence under Section 377 or 375 IPC or will it fall under Section 354 IPC? The overt act attributed as against this accused does not fall under the ingredients for the offence under Sections 375 or 377 IPC.



Whereas, the appellant has attempted to outrage the modesty of the victim, who is a partially deaf and dumb.

22.It is relevant to extract Section 354 IPC, which 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".

23.At this juncture it would be relevant to refer to the decision of the Hon'ble Supreme Court in the case of **Aman Kumar And Another v. State Of Haryana** reported in **2004 SCC (4) 379**, wherein it has been held as follows:

13.There is no material to show that the accused were determined to have sexual intercourse in all events. In the aforesaid background, the offence cannot be said to be an attempt to commit rape to attract culpability under Sections 376/511 IPC. But the case is certainly one of indecent assault upon a woman. Essential ingredients of the offence punishable under Section 354 IPC are that the person assaulted must be a woman, and the accused must have used criminal force on her intending thereby to outrage her modesty. What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her dress coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word modesty is not defined in IPC. The Shorter Oxford Dictionary (3rd Edn.) defines the word modesty in relation to a woman as follows:

Decorous in manner and conduct; not forward or lewd; Shamefast; Scrupulously chaste.

14. Modesty can be described as the quality of being modest; and in relation to a woman, womanly propriety



of behaviour; scrupulous chastity of thought, speech and conduct. It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. As observed by Justice Patteson in *R. v. James Lloyd* 1836 7 C&P 317 in order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part. The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.

15. In that view of the matter, it would be appropriate to set aside the conviction of the appellants under Section 376(2)(g) and convict them under Section 354 read with Section 34 IPC.

24. In the case of **Tarkeshwar Sahu v. State Of Bihar (Now Jharkhand)**, reported in **2006 SCC (8) 560**, while dealing with the issue that in the absence of charge under any other section, whether the accused should be acquitted or convicted for outraging the modesty of a woman, the Hon'ble Supreme Court has held as follows:

"23. In the instant case, the accused has been charged with Sections 376/511 IPC only. In the absence of charge under any other section, the question now arises whether the accused should be acquitted; or whether he should be convicted for committing any other offence pertaining to forcibly outraging the modesty of a girl. In a situation like this, we would like to invoke Section 222 of the Code of Criminal Procedure, which provides that in a case where the accused is charged with a major offence and the said charge is not proved, the accused may be convicted of the minor offence, though he was not charged with it. Section 222 CrPC reads as under:

222. When offence proved included in offence charged.  
(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.



(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied.

26.A three-Judge Bench of this Court in **Shamnsaheb M. Multtani v. State Of Karnataka. 2001 2 SCC 577** had an occasion to deal with Section 222 of the Code of Criminal Procedure. The Court came to the conclusion that when an accused is charged with a major offence and if the ingredients of major offence are not proved, the accused can be convicted for minor offence, if ingredients of minor offence are available. The relevant discussion is in paras 16, 17 and 18 of the judgment, which read as under: (SCC P. 584)

16.What is meant by a minor offence for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis--vis the other offence.

17.The composition of the offence under Section 304-B IPC is vastly different from the formation of the offence of murder under Section 302 IPC and hence the former cannot be regarded as minor offence vis--vis the latter. However, the position would be different when the charge also contains the offence under Section 498-A IPC (husband or relative of husband of a woman subjecting her to cruelty). As the word cruelty is explained as including, inter alia, harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

18.So when a person is charged with an offence under Sections 302 and 498-A IPC on the allegation that he



caused the death of a bride after subjecting her to harassment with a demand for dowry, within a period of 7 years of marriage, a situation may arise, as in this case, that the offence of murder is not established as against the accused. Nonetheless, all other ingredients necessary for the offence under Section 304-B IPC would stand established. Can the accused be convicted in such a case for the offence under Section 304-B IPC without the said offence forming part of the charge?

39. So far as the offence under Section 354 IPC is concerned, intention to outrage the modesty of a woman or knowledge that the act of the accused would result in outraging her modesty is the gravamen of the offence.

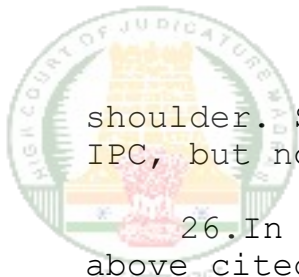
40. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex.

41. Modesty is given as, womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions.

42. The ultimate test for ascertaining whether the modesty of a woman has been outraged, assaulted or insulted is that the action of the offender should be such that it may be perceived as one which is capable of shocking the sense of decency of a woman. A person slapping on the posterior of a woman in full public glare would amount to outraging her modesty for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady.

43. The word modesty is not to be interpreted with reference to the particular victim of the act, but as an attribute associated with female human beings as a class. It is a virtue which attaches to a female on account of her sex."

25. Though in the present case the appellant was prosecuted for the offence under Section 376 IPC, he was convicted and sentenced for the offence under Section 377 r/w 511 IPC. The very case of the prosecution is that the appellant has hugged the victim from behind and pushed her down, the victim also escaped from this appellant and in the course of the incident, she also sustained injury on her



shoulder. Such an act of the appellant, would fall under Section 354 IPC, but not either under Section 376 IPC or under Section 377 IPC.

26. In the light of the above discussion and also in view of the above cited decisions of the Hon'ble Supreme Court, the appellant is found guilty for the offence under Section 354 IPC.

27. In the result,

- the appeal is partly allowed;
- the appellant is found guilty for the offence punishable under Section 354 IPC, convicted and sentenced to undergo two years rigorous imprisonment and to pay a fine of Rs.5,000/- [Rupee Five Thousand], in default to undergo, six months rigorous imprisonment;
- the trial Court is directed to secure the appellant and confine him to prison to undergo the remaining period of sentence;
- Bail bonds, if any executed by the accused, shall stand terminated.

Sd/-

Assistant Registrar (C.O)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

dsk

To

1. The Principal Sessions Judge,  
Sivagangai.

2. The Sessions Judge,  
Mahalir Neethimandram,  
District Fast Track Mahila Court,  
Sivagangai.

3. The Judicial Magistrate,  
Manamadurai.

4. The Inspector of Police,  
All Women Police Station,  
Manamadurai,  
Sivagangai District.

5. The Superintendent,  
Central Prison,  
Trichy.



6.The Superintendent of Police,  
Sivagangai.

7.The District Collector,  
Sivagangai.

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

Copy to

1.The Record Keeper  
Criminal Section,  
Madurai Bench of Madras High Court,  
Madurai. (2 copies)

2.The Additional Public Prosecutor,  
Madurai Bench of Madras High Court,  
Madurai.

**Crl.A(MD)No.357 of 2015**

**01.10.2020**

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