



Bail Slip

The Appellant/Accused viz., Thangaraj, S/o.Sethu was released on bail as per the order of this Court dated 21.04.2017 made in Cr1.MP(MD)No.11618 of 2016 in Cr1.A(MD)No.359 of 2015.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 20.08.2020

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.A(MD)No.359 of 2015

Thangaraj

... Appellant/Sole Accused

Vs.

State through
The Inspector of Police,
Salaigrammam Police Station,
Sivagangai District.
[Crime No.39 of 2009]

... Respondent/Complainant

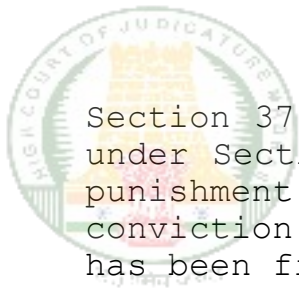
PRAYER: Appeal filed under Section 374(2) of the Code of Criminal Procedure, to call for the records relating to the Judgment made in S.C.No.29 of 2013 dated 14.10.2015 on the file of the learned Sessions Judge, Fast Track Mahila Court, Sivagangai and set aside the same by allowing this criminal appeal.

For Appellant : Mr.M.Subash Babu
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.29 of 2013, dated 25.10.2014 by the learned Sessions Judge, District Fast Track Mahila Court, Sivagangai.

2.This appellant / sole accused was tried for the offence under Sections 354 and 376 r/w 511 of Indian Penal Code [in short 'IPC'] and under Section 4 of Tamil Nadu Prohibition of Harassment of Woman Act, 1998 [in Short 'TNPHW Act'] before the learned Mahila Fast Track Court, Sivagangai in S.C.No.29 of 2013. In conclusion of the trial, the trial Court by its judgment dated 14.10.2015 found this appellant guilty, convicted and sentenced him to undergo five years of rigorous imprisonment, with a fine of Rs.2,000/- and in default, to undergo six months rigorous imprisonment, for the offence under



Section 376 r/w 511 IPC. Though he was found guilty for the offence under Section 354 IPC and under Section 4 of TNPHW Act, no separate punishment was imposed by the trial Court. Aggrieved over the conviction and sentence imposed on the appellant, the present appeal has been filed.

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

3.1. PW1 namely Muthulakshmi, daughter of PW5 Sathayiah got married and was residing in Aranthanarkottai. PW3 the victim girl is the daughter of PW1, aged about 8 years at the time of occurrence. PW1 along with PW3 went to the house of PW5, for attending a village pongal festival at Vaniyangudi Village. On 06.05.2012 at about 5.00pm, the victim girl was playing with other children near a water body. During that time, PW2 a resident of Vaniyangudi village was returning from his agricultural land around 5.30pm and heard the crying sound of the child from the side of a Banyan tree. Therefore, he proceeded to the place, where he saw, this appellant / accused catching hold of the victim girl and kissing her.

3.2. On seeing PW2, the appellant / accused left the girl and ran away from the place of occurrence. PW2 rescued the girl and informed this incident to PW1 and also informed the same to their village Headman Karuppaiyah [PW4] and her father PW5. PW4 the Village Headman advised PW1 that they would enquire into the issue. Accordingly, on the next day they went to the accused's house, but the accused was absconding.

3.3. Thereafter, PW1 went and lodged a complaint before the Salaigramam Police Station on 07.05.2012 at about 10.00m. PW9 Gnanasekaran, Special Sub Inspector of Police, Salaigramam Police Station received the complaint Exp1 and registered the same in Crime No.39 of 2012 under Section 354 IPC and Section 4 of TNPHW Act as against this appellant and the printed FIR is marked as Exp5.

3.4. On receipt of the information, the Inspector of Police [PW10] went to the place of occurrence around 11.00am on 07.05.2012, prepared the observation mahazar [Exp2] and a rough sketch [Exp6] in the presence of witnesses PW6 and PW7 and also recorded the statements of witnesses PW1 to PW6. He also referred the victim girl for medical examination to the Government Hospital, Ilayankudi. Dr. Sivakumar [PW8] was the Medical Officer working at Ilayankudi Government Hospital attended the victim girl at about 12.16 p.m., on 07.05.2012 and issued the accident register [Exp4], wherein he has recorded the statement of the victim child that an unknown person kissed her on her private part. However, the Doctor PW8, noted that there was no external injury on the victim girl PW3. The investigation officer [PW10] after collecting the accident register, examined the Doctor and the witnesses and filed the final report as against this petitioner for the offence under Sections 354 and 376 r/w 511 IPC and under Section 4 of TNPHW Act.



4. During the trial, on the side of the prosecution 10 witnesses were examined and 6 documents were marked.

5. PW1 is the mother of the victim girl, who lodged a complaint in ExP1, based on the statements PW2 and PW3; PW2 is the independent eye witness in this case, who is the native of Vaniyangudi Village, while returning from his agricultural field, he heard the crying sound of the child and witnessed the occurrence, where the accused was kissing the child on her private part; PW3 is the victim girl, who was aged about 8 years at the time of occurrence and she also narrated that on 06.05.2012 around 5.00pm, when she was playing with other children, the accused took her to the rear side of the banyan tree, lifted her skirt and kissed in her private part; PW4 is the village head man, to whom, PW1 has informed the incident; PW5 is the father of PW1 and grandfather of the victim girl, to whose house, the victim PW3 and PW1 came for attending a village festival; PW6 and PW7 are the witnesses for the observation mahazar; PW8 is the Doctor, who examined the victim girl on 07.05.2012; PW9 is the Special Sub Inspector of Police, who registered the case in ExP1 in ExP5 and PW10 is the Investigation Officer;

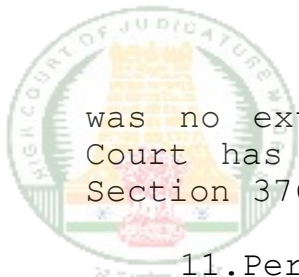
6. The incriminating materials from the prosecution case were put to the accused under Section 313 CrPC and he denied the same. Though the accused has stated that there are witnesses on his side, he has not examined any witness.

7. In conclusion of the trial, the trial Court found this appellant guilty, convicted and sentenced him as stated supra. As against the same, the present appeal is filed.

8. Heard Mr. Subash Babu, learned Counsel for the appellant and Mr. Robinson, learned Government Advocate [Crl Side] appearing for the State.

9. Mr. Subash Basu, learned Counsel for the appellant submitted that there is an inordinate delay in reporting the incident, since the occurrence has taken place on 06.05.2012 at about 5.00 p.m., whereas the complaint was lodged only on the next day, i.e., on 07.05.2012 at 10.00 a.m. The accused is a stranger to the victim girl and however the police has fixed the accused without conducting any identification parade. The victim girl has also admitted during her examination before the Court that the Police Officer instructed her to answer the questions and on the instructions of her mother PW1, she deposed the same.

10. The learned Counsel further submitted that the occurrence is said to have taken place while the victim girl was playing with other children but, none of the children, who were playing with PW3 at the time of occurrence, was examined as witness in this case. The



was no external injury on the victim girl. Therefore, the trial Court has erred in convicting the accused for the offence under Section 376 r/w 511 IPC.

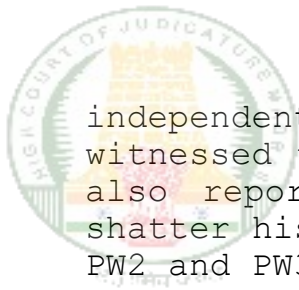
11.Per contra the learned Government Advocate [Crl Side] submits that the prosecution case is established by the evidence of eye witnesses PW2 and PW3 victim. Though the victim girl [PW3] clearly narrated the incident, her evidence was recorded after fulfilling the requirements for examination of a child witness. PW2 is an independent eye witness in this case, who was returning from his agricultural field and on hearing the crying sound, he went there and found this accused kissing the victim child on her private part. This evidence of PW2 is also corroborated by the evidence of the Doctor [PW8]. Though there is no external injury, the accused kissed on her private part with an intention to have intercourse with her and therefore, the trial Court has found him guilty for the offences.

12.This Court paid its anxious consideration to the rival submissions and perused the available records.

13.The victim girl[PW3] was aged about 8 years on the the date of occurrence, i.e., on 06.05.2012. She is a daughter of PW1 and grand daughter of PW5, who came to the occurrence village Vaniyangudi for the purpose of attending a village festival. On the date of occurrence, while she was playing with other children, near a waterbody, the accused took the child to a nearby Banyan tree, lifted her skirt and kissed on her private part, which was witnessed by PW2.

14. As rightly pointed out by the learned Government Advocate, PW2 is an independent witness in this case. He is also native of Vaniyangudi village. PW2 while returning from his agricultural field heard the crying sound of a child, went near the banyan tree and he found this accused committing the offence and also reported the incident to PW1. PW1, resident of Arandharkottai, who came to the occurrence village to attend a village festival, reported the incident to her father [PW5] and to the village Headman [PW4]. At the request of PW4, they waited for some time and verified in the house of the accused, but the accused was found absconding. Therefore they went and lodged the complaint [Exp1] on the next day about 10.00 a.m and the same was also registered by the Special Sub Inspector of Police [PW9] in Crime No.39 of 2012 [Exp5]. This evidence of PW1 is also corroborated by the evidence of PW4 and PW5. Thus, there is no delay in reporting the incident as alleged by the learned Counsel for the appellant.

15.Insofar as the non examination of the other children, who were playing along with the victim girl at the time of occurrence is concerned, they could not have witnessed the incident and when the case is established through the evidence of PW2. PW2 is an



independent eye witness and a resident of a Vaniyangudi Village, has witnessed the occurrence and rescued the child from the accused and also reported the incident to PW1. Though the accused tried to shatter his evidence, the accused could not demolish the evidence of PW2 and PW3 and their evidence is clear and cogent in this regard.

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16. Though the Doctor [PW8] has recorded in the Accident Register [Exp4] that there was no external injury, she has recorded the statement of the child in the accident register [Exp4]. It is not the case of the prosecution that the accused committed penetrative sexual assault. As per Exp4, on the occurrence day, an unknown male person took the victim girl [PW3] to the back side of the nearby banyan tree and kissed on her private part on 06.05.2012 at about 6.00 p.m. Therefore, there is no reason to disbelieve the case of the prosecution based on the doctor evidence.

17. There was an incident on 06.05.2012 around 5.00p.m, where the appellant/accused has taken the child to a nearby banyan tree and kissed on her private part. But, the issue before the Court is whether this act of the accused would amount to the commission of an offence under Section 376 IPC r/w 511 IPC or will it fall under Section 354 IPC?

18. It would be relevant to refer to 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."

19. Admittedly in this case, the accused is said to have taken the child to a nearby banyan tree, lifted her skirt and kissed on her private part. The investigation agency has not collected any dress worn by the accused at the time of occurrence, though the accused was arrested in this case.

20. It is also not the case of the prosecution that the appellant/accused has attempted to commit the rape as defined under Section 375 IPC. 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.The overt act attributed as against this accused does not fall under the ingredients for the offence under Section 375 IPC. Whereas, the appellant has attempted to outrage the modesty of the eight year old girl [PW3] and whether the eight year old girl would fall under the category of a Woman has to be decided in this case.

22.In similar circumstances, the Hon'ble Supreme Court in the case of **State of Punjab Vs Major Singh**, reported in **AIR 1967 SCC 63** while dealing with a case involving the victim of a 7 ½ years old girl, has held as follows:

"It has been found as a fact by the courts below that the respondent had caused injuries to the vagina of a seven and a half month old child by fingering. He has been held guilty of an offence under s. 323, Indian Penal Code. The contention on behalf of the State who is the appellant before us is that the offence amounts to outraging the modesty of a woman and is thus punishable under S.354, Indian Penal Code. The learned Sessions Judge and two of the three learned Judges of the High Court who heard the appeal against the decision of the Sessions Judge were of the view that a child seven and a half month old being incapable of having a developed sense of modesty, the offence was not punishable under s. 354. The third learned Judge, Gurdev Singh, J., however, took a different view. The learned Judge quoted the meaning of the word "modesty" given in the Oxford English Dictionary (1933 Edn.)-which is, "womanly propriety of behaviour, scrupulous chastity of thought, speech and conduct (in men or women) reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions" and observed: "This obviously does not refer to a particular woman but to the accepted notions of



womanly behaviour and conduct. It is in this sense that the modesty appears to have been used in section 354 of the Indian Penal Code". The learned Judge then referred to s. 509 of the Penal Code in which also the word "modesty" appears and then proceeded to say:

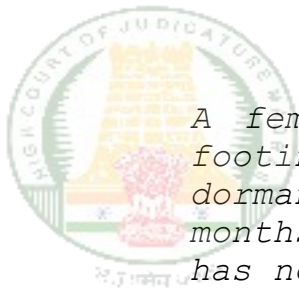
"The object of this provision seems to have been to protect women against indecent behaviour of others which is offensive to morality. The offences created by section 354 and section 509 of the Indian Penal Code are as much in the interest of the women concerned as in the interest of public morality and decent behaviour. These offences are not only offences against the individual but against public morals and society as well, and that object can be achieved only if the word "modesty" is considered to be an attribute of a human female irrespective of fact whether the female concerned has developed, enough understanding as to appreciate the nature of the act or to realise that it is offensive to decent female behaviour or sense of propriety concerning the relations of a female with others.

Section 354 of the Indian Penal Code reads thus:

"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".

In this case the action of Major Singh in interfering with the vagina of the child was deliberate and he must be deemed to have intended to outrage her modesty. I would, therefore, allow the appeal, alter the conviction of the respondent to one under s. 354, I.P.C. and award him rigorous imprisonment to a term of two years and a fine of Rs. 1,000/- and in default rigorous imprisonment for a period of six months. Out of the fine, if realised, Rs. 500/- shall be paid as compensation to the child.

Bachawat, L Section 10 of the Indian Penal Code explains that "woman" denotes a female human being of any age. The expression "woman" is used in s. 354 in conformity with this explanation, see s. 7. The offence punishable under s. 354 is an assault on or use of criminal force to a woman with the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not define "modesty". What then is a woman's modesty? I think that the essence of a woman's modesty is her sex.



A female of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. In this case, the victim is a baby seven and half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless, from her very birth she possesses the modesty which is the attribute of her sex. But cases must be rare indeed where the offender can be shown to have acted with the intention of outraging her modesty. Rarely does a normal man use criminal force to an infant girl for satisfying his lust. I regret to say that we have before us one of such rare cases. Let us reconstruct the scene. The time is 9-30 p.m. The respondent walks into the room where the baby is sleeping and switches off the light. He strips himself naked below the waist and kneels over her. In this indecent posture he gives vent to his unnatural lust, and in the process ruptures the hymen and causes a tear 3/4" long inside her vagina. He flees when the mother enters the room and puts on the light. I think he outraged and intended to outrage whatever modesty the little victim was possessed of, and he is punishable for the offence under s. 354."

23. In the case on hand, the appellant has taken the eight year old girl to a secluded place, lifted her skirt and kissed on her private part and such an act of the appellant / accused will fall under Section 354 IPC and in view of principle laid down by the Hon'ble Supreme Court in the case cited supra, the victim girl falls under the category of women and thus the appellant has outraged the modesty of the victim girl. 24. In view of the above decision of the Hon'ble Supreme Court and the available evidence, this Court holds that the appellant/accused has committed the offence under Section 354 IPC and not under Section 376 r/w 511 IPC.

25. In the light of the above discussion,

- the appeal is partly allowed;
- the appellant is found guilty for the offence punishable under Section 354 IPC, convicted and sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs.5,000/- [Rupee Five Thousand], in default to undergo, six months rigorous imprisonment; Insofar as the offence under Section 4 of Tamil Nadu Prohibition of Harassment of Woman Act, 1998 is concerned the trial Court has found this appellant guilty, but did not impose any separate sentence for the same and the maximum punishment under this section is three years imprisonment and since the appellant has been sentenced for three years for the offence under Section 354 IPC, no separate punishment is imposed for the offence under Section 4 of Tamil Nadu Prohibition of Harassment of Woman Act, 1998;



- 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 (CS-II)

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/ /2020

Sub Assistant Registrar(CS)

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To

- 1.The Sessions Judge,
Fast Track Mahila Court,
Sivagangai
- 2.The Inspector of Police,
Salaigrammam Police Station,
Sivagangai District.

Copy to

- 1.The Record Keeper,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)
- 2.The Superintendent,
Central Prison,
Trichy.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.M.SUBASH BABU, Advocate SR-14601.

Cr1.A(MD)No.359 of 2015

20.08.2020

PM(CO)

CS(21.10.2020) 9P 8C