

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reservation	09.09.2020
Date of Judgment	30.09.2020

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THE HONOURABLE MR.JUSTICE **K.KALYANASUNDARAM**

AND

THE HONOURABLE MRS. JUSTICE **T.KRISHNAVALLI**

Crl.A(MD)No.529 of 2018

and

Crl.MP(MD)No.4027 of 2020

Sampoornalingam @ Sambulingam
@ Rajkumar

: Appellant/Sole Accused

Vs.

State rep by
The Inspector of Police,
All Women Police Station,
Kulithalai,
Karur District.
(Crime No.07 of 2016)

: Respondent/Respondent

Prayer: Criminal Appeal filed under section 374 of the Criminal Procedure Code against the judgment passed by the Additional Sessions Judge, Karur, in S.C No.03 of 2018, dated 10.07.2018

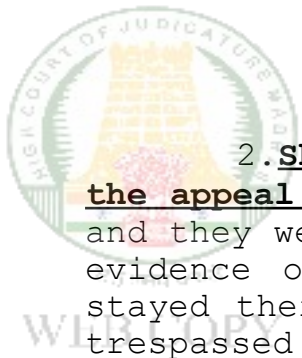
For Appellant : Mr.E.Somasundaram

For Respondent : Mr.M.Chandrasekaran
Additional Public Prosecutor

J U D G M E N T

(Judgment of the Court was made by **T.KRISHNAVALLI.J**)

The Appellant stands convicted in SC No.3 of 2018 on the file of the Additional Sessions Judge, Karur, for the charges under sections 448 and 376(2)(L) IPC and sentenced to suffer one year simple imprisonment for the offence under section 448 IPC and imprisonment of life for the offence under section 376(2)(L) IPC and fine of Rs.1,000/-, which carrying default sentence on the allegation that on 03.11.2016 at 11.30 pm, he trespassed into the house of PW1 and lifted PW15 to a nearby place and committed rape on her.



2. Shorn of unnecessary details, facts necessary to dispose of the appeal are as follows:- PW1 is the mother of PW2, PW8 and PW15 and they were residing at Irumpoothipatti Refugees Camp. It is the evidence of PW1 that on 03.11.2016, she had gone to Madurai and stayed there. The accused knowing this, at 11.30.pm on 03.11.2016 trespassed into her house and took PW15 from the house to the back side of the Madha Church and after closing her mouth, committed rape.

3.It is the further case of the prosecution that PW2 is an employee of KCP Company and at about 11.30 pm on 03.11.2016, she left the company after her days work along with PW3, PW4 and PW7 and when they were nearing Irumpoothipatti Refugees Camp, PW3 heard screaming and informed the same to PW2, PW4 and PW7 and when they went to the back side of the Madha Church, the accused took to his heels. On enquiry, PW15 narrated that when she was at sleep, the accused trespassed into the house and brought her to back side of the Madha Church by his shoulders and committed rape. Then PW15 was brought back to the house and at 12'0 Clock, PW2 informed the incident to her brother Sridharan/PW8, who in-turn informed the same to his mother PW1 through cellphone. PW1 returned from Madurai on 04.11.2016 night to her house and went to Salem to bring the witness Boopathi. Then at 9.00 pm on 05.11.2016, PW1 preferred a complaint Ex.P1 to PW18 the Inspector of Police. On the basis of the complaint Ex.P1, PW18 registered a case in Crime No.7 of 2016 under section 376(2)(L) IPC. Ex.P12 is the printed First Information Report.

4.After registering the case, PW18 sent PW15 through Head Constable PW11 to Karur Government Hospital for examination. PW18 continued with the investigation and proceeded to the place of occurrence by 7.00 pm on 06.11.2016 and prepared an observation mahazar Ex.P4 in the presence of PW5 and one Dinesh and drew a rough sketch Ex.P13. She obtained statement from PW1 to PW5, PW7 and PW8. Then he seized gown MO1, which was worn by the victim at the time of occurrence in the presence of PW4 and one Vedhanayaki. Ex.P3 is a seizure mahazar. PW19 sent the materials objects in Form 91 under Ex.P14 to the Magistrate Court. On the same day, the Inspector obtained statement from PW16, who examined PW15 and obtained statement Ex.P10.

5.PW18 in the course of investigation arrested the accused on 17.11.2016 at 6.30 am in the presence of the Village Administrative Officer PW10 and his Assistant Selvakumar. In pursuance of the arrest, he gave a statement and the admissible portion is Ex.P7 and thereafter, recovered MO2 Lungi and MO3 Shirt under Ex.P8 and sent MO2 and MO3 under Ex.P15 to the Judicial Magistrate in Form 91. To ascertain the IQ of PW15, PW18 gave a requisition to the Chief

Medical Officer, Karur Government Hospital. On 19.12.2016, the Inspector of Police sent PW2 to the Judicial Magistrate No.2, Karur for recording statement under section 164 of Cr.P.C. On 20.12.2016, PW14/Dr.Suresh Kumar issued a certificate in regard to IQ of PW15. The accused was subjected to potency test. PW6 after conducting the test issued a report under Ex.P6. On completing the investigation, final report was laid against the accused on 06.05.2017 under sections 448 and 376(2) (L) IPC.

6.When the accused was questioned under section 313 of the Criminal Procedure Code on the incriminating circumstances, he denied the same as false. To establish the case, on the side of the prosecution, PW1 to PW18 were examined and marked Exs.P1 to P18 and MOs1 to MO3. On the evidence adduced, the learned Sessions Judge held the charges against the accused proved and convicted and sentenced him as stated above. Challenging the same, the accused has come forward with this criminal appeal.

7.The learned counsel appearing for the appellant Mr.E.Somasundaram would urge that there is an inordinate and unexplained delay in lodging the First Information Report. It is further contended that the procedures prescribed under sections 154 and 164 of the Criminal Procedure Code for recording the statement of the victim/PW15 have been violated. He further added that though it is alleged that the accused trespassed into the house of PW1 and took away PW15 to the scene of occurrence, the same is not proved by the prosecution.

8.It is next contended that there are lot of inconsistencies and infirmities in the evidence of the prosecution with regard to the alleged mental illness of PW15 and the medical evidence is not supporting the ocular evidence produced by the prosecution, hence conviction of accused is to be set aside. In this regard, we heard the argument of the learned Additional Public Prosecutor appearing for the State.

9.It is the case of the prosecution that on 03.11.2016 at 11.30 pm, the accused trespassed into the house of PW1, which is situated at Irumpoothipatti Refugees Camp, when she was away at Madurai and he took PW15, who was mentally retarded and physically challenged to a nearby place (behind the Madha Church) and committed rape on her. In the evidence, PW2 deposed that when she along with PW3, PW4 and PW7 were returning home after completing their days work at KCP Company at 11.30 pm on 03.11.2016, PW3 heard the screaming of PW15 and when they visited the scene of occurrence, the accused was present and after seeing them, he ran away. PW2 further stated that at night 12' O Clock, she informed the rape committed by the accused on PW15 to her brother PW8. He would state that on the same day night, I.e., on 03.11.2016 he informed the incident to his mother PW1. PW1 is said to have returned to her house at Irumpoothipatti Refugees Camp on 04.11.2016, wherefrom she



proceeded to Salem to bring her relatives and eventually complaint was lodged only on 05.11.2016 at 9.00 pm.

10. In this regard, it is noticed that PW9, who is the President of Irumpoothipatti Refugees Camp, deposed that he knew PW1 and her family members as well as the accused. He further stated that PW15 is a mentally retarded lady and she could not able to speak and walk. On the date of crime, he was in Salem and on 05.11.2016, the President of Women Organisation Vedhanayaki informed about the occurrence and thereafter, the complaint Ex.P1 was lodged. The evidence of PW9 shows that Ex.P1 complaint was preferred with the assistance of the President of the Woman Organisation. The Refugees Camp has an Association and the Women Organisation. PW4 and PW7 also gave evidence in line with PW2 and further stated that after PW15 reached her house, both of them left the place.

11. In this backdrop, it is very difficult to attach credence to the evidence referred above for the reason that had the accused committed the grave crime as spoken by the witnesses, PW1, PW2 and PW8 would not have delayed for two days to lodge the complaint Ex.P1. It is not the case of the prosecution that Vedanayaki, the President of Women Wing Organisation was also not available in the Refugees Camp until the complaint came to be lodged on 05.11.2016. This creates a doubt over the prosecution case.

12. In 2013, an amendment was brought to section 154(1) Cr.P.C in regard to recording information from the temporarily or permanently mentally or physically disabled by the Police Officer. The relevant portion has been extracted hereunder:-

"154(1)(a) in the event that the person against whom an offence under section 354, section 354-A, section 354-B, section 354-C, section 354-D, section 376, section 376-A, section 376AB, section 376-B, section 376-C, section 376-D, section 376-DA, section 376-DB, section 376-E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be.

13. By the same amendment, a proviso was also inserted to sub-clause (5-A) of section 164 of Cr.P.C for recording the statement by a Judicial Magistrate from temporarily or permanently mentally or physically disabled, who were subjected to sexual assault, which reads as follows:-

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"[(5-A) (a) In cases punishable under section 354, section 354-A, section 354-B, section 354-C, section 354-D, sub-section (1) or sub-section (2) of section 376, section 376-A, section 376-AB, section 376-B, section 376-C, section 376-D, section 376-DA, section 376-DB, section 376-E or section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police :

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter of a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter of special educator, shall be videographed.

14. In the instant case, Dr. Suresh Kumar PW14 conducted IQ test of PW15 on the requisition of PW18. He testified before the trial court that on 01.12.2016, IQ test was conducted and the mental capacity of PW15 was 8 years, two months and understanding capacity was 51%. Ex.P9 is the report. He further stated that with the said mental capacity and understanding capacity, she cannot understand the judicial proceedings. The evidence of PW13 is to the effect that when she was working at Trichy Mahatma Gandhi Memorial Government Hospital in Psychiatric Department, he treated PW15 for mental disorder and on the requisition of the Inspector, she gave a letter stating that PW15 was taking treatment from 2009 for the mental disorder. PW15 gave evidence, in which she has narrated the entire occurrence in the chief examination and she withstood the cross examination by defence. In other words, nothing could be elicited in the cross examination to discredit the evidence. The learned trial Judge on appreciation of the evidence of PW15, rejected the evidence of PW13 and PW14. So, the prosecution case that PW15 was mentally retarded was disbelieved by the trial court.

15. In this case, admittedly no statement was obtained from PW15 during investigation nor she was produced before the Magistrate Court to record her statement. In order to get over this situation, PW18, in her cross examination while admitting that she did not record the statement of PW15, stated that she by gestures only narrated the crime committed by the accused, which is apparently



false, in view of the fact that she has given evidence in this case as PW15. For the reasons best known to the investigating officer, the procedures prescribed in the above referred provisions have been violated.

16.Further, it is noticed that PW16 Dr.Kasthuri, Senior Assistant Surgeon at Government Medical College Hospital, Karur, who examined PW15 on 06.11.2016 at 2.15 am, found no external injuries either on the private part or on breast or any other part of her body, but her hymen was found torn. It is to be noted that the alleged victim was aged 38 years at the time of occurrence.

17.On receipt of Ex.P5 requisition, PW6, Doctor attached to Government Hospital, Karur examined the accused to ascertain his potency to have a sexual intercourse. On examination he found that the accused was about 20 years and his private part was normal, but he concluded stating that due to non-cooperation, potency could not be ascertained, however, it cannot said that he is incompetent to have sexual intercourse. In the cross examination, PW6 admitted that the accused objected through a letter to take the potency test, but it was not exhibited. It is the specific case of the accused that he was ready to undergo the test, but the evidence was given without proper testing. This would indicate that the prosecution failed to prove that the accused had capacity to have sexual intercourse on the date of the alleged occurrence.

18.The testimony of PW15 that on the date of the occurrence, the accused trespassed into her house and took her on the shoulder with an intention to commit the crime, is not supported to by any other witnesses. The prosecution also projected PW15 as physically challenged and she could not walk. In this regard, it is apposite to look into the evidence of PW8, who in the chief examination itself stated that his sister PW15 is normal like any other person and because of the injury in her leg, she had little difficulty in walking.

19.In the matter on hand, there is a delay in lodging the FIR. Medical evidence does not support the case of the prosecution. The manner in which the occurrence is stated to have taken place is not believable. There are also procedural violations as indicated above.

20.Considering the totality of the evidence adduced by the prosecution, in our opinion, there is no scope to sustain the conviction and sentence imposed on the appellant and the accused is to be given the benefit of doubt.

21.In that view, this Criminal Appeal is allowed. The conviction and sentence recorded by the trial court is hereby set aside. The appellant is acquitted from all the charges levelled



against him and he be released from the jail forthwith, if not required in any other case. Consequently, connected Miscellaneous Petition is closed.

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Sd/-

Assistant Registrar (CS-II)

/ /2020

Sub Assistant Registrar(CS)

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Note:-

In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Judicial Magistrate No.II,
Kulithalai,
Karur District.
2. The Chief Judicial Magistrate,
Karur.
3. The Additional Sessions Judge,
Karur.
4. The Principal District Judge,
Karur.
5. The Inspector of Police,
All Women Police Station,
Kulithalai, Karur District.
6. The Superintendent,
Central Prison, Trichy.
7. The Superintendent of Police,
Karur.

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8. The District Collector,
Karur.
9. The Director General of Police,
Mylapore, Chennai-4.
10. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Copy to:

The Section Officer,
Criminal Section(Records),
Madurai Bench of Madras High Court,
Madurai.(2 Copies)

Judgment
made in
Crl.A(MD)No.529 of 2018

30.09.2020

SCR (CO)
NR (19/10/2020) 8P : 13C