



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.03.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.327 of 2019

Madhaiyan

.. Appellant

.Vs.

State Represented by
The Inspector of Police,
Edappadi Taluk,
Edappadi Police Station,
Salem District,
Crime No.38 of 2016.

.. Respondent

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure to set aside the order of conviction dated 11.02.2019 made in S.C.No.50 of 2017 on the file of the Mahila Court, Salem.

For Appellant	:	Mr.R.Marudhachalamurthy
For Respondent	:	Mr.T.P.Savitha Government Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 11.02.2019 in S.C.No.50 of 2017 on the file of the learned Mahila Court, Salem.

2.The case of the prosecution is that on 27.01.2016 P.W.1-mother of the victim girl went to agricultural work, at that time, the victim girl, who is a mentally challenged person was alone in her house. At around 12.00 noon, the appellant/accused came on his two wheeler i.e. T.V.S.XL Heavy Duty Motor Cycle and trespassed into P.W.1's house and sexually assaulted the victim girl. When P.W.1's sister and P.W.1's brother-in-law's wife went to the house of P.W.1, the appellant ran away from the place of occurrence. Thereafter, they informed the same to P.W.1, mother of the victim girl and P.W.4, brother of the victim girl. P.W.1 gave a complaint before respondent police, which was marked as Ex.P1.

3.The respondent police registered a case in Crime No.38 of 2016 for the offence punishable under Sections 376 IPC. After investigation, the respondent police filed a charge sheet before the learned Judicial Magistrate No.II, Sankagiri and the same was taken on file in P.R.C.No.7 of 2016.

4.The learned Judicial Magistrate No.II, Sankagiri after considering the fact that the offences alleged to have been



committed by the accused are triable by the Court of Session, committed the case to the Principal Sessions Court, Salem and the same was taken on file in S.C.No.50 of 2017 and made over to the Mahila Court, Salem. The Mahila Court after completing the formalities framed charges against the appellant for the offences under Sections 451, 376 r/w 511 of IPC.

5. In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 13 witnesses were examined as P.W.1 to P.W.13 and also marked Exs.P1 to P17, besides that one material object was marked as M.O.1. After completion of the prosecution side evidence, the incriminating circumstances culled out from the prosecution witnesses were put against the appellant/accused under Section 313 of Cr.P.C., wherein he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, as many as 3 witnesses were examined as D.W.1 to D.W.3 and also marked Exs.D1 and D2 and no material object was exhibited.

6. The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that the accused/appellant is guilty for the following offences :

- For the offence under Section 451 IPC, the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.10,000/- and in default, to undergo simple imprisonment for a period of six months;
- For the offence under Section 376 r/w 511 IPC the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.10,000/- and in default, to undergo simple imprisonment for a period of six months and ordering the sentences to run concurrently.

7. Challenging the said conviction and sentences, the appellant is before this Court.

8.1 The learned counsel for the appellant would submit that there was no eye witness to the said occurrence. P.W.2 is the sister of P.W.1 as well as mother of the victim girl and P.W.3 is the wife of P.W.1's brother-in-law and they were cited as eye witnesses, who are only interested witnesses. P.W.2 and P.W.3 have stated that they have informed the said incident to one Krishnammal, who is the relative of the appellant and with her help, they woke up the appellant and thereafter, the appellant left the place with his two wheeler. However, the said Krishnammal, who is said to have been one of the eye witnesses was not examined as prosecution witness, which clearly creates a doubt.

8.2 The learned counsel for the appellant would further submit that there are material contradictions between the



prosecution witnesses. P.W.2 and P.W.3 have stated that after intervening of P.Ws.2 and 3 and Krishnammal, the appellant, who was in an inebriated condition woke up and left his two wheeler on the spot and ran away from the place of occurrence, whereas, P.W.4, who is the brother of the victim girl has stated that he found the two wheeler i.e. TVS XL in the place of occurrence. Further, the Investigating Officer (P.W.12) has also deposed that during the investigation he recovered the two wheeler i.e. T.V.S. XL HD Motor Cycle from the scene of occurrence in the presence of P.W.5, who is the Mahazar witness, which also creates a doubt as to whether the appellant took the two wheeler from the scene of occurrence or left the two wheeler there itself.

8.3. Further, the learned counsel for the appellant would submit that P.W.9, Head Mistress of the Specially Trained School, has deposed that the victim girl is capable of answering the questions put forth to her by way of making some expressions, however, the prosecution has stated that the victim girl, who is a mentally challenged person was not in a position to speak answers properly, which also creates a doubt. Further, the Doctors (P.Ws.7 and 8) have not clearly stated about the mental condition of the victim girl, as to whether she has expressed her feelings and also identified the things. Therefore, the motive behind the complaint against the appellant is that when P.W.1 the mother of the victim girl asked the appellant to marry her daughter, the appellant refused to marry her, due to such personal enmity and to take vengeance, the family of the victim girl have foisted a false case against the appellant.

8.4 The learned counsel for the appellant would further submit that P.W.12 the Investigating Officer has stated that on the next day morning of the incident at 6.30 a.m., he came to the spot and investigated the matter and recovered the vehicle from the place of occurrence. P.W.5, the Mahazar witness has deposed that at 6.30 a.m. the Investigating Officer came to the spot and recovered the two wheeler. However, P.W.4 the brother of the victim girl has deposed that the Investigating Officer came to the spot after 11.30 a.m., which also creates a doubt. Therefore, there are material contradictions between their evidence. Further, the Doctor (P.W.7), who examined the victim girl has deposed that there was no possibility of sexual intercourse and her hymen was intact and she was not subjected to any sexual intercourse. According to the prosecution, the appellant has committed rape on the victim girl, however, on examination of the prosecution witnesses they have come to the conclusion that the appellant only made an attempt to commit rape and hence, FIR was altered from Section 376 of IPC to Section 376 r/w 511 IPC. He would further submit that no ingredients were made out under Section 511 IPC. The Doctor/P.W.7 has stated that sexual intercourse might not have been occurred and the victim girl also does not speak anything about sexual assault. P.Ws.2 and 3 have stated



that while passing through the house of the victim girl, they saw the appellant was lying on the cot with the victim girl, however, none of the witnesses have stated that the appellant committed rape or attempted to commit rape on the victim girl. The contradictions between P.Ws.1 to 5 are only material contradictions, which will go to the root of the case of the prosecution. The Doctor evidence also does not corroborate with the evidence of the prosecution witnesses. All these aspects are fatal to the case of the prosecution. In order to substantiate the evidence on the side of the defence, three witnesses were examined as D.Ws.1 to 3 and two documents were marked as Ex.D.1 and Ex.D2.

8.5 The learned counsel for the appellant would further submit that due to previous enmity between the appellant and victim girl's family P.W.4, who is the brother of the victim girl assaulted the appellant brutally and he sustained injuries and on knowing the same P.W.1 lodged the false complaint against the appellant. The prosecution has not explained the injuries sustained by the appellant and the same is fatal to the case of the prosecution. The evidence of the defence witnesses would clearly substantiate the above facts. However, the learned Sessions Judge failed to consider the material contradictions and also the previous motive between the two families and convicted the appellant only on assumption and on sympathy, and therefore, the judgment of conviction and sentence passed by the trial Court against the appellant, is liable to be set aside.

9.1 The learned Government Advocate (Crl.Side) would submit that the victim girl is a mentally disabled person and she is not in a position to move and she simply lay on the cot. On the date of occurrence, when the victim girl was alone in her house, P.W.2 while passing through the house of the victim girl found that a motorcycle was parked outside and a pair of slippers were kept outside the house; and hence, she looked inside and saw the appellant was lying on the cot with the victim girl. P.Ws.2 and 3 on seeing the said occurrence they were shocked and when they intervened, the appellant was not getting up at all, as he was in an inebriated condition. Therefore, they called the neighbour Krishnammal, who is the relative of the appellant and with her help, they woke up the appellant and thereafter, the appellant fled away with his two wheeler. Subsequently, P.W.2 informed the same to P.W.4 and P.W.1 thereafter, they registered a case against the appellant.

9.2 The learned Government Advocate (Crl.Side) would further submit that in order to prove the case of the prosecution, the mother of the victim girl/defacto complainant was examined as P.W.1; the sister of P.W.1 was examined as P.W.2; the brother-in-law's wife of P.W.1 was examined as P.W.3; the brother of the victim girl was examined as P.W.4; P.W.5 is the Mahazar witness; P.W.6 is the Doctor, who



examined the appellant ; P.Ws.7 and 8, the Doctors who examined the victim girl; P.W.9 is the Headmistress of the Specially Trained School for mentally challenged persons; P.W.10 is the Psychiatrist, who examined the victim girl; P.Ws.11 to 13 are Investigating Officers, who investigated the said occurrence.

9.3 The learned Government Advocate (Crl.Side) would further submit that the eye witnesses P.W.2 and P.W.3 had clearly deposed the said incident and the same was corroborated with the evidence of P.W.4, who was the hearsay witness. P.W.8, the Doctor, who examined the victim girl had given the medical certificate showing the age of the victim girl as 20 years, which was marked as Ex.P.11. P.W.9, the Headmistress has clearly deposed that how she translated the expressions given by the victim girl. P.W.10, the psychiatrist, who examined the victim girl had given the certificate (Ex.P13) stating that the victim girl is suffering from mental retardation. From the evidence of P.Ws.2, 3, 7, 8, 9 and 10, the prosecution has established their case that the appellant made an attempt to commit rape. Therefore, the charges were framed against the appellant for the offence under Section 376 r/w 511 IPC. He would further submit that there is a contradiction regarding the vehicle, whether the appellant has taken the vehicle from the scene of occurrence or not. P.W.5, who is the Mahazar witness has clearly deposed that on the next day, the Investigating Officer came to the scene of occurrence and after enquiry, he recovered the vehicle from the place of occurrence and the same was marked as M.O.1. Therefore, the prosecution has proved its case beyond reasonable doubt and the trial Court has rightly convicted the appellant, and the appeal is liable to be dismissed.

10. Heard the learned counsel for the appellant and the learned Government Advocate (Crl.Side) for the respondent and also perused the materials available on record.

11.This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.

12.On a careful reading of the evidences of P.Ws.2 and 3, it would reveal that on the date of occurrence i.e. on 27.01.2016, while they were passing through the house of the victim girl, they found a motorcycle was parked outside and a pair of slippers were kept outside of her house; when they looked inside, they saw the appellant was lying on the cot with the victim girl, who is a mentally retarded person; and on seeing the said occurrence they were shocked and when they intervened, they found that the appellant was not getting up at all, as he was in an inebriated condition; therefore, they called their neighbour Krishnammal, who is the relative of the appellant and with her help they woke up the appellant; thereafter, the appellant fled away from the scene of



occurrence with his two wheeler. There is no dispute with regard to the date of occurrence i.e., on 27.01.2016 and the witnesses were also examined on the next day itself by the Investigating Officer on 28.01.2016 and they had clearly narrated the said incident. P.W.5, the Mahazar witness clearly deposed that the vehicle was recovered from the scene of occurrence.

13. After two years from the date of occurrence, chief examination of P.W.1 was held on 25.07.2018 and further, she was cross examined on 14.09.2018 i.e. after one month from the date of chief examination. P.W.2 in chief examination has stated that the appellant left the scene of occurrence with his two wheeler, whereas, in her cross examination, she has stated that the appellant left his two wheeler and ran away from the scene of occurrence. There is a contradiction regarding recovery of two wheeler as to whether the appellant left the place of occurrence with his two wheeler or not. The above contradictions are minor contradictions. Naturally, a person forgets about small events, as the date of occurrence is 27.01.2016, and trial was commenced after two years. Further, the victim girl who is a mentally retarded person has not understood what happened. It is stated that the vehicle was seized on the next date of occurrence. Therefore, from the evidence of P.Ws.2 and 3 the prosecution has established its case that the appellant has committed the offence under Section 376 r/w 511 IPC. Further, the appellant trespassed into the house of P.W.1 and therefore, he committed the offence under Section 451 IPC.

14. The main defence taken by the appellant is that the injuries sustained by the appellant was not explained properly by the prosecution. At the time of occurrence the appellant was in an inebriated condition and the victim girl is a mentally retarded person, definitely, the parents of the victim girl might have got irritated and attacked the appellant, that may not be fatal to the case of the prosecution.

15. The Court has to see only whether the prosecution proved its case beyond reasonable doubt regarding commission of offence, since by efflux of time in conducting trial after a year, the witnesses might have forgotten some incident and there may be some minor contradictions.

16. The learned counsel for the appellant submitted that at the time of deposition, P.Ws.1 and 4 have deposed that based on the information given by P.W.1, the complaint was typed in the computer and registered before the respondent police, whereas, P.W.2 has deposed that the complaint was given in hand written and at the time of registering the complaint she was along with P.W.1 and P.W.4. Therefore, there is a contradiction regarding preferring the complaint. The said contradictions are minor contradictions and it is not a



material contradictions since they are illiterate people in that situation they did not know how they prefer the complaint. Further, all these facts cannot be remembered after two years, when they were in the witness box. Therefore, the contradictions pointed out by the learned counsel for the appellant are only minor contradictions and it would not go to the root of the case of the prosecution. Therefore, the prosecution established its case from the evidence of P.W.2 and 3, who are the eye witnesses to the said occurrence. In their deposition, they have stated that at the time of occurrence, the appellant was lying on the victim girl and they shouted at him and informed the same to Krishnammal, who is the relative of the appellant. Therefore, the prosecution came to know that the said Krishnammal would not support the case of the prosecution. Therefore, mere non examination of Krishnammal is not fatal to the case of the prosecution. From the evidence of P.Ws.1 to 5 and 9 and 10, this Court finds that the appellant has committed the offence under Section 376 r/w 511 IPC. There is no reason to discard the evidence of P.Ws.2 and 3. Further, mere non-examination of the independent witnesses also not fatal to the case of the prosecution. The evidence of interested witnesses if found to have creditworthiness, conviction could be based on an uncorroborated testimony. In cases of this nature, presence of independent eye witnesses are mostly improbable. If the evidence of interested witnesses are cogent, credible and trustworthy, conviction is permissible.

17. It is a well settled proposition of law that defects in the investigation cannot be a sole ground to disbelieve the case of the prosecution. Lapse on the part of the prosecution should not lead unmerited acquittal, subjected to rider that in such a situation evidence on record should be clinching, so that lapse of prosecution can be condoned. Therefore, the appellant is not entitled to get acquittal on the ground of defective prosecution.

18. Under these circumstances, this Court safely comes to the conclusion that the appellant without looking into the pathetic condition of the victim girl, who is a mentally retarded person, has attempted to commit sexual assault with her. Therefore, the prosecution has established its case beyond all reasonable doubt and also substantiated the charges for the offences under Sections 451, 376 r/w 511 of IPC against the appellant and the trial Court also rightly appreciated the evidence of prosecution witnesses and convicted and sentenced as referred to above. This Court, being an Appellate Court, is a fact finding Court re-appreciated the entire evidence and found that the appellant has committed the charged offence.

19. In the light of the above discussion, this Court does not find any merit in this appeal and the appeal is liable to be dismissed. Accordingly, this Criminal Appeal is dismissed



and the judgment of conviction and sentence passed by the trial Court is confirmed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

ms

To

1.The Sessions Judge, Mahila Court, Salem.

2.Do Through The Principal Sessions Judge,
Salem.

3.The Judicial Magistrate No.2,
Sankari.

4.Do Through The Chief Judicial Magistrate,
Salem.

5.The Inspector of Police,
Edappadi Taluk,
Edappadi Police Station,
Salem District.

6.The Superintendent,
Central Prison, Salem.

7.The Director General of Police,
Mylapore, Chennai - 4.

8.The District Collector, Salem.

9.The Public Prosecutor,
High Court, Madras.

Copy To

1.The Deputy Registrar		with a direction to send back the
(Criminal Section),		original records, if any, to the
High Court, Madras.		trial Court

2.The Honourable POSCO Committee,
High Court, Madras 104.

+1cc to Mr.R.Marudhachalamurthy, Advocate, S.R.No. 16316

CRL.A.No.327 of 2019

GSM(CO)

GN(15/07/2021)

<https://hcservices.ecourts.gov.in/hcservices/>

WEB COPY