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Crl.A.No.78 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.11.2022

Pronounced on : 22.11.2022

CORAM

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Criminal Appeal No.78 of 2016

Senthil @ Gowthaman

... Appellant/Accused

/versus/

State by

The Inspector of Police,
Kaveripakkam Police Station,
Vellore District.

Crime No.32 of 2007

... Respondent/Complainant

Prayer:- Criminal Appeal is filed under Section 374 of Cr.P.C., prayed to call for the records and to set aside the judgment and sentence dated 21.01.2016 imposed in S.C.No.18 of 2008 on the file of the learned II Additional District and Sessions Judge, Ranipettai.

For Appellant : Mr.Agilesh Kumar for
Mr.R.Vivekananthan

For Respondent : Mr.R.Kishore Kumar
Government Advocate (Crl.Side)

JUDGMENT



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The appellant is the sole accused in the case tried for wrongful confinement and rape. The conviction and sentence dated 21.01.2016 passed in Sessions Case No.18 of 2008 by the learned II Additional District and Sessions Judge, Ranipettai challenged in the present Criminal Appeal.

2. The case of the prosecution in brief is that on 25.01.2007, at about 1.00 p.m., while the prosecutrix aged about 17 years went to her land bearing Survey No.98 and walking through her land, the accused chased and caught hold of her, gagged her mouth forced her to lay down under the mango tree and raped her. On seeing her brother, he ran away. After occurrence, the prosecutrix came home with her brother reported the occurrence to her grand father. Her parents returned from Chennai that night at about 9.00 p.m., they were hesitant and confused whether to give police complaint or not. Then the next day on 26.01.2007 lodged the complaint and the same has been registered in Crime No.32 of 2007. The complaint alleged to have been given by the prosecutrix has been marked as Ex.P1.



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3. On receipt of Ex.P1, the Investigating Officer has conducted the investigation, examined the connected witnesses. Arrangements to conduct potency test to the accused and further, the prosecutrix has also been subjected to medical examination. After completing investigation, laid a Final Report on the file of the Judicial Magistrate Court, Wallajapet and the same has been taken on file in P.R.C.No.5 of 2007.

4. The learned Judicial Magistrate, Wallajapet, after considering the facts that the offences alleged to have been committed by the accused are triable by Sessions Court, has committed the case to the Court of Sessions, Vellore Division and the same has been taken on file in Sessions Case No.18 of 2008.

5. The trial Court, after hearing the arguments of both sides and upon perusing the relevant documents, initially framed a combined charge under Sections 376 and 342 of Indian Penal Code and same have been read over and explained to the accused. The accused has denied the charges and claimed to be tried. After considering the evidence of prosecution, held the accused guilty and convicted him vide judgment dated 25.03.2008. This judgment of conviction and



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sentence came to be challenged before the High Court in Criminal Appeal No.307 of 2008. This Court, after considering the fact that composite charges for offence under Sections 342 and 376 I.P.C., been framed against the accused and tried, allowed the appeal with the following direction:-

“The convictions and sentences passed in Sessions Case No.18 of 2008 by the trial Court are set aside and Sessions Case No.18 of 2008 is remitted to the file of trial Court. The trial Court is strictly directed to frame a charge under Section 342 of Indian Penal Code by way of furnishing necessary particulars. The fine amount paid by the appellant/accused is ordered to be refunded to the appellant/accused forthwith. The trial Court is also strictly directed to dispose of Sessions Case No.18 of 2008 before the end of January 2016 and report the matter to the Registry without fail.”

6. Accordingly, the trial Court segregated the charges. Framed charge (1) for offence under Section 342 I.P.C., and charge (2) for offence under Section 376 I.P.C. On 05.11.2015, recalled PW.1 and examined her again on 21.12.2015. After questioning the accused under Section 313 Cr.P.C., on 06.01.2016 in respect of the



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additional incriminating evidence, the trial Court held that the accused was guilty of offences under Sections 342 and 376 I.P.C., sentenced him as below:

<i>Rank of the accused</i>	<i>Conviction under section</i>	<i>Sentence Awarded</i>
Sole accused	376 I.P.C.	To undergo seven years Rigorous Imprisonment and pay a fine of Rs.10,000/- in default to undergo R.I., for another one year.
	342 I.P.C.	To undergo six months Rigorous Imprisonment

The period of sentence to run concurrently. Period of imprisonment already undergone to be set off.

7. The aggrieved accused is before this Court challenging the judgment dated 21.01.2016.

8. The learned counsel for the appellant assailed the judgment on two folds. His preliminary objection is that the trial Court failed to comply the order of this Court dated 01.10.2015 passed in C.A.No.307 of 2008.



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9. According to the learned counsel for the appellant, Section 216(4) of Cr.P.C., on altering the charges, mandates the Court to either direct of new trial or adjourn the trial for such period as may be necessary. In the instant case, the trial Court in spite of direction from the High Court after setting aside the judgment, to frame charge under Section 342 I.P.C., separately and proceed with trial afresh, had recalled PW.1 alone and proceeded to question the accused and render its judgment, based on the testimony and evidence on record, which is implicitly set aside along with the judgment dated 01.10.2015 passed in Crl.A.No.307 of 2008.

10. The learned Government Advocate (Crl.Side) appearing for the State in response to this submission stated that, the High Court in its order dated 01.10.2015 has not ordered new trial or set aside the trial. Pointing the error in charge framed, consolidatedly of the offence under Section 342 together with Section 376 I.P.C., directed the trial Court to frame separate charge for offence under Section 342 I.P.C., and proceed.

11. The direction of this Court in its order dated 01.10.2015, extracted above only for framing separate charge under Section 342 I.P.C., and proceed. It



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has not ordered new trial as pleaded by the learned counsel for the appellant.

Under Section 216 of Cr.P.C., any Court at any time alter or add charge before pronouncement of judgment. Such altered or added charge must be read to the accused and explained. If such alteration or addition in the opinion of the Court not likely to prejudice the accused in his defence or the prosecution in conducting the case, the Court may in its discretion after such alteration or addition proceed with the trial as if the altered or added charge had been the original charge. Only in case if such alteration or addition in the opinion of the Court likely to cause prejudice either to defence or to prosecution, the Court may either direct new trial. The law does not mandates in all cases, when charges altered or added, new trial should be conducted.

12. For easy reference, Section 216 Cr.P.C., is extracted below:-

“216. Court may alter charge.—(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.



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(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.”

13. The judgment of the trial Court dated 25.03.2008 was not remanded for any other reason, but for the erroneous clubbing two Sections 342 and 376



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I.P.C., together and framing the charges without stating material for framing the said charges. Therefore, when after remand for the said purpose, the trial Court has framed separate charges under Sections 342 and 376 I.P.C with substance for framing charges. The altered charge for offence under Section 342 I.P.C., read over to the accused and thereafter, PW.1 was recalled. The accused was given an opportunity to cross examine PW.1 and he has availed that opportunity. Incriminating evidence to attract Section 342 I.P.C., put to the accused by way of questioning under Section 313 of Cr.P.C., and the accused has denied it as false. Therefore, in consonance with the spirit of the Cr.P.C. The trial Court as per the direction of the High Court framed separate charge under Section 342 I.P.C., and has conducted the trial. Nowhere the High Court has observed that the evidence already recorded is vitiated and new trial has to be conducted.

14. For clubbing of two charges together will not vitiate the trial and the said irregularity if any, being rectified by the trial Court after the matter been remanded specifically for that purpose. Therefore the preliminary objection raised by the appellant/accused is legally unsustainable and by setting aside the judgment of the trial Court and remitting back to the trial Court to frame separate charge for



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offence under Section 342 I.P.C., will not implicitly wash away the evidence already recorded. The preposition raised by the learned counsel for the appellant has no support in law particularly, Section 216 or 215 of Cr.P.C.

15. On appreciation of fact, the learned counsel for the appellant submitted that according to the prosecution, the alleged incident occurred on 25.01.2007 at about 1.00 p.m. However, the First Information Report was given belatedly after 23 hours and the F.I.R., was forwarded to the learned Judicial Magistrate 3 days after it was registered. The other connected materials were not sent to the Magistrate immediately, but was substantially delayed for more than 60 days. The unexplained delay in lodging F.I.R., and forwarding the same to the Magistrate is fatal to the prosecution. The self contradiction between Section 164 Cr.P.C., statement of PW.1, her testimony recorded on 27.02.2008 by the Court and on 21.12.2015 after recalled belies, the case of the prosecution. The dress material of PW.1 was sent to forensic laboratory but no tell tale evidence like blood stain or semen found. The physical examination of PW.1 by the doctor indicates that no external injury nowhere found on her body. Whereas PW.1 has deposed that the accused bite her breast and raped her and there was bleeding in her private



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parts. Her brother [PW.3] had also deposed that he saw PW.1 bleeding. But, no blood stain was deducted. This goes to show that the prosecution witness has falsely implicated the appellant and the motive for the said false accusation has been elicited in the cross examination and by marking Ex.D1 and Ex.D2, which are notices sent regarding the land dispute between the father of PW.1 and the accused family.

16. The learned counsel for the petitioner also relied upon the following three judgments to buttress his arguments:

(1) *Santosh Prasad Alias Santosh Kumar Vs. State of Bihar* [(2020) 3 Supreme Court Cases 443]

(2) *Rai Sandeep Alias Deepu Vs. State (NCT of Delhi)* [(2012) 8 Supreme Court Cases 21]

(3) *Raju and others Vs. State of Madhya Pradesh* [(2008) 15 Supreme Court Cases 133]

17. The specific case of the prosecution is that on 25.01.2007 the parents of PW.1 had gone to Chennai. Therefore, PW.1, who was pursuing her 9th standard, did not attend the school on that day and went to the field to watch



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whether anybody stealing coconut from the tree. At that time, the accused, who is the owner of the neighbouring land, has called PW.1 and came after her. PW.1 sensing danger has tried to run, but the accused restrained her and dragged her to nearby mango tree. He has torn her shirt and after moving her dress committed rape. At that juncture, PW.3, the brother of PW.1, has come to the field and saw the accused fleeing and his sister bleeding. He has covered her sister with torn cloths and brought her home reported to her grand father who was at home and were waiting for her parents return. On their return, the matter was informed to the police. PW.1 has clearly stated that they were in the state of confusion and shock. Therefore, they were not able to take decision immediately, whether to report the matter to the police or not. After some deliberations, they have gone to the police station next day and given the complaint which was marked as Ex.P1. The delay having been explained and the explanation being plausible in the case of this nature. Mere delay of 23 hours in lodging the complaint of rape of a minor girl which will have repercussion in her future life and reputation cannot be construed as a complaint motivated or contrived.

18. The learned counsel for the appellant referring the Medical Report



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Ex.P.3, which contains the opinion of the doctor, submitted that the report indicates (1) No external injuries (2) No bite marks (3) hymen ruptured (4) No hair (5) No nail marks. This establishes the facts that PW.1 was not subjected to any physical injury by the accused as alleged by her in the deposition.

19. From the Medical Report, Ex.P3 though the doctor has observed that no external injury or any violent mark on PW.1 body, the said examination was done on 26.01.2007 at 6.30 p.m., after 30 hours of the alleged occurrence. It is now a settled principle of law of evidence, Physical injury is not a sine qua non for proving forcible rape.

20. The learned counsel for the appellant relying upon the judgment of the Hon'ble Supreme Court in *Santhosh Prasad @ Santosh Kumar* case cited *supra* submitted that the prosecutrix fails to cross the test of sterling witness. Neither the medical nor FSL report supports her version found in the complaint and therefore, the appellant is entitled for an acquittal. In the above referred judgment the complainant is a married lady who alleged that the accused trespass into her house and forcibly raped her. There is no other evidence to support her case and her



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testimony alone was relied by the Court below to convict the accused. In the said circumstances, the Hon'ble Supreme Court held that if the evidence of the prosecutrix is of sterling quality without any doubt, her solitary evidence is sufficient. Provided, it inspires the confidence of the Court, it is absolutely trustworthy and unblemished. In this case the witness who was supposed to corroborate the evidence of the victim did not support her case. The material contradiction in her statement has put her version not believable. The identification of the assailant through mobile phone light was disbelieved by the Hon'ble Supreme Court, since the prosecution has not recovered the mobile phone.

21. On going through the above judgment cited *supra*, this Court finds that the facts of the case cited has no relevance to this case. In the instant case, the occurrence has taken place during day time. The victim and accused are known to each other. PW.3, the brother of the victim had identified the accused and corroborated the evidence of PW.1. In *Rai Sandeep @ Deepu* judgment, the Hon'ble Supreme Court has laid the principle how to determine a witness as to sterling witness and the same is extracted below:-

“22. In our considered opinion, the ‘sterling witness’



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should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have correlation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific



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evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

22. On the anvil of the above principle, if the testimony of PW.1, the



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victim, PW.3-her brother, coupled with evidence of PW.2, Doctor, who on examination of victim has stated that the hymen of the girl ruptured though it is suggested that it could have occurred, while playing kabadi and cycling. The absence of injury in this case does not enure any benefit to the accused person unlike in the case of *Raju and others* cited *supra*, where the prosecutrix alleged that she was gang raped by 13 persons by force, however not a single scratch on her body noticed during the medical examination.

23. The yet another defence take by the accused/appellant is the motive (i.e.) property dispute between both families. This defence also does not favour the case of the accused since the document Ex.D1, the notice is one year prior to the incident and document Ex.D2 is subsequent to the incident. For the land dispute, no parents will stake the reputation of their minor girl and give a complaint that she was raped by the neighbouring land owner. In view of this Court, the presence of enmity is yet another factor to hold the accused guilty who with intention to revenge the minor girl family had raped her.

24. For the above said reason, this Court finds the appeal deserves to be



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dismissed. Since the prosecution has proved the guilt of the accused through PW.1 who had categorically stated that she was wrongfully restrained by the accused person while she was walking through her land and he forcibly raped her.

25. Accordingly, this Criminal Appeal stands dismissed. The conviction and sentence imposed by trial Court stands confirmed. The period of imprisonment already undergone by the accused shall be set off. The learned trial judge shall take steps to enforce this judgment.

22.11.2022

*Index : Yes/No
Speaking order/Non-speaking Order
rpl*

To,

1.The Additional District and Sessions Judge, Fast Track Court II, Ranipettai.

2.The Superintendent, Central Prison, Vellore.

3.The Inspector of Police,
Kaveripakkam Police Station,
Vellore District.

4.The Public Prosecutor,
High Court of Madras,
Chennai.

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Dr.G.JAYACHANDRAN.J.,

rpl

Pre-Delivery Judgment made in
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