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Crl.A.No.254 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.03.2023

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.A.No.254 of 2012

Ramesh

... Appellant

Versus

State by,

The Inspector of Police,

All Women Police Station Poonamalee,

Kancheepuram District.

...Respondent

(Crime No.15 of 2005)

Prayer: Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code, to set aside the Judgment of the Learned Sessions Judge-cum- Mahila Court, Chinglepattu (FAC), Kancheepuram District in S.C.No.208 of 2008, dated 22.03.2012.

For Appellant : Mr. T.R. Ravi

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

JUDGMENT

The sole accused in Crime No.15 of 2005 on the file of the All Women Police Station, Poonamalee, has preferred this appeal, aggrieved by the Judgment dated 22.03.2012 in and by which he was convicted for the offence punishable under Section 376 of IPC., and was imposed with the



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sentence to undergo Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.5,000/- and in default to undergo Simple Imprisonment for three months.

2. On 08.07.2005 when P.W.9/*Geetha*, the Inspector of Police was on duty at All Women Police Station, Poonamallee, P.W.1/*Perumayee* appeared before her and lodged a complaint to the effect that her elder daughter aged 15 years was at home after being a drop out from the school after studying 8th std. For the past one week, she was looking tired and was sleeping all the time, therefore when she enquired and was taken to Jeevan Hospital, it was realised that she was three months pregnant. She further informed that one *Ramesh* proposed his love to her. One day, when she went to the fields to attend her nature calls, at the time the said *Ramesh* compelled her and had physical intercourse with her. The intercourse continued for many days. Thereafter, when P.W.1 and their family members went to the said accused house and demanded him to marry the victim, he refused to do so, and therefore, this complaint.

3. On the strength of the said complaint, P.W.9 registered the case in Crime No.15 of 2005 for the offence under Section 376 of IPC., and took up



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the matter for investigation and laid a final report before the Judicial Magistrate No.I, Poonmallee, in P.R.C.No.424 of 2005 proposing the accused guilty of the offence under Section 376 of IPC. After furnishing the copies under Section 207 of the Criminal Procedure Code, the case was committed to the learned Principal Sessions Judge, Chengalpattu and the case was taken on file in S.C.No.208 of 2008 and it was made over to the Trial Court. Thereafter, the Trial Court heard the submissions of the learned counsel on both sides and the charge under Section 376 of IPC., was framed. The accused denied the charge and stood trial.

4. The prosecution in order to bring home the charges examined the de-facto complainant, *Permumayee*, the mother of the victim as P.W.1; the victim girl as P.W.2; One *Panchamma* and one *Nalini* as P.W.3 and P.W.6; One *Ravichandran*, the Headmaster of the school in which the victim girl was studying as P.W.4; Doctor *Geetha*, who examined the victim as P.W.5; Doctor *Srinivasan*, who examined the accused and issued potency certificate as P.W.7; *Vanaja*, the Expert in Forensic Laboratory, Chennai, who conformed the DNA report of the accused as the father of the child born to the victim, as P.W.8; and the Investigating Officer was examined as P.W.9.



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5. On behalf of the prosecution, the complaint given by P.W.1 was marked as **Ex.P-1**; the school Transfer Certificate of the victim was marked as **Ex.P-2**; the Accident Register copy of the hospital was marked as **Ex.P-3**; The Medical Report of the accused was marked as **Ex.P-4**; The Age Certificate of the victim was marked as **Ex.P-5**; The Requisition Letter, to send the victim girl, and the child born to the victim child, for DNA test was marked as **Ex.P-6**; The DNA test report was marked as **Ex.P-7**; The printed First Information Report was marked as **Ex.P-8**; The Rough Sketch was marked as **Ex.P-9**; The Requisition Letter, to send the victim for medical examination was marked as **Ex.P-10**; The Requisition Letter, to send the accused for medical examination was marked as **Ex.P-11**. The Biological Report from the DNA test was marked as **Ex.P-12**. When the accused was questioned on the material evidence and incriminating circumstances on record as per Section 313 of Cr.P.C., the accused denied the same as false. Thereafter, no evidence was let in on behalf of the accused.

6. Therefore, the Trial Court proceeded to hear the arguments of the learned Public Prosecutor on behalf of the prosecution and the learned Counsel for the accused and by a Judgment dated 23.02.2012, it was found that the prosecutrix has categorically deposed that she was forced and



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pressurized into physical intercourse. The contention of the accused was that she consented was not accepted. Therefore, the defence on behalf of the accused submitted that the victim was more than 16 years and that she consented to the act was rejected and the accused was convicted for the offence under Section 376 of IPC and he was punished as above. Aggrieved by the same, the present appeal is laid before this Court.

7. Heard *Mr.T.R.Ravi*, learned Counsel for the appellant and *Mr.R.Kishore Kumar*, learned Government Advocate (Crl.side) appearing for the respondent.

8. The learned Counsel appearing on behalf of the appellant taking this Court through the charge framed and the evidence of the victim child herself, would contend that it can be seen firstly, that the victim herself has deposed that the intercourse happened on several days and therefore, the entire case of the prosecution as if she went to attend the nature's call, where the accused forced her for intercourse is false.

8.1 The fact that the victim not even telling it out to her mother/P.W.1 or anyone else until she behaved abnormal and P.W.1 herself



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found out upon the physical discomfort and other symptoms would also go to show that she voluntarily consented and participated in the act. Therefore, as per the definition of rape under Section 375 of IPC., as it stood as on the date of the occurrence that is as of the year 2005, if the victim is aged more than 16 years and if she had consented to the act, then the offence is not made out and therefore, the Trial Court erred in convicting the appellant.

8.2 He would argue that even though the date of birth is mentioned as 02.05.1990, it is clearly established on the basis of the medical report that is marked as *Ex.P-3* & *Ex.P-5* given by the Doctor that the girl is aged between 16 to 18 years and the cross-examination of P.W.1 as well as the School Headmaster/P.W.4, is clear that the date of birth was not entered based on the birth certificate, there is a likelihood of error, therefore, when the medical evidence on record clearly suggests that the girl is more than 16 years of age and that she consented to the act and the offence of rape is not made out.

8.3 This apart, the learned counsel would take this Court through the evidence of P.W.2. On a cumulative reading of the evidence of P.W.2, he would contend that it can be seen that there was a love affair. Further, the



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learned Counsel would submit that after pregnancy was confirmed, it was the family members of the victim, who actually refused for the marriage and not family members of the first accused as alleged in the complaint.

8.4 This apart the victim proceeded to give birth to a son by name XXX (name redacted), and who is now aged about 17 years. The victim got married subsequently with a third person and she entered into a matrimonial life without hiccup whatsoever and she is now residing at *Usilampatty*. Similarly, the accused also subsequently got married and he is living in *Pallavaram*, Chennai, along with his wife and two children. Both the accused and the victim are pursuing their life in their own ways without any interference whatsoever. The minor son born to the victim child is now living with his grandfather, namely, *Mr.C.Palani*, at Door No.2389, *Periyar Street, Annai Indira Nagar, Kerugambakkam, Kancheepuram District*.

8.5 Upon the suggestion of this Court, the appellant/accused also volunteered to pay a sum of Rs.5 Lakhs towards the maintenance of the said son born to the victim and today, to that effect a Demand Draft drawn on Canara Bank, *Kancheepuram* Branch, for a sum of Rs.5 Lakhs, bearing No.249356 also is produced before this Court. Therefore, he would submit



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that in any event, the same can also be taken into account, and in extraordinary circumstances, this Court would exercise its power under the proviso to Section 376 as it stood then.

9. Per contra, *Mr.R.Kishore Kumar*, learned Government Advocate (Criminal side) appearing for the respondent would submit that firstly, as per the evidence of P.W.2 the age of the victim was less than 16 years and there was no question of any consent whatsoever and when the school certificate has been produced and the Headmaster was also examined, the medical certificate given by the Radiological analyst cannot be given precedence and in view thereof, the entire argument relating to the consent should be rejected. On adjournment, and after getting instructions from the concerned Police, he would confirm the factual position as to the status of the marriage of the victim and status of marriage of the accused. As a matter of fact, the accused and child born to the victim are present before this Court along with his grandfather, today. Therefore, on the question of sentence, he would leave it to the Court.

10. I have considered the rival submissions made on behalf of both sides and perused the material records of this case.



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11. Firstly, even assuming for a moment that the age of the victim child was more than 16 years and less than 18 years and that if the girl has consented, it would not make out an offence punishable under Section 376 of IPC, this Court had an occasion to consider that 'consent' means in **Gopi @ Saravanan Vs. State¹**, and it is useful to extract the relevant portion hereunder:-

“12.....

.....Upon reading of Section 90 of the Indian Penal Code, it will be clear that (a) there must be consent; (b) such consent should not be out of fear or misconception. As per Section 114-A of the Evidence Act, there is a presumption of absence of consent in the offense of rape if the victim deposes that she did not consent. To rebut this presumption, there must be positive evidence let in by the accused and mere absence of a valiant and violent effort on the part of the victim certainly does not amount to consent. As early as in the year 1957, a Learned Judge of the **Punjab & Haryana High Court, had in Rao Harnarain Singh and others Vs. State**, has most eloquently put it as follows :

“A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be “consent” as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after



the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has wished as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure. A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.

(emphasis supplied)

*Thus, 'submission' would not amount to 'consent'.....
.....”*

12. Therefore, the word 'consent' means voluntary participation in the act. Therefore, when the girl has deposed that owing to the mental pressure extracted by the accused in the pretext of an affair and promise to marry coupled with physically forcing himself upon her, she did not resist or



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physically attempt to wriggle out of the same and it would not amount to 'consent'. In any event, as contended by the learned Government Advocate, it can be seen that the girl was aged less than 16 years at the time of occurrence, therefore, I am of the view that finding of the guilt for the offence punishable under Section 376 of IPC., cannot be interfered by this Court.

13. Now coming to the sentence, this Court, even while considering the seriousness of the offence relating to rape, has taken into account whether the physical intercourse, was borne out of physical violence and cranial pressure or out of an immature affair leading to pressure on the victim to participate in this act. If the said circumstances are taken into account, by an overall reading of the evidence of P.W.1 and the cross-examination, it can be seen that the victim girl yielded/ and was pressurized on the strength of the immature/adolescent affair as proposed by the accused. Secondly, it can be seen that both the accused as well as the victim have moved on with their lives and living with their respective spouse and children. The only hidden victim, in this case, is the child born to the victim, who has been taken care of by the noble grandfather. The child is now 17 years and he is present before this Court.



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14. Unfortunately, the child is a school dropout at 9th std. The Grandfather orally represented that if he had adequate financial support, he will educate to the child. In that view, considering the fact, the accused also produced the original Demand Draft before this Court today, which is now being handed over to *Mr.C.Palani*, the grandfather/de-facto complainant/guardian of the minor son born to the victim, namely, XXX (name redacted), aged 17 years. Considering the fact that the accused had been under incarceration for a period of 1 year and 2 months, both pending the trial and after the conviction before the sentence was suspended, I am of the view that this is a fit and extraordinary case to exercise the powers under the proviso to Section 376, to reduce the sentence less than the minimum sentence of 7 years for the special reasons, which are enumerated as above.

15. It is to be noted that the victim is living with the current family and it would be highly insensitive even to disturb her or to make her as a part of the present proceedings. Similarly, the hidden victim in this case, namely, the male child, is living comfortably with the grandfather.

Therefore, the said facts make this case peculiar and special so as to invoke

the power to reduce the sentence.



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16. The minor child who is present before this Court, is enquired by this Court. The minor represented that he dropped out from the school because he was not very studious, but he is very keen to pursue his education if there is some financial support. Today the Demand Draft was handed over to *Mr.C.Palani*/the grandfather of the child so that the Demand Draft will be deposited into the bank account. Both of them agreed that the amount will be spent for the future education of the child. An undertaking was given before this Court that the child will be put into some private tutorial center for private studies, in which, he can first pass out the minimum education qualification of 10th standard and thereafter, depending upon his willingness and interest he can pursue the further education in the form of vocational courses or otherwise and the amount will be spent only for the educational purposes. The child also assured before this Court that he will also pursue his education, and thereafter, he can go for employment. The Demand Draft has been duly handed over after getting the receipt.

17. In the result,

(i) The Criminal Appeal is partly allowed;

(ii) The conviction of the appellant for the offence under Section 376

<https://www.mhc.tn.gov.in/> of IPC, is confirmed;



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(iii) The substantive sentence of imprisonment imposed by the Trial Court as Rigorous Imprisonment for a period of 10 years is modified to the period which he has already undergone and the fine amount shall remain the same;

02.03.2023

Index:Yes

Speaking order

Neutral Citation : Yes

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To

- 1.The Sessions Judge-cum- Mahila Court, Chinglepattu (FAC),
Kancheepuram District.
- 2.The Inspector of Police,
All Women Police Station Poonamalee,
Kancheepuram District.
- 3.The Public Prosecutor,
Madras High Court.



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D.BHARATHA CHAKRAVARTHY, J.

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