



Criminal Appeal No.70 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.04.2023

CORAM

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

Criminal Appeal No.70 of 2017

Magendiran
S/o.Srinivasan

... Appellant/Accused No.2

Vs.

State represented by
The Inspector of Police,
All Women Police Station,
Namakkal, Namakkal District.
Crime No.2/2014

... Respondent/Complainant

Prayer : Criminal Appeal filed u/s.374 of the Code of Criminal Procedure against the judgment passed by Sessions Judge, Fast Track Mahila Court, Namakkal, in S.C.No.93 of 2014, dated 19.01.2017.

For Appellant : Mr.K.Vishwajeeth Yogeshwara
for Dr.G.Krishnamurthy

For Respondent : Mr.L.Baskaran
Government Advocate [Crl.side]



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JUDGMENT

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This Criminal Appeal has been filed against the judgment and order passed in S.C.No.93 of 2014, dated 19.01.2017, convicting the appellant [A2] for offence u/s.376 r/w 511 IPC and sentencing him to undergo five years rigorous imprisonment and to pay fine of Rs.2,000/-, in default, to undergo three months rigorous imprisonment.

2. The case of the prosecution is as follows:

2.1. The complainant [PW-1] married A1 on 13.05.2011. On the demand made by A1 and A3 [mother of A1] gold jewellery to the tune of 10 pounds, a gold ring and other household articles were given at the time of marriage. The complainant was living in a joint family and A2, who is the brother of A1 was living in the same house. A1 is said to be addicted to alcohol and was repeatedly harassing the complainant. The further case of the prosecution is that A2 had the habit of peeping into the bathroom when the complainant takes bath and was continuously harassing the complainant. When this was complained to A1, he directed the complainant to adjust with A2. Ultimately, on 08.11.2011, at about 04.00 p.m., A2 is said to have



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entered the bathroom, pushed down the complainant, attempted to remove her clothes and torn her blouse. With very great difficulty, the complainant escaped from A2.

2.2. The complaint [Ex.P1] was given by PW-1 on 10.12.2013 at 16.30 hours against A1 to A3. On receipt of the complaint, PW-8, Sub-Inspector of Police, All Women Police Station, Virudhunagar, registered the First Information Report [Ex.P6] in Crime No.2 of 2014 for offences u/s.498-A, 376 r/w 511, 506(i) IPC, Section 4 of the Dowry Prohibition Act and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act.

2.3. The investigation was taken up by PW-10, Inspector of Police. PW-10 arrested A2 and remanded him to judicial custody. The Investigation Officer also recorded the statements of witnesses u/s.161(3) Cr.P.C. A1 and A3 obtained anticipatory bail before the High Court. PW-10 prepared the alteration report marked as Ex.P7 and the offence was altered to Sections 498-A and 506(ii) IPC, 376 r/w 511 r/w 109 IPC and Section 4 of the Dowry



Prohibition Act, 1998.

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2.4. On completion of investigation, the final report was filed on 05.07.2014 before the Judicial Magistrate I, Namakkal and the same was taken on file in P.R.C.No.7/2014. Copies were issued to the accused persons u/s.207 Cr.P.C. and the case was committed u/s.209 Cr.P.C. and it was made over to the Court below. The trial Court framed charges against A1 to A3 for offences u/s.498-A IPC, 376 r/w 511 r/w 109 IPC, Section 4 of Dowry Prohibition Act, against A1 for offence u/s.506(ii) IPC and against A2 for offence u/s.376 r/w 511 IPC. When these charges were put to the accused persons, the same were denied and the accused persons pleaded not guilty.

2.5. The prosecution examined PW-1 to PW-10 and marked Exs.P1 to P7. The incriminating evidence that was collected during the course of trial was put to the accused persons when they were questioned u/s.313(1)(b) Cr.P.C. and they denied the same as false.

2.6. The trial Court, on considering the facts and circumstances of the



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case and on appreciation of oral and documentary evidence, came to a conclusion that the prosecution has proved its case beyond reasonable doubts as against the appellant [A2] for offence u/s.376 r/w 511 IPC and accordingly, sentenced him in the manner stated supra. A1 and A3 were acquitted from all charges. This Criminal Appeal has been filed by appellant [A2] against his conviction u/s.376 r/w 511 IPC.

3. Heard Mr.K.Vishwajeeth Yogeshwara, learned counsel for appellant and Mr.L.Baskaran, learned Government Advocate [Crl.side], appearing for the respondent/State.

4. This Court has carefully considered the submissions made on either side and perused the materials available on record.

5. There is no dispute with regard to the fact that A2 is the brother of A1 and he was also living in the same house. PW-1, in her evidence, has categorically stated that right from the beginning, A2 was continuously



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putting her to embarrassment and he also had the habit of peeping into the bathroom when PW-1 was taking bath. She has further stated that he peeps into the bedroom when she and A1 are sleeping. In view of the same, it is clear that A2 was indulging in voyeurism. PW-1 has also stated in her complaint that on 08.11.2011 at about 04.00 p.m., A2 entered into the bathroom when she was taking bath and attempted to remove her clothes and in the said process, her blouse was torn and he attempted to rape PW-1. Unfortunately, A2 has not cross-examined PW-1 in this regard and the allegations made by PW-1 went uncontroverted.

6. PW-2, who is the mother of PW-1, has also spoken about the harassment meted out by A2 and the complaint made by PW-1 to her mother in this regard. PW-2 also has not been cross-examined by A2 in this regard.

7. All the other witnesses have spoken about the marital discord between A1 and PW-1 and the dowry harassment made by A1 and A3. The



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evidence of all those witnesses may not have any bearing insofar A2 is concerned since the specific allegation made against A2 is that he attempted to rape PW-1.

8. Section 218 Cr.P.C. mandates that for every distinct offence of which any person is accused, there should be a separate charge and every charge should be tried separately. If persons are jointly tried for more than one offence, the offence must be committed in the course of same transaction.

9. In the instant case, the allegation against A1 and A3 pertains to demand for dowry and cruelty meted out to PW-1. The other independent allegation is that A2 was sexually harassing PW-1 and had attempted to rape her and it was abetted by A1 and A3. By no stretch, these two offences can be tried together since they are independent offences, which do not fall within the course of the same transaction. Unfortunately, neither the trial Court nor the learned counsel appearing for the accused persons brought



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this to the notice of the trial Court and as a result, a common trial was conducted as against all the three accused persons for various offences. This is clearly a case of misjoinder of charges, which ought not to have been done by the trial Court.

10. The contravention of the mandate provided u/s.218 Cr.P.C. is curable u/s.464 and 465 of Cr.P.C. unless the accused person is able to show that there was failure of justice occasioned due to misjoinder of charges. Useful reference can be made to the judgment of the Apex Court in ***Kamalanantha and others v. State of Tamil Nadu [AIR 2005 SC 2132]***.

11. The evidence of PW-1 and PW-2 which went uncontroverted on the side of A2 sufficiently proves the occurrence. The Court below has convicted A2 for offence u/s.376 r/w 511 IPC on the ground that there was an attempt to rape.



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12. To take recourse to Section 511 IPC, two conditions must be satisfied and they are:

- (a) the offender should have done some act towards commission of the main offence; and
- (b) such an attempt is not expressly covered as a penal provision elsewhere in the Indian Penal Code.

13. Keeping the above ingredients in mind and applying the same to the facts of the present case, the relevant portion of the evidence of PW-1 is extracted hereunder:

"08.11.2011 தேதியில் மாலை 4 மணியளவில் நான் வீட்டில் படுத்திருந்தபோது என்னை மல்லாக்க தள்ளிவிட்டு என் மேல்படுத்துவிட்டு என் சட்டையெல்லாம் கிழித்துவிட்டாரு. நான் சத்தம்போட்டுகிட்டு வெளியே ஓடி வந்துவிட்டேன்."

14. The above description given by PW-1 clearly brings this case u/s.354 IPC. The act of pushing a woman, attempting to remove her clothes coupled with an attempt made to commit sexual intercourse, would certainly outrage the modesty of the woman and it is sufficient to constitute the



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offence u/s.354 IPC. Since the act of A2 is specifically covered u/s.354 IPC, the present case cannot be brought within the ambit of Section 511 IPC. In view of the same, the conviction made by the Court below u/s.376 r/w 511 IPC, is unsustainable. The appellant is liable to be convicted u/s.354 IPC. Accordingly, the conviction imposed by the trial Court stands modified.

15. Insofar as sentence is concerned, the imprisonment is confined to the period already undergone by the appellant and the appellant shall pay compensation of a sum of Rs.25,000/- [Rupees Twenty Five Thousand only] to PW-1 u/s.357(3) Cr.P.C., in default, to undergo six months simple imprisonment. The compensation amount shall be deposited before the trial Court on or before 26.04.2023. On such deposit, the same shall be paid to PW-1.

16. In the result, the judgment and order passed by Sessions Judge, Fast Track Mahila Court, Namakkal, in S.C.No.93 of 2014, dated 19.01.2017, is modified to the extent indicated herein above and this



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Criminal Appeal is partly allowed.

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Post this case under the caption "for reporting compliance" on
27.04.2023.

05.04.2023

Index : Yes

Speaking Order / Non Speaking Order

Neutral Citation: Yes

gm

To

1.The Sessions Judge,
Fast Track Mahila Court,
Namakkal.

2.The Inspector of Police,
All Women Police Station,
Namakkal, Namakkal District.
Crime No.2/2014

3.The Public Prosecutor,
High Court, Madras.

N. ANAND VENKATESH, J



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