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Crl.A.(MD) No.835 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	30.11.2023
Pronounced on	22.12.2023

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR
and
THE HONOURABLE MR.JUSTICE R.SAKTHIVEL

Crl.A.(MD) No.835 of 2022

Karuppachamy
S/o.Aandi

... Appellant

Vs.

State represented by
The Inspector of Police,
All Women Police Station,
Rameswaram,
Ramanathapuram District.
(Crime No.5 of 2017)

... Respondent

Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 [Act No.2 of 1974] praying to call for the records in S.C.No.32 of 2018 on the file of the Mahalir Neethimandram, Fast Track Mahila Court, Ramanathapuram and set aside the Judgment dated 25.02.2022 and acquit the appellant of the charges framed against him.

For Appellant : Mr.T.J.Ebenezer Charles
for Mr.L.Prabhu

For Respondent : Mr.R.Meenakshi Sundaram
Additional Public Prosecutor



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J U D G M E N T

WEB COPY **R.SAKTHIVEL, J.**

This Criminal Appeal is preferred by the 'appellant/accused' [henceforth 'accused' for the sake of brevity] assailing the 'Judgment dated February 25th, 2022' [henceforth 'impugned Judgment' for the sake of clarity] passed by 'The Fast Track Mahila Court, Ramanathapuram' [henceforth 'Trial Court' for the sake of brevity] in Sessions Case No.32 of 2018 in which the accused was convicted for the offences punishable under Sections 450 and 376(2)(m) of 'The Indian Penal Code' 1860 (Act No.45 of 1860) [henceforth 'IPC' for the sake of brevity] and sentenced as follows:

<i>Offence u/s.</i>	<i>Sentence</i>
Section 450 of IPC	To undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs.3,000/-, in default thereof, to undergo Simple Imprisonment for a further period of 1 year.
Section 376(2)(m) of IPC	To undergo Imprisonment for Life i.e., for remainder of the accused's natural life and to pay a fine of Rs.10,000/-, in default thereof, to undergo Simple Imprisonment for a further period of 2 years.
Note: The period of imprisonment already undergone was ordered to be set off under Section 428 of Criminal Procedure Code, 1973 (Act No.2 of 1974) [henceforth 'Cr.P.C.' for the sake of brevity].	



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2. The case of the prosecution, in brief, is as follows:

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2.1. P.W.1 resides in Pamban Chinnappalam along with her husband, son, daughter, sister and sister's daughter. Her daughter namely, X (name masked for the sake of privacy) is the victim in this case [henceforth 'victim' for the sake of convenience and clarity]. Victim is mentally challenged. P.W.1 and her husband are engaged in fishing avocation due to which they would leave their house early in the morning, leaving victim in the care and custody of victim's aunt (P.W.1's sister). The sole accused in this case is also residing in Pamban Chinnappalam.

2.2. On August 24th, 2017, P.W.1 and her husband left the house at 05.00 hours in the morning, leaving victim along with victim's aunt (P.W.1's sister) and victim's cousin (P.W.1's sister's daughter). At about 09.00 hours on the aforementioned date, victim's aunt left the house to Government Hospital to buy medicines while, victim's cousin was in the kitchen at the back of the house. At that time, the accused trespassed into victim's house, disrobed victim and forcibly raped her. Upon witnessing the accused committing rape upon victim, victim's cousin raised alarm. Upon hearing this, neighbours and people in the vicinity rushed to the scene of occurrence and the accused ran away.



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2.3. Upon learning the said incident from victim's aunt, P.W.1 lodged a Written Complaint at All Women Police Station, Rameshwaram on the aforementioned date at 15.00 hours. Pursuant to the complaint, Investigating Officer (P.W.18) registered an FIR (Ex.P.10) in Crime No. 5/2017 under Sections 450 and 376(2)(m) of IPC. Then she went to the scene of occurrence at 16.00 hours on the same day and prepared Rough Sketch (Ex.P.12) and Observation Mahazar (Ex.P.11) in the presence of the witnesses Karupasamy (P.W.15) and Praveen (P.W.16). Then she examined the witnesses to the incident and recorded their Statements. Then at 18.30 hours, she arrested the accused at Pamban Bus Stop and recorded the Voluntary Confession given by him in the presence of witnesses Ibrahim Shaw (P.W.5) and Nambuvel (P.W.8). Then she sent the accused to judicial custody. Then she sent a requisition to the Court and sent the accused for medical examination along with Chandrasekar (P.W.6) and Saravanan (P.W.9). Then she sent the victim for medical examination along with police personnels namely, Geetha (P.W.10) and Chithra (P.W.14). Thereafter, Investigating Officer (P.W.18) got transferred and Investigating officer (P.W.19) took over the case.



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WEB COPY 2.4. Investigating Officer (P.W.19) examined the medical and forensic witnesses in this case. After completion of investigation, she laid Final Report against the accused before the learned District Munsif cum Judicial Magistrate, Rameshwaram.

2.5. The learned District Munsif cum Judicial Magistrate, Rameshwaram took the case on file as PRC.No.07/2018. After furnishing copies under Section 207 of Cr.P.C to the accused, he committed the case file to the Principal Sessions Court, Ramanathapuram under Section 209(a) of Cr.P.C since the offence under Section 376 is exclusively triable by Sessions Court.

2.6. The learned Principal Sessions Judge, Ramanathapuram after receiving the case file, assigned Sessions Case No.32 of 2018 and made over the case to the Trial Court. The Trial Court framed charges under Sections 450 and 376(2)(m) of IPC against the accused on May 24th, 2018, read over and explained the charges to the accused in Tamil. Since the accused pleaded not guilty, trial was ordered.



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2.7. Before the Trial Court, to prove its case, the prosecution examined P.W.1 to P.W.19 (Witnesses) and marked Ex.P.1 to Ex.P.14 (Documents). Accused side has not examined any witness. No exhibits has been marked by the accused side.

2.8. After a detailed trial, the Trial Court found the accused guilty for the charges levelled against him under Sections 450 and 376(2)(m) of IPC and sentenced him as stated *supra* in paragraph no.1.

2.9. Feeling aggrieved with the Conviction recorded and Sentence imposed by the Trial Court, the sole accused has preferred this Criminal Appeal under Section 374(2) of Cr.P.C.

Arguments

3. Mr.T.J.Ebenezer Charles, the learned counsel for the accused argued that the alleged offence took place at 09.00 hours on August 24th, 2017 and the same was allegedly reported to police at 15.00 hours on the aforementioned date, however, the First Information Report [FIR] (Ex.P. 10) was received by the Judicial Magistrate at about 22.30 hours on the



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aforementioned date and hence there was a delay in registering and forwarding FIR (Ex.P.10) to the learned Judicial Magistrate; that the evidence of P.W.2 has contradictions with the prosecution's case; that the Trial Court failed to appreciate the contradictions in the evidence of prosecution witnesses as per law; that the prosecution failed to examine the neighbours of P.W.1; and that the prosecution failed to prove the case beyond reasonable doubt. Accordingly, he prayed to allow this Criminal Appeal, set aside the impugned Judgment and acquit the accused. Further, as an alternative plea, he prayed for the minimum sentence of 10 years.

4. In response to the above arguments, Mr.R.Meenakshi Sundaram, learned Additional Public Prosecutor for the respondent-State submitted that evidence of P.W.2 cited as an ocular witness is natural, reliable and trustworthy; that P.W.2 is rustic and illiterate and therefore minor contradictions in her evidence shall have no impact; that the evidence of P.W.2 has been corroborated by medical evidence; that P.W.1 and her husband had gone fishing and returned only after learning about the incident through P.W.2 and therefore the delay in filing the Written Complaint (Ex.P.1); that there is no enmity or motive between the parties; that the prosecution explained the injury of the accused; that the defence



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theory that P.W.1's son inflicted cut injury on the accused's head has not been established, and that the prosecution has proved the case beyond reasonable doubt. Accordingly, he prayed to dismiss this Criminal Appeal and sustain the Trial Court's Conviction and Sentence.

5. This Court has perused the case file and heard either side. The following points arose for consideration:-

- i. Whether the accused trespassed into P.W.1's house and committed the offence of rape upon the victim?
- ii. Whether the act of the accused attracts the offence punishable under Section 376(2)(m) of IPC or the offence punishable under Section 376(2)(l) of IPC?
- iii. Whether there exist any reason to interfere with the Impugned Judgement?

Discussion and Decision for Point Nos.(i), (ii) & (iii)

6. In this case, P.W.1 is the mother of the victim, P.W.2 is victim's cousin cited as ocular witness, P.W.3 is the step father of the victim, P.W.4 is victim's aunt, P.W.11 to P.W.13 are medical witnesses and P.W.18 & P.W.19 are the investigating officers.



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WEB COPY **Delay in registering and forwarding FIR**

7. According to the case of prosecution, the occurrence took place at 09.00 hours on August 24th, 2017 at P.W.1's house. At that time victim and victim's cousin (P.W.2) were alone in the house. P.W.2 is a rustic and illiterate woman. Immediately, after witnessing the occurrence, she informed her mother who in turn informed P.W.1 about the same. P.W.1 in her cross-examination has deposed that she along with her husband (P.W.3) and son, was at Alagan Kulam at the time of occurrence and that it would take 1½ hours in bus to return home from there. In this case, FIR has been lodged at 15.00 hours on the aforementioned day and the same was received by the learned Judicial Magistrate at 22.30 hours on the aforementioned date.

7.1. This Court finds it apposite to cite *Tulshidas Kanolkar's* case [*Tulshidas Kanolkar Vs. State of Goa*, reported in (2003) 8 SCC 590] wherein the Hon'ble Supreme Court has held that when accusations of rape are involved, delay *per se* is not a mitigating factor. Relevant extract is as follows.



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“5. We shall first deal with the question of delay. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of the first information report does not in any way render the prosecution version brittle”



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7.2. In view of evidence of P.W.1 coupled with the nature of the case and the narrative above, this Court is satisfied that there is no unnatural delay in registering FIR and forwarding it to the learned Judicial Magistrate.

Victim's age and mental health condition

8. Dr.Vallipriya (P.W.11) is the Doctor who examined the victim at 01.30 hours on August 25th, 2017 i.e., the day next to the day of occurrence. Based on her examination, she opined that the victim's age is between 18-20 years.

8.1. Dr. Rajkumar (P.W.13) is the Doctor who examined the victim and conducted X-Ray examination. He opined that the victim is above the age of 18 years as on August 25th, 2017.

8.2. Further, Dr.Periyar Lenin (P.W.12) is the Doctor who examined the victim and issued Ex.P.6 Certificate. He opined that the victim is a "known case of mental retardation with behavioural disturbances, whose severity is moderate in nature". The accused side did not dispute the said evidence.



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WEB COPY 8.3. Hence, this Court is of the view that the victim was above the age of 18 years and was mentally challenged at the time of alleged occurrence.

Ocular Witness

9. Victim's Cousin (P.W.2) is the sole ocular witness in this case. She would depose that on the fateful day, she and victim were alone in the house; that she was cooking in the kitchen; that upon hearing victim's cry, she rushed to see that the accused had disrobed victim and was lying down on top of victim without trousers; and that upon seeing her, the accused ran away. In her cross-examination, she would depose that she is an illiterate; that upon hearing her alarm, neighbours rushed to the scene and assaulted the accused; that she informed her mother about the incident once her mother came back who in turn informed P.W.1; and that the kitchen is situate near the front entrance of the house and the accused trespassed through the back entrance and that she went to Police Station along with the victim and preferred an oral complaint.



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9.1. Further, the evidence of victim's Aunt (P.W.4) corroborates the evidence of the sole ocular witness (P.W.2). Medical evidence stated *infra* also corroborates the evidence of P.W.2.

9.2. Further, victim's mother (P.W.1) deposed that she had gone fishing and upon learning about the incident, she returned home and thereafter, lodged Complaint (Ex.P.1) at 15.00 hours on the fateful day. Her testimony also supports the version of P.W.2.

9.3. Considering the fact that P.W.2 is a rustic and illiterate; that her evidence as to witnessing the incident is clear and cogent; that her evidence is corroborated by medical evidence; and that the deposition is roughly 20 months after the incident, this Court is of the view that her contradictory evidence that she preferred an oral complaint before Police along with the victim soon after the incident, does not affect the case of the prosecution; and that her evidence is natural, reliable and trustworthy.

10. To be noted, Investigating Officer (P.W.18) went to the scene of occurrence at 16.00 hours on the fateful day and prepared Rough Sketch



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(Ex.P.12) and Observation Mahazar (Ex.P.11) in the presence of the witnesses Karupasamy (P.W.15) and Praveen (P.W.16). This coupled with the testimony of the ocular witness (P.W.2) proves the place of occurrence.

Medical evidence

11. Dr.Vallipriya (P.W.11) medically examined the victim on August 25th, 2017 i.e., the day next to the day of occurrence. She deposed that there were no external injuries on the victim's body; that victim's hymen was ruptured; that her reproductive organ was bleeding at the time of her examination; that there is no spermatozoa or hair found in victim's body; that the victim was mentally challenged, deaf and dumb. Further she opined based on her examination that, the victim could have been raped. To be noted, Final Report (Ex.P.5) was marked through P.W.11 and Ex.P. 11 was issued after considering Biological Report (Ex.P.13) and Serological Report (Ex.P.14).

11.1. Dr.Govindhan (L.W.20), Assistant Surgeon, Government Headquarters Hospital, Ramanathapuram medically examined the accused and issued Certificate (Ex.P.8) and opined that there is nothing to suggest



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that the accused cannot perform sexual intercourse. Ex.P.8 was marked through Dr. Rajkumar (P.W.13).

11.2. Conjoint reading of the evidence of ocular witness (P.W.2) and the medical evidence proves the case of the prosecution that the accused committed rape upon the victim.

11.3. Further, the incident took place inside the house. Naturally, neighbours could not have witnessed the same. So, the contention of the learned counsel for the accused that the neighbours of P.W.1 were not examined does not hold water.

11.4. The accused side took a defence that P.W.1's son inflicted cut injuries using billhook on the accused's head; that a Panchayat was convened to settle the dispute; that the accused did not consent for the compromise arrived at by the Panchayatdars and therefore, P.W.1 foisted this false complaint against the accused.

11.5. To be noted, the learned Judicial Magistrate has recorded a head injury on the accused when the accused was produced before him for



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remand on August 24th, 2017. However, P.W.1, P.W.3 and P.W.4 have deposed that there was some unrest in their area after the incident and that accused was assaulted by some people in their area. Their evidence is natural and believable. Therefore, this Court is of the view that the defence has not proved its theory as per law.

11.6. The prosecution examined Tmt.Parimala, Spl. Teacher and Tutor, Regional Wellness Center (வட்டார வளமையம்) as P.W.17. She deposed that she examined the victim and opined that victim can neither communicate through sign language nor speak and that she cannot depose owing to her mental health disability.

12. The prosecution proved that the victim is mentally challenged and is unable to communicate consent. Even assuming that the victim gave her consent, consent given by a mentally unsound person is not valid in law. The prosecution, in view of the evidence of ocular witness (P.W.2) has proved that the accused trespassed into house of P.W.1 with an intention to commit rape upon victim. However, there is nothing on file to suggest that the act of the accused would attract the offence punishable under Section 376(2)(m) of IPC but it rather attracts the offence



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punishable under Section 376(2)(l) of IPC. For ease of understanding,

Section 376(2)(l) of IPC and Section 376(2)(m) of IPC are extracted hereunder:

<i>Section 376(2)(m) of IPC</i>	<i>Section 376(2)(l) of IPC</i>
376. Punishment for rape - (1) ... (2) Whoever,_ ... (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman, ... shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.	376. Punishment for rape - (1) ... (2) Whoever,_ ... (l) commits rape on a woman suffering from mental or physical disability ... shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

13. Hence, this Court is of the view that the act of the accused would attract the offences punishable under Sections 450 and 376(2)(l) and that the conviction recorded by the Trial Court under Section 376(2)



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(m) of IPC is misconstrued and deserves to be modified as Section 376(2)

WEB COPY (l) of IPC.

14. At the time of occurrence, the accused was 48 years old, married and had two girl children. The accused, P.W.1 and P.W.3 are all involved in fishing avocation. They do not even have their own boat for fishing. There is no external injuries on the victim's body as alluded to *supra*. Considering the entire facts and circumstances of the case, this Court is of the view that the accused shall be sentenced with Rigorous Imprisonment of 10 years with fine for the offence punishable under Section 376(2)(l) of IPC. Point Nos.(i) (ii) and (iii) are answered accordingly.

15. Resultantly,

- i. This Criminal Appeal is partly allowed.
- ii. Conviction recorded by the Trial Court for the offence punishable under Section 450 of IPC and Sentence imposed by the Trial Court for the said offence is sustained.
- iii. Conviction recorded by the Trial Court for the offence punishable under **Section 376(2)(m) of IPC** is converted as **Section 376(2)(l) of IPC** and Sentence imposed by the Trial Court is modified as follows:



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“Accused (appellant) is sentenced to undergo **Rigorous Imprisonment for 10 years** and to pay a fine of Rs.10,000/-, in default thereof, to undergo Simple Imprisonment for a further period of **1 year.**”

- iv. The period of imprisonment already undergone is ordered to be set off under Section 428 of Cr.P.C.
- v. The above sentences shall run concurrently.

(M.S., J.) (R.S.V., J.)
22.12.2023

Index: Yes
Neutral Citation: Yes
Internet: Yes
Speaking order

JEN

To

- 1.The Inspector of Police,
All Women Police Station,
Rameswaram,
Ramanathapuram District.
- 2.The Sessions Judge,
Fast Track Mahila Court, Ramanathapuram.
- 3.The Superintendent,
Central Prison, Madurai.
- 4.The Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.



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M.SUNDAR, J.,
and
R.SAKTHIVEL, J.,

JEN

Pre-Delivery Judgment made
in
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22.12.2023