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CRL.A.No.565 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.11.2023

DELIVERED ON : 02.08.2024

CORAM

THE HONOURABLE MR.JUSTICE **SATHI KUMAR SUKUMARA KURUP**

CRL.A.No.565 of 2016

Raja : 1st Accused/Appellant

Vs.

The State Rep. By
The Superintendent of Police,
Kambainallur Police Station,
Dharmapuri
Crime No.341/2002

: Complainant/Respondent

PRAYER: Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code, to set aside the Order of conviction and sentence of the learned Principal Sessions Judge, Dharmapuri in S.C.No.16 of 2014, order dated 24.11.2015.

For Appellant : Ms.Vijayalakshmi K.Rajaratnam
Legal Aid Counsel

For Respondent : Mrs.G.V.Kasthuri
Additional Public Prosecutor



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ORDER

This Criminal Appeal has been filed to set aside the Order of conviction and sentence of the learned Principal Sessions Judge, Dharmapuri in S.C.No.16 of 2014, order dated 24.11.2015.

2. The learned Counsel nominated by Tamil Nadu Legal Aid Committee, Ms.Vijayalakshmi submitted her arguments stating that the Appellant was convicted for the offences under Section 376 of IPC and under provisions of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989.

3. The learned Counsel for the Appellant invited the attention of the Court to the charges framed by the trial Court and the depositions of P.W-1 to P.W-19 and Ex.P-1 to Ex.P-24. It is the submission of the learned Counsel for the Appellant that there were contradictions between the evidence of P.W-1/Father of the victim and P.W-5/Victim. As per the evidence of the father of the victim, the victim was a deaf and dumb. When she was waiting in the bus stop, she was taken away by the Accused to an isolated place to a grove and committed forceful sexual intercourse. The



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parents of the Victim searched for her in their relatives house. The next day, the victim returned home by her own by 5 p.m.

4. The learned Counsel for the Appellant invited the attention of the Court to the evidence recorded by P.W-5/victim in which it was stated that she was taken by the Accused on cycle whereas in the statement given by her under Section 164 of Cr.P.C before the learned Judicial Magistrate, she was taken by the Accused by holding her hand through a foot path to a coconut grove and the Accused had alleged to have committed forceful sexual intercourse on her. From the evidence of the victim, it was clear and she herself admitted that she went on her own volition. The Court questioned the learned Judicial Magistrate who recorded the statement under Section 164 of Cr.P.C., that it was found, there had been correction by interpolation for which the learned Judicial Magistrate submitted it was written by hand by the victim herself which was the interpolation statement that she went on her own. Therefore the conviction recorded by the learned Sessions Judge under Section 376 of IPC is perverse.

5. Also the learned Counsel for the Appellant invited the attention of this Court to the evidence of Doctor and the marking of documents issued by the Doctor under Ex.P-8 and Ex.P-10. As per the Radiologist report, the



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victim was aged 19 years. She had crossed the age of majority. Even though she is a deaf and dumb, She could resist or protest to seek help. But, as per her own evidence, she had not done so. She was not forcefully taken. The learned Counsel for the Appellant submits that initially the case was registered under Section 366 and 376 of IPC and there were two Accused. Subsequently after trial, the Accused-2 was acquitted based on appreciation of evidence.

6. The learned Counsel for the Appellant also invited the attention of the Court to the discussion of evidence by the learned Sessions Judge wherein she had discussed the contradiction. Even though there were contradictions, the learned Sessions Judge had convicted the Accused for offence under Section 376 of IPC. Therefore the same is perverse and is to be set aside.

7. The learned Legal Aid Counsel for the Appellant had relied on the following rulings:

(I) **(2021) 5 SCC 626** in the case of ***Shivaji Chintappa Patil Vs. State of Maharashtra***. The relevant portion reads as follows:

“33. This Court, recently, in the case of Devi Lal (supra) observed thus:-



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“19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same.”

34. In the present case, we are of the considered view that let alone establishing chain of events which are so interwoven to each other leading to no other conclusion than the guilt of the accused, the prosecution has failed even to prove a single incriminating circumstance beyond reasonable doubt. As such, the appeal is allowed and the conviction and sentence passed by the trial court as affirmed by the High Court is set aside. The appellant is acquitted of all the charges and he is directed to be released forthwith if not required in any other case.”

(ii) **2023 SCC Online SC 746** in the case of ***State of Punjab Vs.***

Kewal Krishan. The relevant portion reads as follows:

“22. The argument that the accused has failed to discharge his burden under [section 106](#) of the Evidence Act and, therefore, his conviction was justified is misconceived. [Section 106](#) of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, the question arises of considering facts of which the burden of proof would lie upon the accused. (See: [Shivaji Chintappa Patil v. State of Maharashtra](#) (2021) 5 SCC 626). Here, as we have discussed above, firstly, the incriminating circumstances were not proved beyond reasonable doubt and, secondly, they do not form a chain so complete from which it could be inferred with a degree of certainty that it is the accused and no one else who, within all human probability, committed the crime. In these circumstances, there was no occasion to place burden on the accused with the aid of [section](#).



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106 of the Evidence Act to prove his innocence or to disclose that he parted company of the deceased before his murder.”

8. The learned Additional Public Prosecutor for the State invited the attention of this Court to the evidence of P.W-1-father of the victim, P.W-5-victim, P.W-6-the Teacher who had been working in the Government Special School for Speech and Hearing impaired who had interpreted the witness through sign language and assisted the Investigation Officer, at the stage of investigation. Also, he was summoned by the Court to adduce interpret evidence of victim/P.W-5 to the Court. Accordingly, P.W-5 was also examined as a witness regarding the Complaint of the victim and the evidence of P.W-9 who had examined the victim regarding sexual assault and issued under Ex.P-8-Accident Register regarding the examination of the victim, Ex.P-9 regarding the sexual assault on the victim and Ex.P-10-the Forensic Lab report regarding swab collected from the vagina of the victim to find out, if there was any semen found on the vagina of the victim which had stated that no semen was found on the slides sent to the Forensic Department. P.W-10-Dr.Thiyagarajan serving at Dharmapuri Government Medical College Hospital who had examined the victim and issued age certificate under Ex.P-11 in which he had stated that the age of the victim was between 19 and 20 years which was marked as Ex.P-11. Also, the



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learned Additional Public Prosecutor submitted that except the victim, her father/P.W-1, the Doctors/P.W-9 and P.W-10, the Investigation Officer and the learned Judicial Magistrate – I, Krishnagiri, others had remained hostile. Still, the Court, on proper appreciation of evidence, the learned Principal District Judge, Dharmapuri by Judgment dated 24.11.2015 in S.C.No.16 of 2014 in Paragraph Nos.27 to 34, convicted the Accused. That is why, the learned Judge had acquitted the A-2 from charge under Section 212 of IPC and convicted A-1 only for the offence under Sections 366 and 376 of IPC and acquitted the Accused from the Charge under Section 3 (2) (v) of SC/ST (Prevention of Atrocities) Act. Therefore, the Judgment of the learned Principal District and Sessions Judge, Dharmapuri is a well-reasoned Judgment that does not warrant any interference.

Point for consideration:

Whether the Judgment of the learned Principal District and Sessions Judge, Dharmapuri in S.C.No.16 of 2014 dated 24.11.2015 is to be set aside as perverse?

9. Heard the learned Counsel for the Appellant, learned Additional Public Prosecutor for the Respondent/State. Perused the deposition of the witnesses viz., P.W-1 to P.W-19, the documents marked under Ex.P-1 to Ex.P-24 and the Judgment of the learned Principal District and Sessions



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Judge in S.C No. 16 of 2014.

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10. On perusal of the evidence of P.W-1- the defacto complainant/father of the victim and the evidence of PW-5/the victim, evidence of P.W-6-Special Teacher who is an expert in sign language to have interpreted the sign language of the victim-PW5 in which she claims that when she was sleeping in her house, the Accused-1 in this case entered her room, caught hold of her by the hands and took her on the pathway leading to a grove and he had committed sexual intercourse on her. On the next day, he had asked her to go back to her home. When he had taken her to Coconut grove, he had promised to marry her. P.W-1-father of the victim claims that on the next day, they could not find her in her home. They searched for her in their relatives' house in and around their village. By evening 5 o'clock, she returned home, whereas PW-5 claims that she returned the next day morning. When her father enquired her, she narrated the incident. Then her father took her on a cycle to find out, who was the culprit who had indulged in sexual intercourse with her. She had pointed out the person sitting among his friends in the Village in a common place under a tree. On seeing the father and daughter, he ran away. Therefore, the father/PW-1 went to the Village and made enquiries against him. The elders



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in the Village informed P.W-1 that they would inform him when he returned to the Village and they would hand over him to the Police. Therefore, P.W-1 had approached the Kambainallur Police and lodged a Complaint under Ex.P-1 from where the investigation proceeded. After the investigation commenced, P.W-5-the victim was subjected to medical examination before the woman Doctor/ PW-9-Dr. Surabi, who had issued Ex.P-8 to Ex.P-10 in which she had stated that when the vaginal swab was collected and sent to the Forensic Laboratory, the report was received under Ex.P-10 stating that no semen was found on the vaginal swab. On examination of the victim P.W-5 by the Dr PW-9, she had found that the hymen was intact and her vagina admits two fingers. This part of the Doctor's evidence was not found to corroborate the evidence of the victim/PW-5. Therefore, based on the oral evidence of the victim alone, the learned Principal District and Sessions Judge had convicted the Accused only for the offence under Sections 366 and 376 of IPC. P.W-10 who had examined the victim/P.W-5 and issued radiological report regarding the age of the victim had stated that the age of the victim as between 19 and 20 years. In that case, the victim cannot be treated as a minor. She is a major. Even though she is disabled as hearing and speech impaired, she has knowledge of the repercussions of going along with a stranger. The evidence of PW-1 and P.W-5 is found unbelievable in



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the light of the medical evidence under Ex.P-8 to Ex.P-10 and Ex.P-11. By her age, she is a major and she is aware of the consequences of indulging in such activities. The evidence of P.W-5 does not inspire confidence of the Court. The learned Principal District and Sessions Judge had only relied upon the evidence of the victim as narrated before the Court with the help of the interpreter of sign language, P.W-6 and before the learned Judicial Magistrate, the statement under Section 164 Cr.P.C., was recorded which is marked as Ex.P-18.

11. On appreciation of evidence by this Court as Appellate Court, the finding of the learned Principal District and Sessions Judge convicting the Accused based on the testimony of the victim alone is found unacceptable, as it is not safe to rely on the evidence of the victim, who was aged between 19 and 20 years on the date of the alleged occurrence and also in the light of the Doctors' evidence, the woman Doctor/P.W-9 who had examined her and issued Ex.P-8 to Ex.P-10. It is not reliable and therefore the Judgment of conviction recorded by the learned Sessions Judge is found perverse. The argument of the learned Additional Public Prosecutor, conviction recorded by the learned Principal District and Sessions Judge is a well-reasoned Judgment. It does not warrant any interference by this Court and the Appeal



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lacks merits and is to be dismissed are found unacceptable and hence rejected. The ruling cited the learned Legal Aid Counsel for the Appellant placing reliance on the Judgments reported in **(2021) 5 SCC 626** in the case of ***Shivaji Chintappa Patil Vs. State of Maharashtra*** and **2023 SCC Online SC 746** in the case of ***State of Punjab Vs. Kewal Krishnan*** are found applicable, particularly when the Prosecution has failed to establish the Charge against the Accused. Therefore, when there are two options before the Court, the Court has to naturally lean towards the acquittal. Therefore, here is a case where the incident as narrated by the victim/P.W-5 is found unbelievable. The woman aged between 19 and 20 years, having been disturbed in her sleep by a stranger. She going along with the stranger and he having promised to marry her, is found unbelievable. Without raising hue and cry for being disturbed in sleep by a stranger, she had gone along with the stranger which is found unbelievable as though she was gagged by the stranger and taken on a pathway leading to a coconut grove. P.W-1 claims that it is a coconut grove. P.W-6/the interpreter claims that it is somewhere near the lake near that Village. The place of occurrence itself is found doubtful and suspicious. Added to that the circumstance that the woman Doctor/P.W-9 stating that the hymen of P.W-5-victim is intact. That be the case, there is no sexual assault on her. Instead, the learned Principal



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District and Sessions Judge, Dharmapuri had convicted the Accused based on the sole testimony of the victim/PW-5.

12. Whether the sole testimony of the victim inspires confidence also had to be considered? A woman aged about 19 or 20 years being disturbed in her sleep by a stranger. The stranger promising to marry her, pulling her by the hand, and gagged her mouth, so that she did not cry for help, took her, holding her hand, and she accompanied him along a pathway leading to a grove, where he is alleged to have indulged in sexual intercourse with her is found unbelievable. She having not raised any hue and cry. She claims to have returned the next day morning when the stranger told her to go back home and refused to marry her. The father of the victim/P.W-1 claims that his daughter was not found in the home, in the room where she went to sleep. They searched for her in and around the Village in their relatives' house. The victim/P.W-5 returned home on the next day evening. On enquiry, she narrated the incident. Therefore, he took her on a cycle to find out who had indulged in such act. When they approached the place where the youngsters in the Village used to gather under a tree. On seeing the father and daughter, the Accused ran away. Therefore, P.W-1 along with his relatives, went to the Village and made enquiries, the Villagers in the Village



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where the Accused resided informed them that they would inform when he returned home. At that time, he had gone to the Police Station. The said version is found unbelievable. P.W-5/victim's sign language was interpreted by the person who is the Teacher in the Special School for hearing and speech impaired. He had interpreted the sign language of the victim. As per his evidence, the victim was raped near the Village lake. The place mentioned by the victim and father of the victim differs. Under those circumstances, it is not safe for any Court to rely on the sole testimony of the victim. Therefore, as per the ruling cited by the learned Counsel for the Appellant, the Prosecution failed to prove the Charges. Under those circumstances, the Court has to necessarily lean towards the acquittal.

In the light of the above discussion, the **point for consideration is answered in favour of the Appellant/Accused and against the Prosecution.** The Judgment of the learned Principal District and Sessions Judge, Dharmapuri in S.C.No.16 of 2014 is found perverse and the same is to be set aside.

In the result, this ***Criminal Appeal is allowed.*** The Judgment of the learned Principal District and Sessions Judge, Dharmapuri in S.C.No.16 of



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2014 is set aside. The Appellant has acquitted from the Charges under Sections 366 and 376 of the Indian Penal Code. The bail bond already executed by the Appellant during the pendency of the Appeal is to be cancelled. The fine imposed on the Accused has to be refunded to the Accused.

02.08.2024

Index: Yes/No
Internet: Yes/No
Speaking Order/Non-speaking order
dh

To

- 1.The Principal District and Sessions Judge, Dharmapuri.
- 2.The Superintendent of Police, Kambainallur Police Station, Dharmapuri.
- 3.The Public Prosecutor, High Court, Madras.



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SATHI KUMAR SUKUMARA KURUP, J.

dh

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