



Crl.A.No.834 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on 20.12.2023

Delivered on 11.03.2024

CORAM:

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Crl.A.No.834 of 2016

Kalimuthu

...Appellant / Single Accused

-Vs-

State by Inspector of Police,
Tiruchengode Police Station,
Namakkal District.
(Crime No.546 of 2011)

...Respondent / Complainant

Prayer:- Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, 1973, to set aside the judgment of the learned Principal Sessions Judge, Namakkal District, made in S.C.No.106 of 2012 dated 27.10.2015 and acquit the Appellant/Accused from the charges.

For Appellant : Ms.A.Veeramarthini
Legal Aid Counsel

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

For Victim : Ms.S.Sridevi
Legal Aid Counsel



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JUDGMENT

The Appellant is the sole Accused in S.C.No.106 of 2012 on the file of the learned Principal Sessions Judge, Namakkal District. The Appellant /Accused stood charged and convicted for the offences under Sections 366 and 376(2)(6) of IPC and Section 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

2. The Trial Court, vide impugned judgment dated 27.10.2015, has convicted the Appellant / Accused as follows : -

Conviction under section	Sentence Awarded
366 IPC	To undergo ten years of simple imprisonment and to pay a fine of Rs.5,000/- and in default, to undergo imprisonment for one month.
376(2)(6) IPC	To undergo two years imprisonment and to pay a fine of Rs.5,000/- and in default, to undergo imprisonment for one month.
3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989	To undergo ten years of rigorous imprisonment and to pay a fine of Rs.5,000/- and in default, to undergo imprisonment for one month.



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The learned Principal Sessions Judge, Namakkal, had acquitted Accused from the charges under Section 3(1)(X) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Trial Court further ordered the sentences to run concurrently and also granted set-off under Section 428 Cr.P.C.

3. The Accused/Appellant challenging the legality of the conviction and sentence awarded by the learned Principal Sessions Judge, Namakkal, in S.C.No.106 of 2012 vide impugned judgment dated 27.10.2015, has filed this Criminal Appeal.

4. Learned Counsel for the Appellant submitted that the case for which the charges framed by the Trial Court was not proved by the Prosecution. The Appellant was a senior citizen on the date of the alleged occurrence. He had undergone bypass surgery for heart ailment. A person who has undergone bypass surgery cannot be believed to have indulged in offences under Section 376(2)(6) IPC. Considering the age of the Accused and the fact that he had undergone bypass surgery, the conviction of the Accused by the learned Principal Sessions Judge, Namakkal, is perverse and is to be set aside.



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5. Learned Counsel for the Appellant invited the attention of this Court to the charges framed by the Trial Court as follows:

Number of charges	Charges framed under Sections
Charge 1	366 IPC – Kidnapping of a minor girl for committing rape.
Charge 2	376(2)(6) – Having unlawful intercourse with the child below 12 years.
Charge 3	3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – with intention and knowledge that the act of scolding would cause death of a member of a schedule caste or schedule tribe.
Charge 4	3(1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or Schedule Tribe in any place within public view

6. Learned Counsel for the Appellant invited the attention of this Court to the evidence of the Victim-P.W-2, who was alleged to have been aged 5 years on the date of the alleged occurrence and who was aged 9 years when examined as a witness before the Trial Court.



7. As per her evidence, the Accused is alleged to have touched inappropriately on her vagina, for which she objected, raised sounds and cried. She complained to her mother. For which, the mother is alleged to have gone to the house of the Accused and objected for the offence alleged to have been committed by the Accused by touching the vagina of her child aged 5 years. The offence under Section 376 of IPC is not at all attracted, whereas the learned Principal Sessions Judge, Namakkal, had convicted the Accused for the offences under Section 376 of IPC. All the other witnesses in this case are hearsay witnesses. The mother of the child is P.W-1, who is the De facto Complainant, and she had given a complaint under Ex.P.1, wherein it is stated that the Accused is alleged to have indulged in sexual assault with child aged 5 years. Whereas the Victim as P.W-2, had clearly stated that he had touched inappropriately on her vagina. Therefore, the judgment of conviction awarded by the learned Principal Sessions Judge, Namakkal, sentenced the Accused to ten years of rigorous imprisonment, which is perverse and is to be set aside.

8. As per Ex.P-12, answers were given by the Doctor for the questionnaire raised by the Deputy Superintendent of Police, Tiruchengode, regarding the AR copy. It is stated that the child had



complained of external pain in the genitalia. There was no mark of violence on the vulva or adjacent parts.

9. Learned Counsel for the Appellant also invited the attention of this Court to the evidence of P.W-14, Dr.Mohanabanu, who had issued Ex.P-11. Also, the learned Counsel for the Appellant submitted that P.W-4, P.W-5, P.W-6 and P.W-7 have deposed that they are residing in the same neighbourhood where the Accused reside. They had heard about only the evil act alleged to have been committed by the Accused since they did not support the case of the Prosecution and treated them hostile.

10. Learned Additional Public Prosecutor vehemently objected to the submission of the learned Counsel for the Appellant, stating that the learned Principal Sessions Judge, Namakkal, had on proper appreciation of evidence, convicted the Accused for the offences under Sections 366 and 376(2)(6) of IPC and 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, and acquitted the Accused for the offences under Section 3(1)(X) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.



11. Learned Additional Public Prosecutor invited the attention of this Court to the evidences of the mother of the Victim, the De facto Complainant as P.W-1, the Victim as P.W-2, the paternal grandmother of the Victim as P.W-3, and the hostile witnesses, P.W-4 to P.W-7, where they stated that on the date of the alleged occurrence, there was crowd outside the residence of the Accused, and they had heard that the Accused is alleged to have indulged in sexual assault. P.W-8 is the former Panchayat President of Kavundampalayam, who was a Mahazar witness for the seizure of underwear of the Victim child. P.W-9 is the Tahsildar, who had issued community certificates to the Accused as well as to the Victim. P.W-10 is the Deputy Collector, who had issued certificate based on the enquiry conducted by P.W-8. P.W-11 is the learned Judicial Magistrate, Paramathi, who had recorded the statement of the witnesses under Section 164 of Cr.P.C. P.W-12 is the Special Sub-Inspector of Police, Pallipalayam Police Station, who had received the complaint from the mother of the Victim and registered the FIR in Crime No.546 of 2011 for the offences under Section 376(2)(F) of IPC and Sections 3(2)(V) and 3(1)(X) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. P.W-13 is the Doctor who had examined the Accused and issued potency certificate for the Accused under Ex.P-10.



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P.W-14 - Dr.Mohanabanu, who had examined the Victim child and issued certificate under Ex.P-11. P.W-15 is the Investigation Officer, the Deputy Superintendent of Police, Tiruchengode.

12. It is the contention of the learned Additional Public Prosecutor that the evidence of the Victim, Victim's mother, and paternal grandmother is sufficient to convict the Accused.

13. The learned Additional Public Prosecutor relied on the ruling of the Hon'ble Superme Court in the case of ***Ganesan Vs. State Rep. by its Inspector of Police*** reported in ***(2020) 10 SCC 573***, wherein it is stated that the evidence of the Victim alone will be sufficient to convict the Accused for the offence under Section 376 of IPC. Therefore, it is the submission of the learned Additional Public Prosecutor that the Appeal lacks merit and is to be dismissed.

14. Learned Counsel nominated by the Legal Aid Committee on behalf of the Victim had also submitted her arguments. She invited the attention of this Court to the charges framed by the Trial Court, to the evidence of the mother of the Victim as P.W-1, the Victim as P.W-2 and



the paternal grandmother of the Victim as P.W-3, and also to the discussion by the learned Principal Sessions Judge, Namakkal.

15. It is the submission of the learned Counsel for the Victim that the Accused is a well-known person in the area. He is familiar with the family of the Victim. He had exploited the Victim under the pretext of giving her guava fruit. She invited the attention of this Court to his house. He locked the door and indulged in sexual assault, for which the child cried and came out. When the mother of the child protested and objected in front of the house of the Accused, he is alleged to have scolded her with abusive language, including caste slurs, thereby attracting offences under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Therefore, the learned Counsel for the Victim also sought for dismissal of the Appeal.

16. By way of rejoinder, the learned Counsel for the Appellant submitted to attract the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, that a member of the community should have been abused in a public place in front of the members of the public. Here, no independent witnesses had been examined by the



Prosecution to prove the ingredients of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Therefore, the judgment of conviction recorded by the learned Principal Sessions Judge, Namakkal, against the Accused for the offences under Sections 366 and 376(2)(6) of IPC and Section 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, is perverse and is to be set aside.

17. Point for consideration:

Whether the judgment of the learned Principal Sessions Judge, Namakkal, in convicting the Accused for the offences under Sections 366 and 376(2)(6) of IPC and Section 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, is perverse and is to be set aside?

18. On perusal of the deposition of the witnesses, P.W-1- De facto Complainant, mother of the Victim, P.W-2-Victim and P.W-3- paternal grandmother of the Victim. Here, the mother and paternal grandmother are hearsay witnesses. The Doctor who had examined the child was not examined as a witness before the Court. Instead, another woman Doctor, who is aware of the technicalities used by Doctors who examined their



patients including victims of sexual assault, to speaks about the examination conducted by the women Doctor who examined the victim of crime, P.W-2 and the finding given by the said Doctor. The evidence of this Doctor cannot be treated as personal knowledge based on her examination of P.W-2. It is also hearsay, as she had not conducted examination of P.W-2, victim. As per the records of the Government Hospital which was available regarding the sexual assault committed on the minor child, it is stated by the Doctor that the child had complained of pain in the genitalia only. As per the evidence of P.W-14, nothing was observed to suggest that the child was subjected to sexual assault. It is to be noted that the child was examined on the next day of the alleged date of occurrence.

19. As per the defence of the Accused, the Complainant party, the Victim family owed loan to be repaid to the Accused. Therefore, only to threaten him, they had foisted a case against him. Regarding the provision of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, as rightly contended by the learned Counsel for the Appellant none of the independent witnesses had been examined to prove the case of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,



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1989, of having used casteist remarks against the Victim family by the Accused.

20. On perusal of the judgment, it is found that the learned Principal Sessions Judge, Namakkal, in S.C.No.106 of 2012, by judgment dated 27.10.2015, had convicted the Accused based on the presumptions.

21. It is to be noted that P.W-4 to P.W-7 are all residents in the same area where the Accused reside. They had stated that the Accused is alleged to have indulged in sexual assault on a minor child, as per the people who gathered outside the house of the Accused. It is to be noted that the learned Principal Sessions Judge, Namakkal District, is not expected to give verdict based on hearsay. The learned Principal Sessions Judge, Namakkal District, is expected to appreciate the evidence available before the Court. What was spoken to by the members of the public before the residence of the Accused cannot be considered by the learned Principal Sessions Judge, Namakkal District.

22. The evidence before the Court is different. The Victim herself had stated that, as P.W-2, the Accused is alleged to have pressed his thumb



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on the vagina of the Victim. It does not amount to sexual intercourse. Of course, this is objectionable conduct on the part of the Accused. On the date of the alleged occurrence, the POCSO Act was not in the statute. Had the POCSO Act come into force, the Accused could be convicted for the offence under the POCSO Act. The alleged date of occurrence is 07.12.2011. The POCSO Act came into force in the year 2012. Until such time, the acts committed by adults against the child could not be convicted. Therefore, the Special Act came into existence. From the available materials through P.W-1, P.W-2, and P.W-3, the alleged charges framed by the Court through the evidence of the Victim, P.W-2, along with evidence of P.W-14-Doctor, does not prove the case of the Prosecution that the Accused indulged in the sexual assault on the minor child. Therefore, the conviction of the Accused for the offences under Sections 366 and 376(2)(6) of IPC and 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, are found to be perverse and is to be set aside.

23. In the light of the above discussion, the point for consideration is answered in favour of the Appellant and against the Prosecution.



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In the result, the **Criminal Appeal is allowed**. The judgment of conviction recorded by the learned Principal Sessions Judge, Namakkal District, in S.C.No.106 of 2012 dated 27.10.2015, is hereby set aside. The Accused is acquitted from the charges under Sections 366 and 376(2)(6) of IPC and 3(2)(V) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The bail bond, if any executed by the Accused, shall stand cancelled. The fine amount already deposited before the learned Principal Sessions Judge, Namakkal, if any, is also ordered to be refunded to the Appellant. The Accused is set at liberty.

The service of the learned Counsels nominated by the Legal Aid Committee attached to this Court is appreciated.

The Legal Aid Committee attached to this Court is directed to pay the proper fees as per the law to the panel lawyer.

11.03.2024

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Index : Yes/No

Speaking/Non-speaking order



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To

- 1.The Principal Sessions Judge,
Namakkal.
- 2.The Inspector of Police,
Tiruchengode Police Station,
Namakkal District.
- 3.The Public Prosecutor,
High Court, Madras.
- 4.The Section Officer, VR Records,
High Court, Chennai.



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SATHI KUMAR SUKUMARA KURUP, J.,

cda

**Judgment in
Crl.A.No.834 of 2016**

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