IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30/11/2004

CORAM

THE HONOURABLE MR JUSTICE N.DHINAKAR
and
THE HONOURABLE MR JUSTICE N.KANNADASAN

Criminal Appeal No. 1683 of 2002

Muthu ... Appellant

-Vs-

State, rep. by the Deputy
Superintendent of Police,
Villupuram.(Cr. No.380 of 2000) ... Respondent

Prayer: Appeal against the judgment passed by the learned Principal Sessions Judge (Special Judge), Villupuram, in S.C.No. 204 of 2001 dated 29.10.2002.

!For Appellant : Mr.Syed Fasiuddin
for Mr.N.Suresh Baabu

^For Respondent : Mr.V.M.R.Rajendran
Addl. Public Prosecutor.

:J U D G M E N T

(Judgment of the Court was delivered by N.DHINAKAR,. J)

The accused appeals.

2. The appellant was tried under Section 376(2)(f) I.P.C. as well as under Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (hereinafter will be referred to as ' the Act'), on the allegation that at about 10.00 a.m. on 18.5.2000, he committed rape on Padma @ Padmavathi, aged about seven years, who belongs to Adidravida community. The learned trial Judge, finding the appellant guilty, convicted and sentenced him to imprisonment for life under the above two charges.

3. The case of the prosecution is briefly summarised as

follows:-

P.W.1 is the mother and P.W.2 is the father of the victim
P.W.3, Padma, who was aged about seven years on the date of incident. On 18.5
.2000 at about 10.00 a.m., the victim, P.W.3 was playing with other children
under a tamarind tree at Jaggampet, where she had gone for her annual
vacation. The appellant went there and invited the victim, P.W.3, to a house
saying that her services are required to sweep the floor in the house. P.W.3
went along with him and she was taken to the house, where he committed rape on
the girl. P.W.3 did not divulge the said fact to anyone, but on the next day,
namely, on 19.5.2000, P.W.3 and her mother, P.W.1, went to take bath and at
that time, P.W.3 complained to her mother that she has pain in her private
part. On being questioned by P.W.1, P.W.3 informed her mother as to what
happened on the previous day. This information was conveyed by P.W.1 to her
brother-in-law, who, in turn, informed his brother, P.W.2, the father of the
victim, P.W.3. P.W.2, on getting the information at Palani, where he had gone
in connection with his business, returned to the village on 21.5.2000 and was
apprised of the facts by his wife, P. W.1. P.W.2 took his wife, P.W.1, to
Mylam police station, where a complaint was given at 5.00 p.m. on the same
day to P.W.14, the SubInspector, which was registered as a case in Crime
No.380 of 2000 against the appellant under Sections 376 and 3(1)(x) of the
Act. Ex.P.15 is a copy of the printed first information report. P.W.14
seized the clothes, which the victim, P.W.3 was wearing and investigation in
the crime was taken up by P.W.15, the Deputy Superintendent of Police.

4. P.W.15, on taking up investigation in the crime, proceeded
to the scene of occurrence and prepared an observation mahazar, Ex.P.2 and
drew a rough sketch, Ex.P.16. He questioned, P.Ws.1, 2, 3, 4 and others and
recorded their statements. He sent P.W.3 to the doctor for examination and
P.W.10 examined P.W.3 and found the following:-
" Patient conscious. - Oriented. No external injuries over the body. No
blood or seminal skin over the body or clothes. Labia majora swollen up.
Redness around the hymen present. One finger could not be introduced into the
vaginal orifice. Smear (vaginal) cannot be taken. X-ray taken for age
examination. Her age could be about 6 - 7 years old by physical appearance."

The doctor issued Ex.P.9, the wound certificate. The victim was also examined
radiologically by P.W.12, who issued his certificate, Ex.P.11, with his
opinion that the girl is aged about seven years. On 22 .5.2000, P.W.15
arrested the appellant at about 10.00 a.m. when he was near the Ayyanar
temple at G.S.T.Road, in the presence of witnesses. The clothes, which the
appellant was wearing, were seized, after he was given change of clothes.
Thereafter, the appellant was sent to the hospital for potency test and
accordingly, he was examined by the doctor, P.W.13, who, after examining him,
gave his certificate, Ex.P.14.

5. P.W.15, continuing with his investigation, obtained the
community certificate, Ex.P.10, from P.W.11, for the victim as well as for the
appellant, who certified that P.W.3 belongs to Adi Dravida Community and the
said community is a scheduled caste community and that the appellant, who is a
dhobi by profession, belongs to backward community. The material objects were

forwarded to Court with a request to send them for analysis and after the completion of investigation, the final report was filed against the appellant on 12.10.2000 under Section 376 I.P.C. as well as under Sections 3(1)(x) and 3(2)(v) of the Act.

6. The learned Sessions Judge, finding the appellant guilty, sentenced him to imprisonment for life for the offence under Section 376 (2)(f) under charge No.1 and also imposed a similar sentence under charge No.2 framed under Section 3(2)(V) of the Act. The appellant challenges his conviction and sentence in this appeal.

7. The learned counsel appearing for the appellant submits that Dr.Santhi, who, according to P.W.1, initially examined and treated the victim, P.W.3, was not examined by the prosecution and the evidence of the doctor, P.W.10, does not conclusively establish that the girl, P.W.3, was subjected to rape. He further submits that since P.W.3, in her evidence, admitted that she was examined by the police on the next day of her informing her mother, P.W.1, she must have been examined by the police on 20.5.2000 and the complaint, Ex.P.1, which, according to the prosecution, was given on 21.5.2000, cannot, therefore, be true. It is his further submission that since P.W.6 has admitted that the appellant had taken the victim, P.W.3, to the house of one Selvi, which was locked from outside, it is not possible for the occurrence to have taken place inside the house of Selvi and the said Selvi was also not examined and in the circumstances, the appellant is entitled for an acquittal. He has also placed reliance upon the judgments rendered in MAYUR PANABHAI SHAH v. STATE OF GUJARAT [1982 CRI.L. J. 1972 (SC)] and KOPPULA VENKAT RAO v. STATE OF ANDHRA PRADESH [20 04(2) SUPREME 358]. We have heard the learned Additional Public Prosecutor on the above contentions and perused the entire materials.

8. P.W.3 is the victim in this case. She gave evidence in Court to the effect that when she was playing under a tamarind tree at Jakkampet, the appellant came there and asked her to accompany him to a house to sweep the floor and that she went to the house, where she was raped. She has also stated that she informed her mother, P.W.1 on the next day about the incident. P.W.1, the mother of P.W.3, in her evidence, stated that on 19.5.2000, when she and her daughter, P.W.3, were on their way to take bath, P.W.3 complained to her about the pain felt by her on her private part and when questioned, P.W.3 narrated as to what happened on the previous day. It is her evidence that she informed her brother-in-law, who is the brother of P.W.2, the father of P.W.3. According to P.W.2, on getting the information from his brother about the incident, he reached the village on 21.5.2000 from Palani, where he had gone in connection with his business and was informed about the incident and then, he and P.W.1 went to the police station, where P.W.1 gave a complaint to P.W.14, the Sub-Inspector.

9. We will now take up the evidence of P.W.3 to find out whether her evidence can be accepted. On the day when she was examined in Court, she was ten years old. We have perused the evidence of P.W.3 and in the cross-examination, the defence did not succeed in eliciting any answer,

which will show that the appellant could not have committed the said offence, except for the stray answer, which she had given that she was examined by the police on the next day of her informing the mother. It is to be remembered that she was a girl aged about ten years and was coming from a lower strata of society and if she had given evidence that she was examined by the police on the next day after she informed her mother, it cannot be taken that the police officers have actually questioned P.W.3 on 20.5.2000 itself. Even if such an answer is given any weight, then it will only affect the complaint, Ex.P.1, and not the substratum of the prosecution version that the appellant committed rape on P.W.3.

10. The evidence of P.W.5 that she had seen the appellant taking the victim to the house of Selvi and the evidence of P.W.6 that the house of Selvi was found locked from outside cannot also be a reason to reject the prosecution version. The evidence of P.W.6 shows that Selvi locked the house and went away. But, it does not show that the said Selvi locked the house with a lock and key. The evidence of P.W.6 will only indicate that Selvi, while leaving the house, closed the door and bolted it from outside and when he has said that she locked the door, he must have meant that she bolted the door from outside. In any event, in our view, the said answer given by P.W.6 does not destroy the prosecution version, since the evidence of P.W.3 was not shaken in the cross-examination. Once, we accept the evidence of P.W.3, then the other minor contradictions or omissions will not affect the prosecution version.

11. The contention of the learned counsel that the evidence of the doctor, P.W.10, does not conclusively establish that the victim was raped, in our view, is also to be rejected. The doctor, P.W.10, in her evidence, stated that when she examined, she found swelling on the private part of P.W.3. The answer given by the doctor in the cross-examination, which the learned counsel relied on, that there will be swelling only for about two days on the private part cannot be put against the prosecution, since it is only the opinion of the doctor. In fact, the contemporaneous record, Ex.P.9, prepared by the doctor when she examined the victim shows that on the day when she examined the victim, she found swelling on the labia majora. Therefore, the answer given in the cross-examination could only be taken as an opinion, which is not supported by the contemporaneous record, Ex.P.9, prepared by herself when she examined the victim, P.W.3. At this stage, we have to refer to the judgment of the Supreme Court relied upon by the learned counsel in MAYUR PANABHAI SHAH v. STATE OF GUJARAT [1982 CRI.L.J. 1972 (SC)] (cited supra). The learned Judges of the Supreme Court have only held that the evidence of the doctor has got to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that the doctor is always a witness of truth. The said observation of the Supreme Court will not apply to the facts of this case, since, as we already observed, the evidence of the doctor in the chief-examination is fully supported by the contemporaneous record, Ex.P.9, prepared by her, since she found swelling on the private part of the victim, P.W.3, on the day when she examined and her answer in the cross-examination cannot be given any weight, since it is only her opinion.

12. The other judgment of the Supreme Court, on which the learned counsel placed his reliance is KOPPULA VENKAT RAO v. STATE OF ANDHRA PRADESH [2004(2) SUPREME 358]. The facts in the said judgment are totally different. That was a case where the victim girl agreed to accompany the appellant in that case in a bicycle and the appellant rode the bicycle in a high speed and reached a cattle shed, stopped the bicycle, dragged the victim by using criminal force into the cattle shed and then committed the act without ejaculation and in that case, the evidence of the doctor clearly ruled out the commission of rape as alleged. But here, the evidence of P.W.3, the victim and the evidence of the doctor, P.W.10 conclusively establish that the victim was raped. Therefore, the above judgment relied upon by the learned counsel also will not apply to the facts of this case.

13. The non-examination of Dr.Santhi will not also affect the prosecution version, since the prosecution has examined P.W.3, the victim in the case, who has stated that she was taken to the house and raped. Her evidence is supported by P.Ws.5 and 6, who had seen the appellant taking the victim to the house. The evidence of P.W.3, supported by the evidence of P.Ws.5 and 6, who saw the appellant taking the victim to the house and the evidence of the doctor, P.W.10, which corroborates the evidence of the victim, P.W.3, conclusively establish that the appellant committed the offence of rape. We, therefore, hold that the appellant was rightly convicted under Section 376 (2)(f) of the Indian Penal Code. Insofar as the sentence of imprisonment imposed on him for the said offence is concerned, Section `376 (2) (f) contemplates that whoever commits rape on a woman when she is under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine. Taking into consideration the age of the victim and the community from which she was hailing, we are of the view that the sentence imposed upon the appellant is not severe and we find no reason to reduce the sentence under the said section.

14. Now, we will find out whether the learned trial Judge was justified in convicting the appellant under Section 3(2)(v) of the Act. Section 3(2)(v) of the Act contemplates that whoever not being a member of a Scheduled Caste or a Scheduled Tribe commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Schedule Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine. The words 'on the ground' occurring in Section 3(2)(v), therefore, shows that the offence should be committed by an accused against a person on the ground that he or she belongs to a Scheduled Caste or a Scheduled Tribe. It is not the case of the prosecution that the appellant in this case deliberately raped the victim on the ground that she is a Scheduled Caste. But, it is only a case of rape of a girl, who happens to be a girl belonging to a Scheduled Caste and the appellant did not commit rape because she belongs to a Scheduled Caste. We, therefore, acquit the appellant under Charge No.2, while confirming his conviction and sentence under Charge No.1, though the learned counsel pleads to t reat the appellant with leniency for the reasons, which we have already mentioned above.

15. In the result, the conviction and sentence imposed upon the appellant under charge No.1 are confirmed and the conviction and sentence imposed upon him under charge No.2 are set aside. With the above modification in conviction and sentence, the appeal is dismissed.

Index:Yes
Internet:Yes

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To

1.The Principal Sessions Judge(Special Judge), Villupuram.
2.The District Collector, Villupuram.
3.The Director General of Police, Chennai.
4.The Superintendent, Central Prison, Tiruchirappalli.
5.The Deputy Superintendent of Police, Villupuram.
6.The Public Prosecutor, High Court, Madras.