

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 28.06.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Cr1.A.No.1145 of 2004

Vasudevan

.. Appellant/Accused

vs.

The Inspector of Police,
B-10 Selvapuram Police Station
Coimbatore.
Cr.No.1046 of 2002

.. Respondent/Accused

Prayer: This appeal has been preferred against the judgment dated 10.08.2004 made in S.C.No.120 of 2003 on the file of the Sessions Judge, Magalir Neethimandram, Coimbatore.

For Appellant : Mr.L.Mahendran

For Respondent :Mr.V.R.Balasubramaniam
Additional Public Prosecutor

JUDGMENT

This appeal has been preferred against the judgment in S.C.NO.120 of 2003 on the file of the Sessions Judge, Magalir Neethimandram, Coimbatore. The accused, who was charged under Section 366 & 376 IPC and convicted by the learned trial Judge and sentenced to undergo 10 years RI and a fine of Rs.5,000/- with default sentence under Section 366 IPC and sentenced to undergo 10 years RI and fine of Rs.10,000/- with default sentence under Section 376(1) IPC, is the appellant herein.

2.The case of the prosecution in brief sans irrelevant particulars are as follows:-

On 14.11.2002 at about 7.00 pm the accused kidnapped the victim girl Sajeetha about 12 years from her house bearing Door No.28, Nehru Street,Pusari Palayam, to mulberry garden, inside the Tamil Nadu Agricultural University with intend to rape her.

3.After taking cognizance the learned Judicial Magistrate had issued summons for the appearance of the accused and on his appearance copies under Section 207 of Cr.P.C., were furnished to the accused and since the charges levelled against the accused are exclusively liable to be tried by a Court of Sessions, the learned Judicial Magistrate had committed the case to the Principal Sessions Judge, Coimbatore, under Section 209 of Cr.P.C.

4.On appearance of the accused the learned Sessions Judge framed charges under Section 366 and 376(1) IPC and when questioned, the accused pleaded not guilty. On the side of the prosecution P.W.1 to P.W.12 were examined and Ex.P.1 to Ex.P.20 were exhibited and M.O.1 to M.O.7 were marked.

5.P.W.1 is the victim girl Sageetha, who would depose that on 14.11.2002 at about 7.00 pm, while she was standing in front of her house, her uncle/accused asked her to go near him and placed his right hand on her shoulder and he took her towards east near the Agricultural University and after taking her inside the said agricultural university near the mulberry garden after closing her mouth with his kerchief, had raped her and that she returned to her house and informed about the incident to her parents and that she preferred a complaint Ex.P.1 with the police on the next day and that during the course of the occurrence she had sustained injury on her left thigh with the left leg nail of the accused and that she also handed over her wearing apparels to the police, which she was wearing at the time of occurrence.

6.P.W.2 has not supported the case of the prosecution. Hence, he was treated as hostile witness.

7.P.W.3 is the father of P.W1. According to him, at the time of occurrence P.W.1 was studying in 6th standard and on the date of occurrence i.e., on 14.11.2002 he returned from his work spot at about 9.30 pm and when he enquired about P.W.1 with his wife, she informed that P.W.1 is missing and a little later the girl returned to the house crying and also narrated the incident what had happened to her. Since it was late in the night, on the next day he went to the police station along with P.W.1 and P.W.1 preferred a complaint in which he has also signed. He has identified his signature in Ex.P.1-complaint as Ex.P.2.

8.P.W.4 is the Doctor, who had examined P.W.1 on 15.11.2002 at about 4.40 pm. According to P.W.4, she has not seen any external injuries on the body of P.W.1. According to her, hymen of the victim girl was intact. Ex.P.3 is the copy

of the accident register.

9.P.W.5 is the Radiologist, who had examined P.W.1 and has given Ex.P.4-certificate. He has opined that the victim girl must be aged about 15 year but below 17 years. M.O.1 (series) are the x-rays.

10.P.W.6 has seen the victim girl on 14.11.2002 along with the accused near one Sulochana's house.

11.P.W.7 is the Judicial Magistrate, who had recorded the statement of P.W.9 to P.W.11 under Section 164 of Cr.P.C.

12.P.W.8 is an another witness, who had seen the victim along with the accused on 14.11.2002 at about 7.00 pm near the house of said Sulochana.

13.P.W.9 has seen the victim girl going to her house at about 10.00 pm on 14.11.2002.

14.P.W.14 is the then Head Constable of B-10 Police Station, who had registered the case under Cr.No.1046/2002 on 15.11.2002 at about 7.00 pm on the basis of the complaint preferred by P.W.1. Ex.P.18 is the copy of the FIR.

15.P.W.15 is the Investigating Officer, who had conducted investigation in this case, visited the place of occurrence on 15.11.2002 at about 9.45 am and prepared an observation mahazar Ex.P.12 in the presence of P.W.10 and another witness and also drawn a rough sketch Ex.P.19. He has examined the witnessed and recorded their statements. M.O.4-kerchief was also recovered from the scene of occurrence by P.W.15 in the presence of P.W.10 under Ex.P.14-mahazar. P.W.15 has recovered M.O.5 to M.O.7, wearing apparels, under Ex.P.15-mahazar in the presence of P.W.11.

16.P.W.12 is the doctor, who had conducted potency test on the accused and issued Ex.P.16-repot stating that the accused is potent.

17.P.W.13 is the Headmaster of the school, in which P.W.1 was studying at the time of occurrence. According to her, as per the records of the school the date of birth of P.W.1 is 12.7.1989. Ex.P.17 is the transfer certificate relating to P.W.1.

18.After completing the investigation P.W.15 has lodged the charge sheet against the accused on 16.2.2002 under Section 366 & 376 IPC.

19.When incriminating circumstances were put to the

accused under Section 313 of Cr.P.C., the accused has denied his complicity with the crime. The accused has examined D.W.1 & D.W.2 as defence witnesses. After going through the evidence both oral and documentary the learned trial Judge has come to the conclusion that the charges levelled against the accused under Sections 366 & 376 IPC have been proved beyond any reasonable doubt and accordingly convicted the accused and sentenced him to undergo 10 years RI under Section 366 IPC besides slapping a fine of Rs.5,000/- with default sentence and also sentenced to undergo 10 years RI and a fine of Rs.10,000/- with default sentence under Section 376(1) IPC. Aggrieved by the findings of the learned trial Judge, the accused has preferred this appeal.

20. Now the point for determination in this appeal is whether the prosecution has proved the guilt of the accused under Sections 366 & 376(1) IPC beyond any reasonable doubt?

21. The Point:- Admittedly P.W.1, the victim girl is a minor aged about 13 years at the time of the alleged occurrence. Only on the basis of the ipsi dixit of P.W.1, the learned trial Judge without any corroboration by medical evidence has convicted the accused under Section 376 IPC. The evidence of the doctor P.W.4 has been lost sight of by the learned trial Judge while convicting the accused under Section 376 IPC. P.W.4, doctor, has examined P.W.1 on 15.11.2002 at about 4.40 pm i.e., on the very next day of the alleged occurrence. P.W.4 has categorically stated in her evidence that there was no external injury found on the body of the victim and her hymen was intact. To that effect, she has given Ex.P.3-copy of the accident register. To warrant conviction under Section 376 IPC there must be penetration. But absolutely there is no evidence on record to show that an offence described under Section 375 IPC has been committed by the accused to warrant conviction under section 376 IPC. It is pertinent to note from the evidence of P.W.1 that she handed over her wearing apparels to the police at the time when she preferred Ex.P.1-complaint with the police. P.W.15, the investigating officer, in his evidence in the cross-examination would admit that wearing apparels of the victim girl were sent for chemical examination. But according to the Analyst's report, there was no traces of semen found on the wearing apparels of the victim girl. So, absolutely, there is no evidence on record to show that there was some sexual assault on the victim girl, as spoken to by P.W.1. Under such circumstances, the findings of the learned Sessions Judge that the accused is guilty under Section 376(1) IPC cannot be sustained.

21(a) It is the case of the prosecution that on the date of occurrence the accused had kidnapped the victim girl P.W.1 from her house to the Agricultural University campus and committed the offence of rape. In order to prove this charge, the prosecution relied on the evidence of P.W.6, P.W.8 & P.W.9. P.W.6 in her evidence would say that she saw the victim girl along with the accused near the house of Sulochana. P.W.8 would also depose that on 14.11.2002 at about 7.00 pm she saw P.W.1 along with the accused near the house of Deenadayalan. P.W.9 has seen P.W.1 alone on 14.11.2002 at about 10.00 pm while she was going towards her house at Nehru street. But no one has deposed to the fact that they saw both the accused and the victim girl at the place of occurrence i.e, Mulberry garden, within the campus of the Tamil Nadu Agricultural University. In this regard, it is pertinent to note the evidence of P.W.15, who would admit that there are two watchmen to the said Agricultural University viz. Senthikumar and Chinna kalimuthu and that he had recorded the statements of both the watchmen, but he would admit that he has not sent those statements to the Court. If the case of the prosecution is true then both the victim and the accused who would have spent not less than two hours within the premises of Agricultural University, would have been seen by the watchmen of the said Agriculture University. But absolutely there is no evidence let in to show that both the victim and the accused were seen together at the place of occurrence at the time of occurrence. According to the evidence of P.W.3, the father of the victim, he came to the house on 19.11.2002 at about 9.30 pm. Even according to P.W.3's evidence the distance between his house and the police station is only 3 kms. There is no explanation forthcoming from the prosecution for the delay in preferring Ex.P.1-complaint ie., after 12 hours. As per the evidence of P.W.3, his wife, the mother of the victim girl P.W.1 was available in the house at the time of missing of P.W.1. If it is so, the natural conduct of a mother is to be, to go in search of her missing daughter and to enquire about her with the neighbours. But absolutely there is no evidence on record to show that after she came to know that her daughter is missing from 7.00 pm she had not made any enquiry with the neighbours or made any search in the neighbourhood. Further the mother of the victim was also not examined as a witness for the prosecution. Under such circumstances, I hold that the findings of the learned trial Judge cannot stand for scrutiny of this Court even for a moment. Point is answered accordingly.

22. In the result, the appeal is allowed and the conviction and sentence under Section 366 & 376(1) IPC against the accused in S.C.No.120 of 2003 on the file of the Sessions

Judge, Magalir Nneethimandram, Coimbatore, is set aside and the accused is acquitted from the charges levelled against him. The accused is directed to be set at liberty forthwith, if he is not required in connection with any other case. The fine amount paid, if any, by the accused is to be returned to him.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

ssv

To,

- 1.The Sessions Judge,
Magalir Neethimandram, Coimbatore.
- 2.The Superintendent of Police,
Central Prison, Coimbatore.
- 3.The Public Prosecutor,
High Court, Madras.
- 4.The Inspector of Police,
B.10, Selvapuram Police Station,
Coimbatore.
- 5.The Collector of Coimbatore.
- 6.The D.G.P. of Police,
Chennai.

MBS (CO)
km/9.7.

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