

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 31.08.2019

Coram

THE HON'BLE MR. JUSTICE G.R.SWAMINATHAN

Crl.A.No. 467 of 2015

Rajesh

... Appellant

Versus

The State Rep by
Inspector of Police,
Muthupettai Police Station,
Thiruvallur District.

... Respondent

PRAYER:

This Criminal appeal is filed against the Judgment dated 17.09.2014 in Sessions Case No.26 of 2013, on the file of the learned Sessions Judge, Mahila Court, Tiruvarur, convicting the appellant for the offence under Section 376 of IPC and sentencing the appellant to undergo 7 years Rigorous Imprisonment.

For Appellant :Mr.A. Aswin Kumar,
Legal Aid Counsel.

For Respondent :Mr.T. Shanmuga Rajeswaran
Government Advocate(Crl side)

JUDGMENT

The appellant was convicted for the offence under Section 376 of I.P.C and sentenced to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.1,000/- by the Judgment dated 17.09.2014 on the file of learned Sessions Judge, Mahila Court, Tiruvarur.

2. The case of the prosecution is that on 01.10.2007 at about 8.00 p.m the appellant committed rape on the victim girl who was mentally retarded, and that the said incident was witnessed by the mother of the victim. P.W.1 mother of the victim Girl lodged Ex.P.1 complaint before Muthupettai police station, on the very next day i.e on 02.10.2007. Based on the same Ex.P.6 F.I.R was

registered for the offence under Section 376 of I.P.C and investigation was undertaken.

3. The victim was sent for medical examination. After completion of all the formalities, final report was filed before the Judicial Magistrate, Thiruthuraipoondi against the appellant for the offence under Section 376 and 506 of I.P.C. The case was taken on file in P.R.C.No.10 of 2013 and after committal numbered as S.C.No.26 of 2013. Charges were framed against the appellant. The appellant denied the charges and claimed to be tried. The prosecution examined P.W.1 to P.W.13 and marked Exs.1 to 9 and Mos.1 to 5.

4. On the side of the defence, no witnesses were examined and no documents were marked. The learned trial Judge after considering the evidence on record found the appellant guilty of the offence under Section 376 of I.P.C and sentenced him to undergo 7 years imprisonment and to pay a fine of Rs.1,000/-. Challenging the same this appeal came to be filed.

5. When the matter was taken up on 27.07.2019, there was no representation on the side of the accused. Therefore, this Court directed the Registry to appoint a Legal Aid Advocate. Today, when the matter was taken up for hearing, the appellant is represented by Mr.A.Ashwin Kumar, Legal Aid advocate, who reiterated all the contentions set out in memorandum of grounds and submitted that the Court below erred in convicting the appellant. He pointed out that apart from the interested testimony of P.W.1, there is no other evidence to sustain the charge levelled against the appellant. P.W.3 who was examined on the side of the prosecution and who is said to have witnessed the occurrence along with P.W.1 turned hostile. Likewise, P.W.4 also turned hostile. The learned counsel also pointed out that in the complaint, P.W-1 had described the appellant as a neighbour. The occurrence was alleged to have taken place in his father-in-law's house. But in the cross examination, she stated that the occurrence had taken place in the house of the accused. However, it is only the house of the father-in-law of the accused which is adjacent to the house of P.W.1. Thus, there is a discrepancy regarding the place of occurrence.

6. The core contention of the appellant is that there is no credible or convincing evidence to substantiate the mental condition of the victim. Though he did not concede, he submitted that admittedly the age of the victim girl was above 18 years and if the occurrence had taken place with her consent, that will furnish a complete defence for the accused.

7. Per contra the learned Government Advocate submitted that the impugned Judgment does not warrant any interference and wanted this Court to sustain the impugned Judgment.

8. I considered the rival contentions and perused the entire evidence on record. The contention with regard to the mental condition of the victim is to be taken up first for consideration. It is true that the prosecution did not examine Dr.Selvaraj or mark the certificate said to have been issued by him. But then Dr.Anwar Sadath, Physcian who issued Ex.P.5 was examined as P.W.10. He clearly deposed that the victim was a mentally retarded person. He narrated the physical features characterising a person who are having the conditions of mental retardation.

9. P.W.10/Dr. Dhanapal Vijaya opined that the victim did not have her menstrual cycle for two months and she also stated that there was bleeding on her private part. She opined that she should have been subjected to forcible sexual intercourse. In her cross examination P.W.10 clearly stated the victim was physiologically examined and that she was a mentally retarded person.

10. As rightly pointed out by the learned Additional Public Prosecutor, the victim was examined as P.W.13. Even though the Court below had concluded that she was fit enough to be a witness, it also recorded that she is a mentally retarded person. The victim's mother clearly deposed that her daughter was mentally retarded. The medical experts are also stated the same. Hence, I am satisfied that the victim is a mentally retarded person.

11. Now, the question that arises for consideration is whether the prosecution had established its case beyond reasonable doubt, against the appellant. It is not as if the accused is a stranger to the defacto complainant. In fact they are residing in the very same street. The house of the defacto complainant and that of the father in law of the accused are adjacent to one another.

12. The defacto complainant had stated that on 01.10.2007 at about 8.00 p.m when she returned home from work, she heard the cry of her daughter, coming from the adjacent house. She rushed in and saw the accused committing rape on her daughter. The complaint was lodged on the very next day. The deposition of P.W1 is not at all shaken in the cross examination and there is no reason for her to falsely implicate the appellant. The wife of the accused was examined as P.W.3. It is true that in the

complaint Ex.P.1, the defacto complainant had mentioned that the neighbouring house belongs to the accused. But then in the cross examination it was stated that house belongs to the father-in-law of the accused. This is not a major discrepancy. The fact remains that the house of the defacto complainant is adjacent to the house of the father-in-law of the accused.

13. The victim was examined as P.W.13. As rightly pointed out by the learned Additional Public Prosecutor, the victim felt embarrassed and was not able to acknowledge what happened to her at that point of time as she is like a child. The biological age of the victim might have been 18 years at the time of occurrence. Even a child will feel embarrassed to narrate certain things. Therefore, I find the evidence of P.W.1 to be convincing. The testimony of a victim of sexual intercourse does not even require corroboration. In this case there is medical corroboration that the victim was subjected to sexual intercourse. More than anything else, it was witnessed by none other than her mother. It is true that there was no injury on the body of the victim, but from this one cannot conclude that there was consent. As rightly observed by the Court below, the consent given by a mentally retarded person is not a consent at all. In paragraph No.14 of the impugned Judgment, the Court below had observed as follows:-

"In the light of the above authorities we shall proceed to decide the case in hand. The PW1 mother of the victim girl stated that her daughter is mentally not matured girl. The Doctor PW 10, who examined the victim girl also stated that the victim girl is mentally not matured by observing physical appearance and mental status of the victim girl. At the time of examining the victim girl, this Court put some rational questions to the victim girl, to find out capability and fitness to adduce the evidence. At the time this Court found that the victim girl is mentally not matured. However, she is competent witness. The victim girl is not insane. But mentally not matured according to her age. While deposing before this Court her behaviour is like child. In the above circumstance it can't be say that the victim girl has consented for sex, with due deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power of withdraw the assent according to one's will are pleasure. She does not voluntarily participate after the exercise of the intelligence, based on the knowledge, of the significance and moral quality of the act, and freely exercised a choice between resistance and assent. Submission of her body shall not amount consent. So, considering the facts and circumstance of this case, in view of this Court, the alleged consent by the victim girl, shall not be a consent in the eye of law. So, the Court

held that the victim has not consented for sexual intercourse and the accused had sexual intercourse against the will and without consent of the victim girl. There is no evidence with respect to animosity or false implication. The evidence of victim girl is natural, believable and trustworthy. Her evidence inspire confidence and acceptable one. There is no evidence for tutoring the victim girl. Her evidence corroborated by the evidence of PW10 Doctor. This Court come to the conclusion that the prosecution has proved the charge of rape against the accused, beyond reasonable doubt. Hence, this Court convicted an offence punishable U/s 376 of I.P.C."

14. I am of the view that the Court below has given cogent reasons for holding that the prosecution has established the involvement of the accused beyond reasonable doubt. I find no ground to interfere. This appeal stands dismissed. I however like to place on record my appreciation for the excellent assistance rendered by the Legal Aid Advocate, Mr.A. Aswin Kumar in a professional manner.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1.The Sessions Judge,
Mahila Court,
Tiruvavarur.

2.Inspector of Police,
Muthupettai Police Station,
Thiruvallur District.

3.The Public Prosecutor,
High Court, Madras-104.

Copy to:

The Section Officer,
Criminal Section,
High Court, Madras-104.

+2cc to Mr.A.Ashwin Kumar, Advocate SR.75907.

Cr1.A.No.467 of 2015

LN(CO)

CB(25/09/2020)