IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved on : 14.12.2021

Order Pronounced on : **23.12.2021**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.R.C.No.708 of 2014

Gopi @ Saravanan .. Petitioner

Versus

1.State rep. by
The Inspector of Police,
Kalasapakkam Police Station,
Tiruvannamalai District.
(Crime No.3 of 2002)

2.Prabha .. Respondents
(R2 suo-motu impleaded as per the order in
Crl.R.C.No.708 of 2014, dated 24.11.2021)

Prayer : Criminal Revision Case is filed under Section 397 r/w 401 of Cr.P.C., to set aside the judgment in C.A.No.69 of 2005 dated 03.02.2014 on the file of the learned Sessions Judge, Tiruvannamalai confirming the judgment as made in S.C.No.163 of 2002 dated 17.12.2005 on the file of the learned Chief Judicial Magistrate, Tiruvannamalai and call for the records and acquit the petitioner from all charges.

For Petitioners : Mr.S.Vediappan

For R1 : Mr.L.Baskaran
Government Advocate

(Criminal Side)

ORDER

This Criminal Revision Case is filed by the petitioner/sole accused, aggrieved by the judgment of the learned Chief Judicial Magistrate, Tiruvannamalai dated 17.12.2005 in S.C.No.163 of 2002, thereby, convicting the petitioner for an offence punishable under Section 376 of Indian Penal Code and imposing a sentence of seven years Rigorous Imprisonment and a fine of amount of Rs.500/-, in default, to undergo one month Simple Imprisonment and the judgment of the learned Sessions Judge, Tiruvannamalai dated 03.12.2014 in C.A.No.69 of 2005, thereby, dismissing the appeal filed by the petitioner and confirming the conviction and sentence imposed by the Trial Court.

2. On 02.01.2002, P.W.1, the prosecutrix went to Kalasapakkam Police Station and gave a statement that on the same date i.e., on 02.01.2002 at about 10.00 A.M, when she went to graze her milch cow near the land belonging to her family, the petitioner/accused came to her, made sweet talk and suddenly pulled her by holding her her hand and dragged her to the teak farm belonging to Govind Vathiyar and laid her down and committed rape by preventing her from making any noise and forcefully indulged in the act and at that time, her brother PW2 accidentally came to that spot and upon

seeing him, the petitioner/accused left her and started running away. In fact, P.W.2, picked up a stone and threw at him, but, however, the same hit her at the left ear. Since the accused committed the offense of rape and hence the complaint. P.W.13, Sub-Inspector of Police, reduced the statement into writing and registered a case in Crime No.3 of 2002 for an offence under Section 376 of Indian Penal Code and thereafter, P.W.14 took up the case for investigation and laid a charge sheet, proposing the petitioner/accused as guilty for the offence under Section 376 of Indian Penal Code on 26.03.2002.

3. Upon furnishing copies to the petitioner/accused under Section 207 of Cr.P.C., the learned Judicial Magistrate No.I, Triruvannamalai took the final report on file as P.R.C.No.18 of 2002 and upon committing the case, the Learned Sessions Judge, made over the case to the learned Chief Judicial Magistrate/Assistant Sessions Judge, Tiruvannamalai and thereupon, the learned Chief Judicial Magistrate/Assistant Sessions Judge, Tiruvannamalai had taken the case on file as S.C.No.163 of 2002. Thereafter, the Trial Court proceeded to frame charges under Section 376(1) of I.P.C and upon questioning, the petitioner/accused denied the charge and stood trial.

4. The prosecution examined the prosecutrix/victim as P.W.1, who deposed about the incident; The brother of the prosecutrix, who accidentally came to the spot and virtually rescued P.W.1 and tried to attack the accused, was examined as P.W.2, who spoke to that effect; one Venkatesan, the Village Assistant, who was the witness to the observation mahazar, as P.W.3; one Dhanapal, who was the witness to the seizure of MOs.1 and 2, upon the confession of the accused, as P.W.4; one Settu, who was also the witness in the seizure mahazar, pursuant to the confession of the accused, turned hostile and was cross-examined by the prosecution, as P.W.5; one Dr.Karpagam, who examined P.W.1 victim and deposed that she issued Ex.P6 medical certificate and spoke about examining the victim that there was a tear injury of 1 c.m., in the private part of P.W.1 and that her Vagina admitted two fingers, however, with difficulty and that P.W.1 had felt pain upon touching her breast, as P.W.6; one Dr.Sakunthala, Dentist, who examined P.W.1 and certified that her age would be between 18 to 19 years, as P.W.7; one Chinnaraj, Head Constable, who took P.W.1 to Polur hospital, for determining her age and thereafter to Vellore hospital, as P.W.8; one Dr.M.J.Seenivasan, as P.W.9; One Chelladurai, the Radiologist, who examined P.W.1 and determined her age as 17 to 18 years and issued

Ex.P8, as P.W.10, who carried M.O Tappals to the Forensic laboratory; one Dr.S.Prabhakaran, as P.W.11, who examined the accused and found him to be potent and fit to have physical intercourse; one Nirmala Rajkumar, the Forensic expert as P.W.12, who issued Ex.P13 report and Ex.P14 report and found that there were traces of sperm in M.O.2; one Ravindran, who was the Sub-Inspector of Police, Kalapakkam, at the relevant time and who registered the case in Crime No.3 of 2002, by recording the statement of P.W.1 victim, as P.W.13; one Raja, Inspector of Police as P.W.14, who is the investigating officer.

5. The prosecution marked the statement given by P.W.1 as Ex.P1; form-95 as Ex.P12; observation mahazar as Ex.P3; P.W.4's signature in seizure mahazar as Ex.P4; P.W.5's signature in seizure mahazar as Ex.P5; the accident register copy as Ex.P6; the age certificate issued by the Dentist as Ex.P7; the age certificate issued by the Radiologist as Ex.P8; the letter of forwarding the accused for medical evidence as Ex.P9; the medical report of examination of accused as Ex.P10; the Forensic reports as Exs.P11 and P12; the First Information Report as Ex.P13; the rough sketch as Ex.P14; observation mahazar as Ex.P15; the letter given for examination of accused as Ex.P16.

6. The prosecution marked the skirt worn by P.W.1, at the time of offence as M.O.1; her top as M.O.2; the lungi, worn by the accused, at the time of offence, M.O.3; underwear, worn by the accused, as M.O.4.

7. Upon being questioned about the evidence on record and the incriminating circumstances under Section 313 of Code of Criminal Procedure, the accused denied the charges. No evidence was let in on behalf of the defense. Therefore, the Trial Court proceeded to hear the learned Additional Public Prosecutor for the prosecution and learned Counsel for the accused. By a judgment dated 17.12.2015 found that the evidence of P.W.1 is clinching and unwavering and in a manner as to inspire the confidence of the Court. It further found that the evidence of P.W.2 as corroborating that of P.W.1. The Trial Court adverted to the defense on behalf of the accused that it was voluntary intercourse upon the consent of the accused and upon considering the chain of events and the place of occurrence, concluded that that there is no probability that the offense had happened with the consent of the prosecutrix and therefore, held that the charge against the accused is proved beyond reasonable doubt and imposed the mandatory minimum punishment of seven years Rigorous

Imprisonment and a fine of Rs.500/-, while observing that the period already undergone by the accused, pending the trial can be set off under Section 428 of Code of Criminal Procedure.

8. Aggrieved by the said judgment, the petitioner/accused preferred Crl.A.No.69 of 2005 on the file of the learned Sessions Judge, Tiruvannamalai. The learned Appellate Court, after hearing the learned Counsel on either side, independently appraised the evidence on record and found that P.Ws.1 and 2 have categorically narrated about the incident and there is nothing in their cross-examination which would favour the accused. Thereafter, considering the medical evidence and the Forensic evidence and considering the fact that the case was properly investigated, rejected the defence that the act was consensual. The further argument of the defence based on the judgment of Hon'ble Supreme Court of India in ***Tameezuddin @ Tammu Vs. State of (N.C.T) of Delhi***[1], that in the absence of vaginal swabs being taken, the presence of same being confirmed, there should not be conviction, was also rejected considering the defense taken in the instant case that it is one of the consent and therefore, the absence of procedure of vaginal swabs will not make any difference in this case and dismissed the

1. *(2010) 1 MLJ (Crl) 74*

appeal and confirmed the sentence.

9. Heard Mr.S.Vediappan, learned Counsel appearing on behalf of the petitioner and Mr.L.Baskaran, learned Government Advocate (Criminal Side).

10. The learned Counsel for the petitioner would submit that on perusal of F.I.R, it would be very clear that the accused and P.W.1 were indulging in the act of physical relationship, and at that point of time, P.W.2, brother of P.W.1 accidentally happened to see them and as a matter of fact, enraged by the action of his sister, he hit her with a stone and thus, it is crystal clear that the entire episode was with the consent of P.W.1/prosecutrix. As per Section 375 of IPC which stood at relevant time, if the prosecutrix is above the age of 16 years and if the act of the intercourse was consensual, then no offence is made out. It is his further submission that P.W.2, the brother had, in detail, given the statement about witnessing act of physical intercourse in his 161 statement but before the Court he contradicted as if he did not see actual act, which is a major contradiction and therefore, P.W.2 should not be believed. It is his submission that P.W.2 had previous enmity with the accused as they both

belong to the same village and therefore, unable to fathom the fact that P.W.1 had physical intercourse with the accused, he had pressurized the victim to lodge a false complaint as if the entire act was committed by force. He would further take this Court through the cross-examination of P.W.1 to the effect that she did not make any serious attempt to rescue herself from the clutches of the accused nor did she raise any alarm and therefore, wanted this Court to infer that the act was with the consent. He would also further impress this Court based on the answer given in the cross-examination by P.W.1 that the entire episode happened for about 10-15 minutes and therefore, this would also go to show that the act was consensual in nature and therefore, the Trial Court and the lower Appellate Court erred in convicting the petitioner/accused.

11. Per contra, Mr.L.Baskaran, learned Government Advocate (Criminal Side) appearing on behalf of the prosecution would submit that prosecution in this case has proved the offence beyond doubt. Normally, an offence under Section 376 of I.P.C will be made out even on the solitary evidence of the prosecutrix. In this case, not only evidence of prosecutrix, the corroboratory evidence of P.W.2, who accidentally went to the spot and witnessed the offence; the medical evidence of the Doctor finding injury on

the private part of the victim; forensic evidence finding spermatozoa in MO.4; are all present, which would establish the charge. He would submit that the evidence of P.W.1, prosecutrix cannot be lightly disbelieved in the offence of this nature and therefore, the Trial Court and the lower Appellate Court were right in punishing the accused.

12. I have considered the material evidence on record and the rival submissions made on either side. It is true that at the first blush, upon perusal of F.I.R, it can be argued as though there was a voluntary act of sexual intercourse, being thwarted by P.W.2. But, however, a careful perusal of the entire complaint and thereafter the evidence of P.W.1, it is clear that at about 10. A.M, when the victim, a 17 year old girl was grazing her milch cow, the petitioner/accused initially went near her, made a conversation and suddenly pulled her by catching hold of her hand to the nearby teak farm and had intercourse with her. The very fact that the victim did not physically and violently resist the accused will not make the act as consensual. A proper reading of Section 375 of Indian Penal Code would clearly convey that if the act of the accused is against the will of the prosecutrix and against her consent, it would amount to the offence of rape. One has to step into the shoes of the victim and see the entire episode from

her perspective. She was a 17 year old and was all alone. Yes, she walked along when was dragged by her hand. But, when the accused pushed her down and forced himself upon her. She wanted to and was trying to shout and resist, but, the accused and his acts prevailed. Upon reading of Section 90 of the Indian Penal Code, it will be clear that (a) there must be consent; (b) such consent should not be our of fear or misconception. As per Section 114-A of the Evidence Act, there is a presumption of absence of consent in the offense of rape if the victim deposes that she did not consent. To rebut this presumption, there must be positive evidence let in by the accused and mere absence of a valiant and violent effort on the part of the victim certainly does not amount to consent. As early as in the year 1957, a Learned Judge of the Punjab & Haryana High Court, had in ***Rao Harnarain Singh and others Vs. State***[2], has most eloquently put it as follows :

> "*A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be "consent" as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent Submission*

2 AIR 1958 P&H 123

> *of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has wished as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure. A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.* " (emphasis supplied)

Thus, 'submission' would not amount to 'consent'. In this case, medical evidence on record confirming the injury on the victim, even dispels the argument of voluntary submission. Unless the defence is able to establish that the intercourse was one of free will and consent and rebut the presumption, the prosecution case stands proved.

13. As far as the further submission of the learned Counsel, regarding the contradiction in the evidence of P.W.2, is concerned, there was no cross-examination of PW-14, the Investigating Officer in this regard. Therefore,

the arguments of the learned Counsel for the petitioner, in the present Revision Case fail and does not merit acceptance. I find no infirmity whatsoever in the conclusions of the Trial Court as well as the lower Appellate Court, finding the accused guilty of the offence under Section 376 of Indian Penal Code.

14. As far as the sentence is concerned, it is the submission of the learned Government Advocate (Criminal Side) that there is minimum sentence of seven years prescribed for the offence and therefore, only the minimum sentence is imposed on the accused and therefore, there is nothing to interfere in the sentence by this Court. Per contra, the learned Counsel for the petitioner submitted that Section 376 of I.P.C as it stood on the the of offence, even though there was a minimum punishment of seven years, the proviso vested the discretion in the Court to impose a sentence lesser than the period of minimum sentence for special reasons to be recorded.

15. In this case, he submitted that the offence occurred in the year 2002 i.e., 19 years ago, when the accused was 29 years old. Now, he is 48 years of age. Now, the petitioner is married and is having two children. The prosecutrix is no more. The petitioner became alchoholic and he has

Alchohol withdrawal seizures/Multiple Neurocysticercosis and is undergoing regular and constant treatment in the Government Medical College Hospital, Tiruvannamalai. He submitted the original medical record issued by Tiruvannamalai Medical College Hospital and photo copy of the same is filed before this Court.

16. Therefore, the question arises whether the condition of the accused and efflux of time can be considered as a special circumstance for imposing a sentence lesser than the minimum sentence. The Hon'ble Supreme Court of India The Hon'ble Supreme Court of India in ***Shimbhu and Ors. Vs. State of Haryana***[3], has categorically held that in respect of the offense of rape, the efflux of time or socio economic condition of the accused cannot be 'special reason' to impose a lesser punishment than the minimum sentence. Therefore, I am unable to accept the submission of the Learned Counsel for the petitioner in this regard.

17. 20 years down the lane after the commission of the crime, the case presents the grim aftermath of the crime. The prosecutrix, even though survived the offense, and lived for many years thereafter, did pass away at

3. MANU/SC/0871/2013

an young age, pending disposal of this revision. The direct and indirect impact of the crime on her body and mind cannot be ruled out. The accused being sent to jail at an early age, has since turned into an alcoholic and is very sick now at the age of 48. But the long arm of the law will reach him and land him into jail. In between he is also married and the poor wife and children have to face the social stigma, for no fault of theirs. If only, the accused did not commit the offense, their life in the village would have been peaceful. The offence has everything to do with the corrupt mind of the accused not seeing the prosecutrix as another living being, This crime and the punishment, has only the time tested message to every individual of the society, of the kural :

"???????? ????????? ?????? ????????
????????? ?????? ?????. "

And this is what exactly the Hon'ble Supreme Court of India, had put it ***Shimbhu and Ors. Vs. State of Haryana***[4], that is, primary object of the sentencing policy in the offense of rape being, the deterrent message to the society,

18. In the result, this Criminal Revision case is dismissed. The conviction and sentence imposed by the Trial Court and the Appellate Court

4 Refer foot note No.3

stands confirmed.

23.12.2021

Index : yes
Speaking order
grs

To

1.The Sessions Judge, Tiruvannamalai.

2.The Chief Judicial Magistrate, Tiruvannamalai.

3.The Public Prosecutor,
High Court of Madras.

4.The Inspector of Police,
Kalasapakkam Police Station,
Tiruvannamalai District.

D.BHARATHA CHAKRAVARTHY, J.,

grs

Pre-Delivery order in

Crl.R.C.No.708 of 2014

23.12.2021