

Mariyados Vs. State By:

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SooperKanoon Citation : sooperkanoon.com/1167821

Court : Chennai

Decided On : Jun-18-2014

Judge : P.N.Prakash

Appellant : Mariyados

Respondent : State By:

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED: 18.06.2014 Coram THE HONOURABLE MR.JUSTICE P.N.PRAKASH Criminal Revision Case (Md.No.718 of 2007 Mariyadoss : Petitioner/Sole Accused versus State by: Inspector of Police, All Women Police Station, Kumbakonam, Crime No.3 of 2003 : Respondent/Complainant PRAYER: Criminal Revision Petition filed under Section 397 r/w.

401 of Criminal Procedure Code, praying to call for the records of the learned Additional Sessions Judge-cum-Fast Track Court-I, Thanjavur in C.A.No.56 of 2007, dated 21.09.2007, set aside the conviction and sentence imposed by the learned Principal Assistant Sessions Judge, Kumbakonam in S.C.No.104 of 2005, dated 20.04.2007 and as confirmed the learned Additional Sessions Judge-cum-Fast Track Court-I, Thanjavur and acquit the revision petitioner.

For Petitioner : Mr.M.Karunanithi For respondent : Mrs.P.Kannithevan Government Advocate (Crl.

side) :

ORDER

This Criminal Revision Petition has been preferred by the accused challenging the concurrent findings of the two Courts below convicting him for an offence under Section 376 I.P.C.and sentencing him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.10,000/- and in default, to undergo imprisonment for six months.

2.It is the case of the prosecution that the victim in this case one 'x' (P.W.2) is deaf and dumb and she is the daughter of Sarasu (P.W.1).P.W.2 has three brothers and two sisters and they were all living with their mother P.W.1.

On 26.03.2003, P.W.1, P.W.2 and Prema(P.W.9).elder sister of P.W.2 and daughter of P.W.1) called on Sakunthala (P.W.8) in the adjoining village, Vanduvancheri, as she was physically indisposed.

Sakunthala (P.W.8) is a cousin sister of Sarasu (P.W.1).They were all sitting in the house of Sakunthala and were chatting, and at around 12.00 noon P.W.2 wanted to attend nature's call and she conveyed this by signs.

So, Sakunathala asked her to go to the fields in the rear side of the house and they continued with their conversations.

When P.W.2 did not return, even after a long time, P.W.1 became a little anxious and went behind in search of P.W.2.

She heard some strange noises from the house of one Nagaraj and banged the door of the house.

The door flung open and she found her daughter P.W.2 lying on the floor with her dress lifted above and the accused was over her.

On seeing P.W.1, the accused fled.

P.W.1 started raising a hue and cry which attracted the attention of the neighbours and on hearing her shouts P.W.8 and P.W.9 also came towards Nagaraj's house

and they saw the accused running away.

When they went into Nagaraj's house, P.W.2 was on the floor scantily clad with her garments lifted above and she was found dishevelled.

It was obvious to them that the accused had sexually exploited the mute girl.

When P.W.1 wanted to lodge a complaint, her cousin P.W.8 told her that they should inform the village headman and convene a panchayat in the village.

Accordingly, the village headman was informed and he advised P.W.1 to bring the headman of her village also for the panchayat in the evening.

At the request of P.W.1, Sakarai @ Arulanandam (P.W.12) the village headman and other elders from P.W.1's village came to P.W.8's village for the panchayat.

During the panchayat, when P.W.2 was questioned, she pointed out to the accused as a person who had ravished her.

The accused denied his involvement and the village elders advised P.W.1 to proceed legally against the accused.

The panchayat got over in the mid-night of 26.03.2003.

On 27.03.2003, P.W.1 and P.W.2 accompanied by other family members went to the police station and lodged a complaint, (Ex.P1) based on which a case in the Kumbakonam All Women Police Station Crime No.3 of 2003 for an offence under Section 376 I.P.C.was registered by Amsavalli (P.W.13).Sub Inspector of Police, on 27.03.2003 at 21.30 hours.She prepared the printed F.I.R.(Ex.P10) which was received by the jurisdictional Magistrate at 04.15 p.m.on 28.03.2003.

P.W.13 examined P.W.1 and recorded her statement.

She took possession of the garments namely nighty (M.O.1).inner-petticoat (M.O.2).interior petticoat (M.O.3) and panties (M.O.4) that were worn by P.W.2 at the time of incident.

The material objects were taken possession under Form 95 (Ex.P2) for the purpose of sending the same for scientific examination through Court.

P.W.13 went to the place of occurrence on 28.03.2003 and prepared a rough sketc.(Ex.P11) and an observation mahazar (Ex.P9) in the presence of witnesses.

On 29.03.2003, the Investigating Officer (P.W.13) requisitioned the service of one Bhuvaneswari (P.W.7) who had undergone special training for teaching deaf and dumb children and who was working in Vallalar Elementary School as a teacher, for the purpose of assisting her in the enquiry of P.W.2.

With her assistance the statement of P.W.2 appears to have been recorded.

On 29.03.2003 at 09.25 a.m, the Investigating Officer sent P.W.2 to Government Hospital, Ayyampatty, where she was examined by Dr.Suryakumari (P.W.3) who examined her private parts and noted the following observations in the accident register (Ex.P3) ".History of attempted rape on 26.03.2003.

Patient is conscious.

No external injuries.

Clinically no STD disease.

Hymen intact.

Old tear about 2 cMs.over fourchette and left labia majora.

Bleeding from tear.

Vaginal smear and pubic hair were taken for analysis."

Dr.Raghupathy (P.W.4) who checked her auditory faculty certified that P.W.2 is deaf and dumb by birth and he issued a certificate to that effect which was marked as Ex.P4.

The audio graph that was taken by the doctor was marked as Ex.P5.

On the same day (29.03.2003) P.W.2 was examined by Dr.K.Malathy for determining her age.

The radiological examination and other tests were performed and the certificate (Ex.P6) was issued by Dr.K.Malathy (P.W.5).according to which the age of P.W.2 was determined as about 20 to 25 yeRs.On 29.03.2003 the Investigating Officer arrested the accused at 09.00 p.m.and produced him before the jurisdictional Magistrate for remand.

The garments that were worn by P.W.2 were sent with Form 95 to the jurisdictional Magistrate on 04.04.2003.

On the orders of the Court, the accused was examined by Dr.Ramesh (P.W.6) in the Government Hospital, Kumbakonam to determine if he was capable of having sex.

Dr.Ramesh(P.W.6) in his evidence as well in the certificate (Ex.P8) has opined that the accused is potent and is capable of having coitus.

The garments of P.W.2 were sent by the Court for scientific examination and the report dated 08.04.2003 (Ex.P12) of the Scientific Officer, Assistant Chemical Examination given by the scientific officer and assistant chemical examiner to the Government disclosed that blood was detected only in the interior skirt and not in the other items belonging to P.W.2.

The prosecution had failed to obtain the serology report and marked it as exhibit in the Court which would have disclosed the blood group.

P.W.13 almost completed the investigation and as she was transferred, the investigation was continued by Vasantha (P.W.14) who recorded the statement of the doctor and other experts.

She completed the investigation and filed a final report on 30.09.2003 before the Judicial Magistrate, Kumbakonam, under Section 375 r/w.

511 I.P.C.against the accused.

The learned Judicial Magistrate took the same on file and when the accused appeared before him the provisions under Section 207 Cr.P.C.were complied with and the case was committed to the Court of Sessions from where it was made over to the Court of the Principal Assistant Sessions Judge, Kumbakonam in S.C.No.104 of 2005.

The trial Court framed a charge under Section 376 I.P.C.against the accused and when he was questioned, he pleaded not guilty to the charge.

The prosecution examined 14 witnesses, marked 12 exhibits and 5 material objects.

When the accused was questioned under Section 313 Cr.P.C.he denied the incriminating circumstances against him.

On behalf of the accused one witness was examined and one exhibit was marked.

After considering the evidence on record, the trial Court convicted the accused for the offence under Section 376 I.P.C.and sentenced him to undergo seven years rigorous imprisonment and to pay a fine of Rs.10,000/- in default, to undergo six months rigorous imprisonment.

Aggrieved by the judgment of the trial Court the accused appealed to the Sessions Court in C.A.No.56 of 2007 which was dismissed on 21.09.2007 aggrieved by which he is before this Court in this revision petition.

3.Heard the learned counsel Mr.M.Karunanithi, for the accused and Mrs.S.Prabha, learned Government Advocate (Crl.

side).4.Mr.M.Karunanithi, learned counsel for the accused vehemently submitted that the prosecution had suppressed the genesis of the case and a false case has been foisted against the accused.

It was submitted by Mr.M.Karunanithi that the accused was converting people to Christianity which was not liked by Kaliyamoorthy (P.W.10).the brother of P.W.2 and he had engineered this false case against the accused.

In support of his contention, the learned counsel submitted that he had filed an application under Section 91 Cr.P.C. for summoning the General Diary and F.I.R. Book from the station house which though was ordered by the trial Court was not actually produced by the police and therefore an adverse inference should be drawn against the prosecution in terms of Section 114 of the Evidence Act, 1872.

He further submitted that the defence had examined the Inspector of Police of the respondent police station as D.W.1 and through her they had marked a copy of the printed FiRs. Information Report of the same police station in Crime No.1 of 2003.

The learned counsel pointed out that the printed F.I.R. (Ex.D1) relating to Crime No.1 of 2003 bears the number 343107 but whereas the printed F.I.R. in respect of the present case which is crime No.3 of 2003 bears the number 343110.

According to him, when Crime No.1 of 2003 bears the number 343107, then Crime No.3 of 2003 should be 343109 and not 343110.

He submitted that P.W.2 had given a complaint which was taken on file and a case was registered in 343109 and that was torn and thereafter, the present case against the accused was filed implicating him falsely.

He built his argument further by reading the evidence of P.W.1, who had stated in the cross examination that she had gone to Dharasuram police station and lodged a complaint but whereas the present case has been registered in Kumbakonam Police Station.

He relied upon the judgment of the Supreme Court in Yerumalla Latchaiah v.

State of Andhra Pradesh [(2006) 3 SCC (Cri) 373]. to persuade this Court to draw an adverse inference in this regard.

Though at the fiRs. blush this argument did sound attractive, but on a closer scrutiny of the evidence on record I am unable to persuade myself to draw an adverse inference under Section 114 of the Evidence Act for the following reasons.

5. It may be necessary to state here that there is no legal evidence in this case to show that the accused had filed an application under Section 91 Cr.P.C. and that it

was allowed by the trial Court and inspite of which the General Diary and F.I.R.book was not produced by the police.

These arguments were advanced across the Bar by the learned counsel for the accused which this Court could have easily ignored in the light of the fact that there is no materials before this Court to assert this fact.

A party who wants the Court to draw adveRs.inference must fiRs.establish legally that a request was made and inspite of the order of the Court it was not complied with by the adveRs.party.

This should have to be proved as any other fact by examining some witness and not merely by oral submissions in a revisional proceedings as in this case.

Though this Court could have dismissed this plea on this short ground, in the interest of justice this Court proceeded to examine the merits by pressurising that an application under Section 91 Cr.P.C.was made and allowed by the trial Court.

6.In a private lis between two parties, if one party does not produce a record in his possession despite order of a Court, then an adveRs.inference can be drawn.

A criminal case is not a private lis between two parties.

According to P.W.1 and P.W.2 the incident had taken place on 26.03.2003 and after a futile village panchayat, they have admittedly gone to the police station only on the next day i.e., on 27.03.2003.

The police investigation like registration of F.I.R.started only thereafter.

The victim party has no control over the police records.

In fact judicial notice can be taken of the fact that in this country police records are not maintained like in Scotland Yard or FBI.

That is why we still have Section 25 of the Evidence Act and 162 Cr.P.C.in the Statute Book and only very recently by a Parliamentary amendment to the Criminal Procedure Code, the police have been directed to paginate the Case

Diary and keep it as a volume.

This amendment to Section 172 Cr.P.C. was introduced by the Parliament with effect from 31.12.2009 by Central Act 5 of 2009 in order to curb the mischief of insertions and interpolations in the maintenance of Case Diary.

The police records and the evidence of the police officer are not substantive evidence with regard to the factum of an incident in question because they come into picture only after a complaint has been registered by them.

Therefore, this Court should see whether the prosecution has adduced satisfactory evidence in order to prove whether the alleged offence had taken place on 26.03.2003 or not and the failure of the police to produce the called for documents cannot outweigh the primary evidence of witnesses like victim a eyewitness in a given case.

We may profitably refer to the following passage in the judgment of the Hon'ble Supreme Court in Harpal Singh etc. v. Devinder Singh and another [1997(6) Supreme Today 274]. "23.

No doubt, Randeep Rana would have been a material witness.

But merely because he was not examined by the prosecution a criminal court is not to lean to draw the adverse inference that if he was examined he would have given a contrary version.

The illustration (g) in Section 114 of the Evidence Act is only a permissible inference and not a necessary inference.

Unless there are other circumstances also to facilitate the drawing of an adverse inference, it should not be a mechanical process to draw the adverse inference merely on the strength of non-examination of a witness even if it is a material witness.

We do not see any justification, in this case, in drawing such an adverse inference due to non-examination of Randeep Rana.

(vide State of Kamataka v.

Main Patel [1996].SCC CrI.

632, relied on.".

Therefore, this Court finds no merit in the said plea.

7.Coming to the evidence against the accused we have the evidence of the victim girl herself and the evidence of P.W.1, P.W.8 and P.W.9.

The learned counsel for the accused submitted that the evidence of the victim girl ought not to have been relied upon by this Court because the trial Court had failed to record the signs that was shown by her.

In support of his contention he cited a few judgments which I shall discuss little later.

It may be necessary to extract Section 119 of the Evidence Act as it stand earlier.

".119.Dumb witnesses.-A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court.

Evidence so given shall be deemed to be oral evidence.".

8.From a bare reading of Section 119, it is clear that the Court should fiRs.asertain whether the witness is capable of writing.

Only if the witness is not capable of writing, the Court should require the witness to speak by signs and gestures.

The learned counsel submitted that in this case the trial Court had failed to fiRs.enquire whether P.W.2 was capable of writing out the answeRs.I perused the deposition of P.W.2 and found that the trial Court has not given any finding to the effect that P.W.2 does not know to read and write.

But on seeing the signatures of P.W.2 in the original deposition that was called for from the Trial Court I am thoroughly convinced that she does not know to read and write.

She has merely scribed her name in Tamil language in a totally disjointed manner.

Perhaps everybody including the trial Court Judge have assumed that P.W.2 is an unlettered person in the light of admitted social background namely that she is a Dalit from a remote dalit colony insulated even from minimum schooling due to poverty conditions.

She has no father and her mother P.W.1 is merely an agricultural labourer.

It would have been in the fitness of things had the trial Judge made an enquiry to ascertain about her literacy levels.

Just because that has not been done, it cannot be said in this case that any great prejudice had been caused to the accused.

9.The next argument advanced by the learned counsel for the accused is that the trial Court had failed to record the signs and gestures.

In this regard, he relied upon the judgment of the Hon'ble Supreme Court in State of Rajasthan v.

Darshan Singh alias Darshan Lal [2012 CrI.

L.J.2908].The Hon'ble Supreme Court in para 18 has held as follows: ".18..When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath.

On being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter.

However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language.

The law required that there must be a record of signs and not the interpretation of signs."

10. That was a case filed by the State of Rajasthan against the acquittal of accused and the Hon'ble Supreme Court has refused to interfere with the acquittal.

The Supreme Court has noted that the trial Court had used the service of the victim's father as an interpreter for interpreting the signs and gestures of the dumb witness.

The Court below had held that the father being an interested witness ought not to have been used as an interpreter.

In the light of those facts, the Supreme Court did not interfere with the acquittal of the accused.

The facts obtaining in this case is different.

Right from the time of investigation the police had taken the service of Bhuvaneshwari (P.W.7) a teacher who was specially trained to decipher the language of the mute.

The Court had also requisitioned the service of Bhuvaneshwari(P.W.7) to interpret the evidence of P.W.2 in the Court.

At that time no exception was taken by the accused for this procedure.

Both of them were administered oath by Court.

Bhuvaneshwari (P.W.7) assisted the Court in interpreting the signs and gestures of P.W.2.

Thereafter, Bhuvaneshwari was examined as P.W.7.

in order to prove the fact that she had assisted the police during investigation.

It is not the case of the accused that Bhuvaneshwari was in any way related to the victim's family or known to them.

The police and the Court had requisitioned her service from a Special School for this singular purpose.

The learned counsel for the accused relied upon the judgment of Himachal Pradesh High Court in Sunil Kumar V.

State of Himachal Pradesh [2012 CrI.L.J.1743].in which the High Court had acquitted the accused on the ground that the trial Court had not recorded the signs made by the dumb witness but had only recorded the interpretation of the signs.

The Himachal Pradesh High Court also found other grounds, apart from this, for acquitting the accused in that case.

In any event the judgment of the Himachal Pradesh High Court is only of persuasive value and does not bind this Court.

In my opinion, for the failure of the Court to record the actual signs of the dumb witness the accused cannot be acquitted.

We cannot forget the maxim *actus curiae neminem gravabit* which means the act of Court should not prejudice any party.

In our judicial system the Presiding Officer is the master of his Court and if for reasons, be it out of ignorance or on account of supine indifference or otherwise, if he fails to perform his duty in the manner known to law that cannot inure to the advantage of any party unless grave prejudice is shown to have been caused.

In this case, the accused was represented by a lawyer in the trial Court and he has used the same interpreter for cross-examining P.W.2.

He did not complain that his questions were being misinterpreted and erroneously recorded by the trial Court.

Thus, after the acquiescence to it and participating in the proceedings, one cannot reprobate it at the revisional stage.

Mr.M.Karunanithi, fairly submitted that even if the evidence of P.W.2 is overlooked on this ground, this Court can look for other collateral evidence to prove the offence.

The learned counsel for the accused brought to my notice the unreported judgment of Punjab and Haryana High Court in Raja @ Rajender v.

State of Haryana [<http://indiankanoon.org/doc/162931976/>].For the purpose of future guidance of trial Courts, it may be relevant to extract paragraphs 26 and 27 of the judgment: ".26.

In the present case, statement under Section 164 of the Cr.P.C.was recorded by the Judicial Magistrate on the interpretation made by Satpal interpreter.

No doubt, the statement made by the witness under Section 164 of the Cr.

P.C.is not a substantial evidence but the Court can take into account that in her statement under Section 164 of the Cr.P.C., the prosecutrix has supported the case of the prosecution.

The trial court recorded the statement of the prosecutrix through interpreter and the trial Court has given details of each sign/gesture made by her.

For example, the oath was administered to the prosecutrix, the interpreter has folded her hand whereupon the witness has also folded her hand where upon the interpreter has stated that the witness has taken oath of speaking truth.

The next question put to this witness was regarding age.

Upon this interpreter signal with her both hands and then lifted her right hand in inquiry position Criminal Appeal No.S.611 SB of 2009 10 whereupon the witness lifted her both hands indicating five fingers three times and then raising one finger of one hand only, upon which interpreter stated that witness has given her age as 31 yeRs.So, the sign given by the prosecutrix makes the things clear regarding her age.

The other question regarding children and education of the children etc.has been answered by the prosecutrix in a sign language which makes the things understandable to a commoner.

A question was put to give the total number of assailants.

This question was put by interpreter making gesture with her right hand upon which the witness raised five fingers of one hand and then made a circle with index finger and thumb inserted in finger of other hand in that hole, to which interpreter replied that witness has stated that five persons had committed sexual intercouRs.with her.

A question was put to the prosecutrix whether all the assailants are present in the Court, on the inquiry gesture of the interpreter, the prosecutrix raised her four fingers and then raised one finger and making the signs with her fingers of her right hand by closing the fist and opening and closing the same to which interpreter stated that four persons are present in the court while one is not present.

27.Another question was put to the witness how many times wrong act was committed with you and individual by each assailants.

The interpreter made inquiry sign to which the prosecutrix gesture by raising three fingers fiRs.then two fingers and one raising her index finger three times and the same has been interpreted that two assailants committed wrong act one each.

The very important question which was put to the prosecutrix was that can she recognize those persons, if they are present or Criminal Appeal No.S.611 SB of 2009 11 not ?.

To answer that question, interpreter moved her hand upon her face and then made inquiry upon which the witness the prosecutrix has put her hand against her face and interpreter has replied that she can recognize the assailants as the witness has put her right hand before her face indicating a mirror in front of her.

Thereafter, the prosecutrix had pointed out towards the accused individually who were present in the Court with the police officials.

So, in this manner, the prosecutrix has recognized all the four accused in the present as assailants."

11. On an independent research made by me I came to understand that only English has got codified international sign language for the mute.

There is no such codified sign language for Indian languages.

Dumb witnesses can be classified broadly into two categories viz., witnesses who are dumb; and witnesses who are deaf and dumb.

These witnesses can be further classified into two categories viz., those who have attended Special Schools for the hearing impaired and those who have not had that special education.

The former category of witnesses who have undergone this formal learning in the Special School will understand the questions from lip movement and also from gestures by trained teachers. In response to the question put by the expert, they will give their answers both by lip movement and gestures.

As regards the latter category of witnesses who have not undergone any training in Special Schools, the questions can be put to them only through signs and gestures and they would also answer by signs and gestures.

12. Section 119 of the Evidence Act as amended by the Parliament with effect from 15.03.2013 reads as under: ".119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, evidence so given shall be deemed to be oral evidence: Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed."

13.The Madras High has issued a circular in R.O.C.No.1729/2010/RR, dated 02.06.2010 to all the Subordinate Courts, containing a list of Advocates who are trained to provide assistance to the Court for recording the evidence of deaf and dumb witnesses.

This list has been prepared for all the Districts in the State and the mobile numbers of the Advocates are also given.

This R.O.C.was issued pursuant to the direction by this Court on 30.11.2009 in W.P.(MD)No.5802 of 2006.

Apart from the names of the Advocates, the list also contains the addresses of Special Schools for deaf and dumb in Tamil Nadu from where the Courts can requisition the service of teachers for this purpose.

As regards the expenses for videographing the evidence of a dumb witness, it should be defrayed from the contingent fund.

The Judicial Officer who is vested with contingent fund in a district, shall make available necessary funds for videographing when a request is made by a Presiding Officer of a Court under his administrative control.

14.During my informal discussions with some trial Court Judges about the viability of videographing the evidence of dumb witnesses and videographing the confession statements under Section 164 Cr.P.C., they expressed a very genuine apprehension that the videographer, who would have it in his system, may knowingly or unknowingly share it with third parties, in which event, it may even get uploaded in online platforms and portals like You-tube and will be a great injustice and embarrassment to the witness.

I gave my anxious consideration to these possibilities and I felt that if an affidavit of undertaking is obtained from the videographer to the effect that he will not disclose the proceedings to anybody, will maintain secrecy and will also not retain a copy of the proceedings in any form or transmit or publish the recordings, it can to some extent be a deterrent.

Therefore, trial Courts should obtain an undertaking affidavit from the videographer as aforesaid and make it part and parcel of the Court records so that action can be taken against the videographer, if he violates the undertaking.

15. Coming to the evidence of (P.W.2) she has stated in her chief examination on 13.02.2007 as follows: ".P.W.1 is my mother.

My name is Priya.

On the date of incident, I went to attend nature's call, the accused in the dock Mariyadoss took me and lifted my skirt and removed my panties and then, he laid on me and hugged me.

He kept his male organ in my private part.

I pushed him but I was unable to.

I fainted.

Police enquired me.

I told them everything."

She was recalled for cross-examination on 21.02.2007.

In the cross examination, she has stated as follows: Question :Apart from police, did anyone else enquire you?.

Answer :The witness did not understand this question.

Question :Did not understand means what?.

Answer :Did not understand the question.

Question :Were there any injuries on your body?.

Answer :Yes.

Question :Where were the injuries?.

Answer :On the breast part there was injury.

Question :Was there injury on your back?.

Answer :Yes, there was an injury on my back.

Question :After how much time did you gain consciousness?.

Answer :I do not know at what time I regained consciousness.

Question :Do you know the accused before incident?.

Answer :I have seen the accused before the incident.

Question :Do you know the name, father's name and address of the accused?.

Answer :I do not know the name and father's name of the accused.

Suggestion: I deny the suggestions that no such incident took place; on 26.03.2003 I alone went to the house of Shagunthala; I drove a bi-cycle with bar [Gent's cycle].and when I fell down some boys made fun of me in the village; I sustained injuries in my private parts when I fell down from the cycle due to friction with the cycle bar; at the instance of my uncle Kaliyamoorthy, I have foisted the false case against the accused; the garments marked are not that of mine.

16.She was further examined in chief with the permission of the Court by the prosecution and the clothes worn by her were marked as M.O.1, M.O.2, M.O.3 and M.O.4.

There are no grounds to infer that P.W.2 spoke untruth.

Even if we eschew the evidence of P.W.2 on the ground that the trial Court had failed to record the signs and gestures, we have the evidence of P.W.1, P.W.8 and P.W.9.

These witnesses have clearly stated that they were all talking in the house of P.W.8 and at that time P.W.2 wanted to attend nature's call.

P.W.2 went behind the house and did not return for quite sometime.

P.W.1 went in search of P.W.2 and after opening the door of Nagaraj house, P.W.1 saw the accused lying over P.W.2 and her skirt was lifted up.

When P.W.1 started making noise, P.W.8 and P.W.9 came to the place and saw the accused running away from Nagaraj's house and when they went inside, they found P.W.2 lying on the floor dishevelled.

This evidence of P.W.8 and P.W.9 is relevant under Section 6 of the Evidence Act.

It is relevant to extract Section 6 of the Evidence Act: ".6.Relevancy of facts forming part of same transaction.-Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.".

The fact that P.W.8 and P.W.9 saw the accused running from the house of Nagaraj (which is an incriminating conduct against the accused under Section 8 of the Evidence Act) and when they went to the house, they found P.W.2 lying on the floor with her dress lifted up are by themselves not facts in issue, but they are so connected with the fact in issue (fact in issue being whether it was the accused who ravished P.W.2) so as to form part of the same transaction, they become relevant under Section 6 of the Evidence Act.

When P.W.8 and P.W.9 go there, P.W.1 was heard saying ".The accused has spoilt her and is running.".

This statement of P.W.1 as heard by P.W.8 and P.W.9 is relevant as res gestae.

The defence did not make any serious dent in the cross-examination of P.W.1, P.W.8 and P.W.9 with regard to the core issue in this case.

The defence's cross examination was that P.W.1 had gone to Dharasuram police station but, whereas F.I.R.is registered by Kumbakonam police station.

This, in my considered opinion, is not so material because the victim family would have been distraught after the incident and they would have run from pillar to post after the panchayat failed.

17.The learned counsel for the accused submitted that there is a huge delay by P.W.1 in lodging the complaint.

This Court finds that the delay has been clearly explained by the prosecution.

The incident in question had happened in a Dalit village.

P.W.8 in whose village the incident had taken place has advised P.W.1 not to rush to the police station but to convene a village panchayat and at her instance, the village Panchayat was convened in the night.

The headman of P.W.1's village, P.W.12 and others attended the panchayat and he gave evidence that in the presence of elders.P.W.2 identified the accused as the perpetrator of the offence.

The accused denied his involvement and the elders of the village advised P.W.1 to go to the police station.

Thus, delay, if any, has been satisfactorily explained by the prosecution.

18.The next question is, was P.W.2 raped as defined in Section 375 or was there an attempt to rape?.

After completing the investigation, the Investigating Officer (P.W.13) was of the opinion that the accused had committed an offence under Section 376 r/w.

511 I.P.C.and accordingly, he filed a final report to that effect.

The trial Court framed a charge under Section 376 I.P.C.against the accused.

Neither the Investigating Officer nor the trial Court can be faulted for holding two different opinions and this only shows that the trial court had independently exercised its mind without being influenced by the opinion of the police officer.

19.Coming to the evidence on record, P.W.1, P.W.8 and P.W.9 are not eye witnesses to the actual commission of coitus.

P.W.2 did not speak anything about penetration.

Perhaps, it was fortunately averted because of timely intervention of P.W.1 who made a hue and cry spontaneously.

The medical evidence also is to the effect that there has only been an attempt to rape.

The injury found by Dr.Suriyakumari (P.W.3) on the labia majora and fourchette (which are external parts) was found to be an old injury.

Hymen was found to be intact.

Dr.Suriyakumari (P.W.3) in Ex.P3 has stated that it was an attempt to rape.

In her chief examination, she stated that she collected the pubic hair and vaginal smears and sent them for forensic examination.

She received a report to the effect that there was no evidence of sexual intercourse.

From the evidence of P.W.2 and from the medical evidence, I am unable to hold that the accused had committed rape on P.W.2 as defined under Section 375 I.P.C.From the evidence on record, the accused can be convicted only for an offence 376 r/w.

511 I.P.C.Both the courts below have sentenced the accused to seven years rigorous imprisonment for the offence under Section 376 I.P.C.and have not awarded any compensation to the victim.

The accused is in incarceration.

It will serve the interest of justice, if the accused is sentenced to undergo four years rigorous imprisonment and directed to pay a compensation of Rs.1,00,000/- to the victim, in de-fault, to undergo one year rigorous imprisonment for offence

under Section 376 r/w.

511 I.P.C.20.To sum up, the conviction and sentence imposed upon the accused by the Courts below for the offence under Section 376 I.P.C.is set aside and in its place the accused is convicted for the offence under Section 376 r/w.

511 I.P.C.and sentenced to undergo four years rigorous imprisonment and pay a compensation of Rs.1,00,000/- to P.W.2 in default to undergo six months rigorous imprisonment.

21.This Court records its appreciation for the fair assistance rendered by Mr.M.Karunanithi, learned counsel for the accused and Mr.P.Kannithevan, learned Government Advocate (Crl.

side) for the State.

22.With the above modifications, the appeal is disposed of.

To 1.The Additional Sessions Judge-cum-Fast Track Court-I, Thanjavur.

2.The Principal Assistant Sessions Judge, Kumbakonam.

3.The Inspector of Police, All Women Police Station, Kumbakonam.

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