

Paul Pazham @ Pazham Vs. State Represented by

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Court : Chennai

Decided On : Sep-08-2014

Judge : P.R.Shivakumar

Appellant : Paul Pazham @ Pazham

Respondent : State Represented by

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED: 08.09.2014 CORAM THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR Criminal Appeal (MD)No.183 of 2006 Paul Pazham @ Pazham ..Petitioner versus State represented by Inspector of Police, Panagudi Police Station, Cr.No.342/2000, Tirunelveli District..Respondent Appeal filed under Section 374 (2) Cr.P.C., to call for the records from the lower Court (Mahila Court, Tirunelveli, Tirunelveli District) and set aside the judgment of the lower Court by acquitting the appellant in S.C.No.468 of 2002 dated 08.02.2006 of Mahila Court, Tirunelveli, Tirunelveli District.

!For Petitioner : Mr.V.Kathirvelu, Senior Counsel for Mr.K.Prabhu ^ For Respondent : Mr.T.Mohan, Additional Public Prosecutor :

ORDER

The sole accused in Sessions Case No.468 of 2002 disposed of by the Mahila Court Tirunelveli, by judgment, dated 08.02.2006 is the appellant in this appeal.

He was prosecuted before the trial Court for alleged offences punishable under Sections 450 IPC and 376 IPC.

2.The learned trial Judge upon consideration of the evidence held the prosecution to have proved the charges against the appellant/accused beyond reasonable doubt and accordingly, convicted the appellant herein/accused holding him guilty of the above said offences with which he stood charged with the following punishments:- Section Punishment 450 IPC Rigorous Imprisonment for 7 years and a fine of Rs.5,000/- with a default sentence of 2 years Rigorous Imprisonment 376 IPC Rigorous Imprisonment for 7 years and a fine of Rs.5,000/- with a default sentence of 2 years Rigorous Imprisonment 3.The judgment of the trial Court dated 08.02.2006 made in the said Sessions Case.No.468 of 2002 is challenged by the appellant/accused in this appeal on both the grounds namely, regarding the conviction and quantum of punishment.

4.The case of the prosecution, in brief, is as follows: (i)The victim (P.W.1) and (P.W.2) the sister of the victim are the residents of Azhagappapuram village, Radhapuram Taluk, Tirunelveli District.

The parents of the victim used to stay in their work place situated at about 5 kms away from Azhagappapuram and as such, it was quite useful for the victim (P.W.1) and her sister (P.W.2) alone to spend their nights in their hut at Azhagappapuram.

On 13.10.2000 at about 01.00 a.m with an intention of having sexual intercourse with the victim (P.W.1).the appellant/accused entered the house sneaking through the gap between the wall and the thatched roof.

After gaining access into the house, he lifted the petticoat of P.W.1, jumped over her and attempted to have sexual intercourse with her without her consent.

When she resisted and attempted to raise an alarm, the appellant/accused subdued her attempt by putting his shirt removed from his body into her mouth, over powered her and had sexual intercourse with P.W.1 without her consent and against her will.

(ii)P.W.2 got awakened by the noise created by the struggle made by P.W.1 to escape from the clutches of the appellant/accused and she lighted the chimney lamp besides lighting a torch light with the illumination of which both P.Ws.1 and 2 were able to see the face of the appellant/accused and identify him to be Paul Pazham alias Pazham of Melatheru, Azhagappapuram.

Immediately, the appellant/accused escaped from the scene of occurrence.

(iii)The message regarding the above said incident was conveyed by P.W.8-Rajalingam, the maternal uncle of P.W.1 to P.W.3-Selvamani, the father of P.W.1 at 9.00 a.m on 13.10.2000.

P.W.3, on his arrival at Azhagappapuram took P.W.1 to Panagudi Police Station and lodged a complaint under Ex.P.1.

P.W.11, the Sub Inspector of Police registered an FIR under Ex.P.5 based on the above said complaint viz., Ex.P.1 and placed the CD file before the P.W.12, the Inspector of Police, for investigation.

(iv)P.W.12, the Investigating Officer, during investigation, visited the place of occurrence, prepared Ex.P.2-observation mahazor and Ex.P.6-rough sketch, examined the witnesses, arrested the accused and sent him for remand, referred the victim girl to the Medical Officer for medical examination and also referred the appellant/accused for potency test.

During the couRs.of investigation, the Investigating Officer (P.W.12) also obtained Ex.P.3-school certificate of P.W.1 from P.W.9, Headmaster of the school in which P.W.1 allegedly studied up to 5th standard in order to show that she was a minor less than 16 years old as on the date of occurrence.

(v).P.W.10,Dr.Vanaja Jasmine, treated P.W.1 and issued Ex.P.4 certificate opining that P.W.1 was not a virgin but she could have had sexual intercouRs.not in the recent past but long before her examination by P.W.10.

The Investigating Officer received the said certificate and the certificate issued by the Medical Officer after conducting potency test for the appellant/accused,

completed the investigation and submitted a final report alleging commission of lurking house trespass punishable under Section 457 IPC and rape punishable under Section 376 IPC.

5.After the case was duly committed for trial by the committal Magistrate in P.R.C.No.4 of 2002, the case was taken on file in the Sessions Case Division of Tirunelveli as Sessions Case No.468 of 2002 and on the question of jurisdiction, it was made over to the Mahalir Needhimandram (Mahila Court).Tirunelveli for trial and disposal.

6.In order to prove the prosecution case, as many as 12 witnesses were examined as P.Ws.1 to 12 and 9 documents were marked as Exs.1 to 9 besides producing two material objects as M.Os.1 and 2 on the side of the prosecution.

After being questioned under Section 313(1)(b) Cr.P.C regarding the incriminating materials found in the evidence adduced on the side of the prosecution, no witness was examined and no document was produced on the side of the appellant/accused.

7.The learned trial Judge, after hearing the arguments advanced on both sides, considered the evidence in the light of the points urged in the arguments and upon such consideration pronounced a judgment holding the appellant/accused guilty of both the offences punishable under Sections 457 and 376 IPC for which he was prosecuted, convicted him as per the charges and punished him as indicated supra.

9.The points that arise for consideration in this appeal are: ?.Whether the trial Court has committed an error in convicting the appellant/accused for the offences punishable under Sections 457 and 376 IPC holding him guilty of the said offences?.

(ii) in case the answer to the question (i) is in the negative, whether the punishment imposed is excessively disproportionate and liable to be reduced?..?

10.The arguments advanced by Mr.V.Kathirvelu, learned Senior Counsel for the appellant/accused and Mr.T.Mohan, learned Additional Public Prosecutor are

heard.

The judgment of the trial Court and other materials available on record are also perused.

This Court also reappraised the evidence in order to find out whether the finding of the Court below can be sustained or not.

11.It is the contention of the learned Senior Counsel appearing for the appellant/accused that the learned trial Judge, disregarding a number of discrepancies found in the prosecution case and the evidence adduced through the prosecution witnesses, both oral and documentary chose to record a conviction for the offences; that the said finding of the trial Court is totally erroneous, infirm and defective and that hence the same should be interfered with and reversed by this Court.

In support of the said contention, learned Senior Counsel has made the following submissions:- ?The prosecution itself was not sure of its case as to whether there was any consent or absence of consent on the part of P.W.1 for the alleged sexual intercourse.

The same was the reason why the prosecution had chosen to rely on Ex.P.3-Record Sheet obtained from P.W.9, who was a retired Headmaster of a school, in order to show that the victim was aged below 16 years as on the date of occurrence, so that the consent, if any, might be immaterial in establishing the prosecution case of commission of offence under Section 376 IPC.

The said document is totally unreliable in the light of the evidence adduced by the victim girl herself as P.W.1 that she has studied only up to 3rd standard, whereas in Ex.P.3 entries had been made as if she studied up to 5th standard and passed even 5th standard.

The same was the reason why the prosecuting agency did not produce the report of the ossification test which could have been conducted as usually done in case, the victim happens to be on the border line of age 16 years. The medical evidence regarding the age of the victim has been deliberately suppressed in order to

project the case to be a case of rape of a girl aged below 16 years. P.W.10, Medical Officer also opined that the victim had completed the age of 16 years. The vital discrepancy regarding the source of light with which P.Ws.1 and 2 were able to identify the accused was not adverted to by the learned trial Judge.

Had the trial Judge properly considered the evidence of P.Ws.1 and 2 regarding the illumination point throwing light on the face of the accused to be identified by P.Ws.1 and 2, it would have definitely disbelieved the evidence of P.Ws.1 and 2 regarding the identification.

The improbability of the accused sneaking through a small gap in between the wall and the roof without being caught and detained by the victim girl and her sister, who were two in number, was also not adverted to by the learned trial Judge which resulted in an erroneous finding if not perverse.

The learned trial Judge also omitted to consider the fact that no torch light was shown to the Investigating Officer and torch light allegedly used by P.W.2 was neither shown at the time of preparing of observation mahazor/Ex.P.2 nor recovered by the Investigating Officer.

The learned trial Judge also simply avoided noticing the discrepancies in the evidence of P.Ws.1 and 2 as to whether the flame of chimney lamp was increased by P.W.2 or the chimney lamp which was not burning at the time of occurrence and was ignited by P.W.2.

on hearing the struggling the noise of P.W.1.

There is also no explanation as to how the appellant/accused was able to identify in the dark when both the P.Ws.1 and 2 were sleeping side by side without being detected by P.Ws.1 or 2.

The medical evidence adduced through P.W.10 will falsify the prosecution case that she was subjected to forcible sexual intercourse on the alleged date of occurrence.

As the evidence of P.W.10 and Ex.P.4-certificate issued by P.W.10 revealed the fact that she could not have had sexual intercours.(either voluntary or involuntary) in the recent past namely, a few days prior to her examination by P.W.10.

There is also a discrepancy regarding who was the scribe of Ex.P.1- complaint and where it was prepared.

According to P.W.11's evidence, a written complaint was handed over to him, based on which, he prepared the FIR.

P.W.1 also says the same thing.

But none of the prosecution witnesses speak about the place wherein the complaint was prepared and the scribe who wrote the complaint.

If at all the above said aspects were taken into consideration by the learned trial Judge, the trial Court would have arrived at a conclusion that there were many imponderables and more reasonable doubts regarding the prosecution version, resulting in a decision that the prosecution failed to prove the charges against the appellant/accused beyond reasonable doubt.

As the learned trial Judge had not considered those aspects, it resulted in an erroneous finding holding him guilty of the offences with which he stood charged and convicting him accordingly?.12.Based on the above said submissions, the learned Senior Counsel for the appellant/accused argued that this Court, on re-appreciation of evidence, should hold the finding of the trial Court to be erroneous, set aside the judgment of the trial Court and acquit the appellant/accused holding that the prosecution miserably failed to prove its case beyond reasonable doubt.

13.Per contra, Mr.T.Mohan, learned Additional Public Prosecutor, would contend that in the absence of birth certificate or other authentic document to show the date of birth or the age of the victim (P.W.1).reliance made on the school certificate could not be found fault with and that since the victim girl was aged below the 16 years as per Ex.P.3-school certificate as on the date of occurrence, the presence or absence of consent shall be immaterial and the proof of sexual intercours.alone will be enough to prove the charge of committing the offence

punishable under Section 376 IPC made against the appellant/accused.

It is the further contention of the learned Additional Public Prosecutor that the minor discrepancies found in the evidence of the prosecution witnesses are blown out of the proportion by the learned Senior Counsel for the appellant/accused and an attempt has been made by the learned Senior Counsel for the appellant/accused to show that the prosecution has not proved its case beyond reasonable doubt.

Learned Additional Public Prosecutor would contend further that the trivial differences cannot be termed contradictions much less material contradictions and they are to be ignored; that even if the Court does not believe the evidence of other witnesses, the cogent evidence adduced by the victim (P.W.1) herself cannot be rejected as it is quite natural and that convicting the accused on the basis of the evidence of the prosecutrix is not against law and is not unknown to law.

14. Based on the above said submissions, the learned Additional Public Prosecutor, submits that there is no error or defect, much less a grave error found in the judgment of the trial Court convicting the appellant/accused for the offences punishable under Sections 457 and 376 IPC warranting interference by this Court.

15. This Court paid its anxious considerations to the above said submissions made on both sides.

16. Let us now consider whether the prosecution has proved its case beyond reasonable doubt and whether the finding of the trial Court in this regard can be termed either defective, infirm or perverse, warranting interference by this Court.

The occurrence is said to have taken place during night hours i.e., one hour after midnight.

The occurrence place is a small house which can be termed a cottage.

According to the prosecution case, the appellant/accused did not break open the lock of the main door or any door of the said house to gain access into the house

in order to accomplish his intention of having sexual intercourse with the victim (P.W.1). On the other hand, as per the evidence of P.Ws.1 and 2 which is also corroborated by P.W.12-Investigating Officer and by the observation mahazor marked as Ex.P.2, there was a short wall and the thatched roof of the house was rested on the wall leaving a gap of 1+ feet between the wall and the roof.

According to the prosecution case, the appellant/accused peeped into the house through the said gap for gaining his access.

The evidence makes it clear that a person can gain access through the said gap only in a horizontal lying position, that too with much difficulty.

This is so clear from the evidence of P.W.2.

If at all, a person could choose such a gap as a point of access into the house, that too during night hours the same may give rise to a suspicion that he could have done so on previous occasions also.

If the same is considered in the light of the fact that no alarm was made by the victim (P.W.1) and there were also discrepancies regarding whether she could recognise the person having sexual assault on her to be the appellant/accused.

When there are discrepancies regarding on what light P.W.1 saw the face of the accused, as rightly contended by the learned Senior Counsel for the appellant/accused, it may lead to an inference or a suspicion, at least, that there could have been an invitation and a consent on her part.

17.If at all the prosecution story of the alleged occurrence could be true, as rightly contended by the learned Senior Counsel for the appellant/accused, the prosecution would not have suppressed the result of the ossification test and medical examination conducted for fixing the age of the victim.

We have to presume that the Investigating Officers and the officials assisting during investigation did their duties in proper manner and they would not omit necessary things to be done towards the collection of evidence for ascertaining the truth and prosecuting the appellant/accused.

Whenever a case of rape is reported, it is quite mandatory and it is quite probable for the Investigating Officer to produce the victim before the Magistrate and get an order for medical examination, which would include the examination for ascertaining the age of the victim.

Such a requirement shall be more stringent when the victim is an unmarried girl in the age group of below 18 years or below.

When it has been contended by the prosecution that the victim was aged below 16 years and no birth register extract was produced, the investigating agency ought to have and could have referred the victim girl (P.W.1) to the Medical Officer for fixation of the age.

It is not in dispute that the victim girl (P.W.1) was referred to the Medical Officer by an order of Magistrate.

However, the requisition made by the Investigating Officer either to the Judicial Magistrate concerned or to the Medical Officer, for medical examination has not been produced and it has been suppressed.

As rightly contended by the learned Senior Counsel for the appellant/accused, had the letter/order requesting medical examination of the victim girl been produced, it would have shown that a request for fixing the age of the victim was also made and that the suppression of the same will give rise to an adverse inference that the request as well as the medical evidence regarding the fixation of age were buried as the same would go against the prosecution version in respect of the age of the victim.

18. The very foundation of the prosecution is the FIR.

If the foundation is shaking, then the prosecution story is to be viewed with suspicion.

In this case, we cannot find fault with the father of the victim (P.W.3) taking the victim girl (P.W.1) to the police station to give the complaint/Ex.P.1 came to be lodged with the police only at 9 p.m on 13.10.2000.

There was a time gap of 20 hours from the alleged time of occurrence.

According to the prosecution case, P.W.3 received information at 10.00 a.m. Thereafter, there was a delay of 11 hours. Of course, in sensational cases like child sexual abuse or sexual assault on an unmarried girl, there shall be hesitation on the part of the parents and a lot of deliberations or consultation as to whether it would be advisable to lodge a complaint or not shall take place before taking a decision.

Therefore, the said time gap alone shall not be taken as a material which would make the case of the prosecution unbelievable or improbable.

However, in this case, besides such a delay in lodging the complaint, there is also a discrepancy as to how the complaint was lodged.

According to P.Ws.1 and 11, a written complaint was given in the police station.

But P.W.1 was not in a position to say at what place it was written and who acted as the scribe of the complaint.

P.W.3's evidence in this regard is not clear as to whether the complaint was written at some other place or it was written in the police station.

19. The neighbors examined on the prosecution side as P.Ws.4 to 6 to prove that they heard the hue and cry from P.Ws.1 and 2 have not supported the prosecution version and they were treated hostile and cross examined by the Public Prosecutor with the permission of the Court.

But the cross examination of the said witnesses made by the Public Prosecutor did not result in elicitation of any answer favorable to the prosecution case or supporting the prosecution version.

P.W.7, Rajalingam is the maternal uncle of P.Ws.1 and 2 residing in the very same village.

According to his evidence, it was informed by P.W.1 only at 7.00 a.m. In the absence of parents, it is quite natural for the girls who were sexually assaulted to

go and inform the near relative like P.W.7 immediately.

But there is no explanation as to why there was a delayed information to P.W.7 who in turn had to inform the parents of the victim girl.

20.The evidence of P.W.10, the Medical officer who examined P.W.1, shows that there was no external injury on the face, chest or the female genital organ of P.W.1.

Her evidence shows that hymen had been ruptured, but the vaginal smear taken did not evidence the presence of discharge of any liquid or presence spermatozoa.

She was examined on 15.10.2000 and opined that P.W.1 was not virgin, but she could not have had sexual intercours.in the recent past.

Then a question would arise how the hymen had been ruptured.

If at all it was the forcible rupture of hymen, the wound would not have healed within two days and the Medical Officer would have noted it.

Though the Medical officer opined that the girl could have been raped without causing any external injury after gagging her mouth with a linen, she has also made it clear that she was not subjected to sexual intercours.in the recent past and the rupture of hymen could have been even caused due to homo sexual activities.

21.According to the prosecution version as spoken to by P.Ws.1 and 2, after the appellant/accused was identified by them, he did not open the door and ran away and on the other hand, he again exited through the gap in between the wall and the roof which was small enough for a person to suddenly escape through such gap.

If at all, an attempt was made by him to escape through such gap, he could have been caught by P.Ws.1 and 2 and over powered him while he had protruded a part of his body through the gap outside the house and still the other part would have been inside the house.

Nothing was done either by P.W.1 or P.W.2 to catch him and bring it the notice to the neighbours by raising alarm.

22. So far as the identification of the accused by P.Ws.1 and 2 during his action is concerned, the story propounded by the prosecution does have a number of loopholes.

FiRs. of all, there is a vital discrepancy between the evidence of P.Ws.1 and 2 as to whether the chimney lamp was burning with a small flame which was increased by P.W.2 or it was not burning making it necessary for P.W.2 to lit the chimney lamp.

It is the evidence of P.W.1 that the chimney lamp was not burning and it was dark when the appellant/accused committed sexual assault on her and that when she raised a voice, her younger sister namely, P.W.2 switched on the torch light in the illumination of which she was able to identify the appellant/accused.

However, P.W.2 gives a contrary version.

She would say that while they were sleeping on dreadful night, the chimney lamp was burning and on hearing the noise of the struggle made by P.W.1, she switched on the torch light and identified the appellant/accused.

She has also given version in the cross examination, contrary to what she had stated in the chief examination.

Giving a go bye to the statement made in the chief examination that the chimney lamp was burning, during the cross examination she stated that the chimney lamp was not burning and the entire room was in dark.

The subsequent act on the part of P.W.2 also gives rise to a suspicion.

As per her version, she acted very normally and she went to the school in the morning on the alleged date of occurrence and only after she came from the school, she accompanied her parents and P.W.1 to the police station to lodge a complaint.

P.W.2 in her evidence says that when she accompanied her parents to the police station, the police recorded the complaint/statement to their dictation.

This is contrary to the evidence of P.Ws.1 and 11 that a written complaint was lodged.

23. We have already seen that the presence of torch light in the scene of occurrence was not noted by the Investigating Officer while preparing the observation mahazor marked as Ex.P.2 and rough sketch marked as Ex.P.6. It was also not produced before the Investigating Officer and it was not recovered to show that there was a torch light and the same was used by P.W.2 to identify the appellant/accused.

Even though the M.O.1, the shirt of the appellant/accused was produced which was allegedly used for gagging the mouth of the victim (P.W.1) at the time of his alleged act of raping P.W.1, there is no reliable evidence to connect the said shirt with the appellant/accused.

Except a bald statement that the shirt had been left by the appellant/accused in the place of occurrence and the same was handed over by the victim (P.W.1) to the police officials at the time of lodging the complaint, there is no evidence to show that the said shirt belonged to the appellant/accused.

It was also not tried on the appellant/accused to find out whether it could have been to his size.

The tailor or the shop in which it was purchased if it was a ready-made shirt also has not been examined and no investigation in this regard was conducted.

Even though, the petticoat of the victim (P.W.1) was produced as M.O.2, there was no seminal stain found in the petticoat indicating that she could have been subjected to intercourse.

In fact M.O.1-shirt was not sent to the forensic lab.

On the other hand, M.O.2-petticoat, which was sent to the Forensic Lab for chemical examination, resulted in no opinion useful to the prosecution.

In fact the examination of the petticoat did not result in detection of any semen or spermatozoa.

If all the above said aspects are taken into consideration, any reasonable person can arrive at a conclusion that the prosecution failed in many respects and the improbabilities in the prosecution case created by the discrepancies/contradictions, which cannot be termed trivial, will lead to the only conclusion that the prosecution miserably failed in its attempt to prove either the charge of lurking house trespass punishable under Section 457 IPC or the charge of rape punishable under Section 376 IPC.

Proper appreciation of evidence will lead to the inescapable conclusions that there are many loopholes and reasonable suspicion regarding the prosecution version and hence, it is not desirable in the interest of justice to convict the appellant/accused on the strength of the above evidence.

The learned trial Judge committed an error without taking into consideration the above said aspects and thus the learned trial Judge has rendered a finding holding the appellant/accused guilty of the offences punishable under Sections 457 and 376 IPC.

The said finding cannot be confirmed and it deserves to be set aside and reversed.

24. For all the reasons stated above, this Court comes to the conclusion that the conviction of the appellant/accused for the offences under Sections 457 IPC and 376 IPC recorded by the trial Court is liable to be set aside and that the appellant/accused is entitled to be acquitted holding him not guilty of any of the offences for which he was prosecuted since the prosecution has not proved its case beyond reasonable doubt.

25. Accordingly, the Criminal Appeal is allowed.

The judgment of the trial Court is set aside regarding the conviction as well as the sentence and the appellant/accused is acquitted of both the offences with which he stood charged.

The fine amount, if any, paid by him shall be refunded.

As it is reported that the appellant/accused is on bail, the bail bond shall stand cancelled.

To The Mahila Court, Tirunelveli, Tirunelveli District.

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