

Subbaiah Vs. State Represented by

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Court : Chennai

Decided On : Aug-04-2014

Judge : P.R.Shivakumar

Appellant : Subbaiah

Respondent : State Represented by

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED :

04. 08.2014 CORAM THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR
Crl.A.(MD)No.76 of 2007 Subbaiah .. Appellant/accused Vs. State represented by
Inspector of Police, All Women Police Station, Palayamkottai, Cr.No.16/2005,
Tirunelveli District. .. Respondent/Complainant Prayer: Criminal Appeal is filed
under Section 374(2) of Cr.P.C., as against the Judgment passed by Mahalir
Neethimandram, Tirunelveli, Tirunelveli District in S.C.No.133/2006, dated
31.01.2007. !For Appellant : Mr.V.Kathirvelu, Senior Counsel for Mr.K.Prabhu ^For
Respondent: Mr.T.Mohan Additional Public Prosecutor :

JUDGMENT

The sole accused in Sessions Case No.133 of 2006, decided by Mahalir
Neethimandram, Tirunelveli, has come forward with the appeal under Section 374
of the Code of Criminal Procedure challenging the Judgment of the trial Court,
both in respect of conviction and also in respect of sentence.

2. A case was registered by P.W.10, the Sub Inspector of Police, All Women Police Station, Palayamkottai in Crime No.16 of 2005 for alleged offences under Sections 354 and 376 r/w 511 IPC and also an offence under Section 4 of Tamil Nadu Prohibition of Harassment of Women Act, 1998. Initially investigation of the case was done by P.W.11-Tmt.Nalini, the then Inspector of Police, All Women Police Station, Palayamkottai. Subsequently, her successor in office viz., P.W.12-Tmt.Maria Ronickam, Inspector of Police, continued the investigation and submitted a final report dated 30.01.2006 accusing the appellant herein of committing the above said offences on 20.07.2005 at about 4.00 p.m. The learned Judicial Magistrate No.I, Tirunelveli, took it on file as P.R.C.No.2 of 2006, supplied copies of the documents sought to be relied on by the prosecution to the appellant herein/accused and committed the case for trial to the Court of Session, Tirunelveli Division, as one of the offences alleged against the appellant/accused, viz., the offence punishable under Section 376 r/w Section 511 IPC was exclusively triable by a Court of Session. Thus, the case was taken on file by the Principal Sessions Judge, Tirunelveli as Sessions Case No.133 of 2006 and the same was made over to the Mahalir Neethimandram on point of jurisdiction, for disposal according to law.

3. On appearance, the appellant/accused denied the allegations. Necessary charges were framed and a trial was conducted, since the appellant pleaded not guilty. In order to prove the prosecution case, twelve witnesses were examined as P.Ws.1 to 12 and 18 documents were marked as Exs.P1 to P18 on the side of the prosecution. One material object was marked. After evidence of the prosecution was concluded, the incriminating materials found in the prosecution evidence were culled out and the appellant herein/accused was questioned regarding those materials under Section 313(1)(b) of the Code of Criminal Procedure. The appellant/accused denied the evidence relied on by the prosecution and submitted that due to previous enmity, a false case was cooked up and the family members and close relatives of the defacto complainant were made to depose against him with a view to get him convicted for an offence involving moral turpitude. No witness was examined and no document was produced on the side of the accused.

4. The learned trial Judge considered the evidence after hearing the arguments advanced on both sides and upon such consideration, arrived at a conclusion that the charge under Section 376 r/w 511 IPC alone stood proved, whereas the other two charges viz., charges for offences under Section 354 IPC and Section 4 of Tamil Nadu Prohibition of Harassment of Women Act, 1998 were not proved. Accordingly, the learned trial Judge recorded conviction convicting the appellant/accused for the offence under Section 376 r/w 511 IPC. After giving an opportunity to the appellant/accused to make his representation regarding punishment, the learned trial Judge sentenced him to undergo rigorous imprisonment for five years and to pay a fine of Rs.1,000/- with a further direction that in case of default in payment of fine, he should undergo rigorous imprisonment for three months. Incorporating the order of conviction and sentence, the learned trial Judge pronounced the Judgment on 31.01.2007. The said Judgment is challenged in the present appeal, both in respect of conviction and sentence.

5. Before ever dealing with the submissions made on behalf of the appellant and on behalf of the respondent in this appeal, it shall be helpful to briefly narrate the case of the prosecution.

6. The brief story of the prosecution can be stated thus:- P.W.1-Muthuselvi and P.W.2-Mariappan are the parents of P.W.3-Vanitha Selvi. P.W.4-Selvi and P.W.5-Tharmar are the relatives of P.Ws.1 to 3. P.Ws.1 to 5 and the appellant/accused Subbiah are resident of Jothipuram near Palayamkottai bus stand. On the date of alleged occurrence (20.07.2005) P.W.3 was aged about six years and she was a school going child. On 20.07.2005, at about 4.00 p.m., after her return from school, she was taken by the appellant/accused to his house and was sexually assaulted by him. P.W.1, the mother of P.W.3 noticed the difference in the behavior of P.W.3 on her return from the house of the appellant and P.W.4 was informed of the same. P.W.5 had seen the victim girl viz., P.W.3 coming out of the house of the appellant/accused. When P.W.1 examined the person of P.W.3, she found nail marks on the chest and also on the female reproductive organ of P.W.3. She also noticed contusion on the genital (vulva) of her daughter. After informing P.W.4, P.W.1 took the child to police station, where a complaint was lodged and

the child (P.W.3) was referred to the hospital for medical examination. P.W.6- Dr.Sujatha examined the victim girl, prepared Ex.P5- Accident Register and issued Ex.P6-wound certificate. The vaginal smear of P.W.3 was also taken and sent for chemical examination. During the course of investigation, the appellant/accused was referred to the medical officer for potentiality test and a certificate in this regard was obtained under Ex.P9. The Jatti, which was allegedly recovered from the parents of the victim girl, was sent for chemical examination and Ex.P11- Chemical report and Ex.P12- Serological report were received. The investigation conducted by P.W.11 and continued by P.W.12 resulted in the collection of materials, which according to the Investigating Officer, were sufficient to prosecute the appellant/accused for the offences mentioned in the final report, viz., offences under Sections 354 and 376 r/w 511 IPC and also an offence under Section 4 of Tamil Nadu Prohibition of Harassment of Women Act, 1998.

7. Mr.V.Kathirvelu, learned senior counsel appearing on behalf of the counsel for the appellant/accused has argued that the learned trial Judge, without properly appreciating the evidence and without applying the correct principles of law, wrongly recorded a conviction holding the accused/appellant guilty of the offence of attempt to commit rape punishable under Section 376 r/w 511 IPC; that the learned trial Judge failed to note numerous contradictions, which are vital and material, found in the evidence adduced on behalf of the prosecution and the same resulted in a finding, which can even be termed perverse; that the learned trial Judge, even committed an irregularity in not recording a certificate to the effect that the victim-child witness, was competent to be a witness and that the probability of the defence theory propounded by the appellant/accused was totally disregarded by the learned trial Judge. The further contention of the learned Senior Counsel is that when the medical evidence does not show any injury on the victim child, conviction of the appellant/accused for an attempted rape cannot be sustained, especially when the prosecution projected a theory that the underwear of the victim girl did contain spermatozoa, whereas the vaginal smear did not contain traces of semen and that even though, the prosecution was able to get a certificate that the underwear of the victim girl produced as M.O.1 did contain Spermatozoa, it was not proved to be that of the appellant/accused. The learned Senior Counsel also argued that all the supposed eye witnesses are interested

witnesses and they did have a strong motive for foisting a case against the appellant/accused to wreck vengeance for the trial faced by P.W.2, the father of the victim child for an offence under Section 376 IPC in another case. It is the further contention of the learned Senior Counsel that the learned trial Judge having arrived at a correct conclusion that the appellant/accused was not guilty for the other two offences viz., offences under Section 354 IPC and Section 4 of Tamil Nadu Prohibition of Harassment of Women Act, 1998, chose to record a conviction for the offence under Section 376 r/w 511 IPC, simply thinking that such a case should not result in acquittal, even though no sufficient evidence is available for proving the guilt of the accused.

8. On the other hand, Mr.T.Mohan, learned Additional Public Prosecutor has contended that the evidence of the victim girl viz., P.W.3 could not have been rejected as unreliable and that believing the testimony of the child witness, who was supported and whose evidence was corroborated by the other witness, the trial Court rightly recorded a conviction for the offence under Section 376 r/w 511 IPC. The learned Additional Public Prosecutor would contend further that though there is no certificate in any specific form, the deposition of P.W.3 recorded by the learned trial Judge contains the preliminary examination and the same would show the satisfaction of the trial Court that the witness was able to understand the nature of the proceedings and the said child was competent to be examined as a witness. It is the contention of the learned Additional Public Prosecutor that the absence of spermatozoa in the private part of the victim girl is insignificant in the light of the fact that the child did have a bath immediately after the occurrence and that under the said circumstances alone, the learned trial Judge relied on the presence of spermatozoa in the inner wear of the victim child produced as M.O.1. According to the submission of the learned Additional Public Prosecutor, when the potentiality of the accused is established, the failure to conduct a test to find out whether the spermatozoa found in M.O.1 was that of the appellant/accused or not, shall be insignificant and that the over all effect of the evidence adduced on the side of the prosecution will prove that the accused had committed the offence, for which he was convicted by the trial Court. In line with the above said submissions, the learned Additional Public Prosecutor has submitted that the finding of the trial Court based on appreciation of evidence should not be interfered with by this

Court pointing out certain loopholes alone, which, according to the prosecution, are immaterial or insufficient to negative the guilt of the accused.

9. This Court paid its anxious consideration to the above said submissions made on both sides.

10. The point that arises for consideration in this appeal is as follows:- Whether the conviction recorded and sentence imposed by the trial Court on the appellant/accused are erroneous and infirm requiring interference by this Court?.

11. The appellant/accused was prosecuted before the trial Court for alleged offences punishable under Sections 354 and 376 r/w 511 IPC and also an offence under Section 4 of Tamil Nadu Prohibition of Harassment of Women Act, 1998. There is no direct eye witness except P.W.3-victim child, for the alleged occurrence, viz., the alleged attempt to rape made by the appellant/accused. Even P.W.1, the mother of the victim child has not deposed in clear terms that she made enquiry with her daughter and on such enquiry, her daughter revealed the fact that the appellant/accused committed sexual assault and made an attempt to commit rape on her. On the other hand, it is her simple statement that the victim child after the occurrence came to their house and wanted to take bath; that growing suspicious of the conduct of her child, she examined her body and private parts, where upon she was able to find nail marks on the chest, genetic organs and contusion on the female reproductive organ (vulva); that thereafter, she informed the same to P.W.4 and that after the arrival of her husband viz., P.W.2, they went to Palayamkottai Police Station and lodged a complaint with a male Sub Inspector of Police, who was present there. Though P.W.1 would have stated that on examination of the person of her child, she found nail marks and contusion, her testimony stands falsified by the evidence of P.W.6-medical officer, who examined the victim girl P.W.3. The Accident Register and wound certificate issued by her viz., Exs.P5 and P6 are enough to falsify the above said statement of P.W.1.

12. P.W.5 was examined as a chance witness, who saw the victim coming out of the house of the appellant/accused. There is a vital contradiction in this regard between the evidence of P.Ws.1 and 3. It is the testimony of P.W.1 that at the time of occurrence, her daughter was wearing jatti alone and she did not wear any

gown. On the other hand, when P.W.3 was referred to P.W.6-medical officer, she was informed that the accused took the victim child into his house and lifted the gown and since the mother of the victim child came there at that point of time, he ran away from that place. Hence, it is doubtful as to what kind of costume the child was wearing at the time of alleged occurrence. Further, the medical officer could not find any kind of injury on any part of the body of the victim child. According to the victim girl's testimony, the accused laid on her and rubbed reproductive organ (penis) on the female genital of the victim child. The same also stands falsified by the evidence of P.W.6. P.W.6 would say that even in case of rubbing with the male genital on the outer surface of the female genital of the child, bruises or other injuries would have been found. Curiously, no such injury and not even a scratch was found in this case. More over, the evidence of a child witness has to be approached with utmost caution, because of her susceptibility to be tutored by their parents and others. In this case, P.W.3 has admitted during her evidence that she was tutored in the police station, a day prior to her examination in the Court as to what she should depose and how she should depose. It is also her further admission that on the date of her examination as a witness in the Court also, she was again taken to the police station and was tutored as to how she should depose before the Court. In the light of such an admission, the evidence of P.W.3 should be taken as a weak piece of evidence.

13. It is an admission made by P.W.1 and also P.W.3 that on the date of occurrence, P.W.3 went to school and she had returned home before the alleged occurrence would take place. Both of them uniformly state that the classes were over by 4'o clock. P.W.1 would state that her daughter used to go by walk and it would take half-an-hour to forty five minutes to cover the distance between the school and her residence. On the other hand, P.W.3 would say that on the date of occurrence, she had gone to school in an auto rickshaw and returned in the evening in an auto rickshaw. The same seems to be an improvement made after P.W.1 was cross examined with regard to the distance and the time that would be taken for covering the said distance if a child aged 6 years goes by walk.

14. P.W.4 who simply speak about the fact that P.W.1 informed her that something was odd in the inner wear of the child, when P.W.3 came from the house of the

appellant/accused. Apart from that, she did not say anything to directly implicate the accused. Apart from stating that he saw the child coming out of the house of the accused, no fact useful to the prosecution to prove the charge against the accused, was spoken to by P.W.5. It shall be pertinent to note that P.W.4 is none other than the brother's wife of P.W.2 and P.W.5 is a close relative of P.W.3. Apart from the above said relatives, of whom, P.Ws.1 and 3 alone is projected as the directive eye witnesses, there is no other independent witness to prove the occurrence. Even the reliability of P.W.3 is questionable in the light of the discrepancies pointed out supra and the admission made by her that she was tutored twice viz., on the date of her examination as witness and on the previous day, as to how she should depose.

15. Let us now consider whether the other evidence, which are circumstantial, shall be enough to support the conviction of the accused for the above said offence (offence punishable under Section 376 r/w 511 IPC).

16. The circumstantial evidence are; (1) P.W.1, the mother of the victim child noticed nail marks and injuries on the victim child; (2) The inner wear of the child did contain stains of sperms; and (3) P.W.5 saw the victim child coming out of the house of the appellant/accused.

17. As pointed out supra, the first circumstance viz., P.W.1 noticing nail marks and injuries on P.W.3 stands disproved. So far as the second circumstance viz., the inner wear of the victim child was found stained with sperms is concerned, the very recovery of M.O.1 itself is doubtful. The recovery mahazar marked as Ex.P16 is dated 20.07.2005. It states that M.O.1 was recovered on the date of occurrence viz., 20.07.2005. The contents of the said documents stand falsified by the testimonies of P.Ws.1 and 2. Both of them state that M.O.1-jatti was not handed over the police on the date of occurrence and it was handed over to the police on the next day. The mere fact that the said inner wear, which was produced belatedly to the police, did contain stains of spermatozoa, will not be enough to connect the accused with the same. The possibility of such stains being made by some other person for implicating the accused has not been ruled out. So far as the third circumstance viz., P.W.5 having seen the victim child coming out of the

house of the appellant/accused is concerned, as already pointed out, his evidence is of doubtful veracity, because he is a close relatives of P.Ws.1 to 3.

18. According to P.W.1, at the first instance, a complaint was lodged at Palayamkottai Police Station and the complaint was recorded by a male Sub-Inspector of Police in the said police station. On the other hand, Ex.P1 is a written complaint and P.W.10 Sub Inspector of Police, who registered the case, would state that she received a written complaint and registered the First Information Report. If it is so, then this Court has to accept the contention of the learned Senior Counsel for the appellant that Ex.P1 could not be the First Information received by the police and that the information received at the first instance in point of time was burked and Ex.P1 was created and substituted in its place, has got to be accepted. In this regard, P.W.2's evidence also lends support to the arguments advanced by the learned senior counsel. He would say that before ever he could reach his house on the date of occurrence, his wife went to the police station and lodged a complaint. The evidence of P.W.1 is quite contrary. She would say that only after the arrival of her husband, both of them together went to the police station, where she gave a complaint statement, which was reduced to writing and that she signed as a author of the statement, whereas her husband signed as a witness. Such a statement reduced to writing by the male Sub Inspector of Police, which contains the signatures of P.Ws.1 and 2, has not seen the light of the day. Further, P.W.1 herself at one place, has stated that someone in her house scripted the complaint and she did not know what were the contents of the complaint. P.W.2 would say that he signed the complaint as a witness only on the day subsequent to the date of occurrence. When such is the tenor of evidence of P.Ws.1 and 2, regarding the manner, in which the criminal law was set in motion, the learned trial Judge, seems to have disregarded those aspects and rendered a finding, perhaps pursuant to a pre- determination that in cases of such nature total acquittal by the trial Judge would not be desirable.

19. Apart from the contradictions and other lacunae found in the prosecution case, the defence plea taken by the accused and the admissions made by the prosecution witnesses regarding the defence plea and its probability have not been adverted to by the learned trial Judge. Admittedly, the houses of the

prosecution witness are facing towards north and the house of the accused does not have direct access to the street and that he has got only an access through a space in between his house and the agriculture land lying on the northern side, which was used by the appellant/accused as an access to his house. Admittedly, there was a civil dispute between the accused and P.W.2 regarding that stripe of land and the same ended in a Judgment in favour of the accused. There is also an admission that the P.Ws.2's sister was given in marriage to the accused; that she left her husband and eloped with another man and that thereafter, the appellant/accused contracted a second marriage. There is also an admission made by the prosecution witnesses that P.W.2 viz., the father of the alleged victim child, was prosecuted for an offence of rape. It is also an admitted fact that before the occurrence, once P.W.2 assaulted the accused, for which a criminal case was instituted against P.W.2 and he was convicted and fined.

20. It is also pertinent to note that the Court below did not consider the probability of the defence theory. According to the appellant/accused on the date of occurrence he had gone to Thoothukudi in the morning 8.00 a.m. itself for collecting the rent for the bullock cart; that he spent the night in a relative's house. By taking such a stand the appellant/accused has set up a plea of alibi. No doubt the proof of the plea, of alibi shall be on the appellants/accused and he did not examine any witness. But, such a plea of alibi need not necessarily be proved by examining witnesses on his side. It can be proved by preponderance of probabilities relying on the admissions made by the prosecution witnesses.

21. In this regard P.W.1 states that the appellant/accused was not found in his house when police went there in evening of the date of occurrence; that his wife informed the police that the appellant had gone to Thoothukudi in the morning itself and that the parents of the accused, his elder brother Muthumalai and the wife of the appellant were taken to the police station. The prosecution did not come forward with the case, the appellant/accused was arrested by the police and produced for remand. On the other hand the records show that he surrendered before the Magistrate and there upon he was reported to the hospital for potentiality test. Hence the plea of alibi can not be brushed aside as improbable.

22. In addition, there are clear admissions made by P.W.1 regarding long standing enmity. The admissions made by P.W.1 will show that there was a long drawn civil litigation and long standing enmity between P.W.2 and the appellant/accused. P.W.1 has admitted that regarding the stripe of land used by the appellant/accused, there was a civil dispute and the same ended in favour of the appellant/accused. It is her further admission that there were frequent quarrels between P.W.2 and his parent; that as such the mother of P.W.2 used to take food in the house of the appellant/accused and sleep there and that therefore, P.W.2 did have grievance against the appellant/accused. She has also admitted that in a case registered on the complaint that P.W.2 assaulted the appellant/accused, P.W.2 was convicted and he paid fine. Even such admissions made by P.W.1 have been denied by P.W.2. P.W.2 himself admitted that he faced criminal case along with one Ravichandran for offences of rape and molestation. As such, he knows how to foist a case of an attempt to rape. A question may arise as to whether P.Ws.1 and 2 would risk the reputation of their daughter. P.W.3 was only a child aged 6 years and P.W.2's antecedent will make it probative that there could be no wonder in his making such allegations against the appellant/accused.

23. All the above said facts will go to show that there was a clear and strong motive for the members of P.W.2's family to implicate the appellant/accused and foist a case. If these aspects are corroborated to the contradictions and defects in the evidence of the prosecution, then, any Court will come to a conclusion that the prosecution case regarding the alleged offence under Section 376 r/w 511 IPC and also the alleged occurrence, itself has not been proved beyond reasonable doubt. The learned trial Judge without properly appreciating the evidence and with a prejudice mind, projected the case and executed the determination to convict the accused atleast for one of the offence and the same has recorded in the Judgment convicting the appellant/accused for the offence under Section 376 r/w 511 IPC.

24. The above said discussions will make it clear that the conviction recorded by the trial Court cannot stand the scrutiny of this Court and that the Judgment of the trial Court convicting the appellant/accused for the offence under Section 376 r/w 511 IPC, without hesitation, can be termed defective in firm and liable to be set aside.

25. In the result, the appeal succeeds and the Judgment of the trial Court passed in S.C.No.133/2006, dated 31.01.2007, finding the appellant/accused guilty of the offence under Section 376 r/w 511 IPC, is set aside. The appellant/accused is acquitted of the said offence also. The bail bond executed by the appellant/accused shall stand discharged and fine amount, if any, paid by the accused shall be refunded. To 1. The Mahalir Neethimandram, Tirunelveli, Tirunelveli District. 2.The Inspector of Police, All Women Police Station, Palayamkottai, Tirunelveli District.

3. The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai.

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