

Selvam Vs. The State Rep. By

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Court : Chennai

Decided On : Jan-27-2015

Judge : M.Sathyannarayanan

Appellant : Selvam

Respondent : The State Rep. By

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

27. 01.2015 CORAM THE HON'BLE MR.JUSTICE M.SATHYANARAYANAN
Criminal Appeal (MD)No.104 of 2007 Selvam : Appellant/Accused Vs. The State
rep. by The Inspector of Police, Kottampatti Police Station, (Crime No.336 of
1996), Madurai District. : Respondent/Complainant Prayer: Criminal Appeal is filed
under Section 374 of Code of Criminal Procedure praying to call for the records in
S.C.No.4 of 2006, on the file of the learned Sessions Judge, Mahila Court,
Madurai and set aside the conviction and sentence imposed on the appellant, by
judgment dated 18.01.2007, in the interest of justice. !For Appellant : Mr.F.Deepak
^For Respondent : Mrs.S.Prabha, Government Advocate(Crl. Side) :

JUDGMENT

The sole accused, who stood charged under Sections 376 and 417 of Indian Penal
Code, tried for the said offences, but was convicted under Section 376(1) of Indian
Penal Code and sentenced to undergo 3 years rigorous imprisonment, to pay a

fine of Rs.5,000/-, with the default sentence of six months rigorous imprisonment, vide judgment dated 18.01.2007, made in S.C.No.4 of 2006 on the file of the Sessions Court, Mahila Court, at Madurai, has filed this appeal. The Trial Court further ordered that out of the fine amount of Rs.5,000/-, Rs.4,000/- shall be paid to P.W.1/victim by way of compensation under Section 357(1) (b) of Code of Criminal Procedure. The Trial Court has also acquitted the appellant/accused for the commission of the offence under Section 417 of Indian Penal Code. The accused, aggrieved by the conviction and sentence recorded by the Trial Court for the commission of the offence under Section 376(1) of Indian Penal Code, has filed this appeal.

2. The facts leading to the filing of the present Criminal Appeal are, briefly, narrated as follows:

2. 1. P.W.1 is the victim and she is the sister of one Soundararajan (not examined). The said Soundararajan has lodged the complaint under Ex.P.5 with the Sub-Inspector of Police, attached to Kottampatti Police Station stating that his sister/P.W.1 and the appellant/accused were used to go together for grazing cattle and at about four months prior to November, 1996, the physical appearance of his sister got somewhat changed and, therefore, he asked his mother to enquire the victim/P.W.1 and on examination, it was found that P.W.1 was pregnant. It is further stated in Ex.P.5 by Soundararajan that his sister/P.W.1/Victim is a deaf and dumb woman and by physical signs, she has informed that it was the appellant/accused who had a forcible relationship with her. The said Soundararajan would further state in Ex.P.5-complaint that a panchayat was also convened with the important person of the locality as well as the relatives and one Chinna Karuppan also took the appellant/accused for the purpose of settling the matter and since it did not fructify, he lodged a complaint. 2.2. The Sub-Inspector of Police, namely Sakkariyas (not examined), attached to Kottampatti Police Station, on receipt of Ex.P.5- complaint, registered a case in Crime No.336 of 1996, on 22.11.1996 at about 19.30 hours for the commission of the offences under Sections 376 and 420 of Indian Penal Code. 2.3. P.W.8-Balasubramaniam was the Inspector of Police, attached to Kottampatti Police Station and he took up further investigation of the case on 14.07.2003 and on perusal of the Case Diary,

he found that on 22.11.1996, at about 07.30 p.m., one Soundararajan lodged a written complaint to the Sub-Inspector of Police, attached to Kottampatti Police Station, namely Sakkariyas and on receipt of the same, he has registered the case as stated above. The complaint given by the said Soundararajan was marked as Ex.P.5 and the printed First Information Report was marked as Ex.P.6, subject to the objections raised on behalf of the appellant/accused. 2.4. According to P.W.8-Balasubramaniam, the Inspector of Police, namely Sakkariyas, who registered the First Information Report, died about six months prior to September, 2006 and during the course of investigation conducted by the said Sakkariyas, he prepared the observation mahazar marked as Ex.P.7 and also prepared the sketch marked as Ex.P.8 and, thereafter, he has examined P.W.3 ? Nallamuthu, P.W.4-Veeran , Soundararajan, Shajahan and Palanichamy and recorded their statements under Section 161(3) of Code of Criminal procedure. The said Sub-Inspector of Police, namely Sakkariyas has also taken steps to get the age certificate of the victim/P.W.1 and also took steps to examine her medically and further took steps to get the certificate in that regard. The said Sub-Inspector of Police has examined the brother of P.W.1-Soundararajan, who has lodged Ex.P.5-complaint as well as the mother of the victim girl, namely Sigappayee and recorded their statements under Section 161(3) of Code of Criminal Procedure. 2.5. P.W.7-Karuppaiah took up the case for further investigation and according to him, he continued the investigation from 19.01.2003 and gave a requisition to the Principal of Deaf and Dumb School to examine the victim/P.W.1 and she was examined by P.W.2, a teacher, attached to the said School and subsequent to the examination, P.W.7 has recorded the statement of P.W.2 under Section 161(3) of Code of Criminal procedure. 2.6. P.W.8-Balasubramaniam continued with the investigation and obtained the Potency Certificate of the appellant/accused from P.W.9-Dr.Natarajan and the same was marked as Ex.P.9. P.W.8 also examined Dr.Gandhimathi Nathan, who issued the age certificate to P.W.1/victim and on 27.04.2004, he sent the appellant/accused, P.W.1/victim as well as the child born to P.W.1 for DNA test through the Court. P.W.5-Forensic Expert, after collecting samples, conducted the test and she has given the report marked as Ex.P.2, opining that "from the DNA typing results, it is found that in the absence of identical twins, the appellant/accused (Mr.A.Selvam) is the biological father of the

child Sakthivel". P.W.8 has also recorded the statement of P.W.5 under Section 161(3) of Code of Criminal Procedure. P.W.8 has examined P.W.6 the Head Clerk, attached to the Court of Judicial Magistrate, Madurai, and after completion of investigation, he has filed the final report charging the appellant/accused for the commission of the offences under Sections 417 and 376 of Indian Penal Code. 2.7. The Court of Judicial Magistrate, Melur, on filing of the final report, took it on file in P.R.C.No.47 of 2004 and issued summons to the accused and on his appearance, he was furnished with copies of documents under Section 207 of Code of Criminal Procedure. The said Court, having found that the case is exclusively triable by the Sessions Court, has committed the case to the Court of District Sessions Judge, Madurai, which, in turn, made over the same to the Sessions Court/ Mahila Court, Madurai. 2.8. The said Court, on appearance of the accused, has framed the charges against him under Sections 376 and 417 of Indian Penal Code and questioned him and he pleaded not guilty to the charges framed against him and prayed for trial of the case. 2.9. The prosecution, in order to sustain their case, has examined P.W.1 to P.W.9 and marked Exs.P.1 to P.10. 2.10. The accused was questioned under Section 313(1)(b) of the Code of Criminal Procedure, 1973, with regard to the incriminating circumstances made out against him in the evidence tendered by the prosecution and he denied it as false. 2.11. On behalf of the accused, no oral evidence was let in and no documents were marked. 2.12. The Trial Court, on appreciation of oral and documentary evidences, has convicted and sentenced the appellant/accused for the commission of offence under Section 376(1) of Indian Penal Code and acquitted him for the commission of the offence under Section 417 of Indian Penal Code and hence, this appeal.

3. The learned counsel appearing for the appellant/accused has invited the attention of this Court to the oral and documentary evidences let in by the prosecution and would submit that even for the sake of arguments, the materials placed before the prosecution are tenable, still no case has been made out against the appellant/accused for the commission of the offence under Section 376(1) of Indian Penal Code. It is the further submission of the learned counsel appearing for the appellant/accused that though the alleged offence said to have been committed about six years prior to leading of Ex.P.5-complaint by the brother of

P.W.1/victim, no proper investigation has been done and in the cross-examination of P.W.8, he would depose that as per the statement given by the mother of the victim/P.W.1, namely Sigappayee, under Section 161(3) of Code of Criminal Procedure, the victim had stated that she was beaten by the appellant/accused and the mother of the victim/P.W.1 has also indicated that no action need be taken against the appellant/accused and the brother of the victim, namely Soundararajan has also stated so and, therefore, it remains a mystery, on what basis, the respondent police has chosen to register a case against the appellant/accused.

4. It is further contended by the learned counsel appearing for the appellant/accused that though the victim was subjected to medical examination, her medical report has not been marked and curiously, the brother of the victim, who has lodged Ex.P.5-complaint, though was examined during investigation, was not cited as a witness and similarly, the mother of the victim girl was also not cited as a witness, though she was examined during investigation. However, both of them died subsequently. It is also contended by the learned counsel appearing for the appellant that the case of the prosecution proceeds with many infirmities and inconsistencies and in any event, the Trial Court ought to have awarded the benefit of doubt and acquitted the appellant/accused, instead, the Trial Court has chosen to convict him for the offence under Section 376(1) of Indian Penal Code and having taken into consideration the cumulative circumstances, has awarded him the sentence of imprisonment of three years only, though Section 376(1) of Indian Penal Code stipulates the sentence of imprisonment, which shall not be less than seven years and, therefore, prays for interference.

5. Per contra, the learned Government Advocate (Criminal side) would vehemently contend that the respondent, after thorough and proper investigation, has filed the final report charging the accused for the commission of the offences under Sections 376 and 417 of Indian Penal Code and would further add that the testimonies of the witnesses corroborate with each other on material particulars and their testimonies are also well supported the case of the prosecution and that the documentary evidence let in by the prosecution also corroborates with the version of the prosecution witnesses and, therefore, the Trial Court has rightly recorded the conviction under Section 376(1) of Indian Penal Code and imposed

the sentence of imprisonment against the appellant/accused as stated above and prayed for dismissal of this appeal.

6. This Court paid its anxious consideration and attention to the submission made by the learned counsel appearing for the appellant/accused and the learned Government Advocate (Criminal side) appearing for the State and also perused the oral and documentary evidences and the original record.

7. This Court, on a thorough scrutiny and careful appreciation of oral and documentary evidences, is of the view that once again the prosecution has failed miserably in conducting proper investigation and thereby, enables the accused to go scot-free, though the victim in question, who is no more now, was deaf and dumb and Ex.P.2-DNA report given by P.W.5- Forensic Expert would also disclose that the boy, namely Sakthivel was born out of the said relationship between the appellant/accused and P.W.1/victim.

8. A perusal of Ex.P.5-complaint lodged by the brother of the victim/P.W.1 would disclose that the appellant/accused as well as his sister used to graze cattle together and noting the change of physical appearance, he asked his mother to enquire with the victim/P.W.1 and she was informed that the appellant/accused had a forcible physical relationship with P.W.1/victim and one Chinna Karuppan - Tailor made an attempt to mediate and however, it did not fructify and subsequently, the complaint came to be lodged.

9. P.W.1- victim girl was deaf and dumb and by using the services of P.W.2, who was employed as a teacher of YMCA Deaf and Dumb School, P.W.1 was examined in the Court. A perusal of her chief-examination would disclose that she knows the identity of the appellant/accused and about two years prior to September, 2006, she had a relationship with the appellant/accused and out of which, a child was born and she was very categorical that the appellant/accused is the father of the child. She would further state that she along with her mother and brother (not examined) lodged a complaint and she was examined by the police and she was also subjected to medical examination and her child was also subjected to some test and in the Panchayat conducted, the appellant/accused has refused to marry and also disowned the child. In the cross-examination, P.W.1

was very categorical, it was the accused who had a physical relationship with her and she has also informed the said fact to her mother, who was not examined.

10. P.W.2 was employed as a teacher in YMCA Deaf and Dumb School and in the cross-examination, she would depose that she has to repeat a same question very many times to P.W.1/victim, as she was not in a position to understand the sign and give answer and denied the suggestion that she has not put proper questions.

11. P.W.3 is the father of P.W.1 and he was examined on 06.09.2006 and in the chief-examination, he would depose that the appellant/accused and her daughter used to go for grazing the cattle together and her daughter informed that about eleven years prior, she was pregnant and further informed him that the appellant/accused had a forcible physical relationship with her and the said fact was informed four months after the pregnancy and, thereafter, Panchayat was convened and it did not fructify and subsequently, his son has lodged a complaint and he is also no more and so also, his wife who died about two years ago, i.e., in the year 2004. In the cross-examination, he would state that before the police, he has told them that his daughter informed him that the accused had beaten her and at the time of his examination by the police, his wife was also present and denied the suggestion that wife did not want the police to take action on the complaint.

12. P.W.4 was one of the Panchayatdars and in the chief- examination, when the appellant/accused was questioned, he has told them that he has not touched the victim/P.W.1 and, therefore, asked the brother of the victim/P.W.1 to take action accordingly.

13. P.W.5 is the Assistant Director of Government Forensic Lab at Chennai and in the chief-examination, she would depose that the appellant/accused, the victim girl and the child were produced before her and after collecting samples, she conducted DNA test and gave the report under Ex.P.2 opining that the appellant/accused is the father of the boy namely Sakthivel, who was born to P.W.1.

14. P.W.6 is the Head Clerk, attached to the Court of Judicial Magistrate, Madurai and he speaks about the requisition made for sending the victim girl for

examination about her age.

15. P.W.7, who continued the investigation after the registration of the case by the Sub-Inspector of Police, Kottampatti Police Station, namely Sakkariyas and P.W.8, who succeeded P.W.7, has continued the investigation and filed the final report.

16. P.W.9 is the doctor, who examined the appellant/accused and issued a certificate under Ex.P.9 opining that the appellant/accused is potent.

17. P.W.8, the second Investigation Officer, in the cross- examination, has deposed that none of the witnesses had given statement as to the commission of rape and he has also not examined P.W.1/victim through the services rendered by the Deaf and Dumb School, but as per the statement given by the mother of P.W.1 under Section 161(3) of Code of Criminal Procedure, by adopting sign method, she asked the victim/P.W.1 and she did not state anything about the commission of rape, but she has told that she was beaten by the appellant/accused at the time of grazing the cattle. P.W.8 would admit that the mother of the victim girl did not want any police action against the appellant/accused and her brother, namely Soundararajan, who has lodged Ex.P.5-complaint, also stated so.

18. A careful analysis and consideration of the oral and documentary evidences tendered by the prosecution would disclose the sorry state of affairs with regard to the investigation done by the respondent. First Information Report came to be registered by the Sub-Inspector of Police, namely Sakkariyas on 22.11.1996 at about 19.30 hours, and the final report dated 23.09.2004 was taken on file by the Committal Court on 12.10.2004 and the examination of the witnesses commenced in the year 2006. Though it is stated by the Investigating Officer that the mother of the victim as well as the brother of the victim lodged the complaint-Ex.P.5 are no more, he has not taken any effective steps to expedite the trial and examine the concerned witnesses and, it remains a mystery. Though the victim girl was subjected to medical examination and the opinion of the doctor was obtained, it has not been seen the light of the day during the course of trial. As rightly pointed out by the learned counsel appearing for the appellant, on account of non-examination of the first informant/defacto complainant, namely the brother of the victim, who has lodged Ex.P.5- complaint, the case projected by the prosecution

has fallen to the ground and the feeble explanation offered by the prosecution, on account of his demise, he was not examined, is hard to digest, as the prosecution has failed to explain as to why it took two years to commence the trial.

19. No doubt, the potency test report given by P.W.9 would disclose that the appellant/accused is potent. As pointed out earlier, unfortunately, the medical report of the victim girl has not been marked. In Ex.P.5-complaint, it is the statement of the brother of the victim/P.W.1 that on noting the change of physical appearance, he asked his mother to make enquiry with P.W.1 and she informed about the forcible physical relationship of the appellant/accused and consequential pregnancy. As pointed out earlier, the mother of the victim/P.W.1 was also not examined during the course of trial and the explanation offered was, she is no more.

20. P.W.8, in the course of his cross-examination, would admit that as per the statement given by the mother of P.W.1 under Section 161(3) of Code of Criminal Procedure, the victim/P.W.1 had stated that she was beaten by the appellant/accused and further, the mother of the victim girl/P.W.1 asked the police not to take any action against him. The same thing was said by the first informant-brother of P.W.1 during the course of recording the statement under Section 161(3) of Code of Criminal Procedure.

21. It is very pertinent to point out at this juncture, on the same set of evidence, the Trial Court has acquitted the appellant/accused for the commission of the offence under Section 417 of Indian Penal Code, but, however, chosen to convict him under Section 376(1) of Indian Penal Code and very curiously, without recording any special and adequate reasons, as contemplated under the proviso to Section 376(1) of Indian Penal Code, has sentenced him only for a period of three years.

22. It is very sadden to note that as per the evidence of P.W.5, the Assistant Director, attached to Government Forensic Lab at Chennai, the appellant/accused is the biological father of the boy born to P.W.1, as per Ex.P.2 report and on account of the subsequent development, namely the demise of the victim/P.W.1, coupled with the fact that the appellant/accused has also abandoned the child, the child is left in lurch. All these unfortunate things happened on account of the tardy

and inefficient investigation done by the respondent.

23. In the considered opinion of the Court, the infirmity pointed out above has shaken the very foundation laid by the prosecution, though it is the settled position of law that the deficiency in investigation will not lead to per se acquittal of the accused, in the considered opinion of the Court, the above said deficiencies had gone deep into the root of the case projected by the prosecution and, therefore, this Court is left with no other option except to award the benefit of doubt and acquit the appellant/accused, of course, with a heavy heart.

24. In the result, the Criminal Appeal is allowed and the conviction and sentence recorded by the Trial Court against the appellant/accused, vide judgment dated 18.01.2007, made in S.C.No.4 of 2006 for the commission of the offence punishable under Section 376(1) of Indian Penal Code are set aside and the appellant/accused is acquitted of the said charge. Fine amount, if any, paid by the appellant/accused, is directed to be refunded to him. The bail bonds executed by him shall stand terminated. 27.01.2015 Index:Yes/No Internet:Yes/No SML To 1.The Court of Sessions Judge, Mahila Court, Madurai. 2.The Inspector of Police, Kottampatti Police Station, (Crime No.336 of 1996), Madurai District. 3.The Public Prosecutor, Madurai Bench of Madras High Court, Madurai. M.SATHYANARAYANAN, J.

SML Judgment made in Criminal Appeal (MD)No.104 of 2007 Dated:

27. 01.2015

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