

Xavier Thomas Vs. The State Rep. By

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Court : Chennai

Decided On : Jan-27-2015

Judge : M.Sathyannarayanan

Appellant : Xavier Thomas

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.159 of 2007 Xavier Thomas : Appellant/Accused versus The State rep.

by The Inspector of Police, All Women Police Station, Manapparai, Manapparai Taluk, Trichy 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.151 of 2007, on the file of the learned Sessions Judge, Mahila Court, Trichy and set aside the conviction and sentence imposed on the appellant, by judgment dated 01.03.2007.

!For Appellant : Mr.R.Chinnadurai ^For Respondent : Mrs.S.Prabha, Government Advocate(Crl.

Side) :

JUDGMENT

The sole accused, who stood charged for the commission of the offences under Sections 376, 450 and 506(i) IPC and convicted for the commission of the offences under Sections 376(2)(f) and 506(i) IPC by the trial Court, has filed this appeal.

2.The trial Court, vide judgment dated 01.03.2007, made in S.C.No.151 of 2006 has convicted and sentenced the appellant/accused as follows; Section 376(2)(f) IPC ?.

4 years RI and fine of Rs.1000/- with default sentence of six months.

3.In view of the conviction and sentence imposed on the appellant/accused under Section 376(2)(f) IPC, the trial Court did not pass a separate sentence for the commission of the offence under Section 506(i) IPC.

The trial Court has acquitted the appellant/ accused for the commission of the offence under Section 450 IPC by awarding the benefit of doubt.

The trial Court further directed that the period of incarceration of the appellant/accused during the couRs.of investigation and trial to be set off under Section 428 of Cr.P.C.The accused/appellant aggrieved by the said conviction and sentence recorded by the trial Court has filed this appeal.

4.The facts leading to the filing of this appeal briefly stated are as follows; (a) The victim girl was aged about 8 years at the time of occurrence on 16.01.2006.

PW1 is the father of the victim.

He has given Ex.P1 written complaint to PW15 stating that on 16.01.2006 his daughter/victim, aged about 8 yearRs.was playing nearby his house and at that time, the accused/appellant, who belongs to the same locality, took her to a secluded place and made an attempt to rape her and she raised alarming and on hearing the same, PWs.1 to 3 rushed to the spot and on seeing them, the accused fled away from the scene and thereafter, took his daughter to an hospital and gave treatment.

(b)PW15 - Inspect of Police, All Women Police Station, Manapparai, on receipt of the complaint Ex.P1 given by PW1, registered a case in Crime No.2 of 2006 for the commission of the offences under Sections 376, 511 and 506(i) IPC at about 19.00 hours on 17.01.2006.

The printed FIR was marked as Ex.P7.

PW7 on the same day had examined the victim girl, aged about 8 years and recorded her statement under Section 161(3) Cr.P.C.and also searched for the accused and apprehended him near Manapparai Police Station at about 21.30 hours on the same day.

(c)PW15 examined the mother of the victim girl (PW2) and sister of PW2 (PW3) and recorded their statement.

On 18.01.2006, PW15 in the presence of PWs.4 & 5 prepared the observation mahazar and sketch, and the same were marked as Exs.P2 & P8.

PW15 seized the clothes owned by the victim girl as well as by the appellant/accused on 19.01.2006 in the presences of the witnesses and forwarded the same under Form No.95 to the Jurisdiction Magistrate Court.

The seized articles were marked as MOs.1 to 5.

(d)On 19.01.2006, PW15, after obtaining necessary permission, sent the victim girl for medical examination.

PW13, who, at the relevant point of time, in the services of the Government Headquarters Hospital at Trichy, had examined her at about 01.30 p.m.The mother of the victim girl ?.

PW2, who accompanied her, has told to PW13 that her daughter was raped by an unknown person.

PW13 after examining the victim girl has given a report.

The said report is marked as Ex.P5.

PW15 has also sent a request for examination of the appellant /accused as to his potency and he was taken to the Medical College Hospital, Trichy and he was examined as PW12 ?.

Doctor and a certificate was given by him stating that he is capable of having intercourse and the said certificate was marked as Ex.P4.

(e) On 20.01.2006 PW15 examined PW6, PW1 and other witnesses and recorded their statement under Section 161(3) Cr.P.C. On 21.01.2006, PW15 examined PW10, PW3 and other witnesses and recorded their statement.

On 24.01.2006 PW15 examined PW14 and PW13, and on 25.01.2006 PW15 examined PW12, who issued Ex.P4 - potential certificate and recorded his statement.

(f) PW15, after conclusion of the investigation, has filed the final report charging the accused for the commission of the offences under Sections 376, 450 and 506(i) IPC, on the file of the Court of Judicial Magistrate, Manapparai, who took it on file in P.R.C.No.16 of 2006.

3.The Court of Judicial Magistrate, Manapparai, on appearance of the accused, furnished him copies of the documents under Section 207 of Cr.P.C. and having found that the case is exclusively triable by the Sessions Court, has committed the case to the Court of Principal Sessions Judge, Trichy, who, in turn, made over the same to the Sessions Court/ Mahila Court, Trichy.

4.The trial Court on appearance of the accused explained Sections 376, 450 and 506(i) IPC and questioned the accused and he pleaded no guilty to the charges framed against him and the prosecution in order to sustain the case examined PWs.1 to 15 and marked Exs.P1 to P8 and also marked MOs.1 to 5.

5.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.

On behalf of the accused, DWs.1 to 3 were examined and no exhibit was marked.

6.The trial Court on consideration of oral and documentary evidence has convicted the appellant /accused as stated above.

7.The learned counsel appearing for the appellant/accused made the following submissions; (a)Ex.P1 - complaint given by PW1 came in a suspicious manner as it is agreed by PW1 that no written complaint was given, whereas Ex.P1 a written complaint was stated to be given by PW2 herself and further the FIR was also belatedly reached the Court only on 18.01.2005 at about 5.15 p.m.and the delay in belated despatch has not been explained at all and therefore, the origin of the complaint itself is highly doubtful.

(b) Ex.P1 is bereft of any material particulars as to the time and date of the occurrence and therefore, it cannot be the basis to commence the investigation.

(c)The testimonies of PWs.1 to 3 would disclose that they would not have seen the occurrence at all and their oral evidence would only say that they saw the accused fled away from the scene of crime.

(d) According to PWs.1 & 2, the victim girl was taken to a private hospital and she was given treatment and admittedly the relevant records pertaining to the treatment given to the victim girl in the private hospital has not been seized and the concerned Doctor, who initially treated the victim girl, was also not examined.

(e)Even assuming for the sake of argument that the prosecution has proved the case, it can be said only an attempt and no actual offence took place and therefore, the trial Court had committed the grave error in convicting the petitioner under Section 376(2)(f) IPC.

(f)The trial Court, having acquitted the appellant/accused for the commission of the offence under Section 450 IPC, ought to have acquitted him from the alleged the commission of the offence under Section 376(2)(f) IPC also for the reason that it is the case of the prosecution that the appellant/accused went to the house of the victim girl and committed the offence.

(g)The learned counsel for the appellant has invited the attention of this Court to the testimonies of witnesses and exhibits marked by the prosecution and would

submit that the prosecution has miserably failed to prove the case beyond reasonable doubt and further invited the attention of this Court to the testimonies of DWs.1 to 3 and would submit that if their version is properly considered, it would reveal that the appellant/accused would not have been present at all at the time of the alleged commission of the offence and therefore, prays for setting aside the conviction and sentence passed by the trial Court and for Hon'ble acquittal of the appellant/accused.

8.Per contra, the learned Government Advocate (Criminal side) would submit that admittedly the witnesses are rustic persons hailing from a remote village located in Manapparai Taluk and their testimonies are natural, cogent and trustworthy and the testimonies of PWs.1 & 2, coupled with medical and other evidence corroborate with each other and the materials particulaRs.Though the statement of the victim girl was recorded under Section 161 of Cr.P.C., she was not examined, but that cannot mitigate the veracity of the case projected by the prosecution for the reason that the parents of the victim girl viz., PWs.1 & 2 had spoken to the fact that on hearing of alarming raised by the victim girl, who was aged about 8 yeaRs.they rushed to the spot and saw the accused fled away and immediately asked the victim girl, who narrated the incident that the appellant/accused had forcible physical relationship.

9.In sum and substance, it is the submission of the learned Government Advocate (Criminal side) that the trial Court has taken into account the prosecution as well as defence taken on either side and correctly arrived at a conclusion that the appellant/accused is guilty of the offence for which he was convicted and in fact, trial Court has shown leniency by awarding a sentence of four years rigorous imprisonment only by citing the ineffective reasons and prays for dismissal of this appeal.

10.This Court paid its best attention to the rival submissions and also perused the materials available on record.

11.The occurrence, according to the prosecution, took place on 16.01.2006 at about 01.00 p.m.and it is the version of the prosecution that the victim girl, who was the eldest daughter of PWs.1 & 2, along with the other children, was playing

near the house and the appellant/accused came to the spot and in the pretext of getting tamarind fruits, asked her to procure a stick and took her to the rear portion of the north street house at Puthupatti and removed her garments as well as his garment and had forcible physical relationship.

It is the further case of the prosecution that on hearing the alarming of the victim girl, PWs.1 to 3 rushed to the spot and they saw the accused fleeing away from the place and immediately they made enquiry with the victim girl about the incident and thereafter, she was taken to the private hospital and she was given treatment and on the next day, PW1 went to the Police Station and lodged a complaint and on receipt of the same, PW15 has registered the FIR and commenced the investigation.

12.As regards the delay in FIR, it is the settled position of law that in a case of rape, the delay in lodging the complaint cannot be stated as a fatal one, since it is a social stigma and life and future of the victim is involved.

In normal circumstance steps will be taken to mediate the matter and therefore, the delay in registering the FIR cannot be termed as fatal.

13.No doubt, the FIR which came to be registered on 17.01.2006 at 19.00 hours has reached the jurisdiction Magistrate Court at 15.00 hours on 18.01.2006.

Though it is the submission of the learned counsel for the appellant/accused that the belated lodging of the complaint and belated reaching of the FIR are fatal to the case of the prosecution, this Court is of the opinion that it is not so for the reason that the Investigation Officer was not specifically questioned as to the belated dispatch of the FIR and if any specific question was put to her, it was open to the Investigation Officer to offer explanation.

As already observed above, in a case of the commission of the offence like rape, the delay is not a fatal to suspect the case of the prosecution.

14.Though it is submitted by the learned counsel for the appellant/accused that the testimonies of PWs.1 to 3 would disclose that they would not be actually seen the occurrence, PW2 would specifically say that she had seen the occurrence along

with PW1 and PW3.

She would further depose that the appellant/accused is related to her and he used to visit her house and used to pamper her girl children, who are numbering four.

It is the submission of the learned counsel appearing for the appellant/accused that only on account of affection towards the children of PWs.1 & 2, the accused used to visit the house often and in view of the possible explanation, there is no need to suspect that only for the purpose of commission of rape the appellant/accused had been coming to the house.

However, this Court is of the view that the same can be put against the appellant/accused also for the reason that he used to visit the house of PWs.1 & 2 often and taking advantage of the situation has misbehaved with the child and on raising alarming by the victim girl, he fled away from the scene of occurrence and it was also witnessed by PWs.1 & 2.

15.It is the forcible and vehement submission of the learned counsel for the appellant/accused that the case of the prosecution is that the victim girl was raped, but the same was not established through medical evidence and drawn the attention of this Court to the testimony of PW.13 and Ex.P5 - accident register issued by the said Doctor.

It is to be remembered at this juncture that the offence was committed on the afternoon hours on 16.01.2006 and the immediate concern of the parents is to take the victim to the hospital and as such in the case on hand, the victim happened to be aged about 8 years at the relevant point of time and she was taken to a private hospital and was given some treatment and thereafter, on the next day, the complaint was lodged.

On account of the passage of time, the Doctor - PW13, who examined the victim girl was unable to find out trace of rape.

16.At this juncture, a feeble attempt was made by the learned counsel for the appellant/accused that in any event, it can be construed only an attempt and therefore, the trial Court has committed a grave error in convicting the

appellant/accused for the commission of the offence under Section 376(2)(f) of IPC.

However, the said submission is also liable to be rejected for the reason that as per the version of PWs.1 & 2 and as spoken to by the victim girl to them, the accused after removing of clothes put his private part into the private part of the victim girl and as per the Explanation-I of Section 375 of IPC, "for the purposes of this Section, "vagina" shall also include labia majora".

In the light of the explanation I to Section 375 of IPC, it cannot be said that the appellant/accused has not committed the offence of rape.

17.PW15, while in the box was specifically questioned as to the non collection of the material records in the private hospital, where the victim was initially given treatment, and in her cross-examination, she has clearly deposed that the details of which has not been disclosed and when PWs.1 & 2 examined, they were unable to shell out any details and therefore she was not in a position to collect the material records and this Court found the said material explanation offered by PW15 in the cross examination is acceptable.

18.

The attention of this court was also invited to the testimonies of the defence witnesses DWs.1 to 3.

The appellant/accused himself was examined as DW1 and he has deposed that in a political vengeance, he has been falsely implicated and he has nothing to do with the alleged commission of the offence.

DW2 would depose that she was working in the field at the relevant point of time and she did not hear any alarming and would further depose that the appellant/accused did not have any problem with the women folk of the locality and by selling floweRs.he is eking out his livelihood and for that purpose, he used to leave the place in the morning and reach the place in the evening.

DW3, who is a neighbour, would depose that he did not hear any alarming.

It is to be pointed out at this juncture that as per the testimonies of PWs.1 & 2 there is no nearby house within the vicinity of 100 to 200 yards and therefore, the neighbouring land owners or neighbours would not have heard the alarming.

PWs.1 & 2 on hearing the alarming immediately rushed to the spot and saw the accused fleeing away from the scene of occurrence and immediately made enquiry with her daughter and she has categorically stated that it is the appellant/accused committed the offence punishable under Section 376(2)(f) IPC.

19.The trial Court has considered the oral and documentary evidence in proper perspective and taking into consideration the plea of the appellant/accused that he has married and begotten two children and he has to maintain them, has shown leniency and awarded sentence of rigorous imprisonment only four years.The State has not filed any appeal seeking enhancement of the sentence.

20.This Court on an independent application and appreciation of oral and documentary evidence let in by the prosecution and by the accused including his testimony is of the view that there is no error apparent and infirmity in the reasons assigned by the trial Court for conviction and sentence of the accused.

The discrepancy pointed out by the learned counsel for the appellant in the facts and circumstances of the case are trivial in nature and it is also to be remembered at this juncture that the witnesses are rustic persons hailing from a remote locality and their rural background should also be taken into consideration while appreciating their oral evidence.

This Court is of the view that the appeal lacks merits and it is liable to be dismissed.

21.In the result, the criminal appeal is dismissed and the conviction and sentence passed by the trial Court are confirmed.

The bail bonds executed by him shall stand terminated.

The respondent is directed to take expeditious steps to secure the custody of the accused to undergo the remaining period of imprisonment.

27.01.2015 Index :Yes/No Internet:Yes/No gcg To 1.The Sessions Judge, Mahila Court, Trichy.

2.The Inspector of Police, All Women Police Station, Manapparai, Manapparai Taluk, Trichy District.

3.The Government Advocate, Madurai Bench of Madras High Court, Madurai.

M.SATHYANARAYANAN, J.

gcg Judgment made in Criminal Appeal (MD)No.159 of 2007 27.01.2015

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