

Murugan Vs. The State Rep.By

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Court : Chennai

Decided On : Feb-03-2015

Judge : M.Sathyannarayanan

Appellant : Murugan

Respondent : The State Rep.By

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED :

03. 02.2015 CORAM THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN CrI.A(MD)No.271 of 2007 and M.P.(MD)No.1 of 2015 Murugan ... Appellant / A1 Vs. The State rep.by The Inspector of Police, Sawyerpuram Police Station, Thoothukudi District. ... Respondent / Complainant Prayer: Appeal filed under Section 374(2) of Cr.P.C., against the Judgment and conviction rendered by the Additional District and Sessions Judge (Fast Track Court No.II), Thoothukudi, Thoothukudi District in S.C.No.217 of 2006, dated 05.06.2007. !For Petitioner : Mr.R.Anand ^For Respondent : Ms.S.Prabha Govt.Advocate (crl.side) :

JUDGMENT

This Criminal Appeal has been filed against the Judgment and conviction rendered by the learned Additional District and Sessions Judge (Fast Track Court No.II), Thoothukudi, Thoothukudi District in S.C.No.217 of 2006, dated 05.06.2007.

2. The appellant is arrayed as Accused No.1 in S.C.No.217 of 2006, on the file of Court of Additional District and Sessions Judge (Fast Track Court No.II), Thoothukudi, Thoothukudi District and he along with A2 stood charged and tried for the commission of offences under Sections 366(A) and 376 of IPC. The trial Court vide Judgment dated 05.06.2007, had acquitted the Accused No.2 but, convicted and sentenced Accused No.1 for the offence under Section 366(A) of IPC ? 7 years Rigorous Imprisonment and a fine of Rs.1000/-, in default, to undergo 3 months rigorous imprisonment and further convicted the appellant / A1 for the offence under Section 376 of IPC. - 7 years Rigorous Imprisonment and a fine of Rs.1000/-, in default, to undergo 3 months rigorous imprisonment. The trial Court directed that the sentences of imprisonment shall run concurrently and also setoff the period of incarceration in terms of Section 438 of Cr.P.C. The appellant / A1, aggrieved by the conviction and sentence passed by the trial Court vide impugned judgment, has filed this Criminal Appeal.

3. The facts leading to filing of this appeal is briefly narrated are as follows:- The case of the prosecution is that on 25.07.2005, A1 without consent of P.W.1 / victim girl, took her and he was actively aided and assisted by A2 and they visited various places and lastly, the victim girl was taken to Andhra Pradesh, where P.W.1/ victim girl stayed with A1 for about 10 days, the Accused No.1 had a physical relationship with P.W.1/victim girl, against her wish. On 14.08.2005 at about 3.30 a.m., he brought the victim girl back to the native place viz., Kombukaran Pottal Village and the girl was secured and both the accused were arrested.

4. P.W.2 is the mother of the P.W.1 / victim girl and she lodged a complaint under Ex.P1, to P.W.13, the Sub-Inspector of Police, attached to Sayarpuram Police Station, Thoothukudi District. In Ex.P1, Complaint, it is stated among other things that she is residing with her husband and out of wedlock, she begotten three female children and two of them already got married and the 3rd child is the victim girl and she is studying 9th Standard in Pannavilai Takkar Higher Secondary School. She would further state that P.W.1 on 25.07.2005 at about 7.00 p.m., left for school but she did not return till night and therefore, she along with her daughter, viz., Yesuvadiyal (not examined as witness) her husband Muniyasamy

(P.W.3) made a search but they were unable to trace her and they also searched in various other places. On 30.07.2005, in the morning hours, when they were made enquiry, they came to know that the Accused No.1 used to castigate and taunt her daughter / P.W.1 and from 25.07.2005 onwards Murugan is also missing and therefore apprehending that A2 has also played his role lodged a complaint. P.W.13, on receipt of Ex.P1, complaint, registered an FIR in Crime No.160 of 2005 against the above said accused for the commission of offence under Section 366(A) of IPC. The printed FIR was marked as Ex.P9.

5. P.W.18 was the Station House Officer of Sayarpuram Police Station, Thoothukudi District and on receipt of Ex.P9, FIR at about 9.00 a.m., on 25.07.2005, commenced investigation and went to Kombukaran Pottal Village and reached the spot about at 10.15 a.m., and in the presence of P.W.10 and Murugesan prepared the Observation Mahazar and Sketch, marked as Exs.P5 and P.19 respectively. Thereafter, P.W.18 examined P.W.2, the mother of the victim girl/P.W1, Perumal Nadar, Yesuvadiyal, Murugan, Senthur, Ramsing(P.W.7), Anthonykambart (P.W.9) and also examined P.W.10 and P.W.13, the Sub-Inspector of Police, who registered the FIR and recorded their statements under Section 161(3) of C.r.P.C. On 14.08.2005 at about 9.00 a.m., when A1 and P.W.1 were produced in the Police Station, he recorded the statement of P.W.1 / victim girl and thereafter, altered the Sections from 366(A) of IPC., to Sections 363 and 376 of IPC., and forwarded the alteration report to the jurisdictional Magistrate and it was marked as Ex.P.20. P.W.18 sent the victim girl for medical examination through P.W.15, a woman Police Constable and a Head Constable Rajan. After obtaining necessary requisition from the jurisdictional Magistrate, A1 was sent for Judicial custody and thereafter, P.W.18 examined through P.W.16 and other constables.

6. On 19.08.2005 P.W.18 made a requisition to the jurisdictional Magistrate for recording the statement of victim girl under Section 164 of Cr.P.C., and also recovered M.Os.1 and 2 owned by the victim girl and sent a requisition for subjecting the said material objects for chemical analysis. The requisition letter was marked as Ex.P.21 and the letter of Jurisdictional Magistrate was marked as Ex.P22.

7. P.W.12 Dr.Indirani has examined the victim girl on 15.08.2005 at about 2 p.m., and she has given the accident register, marked as Ex.P8, noting down the following features:- ?. Name of injury and treatment: (Simple, grievous or opinion reserved) Miss.Epsi @ Kopsi has been alleged to have forced intercourse by known person on 29.07.2005 at 10.00 p.m., and again & again till 11.08.2005 at various place from Kombukaranpottal. (ne) LMP :

11. Normal Breast development : Normal Right Breast ?. Scratch marks 1 x 1 cm 2m. num present L/E Examination of genetalia Pub c hair present Genitalia ?. No contusion, abrasion (or scratch mark) Hymen ?. absent Vaginal (n2) & congested No Evidence of mathy of public hair Cx Av) Normal size for nices free No bleeding / discharge proof a) There is no evidence for rape has occurred b) There is no evidence of (nc) over external genetalia and Except the Scratch marks (ne). c) No evidence of (nc) d) There is no evidence of pregnancy.(n) e) Yes f) Vaginal smear?.

8. P.W.18 also sent the victim girl for ossification test for the purpose of ascertaining 'A' certificate to Dr.P.Amutha and the said witness, after conducting the test, has issued 'A' Certificate, marked as Ex.P18 and recorded her opinion, which is as follows:- ?.Opinion: From the X-ray appearances, I am opinion that Epse @ Kefsi Daughter of Perumal Nadar above 16 years of age and is below 18 years. ?.

9. P.W.18 after receipt of the chemical analysis report marked as Ex.P24, examined P.W.15 and other witnesses on 16.08.2005 and examined their statements and on 17.08.2005 examined P.W.8 and another and recorded their statements. P.W.18 has received the chemical analysis report and sent the same to the Court of Jurisdictional Magistrate and on 10.10.2005 examined Dr.Indirani, who examined the victim girl, Radiologist Amudha, who issued Ex.P.18 certificate (not examined as witness) and the Doctor, who examined A1 and issued Ex.P14 potential certificate and recorded their statements. On 17.08.2005 P.W.18 collected Ex.P4, the certificate issued by P.W.8, the Headmaster of the School, in which the victim girl has studied and after completion of investigation and obtaining legal opinion has filed the final report on 03.11.2005 charging both the

accused for the commission of offences under Section 363 and 376 of IPC.

10. The Court of Judicial Magistrate No.2, Thoothukudi, on receipt of the final report filed by P.W.18, summoned both the accused and furnished them with copies of documents under Section 207 of Cr.P.C., and having found that the case is to be tried by the Sessions Court, committed the same to the Principal Sessions Court, Thoothukudi, which in turn, sent it to the FTC No.2, Thoothukudi. The said Court, on appearance of the accused, has framed charges under Sections 366(A) and 376 of IPC and questioned them and both the accused pleaded not guilty.

11. The prosecution in order to sustain their complaint, examined P.Ws.1 to 18 and marked Exs.P1 to 24 and also marked M.O.1 and 2. Both the accused were questioned under Section 313(1)(b) of Cr.P.C., with regard to incriminating substance made out against them in the evidence rendered by the prosecution and they denied it as false. On behalf of the accused, two witnesses were examined and Exs.P1 to P6, the letters written by P.W.1, to A1 were marked.

12. The trial Court, on consideration of oral and documentary evidences has convicted and sentenced A1, as stated above and acquitted A2 and challenging the acquittal of A2, the State has not preferred any appeal and therefore, it has attained finality.

13. Mr.Anand, the learned counsel appearing for the appellant / A1 made the following submissions:- (i) The age of P.W.1./ victim girl was not properly fixed and according to P.W.18, when he was searching the records maintained by the School, in which P.W.1 studied, he found the Birth Certificate, but he has not taken care to seize any of the School records. (ii) P.W.4 the Headmaster of the School, who issued Ex.P4, Age Certificate and would admit that he has not handed over any records to the Police and there is no Birth Certificate of P.W.1 available in their School. Therefore, the prosecution has failed to collect the materials on record which could have evidence of fact that the victim girl on the date of alleged occurrence was aged about 16 years. (iii) P.W.17 who has spoken about Ex.P18, Ossification Certificate issued by the Doctor Amudha, who has subsequently gone to abroad, has also deposed that as per the external appearance, the age of the victim girl / P.W.1 is above 16 and below 18 years and in the light of overwhelming documentary evidence in the form of Exs.D1 to D6, the love letters written by

P.W.1 to the appellant, it cannot be construed that it is the case would fall under Sections 366(A) and 376 of IPC. (iv) The learned counsel appearing for the appellant also invited the attention of this court to the testimonies of other witnesses and exhibits marked on behalf of the prosecution and would contend that admittedly it is a case of love affair and it was a case of consensual physical relationship and even as per the version of prosecution, the victim girl was voluntarily brought down her native place by A1 himself and the respondent police created the scene, as if they caught and handed over to the police. The learned counsel appearing for the appellant would further contend that the victim girl subsequently got married and living and so also the appellant and taking into consideration of the above facts and circumstances, prays for acquittal of the appellant / A1.

14. Per contra, Ms.Prabha, the learned Government Advocate (crl.side) appearing for the respondent would vehemently contend that the testimonies of P.W.1 / victim girl coupled with the testimonies of other witnesses had established the undenying facts that she was forcibly taken from her native place and she was taken to various places and finally A1 and the victim girl reached Andhra Pradesh, where he had forcible physical relationship with her against her wishes. The testimonies of P.W.8, the Headmaster of the School (incharge), in which P.W.1 had studied, would disclose that she was studying 9th Standard and as per Ex.P4, Age Certificate, she was aged about 14 years and in the light of the same, whether It is a case of consent for physical relationship or not, the ingredients of Sections 366(A) and 376 of IPC would stand squarely attracted and the trial Court on a proper consideration of oral and documentary evidence, has rightly recorded the conviction and sentences against the Accused No.1 and hence, prays for dismissal of this appeal.

15. This Court has carefully considered the submissions made by the learned counsel appearing for the appellant / A1 and the learned Government Advocate (crl.side) appearing for the respondent and also perused the oral and documentary evidence available on record.

16. The 6th clause of Section 375 of IPC which existed prior to Criminal Law (Amendment) 2013 states that '? with or without her consent when she is under 16 years of age'. Therefore, the moot point is to be decided is whether P.W.1 / victim girl, at the time of the alleged occurrence was aged 14 years or above 16 years and she was raped?.

17. P.W.8, is the Headmaster of the School, in which the victim girl / P.W.1 was studying in 9th Standard and in the chief examination he would state that at the time of the alleged occurrence, he was incharge of the post of Headmaster and between 2005 ?. 2006 and P.W.1 / the victim girl was studying 9th Standard and after verifying the records and found that she was born on 14.01.1991, and issued Ex.P4 Age Certificate. In the cross- examination, P.W.8 deposed that he has not handed over Transfer Certificate to the Police and would further admit that the birth certificate of P.W.1/ victim was not available at that point of time and he denied the suggestion that the said certificate has been issued. P.W.18 the Investigating Officer in the cross-examination would admit that he examined P.W.8 and also perused the School records but, he has not seized records and the victim girl during the course of her examination also did not disclose the fact that during which year she was admitted in the school and he has also not perused the documents. It was further admitted by P.W.18 that when he perused the School records, the Birth Certificate of P.W.1 / victim girl was available and he did not remember which authority has issued the Birth Certificate and he has not perused the records available in the said School as to the primary studies. P.W.8 also admitted that he has not taken any steps to get the Transfer Certificate and pleaded ignorance as to the non-seizure of the Birth Certificate and denied the suggestion, since the documents were against the case projected by the prosecution he did not seize it.

18. P.W.17 was the Assistant Surgeon attached to Thoothukudi Government Medical College Hospital, at the relevant point of time and he has spoken about Ex.P18, the ossification / age certificate issued by Dr.Amudha, who has subsequently gone to abroad. In the chief examination, based on the record he deposed that after pursuant to order passed by the Jurisdictional Magistrate, the victim girl was produced and x-rays were taken and other tests were done and

Dr.Amudha was opined that she has completed 16 years but, below 18 years and the certificate issued by the Doctor Amudha was marked as Ex.P18 and X-rays was marked as M.Os.3 series.

19. This Court has also perused Exs.D1 to D6, letters written by P.W.1, to A1 and the contents of the letters would disclose her imagination on account of her love affair with A1. The attention of P.W.1 was also invited to the said letters in the course of her cross-examination and she has admitted the fact that all the letters were written in her own hand-writing, though she would state that those letters were written at the request made by one Madathi. P.W.1 would further admit that except A1, she had not acquaintance with anybody and she has developed acquaintance even when she was studying in 8th standard.

20. P.W.2 is the mother of the victim girl in the cross-examination she would admit the birth of her daughter / P.W.1 was registered in the office of Nattathi Panchayat Union Office and admitted the suggestion that at the time of admitting her daughter in the School the Birth Certificate was given to the School. It is pertinent to point out at this juncture that P.W.18, Investigating Officer in the course of his cross examination would also corroborate this version by stating that he did find the Birth Certificate available in the School records but, he did not seize it.

21. The testimonies of the above said witnesses and exhibits would disclose the fact that it was a case of a love affair between P.W.1 and A1 and the prosecution has miserably failed to prove that the victim girl / P.W.1 was aged about 14 years.

22. The Medical evidence in the form of testimonies of P.Ws.12 and 17 coupled with Exs.P.18, P.23 and P.24 did not support the case of prosecution. As already pointed out, the contents of Exs.D1 to D6 would clearly disclose that P.W.1/ victim girl was in deep love with A1 and on account of the said acquaintance, there was consensual physical relationship between them.

23. Therefore, in the light of the above facts and circumstances it cannot be said that the appellant / A1 against the wish and consent of the victim girl had forcible physical relationship and as already pointed out, the prosecution has miserably failed to prove that at the time of the alleged occurrence the victim was aged

below 16 years. In the light of the above said infirmities pointed out, this Court left with no other option, except to acquit the appellant / accused.

24. In the Result, the Criminal Appeal is allowed and the conviction and sentence passed by the learned Additional District and Sessions Judge (Fast Track Court No.II), Thoothukudi, Thoothukudi District in S.C.No.217 of 2006, dated 05.06.2007, is set aside and the appellant / A1 is acquitted of charges under Sections 366(A) and 376 of IPC. The bail bond executed by the accused shall stand terminated. The fine amount, if any, paid by the appellant /A1 is directed to be refunded. Consequently, connected miscellaneous petition is closed. 03.02.2014 Index : Yes / No Internet : Yes / No MPK To 1.The Additional District and Sessions Judge (Fast Track Court No.II), Thoothukudi, Thoothukudi District
2.The Inspector of Police, Sawyerpuram Police Station, Thoothukudi District.
3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai. M.SATHYANARAYANAN, J.

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