

Ponsekar Vs. The State Represented By

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Court : Chennai

Decided On : Feb-17-2015

Judge : M.Sathyannarayanan

Appellant : Ponsekar

Respondent : The State Represented By

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED :

17. 02.2015 CORAM THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN Criminal Appeal (MD)No.284 of 2007 and M.P.(MD)No.1 of 2015 Ponsekar ... Appellant/ Accused Vs. The State represented by The Deputy Superintendent of Police, Nanguneri, Tirunelveli District. (Cr.No.207 of 2004) ... Respondent/ Complainant Prayer : Appeal filed under Section 374(2) of the Code of Criminal Procedure, against the judgment dated 07.05.2007 in S.C.No.63 of 2004 on the file of the II Additional Sessions Judge, Tirunelveli, whereby he had been found guilty of the alleged offence under Section 376 r/w 511 I.P.C. and sentenced him to undergo 7 years rigorous imprisonment and to pay a fine of Rs.5,000/- in default to undergo 1 1/2 years simple imprisonment. !For Appellant : Mr.S.R.A.Ramachandran ^For Respondent : Mrs.S.Prabha, Government Advocate (Crl.Side) :

JUDGMENT

The appellant is the sole accused in S.C.No.63 of 2004, on the file of the Court of II Additional Sessions Judge, Tirunelveli and he was charged for the commission of the offences under Sections 376 and 506(i) I.P.C. and under Section 3(2)(V) of the SC/ST(Prevention of Atrocities) Act. The trial Court, after full- fledged trial, found him not guilty for the commission of the offence under Section 506(i) IPC and 376 IPC and 3(2)(V) of the SC/ST(Prevention of Atrocities) Act, however, found him guilty for the commission of offences under Sections 376 r/w 511 I.P.C., and vide impugned judgment dated 07.05.2007, it has sentenced him to undergo rigorous imprisonment for a period of 7 years and also to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for a period of 1-1/2 years. The trial Court has also set off the period of detention already undergone by the appellant/accused during the trial or inquiry under Section 428 of the Code of Criminal Procedure. The appellant/accused, aggrieved by the conviction and sentence, passed in the judgment dated 07.05.2007, made in S.C.No.63 of 2004, by the Court of II Additional Sessions Judge, Tirunelveli, has filed this Criminal Appeal.

2. The facts of the case leading to the filing of this Criminal Appeal are stated as follows:

2. 1. P.W.1 is the mother of the victim-P.W.2 and she lodged a complaint on the file of Kalakkad Police Station, stating that she is a resident of South Puliyangulam Colony and eking out her livelihood as agricultural coolie and she is having four daughters and one son and the fifth daughter-P.W.2 is studying 5th standard in Kalakad Muthiah School. She would further state that on 22.02.2004 at about 05.00p.m., her daughter P.W.2 returned from school and P.W.1 asked her to go to shop and buy rice husk and she went to purchase the same, but did not return for quite sometime. Therefore, P.W.1 and her son-in-law Murugan (not examined) were proceeding and when they went near the land owned by Rajadurai Nadar (P.W.4), they heard an alarm raised by her daughter-P.W.2 and when they went inside, they found that the appellant/accused was lying over P.W.2, who raised an alarm to save her. The occurrence was also witnessed by P.W.3 and P.W.4 and when they raised an alarm, the appellant/accused fled away from the scene of occurrence and while doing so, he threatened the witnesses with dire

consequences. Since night hours had fallen, fear for their life, P.W.1 did not lodge a complaint. On the next day, she proceeded to Kalakad Police Station and lodged a complaint, which was marked as Ex.P.1. 2.2. P.W.10 was the Sub-Inspector of Police, attached to Kalakkad Police Station and pursuant to the complaint given by P.W.1-the mother of the victim, he has registered an F.I.R. in Cr.No.207 of 2004 for the commission of the offence under Section 376 I.P.C. r/w Section 3(2)(V) of the SC/ST(Prevention of Atrocities) Act at 09.30 hours on 23.04.2004. The printed F.I.R. was marked as Ex.P.9. 2.3. P.W.11 was the Deputy Superintendent of Police of Nanguneri and on receipt of the F.I.R., commenced the investigation and went to the scene of occurrence at about 11.00a.m. on 23.04.2004 and in the presence of P.W.5, he prepared Observation Mahazar and rough Sketch, which were marked as Ex.P.2 and Ex.P.10 respectively. P.W.11 examined P.W.1, P.W.2-victim girl, son-in-law of P.W.1-Murugan, P.W.3 and P.W.10 - Sub Inspector of Police, who registered the F.I.R. by recording the statement under Section 161 of the Code of Criminal Procedure. 2.4. On 23.04.2004 at about 02.00p.m., P.W-11 effected the arrest of the appellant/accused and after conducting a body search, send him for judicial custody. P.W.11, on the same day, made a request to find out the physical condition of the appellant/accused by sending a request to the jurisdictional Magistrate Court. 2.5. P.W.6, after examining the appellant/accused, has issued a certificate under Ex.P.3, stating that " there is nothing to suggest that the person is incapable of taking part in sexual intercourse."

P.W.11 also sent the victim girl along with the two constables for medical examination to Tirunelveli Medical College Hospital and she was examined by P.W.7 at about 05.00p.m. on 23.04.2004. Ex.P.5-was the accident register issued by P.W.7, wherein she has noted that " no evidence of external injuries, not attained monarch, no public hair, no sign of injuries, hymen intact". P.W.7 issued Ex.P.6 - wound certificate and on a perusal of the chemical analysis report, it is opined that "no evidence of sexual intercourse". 2.6. P.W.11 collected the community certificates of the appellant/accused, which was marked as Ex.P.8 and P.W.2/victim girl, which was marked as Ex.P.7 issued by P.W.9 and P.W.8 respectively. 2.7. P.W.11 had examined P.Ws.7, 8 and 9 and recorded their statements and after the completion of the investigation, he filed a charge sheet on

04.06.2004, charging the accused for the commission of offences under Sections 376 and 506(i) I.P.C. and Section 3(2)(V) of the SC/ST(Prevention of Atrocities) Act. 2.8. The Court of Judicial Magistrate, Nanguneri, on receipt of the charge sheet, took it on file in P.R.C.No.26 of 2004, and summoned the accused and on his appearance, furnished the documents under Section 207 Cr.P.C. The said Court, having found that the case is exclusively triable by the Sessions Court, committed the same to the Court of Principal Sessions Judge, Tirunelveli, which, in turn, made over the same to the Court of II Additional Sessions Judge, Tirunelveli. 2.9. The trial Court, on appearance of the accused, has framed the charges under Sections 376 and 506(i) I.P.C and Section 3(2)(V) of the SC/ST(Prevention of Atrocities) Act and the accused was questioned and he pleaded not guilty to the charges framed against him and prayed for trial of the case. 2.10. The prosecution, in order to sustain their case, has examined P.W.1 to P.W.11 and marked Exs.P.1 to P.10 and M.O. 1 and M.O.2. 2.11. 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. 2.12. On behalf of the appellant/accused, no oral evidence was let in and no document was marked. 2.13. The trial Court, on consideration of the oral and documentary evidences, found the accused guilty of the charges and convicted him and imposed the sentences as stated above and aggrieved by the conviction and sentence passed by the trial Court, the accused has preferred this Criminal Appeal.

3. Mr.S.R.A.Ramachandran, learned Counsel for the appellant/accused made the following submissions:

3. 1. Ex.P.1 complaint has not come into existence in the manner projected by the prosecution, as there is discrepancy with regard to the author of the said complaint. 3.2. The prosecution has miserably failed to establish that the victim girl was aged below 16 years at the time of alleged occurrence. Though she was studying in the School, P.W.11 - the Investigating Officer did not care to collect the relevant school records pertaining to her age and also not conduct any medical test on P.W.2 to ascertain her correct age. 3.3. The medical evidence, in the form of Exs.P.5 and P.6, coupled with the testimony of P.W.7, would establish that not

even an attempt was made to commit the offence of rape. At the worst, it can be termed to outrage the modesty of a woman, which is punishable under Section 354 I.P.C. The independent witnesses viz., P.W.3 and P.W.4, who had also said to have witnessed the commission of the crime, turned hostile in toto and except the interested testimonies of P.W.1 and P.W.2, the prosecution has failed to adduce any other substantial and tenable evidence to show that it was the accused, who committed the offence.

4. It is further contended by the learned Counsel for the accused/appellant that since the prosecution has miserably failed to establish the guilt on the part of the appellant/accused, beyond any reasonable doubt, the trial Court, in any event, ought to have acquitted him by awarding benefit of doubt and in the alternative, he made submission that in the event of this Court has come to the conclusion that an attempt has been made to commit the offence, then the conviction and sentence can be modified.

5. The learned Counsel for the appellant, in support of his submissions, placed reliance upon the judgment of the Honourable Supreme Court made in Abbas Ahmed Choudhary Vs State of Assam reported in (2010)12 Supreme Court Cases 115 = (2011)2 Supreme Court Cases (CrI) 439.

6. Per contra, Mrs.S.Prabha, learned Government Advocate (Criminal Side) for the respondent would vehemently contend that it is the well settled position of law that the testimony of prosecutrix/victim inspired confidence, then it could be the sole basis to record the conviction and sentence and the prosecution, through the testimonies of P.W.1- mother of the victim girl and P.W.2-victim girl, established the case that the appellant/accused had made an attempt to commit rape on P.W.2/victim girl and though the medical evidence did not communicate anything in this regard, the trial Court, has rightly taken into consideration the said aspect and instead of convicting him for offences under Sections 376 and 506(i) I.P.C., has rightly recorded the conviction for the offences under Sections 376 r/w 511 I.P.C. and would further add that the victim belongs to downtrodden community and the community certificate marked as Ex.P.7 issued by P.W.8 would also establish the fact that she belongs to Scheduled Caste community and the trial

Court, on overall consideration of the oral and documentary evidences, has rightly convicted the appellant/accused and hence, prayed for confirming the conviction and sentence passed by the trial Court.

7. This Court has carefully considered the submissions made by the learned Counsel for the appellant/accused as well as the learned Government Advocate (Criminal Side) for the respondent and perused the materials available on record and also the original records.

8. P.W.1 is the mother of the victim girl. In her cross-examination, she would submit that her daughter/P.W.2 is studying in Kalakkad Muthiah School and used to go to school in a van and with regard to the lodging of complaint, she would state that the complaint, which was marked as Ex.P.1, was written by a lady known to them and when she went to the police station to lodge the complaint, she was accompanied by P.W.2 and her son-in-law Murugan. P.W.1 denied the suggestion that the mother of the appellant/accused was employed in the Noon-meal Centre and since a dispute with regard to distribution of noon-meal to the children, there was a wordy altercation between the mother of the appellant/accused and P.W.1 and consequently, lodged the said complaint. P.W.1 would further submit that she is illiterate and Ex.P.1- complaint was written by a known lady and she only read the contents of the complaint.

9. P.W.2-victim girl, in her chief-examination, speaks about the overt act, on the part of the appellant/accused and when she raised an alarm, her mother-P.W.1, her brother-in-law Murugan (not examined), P.W.3 and P.W.4 rushed to the spot and immediately, on seeing them, the appellant/accused fled away from the scene of occurrence and also criminally intimidated. In the cross-examination, she would state that the School, in which, she is studying, is a middle school and she used to go to school in a van and for buying rice husk, she took a bag and when she raised an alarm, except his mother, his brother-in-law and P.W.3 and P.W.4, nobody had turned up. She has also, once again, reiterated the overt act on the part of the appellant/accused and would further state that she, her mother and her brother-in-law proceeded to the police station and they have only written the complaint and as per her dictation, his brother-in-law Murugan has written the said

complaint.

10. The learned Counsel for the appellant/accused would also contend that there is discrepancy between the testimonies of P.W.1 and P.W.2 and Ex.P.1 - complaint did not come into existence in the manner spoken by the prosecution and P.W.1, in her chief-examination, has stated that some known female has written the complaint, however, in the cross-examination, she has stated that it was written by the Police Officer and as per P.W.2 - victim girl, she dictated the contents of the complaint and it was reduced into writing by her brother-in-law Murugan (not examined).

11. It has to be pointed out, at this juncture, that it is the testimony of P.W.1 that at the time of occurrence, it became dark hours and fear for their life, they waited for next day and thereafter, proceeded to the police station and lodged a complaint. P.W.10 registered the F.I.R. at about 09.30 a.m. on 23.04.2004 and immediately, dispatch the originals, to the jurisdictional Magistrate Court and the copies to the Superior Officers. A perusal of the record would show that the F.I.R. has been reached the jurisdictional Magistrate Court without loss of time. Since the complaint came to be lodged without any loss of time, there was no belated dispatch of original F.I.R. - Ex.P.1, coupled with the fact that the occurrence took place in the year 2004 and the testimonies of the witnesses, who are restrict and hailing from rural place, came to be recorded in 2007, the discrepancies pointed out are bound to take place and in the considered opinion of this Court, it is not shaken the very foundation of the case made by the prosecution in the form of Ex.P.1-complaint and therefore, the submission made by the learned Counsel for the appellant/accused, in this regard, is liable to be rejected.

12. On the merits of the case, this Court has done a careful scrutiny through the testimonies of P.W.1 and P.W.2. It is the testimony of P.W.1 that since she asked her daughter to get rice husk from the shop and since she did not return for quite sometime, she along with her son-in-law Murugan went and searched for her and when they went near the land of P.W.4, they had heard an alarm of her daughter and immediately, they went and saw that the appellant/accused was lying on her daughter viz., P.W.2 and she, P.W.3 and P.W.4 raised an alarm and on seeing

them, the appellant/accused fled away from the scene of occurrence. No doubt, P.Ws.3 and 4 turned hostile and P.W.3 and P.W.4 denied the suggestion that since the appellant/accused belongs to the community of P.W.3 and P.W.4, they turned hostile.

13. It is the settled position of law that the testimony of the raped victim can be acted upon without any corroboration and as per the catena of decisions rendered by the Honourable Supreme Court of India, the testimony of a raped victim stands on a higher pedestal than an injured witness and if the Court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony and assurance, short of corroboration as understood in the context of an accomplice, would suffice.

14. This Court, testing the testimony of P.W.2, in the light of the legal position stated above, is of the view that her testimony is credible and trustworthy and inspires confidence. P.W.2, at the time of cross- examination, would state that she is aged about 15 years and she would further state that the appellant/accused forcibly pushed her and also removed her inner garment.

15. The testimony of P.W.2 with regard to attempt made by the appellant/accused to commit rape has also been corroborated to the testimony of P.W.1- mother of the victim girl. No doubt, P.W.3 and P.W.4, who are also witnesses to the said occurrence, did not support the case of the prosecution, but it does not mean that the testimonies of P.W.1 and P.W.2 cannot be believed. In the considered opinion of this Court, the testimonies of P.Ws. 1 and 2 corroborate with each other on material particulars.

16. It is the vehement submission of the learned Counsel for the appellant/accused that the medical evidence, in the form of Exs.P.5 and P.6, coupled with the testimony of P.W.7, did not substantiate the case projected by the prosecution. In fact, the trial Court, on a fair appreciation of oral and documentary evidences, did not convict the appellant/accused for the commission of the offence under Sections 376 and 506(i) I.P.C., but only convicted him for the offence under Sections 376 r/w 511 I.P.C.

17. In the Judgment of Honourable Supreme Court of India, in Yerumalla Latchaiah Vs. State of A.P. reported in (2006)3 Supreme Court Cases (Crl) 373, the Honourable Supreme Court of India, on the facts of the case, without relating to any earlier decision, found that the prosecutrix was aged about 8 years at the time of alleged occurrence and taking into consideration the testimony of the Doctor, who has stated in her evidence that there was no sign of rape, has allowed the appeal and acquitted the appellant.

18. In the judgment in Reshma Devi and Another Vs. State of Punjab and Another reported in (2010)12 Supreme Court Cases 115 = (2011)2 Supreme Court Cases (Crl) 439, it has been held that the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully.

19. There cannot be any difference of opinion in accepting the proposition laid down by the Honourable Supreme Court of India, but it is settled position of law that application of law depends upon the facts and circumstances of each case.

20. In the judgment of the Honourable Supreme Court of India in Koppula Venkat Rao Vs. State of A.P. reported in (2004)3 Supreme Court Cases 602, the scope of conviction for offence under Sections 376 r/w 511 I.P.C. came up for consideration and it has been held as follows: "8. The plea relating to applicability of Section 376 read with Section 511. IPC needs careful consideration. In every crime, there is first, intention to commit, secondly preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the Act, Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had

succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.

9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence, if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word "attempt" is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it, and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.

10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be

described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.

11. In order to find an accused guilty of an attempt with intent to commit a rape. Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.

12. The sine qua non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. Definition of "rape" as contained in Section 375 IPC refers to "sexual intercourse" and the Explanation appended to the Section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Intercourse means sexual connection. In the instant case that connection has not been established. Courts below were not correct in their view."

21. In the light of the said decision, coupled with the factual aspects, this Court is of the considered view that the appellant/accused made an attempt to commit rape on P.W.2 - victim girl. No doubt, P.W.11 did not make any attempt to ascertain the actual age of the victim girl and not even choose to collect the document from the School as to the age of the victim girl. But the suggestion made to P.W.1 and P.W.2 by the defence would disclose that she was studying in the School and she was aged well below 16 years. The trial Court, on a proper appreciation of oral and

documentary evidences, had convicted the appellant/accused for the offence under Sections 376 r/w 511 I.P.C.

22. At this juncture, the learned Counsel for the appellant/accused would submit that the trial Court imposed the sentence of 7 years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo 1-1/2 years simple imprisonment and taking into consideration the fact that the appellant/accused has been married and begotten three children, the period of sentence of imprisonment may be reduced and on the said submission, this Court heard the learned Government Advocate(Crl.Side) also.

23. In the light of the said submission made by the leaned Counsel for the appellant/accused with regard to the imposition of sentence, this Court is of the view that the sentence of imprisonment of 7 years rigorous imprisonment is to be reduced to 3-1/2 years and the sentence of fine and default sentence awarded by the trial Court is to be maintained.

24. In the result, this Criminal Appeal is dismissed, confirming the conviction recorded by the trial Court for offence under Section 376 r/w 511 I.P.C. vide impugned judgment dated 07.05.2007 made in S.C.No.63 of 2004 and the sentence of imprisonment of 7 years rigorous imprisonment is reduced to 3-1/2 years rigorous imprisonment and the sentence of fine and default sentence awarded by the trial Court is unaltered. The period of incarceration already undergone by the appellant/accused, during the course of investigation and trial, is to be set off under Section 428 of the Code of Criminal Procedure. Consequently, the connected Miscellaneous Petition is also dismissed. Index :Yes/No 17.02.2015 Internet :Yes/No ssl To 1.The Deputy Superintendent of Police, Nanguneri, Tirunelveli District. 2.The Court II Additional Sessions Judge, Tirunelveli, 3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai. M.SATHYANARAYANAN,J.

ssl Criminal Appeal (MD)No284 of 2007 and M.P.(MD)No.1 of 2015 17.02.2015

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