

M.Dharma @ Dharmaling Vs. State Through

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Court : Chennai

Decided On : Jul-22-2015

Judge : S.Nagamuthu

Appellant : M.Dharma @ Dharmaling

Respondent : State Through

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

22. 07.2015 CORAM THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
CRIMINAL APPEAL (MD).Nos.292, 308 and 312 of 2013 M.Dharma @
Dharmalingam : Appellant/A3 in C.A.No.292 R.Rajavel : Appellant/A1 in
C.A.No.308 R.Ramesh : Appellant/A2 in C.A.No.312 Vs. State through The
Inspector of Police, All Women Police Station, Tirunelveli (Rural) Tirunelveli
District. Crime No.3 of 2009 : Respondent in all Appeals PRAYER: Appeal is filed
under Section 374(2) of the Code of Criminal Procedure against the judgment
dated 16.09.2013 made in S.C.No.445 of 2010 on the file of the learned Sessions
Judge (Mahila Court) Tirunelveli. !For Appellants : Mr.V.Kathirvelu Senior counsel
for Mr.K.Rajeshwaran for A2 & A3 Mr.V.Panneerselvam for A1 ^For Respondent :
Mr.C.Mayilvahana Rajendran Addl.Public Prosecutor :

JUDGMENT

The appellants in these three appeals are the accused 1 to 3 in S.C.No.445 of 2010 on the file of the learned Sessions Judge, Mahila Court, Tirunelveli. There were as many as 4 charges framed by the trial Court. The first charge was against the accused 2 and 3 under Section 366(A) IPC. The 2nd charge was under Section 376 IPC against the first accused. The third charge was under Section 506(ii) IPC against the first accused and the fourth charge was under Section 376 read with Section 109 IPC against the accused 2 and 3. The trial Court by judgment, dated 16.09.2013, convicted the accused 2 and 3 under Section 366(A) IPC, convicted the first accused under Section 376 IPC and convicted the accused 2 and 3 under Sections 376 read with 109 IPC. The first accused was acquitted of the charge under Section 506(ii) IPC. For the offence under Section 376 IPC, the trial Court sentenced the first accused to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/-, in default to undergo rigorous imprisonment for one year, sentenced the accused 2 and 3 to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for one year for the offence under Section 366(A) IPC, sentenced the accused 2 and 3 to undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for one year for the offence under Section 376 read with 109 IPC. Challenging the said conviction and sentence, the appellants are before this Court with these appeals.

2. The case of the prosecution in brief is as follows: P.W.1 in this case is the victim of kidnapping and rape. She is a resident of Alagiyapandiyapuram Village. It is alleged that on 19.03.2009, at about 8.30 p.m., when she was taking water in a public tap, the accused 2 and 3 came there in a motorcycle. These two accused told her to come with them for harvest. She declined. Then, it is alleged that both these accused forcibly took her on the motorcycle. One of the accused drove the motorcycle and the other was sitting along with P.W.1 as pillion rider. As a matter of fact, P.W.1 was made to sit between these two accused. They took her to a lonely place known as 'Mani Iyer' field. They stopped the vehicle, asked her to get down. She did so. Then, they told her that she should wait there for another man to come. Accordingly, she waited for about 10 minutes. The accused 2 and 3 left the place in their motorcycle. Thereafter, suddenly from darkness, the first accused appeared. He held her hands and took her into the field. According to her,

then, he forcibly removed her dress and had penile sexual intercourse with her. For about two hours repeatedly, he had sexual intercourse with her. He also threatened P.W.1 not to disclose about the occurrence to anybody. At that time, P.Ws.2 and 3, namely, her mother and one Sundar came to the place of occurrence. On seeing them, the first accused fled away from the scene of occurrence. When enquired, P.W.1 told them that the first accused had raped her. Thereafter, she was taken to All Women Police Station at Manur, where P.W.1 made a complaint. But she was directed to go to All Women Police Station, Tirunelveli. Accordingly, on 20.03.2009, at 6.00 p.m., she made a complaint to All Women Police Station, at Tirunelveli. 2.1. P.W.17 was the then Sub Inspector of Police attached to the said police station. On receipt of the said complaint, she registered a case in Crime No.3 of 2009 under Sections 366, 376 and 506(i) IPC. Ex.P1 is the complaint and Ex.P16 is the FIR. She forwarded these two documents to the Court and then, handed over the case diary to P.W.18, the then Inspector of Police, for investigation. 2.2. Taking up the case for investigation, on 20.03.2009, at 7.15 p.m., P.W.18 went to the place of occurrence and prepared an observation mahazar and a rough sketch showing the place of occurrence. On the same day, she arrested all the accused and forwarded them to Court for judicial remand. While in custody, the first accused gave voluntary confession, out of which, the motorcycle bearing registration No.TN20D4608 was recovered under a mahazar on 20.03.2009. P.W.18 examined P.W.1 and sent her for chemical examination. 2.3. P.W.11 ?. Dr.Meena, Tirunelveli Medical College Hospital, examined P.W.1 on 20.03.2009 at 5.00 p.m. During the examination, she found that P.W.1 was fully grown and the hymen in her vaginal cavity was absent. There were no external injuries found. There was no spermatozoa found anywhere on the body of P.W.1. She finally gave opinion that there was no sign of any recent sexual intercourse on P.W.1. Ex.P11 is the certificate issued by her and Ex.P12 is the Accident Register. During the course of investigation, the first accused was also sent for medical examination. P.W.14 ?. Dr.Mani examined him on 25.03.2009. He opined that the first accused was fully grown up and he was capable of performing penile sexual intercourse with a woman. P.W.18 recovered the dress materials of P.W.1 and forwarded the same to the Court. P.W.6, the Assistant Director of Forensic Sciences Laboratory at Tirunelveli, examined the

Chudithar top, shawl and the chudithar bottom belonging to P.W.1, which were owned by her at the time of alleged occurrence. According to P.W.6, there was no spermatozoa found on these dress materials. P.W.14 examined P.Ws.2 and 3, Doctors, collected all the materials and finally laid the final report against the accused. 2.4. Based on the above materials, the trial Court framed charges as detailed above. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 18 witnesses were examined and 19 documents were exhibited, besides 5 material objects. 2.5. Of the said witnesses, P.W.1 is the victim and P.W.2 is her mother. P.W.1 has vividly spoken about the entire occurrence. P.W.2 has stated that when she went in search of P.W.1 along with P.W.3, she found P.W.1 coming from Mani Iyer field weeping. She has further stated that at that time itself, P.W.1 told them that she was raped by the first accused. P.W.4 was the then Judicial Magistrate, who had recorded the statement of P.W.1 under Section 164 Cr.P.C. The said statement has been marked as Ex.P4. P.W.5 - Dr.Nansi Dora has spoken about the age of P.W.1. During the course of investigation, according to her, she was asked to examine P.W.1 and on such examination, she gave opinion that P.W.1 had completed 16 years of age as on the date of occurrence. P.W.7 is the Assistant Director of Forensic Sciences Laboratory, who has stated that there was no spermatozoa found on the dress materials of P.W.1. P.W.11 ?. Dr.Mani has spoken about the medical examination conducted on P.W.1. The others are police officials. P.W.18 has spoken in detail about the investigation done by her. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., they denied the same as false. However, they do not choose to examine any witnesses on their side nor to mark any documents. Having considered all the above materials, the trial Court convicted the accused as detailed in the first paragraph of the judgment and accordingly punished them. That is how, they are before this Court with these 3 appeals.

3. I have heard the learned Senior counsel for the accused 2 and 3, Mr.V.Panneerselvam for the 1st accused and the learned Additional Public Prosecutor Mr.C.Mayilvahana Rajendran appearing for the State and I have also perused the records.

4. The learned Senior counsel appearing for the accused would submit that the evidence of P.W.1 is highly unnatural and therefore, the same is unbelievable. The learned Senior counsel would point out that even according to the evidence of P.W.1, she was very passive at the time of occurrence and she did not make any resistance. This, according to the learned counsel, would go to show that she was a consenting party. The learned Senior counsel would further submit that the medical evidence does not corroborate the eye witness account of P.W.1 and thus, the very factum of sexual intercourse has not been proved. The learned Senior counsel would further submit that P.W.1 was legally competent to give consent, as she had completed 16 years of age as on the date of occurrence. Thus, according to the learned counsel, the prosecution has not proved the case beyond reasonable doubt and therefore, the accused are entitled for acquittal.

5. The learned Additional Public Prosecutor would, however, oppose these appeals very strongly. According to him, the accused have committed a heinous crime of kidnapping and rape and therefore, they do not deserve any leniency at the hands of this Court. He would further submit that the evidence of P.W.1 ? the prosecutrix is very cogent and convincing and the same is duly corroborated by the evidences of P.Ws.2 and 3 and the medical evidence. Therefore, according to the learned counsel, there is no reason to disbelieve the evidence of P.W.1 and to acquit the accused.

6. I have considered the above submissions.

7. Admittedly, P.W.1, as on the date of occurrence, had completed 16 years of age and thus, legally she was competent to give consent for sexual intercourse with a man. P.W.1 has admitted during cross examination that the distance between her house and that of the main road is roughly about 2 kms. She has further admitted that from the main road, the place of occurrence is at a distance of 1+ kms. Thus, the total distance covered from the house of P.W.1 to the place of occurrence is 3+ kms. It is her evidence that she was sitting in the motorcycle between the accused 2 and 3. But, though the vehicle travelled such a long distance, she did not raise any alarm. She did not make any resistance at all. After going to the place of occurrence, the accused 2 and 3 asked her to get down from the

motorcycle and told her that yet another man will come to meet her. Saying so, the accused 2 and 3 left the place of occurrence. Had P.W.1 was not a consenting party, immediately thereafter, she would have rushed towards her house. She has admitted that she was very familiar with the place of occurrence. Therefore, nothing would have prevented her from immediately rushing from the place of occurrence, after the accused 2 and 3 had left. It is her further admission that after the accused 2 and 3 had left, she was waiting for about 10 minutes without any resistance to meet an unknown person and with knowing the purpose. It was only after 10 minutes, it is alleged that the first accused came to the place of occurrence, suddenly from darkness. Even after seeing him, she did not make any resistance. He took her to a further distance that too to a secluded place, then, started having sexual intercourse with her. It is not in evidence that she resisted in any manner. She did not raise any hue and cry. Not only that, this incident of sexual intercourse was continued for two hours. During cross examination, P.W.1 has categorically stated that she spent two hours with the first accused in the field having sex with the first accused repeatedly. This would clearly go to show that P.W.1 was a consenting party for sex with the first accused.

8. It is in the evidence of P.W.1 that after everything was over, P.Ws.2 and 3 came in search of her. P.Ws.2 and 3 have also stated that they came to the place of occurrence in search of P.W.1. On seeing P.Ws.2 and 3 coming near the place of occurrence, the first accused fled away from the scene of occurrence. This has been so stated by P.W.1 also. Then P.W.1 started walking towards P.W.2. It was, only at that time, she told P.W.2 that the first accused had sexual intercourse with her. This conduct of P.W.1 would clearly go to show that she was a consenting party for going with accused 2 and 3 and then for having sexual intercourse with the first accused. Absolutely, there is no material to show that she was subjected to sexual intercourse without her consent and that too by force.

9. Now, turning to the medical evidence, the Doctor has found no injury at all on P.W.1. If really, she was not a consenting party, she would have quite naturally resisted. In such resistance for two hours, by all probabilities, she would have suffered minor injuries, like scratches on her body. But, according to the Doctor, no such injury was found. Above all, no spermatozoa was even found on her body.

In her dress material also, no spermatozoa was found, as has been spoken to by the Assistant Director of Forensic Lab. These facts would also go to further strengthen the case of the accused that she was not at all raped by the first accused. From the narration of the facts, it can be only inferred that P.W.1 was a consenting party, she went along with accused 2 and 3 and then had sex with the first accused for two hours and when, it was noticed by her mother, she started making allegation of rape. This is the only possible inference, which one could make out from the evidence available in the case. Thus, in my considered opinion, the lower Court was not right in convicting the accused. I hold that the prosecution has failed to prove the charges against the accused beyond reasonable doubt.

10. In the result, the criminal appeals are allowed; the conviction and sentence imposed on the appellants are set aside and they are acquitted. Fine amount, if any paid by them, shall be refunded. Bail bond shall stand terminated. To 1.The Sessions Judge (Mahila Court) Tirunelveli. 2.The Inspector of Police, All Women Police Station, Tirunelveli (Rural) Tirunelveli District. 3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai. .

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