Mirthagai Ali Vs. State

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Court : Chennai

Decided On : Jul-20-2006

Reported in : 2007CriLJ1247

Judge : K.N. Basha, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 376 and 506; Code of Criminal Procedure (CrPC) , 1974 - Sections 313

Appeal No. : Cri. App. No. 118 of 1998

Appellant : Mirthagai Ali

Respondent : State

Advocate for Def. : R. Muniapparaj, Govt. Adv. (Crl. side)

Advocate for Pet/Ap. : A. Syamala, Adv.

Disposition : Appeal allowed

Judgement :

K.N. Basha, J.

1. The appellant/accused has preferred this appeal challenging his conviction and sentence passed by the learned IV Additional Sessions Judge, Chennal, in S. C. No. 341 of 1996 by the judgment dated 19-12-1997 convicting the appellant under

Section 376 I. P.C. and sentencing him to undergo two years rigorous imprisonment and to pay a fine of Rs. 5000/-, in default, to undergo six months rigorous imprisonment and also convicting the appellant under Section 506 (ii) I.P.C. and sentencing him to undergo one year rigorous imprisonment and to pay a fine of Rs. 2,500/-, in default, to undergo three months rigorous imprisonment.

2. This is an unfortunate case wherein, the accused is alleged to have committed the offence of sexual assault inside a sacred place viz., Dharga.

3. The accused faced the trial in the following backdrop:

(a) P.W. 1 is the prosecutrix in this case. P.W. 2 is the mother of the prosecutrix, P.W. 1. The father of the prosecutrix is running a cycle tube puncture shop and the mother of the prosecutrix, P.W. 2, is running a tiff in stall. The accused is a resident of the same street as that of the prosecutrix, P.W. 1 and her mother, P.W. 2. and opposite to his house he is having a portion of a Dharga premises and used the same as a rice grinding shop and he used to accept the rice from the public for grinding with charges. On 7-2-1995, at 6.00 p.m., P.W. 1 went to the place where the accused was having his rice grinding shop and gave rice for grinding and the accused said that she can come collect the rice batter on the next day morning. Thereafter, P.W. 1 went to the house of the accused on the next day morning at 3.00 a. m. and the accused asked her to go to the Dharga and take the rice batter from there, which was kept by him. When P.W. 1 went inside the Dharga the accused also followed her and closed the doors of the Dharga and when P.W. 1 questioned, the accused put a cloth on her mouth, pushed her down and removed her dresses and committed sexual assault on her. Thereafter, the accused is also said to have threatened P.W. 1 that if she informs anyone, he will kill her. P.W. 1 started weeping and left from that place. As she was frightened due to the threat of the accused, she has not informed anyone about the occurrence including her parents. P.W. 1 claimed that she had informed her parents about the occurrence only on 14-2-1995. Thereafter, P.W. 2, mother of P.W. 1 and father of P.W. 1 went and questioned the accused along with P.W. 1 and even at that time the accused is said to have threatened all of them with dire consequences. On the same day, P.W. 1 went to D-2, Anna Salai Police Station along with her mother P.W. 2 and

father.

(b) P.W. 8, the Inspector of Police, stated that P.W. 1 came on 14-2-1995 and informed him about the occurrence and the same was recorded by a person accompanied with her. Ex. P1 is the report and on receipt of the report, Ex. P1, P.W. 8 registered the case in Crime No. 420 of 1995 for the offences punishable under Sections 376 and 506 (ii) I. P.C. Ex. P. 12 is the First Information Report.

(c) P.W. 8 took up investigation in this case and he went to the scene of occurrence and prepared the rough sketch, Ex. P. 13. He also prepared the Observation Mahazar, Ex. P. 14. Thereafter, he has examined P. Ws. 1 to 3 and others and recorded their statements. He has also recovered clothes, M. Os. 1 to 3, produced by P.W. 1.

(d) On 14-2-1995 at 9.00 p. m., P.W. 8 arrested the accused and in pursuance of the admissible portion of the confession of the accused, Ex. P.1, P.W. 8 recovered M. O. 4, lungi and M.O. 5, knife under Ex. P. 17. Thereafter, he has sent P. W, 1 for medical examination through the XIII Metropolitan Magistrate under Ex. P. 6, Requisition. He has sent the accused for medical examination under Ex. P. 9. requisition.

(e) The doctor, P.W. 6, attached to the Government General Hospital, Chennai, received Ex. P. 6, requisition, on 15-2-1995. As per Ex. P. 6, the doctor, P.W. 6, conducted examination of P.W. 1 on 16-2-1995 at 11.00 a. m. and found that P.W. 1 is a moderately nourished female. On the examination of private parts, she made the following observations:

Vulva : NormalVagina : Torn at 5 and 7 O'clock position.No fresh.Fourchette, Perineum : IntactCervix : Upwards, uterus anteverted, normalin size. Fornices free, no whitedischarge.The doctor, P.W. 6, is of the opinion that the prosecutrix could have had sexual intercourse. Ex. P. 8 is the medical examination report issued by the doctor. P.W.6, in respect of the prosecutrix, P.W. 1.

(f) The doctor, P.W. 7, attached to the Royapettah Hospital, examined the accused on 21-2-1995, as per the requisition, Ex. P.9 received by him. He made the

following observations on examination of the accused:

Moderately nourished male individual. Well developed genital organs present. Pubic hair present, not matted. Smegma absent. Prepuce circumcised. No injuries seen anywhere on the body. No venereal disease seen. No Urethral discharge present.

There is nothing to suggest that the person is impotent/incapable of performing sexual intercourse.

The doctor, P.W. 7, is of the opinion that he could not give any opinion regarding the sexual offence said to have been committed by the accused since he was produced fifteen days after the incident. Ex. P. 10 is the medical examination certificate issued by the doctor, P.W.7, in respect of the accused.

(g) P.W. 8 has also sent the seized clothes for chemical examination under Ex. P. 18, Requisition. Ex. P. 20 is the Chemical Examination Report. Ex. P. 21 is the Blood Test Report and Ex. P. 22 is the Serologist Report. Ex. P.23 is also the Blood Test Report. P.W. 8 also examined the doctors, P. Ws. 6 and 7, and recorded their statements. After completion of investigation. P.W. 8 filed the charge sheet against the accused on 26-6-1995 for the offences under Section 376 and 506 (ii) I. P.C.

4. The prosecution, in order to bring home the charges levelled against the accused, examined P. Ws. 1 to 8, filed Exs. P. 1 to P. 23 and marked M. Os. 1 to 5.

5. When the accused was questioned under Section 313 Cr. P.C. in respect of the incriminating materials appearing against him through the evidence adduced by the prosecution, the accused denied his complicity and he has stated that he has been falsely implicated in this case.

6. Learned Counsel for the appellant contended that the prosecution has miserably failed to prove its case by adducing clear, cogent and convincing evidence. Learned Counsel for the appellant further contended that the entire prosecution case rests on the sole testimony of P.W. 1, the prosecutrix and her

evidence is self contradictory and the conduct of P.W. 1 not informing about the occurrence to anyone for more than a week throws considerable doubt about her version. It is also contended by the learned Counsel for the appellant that the explanation given by P.W. 1 that she has not informed anyone including her parents on the ground that she was threatened by the accused not to inform any one is also unacceptable. The learned Counsel for the appellant also contended that there is also doubt about the genuineness of Ex. P. 1 as the prosecution failed to examine the person who is said to have written Ex. P. 1 and further in Ex. P. 1 only the thumb impression of P.W. 1 was obtained and there is no recording to the effect that the contents of the said report, Ex. P. 1, was read over to P.W. 1. Learned Counsel for the appellant also contended that though the father and the mother of the prosecutrix, P.W. 1, are said to have accompanied her for giving the report, Ex. P. 1, they have not attested Ex. P. 1 and the non examination of the father of P.W. 1 is also fatal to the prosecution case. Last but not the least submission made by the learned Counsel for the appellant is that the medical evidence totally belies the prosecution case as the doctor has not found any external injury or marks of violence on P.W. 1 and further the evidence of the doctor, P.W. 6, shows that P.W. 1 was accustomed to sexual intercourse.

7. Per contra, Mr. Muniapparaj, learned Government advocate (Crl. Side) submitted that the evidence of P.W. 1, prosecutrix, is quite natural and the same is not suffering from any infirmities. It is further contended by the learned Government Advocate that the delay in informing anyone about the occurrence on the part of P.W. 1 is not fatal to the prosecution case, more particularly in a case of rape, as the victim always hesitates to disclose the occurrence to anyone. The learned Government advocate (Crl. Side) further contended that after P.W. 1 informed her parents about the occurrence on 14-2-1995, P.W. 2, mother of P.W. 1, along with her husband and the prosecutrix, P.W.I, went to the police station and thereafter P.W.I gave the report, Ex. P.1. It is also pointed out by the learned Government Advocate (Crl. Side) that apart from P.W. 2, P.W. 3 also corroborated the version of P.W. 2 about P.W. 1 giving the report to the police. The learned Government Advocate (Crl. Side) further contended that there is absolutely no animosity either on the part of P.W. 1, the prosecutrix, or on the part of P.W. 2, her mother, to falsely implicate the accused and therefore their evidence cannot be

rejected. It is also submitted by the learned Government Advocate (Crl. Side) that though the medical evidence does not disclose a clear case of rape, the ocular evidence of the prosecutrix can be accepted, as the evidence of P.W. 1 is quite natural. The learned Government Advocate (Crl. Side) also placed reliance on the decision of the Supreme Court of India in State of M.P. v. Dayal Sahu reported in 2005 Cri LJ 4375 : to the proposition that once the statement of the prosecutrix inspires confidence and accepted by the Court, conviction can be passed on her sole testimony and further the non examination of the doctor or his report is not fatal to the prosecution case, if the statement of the prosecutrix is acceptable and believable.

8. I have given my careful and anxious consideration to the rival contentions put forward by either side.

9. The entire perusal of records shows that the case of the prosecution mainly rests on the sole testimony of the prosecutrix, P.W. 1. As far as P.W. 2, the mother of the prosecutrix, P.W. 1, is concerned, she has been examined to speak about the disclosure of the alleged offence of sexual assault committed on her daughter/P.W. 1, as she had informed her about the occurrence nearly after seven days. As stated above, the occurrence is said to have taken place on 8-2-1995 and the prosecutrix /P.W. 1, is said to have disclosed about the occurrence to her mother on 14-2-1995. The doctor, P.W.6. examined the prosecutrix on 15-2-1995 and issued the certificate for the age, Ex. P.7 and the certificate of examination for sexual offence, Ex. P. 8. The doctor has not found any external injuries much less any marks of violence on P.W. 1. The doctor, P.W. 6, also stated that the prosecutrix is a moderately nourished female. It is also mentioned in Ex. P. 8 regarding the examination of private parts as follows:

Vulva : NormalVagina : Admitted one finger without painHymen : Torn at 5 and 7 o'clock position.No fresh.Fourchette, Perineum : IntactCervix : Upwards, uterus anteverted, normalin size. Fornlces free, no whitedischarge.

The doctor is also of the opinion that the prosecutrix P.W. 1 could have had sexual intercourse. Therefore this Court is left with the evidence of P. Ws. 2 and 6 to test the credibility of the evidence of P.W. 1, the prosecutrix in this case.

10. As rightly contended by the learned Government Advocate (Crl. Side), the conviction can be passed on the solitary evidence of the prosecutrix if the same is reliable and acceptable. The Hon'ble Supreme Court has held in State of M.P. v. Dayal Sahu reported in 2005 Crl. L.J. 4375 that,

Once the statement of prosecutrix inspires confidence and accepted by the Courts as such, conviction can be passed only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the Courts for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for Judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Non-examination of doctor and non-production of doctor's report would not be fatal to the prosecution case, if the statement of the prosecutrix and other prosecution witnesses inspire confidence.

11. By keeping in mind the principle of law laid down by the Apex Court in respect of the evidence of the prosecutrix, as stated supra, this Court has to consider the evidence of P.W. 1 to find out whether her evidence inspires confidence. In this case, it is the version of P.W. 1 that as per the instruction of her mother/P.W.2, she went to the rice grinding shop of the accused on 7-2-1995 evening at 6.00 p.m. and the accused informed her to come and collect the rice batter on the next day morning at 3.00 a.m. Therefore she went to the house of the accused at 3.00 a.m. on the next morning and the accused asked her to go and take the rice batter which was kept inside the Dharga, adjacent to the house of the accused. Thereafter she went inside the Dharga and took the rice batter and at that time the, accused is said to have closed the door of the Dharga and committed the offence of sexual assault on her forcibly. It is also stated by P.W. 1 that at the time of the alleged occurrence, the accused is said to have caught hold of her hands and made her to lie down forcibly and thereafter removed her jacket and dresses and committed the sexual assault. After the occurrence, she, started weeping and returned back to her house, but, she has not disclosed anything about the occurrence to her parents as she was frightened since the accused threatened her not to disclose about the same to anyone. It is the further case of P. W, 1 that she was continuously weeping up to 14-2-1995 and when her mother/P.W. 2 and her

father questioned her on 14-2-1995, she had informed her mother about the occurrence and at that time her father was also present in the house. It is also admitted by P.W. 1 in her cross-examination that while she was weeping from 7-2-1995 to 14-2-1995, in spite of her parents asking her the reason for her weeping she has not disclosed about the occurrence, P.W. 1 went on to state further in the chief examination itself that after disclosing about the occurrence to her mother/P.W. 2 and her father, both her father and P.W. 2, her mother, went and enquired the accused about his conduct along with her and even at that time the accused is said to have threatened all of them with dire consequences. But the fact remains that P.W. 2 has not whispered a word about enquiring the accused after the disclosure made by her daughter, P.W. 1 in respect of the occurrence and also the accused threatening them with dire consequences. P.W. 2 has simply stated that on the disclosure of the occurrence by P.W. 1, she went to the police station to give the report along with her daughter, P.W. 1, and her husband and the occurrence was narrated to the police by P.W. 1, her daughter, which was reduced into writing by the police. P.W. 3, who is the neighbour of P.W. 2, is said to have attested the report. Ex. PL

12. It is relevant to consider at this juncture that P.W. 2, mother of the prosecutrix/P.W. 1, has categorically stated in' her cross examination that P.W. 1 never went to the rice grinding shop of the accused earlier and she went to the shop of the accused for the first time only on 7-2-1995. It is also admitted by P.W. 2 that she only asked P.W. 1 to gel rice batter from the shop of the accused at 3.00 a.m. It is also pertinent to note that in the report, Ex. P.1, given by P.W. 1, it is stated that the accused asked her to come and collect the rice batter on the next day morning and only P. W, 1, on her own, went to the house of the accused at 3.00 a.m. and therefore, the present version of P.W. 1 to the effect that the accused asked her to come and collect the rice batter on the next day morning at 3.00 a.m. is proved to be false. Further, the explanation given by P. W, 1 for going to the house of the accused at wee hours is that since it was Ramzan fasting period, she went at 3.00 a.m, to collect the rice batter is also, on the face of it, unbelievable. P.W. 2, mother of P.W. 1, has not whispered a word about this explanation and she has simply stated; that she only asked her to get the rice batter at 3.00 a.m. Added to these infirmities in the evidence of P, W. 1, P.W. 1

also stated in her cross-examination that during the occurrence she has sustained scratches on her hand and she has shown the scratches to the doctor, P.W. 6 and further the doctor, P.W.6, also put medicine on those injuries. But the fact remains that the doctor; P.W.6, has not stated anything about seeing neither scratch injuries nor nail marks on P.W. 1 and on the other hand, the Doctor, P.W. 6 stated that PW1 could have had sexual intercourse and he has not found any fresh wounds and marks of violence. Even during the investigation of P.W. 8, Inspector of Police, P.W. 1 has not stated that she suffered any blood stained injuries on her hand.

13. The Hon'ble Supreme Court has held in Sudhansu Sekhar Sahoo v. State of Orissa reported in : 2003 CriLJ4920 that,

Rape - sole testimony of prosecutrix - Prosecutrix an unmarried educated woman travelling along with accused at night in a jeep for long distance allegedly for meeting her superior officer - She alleging that accused raped her in his house when they reached there - Her conduct unusual. No rational explanation given as to what urgent official work was there at night. Medical evidence not corroborating her version - No stains of blood or semen on her clothes. She asserting that she was virgin till alleged incident however medical evidence revealing that she was habituated to sex - Many loose ends in prosecution case - Accused entitled to benefit of doubt.

14. In yet another decision relating to the case of rape in Uday v. State of Karnataka reported in 2003 SCC (Cri) 775 : 2003 Cri LJ 1539 : , the Hon'ble Supreme Court has held that.

The Court must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

Therefore, in view of the above principles of taw laid down by the Apex Court in respect of rape cases, the evidence of P.W. 1 is highly suspicious as she has not suffered any injury, much less any marks of violence were found on her, coupled with the fact that the medical evidence disclosed that she was accustomed to

sexual intercourse and her abnormal conduct of going to the house of the accused at the wee hours at 3.00 a.m. in spite of her version in Ex. P. 1 that the accused asked her to come and collect the rice batter only on the next day morning, it is not possible to rule out that the prosecutrix, P.W. 1, is a consenting party for the sexual act said to have been committed by the accused.

15. There is also serious doubt about the genuineness of Ex. P. 1, the report, said to have been given by P.W. 1, It is the case of P.W. 1 that she went along with her father and mother/ P.W. 2 to the police station to give the report. Further P.W. 1 stated that the report was written by a person accompanied with them and thereafter, she has affixed her thumb impression. But P.W. 1 has not mentioned the name of the person who wrote Ex. P. 1, on the other hand, P.W. 2, mother of P.W. 1, stated that she went to the police station on 14-2-1995 along with her daughter and her husband and her daughter P.W. 1, narrated about the occurrence which was reduced into writing by P.W. 8, Inspector of Police. But P.W. 8. Inspector of Police, has stated that some other person wrote Ex. P. 1 and he was also not able to give the name of that person and further, it is admitted by P.W. 8, Inspector of Police, that it is not recorded in Ex. P. 1 that the contents of Ex. P. 1 were read over to P.W. 1 and P.W. 1, after accepting the contents, affixed her thumb impression. It is further pertinent to note that P.W. 8 has not whispered a word about P.W. 2 her mother and her father accompanying P.W. 1 at the time of giving the report and it is also relevant to note that even P.W. 3, the so called attesting witness to Ex. P. 1, has also not stated that at the time of giving the report, P.W. 2 and her husband was present along with P.W. 1 and further P.W. 3 stated that Ex. P. 1 is not written by the Inspector of Police, P.W. 8, but some other person wrote Ex. P1. the report.

16. Therefore, the above said inconsistent version throws serious doubt not only in respect of the person who wrote Ex. P. 1, but also who are all the persons accompanied P.W. 1 at the time of recording the report, Ex. P. 1. The non-examination of the person who is said to have written the report Ex. P. 1 is also fatal to the prosecution case as all the witnesses, right from P. Ws. 1 to 3 and 8, have categorically stated that some person wrote Ex. P.1 but they have not even stated the name of that person which throws serious doubt about the genuineness

of Ex. P. 1.

17. There is no doubt that the offence of rape is a very serious offence and also inhuman on the part of any person committing such a sexual assault on innocent victim girls. It is needless to state that rape is not only a crime against the person or a woman but it is the crime against the entire society. Such serious and grave offenders should be dealt with all seriousness and if the offence is proved, they should be punished with adequate sentence and at the same time, the Court should also guard against false and frivolous cases. The Hon'ble Supreme Court of India has held in Rang Bahadur Singh v. State of U. P. reported in : 2000 CriLJ1718 that, (Para 22 of Cri LJ)

The time tested rule is that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilt of the accused beyond reasonable doubt a conviction cannot be passed on the accused. A criminal Court cannot afford to deprive liberty of the appellants, lifelong liberty, without having at least a reasonable level of certainty that the appellants were the real culprits.

18. In the instant case, as stated above, the evidence of P.W. 1 not only suffers from serious infirmities but also suffers from inherent improbabilities. The following infirmities in the evidence of P.W. 1, as stated above, cannot be overlooked:

(i) The conduct of P.W. 1 going to the house of the accused at wee hours, at 3.00 a.m. in spite of the specific statement in her report, Ex. P1, that the accused asked her to come and collect the rice batter only on the next morning, throws considerable doubt about the veracity of her version.

(ii) P.W. l's version that she sustained scratch injuries is falsified by the medical evidence through the doctor, P.W. 6. The doctor has not found any scratches or any external injuries or marks of violence on P.W. 1, which also falsified the version of P.W. 1. The medical evidence of the doctor, P.W. 6, to the effect that P.W. 1 was accustomed to sexual intercourse also raises doubt about the alleged commission of sexual assault on her by the accused.

(iii) The conduct of PW. 1 that in spite of her weeping right from the alleged date of occurrence on 8-2-1995 till 14-2-1995 and in spite of her being questioned by her parents, the non-disclosure about the occurrence till 14-2-1995 is unbelievable and unacceptable.

(iv) P.W. l's version that after her disclosure about the occurrence to her parents, P.W. 2, her mother and her father, all of them, including P.W. 2, her mother and her father along with her went to the house of the accused on 14-2-1995 and questioned the accused and for that the accused threatened all of them with dire consequences is also falsified by the version of P.W. 2, her mother as she has not made a whisper about going to the house of the accused and questioning him in respect of his conduct of committing sexual assault on P.W. 1.

(v) P.W. 1 's version about giving report to the police is also falsified by several infirmities viz., P.W. 1 stated that she went along with her mother, P.W.2 and her father to the police station and on her narration, one person recorded the version in Ex. P. 1 and thereafter she affixed her thumb impression in the report, Ex. P. 1 and the same was given to the police is also falsified by the version of other witnesses. P.W. 2, her mother, stated that the narration of P.W. 1 about the occurrence was reduced into writing by P.W. 8, inspector of Police. P.W. 8 on the other hand, stated that he has not written the statement given by P.W. 1 and some other person wrote the report, Ex. P. 1. P.W. 3, the attesting witness to the report, Ex. P. 1, also stated that some other person has written Ex. P1, and he has categorically stated that the report, Ex. P1, was not written by the inspector of Police, P.W. 8. Added to these inconsistent versions, P.W. 3, the attesting witness and P.W. 8, the Inspector of Police, have not stated that P.W. 1 was accompanied with her mother/P.W. 2 and her father.

Therefore, in view of the above-said infirmities, the evidence of P.W. 1 not at all inspires the confidence of this Court as her version not only falsified by the evidence of her own mother/P.W. 2 but also falsified by medical evidence through the evidence of the doctor, P.W. 6 coupled with the circumstances as narrated above. Therefore, this Court is of the considered view that it is most unsafe to place reliance on the uncorroborated testimony of P.W. 1.

19. For the aforesaid reasons, the appeal is allowed and the conviction and sentence imposed on the appellant is set aside. Bail bond executed, if any, shall stand cancelled. Fine amount paid, if any, shall be refunded to the appellant.