

Ganesan Vs. State Represented by Inspector of Police

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Court : Chennai

Decided On : Mar-17-2006

Reported in : 2006(2)CTC831

Judge : S. Sardar Zackria Hussain, J.

Acts : Evidence Act - Sections 65; Indian Penal Code (IPC) - Sections 354, 375 and 376; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Crl. A. No. 606 of 1998

Appellant : Ganesan

Respondent : State Represented by Inspector of Police

Advocate for Def. : A.N. Thambidurai, Government Adv. (Criminal Side)

Advocate for Pet/Ap. : P.V.S. Giridhar, Adv.

Disposition : Appeal dismissed

Judgement :

S. Sardar Zackria Hussain, J.

1. The appellant is the sole accused in S.C.No.96 of 1997 on the file of the Additional Assistant Sessions Court, Erode, and the appeal is directed against the conviction and sentence imposed to the appellant to undergo Rigorous

Imprisonment for ten years and to pay a fine of Rs.3,000/-, in default to undergo three months rigorous imprisonment for the offence under Section 376 I.P.C.

2. The brief facts that led to the filing of this appeal are as follows:-

(a) P. W. 1 Vijaya is the victim girl aged about 13 years and studied upto sixth standard at the time of occurrence. P. W. 3 is the mother of P. W. 1 and P. W. 2 is brother of P.W. 3. P. W. 1 attained puberty. Parvathi is the elder sister of the accused and is residing as a tenant in the house of senior paternal uncle Chandran of P.W. 1. The accused used to come to the house of his sister Parvathi frequently and give chocolates to P.W. 1 whenever she used to go to fetch water and to school. On 25.11.1996 around 7.30 p.m. while P.W. 1 was playing before the house of her senior paternal uncle, the accused called P.W. 1 that he will give chocolates, and so, P.W. 1 went with the accused to Murthy Forest, one kilo metre away from the house of P.W. 1. The accused pulled her down under a neem tree and lie over her and after lifting her skirt, removed her underwear and also his underwear , then he put his private part into her urinal hole and pressed. P.W. 1 shouted unable to bear the pain. In search of victim girl, her mother P.W. 3 and her uncle P.W. 2 came to the scene of occurrence and found P.W. 1 making hue and cry. They came and beat the accused with torch light and pushed the accused and lifted P.W. 1. The accused had run away. P.W. 1 informed her mother P.W. 3 as to what the accused had done to her. Since the father of P.W. 1 was away, they remained in the house during night and after changing her dress, P.W. 1 went with her mother P.W. 3 and uncle P.W. 2 to the police station. P.W. 1 gave complaint Ex.P-1 to P.W. 12, Inspector of Police, Erode Taluk Police Station, Erode, who registered the same in Crime No.580 of 1996 under Section 376 I.P.C. The printed FIR is Ex.P-16.

(b) P.W. 12 went to the scene of occurrence, prepared observation mahazar Ex.P-2 in the presence of P.Ws.5 and 6 and drawn rough sketch Ex.P-18 and recovered M.O.1, blue colour skirt of P.W. 1, M.O.1 underwear of P.W. 1 and M.O.3 shirt of P.W. 1 under Form 95(Ex.P-17). P.W. 12 sent P.W. 1 for medical examination and he recorded the statements of P.Ws.4 to 6 and other witnesses.

(c) As per the requisition Ex.P-9 made by P.W. 12, P.W. 10 Dr. Vijaya, attached to Erode Government Hospital Erode, examined the victim girl on 26.11.1996 at 2.30 p.m. and the doctor issued accident register extract Ex.P-10.

(d) As per the requisition of P.W. 12, P.W. 9, Radiologist attached to the Government Hospital, Erode after taking Radiology on 26.11.1996, issued radiological report Ex.P-7 suggesting the bone growth of the victim girl would be between 17 to 18 years at the time of occurrence and the Radiology photos are M.O.6 series.

(e) On 26.11.1998, P.W. 12 arrested the accused near Sengodampallam bus stop and recorded his confession statement (admissible portion is Ex.P-4) and on the basis of which P.W. 12 recovered M.Os.4, underwear of the accused and M.O.5 lungi of the accused. He sent the accused for remand after subjected to the medical examination.

(f) As per the requisition Ex.P-15, P.W. 8, Dr.D.Ganesan, attached to the Government Hospital, Erode, after examination of the accused on 28.11.1996 at 3.30 p.m. issued accident register Ex.P-6 that the accused is potent.

(g) On 1.1.1997, P.W. 12 recorded the statement of Sengotayampalayam Headmaster, Dr. Nirmala and Dr. Ganesan (P.W. 8) and after completing the investigation, he filed charge-sheet.

3. Before the trial Court, the prosecution examined 12 witnesses P.Ws.1 to 12 and marked Exs.P-1 to P-19 and M.Os.1 to 6.

4. When the accused was questioned under Section 313 of the Code of Criminal Procedure, on the basis of the incriminating evidence made available against him by the respondent, he denied the offence and stated that false case has been foisted against him.

5. The trial Court, in appreciation of such evidence let in on the side of prosecution, found the accused guilty and convicted and sentenced as set out above, which is under challenge in this appeal.

6. Heard the learned counsel for the appellant/accused and the learned Government Advocate (Criminal side).
7. The learned counsel for the appellant/accused firstly submitted that the age of the prosecutrix P.W. 1 is between 18 to 20 years as per the radiological report Ex.P-7 and the Radiologist P.W. 9 also confirmed the same and as such, the age of P.W. 1 is above 16 years and so there is no case for statutory rape and the xerox copy of school certificate Ex.P-5 relating to P.W. 1 is inadmissible in evidence since it is a xerox copy.
8. According to the learned counsel for the appellant/accused, P.W. 1 consented for the sexual act, in that, the accused had close contact with P.W. 1 and used to offer chocolates and P.W. 1 went voluntarily along with the accused and P.W. 1 has not stated in her evidence that she refused and protested for the act committed by the accused. There are also no signs of injuries suffered either by the prosecutrix or by the accused, which is supported by the medical evidence.
9. It is further contended by the learned counsel for the appellant/accused that as per the evidence of P.Ws.8 to 10 (doctors), there is nothing to show that there was penetration. P.Ws.8 to 10 have stated that there may not be any intercourse or penetration. So, according to the learned counsel, in any event the offence under Section 376 is not attracted.
10. Then by referring to Section 65 of the Indian Evidence Act, the learned counsel for the appellant/accused vehemently contended that no reliance can be placed upon the school certificate Ex.P-5 relating to P.W. 1, in that it is only a xerox copy. The learned counsel attacked the evidence of P.Ws.1 to 3 as not reliable and attracting the offence under Section 376 I.P.C. It is then submitted by the learned counsel that Ex.P-10, the accident register extract relating to prosecutrix reveals that the offence of rape could not have been committed on P.W. 1.
11. The learned counsel for the appellant/accused also submitted that there have been discrepancies and contradictions in the evidence of P.Ws.1 to 3, that the manner in which the alleged occurrence took place, as to how P.W. 1 was rescued, the manner in which Ex.P-1 was prepared and about the presence of the

accused at the scene of occurrence and also about the place where the prosecutrix was enquired about the occurrence by P.Ws.2 and 3 and also as to the place where M.Os.1 and 2 of prosecutrix were found at the place of occurrence.

12. The learned counsel for the appellant/accused further submitted that there have been contradictions in the evidence of P.Ws.5, 6 and 12 as regards the time the observation mahazar Ex.P-2 was signed and the persons who were present at the place of occurrence as well preparing Ex.P-2 and the place where the observation mahazar was prepared and the place where M.Os.4 and 5 of the accused were recovered.

13. The learned counsel for the appellant/accused also argued that as per the forensic report Ex.P-13, there was no possibility of rape alleged to have been committed by the accused on P.W. 1. Inasmuch as according to the learned counsel, no intercourse or penetration has been proved and since P.W. 1 prosecutrix, aged above 16 years has consented for the sexual act and since P.W. 1 is aged below 16 years only the offence under Section 354 I.P.C. alone is made out.

14. It is also argued by the learned counsel for the appellant/accused that the delay in preferring the complaint has not been satisfactorily explained.

15. To the view that unproved and unexhibited school certificate cannot be relied on, the learned counsel for the appellant/accused has relied on the decision in Ram Murti v. State of Haryana reported in AIR 1970 Supreme Court 1020.

16. The learned counsel for the appellant/accused also relied on the following decisions:-

(1) Albert v. The State rep. by Public Prosecutor reported in 1998 2 LW (Cri) 463, in which, this Court held thus:-

From the materials available on record, it can be safely said that an offence under Section 376 I.P.C. has not been made out, as P.W. 1 is a minor girl who has not attained puberty, and the medical evidence is also not in favour of the case of the prosecution since P.W. 5 the Doctor has stated the hymen was intact and there

was no injury on the private parts of P.W. 1 to prove rape. In such circumstance an offence punishable under Section 376 IPC has not been made out. However, from the decisions of various Courts, in such circumstance, the offence can be taken as one under Section 376, I.P.C. read with 511 I.P.C. or under Section 354, I.P.C. In the instant case, as the medical evidence is very weak and there are sufficient materials from the evidence of P.W. 1 to hold that the accused had outraged the modesty of P.W. 1, it can be safely said that the accused is liable for offence under Section 354 I.P.C.

(2) Mohar Singh v. State of Punjab reported in : 1981 CriLJ998 , in which the Hon'ble Supreme Court held that conviction cannot be based on the evidence where there is inconsistency between ocular and medical evidence.

17. The learned Government Advocate by referring to the evidence of P.W. 7, Headmistress of Sengodampalayam Panchayat Union School, in which school P.W. 1 studied, through whom Ex.P-5 was marked that she issued Ex.P-5 and the seal affixed therein is the seal of her school. It is submitted by the learned Government Advocate that though the accused had sufficient opportunity to contest the veracity of Ex.P-5, the same has not been availed. Since the original documents relating to Ex.P-5 is required, they were not produced in the Court and Ex.P-5 being the xerox copy of the school certificate, it is admitted in the evidence under the Indian Evidence Act as secondary evidence.

18. The learned Government Advocate also argued that there have been no inconsistency in Ex.P-1 with reference to the evidence of P.Ws.1 to 3, 8 and 9, in that there have been clear evidence let in through P.W. 7 and Ex.P-5. It is further submitted that it is well settled that medical evidence cannot prevail over the ocular evidence of P.Ws.1 to 3 and 7 as also held by the Hon'ble Supreme Court in Vishnu - vs. - State of Maharashtra reported in (2006) 1 SCC (Cri) 217, in which the Hon'ble Supreme Court held thus:-

The statement of the prosecutrix, in our view, is quite natural, inspires confidence and merits acceptance. In the traditional non-permissive bounds of society of India, no girl or woman of self-respect and dignity would depose falsely, implicating somebody of ravishing her chastity by sacrificing and jeopardising her

future prospect of getting married with a suitable match. Not only would she be sacrificing her future prospect of getting married and having family life, but also would invite the wrath of being ostracised and cast out from the society she belongs to and also from her family circle. In our view, a clear case of rape, as defined under Section 375 clause thirdly I.P.C. has been established against the accused. It is now well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence.

19. The learned Government Advocate also relied on the decision in Ravi Kumar v. State of Punjab reported in : 2005 CriLJ1742 , in which the Hon'ble Supreme Court held thus:-

Where ocular evidence is cogent and credible, medical evidence to the contrary cannot corrode the evidentiary value of the former.

20. The learned Government Advocate further submitted that the prosecution clearly established the case of rape committed by the accused through P.W. 1 and the Exhibits marked on the prosecution side and also the fact that the victim girl P.W. 1 was aged below 16 years at the time of occurrence as is clearly borne out by the certificate Ex.P-5 and supported by the evidence of P.Ws.1 to 3 and therefore, according to the learned Government Advocate, the conviction and sentence in respect of the offence under Section 376 I.P.C. imposed to the accused by the trial Court does not call for any interference and is to be confirmed.

21. As per the case of prosecution, the occurrence took place on 25.11.1996 at 7.30 p.m. in the Murthy Forest one kilo metre away from the house of P.W. 1, the victim girl. The complaint was preferred by P.W. 1. In the complaint it is stated that P.W. 1 was studying sixth standard and four months before the complaint, she attained puberty. In her evidence, P.W. 1 has stated that she had studied upto sixth standard and attained puberty. P.W. 3, the mother of P.W. 1 has also stated that P.W. 1 attained puberty four months prior to occurrence and that P.W. 1 was aged 12 years at the time when she gave evidence and studied upto sixth standard. P.W. 7 is the Headmistress of Panchayat Union School, Sengodampalayam and has stated in her evidence that P.W. 1 was studying sixth standard in 1996 and left the school after obtaining transfer certificate and as per

the school records, P.W. 1 was born on 15.1.1986 and she left the school on 17.12.1996 after obtaining transfer certificate and she brought the admission register for admitting P.W. 1 in her school and has not filed original transfer certificate, since the said document as well the admission register are required for the school and she further stated in her evidence that Ex.P-5 is the xerox copy of the record sheet furnished by the school containing her signature and the seal of the school, which was marked, subject to objection. Therefore, it is clear from the evidence of P.Ws.1, 3 and 7 that the victim girl P.W. 1 was aged 12 to 13 years at the time of occurrence and below 16 years and she studied sixth standard in the year 1996. Therefore, no credence can be attached and much reliance cannot be given to Ex.P-7 radiological report given by Radiologist P.W. 9 that P.W. 1 could have been above 17 years and below 18 years and clear evidence let in on the prosecution side through P.Ws.1, 3 and 7 that the victim girl P.W. 1 was aged 13 years at the time of occurrence and below 16 years, in which case, there is no force in the argument advanced for the appellant that the statutory rape is not attracted.

22. In the complaint Ex.P-1 preferred by P.W. 1 it is stated that she was studying sixth standard at the time of occurrence, that she attained puberty four months before giving complaint, that Parvathi is the elder sister of the accused and is residing as a tenant in the house of senior paternal uncle Chandran of P.W. 1, that the accused used to come to the house of his sister Parvathi frequently and give chocolates to P.W. 1 whenever she used to go to fetch water and to school, that on 25.11.1996 around 7.15 p.m. the accused called P.W. 1 to purchase chocolates and took P.W. 1 along with him to Murthy Forest, that P.W. 1 asked as to why the accused took her to that place, for which the accused informed her that it is for chit-chat and so both were chit-chatting, that suddenly the accused pulled her down under a neem tree and lie over her and after lifting her skirt removed her underwear and also his underwear and lungi, he put his sexual part into her urinal hole and pressed, that P.W. 1 shouted not to perform the act and she also shouted unable to bear the pain that still the accused pressed his sexual part, that on hearing the noise, her uncle P.W. 2 came and pushing the accused lifted P.W. 1 and accused had run away and that her uncle enquired as to what happened and she informed the sexual assault committed by the accused.

23. In their evidence, P.Ws.1 to 3 explained the delay that since the father of P.W. 1 was away on that day, they remained in the house whole night and only next day morning, they gave complaint Ex.P-1 to P.W. 11.

24. P.W. 8 Doctor, who examined the accused and certified that the accused is potent has stated that he examined the accused only on 28.11.1996 at 3.30 p.m. and therefore, P.W. 8 could not have noted the injury on the sexual part of the accused.

25. P.W. 10 Doctor examined P.W. 1, the victim girl on 26.11.1996 at 2.30 p.m. and issued accident register extract Ex.P-10 stating that by clinical and physical examination he found that P.W. 1 is aged about 15 years and vagina of P.W. 1 did not admit one finger and no injuries over vagina or labia were found to P.W. 1. Merely because it is stated by Doctor P.W. 10 that vagina of P.W. 1 did not admit one finger and there was no injury in vagina or labia, it is not suggestive of the fact that P.W. 1 was not raped by the accused at the time of occurrence as stated by her. Though the occurrence took place on 25.11.1996 at 7.30 p.m., she was examined by P.W. 10 doctor on 26.11.1996 at 2.30 p.m.

26. In the complaint as well in the evidence, P.W. 1 has clearly stated that taking P.W. 1 to the Murthy Forest one kilo metre away from the house of P.W. 1 by saying that he will give chocolates, the accused pulled her down under a neem tree and lie over her and after lifting her skirt removed her underwear and also his underwear and lungi, the accused put his private part into P.W. 1's urinal hole and pressed. Such evidence of P.W. 1 is very much convincing and reliable. Immediately after occurrence P.W. 1 also informed the sexual assault committed by the accused to her uncle, P.W. 2, and her mother P.W. 3.

27. The statement of the prosecutrix/P.W. 1 that at the time of occurrence, P.W. 1 was aged about 13 years and studied upto sixth standard and as such, she could not have come forward with the case of rape against the accused sacrificing her future prospect of marriage, inspires confidence and on that basis conviction can be sustained in respect of the offence of rape against the accused.

28. The Additional Assistant Sessions Court considering all these aspects properly and finding the accused guilty convicted and sentenced as set out above and the same being proper no interference can be made.

29. In the result, the Criminal Appeal fails and is dismissed. The conviction and sentence imposed to the accused as per judgment dated 17.7.1998 made in S.C.No.96 of 1997 on the file of the Additional Assistant Sessions Court, Erode are confirmed. The bail bond executed by the accused is cancelled. The Additional Assistant Sessions Judge, Erode is required to secure the custody of the accused to undergo the remaining period of sentence.

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