*Crl.A.No.237 of 2014***IN THE HIGH COURT OF JUDICATURE AT MADRAS**

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DATED : 02.03.2023

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.A.No.237 of 2014

Kumar

.. Appellant

Versus

State by :

The Sub Inspector of Police,
Cheyyar Police Station,
Cheyyar,
Thiruvannamalai District.
(Crime No.49 of 2009)

.. Respondent

Prayer : Criminal Appeal filed under Section 374(2) of The Criminal Code of Procedure, to call for the records pertaining to the judgment and sentence, dated 09.04.2014 passed in S.C.No.105 of 2011 on the file of the learned Assistant Sessions Judge, Cheyyar convicting the appellant under Section 452 I.P.C and sentencing him to undergo Rigorous Imprisonment for seven years and to pay a fine of Rs.5,000/- in default, to undergo Rigorous Imprisonment for six months and convicting him under Section 323 I.P.C and sentencing him to undergo Rigorous Imprisonment for one year and to pay a fine of Rs.1000/- in default, to undergo Rigorous Imprisonment for one month and convicting him under Section 376 r/w 511 I.P.C and sentencing him to undergo Rigorous Imprisonment for ten years and to pay



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a fine of Rs.10,000/- in default, to undergo Rigorous Imprisonment for six months and further convicting him under Section 4 of Tamil Nadu Prohibition of Harassment of Woman Act and sentencing him to undergo Rigorous Imprisonment for three years and to pay a fine of Rs.5000/- in default, to undergo Rigorous Imprisonment for six months and set aside the same.

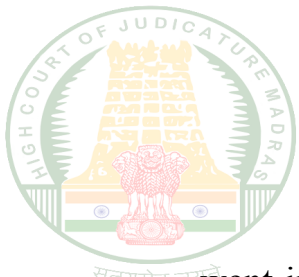
For Appellant : Mr.Sharukumar.S.I
for Mr.K.Elangovan

For Respondent : Mr.R.Kishore Kumar
Government Advocate (Crl. Side)

JUDGMENT

A. The Complaint :

It is alleged that on 15.01.2009 at about 9.00 P.M, when *P.W.1*, *Sumathi*, was alone at home, she heard noise of the rear-side door being locked and upon opening, the accused was standing near the door. When she asked him what he is doing there at that time, suddenly, the accused came inside the house, pushing her inside the house, bolted the door from the inside and with his *lungi*, stuffed her mouth and covered her face, hit her with his hands and outraged her modesty. At that point of time, her husband came in and upon seeing him, the accused ran away and the husband also



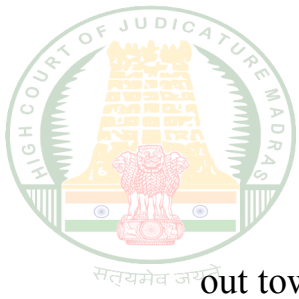
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went in pursuit of him. It is said that the complaint was given on the next day i.e., on 16.01.2009, for which, C.S.R receipt was given.

B. The Investigation & Final Report :

2. Thereafter, on 23.01.2019, **P.W.9**, the Sub-Inspector of Police, *Cheyar* Police Station registered a case in Crime No.49 of 2009 for the offences under Sections 323 and 354 of *The Indian Penal Code* (hereinafter referred to as '*The IPC*') and Section 4 of the Tamil Nadu Prohibition of Harassment of Woman Act, 1998 (hereinafter referred to as '*TNPHW Act*') and took up the case for investigation. He completed the investigation and filed a chargesheet before the learned Judicial Magistrate No.II, *Cheyar*, which was taken on file as C.C.No.118 of 2009.

2.1. During the course of the trial, **P.W.1**, *Sumathi*, the victim, while deposing in tune with her complaint, proceeded further to say that the accused not only outraged her modesty, but, after tying her hands and legs, committed rape on her and that she fainted. In view of the said evidence, since the learned Magistrate, *prima facie*, found that the allegation points



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out towards an offence under Section 376 of *The IPC*, committed the case to the learned Principal District and Sessions Judge, *Tiruvannamalai* and the case was taken on file as S.C.No.105 of 2011 and was thereafter made over to the Trial Court. The Trial Court thereafter framed charges under Sections 452, 323 and 376 of *The IPC* and Section 4 of the *TNPHW Act* and upon being questioned, the accused denied the charges and stood trial.

C. The Trial :

3. So as to bring home the charges, *P.Ws.1* to *9* were examined on behalf of the prosecution and *Exs.P-1* to *P-7* were marked. Upon being questioned about the material evidence and incriminating circumstances on record as per Section 313 of The Code of Criminal Procedure (hereinafter referred to as '*The Cr.P.C.*'), the accused denied the same as false. Thereafter, on behalf of the accused, one *Soundararajan*, Doctor at the *Chengalpattu Medical College Hospital*, was examined as *D.W.1*.

3.1. Thereafter, the Trial Court proceeded to hear the learned Additional Public Prosecutor and the learned Counsel for the accused and by a judgment, dated 09.04.2014, found that in a case of sexual assault, the



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evidence of the victim by itself is enough to convict the accused and does not need any corroboration. Further, the case of the prosecution is also fortified in view of the presumption under Section 114-A of the *Evidence Act, 1872* and when the accused has not rebutted the presumption by adducing appropriate evidence, held that the offences stood proved. Therefore, finding that the accused committed offence under Section 452 of *The IPC*, it imposed sentence of 7 years Rigorous Imprisonment and a fine of Rs.5,000/- and in default of payment of fine, to undergo six months Rigorous Imprisonment; finding guilty of the offence under Section 323 of *The IPC*, imposed a sentence of one year Rigorous Imprisonment and to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo one month Rigorous Imprisonment; of the offence under Section 376 read with 511 of *The IPC*, to undergo 10 years Rigorous Imprisonment and a fine of Rs.10,000/- and in default of payment of fine, to undergo six months Rigorous Imprisonment and under Section 4 of the *TNPHW Act*, to undergo 3 years Rigorous Imprisonment and a fine of Rs.5,000/- and in default of payment of fine, to undergo six months Rigorous Imprisonment. Aggrieved by the same, the present appeal is laid before this Court.

**D. The Submissions :**

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4. Heard *Mr.Sharukumar.S.I*, learned Counsel for the appellant and *Mr.R.Kishore Kumar*, learned Government Advocate (Crl. Side) for the respondent.

4.1. *Mr.Sharukumar.S.I*, learned Counsel, taking this Court through the First Information Report and thereafter, the evidence let in by ***P.W.1***, the victim before the learned Judicial Magistrate No.II, *Cheyar* and thereafter before the Court, during the trial, would submit that in this case, the evidence of ***P.W.1*** is absolutely vaguely vague and self-contradictory and the case of the prosecution has to fail by the evidence of ***P.W.1*** itself. To top it all, the evidence of ***P.Ws.2, 3*** and ***4*** all go in different directions studded with material contradictions in each and every aspect of the prosecution's case and therefore, when there is absolutely no cogent and coherent material on record, the conviction is made without any basis whatsoever. Further, taking this Court to the medical evidence on record starting from the Accident Register copies of both the Hospitals and the evidence of the Doctors, who examined the accused both initially at the *Government Hospital, Cheyyar* and thereafter, *Medical College Hospital at*

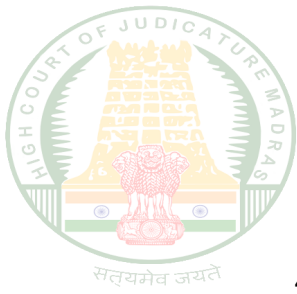


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Chengalpattu, he would submit that both the Doctors have categorically deposed that absolutely no whisper was made to them about the rape being committed on her.

4.2. Further, when the Doctors wanted to take vaginal smear, she had even represented to them that apart from the rape committed on her, before and after the offence, she had intercourse with her husband and thereby, prevented the Doctors from collecting any vaginal smear. To top it all, this is also a case where without even informing the Hospital authorities, she came out of the Hospital. This being the case, finding of the Trial Court is perverse in nature, since, all these relevant materials have not at all been adverted to, but, the Trial Court decided only the legal position as to whether, in a case of sexual assault by rape, conviction can be made on the evidence of the survivor alone and convicted the appellant. On the other hand, all the above submissions made by the defence have not even been adverted to or answered by the Trial Court. That being the situation, he would pray that this Court should interfere by way of this appeal.



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4.3. In support of his submissions, the learned Counsel also relied upon a judgment of the Hon'ble Supreme Court of India in ***Bhagwan Sahai and Anr. Vs. State of Rajasthan***¹, more particularly relying upon paragraph No.8 for the proposition that if there is doubt as to the genesis of the case itself, the benefit of doubt has to be given to the accused. The learned Counsel relied upon a judgment of this Court in ***M.Arunachalam Vs. The Inspector of Police*** (Crl.R.C.No.811 of 2018), more specifically relying upon paragraph No.16 to contend that unless it happened in a public place, the offence under Section of the *TNPHW Act* will not be attracted. The learned Counsel relied upon a judgment of the High Court of Andhra Pradesh in ***Konduri Venkata Rao and Ors. Vs. The State of A.P.***² to contend that unless the prosecution specifically proves some preparation to commit the offence, the offence under Section 452 of *The IPC* cannot be held to be proved.

4.4. Opposing the above said submissions, *Mr.R.Kishore Kumar*, learned Government Advocate (Crl. Side) would submit that in this case, even though ***P.W.1*** immediately mentioned only outraging of modesty, later

1 (2016) 13 SCC 171

2 2011 SCC OnLine AP 1008

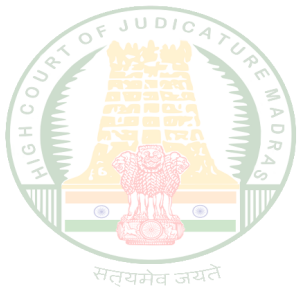


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on, she had deposed about the commission of the offence of rape. Even considering that the said part as an embellishment, still, even by the cross-examination of the defence and the evidence of *P.Ws.1* and *2* and the other medical evidence about injury, the offence under Sections 323 as well as 354 of *The IPC* are categorically made out and at least to the extent, the case of the prosecution is sustainable.

E. The Findings of this Court :

5. I have considered the rival submissions made on behalf of both the sides and perused the material records of this case. In this case, firstly, it is seen that the occurrence is alleged to have happened on 15.01.2009 at about 9.00 P.M. It is alleged that complaint was given on the next day, to which, a C.S.R receipt was given. *P.W.7, Ranganathan*, states that upon receipt of information from the Hospital, he went to the Hospital and recorded her statement and entered as No.26 of 2019 in the Community Service Register and placed it before *P.W.9*. The said C.S.R was not produced before the Court. This assumes significance especially in the teeth of admission by *P.W.9*, Investigating Officer, as follows:-



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".....அசா.2 என்னிடம் கொடுத்த வாக்குமூலத்தில் அடிதடி வழக்கு என்று தான் சாட்சியம் அளித்துள்ளார் என்றால் சரி தான்....."

5.1. However, in the Accident Register, an information is given before the Hospital that the accused assaulted her and thereafter, attempted to rape her by hitting over face and mouth and tying both her hands and legs and attempted to have physical intercourse. Prior to intercourse, when her husband suddenly came in after hearing his voice, the accused ran away. Eight days after the same, on 23.01.2009, the First Information Report was recorded based on the complaint of *P.W.1*. It has to be seen that the allegation made in the complaint is as follows:-

"..... அப்போது எங்க ஊரைச் சேர்ந்த குமார் S/o போத்து என்பவர் வந்து என் வாயை கையால் பொத்தி துணியால் முடினான். கையால் முகத்தின் மீது குத்தினான். முடியை பிடித்து இழுத்து கையை கட்டினான். மானபங்கம் செய்தான். உடனே என் கணவர் முன்பக்க கதவு திறந்து வந்ததும் குமார் ஓடிவிட்டான்....."

5.2. Further, when the matter came up for trial before the learned Judicial Magistrate No.II, *Cheyar*, the following allegations are made:-



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".....அப்போது எங்கள் சூளைக்கு மண் ஓட்டிவரும் குமார் எங்கள் வீட்டு வாசற்படியில் நின்று இருந்தான். இங்கு என்னடா வேலை போடா என்று சொன்னேன். எதிரி என்னை வீட்டுனுள் தள்ளி கையால் வாயை என்னுடைய வாயை பொத்திவிட்டான். எதிரி தன்னுடைய லுங்கியை என்னுடைய முகத்தை முடினான். பின்னர் கையால் முகத்தின்மீது குத்தினான். என்னை பிடித்து கீழே தள்ளினான். நான் கீழே விழுந்துவிட்டேன். என்னை கெடுப்பதற்காக முயற்சி செய்தான். நான் காலால் குமாரை எட்டி உதைத்துவிட்டேன். எதிரி என்னுடைய கை, கால்களை கட்டிவிட்டு XX XXXXXX XXX வலுக்கட்டாயமாக உடலுறவு கொண்டான். என்னிடம் பலவந்தமாக உடலுறவு கொண்டதால் எனக்கு மயக்கமாகிவிட்டது. அதுசமயம் எனது வீட்டுக்காரர் முன்பக்கமாக வந்துள்ளார். என் கணவர் வீட்டுக்குள் வந்தது அந்த நிலமையில் தெரியவில்லை. என் கணவர் வந்ததை பார்த்தபோது குமார் ஓடிவிட்டார்....."

5.3. Thereafter, during the trial, she has deposed as follows:-

".....எதிரி குமார் அங்கு இருந்தான். இங்கு என்னடா வேலை போடா என்று சொன்னேன். என் வீட்டிற்குள் தள்ளி என் வாயை கையால் முடி அவன் அணிந்திருந்த லுங்கியை எடுத்து என் முகத்தை முடி முகத்தில் குத்தினான். என் கைகளை கட்டிவிட்டான். நான் காலால் எட்டி உதைத்தேன். காலை கட்டி விட்டான்.



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மானபங்கம் செய்து பலாத்காரமாக உடல் உறவு செய்தான். என் கணவர் முன் பக்கம் வருவதை பார்த்துவிட்டு என்னை விட்டுவிட்டு ஓடிவிட்டான். எனக்கு மயக்கமாகிவிட்டது. கொஞ்ச நேரம் கழித்து நான் எழுந்து வந்தேன். என் கணவர் துரத்திகொண்டு ஓடினார்....."

5.4. If her own statement and chief evidence is as above, in the cross-examination, her evidence is as follows:-

".....என்னை வீட்டுக்குள் தள்ளிவிட்டு கதவை மூடிவிட்டு கையால் வாயை பொத்தினான். பிடித்து தள்ளி அப்படியே வாயை பொத்தினான். உடனே வந்து வாயை பொத்திவிட்டான். அசம்பாவிதம் நடக்கபோகிறது என்று எனக்கு தெரிந்தது. வாயை பொத்திவிட்டான். நான் பஸ்சில் விழுந்துவிட்டேன். அந்த வலியில் என்னால் வாயை திறக்க முடியவில்லை. விடுபட நான் முயற்சி செய்தேன். முடியவில்லை. முகத்தை மூடி கயிற்றால் கைகளை முன்புறமாக கட்டிவிட்டான். இரண்டு கையாலும் பிடித்து தான் கயிற்றால் கட்டிவிட்டான். அப்போது கத்தினேன். அப்போது யாரும் வரவில்லை. அவன் லுங்கியால் என் முகத்தை மூடினான். என் கணவர் வந்த மணி எனக்கு தெரியாது. என் கணவர் வந்ததை நான் பார்க்கவில்லை. லோகநாதன், மற்றும் என் மைத்துனர் பாபுவும் வந்து தான் என் கை கட்டை அவிழ்த்தார்கள். என் முகத்தில் இருந்த லுங்கியை எடுத்தார்கள்.



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எனக்கு மயக்கமாக இருந்தது. கை கட்டு அவிழ்த்தபோதும், லுங்கி எடுத்தபோதும் என் கணவா அங்கு இல்லை. என் கணவர் எதிரியை துரத்திபோனது நான் மயக்கமாக இருந்ததால் பின்னால் எனக்கு தெரிந்தது. கை கட்டை அவிழ்த்ததையும், லுங்கி எடுத்ததையும் போலிசார் கேட்கவில்லை. நான் சொல்லவில்லை....."

Thus, it can be seen that the evidence of *P.W.1* by itself is inherently, contradictory wavering and further reading of her entire evidence leaves with more confusion.

5.5. Further, the time when *P.W.2* came inside the house and how *P.Ws.3* and *4* came to the spot, all are contradictory and different versions are given by all the four witnesses i.e., *P.Ws.1, 2, 3* and *4*. This apart, there is yet another thing which is also strange. In this case, immediately, even though *P.W.1* alleges that the accused committed penetrative sexual assault on her, she had also informed the Doctor that she had physical intercourse with her husband before and after the commission of the offence by the accused. In this case, the offence is said to have been committed at about 9.00 P.M on 15.01.2009 and she makes such a statement to the Doctor on 16.01.2009. To top it all, she came out of the Hospital without being discharged and without informing the authorities which is the evidence on



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record and on account of her behaviour, the Doctors could not render any final opinion regarding the whole episode. Therefore, even though, in a case of sexual assault, the conviction can be based on the sole testimony of the victim, the same has to be stellar in quality and unwavering.

5.6. In this case, even as per the Investigating Officer, she did not even whisper anything about being subjected to rape until she came to witness box in the trial before the learned Judicial Magistrate No.II, *Cheyar*. She did not also whisper about the same to the Doctors. The manner, in which the offence is said to have committed, is also riddled with contradictions and absolutely, does not inspire the confidence of this Court. Therefore, in a case like this, the case of the prosecution that conviction should be based on sole testimony cannot be accepted. Further, to top it all, by her own conduct, *P.W.1* had even prevented further corroborative medical evidence which would have been on record.

5.7. Further, the case of the defence is that there is a business relationship between the accused and *P.W.2*, the husband of *P.W.1* and that the accused was supplying mud to the brick kiln run by *P.W.2*, the husband



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of **P.W.1**. There were disputes between them regarding transactions and that there was a previous complaint which was given by the wife of the accused against **P.W.2**. Therefore, it is the case of the defence that on account of the previous enmity and because of the fact that **P.W.2** had hit the accused when he came to demand balance amount due, such a false complaint is lodged and the evidence of the prosecution is not to the effect of ruling out such a defence and therefore, in this case, the very occurrence is in doubt.

5.8. In a serious case of this nature, firstly, the very reference to the hospital whether it was with a memo from the Police Station or whether the message went to the Police Station from the Hospital itself is in doubt.

5.9. Secondly, when such a serious complaint is made, it is not known why the case is treated as a petition under the Community Service Register. Thirdly, it is also not known what factors subsequently came to light or unearthed which resulted in registering an F.I.R on the same complaint after 8 days and the allegations of **P.W.1** keeps on changing on repeatedly and with the passage of time more and more serious allegations are made and



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therefore, absolutely, the case of the prosecution is not believable. Thus I hold that the case of the prosecution is not proved not only in respect of the offence under Section 376 of *The IPC*, but also, in respect of the other offences under Sections 323, 354 and 452 of *The IPC* and Section 4 of *The TNPHW Act* and that the appellant herein is entitled for the benefit of doubt.

F. The Result :

6. In the result :

(i) this Criminal Appeal in Crl.A.No.237 of 2014 is allowed;

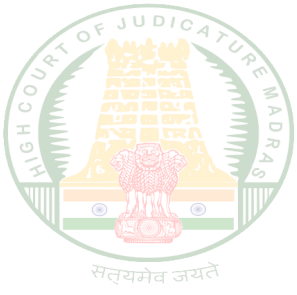
(ii) the conviction and sentence imposed against the appellant by Judgment dated 09.04.2014 in S.C.No.105 of 2011 on the file of the learned Assistant Sessions Judge, Cheyyar stands set aside and the appellant/accused is acquitted of all the charges framed against him;

(iii) Fine amount, if any, is ordered to be refunded.

02.03.2023

Index : yes
Speaking order
Neutral Citation : yes
grs

To



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1. The Assistant Sessions Judge,
Cheyyar.
 2. The Judicial Magistrate No.II,
Cheyyar.
 3. The Public Prosecutor,
High Court of Madras.
 4. The Sub Inspector of Police,
Cheyyar Police Station,
Cheyyar,
Thiruvannamalai District.



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VERDICTUM.IN



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D.BHARATHA CHAKRAVARTHY, J.,

grs

Crl.A.No.237 of 2014

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