

(2009) 09 MAD CK 0172

Madras High Court

Case No: Criminal Appeal No. 797 of 2006

Lawrance

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Sept. 14, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 343, 363, 366, 373, 375

Hon'ble Judges: T. Sudanthiram, J

Bench: Single Bench

Advocate: S. Kolandasamy, for the Appellant; J.C. Durai Raj, Government Advocate (Criminal side), for the Respondent

Final Decision: Dismissed

Judgement

T. Sudanthiram, J.

The appellant herein who is an accused in S.C. No. 29 of 2003, on the file of the Session Court, Nilgiris at Udagamandalam stands convicted for offences under Sections 376, 366 and 343 IPC and sentenced to undergo 7 years rigorous imprisonment and to pay a fine of Rs. 10,000/- in default to undergo one year simple imprisonment u/s 376 IPC; sentenced to undergo 7 years rigorous imprisonment and to pay a fine of Rs. 10,000/- in default to undergo one year simple imprisonment u/s 366 IPC; and sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs. 1000/- in default to undergo three months simple imprisonment u/s 343 IPC and the sentences of imprisonment shall run concurrently. Aggrieved by the said conviction and sentence, the appellant has preferred this appeal.

2. The case of the prosecution in brief is as follows:

P.W.2, who is aged about 14 years at the time of occurrence was residing with the parents in Gurusadi village, Ooty. The accused was residing in the next house. The accused used to visit the house of P.W.2 and he promised that he would marry her.

On 22.10.2001, he promised to marry her and asked her to accompany him. On 23.10.2001, at about 9.00a.m., the accused came to her and told her that she could believe him and if she comes with him, he would maintain her like a Queen. As she refused to accompany him, he threatened that he would commit suicide and therefore, she left the house and went along with him. She was taken by the accused to the relative house at Nondimedu and in that house the mother of the accused was also living. As the mother of the accused go to coolie work in the morning, afterwards the victim P.W.2 was forcibly raped by the accused continuously she was raped for three days. On 26.10.2001, as she compelled the accused, he took her to Mariamman temple and tied a "Thalli". Again she was taken to the house wherein she was ill-treated by the mother of the accused. As the "Thalli" was removed on 31.10.2001, she was driven out of the house, she went to the maternal uncle's house and the father of the victim girl was also informed about the incident.

3. P.W.1, father of P.W.2 as he was searched for his daughter from 21.10.2001, since she was missing, as P.W.2 was brought by her uncle on 31.10.2001, he was came to the house and went to the Police Station and gave complaint Ex.P.1. P.W.7 who is Sub Inspector of Police of G.1, Udagamandalam Police Station received a complaint Ex.P.1 from P.W.1 and registered a case in Crime No. 540 of 2001 for offence u/s 343 and 376 IPC and prepared the printed First Information Report Ex.P.6. He went to the house of P.W.2 and as she had not in a mood to give any statement, he recorded the statement of her father and came back to the police station and altered the case u/s 343, 363 and 376 IPC and prepared the altered FIR Ex.P.7. P.W.8, who was the Inspector of Police during the relevant period took up the investigation in this case and went to the scene of occurrence and prepared the observation mahazar Ex.P.5 and rough sketch Ex.P.8, and also examined the witnesses. He gave requisition to the Magistrate for sending the victim for medical examination.

4. P.W.3 Doctor examined P.W.2 on 03.11.2001 at 10.00a.m., and on examination he found that the hymen of the girl was not found intact. The accident register recorded is Ex.P.2. P.W.3 Doctor further opined that she was subjected to sexual intercourse.

5. P.W.4 Assistant Medical Officer, examined P.W.2 victim girl on 29.01.2002 for determining her age. On radiological examination, the age of the girl is determined to be above 15 years and below 17 years. The Doctor issued age certificate Ex.P.3. PW.9 Inspector of Police took up investigation in this case on 07.07.2002 and on completing the investigation, filed final report on 20.07.2002 for offence under Sections 363, 376 and 343 IPC.

6. The prosecution in order to establish the case, examined P.W1 to P.W.9 and marked Exhibits P.1 to P.12. After examination of witnesses, the accused was questioned u/s 313 Cr.P.C, he had denied his complicity and he also filed a written statement. The trial Court after considering the evidence convicted the accused as

stated above.

7. The learned Counsel appearing for the appellant, submitted that no occurrence had taken place as alleged by the prosecution from 23.10.2001 to 31.10.2001 and no one was examined in support of P.W.1 that there was kidnap and confined in a house. The learned Counsel for the appellant further submitted that during the said period, the accused was insisted P.W.2 to marry and for four days there was a dialogue and there had been talks between the parties in the police station and P.W.1 also. P.W.1 father of P.W.2 also admitted the said fact. The learned Counsel for the appellant further submitted that there had been some affair between P.W.2 and the accused, which could have been earlier to the period of alleged occurrence. As the accused was living with another children and having two children, there is no possibility for the accused to marry P.W.2 and therefore, the complaint had been given against the accused.

8. The learned Counsel for the appellant submitted that even according to the prosecution case, P.W.2 was only a party, and there is no material to show that she was forced at any stage. Even according to the medical evidence, there is no mark of violence on the body of the victim girl and therefore, the ingredients of offence of rape are not made out. The learned Counsel for the appellant further added that the prosecution also failed to establish the age of P.W.2 and though it is admitted by P.W.1 that P.W.2 was studying in school and school certificate also was produced before the investigation officer, the prosecution has deliberately suppressed the school certificate and the Doctor also opined that the age of the girl was 15 to 17 years.

9. The learned Government Advocate (Criminal side) submitted that the defence version that the no occurrence had been taken place on 23.10.2001 and there had been talks in the police station has not been accepted by any of the police officer and the specific evidence of P.W.1 is that the complaint was given only on 31.10.2001 and the enquiry and investigations had commenced only after receipt of the complaint from P.W.1. The learned Government Advocate (Criminal side) further submitted that the evidence by P.W.2 is corroborated by the medical evidence and even the accused had not denied the affair with P.W.2.

10. This Court considered the submission made by both parties and perused the records. Before considering the evidence of P.W.2, it is necessary to deal with the evidence let in by the prosecution regarding the age of the victim/ P.W.2. Though in Ex.P.1 complaint given by P.W.1, the age of P.W.2 is mentioned as 14 at the time of occurrence, P.W.1 in his evidence has not mentioned about the age of P.W.2. P.W.2 also has not stated anything about the age in the chief examination. In the details given about her, her age is mentioned as 17 on the date of recording evidence, which means she was aged above 14 years at the time of occurrence. She admitted in the cross examination that she studied in the school at the time of occurrence. She admitted in the cross examination that she studied in the school up to 8th

standard and she did not remember the date on which she stopped going to school. Though the Investigating Officer says that no school certificate was produced to him, P.W.1 admitted in her cross examination that that she gave the school certificate of P.W.2 in the police station. It appears that the prosecution has not suppressed the age certificate of P.W.2. The opinion of the Doctor also is that P.W.2 is above 15 years and below 17 years. A suggestion has been put by the defence, that as per the school certificate of P.W.2, she was aged about 16 years. In the said circumstances, this Court is of the view to hold that the girl was aged 16 years at the time of occurrence.

11. It is the specific evidence of P.W.2 that the accused often used to come to the house of the victim girl and told that he wanted to marry her. She was induced by the accused to leave her parental house and accompany him. On 23.10.2001, she was taken by the accused to the relative house wherein she was subjected to sexual intercourse continuously for three days. On her compulsion, though accused tied "Thalli", subsequently that was also had been removed and she was sent out of the house only after the return the complaint was filed. This evidence of P.W.2 has been totally denied by the accused. On the other hand, it is contended that prior to the date of complaint, for a period of four days, there had been a talk between the accused party and P.W.2's party. In support of this contention of the accused, except the written statement filed by the accused, no other material is available. The Investigating Officer has denied the suggestion in respect of that fact. P.W.2 also denied the said suggestion. P.W.1, father of P.W.2 had admitted that only on 31.10.2001, the Sub Inspector of Police talked to him and he specifically denied the suggestion that even on 23.10.2001, the Sub Inspector of Police talked to him about the incident. Therefore, the evidence of P.W.2 remains unassailed and further her evidence also corroborated by the medical evidence through P.W.3 and Ex.P.2 accident register.

12. Though it is submitted by the learned Counsel for the appellant that even according to the prosecution case, the ingredients of the offence u/s 373 IPC is not made out, since P.W.2 was a consenting party, the contention of the defence has only to be rejected. Even it is the accepted version of the defence that the accused was having affair with another girl Kanaga and through her, he had two children. Even in the written statement, the accused had admitted the said fact. It is also suggested to P.W.2 by the accused that the accused was already married to one Kanjana and he was leading a family life with her and he was having two children. Therefore, it is clear from the evidence that the accused by making a false compromise, induced P.W.2 to leave her parents house and after taking her to his relative house, he had sexual intercourse for three days against her wish. Even if P.W.2 was either above 16 or above 18, as P.W.2 was induced by the accused by deceitful means, with the intention of seduce her to illicit intercourse, the ingredients of offence u/s 366 IPC are made out in this case. Further even taking P.W.2 was consenting by the sexual intercourse, in the facts and circumstances, the

consent by P.W.2 should be taken as consent given under misconception.

13. Section 90 IPC is as follows:

[1]90. Consent known to be given under fear or misconception

A consent is not such a consent as it intended by any Section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person: if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child: unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

14. As it is the case of the accused himself that he was living with another lady and he was leading the family life and having two children, the promise made by the accused to marry the victim girl P.W.2, was only with an idea of making her to consent for doing the act. The consent said to have given by the victim/P.W.2, is only a consent under misconception, which will not exclude the liability of the accused from the offence u/s 375 IPC.

15. For the above said reasons, this Court is to hold that the prosecution has proved its case against the accused beyond reasonable doubt, and the conviction on the accused by the trial Court u/s 376, 366 and 343 IPC are confirmed.

16. The learned Counsel for the appellant submitted that the appellant was aged only 22 years at the time of occurrence, and prayed for leniency.

17. This Court is unable to reduce the sentence, since the minimum sentence u/s 376 IPC is seven years imprisonment and the accused has already been sentenced only 7 years imprisonment. The learned Counsel for the appellant also submitted that the petitioner is a poor man and even this Court granted bail pending appeal, he could not come on bail, since he could not deposit the amount as per the bail conditions. Considering the submission made by the learned Counsel for the appellant, the fine imposed on the accused for the offences u/s 376, 363 and 343 IPC are deleted.

18. Only with the above modification in the sentence, the appeal is dismissed.