

CASE NO.:
Appeal (crl.) 97 of 2004

PETITIONER:
Viswanathan & Ors

RESPONDENT:
State Rep. by Inspector of Police, Tamil Nadu

DATE OF JUDGMENT: 29/04/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T
REPORTABLE

CRIMINAL APPEAL NO.97 OF 2004
WITH
CRIMINAL APPEAL NOS.100, 99, 98 and 629 of 2004 and 785 of 2005

S.B. Sinha, J.

1. Appellants herein, who are six in number, have preferred these appeals from a common judgment and order dated 6.3.2003 passed by the High Court of Judicature at Madras.

2. Appellants were convicted under Section 376(2)(g) of the Indian Penal Code (hereinafter referred to as 'the Code') and sentenced to undergo rigorous imprisonment for 10 years.

3. The incident took place on 20.11.1994. The victim was working as a Coolie. She was married and had two children. She was returning to her home on a bicycle with her brother, Palanisamy at about 10.00 pm after watching a movie. Appellants herein allegedly joining hands with each other, chased them. They were riding on their own bicycles. They dashed with the bicycle of the Palanisamy. Palanisamy and the victim fell on the ground. Allegedly, victim was asked to enjoy herself. Palanisamy, when questioned about the said conduct on the part of accused No.1 Babu, who was known to the victim as a mason, was slapped by the accused No.1. He ran away out of fear.

4. The victim was taken at a nearby place and accused No.2 to 4 and 6, allegedly raped her one after the other. She lost her consciousness.

5. Palanisamy went to the village and brought some people with him. They found the victim lying naked in an unconscious condition. PW8, Chinnadurai, and others poured water on her face. She was taken home after she regained her consciousness.

6. She regained her composure in the evening. They came to the Police Station and lodged the First Information Report at about 7.00 pm on 21.11.1994. She was medically examined at about 0720 hours on 22.11.1994. No injury on her person, however, was found. No injury on her private part was also noticed. In the FIR, accused Nos.1 to 4 were named. Accused Nos.5 and 6 were not named. It was said to be a moonlit night. All the accused, however, were not put on the Test Identification Parade. On completion of investigation, they were charge sheeted and put on trial. Admittedly, no charge under Section 376(2)(g) was framed.

The allegations made against them in the FIR read as under :

"On the moonlight, I identify one person is Babu who is working as a mason along with another three persons were standing along with backside of cycle.

All the accused were laughed at me when I was standing at Kariampalayam bus stop to go for work. I saw them. Babu called me to come with him. Immediately my brother asked about this, suddenly Babu slapped him. Then Babu rushed with tears in the said cycle. All the three persons rushed me to the damaged wall building and place me near the tank. I tried to escape from them. The three persons pushed me with force and closed the mouth with my saree. I cannot do anything. I saw all the faces in the moon light. Babu called one Thangavelu and told him that to go with me. Thangavelu placed on me without dress and raped me. Next Thangavelu sent one Sakthi. He also raped me. Next Babu called one Murugesan and sent to me. He also raped me. Then I felt unconscious. I do not know about the further matter. When I awakened, the village people, my brother, my uncle Chinnan and others poured water on my face and help me to get up. I felt serious pain and am crying and weeping. My brother helped me to reach my house. I am not able to get up since I lay down in the bed. In the evening I feel better. Immediately I and my brother come to the police station and explain the matter."

7. Before the learned trial Judge 10 witnesses were examined, material amongst them is the victim herself (PW-6) and her brother, Palanisamy (PW-7). Before the learned Trial Judge, the victim did not identify all the accused. She identified accused No.1, 2 and 3. The names of accused Nos.5 and 6 were not mentioned by her at all. In her deposition, she stated : "They take me to a damaged wall building at Kariampalayam and raped me. The first accused sent third accused to enjoy me. Third accused removed all the dresses. I felt unconscious. He do all the wrongs. Then the 1, 2 accused raped me. Then I do not know what happened. I felt unconscious."

8. PW7, in his deposition, stated that he knew the accused No.1 Babu only. Except Babu, he did not name any other person.

9. The learned Trial Judge, as also the High Court, as indicated hereinbefore, found the accused guilty under Section 376(2)(g) of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for 10 years.

10. Mr. Viswanathan and Mr. Francis, learned counsels appearing on behalf of the appellants, in support of the appeals, would submit

(1) The findings of the High Court as also the learned Trial Judge are not sustainable as use of force by putting a cloth in her mouth had not been disclosed by the prosecutrix in her deposition except in the First Information Report.

(2) Whereas the prosecutrix named Accused Nos.1, 2 and 4 in the FIR, with specific allegation of commission of rape by Accused No.1 and 3, she changed her story and attributed the said act on Accused No.1, 2 and 3 in her deposition before the Court.

(3) Her evidence is neither natural nor trustworthy as in the FIR, she named only two persons to have committed the offence, but she improved the said story in her deposition in Court alleging three other persons were on the back of the cycle and in total, there were six persons; whereas PW7 merely stated that Accused 1 and three other persons called his sister to enjoy which clearly go to show that they were not very clear as to how many people followed and how many

people allegedly raped her.

(4) As no external injury was found on her body or on her private part, as stated by Doctor R. Jayabal (PW2), the prosecution case appears to be doubtful.

(5) Although in the First Information Report, she had named Accused No.4, in her evidence she did not name him at all.

(6) There was no reason as to why no Test Identification Parade was held.

(7) In absence of any charge having been framed under Section 376(2)(g) of the Indian Penal Code which provides for a minimum punishment of 10 years, the accused were gravely prejudiced.

(8) The delay in lodging the First Information Report has not been satisfactorily explained.

(9) There is nothing on record to show that all the six persons had common intention to commit the offence in question.

11. Mr. Sundaravaradan, learned senior counsel appearing on behalf of the State, on the other hand, would support the judgment.

12. The fact that an incident of the nature disclosed in the FIR had taken place is not in question. The fact that she was found lying naked at the place of occurrence in an unconscious state, stands proved not only by PW7 but also by PW8, Chinnadurai. The evidence of PW8 remains uncontroverted. He has not been cross-examined.

PW9 is the investigating officer. He stated that the FIR was lodged at about 7.00 pm in the evening on 21.11.1994.

She was sent to the hospital for medical examination. Indisputably, the prosecutrix did not suffer any injury. For the purpose of proving commission of the offence of rape, however, the same was not necessary as she was a grown up girl aged between 20 to 23 years as opined by Dr. Gopikrishnan. She was furthermore mother of two children.

13. She knew Accused No.1, Babu. It was the said accused who had taken a leading role in the whole episode. He invited others to rape her. Having regard to the circumstances in which she was found by the villagers including PW8, we have no doubt in our mind that she was subjected to rape.

The only question which arises for consideration, therefore, is as to who were the persons responsible therefor.

14. The allegations made in the First Information Report are not evidence. She might have named four persons, namely, accused Nos.1 to 4 in the FIR, but, as indicated hereinbefore, she named only accused Nos. 1 to 3 in her deposition. Only accused No.1, Babu, has been named by PW7 and none other. She, therefore, knew only the four persons. She had not named accused Nos.5 and 6 either in the FIR or in her deposition. They had been arrested on the basis of the statements made by their co-accused. They had not been put to Test Identification Parade. The prosecutrix, in her deposition before the learned Trial Judge, neither named nor identified accused Nos. 4 to 6. On what basis, therefore, their guilt is said to have been established is not known. Both, the learned Trial Judge as also the High Court, in their judgments did not deal with this aspect of the matter.

15. In a situation of this nature, a Test Identification Parade was required to be held at least for the purpose of identification of accused Nos. 5 and 6. Some weight should have been given for arriving at a finding as regards the guilt of accused Nos.5 and 6, as they had not been identified in the court.

16. We, therefore, are of the opinion that in absence of any Test Identification Parade having been held or they having been identified in court, the accused Nos.4 to 6 cannot be held guilty of commission of the said offence. They are, in our opinion, have wrongly been convicted.

As regards the identification of the rest of the accused, we may notice that in *Devinder Singh v. State of H.P.* [(2003) 1 SCC 488], it was held :

"In view of these circumstances even if it is accepted that the prosecutrix had a fleeting glimpse of the appellants when they lighted the torch in her room, in the absence of any other evidence to show that the prosecutrix had occasion to see the appellants earlier, or to know them, it was incumbent on the prosecution to hold a test

identification parade. This is not a case where an occurrence took place in broad day light and the prosecutrix had ample opportunity of noticing the features of the appellants. This apart, her naming some of the accused persons in the First Information Report and not naming them in the course of deposition casts a serious doubt on the veracity of this witness."

17. Some delay has occurred in the lodging of the FIR but keeping in view the trauma suffered by the victim, her statement that she had regained her composure only in the evening cannot be disbelieved particularly in view of the evidence of PW8.

18. In a situation of this nature and particularly having regard to the sociological backgrounds from which PW6 and PW7 and other witnesses hail, we are not in a position to agree with the submissions of Mr. Viswanathan that the prosecution's case should be thrown out only on the ground of delay in lodging the FIR.

19. PW7 also is a natural witness. He was slapped. He was put to fear. He was chased. He had run away to his village, collected some people and came back to the scene of occurrence. We do not see as to why he should be disbelieved. If he was to lodge a false case, he could have done so even otherwise.

20. Whether they were accompanied by the village people or their caste people is not a matter of any significance. For the similar reason, whether PW7 was sent back by the Investigating Officer to get her clothes or not is again not a matter of great significance.

Section 376(2)(g) of the Code reads as under :

"376. Punishment for rape.\027(1) \005

(2) Whoever, --

(a) to (f) \005

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years,
Explanation I.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section."

21. Explanation-I one appended to the said provision clearly states that the persons who have common intention to commit the said offence would also be liable in terms of Section 376(2)(g) of the Act. The common intention of all the accused need not be supported by the fact that each one of them took part in actual commission of the offence. The very fact that they came on cycles and dashed with the cycle of PW7 would clearly show that they had a common intention to commit the offence. If they had the common intention of committing the offence, they although were charged under Section 376 in general, they could be convicted also under Section 376(2)(g) as the latter is merely a graver form of the offence of rape as defined in Section 375 of the Code. In any event, we do not find that they were prejudiced in any manner whatsoever; as evidently :

(1) they not only gathered and obstructed her from proceeding towards her residence with her brother in the bicycle but also deliberately making her and her brother to fall down from the cycle; and

(2) She was physically removed to a secluded place and at least three of them took part in committing the offence of rape on her one by one.

22. The evidence of PW6 to the aforementioned extent is cogent and convincing and has been corroborated by PW7 who not only is a witness of the events which took place immediately prior to the actual occurrence of rape but also a witness to the scene of occurrence where he found his sister lying naked in an unconscious state.

The material objects were found to have semen stains. The accused were also tested as regards proof of potency and the doctors who examined them categorically came to the conclusion that they were not incapable of committing sexual intercourse. There may be some inconsistency as pointed by Mr. Viswanathan with regard to recovery of the clothes or sending the same for chemical examination, but our findings on the aforementioned grounds, in our opinion, are sufficient to prove the common intention on the part of accused Nos.1 to 3.

23. For the reasons aforementioned, the appeals preferred by accused Nos.1, 2 and 3 are dismissed whereas the appeals preferred by accused Nos. 4, 5 and 6 are allowed. They are on bail. Whereas accused Nos.1, 2 and 3 are directed to surrender, accused Nos.4, 5 and 6 are discharged from their bail bonds.