

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 23.06.2021

JUDGMENT PRONOUNCED ON : 07.07.2021

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

Crl.A.No.767 of 2015

Anbu Selvan

...Appellant

..Vs..

State represented by the
Inspector of Police (Law&Order)
V1, Villivakkam Police Station,
Chennai – 600 049.

..Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code, to set aside the order passed in Special Sessions Case No.225/2013 dated 27.04.2015 passed by the Special Judge, Mahila Court, Chennai.

For Petitioner : Mr.C.Mohan Raj

For Respondent : Mr.R.Vinoth Raja
Government Advocate (Crl.Side)

JUDGMENT

The convicted sole accused challenges the judgment of conviction and sentence passed by the Mahila Court, Chennai in S.C.No.225/2013 wherein the appellant was convicted for an offence under Section 366 of I.P.C and sentenced to undergo 7 years Rigorous Imprisonment and convicted under Section 354 of I.P.C and Section 4 of the Tamil Nadu Prohibition of Woman Harassment Act and sentenced to undergo 2 years Rigorous Imprisonment and also convicted under Section 506 (ii) of I.P.C and sentenced to undergo 2 years Rigorous Imprisonment. The above sentences of the imprisonment were ordered to run concurrently.

2. The case of the prosecution in brief is that the accused is alleged to have committed an act of kidnapping one "(Miss:X)" a blind lady, who came from Gudiyattam to Villivakkam to learn English Music from "Sangeetha Kalalayam", which is existing at Villivakkam. The accused is an Auto Driver. On 21.03.2020 the auto driver was engaged by her to transport from the Villivakkam bus stand to Music Institute at No.6, North Jaganathan street. The accused did not drive the auto in the route to the said places it was engaged. The accused made different route and parked in an isolated place. Thereafter, he had gone to the back seat where the victim lady was seated and he kissed her after hugging, caused sexual harassment to her by putting his

hands on different parts of her body and she shouted. The accused criminally intimidated by saying that he would even go to the extent of killing by murder, if she failed to co-operate. So is the charge sheet.

3. During the time of trial, the victim (the blind) was examined as P.W.1 and the owner of the "Sangeetha Kalalayam" was examined as P.W.2 and Manager was examined as P.W.3 and neighbours in the scene of the occurrence were examined as P.W.4 to P.W.8. Attestor of the Observation Mahazar was examined as P.W.9. P.W.10 Praveen Kumar was co-auto driver in the Villivakkam bus stand. P.W.11 is the President of the villivakkam bus stand auto stand. Ravi, who is the owner of the auto, which is the subject matter of the case, was examined as P.W.12 and P.W.13 is the Sub-Inspector of Police, who received the complaint under Ex.P1 and registered Ex.P4-F.I.R and P.W.14 is the Investigation Officer.

4. The accused was questioned under Section 313 Cr.P.C. with regard to the incriminating circumstances and he denied his complicity. On consideration of both oral and documentary evidence, the learned Sessions Judge, Mahila Court, Chennai has held that the charges against the accused are proved and accordingly, laid the conviction on all the charges and sentenced him as stated supra.

5. Challenging the correctness of the conviction passed in the above sessions case, the convicted sole accused has preferred this appeal. .

6. Heard Mr.C.Mohan Raj, learned counsel for the appellant and Mr.R.Vinoth Raja, learned Government Advocate (Crl.Side).

7. The learned counsel for the appellant could contend that

(i) the identity of the accused was not proved in the manner known to law and since P.W.1 is a blind (visually challenged person), her evidence cannot be termed as "eye witness" if at all, can be termed only as a "hearsay witness" which is inadmissible in evidence and contented that the evidence of P.W.1 has to be rejected as an hearsay evidence and

(ii) further contended that P.W.7 Lalitha and P.W.8 Sathya can be treated only as a hearsay witnesses and their evidence cannot be admitted in evidence.

8. As to the admissibility of the evidence of P.W.4, P.W.5 and P.W.6, the learned counsel submits that the trial Court has considered the evidence of P.W.4, P.W.5 and P.W.6 as admissible in evidence and thus has committed an error.

9. The sum and substance of submission of the learned counsel for the appellant is that the identity of the accused is not established in the manner known to law and it is specifically

contended by the counsel that he is not the person who drove the auto on that day, in short, he claims that "(I am not he)."

10. The learned Government Advocate (Crl.Side) has made submission in support of the judgment passed by the Sessions Court.

11. Pending trial, P.W.12-Ravi filed Crl.M.P. before the Sessions Court for the interim custody of the vehicle and the same was allowed after taking photographs and surety bond from the owner of the vehicle. The photographs of the auto and the C.D were marked as M.O.1 before the trial Court.

12. On a close scanning and scrutinizing of the prosecution witnesses, both oral and documentary evidence, the criminal law was settled to motion by filing of Ex.P1-complaint by P.W.2 Senthilkumar, who runs musical school for the blind in the name and style of "Sangeetha Kalalayam" at 6th street, North Jaganathan Nagar, Villivakkam, Chennai.

13. Testimony of disabled prosecutrix: (Legal position)

2021 SCC Online SC 343 [Patan Jamal Vali Vs.The State of Andhra Pradesh] has held that:-

.....the testimony of a prosecutrix with a disability, or of a disabled witness for that matter,

cannot be considered weak or inferior, only because such an individual interacts with the world in a different manner, vis-a-vis their able-bodied counterparts.

As long as the testimony of such a witness otherwise meets the criteria for inspiring judicial confidence, it is entitled to full legal weight. It goes without saying that the Court appreciating such testimony needs to be attentive to the fact that the witness' disability can have the consequence of the testimony being rendered in a different form, relative to that of an able-bodied witness.

14. Hearsay Evidence when admissible:-

35. The Hon'ble Apex Court in the decision reported in (i) (2011) 7 SCC 130 [Krishan Kumar Malik Vs.State of Haryana] has held that:

"34. We shall now deal with Section 6 of the Act, which reads as under:

"6. Relevancy of facts forming part of same transaction- Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places".

35. Black's Law Dictionary defines res gestae as follows:

"(Latin: 'things done') The events at issue, or other events contemporaneous with them. In evidence law, words and statements about the res gestae are usually admissible

under a hearsay exception (such as present sense impression or excited utterance)".

36. The said evidence thus becomes relevant and admissible as *res gestae* under Section 6 of the Act.

37. Section 6 of the Act has an exception to the general rule whereunder hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of *res gestae* must have been made contemporaneously with the act or immediately thereafter".

(ii) (2013) 12 SCC 17 [State of Maharashtra Vs.Kamal Ahmed Mohammed Vakil Ansari and others] has held that:

"38.In *Gentela Vijayavardhan Rao V. State of A.P*, wherein this Court held that the principle of law embodied in Section 6 of the Evidence Act is expressed as "*res gestae*". The rule of "*res gestae*", it was held, is an exception to the general rule that hearsay evidence is not admissible. The rationale of making certain statements or facts admissible under Section 6 of the Evidence Act, it was pointed out, was on account of spontaneity and immediacy of such statement or fact in relation to the "fact in issue". And thereafter, such facts or statements are treated as a part of the same transaction. In other words, to be relevant under Section 6 of the Evidence Act, such statement must have been made contemporaneously with the fact in issue, or at least immediately thereupon and in conjunction

therewith. If there is an interval between the fact in issue and the fact sought to be proved then such statement cannot be described as falling in the "res gestae" concept.

.....In our considered view, the test to determine admissibility under the rule of "res gestae" is embodied in words "are so connected with a fact in issue as to form a part of the same transaction". It is therefore, that for describing the concept of "res gestae", one would need to examine whether the fact is such as can be described by use of words/phrases such as, "contemporaneously arising out of the occurrence", "actions having a live link to the fact", "acts perceived as a part of the occurrence", exclamations (of hurt, seeking help, of disbelief, of cautioning, and the like) arising out of the fact, spontaneous reactions to a fact, and the like. It is difficult for us to describe Illustration (a) under Section 6 of the Evidence Act, specially in conjunction with the words "are so connected with a fact in issue as to form a part of the same transaction", in a manner differently from the approach characterized above".

15. Probative value of version of P.W.1:-

The victim was examined as P.W.1. She is a blind (visually challenged). As per her version, due to "typhoid" during school days, she lost her vision. Thereafter, she studied in the school and college run by the church and she was doing her 2nd year M.C.A course during relevant point of time and she learnt that P.W.2 is running a

"Sangeetha Kalalayam" where, they taught music for the visually challenged person, accordingly, P.W.1 contacted P.W.2 over phone. After fixing the appointment, she came from her native place at Gudiyattam and reached Villivakkam town bus stand from there she engaged the service of an auto having Registration No.TN M 5034 on 21.03.2010 at around 4.15 p.m to reach the said music institute run by P.W.2 and she contacted the said P.W.2 over phone and on his instruction, P.W.1 gave the cell phone to the auto driver (the accused) as to the direction for reaching the music institute.

16. However for reaching the said institute, P.W.2 said to have given instructions that he could be reached within 10 to 15 minutes. After passage of sometime, she entertained a suspicion that the vehicle is not going in the stated route. Though she is a blind, she could have the sense of the sound surrounding her position. She found that the traffic sounds are fading away while silence has been encroaching upon her ears and hence, she questioned the accused auto driver as to where he is proceeding and she did not notice any sound of climbing the over bridge as told by P.W.2. At that time, the accused auto driver stopped the vehicle and she felt the hand of the auto driver on her shoulder and he kissed in her cheek after hugging her and made advancement and when she started crying and shouting, he criminally intimidated P.W.1 that he will kill, if you makes any noise.

However, as she started the creaming and weeping, two persons, who were going on the street, came to their rescue and questioned the auto driver and the accused has not given a proper reply and on seeing the discomfutable position of P.W.1, they also called some of the ladies of the house in the end of the street on the 3rd main road, south Jagannathan Nagar and as the public are coming nearer to the auto and making enquiries with P.W.1, the auto driver has started fleeing from the scene. Meanwhile, two ladies (P.W.7 and P.W.8) came to the scene of occurrence and enquired with her and she had narrated the act of the accused-auto driver to her body and his criminal intimidation. Thereafter, P.W.4 and P.W.5 have contacted P.W.2 Senthilkumar, who in turn has replied that since he is returning from Sriperumbudhur, he could not reach immediately, however, deputed his Manager P.W.3-Suresh, to go over to the area, after enquiry about the scene of occurrence.

17. P.W.3-Suresh, Manager, came down to the scene of the crime and at that time, P.W.4 to P.W.8 have handed over P.W.1-victim girl rescued from the clutches of the accused, who ran away from the scene of the occurrence by leaving the auto and the auto was seized by the public.

18. P.W.2 senthilkumar, who is the owner of the Sangeetha Kalalayam could depose that what was stated by P.W.1–victim girl and purpose of her visit to his music institute and what transpired between himself and P.W.2, she had specifically deposed that he spoke to the auto driver over phone of P.W.1 and gave instruction about the route and the location of the Sangeetha Kalalayam as North Jaganathan Nagar in Villivakkam. The scene of the crime is South Jaganathan Nagar of Villivakkam which is abutting to the Railway Track of the Villivakkam.

19. The learned counsel for the appellant could contend that P.W.1 is a blind girl. Her evidence cannot be treated as eye witness and if at all her version has to be treated only as hearsay witness, her evidence is inadmissible in evidence and further disputed about the identity of the accused that he is not the one who committed the offence.

20. On a perusal of the cross examination of P.W.1, the identity of the accused was not challenged while P.W.1 was in the witness box assumes significance.

21. P.W.4, P.W.5 and P.W.6 are Vinothkumar, Raju and Sankar. P.W.4 Vinothkumar has identified the accused in the Court and also he has seen the accused along with P.W.1 victim girl on 21.03.2020 at the scene of the crime namely, 1st cross street, 3rd

Main Road, South Jaganathan street. He is a resident of the scene of the crime which is situated on the back side of his house. The scene of the crime is the junction of the 1st cross street with the 3rd main road of South Jaganathan Street.

22. The musical institute (run by P.W.2) is in the North Jaganathan Nagar and not in South Jaganathan Nagar. The evidence of P.W.4, P.W.5 and P.W.6 are specific to the extent that on hearing "Hue and cry" of a girl, they went and enquired the auto man as to why the girl sitting in the auto and making hue and cry and her dresses are in a damaged position and hence, I find that the version of P.W.4 to P.W.6 are contemporaneous to the occurrence and exclamation of fear and seeking help in the act of P.W.1.

23. P.W.1 has spoken about her visit to the music institute and the manner how the auto driver has contacted herself on her body and also her act of doing "என்னை கட்டிப்பிடித்து முத்தம் கொடுத்தார்" While, two persons are started enquiry, the auto man-accused has tried to give a slip and hence, they got over and make the noise alarm whereby P.W.6 Sankar, P.W.7 Lalitha and P.W.8 Sathya came to the scene of the occurrence. While, P.W.7 Lalitha and P.W.8 Sathya were enquiring with the girl, the accused whisked away from the hands of P.W.4 and P.W.5 and started running from the scene of the crime which was witnessed

by P.W.6 Sankar. So is the evidence of P.W.5 Raju.

24. In the cross-examination nothing worthwhile has been elicited to discredit the occurrence witness namely the version of P.W.4 and P.W.5 assumes significance.

25. On arrival of P.W.6, the accused had ran away and it is specifically spoken to by P.W.6 Sankar. P.W.7 Tmt.Lalitha and P.W.8 Tmt.Sathya have clearly spoken that on hearing the noise and sound of P.W.4 and P.W.5, they came to the scene of the occurrence and stated that P.W.3 Suresh (the Manager of the P.W.2) arrived the scene of crime from the music institute and P.W.1-victim girl was handed over to him. During that time, P.W.1-victim girl has clearly spoken with P.W.6, P.W.7 and P.W.8 about the manner as to how the accused had contacted with her.

26. For the reasons best known, the defence counsel has not cross examined P.W.7 and P.W.8 assumes significance and hence, this Court finds that the identity of the accused which was not challenged by P.W.1 when she was in the witness box and they also not challenged the occurrence witnesses P.W.4 and P.W.5 and furthermore, the identity of the accused was clearly identified by the above said prosecution witnesses and hence, I hold that the prosecution has let in positive evidence as to the identity of the accused namely the nexus

between the accused and the auto and the presence of auto and the accused at the scene of the crime and act of the accused on the body of P.W.1 have been clearly established.

27. As stated supra, the learned counsel for the defence has not chosen to cross-examine the independent witnesses P.Ws.5, 6 and 7 as to the presence of the accused or identity of the accused or the presence of the accused at the scene of the crime along with P.W.1 – victim also assumes significance.

28. From the evidence, on an combined reading of evidence of P.W.1 coupled with the evidence of P.W.6, P.W.7 and P.W.8, I find that their version are contemporaneously arising out of occurrence and that the same is very much in contemporary in time and narration of the event immediately after the act of the accused on the body of the victim, being act having live link to the exclamation of seeking help. The evidence of P.W.3, P.W.5, P.W.7 and P.W.8, who are all neighbours living at the end of the road are independent witnesses, who have no personal enmity or previous acquaintance with the accused and they have no grudge to grind against the accused for falsely implicating the accused in this case. Furthermore, they only guarded the auto left behind till the police came and seized the material object auto and

hence, I find that their evidences are reliable and trustworthy. So also the victim girl and P.W.2 have no previous enmity or motive against the accused for giving any false complaint against the accused.

29. P.W.6 and P.W.9, who are the attestors of the observation mahazar and seizure mahazar, have clearly spoken about the presence of the auto at the scene of the crime as per Ex.P2-rough sketch and Ex.P5-seizure mahazar under Ex.P3 also stands proved.

30. Though P.W.10 has stated that he is not aware of the accused, P.W.11, the President of the auto stand at Villivakkam bus stand, has stated that the accused and the auto-M.O.1 used to stand in the bus stand of Villivakkam and the accused was travelled assumes significance.

31. P.W.12 owner of the auto has claimed that on a daily basis, he has lend his vehicle to the accused, who is an auto driver and on that date viz., 21.03.2010, the accused alone has taken the auto on hire basis.

32. In the absence of anything in the cross-examination to disbelieve evidence of P.W,1, this Court is of the considered view that the version of P.W.1-victim girl, as to the sexual assault on her body

by the accused cannot be rejected merely because she is a visually challenged person.

33. In the case on hand, P.W.1's blindness meant that she had no visual contact with the world. Her primary mode of identifying those around her, therefore, it is by the sound of their voice and so P.W.1's testimony is entitled to equal weight as that of a prosecutrix who could have been able to visually identify the appellant.

34. For the reasons stated supra, the credibility and trustworthiness of the prosecutrix P.W.1 was discussed in detail. The above evidence could amply prove that the victim has successfully identified the accused and her evidence cannot be doubted simply because she is a blind girl.

35. Law does not distinguish the evidence of able-bodied person with that of the disabled [differently enabled]. Merely because of the factum of disability, her evidence cannot be treated as inferior in nature to that of able-bodied person. To do so, could be negation to the constitution principle of right of equality.

36. As per the guidelines, enumerated by the Hon'ble Apex Court in evaluating the evidence of the prosecutrix, who is visually

challenged, her evidence on 'fact-in-issue', should be read in a cumulative manner on the other prosecution witnesses has to be weighed at the initial stage. Thereafter, her evidence with "material fact" and "relevant fact", as to the prosecution theory has to be assessed in corroboration with other independent witnesses, so as to arrive, at conclusion of probative value of blind prosecutrix as to its reliability and trustworthy.

37. P.W.1 as a blind lacks vision, but her version had vision and hence, this Court holds that the evidence of P.W.1 is admissible in evidence.

38. Thus, this Court finds that the prosecution has let in positive evidence in support of the charge and also proved the charges beyond reasonable doubt.

39. At the risk of repetition, however for the sake of clarity, the auto having registration No.TN 01 M 5034 belongs to the witness P.W.12 and as per his evidence, his auto was taken on hire basis by the accused and on the said date i.e., 21.03.2020 the auto was taken on hire by the accused. The presence of the auto driver along with the auto at the Villivakkam bus stop was spoken to by P.W.11–Mohammed Huseen–the president of the auto stand and the presence of the auto

along with the accused at the road in the road junction (of first cross street, South Jaganathan Nagar and third main road of South Jaganathan Nagar), has indicated in a rough sketch Ex.P5 was clearly spoken to by P.W.3 to P.W.9. The presence of the accused along with P.W.1 victim girl has been clearly deposed by P.W.4, P.W.5 and P.W.6. P.W.6 has also specifically stated that on his arrival, the accused fled away from the clutches of P.W.4 and P.W.5 and thereafter, P.W.7 and P.W.8 arrived the scene.

40. As per Christian faith, God rewrites Paul's plans and closes one door, opening another in a whole new Direction. Humans plan but God establishes the steps to take.

41. In the instant case, P.W.1/victim girl, on faith in the God, was in hopeless situation and she could depose about how she was taken to the place other than to a place where the Auto driver was engaged by her. In other words, while the accused/Auto driver was hired to take the victim girl to the North Jaganathan Nagar, Villivakkam, Chennai, instead, he has taken the victim girl to the South Jaganathan Nagar, Villivakkam, Chennai and to an isolated place near the railway track, which is a road junction between 3rd main road and first cross street of the said South Jaganathan Nagar and thereby, the accused had committed the offence punishable under Section 366 IPC.

The accused by his act of putting his hand on the shoulder of the victim girl coupled with the request for sexual intercourse after hugging and kissing and such act of the accused could be outraged the modesty of the women and hence, the essential ingredients of the offence under Section 354 of IPC coupled with Section 4 of the Tamil Nadu Prohibition of Woman Harassment Act are made out and hence, I find that the Sessions Court has rightly come to the conclusion in rendering a similar finding that the above charges are proved by the prosecution beyond reasonable doubt is well considered and well merited and it does not suffer from any irregularity or illegality warranting interference by this Court at the appellate stage.

42. Accordingly, the conviction passed by the Sessions Court for the offence under Sections 366 I.P.C, 354 I.P.C and 4 of the Tamil Nadu Prohibition of Harassment of Woman Act 1988 and also under Section 506 (ii) are hereby confirmed.

43. On the factum of sentence, the learned counsel for the appellant could contend that since the date of conviction, the accused/appellant is inside the custody and hence, the sentence may be reduced to the period already underwent by the accused.

44. Taking into consideration the act of the accused on the body of P.W.2 victim girl, this Court finds that the appellant auto man/accused appears to be a "heartless person" having capitalized the situation on the helplessness of P.W.1 visually challenged person" and successfully committed the act of sexual assault on her body and hence, this Court finds that considering the position of P.W.1 and the act of the accused, this Court finds that the accused is not entitled for reduction of the sentence, not even for a single day and the sexual assault on the woman are on the raise, while the victim girl is a visually challenged person and hence, the sentence awarded by the learned Sessions Judge for the proved charges are appears to be just and reasonable and the same cannot be termed as excessive.

45. In this view of the matter, the sentence passed by the Sessions Court is hereby confirmed.

46. Since the owner of the vehicle is noway connected with the offence, P.W.12 is permitted to keep the vehicle as ordered by the Sessions Judge is hereby confirmed.

47. Taking into consideration the date of the incident and also that the charges are proved in the manner known to law, I hereby recommend to the Member Secretary, Tamil Nadu State Legal Services

Authority for grant of compensation of Rs.1,00,000/- [Rupees one lakh only] to the victim girl under the "Tamil Nadu Victim Compensation Scheme."

48. In the result, **this Criminal Appeal is dismissed**. The judgment of conviction and sentence passed by the Sessions Court in S.C.No.225 of 2013 dated 27.04.2015 are hereby confirmed.

49. Before parting with this criminal appeal, this Court place it on record its appreciation to the Investigating Officer for the services rendered by him.

07.07.2021

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Internet:Yes

Speaking Order:Yes

To

1. The Special Judge, Mahila Court, Chennai.
2. The Commissioner for Differently abled
3. The State Legal Services Authority–Member Secretary,
(for differently abled)
4. The Central prison,Chennai.

RMT.TEEKAA RAMAN,J.,

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Pre-Delivery Judgment in
Crl.A.No.767 of 2015

07.07.2021