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CRL.A.NO.285 OF 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 24 / 08 / 2023

JUDGMENT PRONOUNCED ON : 30/ 01 / 2024

CORAM:

THE HON'BLE MR.JUSTICE R.SAKTHIVEL

CRL.A.NO.285 OF 2017

Sadiq

Versus

... Appellant

State Represented by
Sub-Inspector of Police
H-6, R.K.Nagar Police Station
Chennai – 21.

... Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, praying to set aside the judgment, conviction and sentence dated 29.05.2017 in S.C.No.68 of 2014 on the file of Mahalir Neethimandram at Chennai.

For Appellant : Dr.G.Krishnamurthy

For Respondent : Mr.C.E.Pratap
Government Advocate (Criminal side)

JUDGMENT



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This Criminal Appeal is preferred, assailing the judgment dated 29.05.2017 passed by the 'learned Sessions Judge, Mahalir Neethimandram, Chennai' (henceforth 'Trial Court' for the sake of brevity) in S.C.No.68 of 2014, by the 'appellant herein' (henceforth 'A1' as per Trial Court's description), in which he was convicted and sentenced to undergo four years rigorous imprisonment with a fine of Rs.3,000/-, in default thereof, to undergo further period of three months rigorous imprisonment, for the offence under Section 366 of 'The Indian Penal Code, 1860' (hereinafter referred to as 'IPC' for the sake of brevity and convenience); and sentenced to undergo seven years rigorous imprisonment with a fine of Rs.3,000/-, in default thereof, to undergo a further period of three months rigorous imprisonment for the offence under Section 376 of IPC.

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

2.1. X, aged 14 years and pursuing 10th Standard at the time of occurrence, is the sole victim in this case. She is residing along with her mother / *defacto* complainant and step-father in Chennai. Victim girl X's



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mother does tailoring work from her house and victim girl's step-father is an auto-rickshaw driver. Victim girl-X has a sister who is married. A1-Sadiq resides close to victim-X's house.

2.2. On July 14th, 2011, the victim girl went missing. X's mother/*defacto* complainant learnt from A1-Sadiq's mother that A1 took X to Karthick's house who is arrayed as A2 before the Trial Court. However, X was not found at A2's house.

2.3. Therefore, X's mother preferred Ex-P.2-Written Complaint at 'H6-R.K.Nagar Police Station' (henceforth 'Police Station' for the sake of convenience) on July 16th, 2011 at 12.00 hours. Upon receiving the Ex-P.2 Written Complaint, the 'then Inspector of Police, H6-R.K.Nagar Police Station' (P.W.8) [henceforth 'Investigation Officer' for the sake of brevity and clarity] registered 'First Information Report' [henceforth F.I.R] (Ex-P.10) in Crime No.725/2011 under Section 366 of IPC.

2.4. Then, on July 26th, 2011, based on a tip-off, the Investigation Officer arrested A1-Sadiq, Karthick Kumar, and Kaviyarasu arrayed as A2



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and A3 before the Trial Court and recovered the victim girl-X from their custody at 09.00 hours in Chennai *Koyambedu* Bus Stand. Then the Investigation Officer recorded the voluntary confession statement given by A1-Sadiq in the presence of the witnesses, Anantha Krishnan (P.W.2) and Lokesh Kumar (P.W.5). She then examined and recorded the statement of X and then handed over X to her elder sister. Then she altered the Section of law from 366 of IPC to 366, 366A and 376 of IPC vide Alteration Report (Ex-P.11). Then she produced all the accused before the learned XV Metropolitan Magistrate, George Town, Chennai and they were remanded to judicial custody. After completion of investigation, she filed charge-sheet before the learned XV Metropolitan Magistrate, George Town, Chennai under Sections 363, 365, 366 and 376 of IPC against A1 and under Sections 363, 365, 366 and 376 read with 109 of IPC against A2 and A3.

2.5.The learned XV Metropolitan Magistrate registered the case on file as PRC.No.65 of 2013. After furnishing copies under Section 207 of 'The Code of Criminal Procedure, 1973' [henceforth 'Cr.P.C.' for the sake of brevity] to the accused, the learned Metropolitan Magistrate committed the



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case file to the Principal Sessions Court, Chennai as the offence punishable under Section 376 of IPC is exclusively triable by Sessions Court. The Principal Sessions Court in turn made over the case to the Trial Court. The Trial Court framed charges and subsequently amended the same as against A1 under Sections 366 and 376 of IPC and against A2 and A3 under Section 366A of IPC and read over and explained the same to all the accused. Since the accused pleaded not guilty, Trial was ordered.

2.6.To prove its case, the prosecution examined P.W.1 to P.W.9 (Witnesses) and marked Ex-P.1 to Ex-P.11 (Documents). The defence side neither examined any witnesses nor marked any documents. No Material Objects were marked by either side. The incriminating evidence against A1 available on record were put in question to the appellant / A1 under Section 313 of Cr.P.C., and A1 denied the same as incorrect.

2.7.The Trial Court after hearing either side, concluded that the prosecution has proved the charges against A1 for the offences punishable



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under Sections 366 and 376 of IPC and that the prosecution has not proved the charges against A2 and A3 for the offence punishable under Section 366A of IPC. Accordingly, the Trial Court acquitted A2 and A3, and convicted and sentenced A1 as stated supra in paragraph no.1.

2.8. Feeling aggrieved with the Conviction recorded and the Sentence imposed by the Trial Court, A1 has preferred this Criminal Appeal under Section 374(2) of Cr.P.C.

Arguments

3. Dr. G. Krishnamurthy, learned counsel for A1 argued that the prosecution has not established that on July 14th, 2011, victim-X (P.W.3) was under the age of 16 years. Further he argued that the Investigating Officer did not collect any evidence to prove that the victim was under the age of 16 years on the date of alleged offence; that the prosecution did not lay foundation as regard to the age of the victim; that Ex-P.1 was surprisingly produced during the examination of the victim; that Ex-P.1 is a 'photocopy' of the birth certificate which is not admissible in evidence; that the prosecution



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did not get leave from the Court before marking Ex-P.1; that the prosecution failed to examine the Authority who issued Ex-P.1-Birth Certificate and verify the relevant entries; and that, hence, Ex-P.1 is inadmissible and fabricated for the purpose of this case. He further submitted that A1 did not commit any offence as alleged; that P.W.3/victim girl-X has not stated anywhere that A1 committed the alleged offence; and that the Trial Court did not appreciate the evidence properly and convicted A1 under Sections 366 and 376 of IPC. Accordingly, he prayed to allow the Criminal Appeal and acquit A1.

4.Per contra, Mr.C.E.Pratap, learned Government Advocate (Criminal Side) submitted that though the prosecution did not annex Ex-P.1 Birth Certificate along with the Final Report, no objection was raised by A1 while marking Ex-P.1 birth certificate; that, P.W.1 and P.W.3 / victim-X have clearly deposed that P.W.3/victim-X was born on September 16th, 1996; that it has been clearly stated in Ex-P.2-Written Complaint that the victim-X is aged 14 years and pursuing 10th standard at the time of occurrence; that the defence side neither denied the same, nor put any question or suggestion in this regard; and that, hence, A1 is not entitled to raise the point in appeal. He

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further submitted that in these circumstances, the prosecution has proved that the victim was born on September 16th, 1996 and that the offence took place on July 14th, 2011, and thus clearly made out that, on the date of alleged offence, the victim was under the age of 16 years. Further, he submitted that the evidence of victim and her mother clearly proved the offences punishable under Sections 366 and 376 of IPC; that the Trial Court after considering the evidence and materials carefully, found that A1 committed the offences punishable under Sections 366 and 376 of IPC; and that there is no warrant to interfere with the Trial Court's judgment. Accordingly, he prayed to dismiss the appeal.

5.This Court has heard either side and perused the case file. The following points arise for consideration.

(i)Whether the prosecution has proved that the victim was under the age of 16 years on the date of the alleged occurrence?



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(ii)Whether the prosecution has proved the offence punishable under Section 366 of IPC against A1?

(iii)Whether the prosecution has proved the offence punishable under Section 376 of IPC against A1?

Discussion and Decision for Point No.(i)

6.The *defacto* complainant is the mother of the victim. In the complaint, the *defacto* complainant has stated that the victim was pursuing 10th Standard in a private coaching center. In the complaint, though the date of birth of victim-X was not mentioned, the age of victim-X is mentioned as 14 years. The Investigating Officer did not collect any evidence or material in regard of the date of birth of victim-X. The Investigating Officer could have examined the authorities from the school where victim-X pursued her studies upto 9th Standard. Further, the Investigating Officer did not collect the Birth Certificate of victim-X from the *defacto* complainant. Doctor (P.W.6), who



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examined victim girl-X and issued age certificate (Ex-P.6) after X-Ray examination and clinical examination, has opined that the victim is above the age of 16 years and below the age of 18 years. Further, Photocopy of the Birth Certificate (Ex-P.1) was marked through the victim (P.W.3) during the trial without due and explicit leave from the Court. The contention of A1 is that the Ex-P.1-Photocopy of Birth Certificate is inadmissible as per law and should be eschewed from consideration. It is a settled legal position that a mere 'photocopy' of a document without any authentication is inadmissible and cannot be marked without the original document being produced. P.W.3/victim-X has not stated anything about the original Birth Certificate. As stated *supra*, the Prosecution has not examined the authority who issued the same. However, the accused side neither denied the contents of Ex-P.1, nor objected to mark the same nor put any suggestion or question in this regard though Ex-P.1 was marked in the open court in the presence of the accused. Hence, this court is of the view that Ex-P.1 was marked with the implicit leave of the Court. However, Ex-P.1 qua photocopy is inadmissible in evidence as per law and this Court concludes that it is eschewed from consideration.

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6.1.Ex-P.2-Written Complaint, it has been stated that the victim is 14 years old and pursuing 10th Standard. The said fact has not been denied by the accused side. P.W.1 who is the elder sister of Victim-X, P.W.4 who is Victim-X's mother and Victim-X have clearly deposed that the date of birth of the victim is September 16th, 1996. As alluded to *supra*, the accused side has neither denied the age nor the fact that the victim was pursuing 10th Standard. Medical expert's estimate of age is only opinion and may not be accurate. Therefore, though Ex-P.1 is inadmissible as per law, in view of the uncontroverted testimonies, this Court concludes that the prosecution has proved that the date of birth of the Victim is September 16th, 1996, which means, the victim girl-X was about 14 years 9 months and 28 days old at the time of occurrence. Point No.(i) is answered accordingly against A1.

Discussion and Decision for Point No.(ii) and (iii)

7.Victim girl-X has deposed that A1 is a known person running a mutton stall in the same street where she resides; that A1 would smile at her whenever she goes to the mutton stall along with her mother; that on July 14th,

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2011, her sister (P.W.1) chided her as she went to her sister's house late after classes; that, being mad at her sister, she went to her mother's house; that since the house was locked, she was standing outside; that, while so, A1 came there and took her to his home; that since A1's mother fought with him refusing to let them stay there, A1 and the victim went to A2-Karthick's house; that the next day, A1-A3 and the victim went to Nagapattinam by bus and stayed there in a Lodge for a day and then in rented quarters for about 15 days; that during their stay in Nagapattinam, they went on shopping sprees, outings *etc.*, and had sexual intercourse on mutual consent without any coercion; and that A1 did not assault or harass her. She further deposed that, even after the registration of the case and pursuant arrest of A1, she went to Nagapattinam all alone and stayed at A1's sister's house and that upon A1's sister informing the police, police came to Nagapattinam and brought her back. The relevant extract of the evidence of P.W.3 reads thus:

“...சுனாமி குவார்ட்டர்ஸில் வாடகைக்கு எடுத்துதான் தங்கியிருந்தோம். நாங்கள் இருவரும் சேர்ந்துதான் சமையல் செய்தோம். 15 நாள் கழித்து போலிசார் வந்தபோது கவியரசும் உடன் இருந்தார். அப்போது கார்த்திக்கும் உடன் இருந்தார். அவர்களை கைது செய்து காரில் அழைத்து வந்தார்கள். அங்கு இருந்தபோது என்



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அக்காவுடன் போனில் பேசினேன். அப்போது கோயம்பேடு வருகிறோம் என்று சொன்னேன். நாங்கள் கோயம்பேடு வந்தபோது என் அக்கா கணவர், அவருடைய அண்ணன், 2 போலீசார் ஆகியோர் கோயம்பேடு பஸ்டாண்டிற்கு வந்தார்கள். நான் எதிரியுடன் அங்கு 15 நாள் இருந்தேன். எதிரி என்னுடன் உடலுறவுகொண்டார். அப்போது ஆணுறை எதுவும் பயன்படுத்தவில்லை. நான் 1ம் எதிரியுடன் நாகப்பட்டினத்தில் தங்கியிருந்தபோது அவர் என்னை அடிக்கவில்லை, துன்புறுத்தவில்லை. எதிரி எவ்வளவு பணம் தயார் செய்தார் என்று எனக்கு தெரியாது அவருடைய நண்பர்கள் தான் உதவி செய்தார்கள். நான் நாகப்பட்டினத்தில் தங்கியிருந்தபோது எதிரியுடன் வெளியே போவேன், கடைக்கும் போவேன். நான் பஸ்சில் போனபோது என் அருகில் சாதித்தான் உட்கார்ந்திருந்தார். நாகப்பட்டினத்திற்கு நாங்கள் போனபோது கவியரசும், கார்த்திக்கும் அங்கு இருந்தார்கள் பேஷன்பைக் வைத்திருந்தார்கள். அந்த பைக்கில்தான் வந்தார்கள். நான் பள்ளியில் படிக்கும்போது சேகர் என்பவரை எனக்கு தெரியாது. என் அக்கா அடித்தபோது நான் கீழே விழுந்ததால் தலையில் அடிப்பட்டிருந்தது அதனால் மறுநாள் காலை அப்பல்லோ ஆஸ்பத்திரிக்கு போனேன். சாதித்தான் என்னை அன்று கூட்டிசென்றார். ஸ்கேன் எதுவும் எடுக்கவில்லை சாதிக் என்னை கடத்தி சென்று என்னை பாலியல்பலாத்காரம் செய்ததாக சொல்வது பொய் என்றும் எனக்கும் சாதிக்கிற்கும் இடையே கறிக்கடையில் ஏற்பட்ட காசு பிரச்சனை காரணமாக பொய்யாக சாட்சி சொல்கிறேன் என்றால் சரியில்லை. ஹோமில் இருந்து வந்தபிறகு நான்



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மீண்டும் நாகப்பட்டினம் போய் 1 வாரம் சாதிக்கின் அக்கா வீட்டில் தங்கியிருந்தேன். நான் தனியாகத்தான் போனேன். சாதிக் ஜெயிலில் இருந்தபோது நான் அவரிடம் போனில் பேசவில்லை. 2வது முறை போலீசார் தான் நாகப்பட்டினம் வந்து என்னை கூட்டிவந்தார்கள். சாதிக்கின் அக்கா போலீசாருக்கு தகவல் சொல்லி போலீசார் வந்தார்கள். 2வது முறையும் காவல் நிலையம்தான் அழைத்துவந்தார்கள். என் வீட்டிற்கு கூட்டிசெல்லவில்லை. அதன் பிறகு என் அம்மாவிற்கு தகவல் சொல்லி ஸ்டேசனுக்கு வந்தார்கள். போலீஸ் என்னை விசாரித்தபோது நான் நாகப்பட்டினம் ஹோட்டலில் தங்கியிருந்ததை சொல்லியுள்ளேன். அங்குவைத்து உடலுறவு கொண்டதாகவும் சொல்லியுள்ளேன் ...“.

8.The learned counsel for A1 contended that A1 and the victim had consensual sexual intercourse and A1 has not acted against the victim's will or desire; that, as per medical evidence, the age of the victim is above 16 years and below 18 years; that the victim girl is worldly wise, mature and capable of taking life decisions; and that, hence, the act of the accused and the victim are completely consensual in nature and therefore, would not attract the offence punishable under Sections 366 and 376 of IPC as alleged. As concluded *supra* in Point No.(i), this court is of the view that, on the date of

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the offence, the victim was 14 years old. Hence, this court is of the view that X, at the time of occurrence, is capable neither of giving consent for sexual intercourse nor of making life choices. The consent allegedly given by X to have sexual intercourse with A1 is invalid in the eyes of law. To be noted, the A1 has not denied the factum of sexual intercourse with victim-X. Moreover, medical evidence supports the fact that A1 and victim-X were in a physical relationship.

9. Section 375 of IPC as on the date of occurrence reads thus:

'375.Rape.- *A man is said to commit "rape" who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-*

First.-Against her will.

Secondly.-Without her consent.

Thirdly.-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.-With her consent, when the man knows that he is not her husband, and that her consent is given because



she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.-With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.-With or without her consent, when she is under sixteen years of age.

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.'

(Emphasis supplied)

10. In view of the above provision, this Court is of the opinion that the alleged consent is not an informed consent given after understanding the pros and cons as well as the nature and consequence of the intended action, and therefore is immaterial. Therefore, the prosecution has proved the offence punishable under Section 376 of IPC.



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11.It is pertinent to note here that P.W.3/Victim-X, in her evidence, has deposed that A1 took her to A2's house offering to marry her in enticing words. Only because of the enticement of A1 to marry Victim-X, she abandoned her family's custody and went away with A1. As alluded to *supra*, the victim is a minor girl aged about 14 years 9 months and 28 days on the date of occurrence. Hence, the consent allegedly given by the Victim-X to come along with A1 is not a valid one and therefore, the act of the accused attracts the offense punishable under Section 366 of IPC. The above view of this Court is fortified by the judgment of the Hon'ble Supreme Court in ***SATISH KUMAR JAYANTI LAL DABGAR VS. STATE OF GUJARAT*** [2015 (7) SCC 359]. Relevant extract is as follows:

"14) The first thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of Section 375 IPC would get attracted making her consent for sexual intercourse as immaterial and inconsequential. It reads as follows:

'375. Rape-A man is said to commit 'rape' who, except in the case hereinafter excepted, has



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sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

** * **

Sixthly - With or without her consent, when she is under sixteen years of age.

Explanation.-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.”

15.The Legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the



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so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance. "

Point No.(ii) and (iii) is answered accordingly against A1.

Conclusion

12.In light of the dispositive reasoning alluded to *supra*, this Court is of the view that the Trial Court has properly appreciated the evidence adduced and rightly concluded that the prosecution has proved the charges levelled against A1 for the offences punishable under Sections 366 and 376 of IPC. Therefore, there is no warrant to interfere with the Trial Court's judgment. Accordingly, this Court is not inclined to interfere with the judgment passed by the Trial Court.

13.Resultantly, **the Criminal Appeal is dismissed.** The conviction and sentence passed by the learned Sessions Judge, Mahalir Neethimandram, Chennai, in S.C.No.68 of 2014 dated 29.05.2017 is hereby confirmed. The Trial Court is directed to secure the appellant / A1 and commit him to the prison to undergo the remaining period of sentence.



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Index : Yes
Internet : Yes
Neutral Citation : Yes
Speaking order
TK



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To

- 1.The Sessions Judge
Mahalir Neethimandram, Chennai.
- 2.The Sub-Inspector of Police
H-6, R.K.Nagar Police Station, Chennai – 21.
- 3.The Public Prosecutor
High Court of Madras.



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R.SAKTHIVEL, J.

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