

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.02.2015

CORAM:

THE HONOURABLE MS. JUSTICE R. MALA

Criminal Appeal No.191 of 2014
and
M.P.No.1 of 2014

Murugan
S/o.Mannan

.. Appellant/Accused

v.

The State rep by
The Inspector of Police
V-6, Kolathur Police Station
Chennai - 600 099.

.. Respondent/Complainant

(Crime No.553/2009)

Prayer:

Criminal appeal filed under Section 374(2) of Cr.P.C.,
against the judgment of conviction and sentence dated 25.03.2014 made
in S.C.No.306 of 2012 on the file of learned Mahila Court, Chennai.

For Appellant : Mrs.K.R.Vairam (legal aid counsel)

For Respondent : Mr.V.Arul, Govt. Advocate (Crl. Side)

J U D G M E N T

This Criminal Appeal arises out of the judgment of conviction and
sentence dated 25.03.2014 made in S.C.No.306 of 2012 on the file of
learned Mahila Court, Chennai, whereby the appellant/accused is
convicted and sentenced as follows:

Sections	Sentences
366 A IPC	Ten years R.I, Fine of Rs.10,000/- in default to undergo six months S.I.
376 IPC	Ten years R.I, Fine of Rs.10,000/- in default to undergo six months S.I.

The Sentences imposed on the accused are ordered to run concurrently.
Set off was also ordered under Section 428 Cr.P.C.

2. The case of the prosecution based on the prosecution
witnesses is as follows:

(i) P.W.1/Ananthi is the mother of the victim girl P.W.2/Revathi. P.W.3/Mukundan is the maternal uncle and P.W.4/Chandrakumar is the paternal uncle of the victim girl. When P.W.2/Revathi was going to school she became friendly with the appellant/accused who was residing in the house of P.W.5/Padma along with his brother and mother.

(ii) On seeing the duo talking with each other very often, P.W.5/Padma informed P.W.1/Ananthi who beat her daughter P.W.2/Revathi and asked her to stop her friendship with the accused. When P.W.2/Revathi intimated the same to the appellant/accused on 04.12.2009, he took her in his bike to the house of his uncle P.W.8/Varadharajan.

(iii) On the said day, when P.W.4/Chandrakumar took lunch to P.W.2 to her school, he came to know that she was missing and immediately, he intimated the same to P.W.1/Ananthi, who in turn lodged Ex.P.1/Complaint. P.W.9/Mahalakshmi, S.I of Police received the complaint and registered a case in Crime No.553 of 2009 and recorded the statements of P.W.1/Ananthi, P.W.3/Mukundan and P.W.4/Chandrakumar. The printed FIR is marked as Ex.P.8. Thereafter, the matter was placed before Inspector of Police, Singaraja who is no more.

(iv) On receipt of information that the victim girl and the accused are in the Koyambedu Bus Stand, P.W.9/Mahalakshmi and Singaraja, Inspector of Police reached the spot and apprehended them and took them to police station. Thereafter, as per Ex.P.9/Alter report, the case has been registered under 366 IPC from girl missing complaint.

(v) Thereupon, P.W.2/Revathi was sent for medical examination, where P.W.6/Dr.Seethalakshmi examined her and issued Ex.P.4/Medical Certificate and Ex.P.5/Age Certificate. The appellant/accused was also sent for medical examination, where P.W.7/Dr.Saravanan examined him and issued Ex.P.7/Potency Certificate.

(vi) On receipt of the medical report, the Investigating Officer altered the case to Section 366-A and 376 IPC as per Ex.P.11/Alter Report. He also recorded the statements of P.W.6/Dr.Seethalakshmi who examined the victim girl and P.W.7/Dr.Saravan who examined the appellant/accused.

(vii) The Investigating Officer after completing the investigation, filed chargesheet against the accused under Sections 366-A and 376 IPC.

3. The learned Trial Judge placed incriminating evidence against the accused under Section 313(1)(b) Cr.P.C. The accused denied the same in toto. After considering the oral and documentary evidence,

the learned Trial Judge has convicted the appellant/accused as stated above.

4. Challenging the conviction and sentence passed against this appellant, the present appeal has been filed.

5. The learned counsel for the appellant would raise the following points:

(a) The ingredients of Section 366-A IPC has not been made out because it is not the case of the prosecution that the appellant/accused had procured the victim girl for another person.

(b) The victim girl, P.W.2/Revathi is aged about 16 years and she has eloped with the appellant/accused. So, she is a consenting party.

To substantiate his argument, the learned counsel for the appellant relied upon the decision of the Hon'ble Apex Court made in the case of Iqbal v. State of Kerala, dated 24.10.2007 and prayed for setting aside the conviction and sentence imposed under Section 366-A IPC.

(c) The offence under Section 376 IPC is also not made out because there is no evidence to show that there is contradiction between the medical evidence. The doctor had deposed that there is no evidence of rape.

(d) Non-examination of Dhandapani, the paternal uncle of the victim girl, who intimated the fact that the girl was missing is fatal to the case of the prosecution. As also the contradictory evidence of prosecution witnesses.

(e) Since the victim girl is above 16 years of age and has consented for sexual intercourse, the offence under Section 375 IPC is not made out. So, the conviction and sentence made under Section 376 IPC is liable to be set aside.

The Trial Court without considering the above factum has convicted the appellant/accused. Hence, the learned counsel for the appellant prayed for setting aside the conviction and sentence.

6. Resisting the same, the learned Government Advocate (Criminal Side) would submit that as per the evidence of P.W.1/Ananthi, mother of the victim girl, the date of birth of the victim girl is 07.07.1995, which is also evidenced by Ex.P.2/Birth Certificate. So, as on the date of the occurrence viz., 04.12.2009, the age of the victim girl is only 14 years and 5 months. So, she is not competent to give consent for sexual intercourse. Hence, the Trial Court has rightly held that the appellant is guilty for the offence under Section 376 IPC. The learned Government Advocate (Criminal Side) would further submit that the ingredients of Section 366-A IPC is also made out and hence, he prayed for the dismissal of the appeal.

7. Considered the rival submissions made by both sides and perused the typed set of papers.

8. It is an admitted fact that P.W.1/Ananthi is the mother of the victim girl P.W.2/Revathi. P.W.3/Mukundan is the maternal uncle and P.W.4/Chandrakumar is the paternal uncle of the victim girl. P.W.5/Padma is the owner of the house in which P.W.1 and her family and the accused and his family are tenants. P.W.6/Dr.Seethalakshmi is the doctor who conducted examination on the victim girl and issued Ex.P.4/Medical Certificate and Ex.P.5/Age Certificate. P.W.7/Dr.Saravanan is the doctor who conducted examination on the accused and issued Ex.P.7/Medical Certificate which would reveal that the appellant/accused is potent. P.W.8/Varadharajan is the uncle of the accused in whose residence the appellant and the victim girl stayed for two days. P.W.9/Mahalakshmi is the Sub-Inspector of Police who registered the case in Crime No.553 of 2009 and prepared Ex.P.8/F.I.R. P.W.10/Murugesan is familiar with the writings of the deceased Singaraj, the Investigating Officer who conducted the investigation and filed the charge sheet against the accused.

9. It is true that P.W.5/Padma is an independent witness. But she is only a hearsay witness and so, her evidence is noway helpful to the case of the prosecution. P.W.1/Ananthi is the mother of the victim girl. P.W.3/Mukundan and P.W.4/Chandrakumar are the maternal and paternal uncle of the victim girl respectively. In such circumstances, it has to decided whether the evidence of P.W.1 to P.W.4 are reliable ?

10. At this juncture, it is pertinent to note that on appreciation of evidence, witnesses can be broadly categorized into three categories viz., unreliable, partly reliable and wholly reliable. In the case of a partly reliable witness, the court seeks corroboration in material particulars from other evidence, However in a case in which a witness is wholly reliable, no corroboration is necessary.

11. On perusal of the chief and cross-examination of the witnesses of P.W.1 to P.W.4 would show that there is no reason for discarding their evidences. The evidence of P.W.2/Revathi, victim girl is corroborated by the evidence of P.W.8/Varadharajan, the uncle of the accused, in whose residence the accused and P.W.2/Revathi stayed for two days. So, I am of the view that the evidence of P.W.1 to P.W.4 are reliable.

12. Now, this Court has to decide the age of P.W.2/Revathi, the victim girl.

It is true that P.W.6/Dr.Seethalakshmi had examined P.W.2 and issued Ex.P.5/Age Certificate, wherein it was stated that she is above 16 years and below 18 years. But Ex.P.2/Birth Certificate would clearly reveal that P.W.2/Revathi was born on 07.07.1995. Once the birth certificate is available, no reliance can be placed upon the age certificate given by the doctor on conducting the ossification test.

13. As per the medical jurisprudence, the age of a person ascertained by the fusion of bones and formation of teeth need not be accurate, as the fusion of bones and formation of teeth vary from person to person, according to the individual's nourishment and constitution of body. So, the age ascertained by the doctor shall vary by two years on either side.

14. So, as per the Ex.P.2/Birth Certificate, as on the date of commission of offence viz., 07.12.2009, the age of P.W.2/Revathi, the victim girl is only 14 years and 5 months. Hence, I am of the view that the victim girl is below 16 years on the date of commission of the offence and though she is a consented party, she is not competent to give consent for sexual intercourse. So, the argument advanced by the learned counsel for the appellant that the victim girl is above 16 years and she is competent to give consent for sexual intercourse does not merit acceptance.

15. Now the point to be decided is whether the conviction and sentence imposed under Section 366-A IPC is sustainable?

At this juncture, it is appropriate to incorporate Section 366-A IPC and its ingredients.

366-A. Procurement of minor girl.- Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

Ingredients

Essential ingredients are as follows:

- (i) Accused induced a girl.
- (ii) Girl must be below 18 years of age.
- (iii) Girl was induced to go from any place or to do any act.
- (iv) He did so with the intent that the girl will be or knowing that she will be forced to have the illicit intercourse.

In the above proviso, it was specifically stated "knowingly, likely that she will be forced or seduced to illicit intercourse with another person."

16. But it is not the case of the prosecution that the appellant has procured the victim girl/P.W.2 for another person. It would also be appropriate to consider the decision of the Hon'ble Apex Court relied on by the learned counsel for the appellant made in the case of Iqbal v. State of Kerala, dated 24.10.2007, wherein the Hon'ble

Apex Court has identified the essential ingredients of Section 366A of IPC.

17. In the instant case, there is no evidence to show that P.W.2/victim girl was forced to have sexual intercourse with another person other than the accused. In such circumstances, considering the facts of the present case in the light of the dictum laid down by the Hon'ble Apex Court in the above decision, I am of the view that the offence under Section 366-A IPC has not been made out. So, the conviction and sentence imposed by the Trial Court under Section 366-A IPC is hereby set aside and the appellant/accused is acquitted from the charge under Section 366-A IPC.

18. Now this Court has to decide whether the conviction and sentence imposed under Section 376 is sustainable?

As discussed supra, this Court had already come to a conclusion that the age of P.W.2/Revathi, the victim girl is below 16 years, as per Ex.P.2/Birth Certificate. So, now it has to be decided whether P.W.2, the victim girl was subjected to rape ?

19. P.W.4/Dr.Seethalakshmi conducted the medical examination on the victim girl and issued Ex.P.4/Medical Certificate, wherein it was stated that there was no evidence of recent sexual intercourse. Whereas when she was in the witness box, she has deposed in her cross-examination that the victim girl has not sustained any injury or nail mark and that semen was not detected. She had further deposed that the victim girl would have been subjected to sexual intercourse more than 48 hours ago. Admittedly, the victim girl was procured on 07.12.2009 and she was examined by the Doctor on 08.12.2009, well within 48 hours. It is also admitted that there was no injury. In such circumstances, I am of the view that the victim girl was subject to rape. At this juncture, it is appropriate to incorporate Section 375 IPC.

"375. Rape.- A man is said to commit "rape" who, except in the case 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."

20. In the instant case, as already stated the victim girl was below 16 years of age. So, as per Clause 6 of Section 375, even though the victim has consented for sexual intercourse, she is not competent to give consent when she is below 16 years of age. So, the offence under Section 375 IPC has been made out and the appellant/accused is liable to be convicted under Section 376 IPC.

21. The learned counsel for the appellant would argue that the non-examination of Dhandapani, who has intimated the missing of the P.W.2/Victim girl to P.W.1, mother of the victim is fatal to the case of the prosecution. But, P.W.4/Chandrakumar in his evidence has deposed that he alone has taken lunch to P.W.2/Revathi and at that time he came to know that she was missing. That factum was intimated to P.W.1 and only thereafter they started searching for the victim girl. So, just because the name of the paternal uncle who took lunch to P.W.2 on that particular day was wrongly mentioned as Dhandapani, it will support the case of the accused.

22. The learned counsel for the appellant would also raise the contention that there is contradiction between the prosecution witnesses. But as per the dictum of the Hon'ble Apex Court, minor contradiction in the evidence of the prosecution witnesses cannot be a basis for setting aside the conviction.

23. On perusal of the evidence of P.W.2/Revathi would show that when her mother scolded her for talking with the accused, she intimated the same to the accused, who took her to his uncle's house in his bike with an intention to commit rape. Since the uncle of the accused was not willing to accommodate them in this house, they went to some other place and stayed for a day, where the appellant/accused committed rape. Hence, I am of the view that the offence under Section 375 has been made out. So, the conviction and sentence passed against the accused under Section 376 IPC is hereby confirmed.

24. In fine,

(a) The Criminal Appeal is partly allowed. Consequently, M.P.No.1 of 2014 is closed.

(b) The conviction and sentence imposed on the accused under Section 376 IPC is hereby confirmed.

(c) The conviction and sentence imposed on the accused under Section 366-A IPC is hereby set aside.

(d) The Trial Court is directed to refund the balance fine amount to the appellant/accused.

(e) The Bail Bond, if any, executed by the appellant, is ordered to be cancelled.

(f) The Trial Court is directed to take effective steps to secure the accused to undergo the remaining period of sentence.

Sd/-

Assistant Registrar

Dated:3.3.15

True Copy

Sub Assistant Registrar

To

1. The Mahila Judge, Chennai
 2. The Inspector of Police,
V6 Kolathur Police Station, Chennai-99.
 3. The Superintendent, Central Prison, Puzhal, Chennai.
 4. The Public Prosecutor, High Court of Madras
 5. Record Keeper, Criminal Section,
High Court of Madras
- +2 cc to Mr.K.R.Vairam, Advocate,SR.8945.

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Cr1.A.No.191 of 2014

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