

Criminal Appeal No.508/2008

The Appellant/Accused viz.,Manikandan, was released on bail as per the order of this Court dated 14.10.2009 in CrI.M.P.No.1/2009, in CrI.A.No.508/2008.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.02.2015

CORAM:

THE HONOURABLE MS. JUSTICE R. MALA

Criminal Appeal No.508 of 2008

Date of Reserving the Judgment 10.02.2015	Date of Pronouncing the Judgment 16.02.2015
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Manikandan

S/o.Karuppusamy

.. Appellant/Accused

v.

The State rep by its
The Inspector of Police
All Women Police Station
Udumalpet
Coimbatore District

.. Respondent/Complainant

(Crime No.21/2005)

Prayer:

Criminal appeal filed under Section 374(2) of Cr.P.C., against the judgment of conviction and sentence dated 18.03.2008 made in S.C.No.270 of 2006 on the file of learned Sessions Judge, Magalir Needhimandram, Coimbatore.

For Appellant

: Mr.M.N.Balakrishnan

For Respondent

: Mr.V.Arul, Govt. Advocate (CrI. Side)

J U D G M E N T

This Criminal Appeal arises out of the judgment of conviction and sentence dated 18.03.2008 made in S.C.No.270 of 2006 on the file of the learned Sessions Judge, Mahalir Needhimandram, Coimbatore, whereby the appellant/accused is convicted and sentenced as follows:

Sections	Sentences
366-A IPC	10 years R.I, Fine of Rs.1000/- in default to undergo Simple Imprisonment for 3 months.

Sections	Sentences
367 IPC	10 years R.I, Fine of Rs.1000/- in default to undergo Simple Imprisonment for 3 months.
376(1) IPC	10 years R.I, Fine of Rs.1000/- in default to undergo Simple Imprisonment for 3 months.
387 r/w 383 IPC	7 years R.I, Fine of Rs.1000/- in default to undergo Simple Imprisonment for 3 months.

The sentences awarded to the accused are ordered to run concurrently and 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/Mariamammal is the mother of P.W.2/Suganya, the victim girl and they were residing in Rudrappa Nagar, Udumalpet. P.W.2/Suganya was aged about 13 years and had studied upto VI std. Thereafter, she was working as a Daily labourer in Thirumurthy Mill. While so, on the fateful day, viz., 12.06.2005, the appellant/accused who was working along with P.W.2/Suganya invited her for a pilgrimage to Madurai Meenakshi Amman Temple. Though, P.W.2/Suganya refused to come along with him, the appellant/accused persuaded her on assuring that they would return back very soon. So, P.W.2/Suganya accompanied the appellant/accused to Meenakshi Amman Temple at Madurai where the appellant/accused married her under threat. Thereafter, they went to Madurai and stayed there for five days and from there, both of them went to Pappampatty and stayed there for three days. During the course of their stay in Madurai and Pappampatty, the appellant/accused threatened P.W.2/Suganya and put her into fear of death and had sexual intercourse against her wish and consent.

(b) When P.W.2/Suganya did not return home after work, P.W.1/Mariamammal enquired about her whereabouts and came to know that her daughter was kidnapped by the appellant/accused. Hence, she preferred Ex.P.1/Complaint dated 18.06.2005. P.W.8/Gayathri, Sub-Inspector of Police, All Women Police Station, Udumalpet received the complaint and registered a case in Crime No.21/2005 under Sections 366-A and 376 IPC. The FIR is marked as Ex.P.6.

(c) While so, on 21.06.2005, the appellant/accused dropped P.W.2/Suganya near her house. On the very next day, viz., 22.06.2005, P.W.1/Mariamammal produced her before the Police. P.W.10/Mutharasu, who was then the Inspector (in-charge), All Women Police Station, Udumalpet enquired P.W.1/Mariamammal, P.W.2/Suganya and P.W.8/Gayathri and recorded their statements and sent P.W.2/Suganya for medical examination.

(d) P.W.5/Dr.Kalyankumari examined P.W.2/Suganya, the victim

girl and issued Ex.P.3/Accident Register, wherein it was stated that the victim had been subjected to sexual intercourse. P.W.7/Dr.Ramasamy examined the potency of the appellant/accused and issued Ex.P.5/Potency report, wherein it was stated that the appellant/accused was potent. P.W.6/Dr.Balamurugan conducted ossification test on the victim girl, P.W.2/Suganya and issued Ex.P.4/Radiologist report, wherein it was stated that P.W.2 is above 17 years and below 18 years of age.

(e) P.W.4/Robert, who was working as a teacher in Kummampalayam Union Secondary School, Udumalpet was examined and through him Ex.P.2/Record Sheet of P.W.2 was marked, wherein the date of birth of the victim girl was stated as 19.03.1991. P.W.4/Robert who was then the Principal (in-charge) in the said school had issued Ex.P.2.

(f) On receipt of request from P.W.10/Mutharasu, Inspector of Police, the learned Chief Judicial Magistrate, Coimbatore had directed P.W.9/Velmurugan, who was then the learned Judicial Magistrate No.II, Udumalpet to record the statements of the witnesses. The Statement of P.W.2/Suganya and P.W.1/Mariamammal made before the learned Judicial Magistrate No.II, Udumalpet is marked as Ex.P.7 and Ex.P.8 respectively.

(g) Thereafter, P.W.10/Mutharasu conducted the investigation and recorded the statements of P.W.3/Kaleeswari, P.W.4/Robert, P.W.5/Dr.Kalyankumari and P.W.7/Dr.Ramasamy. After completing the investigation, P.W.10/Mutharasu filed the chargesheet against the accused under Sections 366-A, 367, 376(1), 387 r/w 383 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 evidence of P.W.1/Mariamammal and P.W.3/Kaleeswari does not support the case of the prosecution.

(b) In Ex.P.3/Accident Register issued by P.W.5/Dr.Kalyankumari it was stated that P.W.2/Suganya is alleged to have eloped with a known person.

(c) In Ex.P.4/Radiologist Report issued by P.W.6/Dr.G.Balamurugan, it was stated that P.W.2/Suganya, the victim girl is above 17 years of age and below 18 years of age. Hence, P.W.2/Suganya is competent to give consent for the sexual

intercourse.

(d) Though the alleged incident took place on 12.06.2005, the Ex.P.1/Complaint was preferred only on 18.06.2005 and it reached the Court on 20.06.2005. So, the delay has not been properly explained.

(e) Since P.W.2/Suganya had eloped with the accused on her own will and consented for sexual intercourse, the offence under Section 375 IPC is not made out.

(f) Furthermore, the ingredients of Sections 366(A), 387 r/w 383 IPC has not been proved by the prosecution.

The learned counsel for the appellant would submit that the Trial Court without considering the above aspects had convicted the accused and hence, he prayed for setting aside the judgment of conviction and sentence.

6. Resisting the same, the learned Government Advocate (Crl. Side) appearing for the respondent would submit that as per Ex.P.2/Record Sheet of P.W.2/Suganya issued by P.W.4/Robert who was then Head-Master (in-charge) in Kummampalayam Union Secondary School, Udumalpet, the date of birth of P.W.2 is 19.03.1991. Hence, on the date of the alleged occurrence viz., 12.06.2005, the age of the victim girl P.W.2/Suganya was only 14 years. So, the ingredients of Section 375 has been made out. Further, P.W.1/Mariamammal, mother of the victim girl P.W.2/Suganya has deposed that the appellant/accused has taken away his daughter. The learned Government Advocate (Crl. Side) would submit that the ingredients of Section 387 r/w 383 IPC has been made out. So, the Trial Court has considered the matter in proper perspective and came to a correct conclusion. Hence, the learned Government Advocate (Crl. Side) prayed for the dismissal of the appeal.

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

[A]. Now, the point to be decided is whether the delay is fatal to the case of the prosecution?

8. P.W.1/Mariamammal in her evidence has stated that her daughter went missing on 12.06.2005. However, after making enquiries she gave a complaint only on 18.06.2005. The girl returned back home on 21.06.2005. It is true that there is a delay of six days in preferring the complaint. But, the delay in preferring the complaint will not be fatal, because in rustic villages, the parents of the teenage girls may search for their children along with relatives, without disclosing the same to the third parties as it will cause social stigma to the family and that will cause a delay in preferring a complaint. Hence, the argument advanced by the learned counsel for the appellant that the delay is fatal to the case of the prosecution does not merit acceptance.

[B]. Whether the evidence of P.W.1 and P.W.2 are reliable, since they were treated as hostile witnesses?

9. As per Ex.P.2/Record Sheet of P.W.2/Suganya, at the time of the alleged occurrence, P.W.2 was only 14 years of age. However, P.W.1/Mariamman in her chief-examination has stated that her daughter was 13 years old and studying in VI std. When she went for work at Thirumoorthy Mill and did not return home, she enquired and found that the accused/Manikandan had kidnapped her daughter P.W.2/Suganya and immediately, she preferred the complaint. After 9 days, P.W.2/Suganya returned home and the next day, she was produced before the police. The chief-examination was conducted on 18.12.2007 and the cross-examination was conducted on 07.02.2008. It is pertinent to note that in her cross-examination, nothing has been elicited and she has given a total go-by to her earlier version. Hence, she was treated as hostile witness and when the prosecution cross-examined the witness, a suggestion was posed to her that because of the compromise entered into with the accused, she has changed her version. But she denied the same.

10. P.W.2/Suganya, the victim girl was examined-in-chief on 18.12.2007 and cross-examined on 07.02.2008. During the course of cross-examination, P.W.2 has also contradicted her own version of evidence given at the time of chief-examination. Hence, she was also treated as hostile witness.

11. P.W.3/Kaleeswari was a co-worker in the Thirumoorthy Mill in which both the accused and the victim worked. She was also examined-in-chief on 18.12.2007 and cross-examined on 07.02.2008 and during the course of cross-examination, she too contradicted her own version of evidence given during the chief-examination. Hence, she was also treated as hostile witness.

12. As per the decision of the Hon'ble Apex Court, the testimony of the hostile witnesses need not be wholly ignored and the Court should scrutinize the testimony of hostile witnesses and accept the portion of the same which receive corroboration from other evidence on record. It is an admitted fact that during the chief-examination, P.W.2/Suganya has narrated the facts as to how she was kidnapped by the accused/Manikandan. But, when she was cross-examined after a gap of 1½ months, she gave a total go-by to her earlier deposition. In such circumstances, the Trial Court has rightly held that the evidence of P.W.1/Mariamman and P.W.2/Suganya in their chief-examination is admissible in evidence. P.W.2/Suganya in her cross-examination had even went to the extent of saying that she does not know the accused/Manikandan. She further stated that she has deposed in her chief examination only as tutored by the police. But, admittedly after P.W.2 returned home, when she was produced before the police by her mother P.W.1/Mariamman, she was sent to the doctor

P.W.5/Kalyankumari for medical examination and P.W.5/Kalyankumari in her evidence has deposed that P.W.2/Suganya had been subjected to sexual intercourse. When a suggestion was posed, P.W.5/Kalyankumari has deposed that there is chance of tear in hymen even because of exercising and riding bi-cycle. At this juncture, it is appropriate to incorporate the relevant portion in Ex.P.3/Accident Register.

"Alleged to have eloped with the known person on 12.06.2005 and both of them got married on 13.06.2005 at Palani, went to Madurai, stayed there for 5 days. From there both of them went to Pappampatti and stayed there for 3 days. The known person left the girl at her home on 21.06.05"

13. Thus, the above extraction reveals that the appellant/accused and P.W.2/Suganya, the victim girl has gone to Palani and got married. Thereafter, they went to Madurai and stayed there for some days before the appellant/accused dropped P.W.2 at her parents house. In such circumstances, this Court shall take into consideration certain portions of the evidence let in by P.W.1/Mariamammal and P.W.2/Suganya, which has been corroborated by other witnesses. Hence, a portion of evidence let in by the hostile witnesses is reliable.

[C]. Whether P.W.2/Suganya is below 16 years of age?

14. To prove the same, P.W.6/Dr.Balamurugan has examined the victim girl P.W.2/Suganya and issued Ex.P.4/Radiology report, wherein it was stated that P.W.2 is above 17 years and below 18 years. But, P.W.4/Robert who was then the Head Master (in-charge) at the time of issuing Ex.P.2/Record Sheet has deposed that the date of birth of P.W.2 is 19.03.1991. P.W.4 had further deposed that P.W.2 joined the school in I std. on 05.06.1996 and left the school on 31.03.2006, after completing VII std. Though, as per the record she was only 14 years during the time of the alleged incident, P.W.6/Dr.Balamurugan, who conducted ossification test on P.W.2/Suganya has deposed that P.W.2 was aged above 17 years and below 18 years.

15. However, 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. Considering the same, I am of the view that the age of P.W.2/Suganya as on the date of the alleged occurrence is only 14 years and not above 16 years, as per the evidence of P.W.4/Robert and Ex.P.2/Record Sheet. Hence, the Trial Court has rightly held that the age of P.W.2/Suganya is below 16 years.

[D]. Whether conviction and sentence under Section 376(1) IPC is sustainable?

16. As discussed supra, the age of P.W.2/Suganya is below 16 years and so, the consent given by her for sexual intercourse is immaterial. At this juncture, it would be appropriate to consider the ingredients of Section 375:

(1) Accused committed sexual intercourse with a woman.

(2) Such sexual intercourse was (i) against her will, (ii) without her consent.

(3) When such consent was obtained by putting her any of relation or interested person in fear of death or hurt.

(4) Consent was taken under deceitful belief that accused was her husband.

(5) Consent was taken when she was incapable of understanding its nature and consequences due to (i) unsoundness of mind, (ii) intoxication, (iii) administration of any stupefying drug or substance by the accused personally or through some one else.

(6) When accused is husband and woman was below 15 years of age.

17. Thus, when the girl is under sixteen years of age, though she had consented for sexual intercourse, it amounts to rape. Admittedly, in the given case, P.W.2/Suganya is only 14 years and hence, the appellant/accused is guilty under Section 375 IPC. So, he ought to be convicted under Section 376(1) IPC. Hence, the conviction and sentence imposed under Section 376(1) IPC is hereby confirmed.

[E]. Whether conviction and sentence under Section 366-A IPC is sustainable?

18. Now, it is appropriate to consider Section 366-A of IPC which reads as follows:

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.

19. In order to bring home the guilt under Section 366-A, the prosecution has to prove (i) that a minor girl was induced by the accused, (ii) that she was induced with intent that she might or knowing that it was likely that she would be forced or subjected to illicit intercourse with any person.

20. In the absence of any evidence showing that accused had induced victim to leave her father's custody with intent that she may be forced or seduced to illicit intercourse with another person, offence under Section 366-A was not made out.

21. But in the given case, it is not the case of the prosecution that the accused/Manikandan procured the minor girl and forced her to illicit intercourse with another person. Hence, I am of the view that the ingredients of Section 366-A of IPC has not been made out. Hence, the conviction and sentence imposed under Section 366-A is hereby set aside.

[F]. Whether conviction and sentence under Section 367 IPC is sustainable?

22. As already decided, the age of P.W.2/Suganya is below 16 years i.e., 14 years on the date of occurrence. So, she is not competent to give consent for sexual intercourse. Now, it is appropriate to consider Section 367 of IPC which reads as follows:

367. Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.- Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

23. The essential ingredients of Section 367 IPC are as follows:

- (1) Accused kidnapped or abducted a person.
- (2) Accused did so.

(i) With intention that such person might be subjected to or so disposed off as to be put in danger or being subjected to grievous hurt, slavery or unnatural lust of any person.

(ii) Knowing it to be likely that such person will be subjected to or disposed off accordingly.

24. In the above provision it has been specifically stated, "to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of". So, I am of the view that the ingredients of Section 367 IPC is also not made out. So, the conviction and sentence imposed under Section 367 IPC is hereby set aside. However, since P.W.2/Suganya was only aged about 14 years at the time of occurrence and she was taken away by the appellant from her lawful guardian viz., her mother, the accused/appellant is convicted for the offence under Section 362 IPC.

25. Now, it is appropriate to incorporate Section 359 of IPC.
359. Kidnapping.- Kidnapping is of two kinds: kidnapping from India and kidnapping from lawful guardianship.

26. In the instant case, the accused/Manikandan had kidnapped the victim girl P.W.2/Suganya from lawful guardianship. So, I am of the considered view that the appellant/accused is liable to be punished under Section 363 IPC instead of Section 367 IPC, since the accused/appellant is guilty under Section 362 IPC.

[G]. Whether conviction and sentence under Section 387 r/w 383 IPC is sustainable?

27. In respect of the conviction under Section 387 r/w 383 IPC is concerned, Section 387 deals with putting person in fear of death or of grievous hurt, in order to commit extortion and Section 383 deals with extortion. It is appropriate to incorporate both the Sections.

383. Extortion.- Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion".

387. Putting person in fear of death or of grievous hurt, in order to commit extortion.- Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

28. In the instant case, there is no iota of evidence to show that the appellant/accused had put P.W.2/Suganya, the victim girl in fear of death or of grievous hurt, in order to commit extortion. Hence, the conviction the conviction and sentence passed under Section 387 r/w 383 IPC is hereby set aside.

29. As stated supra, the appellant is guilty under Section 362 and 375 IPC. Hence, he ought to be convicted under Section 363 and 376(1) IPC and not under Sections 366-A, 367, 387 r/w 383 IPC. So, the conviction and sentence passed under Sections 366-A, 367, 387 r/w 383 IPC is hereby set aside. The conviction under Section 376(1) IPC is hereby confirmed. The appellant/accused is convicted for the offence under Section 362 instead of 367 IPC.

30. As far as sentence under Section 376 IPC is concerned, the

Trial Court has sentenced the appellant/accused to undergo 10 years Rigorous Imprisonment. Considering the age of the appellant/accused and considering the fact that he is in jail for nearly 3½ years and the fact P.W.2/Suganya had eloped with the appellant/accused as could be evident from Ex.P.3/Accident Register issued by P.W.5/Dr.Kalyankumari, the sentence is reduced from 10 years to 7 years. However, the fine amount of Rs.1000/- imposed on the appellant/accused under Section 376(1) IPC is confirmed.

31. As far as sentence under Section 362 IPC is concerned, the appellant/accused is sentenced to undergo 3 years Rigorous Imprisonment and to pay a fine of Rs.1000/- in default to undergo 1 month Rigorous Imprisonment. The sentence imposed on the accused under Sections 362 and 376 IPC are ordered to run concurrently.

32. In fine,

(a) The Criminal Appeal is partly allowed.

(b) The conviction under Section 376(1) is hereby confirmed, however the sentence is reduced from 10 years to 7 years. The fine amount of Rs.1000/- awarded by the Trial Court is hereby confirmed.

(c) The appellant/accused is convicted for offences under Section 362 IPC instead of 367 IPC and sentenced to undergo 3 years Rigorous Imprisonment and to pay a fine of Rs.1000/- in default Rigorous Imprisonment for a period of one month.

(d) The conviction and sentence passed by the Trial Court under Sections 366-A, 367, 387 r/w 383 IPC is hereby set aside.

(e) Both the sentences are ordered to run concurrently.

(f) The Trial Court is directed to refund the balance fine amount to the appellant/accused, if any.

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

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

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The learned Sessions Judge, Magalir Needhimandram,
Coimbatore.

2.-do- Through The Principal District Judge, Coimbatore

3. The Public Prosecutor, High Court of Madras

4.The Superintendent, Central Prison, Coimbatore

5.The Director General of Police, Mylapore, Chennai

6.The Superintendent of Police, Coimbatore District,Coimbatore.

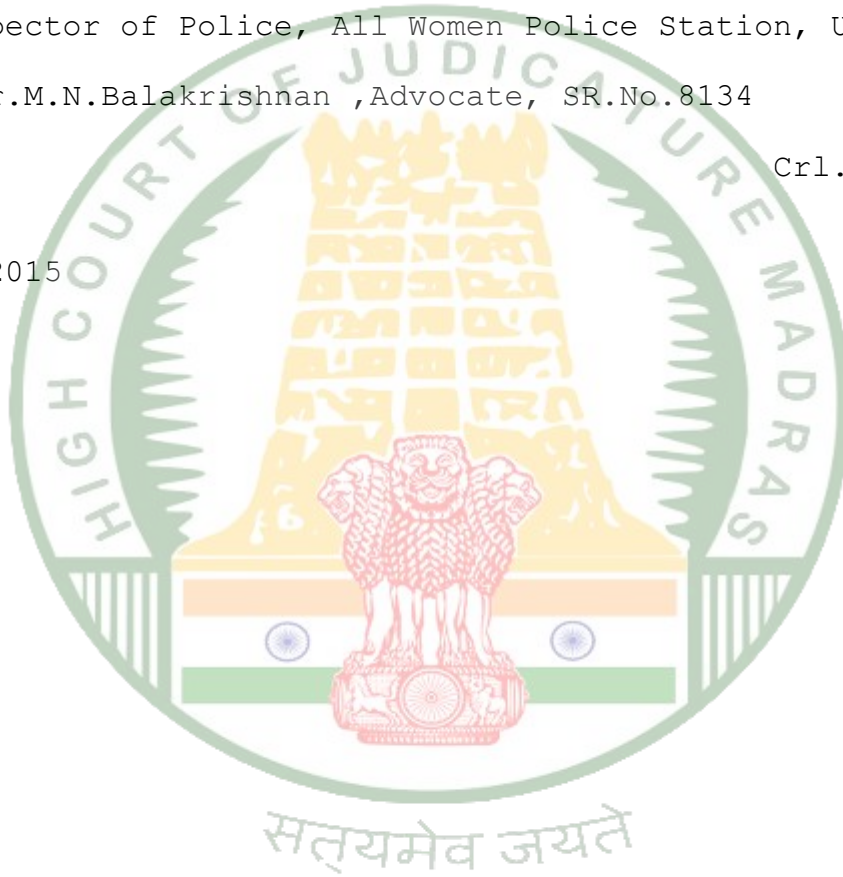
7.The District Collector, Coimbatore, Coimbatore District

8.The Inspector of Police, All Women Police Station, Udumalpet.

1 cc to Mr.M.N.Balakrishnan ,Advocate, SR.No.8134

Crl.A.No.508 of 2008

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