

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.06.2016

CORAM

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
and
THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.272 of 2015

Ramesh @ Ramesh Kumar

... Appellant

-Vs-

State

Rep. by Inspector of Police
All Women Police Station,
Pollachi, Coimbatore District.
(Crime No.45/2010)

... Respondent

This Criminal Appeal has been preferred to set aside the conviction & sentence imposed by judgment dated 26.03.2015 made in Spl.C.C.No.3 of 2014 on the file of the Learned Mahila cum Sessions Judge of Coimbatore by allowing this appeal.

For Appellant : Mr.R.Sankarasubbu

For Respondent : Mr.M.Maharaja
Additional Public Prosecutor

J U D G M E N T

(Judgment of the Court was delivered by S.NAGAMUTHU, J.)

The appellant is the sole accused in Special C.C.No.3 of 2014 on the file of Mahila cum Sessions Court, Coimbatore. He stood charged for offences under Sections 376(i) and 506(i) IPC. By judgment dated 26.03.2015, the Trial Court convicted him under Section 376(i) IPC alone and sentenced him to undergo imprisonment for life and to pay a fine of Rs.50,000/- (no default sentence was imposed). The Trial Court has ordered to pay the entire amount of Rs.50,000/- to P.W.2 and the child born to her, as compensation. Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

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

P.W.1 is the father of P.W.2. P.W.1 was residing at Ganapathy Village near Settupalayam with his wife and two children. The second daughter of P.W.1 is P.W.2. P.W.2 was studying in the Government Higher Secondary School at Kamarajar

Nagar. Her date of birth is 21.06.1996. At the time of occurrence, she was studying 10th standard. Every day, she used to go to school from her house by walk. The accused also hails from the same village and he was a neighbour of P.W.1. On few occasions, when P.W.2 was going to the school or returning home, the accused intercepted her and spoke to her. On one such occasion, he told that he had a love for her. P.W.2 also responded positively. Six months prior to 16.11.2010 on one day, when P.W.2 was at her house, the accused came to her house and asked "Kulambu" from her. Then he went to his house. Taking "Kulambu", P.W.2 went to the house of the accused. On entering into the house, P.W.2 noticed that the accused alone was there in the house. Immediately, the accused held the hands of P.W.2 and hugged her. P.W.2 tried to escape from his clutches. But she could not succeed. The accused touched her abdomen, chest and finally, the accused made her to lie down and had sexual intercourse with her. When P.W.2 wept, he told her that he would marry her. He also wanted her not to disclose the said event to anybody. Therefore, out of fear, she did not disclose the same even to her parents. Similarly, on two or three occasions and subsequently, the accused had sexual intercourse with P.W.2. Out of fear for the accused, P.W.2 did not disclose the same even to her parents. After two to three months of the above incidents, she felt vomiting sensation and also drowsy. She told the same to P.W.1 - her father. P.W.1 took her to the Government Hospital at Coimbatore for treatment. After examining her, the Doctor informed P.W.1 that P.W.2 was pregnant. Then P.W.1 enquired her as to who was responsible for the said pregnancy. For the first time, she informed P.W.1 about the entire occurrence, which led to her pregnancy.

3. P.W.1 thereafter informed P.W.4, a local Panchayatdar about the same. P.W.4 and other villagers enquired P.W.2 and from her, they came to know that she was willing to marry the accused. When they convened the panchayat and asked the accused about his willingness to marry P.W.2, he refused. Thereafter, P.W.4 and other villagers gave liberty to P.W.1 to work out his remedy by approaching the Police. It was only thereafter, P.W.1 had gone to All Women Police Station at Pollachi and made a complaint on 22.11.2010 at 10.00 p.m. P.W.10 - the then Inspector of Police, on receipt of the said complaint registered a case in Crime No.45 of 2010 under Sections 376(i) and 506(i) IPC against the accused. Ex.P9 is the FIR. He forwarded both the documents Ex.P1 - Complaint and Ex.P9 - FIR to the Court, which were received by the learned Magistrate at 5.15 p.m. on 22.11.2010.

4. Taking up the case for investigation, P.W.10 went to the house of the accused and prepared an Observation Mahazar and a rough sketch in the presence of P.W.3 and another witness. On 22.11.2010 at 6.00 p.m., she arrested the accused and brought

him to the Police Station. She forwarded the accused to the hospital for medical examination. P.W.7 - Dr.Raghuramaiah examined him on 28.05.2010 and found that the accused was fully matured and capable of performing sexual intercourse with woman. Ex.P6 is the certificate issued by him. Then she forwarded the accused to the Court for judicial remand. P.W.10 examined P.W.2 and recorded her statement and forwarded her to the hospital for medical examination. P.W.5 examined her on 29.01.2010 at 10.00 a.m. She found that P.W.2 was 24 weeks pregnant. It also came to light that she had undergone treatment at Coimbatore Government Hospital between 17.11.2010 and 20.11.2010. At the request made by P.W.10, P.W.6 extracted blood sample from the accused on 20.03.2013 and also from P.W.2 and the child born to her in the mean while. These blood samples were sent for medical examination. P.W.9 - an Expert in DNA Forensic Science conducted DNA examination on the blood samples of the accused, P.W.2 and the child born to P.W.2 and gave opinion under Ex.P8 report that the appellant is the biological father of the child, born to P.W.2. Thereafter, investigation was taken over by P.W.11. On completing the investigation, she laid charge sheet against the accused.

5. Based on the above materials, the trial Court framed charges under Section 376(i) and 506(i) IPC against the accused. The accused denied the same. In order to prove the case of the prosecution, on the side of the prosecution, as many as 11 witnesses were examined and 10 documents were exhibited. However, no material objects were marked.

6. Out of the said witnesses, P.W.1- the father of P.W.2 has stated that four years prior to 05.06.2014, P.W.2 complained of abdominal pain and drowsiness. Therefore, he took her to Government Hospital at Coimbatore, where the Doctor found her pregnant. He further stated that he informed P.W.4 - Village Panchayatdar that the appellant was responsible for the pregnancy of P.W.2 and in the panchayat, the accused refused to marry P.W.2. It was only thereafter, he gave complaint to the Police. P.W.2 has vividly spoken about the entire occurrence that it was this accused, who had sexual intercourse with her against her free will. P.W.3 has spoken about the preparation of Observation Mahazar and rough sketch. P.W.4 has spoken about the panchayat held, in which, P.W.2 agreed to marry the accused, whereas, the accused refused to marry her. P.W.5 has spoken about the treatment given to P.W.2 on 29.01.2010 at 10.00 a.m. She has stated that at the time of examination, she found P.W.2 pregnant with 24 weeks fetus in her womb. P.W.6 has spoken about the blood samples extracted from the accused and the child for the purpose of DNA examination. P.W.7 has stated that he examined the accused and found that he was potent. P.W.8 - the School Headmaster has spoken about the date of birth of P.W.2 as per school records. According to him, as per the school records,

her date of birth is 21.06.1996. P.W.9 has spoken about the DNA examination conducted. According to her, the accused is the biological father of the child born to P.W.2. P.Ws.10 and 11 have spoken about the investigation done and final report filed.

7. When the above incriminating materials were put to the accused under Section 313 Cr.P.C, he denied the same as false. On his side, he examined one Vellangiri as D.W.1. He has stated that when the accused moved this Court seeking anticipatory bail, he offered to marry P.W.2, but P.W.2 refused to marry and as such, she wanted action to be taken against the accused. He has further stated that accused would not have raped P.W.2 at all.

8. Having considered all the above, the trial Court convicted the accused as detailed in the first paragraph of this judgment and that is how the appellant is before this Court with this appeal.

9. We have heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

10. The evidence of P.W.2 - the prosecutrix goes to prove that the accused had repeated sexual intercourse with her. There is no reason to reject her evidence, because, according to the DNA examination conducted by P.W.9, the accused is the biological father of the child born to P.W.2. But the learned counsel for the appellant would submit that the accused had sexual intercourse with P.W.2, for which she gave full consent. Thus, according to him, mere sexual intercourse, which, the accused had with P.W.2 would not amount to an offence of rape.

11. When it was pointed out, the learned Additional Public Prosecutor would submit that at the time of occurrence, P.W.2 was hardly 14 years old and thus, legally she was incompetent to give consent for sexual intercourse.

12. We have considered the above submissions.

13. P.W.8 - the Headmaster of the School, where, P.W.2 was studying has given evidence that the date of birth of P.W.2 was 21.06.1996, according to the school records. The correctness of the said entry is disputed by the defence. The learned counsel would place reliance on the judgment of the Supreme Court in *Alamelu and another v. State, Represented by Inspector of Police* [2011] 2 SCC 385, wherein, the Hon'ble Supreme Court has taken the view that there was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate issued by the school. The Supreme Court further has stated that the ex parte evidence did not rule out the

possibility of the girl being a major. In those circumstances, the Hon'ble Supreme Court held that the prosecution had failed to prove that the girl was a minor at the relevant date. In that judgment, the Supreme Court referred to the earlier judgment in *Ravinder Singh Gorkhi v. State of U.P.* (2006) 5 SCC 584, wherein, the Supreme Court has held as follows:-

"38....A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted."

14. Referring to the same, the learned counsel for the appellant would submit that in the instant case, solely based on the certificate issued by the school authority, this Court should not conclude that P.W.2 was hardly 14 years old at the time of occurrence. We find no force at all in the said submission. In *Alamelu's* case referred to above, the victim was at the verge of her majority. There is doubt whether she was a minor or she had crossed over to majority. It was in those circumstances, the Hon'ble Supreme Court held that one should not go by the school certificate alone unless the correctness of the entries in the school records are proved. But in the instant case, P.W.2 was not at the verge of her majority. She was doing 10th standard and she was aged 14 years. Her age has been spoken by P.W.1, the father of P.W.2 and P.W.2 herself. But during cross examination, the age of P.W.2 was not at all disputed. Similarly, when the Headmaster of the school was examined, there was no cross examination disputing the correctness of the date of birth spoken by him. Thus, without disputing the age of P.W.2 at the appropriate stage, it is not available for the accused for the first time at this stage to dispute the age of P.W.2. Therefore, we find no reason to reject the case of the prosecution that at the time of occurrence, P.W.2 was less than 15 years of age and thus, legally, she was not competent to give consent. In such view of the matter, we hold that the Trial Court was right in convicting the accused under Section 376(i) IPC.

15. Now turning to the quantum of punishment, P.W.2 has stated even in chief examination, when the accused told her that he had fallen in love with her, she also responded positively, expressing her love. Further, she had sexual intercourse with him on many occasions, which resulted in pregnancy. The accused is a young man. It is also seen from the evidence of D.W.1 that at one stage, the accused offered to marry P.W.2 after she attained majority. At the same time, it cannot be forgotten that now P.W.2 has got a child born to the accused and there is nobody to take care of her and the child. Having regard to the totality of the circumstances, we are of the view that sentencing him to undergo rigorous imprisonment for seven years with a fine of Rs.25,000/- would meet the ends of justice. The Trial Court has failed to take into account the economic status of the accused while imposing condition. Therefore, having regard to the economic status, we reduce the fine amount to Rs.25,000/-, which shall be paid to P.W.2 through P.W.1 towards compensation.

16. In the result, the appeal is partly allowed in the following terms:-

The conviction of the appellant for the offence under Section 376(i) is confirmed. However, the substantive sentence of imprisonment for life and fine of Rs.50,000/- are set aside and instead, he is sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.25,000/- in default to undergo rigorous imprisonment for four weeks. The period of sentence already undergone by the appellant shall be given set off, as required under Section 428 Cr.P.C.

Sd/-

Assistant Registrar(V)

//True Copy//

सत्यमेव जयते

Sub Assistant Registrar

To

1.The Inspector of Police
All Women Police Station,
Pollachi, Coimbatore District.

2.The Mahila cum Sessions Court,
Coimbatore.

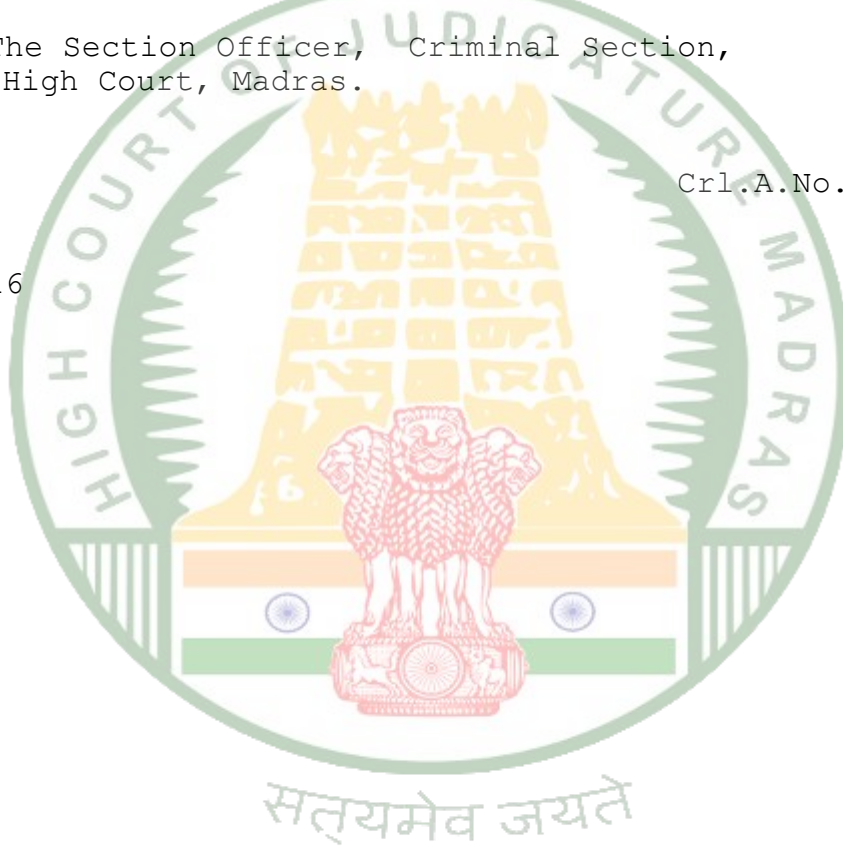
3. The Public Prosecutor, High Court, Chennai.

4. The Superintendent of Police Coimbatore District.
5. Judicial Magistrate No.I, Coimbatore.
6. The Chief Judicial Magistrate, Coimbatore.
7. The Superintendent Central Prison, Coimbatore.
8. The District Collector, Coimbatore.
9. The Director General of Police, Mylapore Chennai.

Copy to: The Section Officer, Criminal Section,
High Court, Madras.

Crl.A.No.272 of 2015

SSK(CO)
Eu 23.07.16



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