

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.08.2016

CORAM

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

Criminal Appeal No.41 of 2016

Manikandan ... Appellant/Sole Accused
-Vs-

State Rep. by
The Inspector of Police
Kotthagiri Police Station
Kotthagiri
Nilgiris District. ... Respondent/Complainant

This Criminal Appeal has been preferred to set aside the conviction imposed by judgment dated 13.03.2012 made in S.C.No.22 of 2010 on the file of the District Sessions Court, Nilgiris, Uthagamandalam, by allowing this appeal.

For Appellant : Mr.V.Rajamohan

For Respondent : Mr.E.Raja
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 S.C.No.22 of 2010 on the file of the learned District Sessions Judge, Nilgiris at Udhagamandalam. He stood charged for offences under Section 376 IPC, Section 4-A of the Tamilnadu Women Harassment Act and Section 302 IPC. By judgment dated 13.03.2012, the Trial Court convicted him under all the three charges and sentenced him to undergo imprisonment for life and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for six months for the offence under Section 376 IPC and to undergo imprisonment for life and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for six months for the offence under Section 302 IPC and to undergo imprisonment for life and to pay a fine of Rs.50,000/- in default to undergo simple imprisonment for six months for the offence under Section 4-A of the Tamilnadu Women Harassment Act. The Trial Court directed the sentences to run

concurrently. 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:

The deceased in this case was one Ms. Janani, who was hardly aged about 6 years. They were residing at Pillikambai village, Sakthi Nagar, Kothagiri Nilgiris District. The deceased was then studying in II standard. The accused was residing as a neighbour. He was a spendthrift having no employment. On 29.09.2009, as usual, the deceased had gone to her school and around 4.30 p.m., she returned to her home from the school. Thereafter, the child was found missing. P.W.1 returned home around 6.30 p.m. He went in search of the child. Around 8.00 p.m, in search of the child, P.W.1 and others went to the house of the accused. The house was found bolted from inside. But there was a murmuring noise from inside the house. P.W.1 knocked at the door repeatedly. There was no response from inside. Then, P.W.1 and others went to the other side of the house. Since the accused did not open the door, they developed a sort of suspicion over the accused. When they were just by the side of the house making efforts to search for the child inside the house, suddenly, the accused opened the front door of the house, carried a gunny bag and threw the gunny bag containing something into a nearby bush near the bathroom and ran away. P.W.1 and others shouted at him. But the accused fled away from the scene of occurrence. They ran to the bush and took the gunny bag and opened it. To their shock, they found the dead body of the deceased with both hands folded and tied with rope. A cloth was inserted into the mouth. There were bleeding through nose and vagina. There was also a semen like fluid in the vagina. Then P.W.1 went to the Police Station and made a complaint.

3. P.W.14, the then Sub-Inspector of Police on receipt of the said complaint registered a case in Crime No.372 of 2009 under Sections 376 r/w 302 IPC at 9.30 p.m. on 29.09.2009. Ex.P27 is the FIR. He forwarded both the documents to the Court, which were received by the learned Magistrate at 7.00 a.m. on 30.09.2009. The case was taken up for investigation by P.W.15. He went to the place of occurrence and prepared an Observation Mahazar and Rough Sketch in the presence of P.W.9 and another witness and then he forwarded the body for post-mortem.

4. P.W.7 conducted autopsy on the body of the deceased at 9.00 a.m. on 30.09.2009. She found the following injuries:-

"1. Nail marks seen on inner aspect of left forearm 4 inch from left wrist.

2. Contusion just above right eyebrow

3. Clotted blood stained discharge from nose and mouth present. Blood stain (clotted) present in perineal region. Long pubic hair found over

labium - the same collected and handed over to PC. Vaginal intrusion allows to fingers. Irregular perinial tear about 3 x 1 x 1 cm present. Hymen ruptured. Vaginal mucosal tear about 1 x 1 x 1 cm present. "

Ex.P4 is the post-mortem certificate. According to her, the deceased would have died due to shock and haemorrhage and due to the injury on the private part.

5. P.W.15 arrested the accused and forwarded him for medical examination. On completing the investigation, he laid charge sheet against the accused.

6. When the accused was in custody, on 15.10.1993, he sent a requisition through the Superintendent of Central Prison, Coimbatore claiming that he was a juvenile in terms of the Juvenile Justice Care and Protection of Children Act, 2000 (for short "the Act") and therefore, he should be given the benefit of the said Act. On receipt of the said requisition, the learned District Sessions Judge, directed the learned Judicial Magistrate, Kothagiri to hold an enquiry into the same and to submit a report. Accordingly, the learned Magistrate took up the petition in CMP.No.2796 of 2010 and held enquiry. During enquiry, he ordered the accused to be examined by a Radiologist. The Radiologist gave opinion that he had completed 18 years of age but had not completed 22 years of age. Relying on the same, the learned Magistrate submitted a report that the accused was not a juvenile in conflict with law in terms of the Act.

7. Thereafter, the learned District Sessions Judge proceeded with the Trial of the case. During trial, the accused again filed another petition in C.M.P.No.616 of 2010 before the learned Judge, requesting to ascertain his age as on the date of the commission of alleged crime. He claimed that he was entitled to the benefits of the Act. The learned Judge dismissed the said petition on the same day on the footing that already the learned Magistrate had fixed the age of the accused as 22 years and that is how, the Trial Court proceeded with the trial and finally, by judgment dated 13.03.2012 held him guilty of all the three charges and accordingly, punished him. Challenging the said conviction and sentence, the appellant is now before this Court with this appeal.

8. In this appeal, the appellant/accused has claimed that the Trial held by the learned Sessions Judge is vitiated, because, as on the date of commission of crime, he was not an adult and he was only a juvenile. In order to prove the said claim, he has examined two witnesses and marked two documents on his side. D.W.1 is the headmaster of St.Marys High School at Kothagiri. It is the admitted case that the accused studied in

the said school. According to D.W.1, as per the school records, the date of birth of the accused is 15.10.1993. During investigation, he issued a certificate to the said effect under Ex.D1. During cross examination, it was elicited that the birth certificate was not submitted to school when the accused was admitted in 6th standard. He has also produced the Transfer Certificate of the accused (vide Ex.D2) D.W.2 was a teacher in the same school. She has stated that during the academic year 2005-2006, the accused was studying in 7th standard in the said school, to whom, she was a class teacher.

9. The Trial Court having considered the prosecution case vis-à-vis, the evidences of D.Ws.1 and 2 and Exs.D1 and D2 refused to reopen the issue as to whether the accused was a juvenile as on the date of commission of the crime or not. The Trial Court was under the view that since the age had already been fixed by the learned Judicial Magistrate, Kothagiri, it was not available for the accused to reopen the issue again and again. On this conclusion, the Trial Court rejected the plea of the appellant to extend him the benefits of the Act. The Trial Court proceeded with the trial and held him guilty.

10. The learned counsel for the appellant would submit that the Trial Court was in error in refusing to reopen the issue of age of the appellant.

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

12. The Hon'ble Supreme Court has time and again held that since the right of a juvenile, in conflict with law, to get the benefits under the Act, is so fundamental in nature, the issue of age can be raised at any stage of the proceedings.

13. In the matter of determination of age, Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 provides for the procedure to be followed. Rule 12(3) reads thus:

"12. Procedure to be followed in determination of age.-

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a)(i) the matriculation or equivalent certificates, if available, and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of any one of the above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child... "

14. It is common knowledge and also has been held several times by the Hon'ble Supreme Court that the opinion of the doctor fixing the age of an individual is purely approximate and therefore, a margin of two years on either side should be given to the said age fixed by the doctor.

15. Further under Section 7-A of the Act, the question of age can be raised before any Court. Thus, in our considered view, the conclusion arrived at by the learned Magistrate that the accused was not a juvenile as on the date of commission of crime and the refusal of the learned Sessions Judge to reopen the said issue of age are illegal.

16. The learned Magistrate, in the instant case, did not examine the age of the accused by considering the relevant materials available on record. The learned Magistrate had sent the accused for medical examination and from out of the report of the Radiologist had held that the accused was not a juvenile. The learned Magistrate had not only failed to follow the dictum laid down by the Hon'ble Supreme Court but had also failed to summon the documents from the school such as birth certificate, transfer certificate and other relevant records. It was because of this reason, the accused made a petition before the learned Sessions Judge, claiming himself to be a juvenile. The learned Sessions Judge has dismissed the same erroneously on the ground that the learned Magistrate had already fixed the age of the accused. During trial, the accused has produced two valuable documents viz., the certificate issued by D.W.1 - the headmaster of the school and Ex.D2 - the Transfer Certificate. These two certificates, which cannot be disputed would go to show that as on the date of the commission of the offence, the accused was only a juvenile. The Trial Court ought not to have refused to consider these documents by declining to reopen the issue of age.

17. As we have already pointed out, the accused is at liberty to raise the issue of determination of age at the time of trial. The Trial Court ought to have gone into the said question. The issue of age of the accused at the time of commission of offence is raised before this Court based on the evidences of D.W.1, D.W.2 and the documents in Exs.D1 and D2. We have perused the evidences of D.W.1 and D.W.2 and Exs.D1 and D2. We are satisfied that the accused has proved the fact that he

was a juvenile on the date of commission of the offences. Therefore, we hold that the entire trial is vitiated and the conviction and sentenced imposed on him are liable to be set aside.

18. Once such a conclusion is arrived that the accused was a juvenile in conflict with law as defined under the Act, as on the date of commission crime, then, as per the provisions of the said Act, we have to refer the matter only to Juvenile Justice Board for enquiry. But in the instant case, the records reveal that from the date of arrest, he has undergone imprisonment along with hardened criminals. He has spent about more than seven years in prison. At this stage, forwarding him to the Board, in our considered view would not serve any purpose as it is sought to be eschewed by the Act. Therefore, we are not inclined to refer the matter to the Board and we are inclined to set the accused at liberty after setting aside the conviction and sentence imposed on him.

19. In the result, the appeal is allowed and the conviction and sentence imposed on the appellant by the learned District and Sessions Judge in S.C.No.22 of 2010 are set aside and he is set at liberty. The fine amount shall be refunded to him.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

To

- 1.The Inspector of Police
Kotthagiri Police Station
Kotthagiri, Nilgiris District.
- 2.The District Sessions Court,
Nilgiris, Uthagamandalam.
- 3.-Do- Thro The Principal Sessions Judge,
Nilgiris.
- 4.The Judicial Magistrate,
Kothagiri, Nilgiris District.
- 5.-Do- thro The Chief Judicial Magistrate,
Nilgiris District.

6.The Superintendent Central Prison,
Coimbatore.

7.The District Collector,
Nilgiris District.

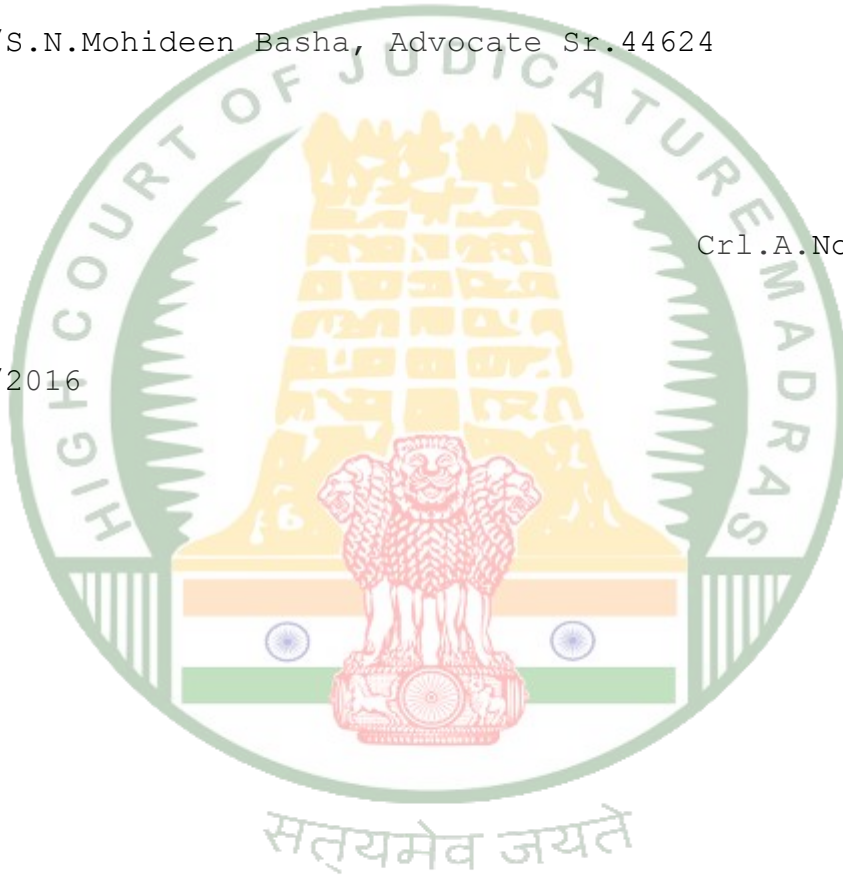
8.The Director General of Police,
Mylapore, Chennai-4.

9.The Public Prosecutor
High Court, Chennai.

+lcc to M/S.N.Mohideen Basha, Advocate Sr.44624

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