

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 17.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE **V.BHARATHIDASAN**

Crl.A.No.9 of 2009

Shankar

... Appellant

vs.

State rep. by
The Inspector of Police,
Veppur Police Station,
Veppur.
(Crime No.265 of 2007)

... Respondent

Criminal Appeal preferred under Section 374(2) Cr.P.C.,
against the judgement dated 18.12.2008 passed by the learned
Sessions Judge, Magalir Neethimandram, Cuddalore, in S.C.No.210
of 2008.

For Appellant : Mr.V.S.Kesavan

For Respondent : Mrs.M.F.Shabana
Government Advocate(Crl. Side)

JUDGMENT

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The first accused, in Sessions Case No.210 of 2008, on the
file of the learned Sessions Judge, Magalir Neethimandram,
Cuddalore, is the appellant herein. Totally, there are three accused
in this case. They stood charged for the offence under Sections 363,
366 IPC, and the first accused stood charged for the offence under

Section 376(1) IPC. The Trial Court, after trial, by Judgment dated 18.12.2008, convicted the first accused under Section 376(i) IPC and sentenced him to undergo Seven years rigorous imprisonment and imposed a fine of Rs.10,000/- in default to undergo three months rigorous imprisonment and convicted him under Section 366 IPC and sentenced him to undergo Seven years rigorous imprisonment and imposed a fine of Rs.2,500/- in default to undergo rigorous imprisonment for three months and convicted him under Section 363 ICP and sentenced him to undergo three years rigorous imprisonment and imposed a fine of Rs.2,500/- in default to undergo three months rigorous imprisonment. The accused 2 and 3 are acquitted from all the charges levelled against them. The sentences ordered to be run concurrently. Challenging the above said conviction and sentence, the appellant/first accused is before this Court with this Criminal Appeal.

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

(i) P.W.5 is the victim girl. P.W.1 is her mother, and

P.W.12 is her father. The accused was working as Tractor Driver in P.W.1's house. On 15.07.2007 at about 9.00 pm., all the three accused kidnapped P.W.5 and A-2 and A-3 send the first accused and P.W.5, in a bus going to Chennai. P.W.1 after came to know

about the same, immediately informed her husband P.W.12, who

was in Dubai. P.W.1's husband came back to Chennai and on 19.07.2007, he has given complaint[Ex.P1] before the respondent police.

(ii) P.W.16, the Sub Inspector of Police, working in the respondent police station, on receipt of the complaint from P.W.12, registered a case in Crime No.265 of 2007, for the offence under Section 366 IPC, prepared first information report[Ex.P11]. Then, he commenced the investigation, proceeded to the scene of occurrence, prepared an observation mahazar [Ex.P11], a rough sketch [Ex.P12] in the presence of witnesses. He examined the witnesses and recorded their statements. On the next day morning, he arrested the accused 2 and 3 and remanded them to judicial custody, and handed over the investigation to the Inspector police.

(iii) P.W.17, the Inspector of Police, working in the respondent police station, on receipt of the first information report, commenced investigation, on 27.10.2007, he arrested the first accused and secured P.W.5, he examined the victim girl and recorded her statement, and sent both the first accused and P.W.5 for medical examination. P.W.15, a Doctor, working in the Government Hospital, Cuddalore, She examined P.W.5. She issued wound certificate Ex.P10. P.W.11, the Radiologist, working in the Government Hospital, Cuddalore. He has conducted Radiologist test for P.W.5 and he has given certificate [Ex.P5] and stated that P.W.5

completed the age of 17 and below 18, P.W.10, the Doctor, working in the Government Hospital, Cuddalore. He examined the first accused and has given opinion that he is potent and he has also issued certificate [Ex.P4]. P.W.17, continued the investigation, examined the Doctors and other witnesses and recorded their statements and after completion of investigation, he laid charge sheet.

3. Based on the above materials, the Trial Court framed charges as detailed above, and the accused denied the same as false. In order to prove its case, the prosecution examined as many as 17 witnesses, exhibited 16 documents and 2 material objects were marked.

4. Out of the witnesses examined, P.W.1 is the mother of P.W.5/victim girl. According to her, the accused was working as Tractor driver in her house. On 15.07.2007, the first accused kidnapped her minor daughter and took her along with A2 and A3. Then, she informed the same to her husband, at that time he was working in Dubai, then, her husband came to India and filed a complaint. P.W.2 is the brother of P.W.1. According to him, P.W.1 informed him about the kidnapping of P.W.5, thereafter he and P.W.1 searched her. On 16.07.2007, P.W.3 informed him that he

saw both the first accused and P.W.5 was going in about to Chennai. The second and third accused sent them off at Veppur "Koot Road". Then, he informed the same to his brother-in-law and thereafter his brother-in-law given complaint on 19.07.2007 to the respondent police. P.W.3 belongs to the same village, he known both the accused and P.W.5. According to him, on 15.07.2007, at about 12.00 p.m., he was waiting in Veppur "Koot Road" for bus, at that time all the accused along with P.W.5, came there and the first accused and P.W.5 boarded in a bus going to Chennai. Subsequently, he informed the same to other witnesses. P.W.4 is the witness to the observation mahazar. P.W.5 is the victim girl. According to her, on 14.07.2007 her father went to Dubai and on 15.07.2007 at about 9.00 p.m., she along with P.W.1 went to a circus, at that time, the first accused asked her to come along with him and told her that he will marry her, and asked her to come to the border of the village. Then, she took Rs.1000/- and some dresses from the house and went to the village border, where, the first accused was waiting. Then, the first accused took her to Veppur Koot Road, where, the second and third accused are waiting, the third accused given a Mangalsuthra, along with a chain and asked him marry her and live happily. Then, the first accused and P.W.5 boarded a bus and gone to Chennai. At Chennai, they went to Medavakkam and stayed at a house of one Palani, and after two

days, the marriage took place between the first accused and P.W.5. The first accused was working as driver at Chennai and during that period they were living as husband and wife. At that time, the first accused had intercourse with her.

5. After three months, the mother of the first accused informed her that the police arrested the second and third accused. Then, they came back to Seithiyathoppu, at that time the police arrested them. P.W.6 is an agriculturist belongs to the same village. He identified the first accused at the time of arrest and he is also the witness to the confession of the first accused. P.W.7 is a mason working at Chennai. According to him on 16.07.2007, the first accused and P.W.5 approached him and told him that they would like to get married and he arranged for a accommodation at a company. Thereafter, both married near a temple, and they stayed there for three months, at that time the first accused was working as a driver. P.W.8 is a person arranged accommodation for A1 and P.W.5 and he also witness to the marriage between A-1 and P.W.5. According to him, both the P.W.5 and the first accused stayed there for three months. P.W.9 is a person gave his ration card for purchasing a mobile phone sim card. His evidence has no substance. P.W.10 is the Doctor working in the Government Hospital, Cuddalore. He examined the first accused and given

certificate. P.W.11 is Radiologist working in the Government Hospital, Cuddalore, he examined P.W.5 and given a report Ex.P5, stating that P.W.5 is aged above 17 years and below 18 years. P.W.12 is the father of P.W.5. According to him, he was working at Dubai and he was not aware of the date of birth of P.W.5. He left Dubai on 14.07.2007 and thereafter he came to know his daughter was found missing. Then, he came to his native place and went to the police station and lodged a complaint.

6. P.W.13 is a Contractor at Chennai. He is the employer of the first accused and the first accused was working as Driver under him. P.W.14 is the Headmaster working in the Government High School, Kannanur. He has given date of birth certificate to P.W.5, stating that the date of birth of P.W.5 is 20.06.1992. P.W.15 is the Doctor working in the Government Hospital, Cuddalore. She examined P.W.5 and given certificate. P.W.16 is the Sub Inspector of Police working in the respondent Police Station, on receipt of the complaint from P.W.12, registered a case, prepared first information report, arrested the second and third accused and remanded them to judicial custody and examined the witnesses and recorded their statements and handed over the investigation to the Inspector of Police. P.W.17 is the Inspector of Police working in the respondent police station. On receipt of the first information report, he

continued the investigation, examined the witnesses and recorded their statements and after completion of investigation, he laid charge sheet.

7. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. His defence was total denial. The accused examined one Rajaraman as D.W.1, and marked one document as Ex.D1. D.W.1 is the uncle of the first accused. He spoke about the marriage between one Govindan and P.W.5, and they have also marked the marriage invitation of P.W.5 as Ex.D1.

8. Having considered all the above, the Trial Court convicted and sentenced the first accused for the offences as stated in the first paragraph of this judgment and acquitted the second and third accused. Challenging the above conviction and sentence, the first accused is before this Court.

9. I have heard Mr.V.S.Kesavan, learned counsel appearing for the appellant and Mr.M.F.Shabana, learned Government Advocate(Crl. Side) appearing for the State and I have perused the materials available on record.

10. It is a specific case of the prosecution is that P.W.5 is a minor girl at the time of occurrence and the first accused kidnapped and induced her and compelled her to marry him and thereafter he committed rape. But the age of the victim girl is disputed by the accused and contending that at the time of occurrence she was major.

11. Since the age of the victim is under dispute, first I take up the issue with regard to the age of the P.W.5/victim girl. In order to prove the age of P.W.5, the prosecution marked the certificate issued by P.W.14, the Headmaster, working in the Government High School, Kannaur, where, the victim girl was studied and the certificate was marked as Ex.P8. In the above certificate, it is stated that the certificate was issued on 16.07.2007, and the date of birth of P.W.5 is 20.06.1992. But, the learned counsel appearing for the appellant would contend that it is not a birth certificate or transfer certificate issued by the School. It is only a certificate given by the Headmaster. In the said certificate it is stated that the date of birth is 20.06.1992 without reference any document, apart from that Ex.P8, the certificate was issued only to the parents of P.W.5, the respondent police separately applied for birth certificate from another Headmaster, namely, one Rajarajan and he has also issued a separate certificate, and he has also given

statement under Section 161 Cr.P.C. at the time of investigation, P.W.16, the Sub Inspector of Police also admitted the same in his cross examination that he sent a request to the Headmaster, and obtained the certificate from the Headmaster on 19.07.2007, but the same was not marked by the prosecution, P.W.17, the Inspector of Police also in his cross examination has stated that he recorded the statement of Headmaster, namely, Rajarajan and he was not examined by the prosecution before the Court. P.W.14, the another Headmaster also admitted that he has issued Ex.P8, certificate to the parents of P.W.5 on 16.07.2007. Even though it is admitted that the respondent police obtained another certificate from the Headmaster, namely, Rajarajan on 19.07.2007, the said certificate was not marked before this Court and the Headmaster Rajarajan was also not examined before the trial Court. But the certificate issued to the parents of the victim girl on 16.02.2007 was marked before this Court as Ex.P8, therefore, it create a doubt about the genuineness of the certificate. Apart from that Ex.P8 is only a certificate issued by P.W.14, without reference to any record, and it has no evidentially value, hence much importance can be given to Ex.P8.

12. The other material available to establish the age of

Government Hospital, Cuddalore has examined P.W.5 and he has given opinion that the age of P.W.5 is between 16 to 18 years and she was also subject to radiology test. P.W.11, the Radiologist, working in the Government Hospital, Cuddalore. He has examined P.W.5, and he was of the opinion that the age of P.W.5 is above 17 years and below 18 years. It is settled law that a Radiological report would only point out the age approximately with a variation of two years, and the margin of error in age has also been judicially recognized. The Hon'ble Supreme Court in **JAYAMALA Vs. HOME SECRETARY, GOVERNMENT OF JAMMU AND KASHMIR AND OTHERS, reported in 1982(2)SCC 538**, is held as follows:

"However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side"

13. In the above facts and circumstances of the case, the age of the girl could not be fixed on the basis of the certificate issued by the Headmaster, P.W.14, the Radiology report for fixing the age of the victim is above 17 years and below 18 years and giving margin of error of two years, the victim is above 18 years and she cannot be considered as minor at the time of occurrence. In

the above circumstances, I am of the considered view that the

prosecution has failed to prove that the victim girl was minor at the relevant date.

14. Now, I have to consider whether the accused has abducted the victim girl and compelled her to marry him and committed rape. To prove the same, the prosecution examined the victim girl as P.W.5. From the evidence of P.W.5, it is clear that the accused did not abduct her, but P.W.5 and on her own volition went along with the first accused. According to her, on 15.07.2007, at about 9.00 pm., she took Rs.1000/- cash and two set of dresses and then she went out of the house and gone to the Veppur Koot Road, where, the accused 1 to 3 are waiting and both the first accused and P.W.5 boarded in a bus and gone to Chennai, where they have got married, and living as husband and wife for nearly three months. After three months, they came to Seithiyathoppu and police arrested them. From the evidence of P.W.5, it could be seen that P.W.5 only on her own volition went along with the first accused and gone to Chennai and got married and both were living husband and wife nearly for three months. In the above circumstances, the prosecution has failed to establish the offences under Sections 363 and 366 IPC. So far as charge under Section 376 IPC, it is clear from the evidence of P.W.5 that only after marriage, A-1 and P.W.5 had sexual intercourse, and P.W.5 being a

major who was a consenting party for the same, and A-1 cannot be convicted for the offence under Section 376 IPC and in the above circumstances, the appellant is entitled for acquittal. In the above circumstances, I am of the considered view that the prosecution has failed to prove the case beyond any reasonable doubt. Hence, the appellant is entitled for acquittal.

15. In the result, the Criminal Appeal is allowed. The conviction and sentence imposed on the appellant in S.C.No.210 of 2008 dated 18.12.2008 on the file of the learned Sessions Judge, Magalir Neethimandram, Cuddalore is set aside and the appellant/accused is acquitted of all the charges levelled against him and bail bond, if any, executed by him shall stand cancelled and the fine amounts paid by him is ordered to be refunded forthwith.

सत्यमेव जयते

17.02.2017

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To

- 1.The Sessions Judge,
Magalir Neethimandram,
Cuddalore.
- 2.The Inspector of Police,
Veppur Police Station,
Veppur.
- 3.The Public Prosecutor,
High Court, Madras.



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