

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.03.2017

CORAM

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

Crl.A.No. 182 of 2016

Nazer

... Appellant / Accused

Vs.

The State represented by
Inspector of Police,
B-10, Selvapuram Police Station,
Coimbatore
(Crime No.1089 of 2009) ... Respondent / Complainant

PRAYER: Criminal Appeal is filed under Section 374 (2) of the Code of Criminal Procedure to set aside the conviction and sentence passed by the Learned Sessions Judge, Magalir Needhimandram (Mahila Court), Coimbatore in S.C.No.1 of 2010 dated 18.03.2014 and allow the above Criminal Appeal.

For Appellant : Mr.C.Prabakaran

For Respondent : Mr.K.Mathan
Government Advocate (Crl.Side)

J U D G M E N T

The Appellant / Accused has focussed the instant Criminal Appeal before this Court (as an Aggrieved person) as against the Judgment dated 18.03.2014 in S.C.No.1 of 2010 passed by the Learned Sessions Judge (Mahila Court), Coimbatore.

2. The Learned Sessions Judge, (Mahila Court) Coimbatore while passing the Impugned Judgment in S.C.No.1 of 2010 on 18.03.2014 had at Paragraph No.38 among other things observed that "... it is crystal clear that the accused has abducted the victim girl under the threat with an intent to commit sexual offence and in the course of same transaction for want of money, the Accused had mortgaged silver anklet of the victim and later, the same was recovered etc.,' and came to the conclusion that the Respondent / Prosecution had proved the charge against the Accused beyond all reasonable doubt.

3. In short, the trial Court had found the Appellant / Accused guilty in respect of an offence under Sections 366(A) and 376 (1) of Indian Penal Code and in respect of an offence under Section 366 (A) of IPC, he was imposed with a punishment of Seven Years Rigorous Imprisonment and was directed to pay a fine of Rs.10,000/- and in default of payment of fine, he was directed to undergo Simple Imprisonment for a period of Six Months.

4. Insofar as the offence under Section 376(1) of IPC was concerned, the Appellant / Accused was sentenced to undergo Seven Years Imprisonment and he was imposed with a fine of Rs.50,000/- (on the payment of the same, the said amount was ordered to be given as compensation to the victim under Section 357 of Cr.P.C., after the Appeal time was over).

5. It comes to be known that apart from the above, the trial Court by taking into consideration the nature and circumstances of the case, gravity of the sufferings by the victim (P.W.2), the pathetic family background of victim's family towards rehabilitation had directed the Government of Tamilnadu to pay a sum of Rs.1,00,000/- from Victim's Compensation Fund as an interim relief. Moreover, the trial Court had directed to provide a suitable job subject to the qualification of the victim towards permanent relief by way of rehabilitating the victim of Section 7(5) Protection of Children from Sexual Offences Rules, 2012. The said amount was directed to be paid by the Government within 30 days from the date of receipt of the Judgment.

6. Challenging the correctness / validity of the Judgment dated 18.03.2010 in S.C.No.1 of 2010 passed by the Learned Sessions Judge, (Mahila Court), Coimbatore, the Learned Counsel for the Appellant / Accused submits that the trial Court had failed to take into consideration the several contradictions in respect of the evidence of prosecution witnesses and in fact the Respondent / Prosecution had failed to establish the case against the Appellant beyond all reasonable doubt.

7. The Learned Counsel for the Appellant / Accused urges before this Court that P.W.2 (Prosecutrix / victim) had travelled with the Appellant / Accused to various places and there was no refusal or complaint made by P.W.2 at any point of time, as such, the finding of the trial Court that the 'Consent' was obtained by fear and threat are unsustainable in Law.

8. Advancing his arguments, the Learned Counsel for the Appellant submits that P.W.2 / Victim is a consenting party to the alleged occurrence and therefore, the offences under Sections 366A and 376 of IPC were not made out in the present case.

9. The Learned Counsel for the Appellant takes a stand that the family members of P.W.2, namely, P.W.1 (Father), P.W.4 (Younger sister) and their neighbours had known the conduct of P.W.2 and the Appellant and in fact the Respondent / Prosecution had foisted the case against the Appellant alleging that the Appellant / Accused had forcibly kidnapped P.W.2. In reality, the evidence of P.W.1 and P.W.2 do not inspire the confidence of the Court and as such the Judgment of conviction passed by the trial Court in S.C.No.1 of 2010 dated 18.03.2014 needs to be set aside, in the interest of justice.

10. The Learned Counsel for the Appellant puts forward an argument that the evidence of P.W.1, P.W.2 and P.W.4 speak about the love affair between the Appellant and P.W.2, therefore, the question of kidnapping the woman and physical affair under threat would not hold good.

11. The Learned Counsel for the Appellant brings it to the notice of this Court that the evidence of P.W.15 (Assistant Director, Forensic Department) mentions that 'Serology Report' was inconclusive of 'Human Group' and therefore, there is no clinching proof beyond reasonable doubt that the Appellant / Accused had physical affair with P.W.2.

12. The Learned Counsel for the Appellant contends that the very case of the Respondent / Prosecution itself was that the Appellant / Accused had threatened P.W.2 (victim) with acid egg and cyanide, but, these were not recovered from the Appellant. Further, it is represented on behalf of the Appellant that the bag was also not recovered by Investigation Officer (P.W.18).

13. In response, the Learned Government Advocate (Crl.Side) contends that before the trial Court, on behalf of the Respondent / Prosecution, witnesses P.W.1 to P.W.18 were examined, Exhibit P.1 to P.15 were marked and M.O.1 to M.O.4 were marked. That apart, D.W.1 and D.W.2 were examined on the side of the Appellant / Accused. The trial Court had on an appreciation of the entire oral and available documentary evidence on record come to the consequent conclusion that the Appellant / Accused was guilty in respect of an offence under Sections 366(A) and 376(1) of I.P.C., and imposed him with necessary punishment and the same does not suffer from any legal infirmities.

14. At the outset, it is to be pointed out that the First Charge levelled against the Appellant / Accused (before the trial Court) was that on 22.09.2009 at about 8.30 hrs, 17 years

minor girl, Ramya daughter of Baskaran, residing at Door No.11/6 Telungupalayam Section Boundary P.10, Selvapuram Thillai Nagar, 2nd Street was lured with words 'if not coming to live with him jointly, he would pour Acid' and by uttering the said words threatened the girl by stating that he would 'Consume Cyanide' and die and kidnapped her and therefore, he had committed an offence under Section 366A of Indian Penal Code.

15. The Second Charge levelled against the Appellant was that in continuation of the said incident, minor girl, Ramya was kept in the house of Raguman of Kalingarayapalayam, Bhavani and in spite of her refusal, by not taking into account, forced her for the period from 22.09.2009 to 24.09.2009 and against her wish he had indulged in intercourse and committed rape on her and thereby committed an offence under Section 376 of IPC.

16. To unfold the whole story of the prosecution case in a proper manner, this Court makes a useful reference to the depositions of Prosecution Witnesses concerned.

17. It is the evidence of P.W.1 (father of Victim) that his wife is a mentally retarded person and further that he is a handicapped person and the victim girl (P.W.2) is his elder daughter and that her date of birth was 18.06.1993. It is the further evidence of P.W.1 that P.W.2 was working in a Diamond Factory at Telungupalayam and she went for her work on 22.09.2009.

18. P.W.1 adds in his evidence that P.W.2 after reaching her company he usually would make an enquiry with her and like that, in a similar fashion, on 22.09.2009, he gave a call to his daughter, P.W.2 over the cell phone, but, the bell was only ringing and the call was not attended to. Thereafter, the call got cut off. When he again made a contact with his daughter, (P.W.2) her cell phone was switched off and therefore, he sent his second daughter and his wife to the Company to ascertain as to what had happened and that when they went there, they were informed that P.W.2 had not turned up to the company for job and that information was passed on to him by his wife and the second daughter and further that once again he made a contact through cell phone with his daughter and at that time also, the contact was cut off.

19. P.W.1 proceeds to depose in his evidence that generally P.W.2 would return to his house at evening 5.30 p.m., but, on that date, 22.09.2009, she had not returned to the house till 8.00'o clock in the night and he made a search in the nearby

place and therefore at about 10.00' o clock he gave a complaint before the P-10 Police station and that he informed his friend about the details of his missing daughter and his friend wrote the complaint, in which, he had affixed his signature and the said complaint was Ex.P.1. He was also examined by the police on the next day and when his daughter (P.W.2) went missing, at that time, she had not worn any jewels and only she was wearing anklets on her legs and the same was marked as M.O.1 (2 in number).

20. In fact, P.W.1 in his evidence had stated that when police made an enquiry with him, he informed that the Appellant / Accused's shop was closed for two days and therefore, he had a suspicion on him.

21. P.W.2 (minor girl) in her evidence had stated that she had studied up to IX standard and that her date of birth was 08.06.1993 and her sister Vasanthi was studying IX standard at the Government School and at the time of occurrence, because of family circumstance, she was going for a job at Diamond Factory at Telungupayalayam and that she knows the Appellant / Accused, who was running a provision and vegetable shop on right hand side of her house. Further, P.W.2 in her evidence had stated that her monthly salary was Rs.5,000/- and that her father had purchased one mobile phone and his father was in possession of one cell phone and at the time of occurrence each one of them were possessing one cellphone.

22. P.W.2 had stated in her evidence that two months prior to the occurrence date, the Appellant / Accused gave her a Tamil padi C.D., and the deck and since she had an acquaintance that the Appellant / Accused was used to view the CDs in her house, indeed she had returned the deck to the Appellant / Accused based on the advice given by her father (P.W.1)

23. P.W.2 in her evidence had candidly deposed that when she had visited the Appellant's shop, the Appellant / Accused would not give her the articles which she had asked for and compulsorily, he used to talk and heckle with her and one day, Karthik of Chinniyampalayam came to the Appellant's shop and the Appellant had introduced the said Karthik to her stating that he was his friend and after taking the CD and deck one month later, the Appellant / Accused had threatened her by uttering 'come along with me to live, otherwise acid would be thrown on her face and that he would consume cynaide and would die'

24. It is the further evidence of P.W.2 that she had informed the Appellant / Accused stating that her father, P.W.1, is a handicapped person and mother is a mentally retarded person and that she had to look after younger sister and ultimately

refused the proposal of the Appellant / Accused and after scolding him came to her house in anger.

25. Further, it is the evidence of P.W.2 that when she was usually going to the company on 22.09.2009, the next day to Ramzan festival at about 7.30 a.m., the Appellant / Accused came very nearer by touching in silver colour bike and compelled to come along with him by threatening that he would throw acid on her face and that he too would consume cyanide. She got frightened went along with Appellant / Accused in the bike and dropped the bike at Chinniyampalayam Karthik's house. As a matter of fact, the Appellant / Accused had handed over bike and key to Karthik and we came to Chinniyampalayam bus stand. The Appellant / Accused took the mobile phone from the victim and the Appellant / Accused took the victim, P.W.2 to Kalingarayanpalayam near Bhavani in a bus and went to one Raghuman's house (his friend) and they reached the house at about 6.00 p.m., because of the rain, the dress worn by P.W.2 became wet and that she was given a saree and blouse by Raghuman's wife and she worn the said dress.

26. It is the evidence of P.W.2 that the Appellant / Accused and herself went into a room for sleep and that the Appellant / Accused hugged her and kissed her and against her wish, indulged in these acts and she was informed him that after marriage, these things can take place and inspite of herself telling the Appellant / Accused, he had not heeded to the same and committed rape by force. Apart from that, the Appellant inserted his male organ into the female organ of the victim and he had intercourse for some time. and this was done forcibly by him and for the next three days, she and the Appellant / Accused stayed in the same house. For three days, the Appellant / Accused had sexually assaulted her.

27. P.W.2 in her evidence had stated that on 25.09.2009, the Appellant / Accused and herself had left the Raghuman's house and went to the house of Hillal (the Appellant / Accused's elder brother) and she asked her phone, to which the Appellant / Accused informed that the phone was missing and that he asked money from her and that she informed him that she had no money therefore, he secured one pair of anklet from her, M.O.1 and that he went along with said article. Moreover, she was informed that the Appellant / Accused had mortgaged the said anklet for Rs.450/- and they proceeded to Madurai on 26.09.2009 by bus. The Appellant / Accused took the P.W.2 to his friend's house, Jayaseelan (in Thirumalai Naicker Mahal) and they stayed there in the house of Jayaseelan. She thought of her parents on 27.09.2009 and insisted the Appellant / Accused to take her for which he refused by saying that he would consume cyanide.

28. The police official came to Jayaseelan's house and made an enquiry on 27.09.2009 and she (P.W.2) had narrated to them about the whole episode and she had handed over her dress to them. She was also taken to the police station where she was subjected for medical examination and in fact victim's statement was recorded by the Learned Judicial Magistrate and in the said statement she had signed. The saree, inskirt, panties worn by her at the time of occurrence at Raghuman's house were marked as M.O.2 to M.O.4.

29. P.W.3 (Neighbour of P.W.2) had deposed that P.W.2 was missing on 22.09.2009 at about 8.00 a.m. and on 22.09.2009 he saw P.W.2, victim girl proceeded in a bike along with Appellant / Accused.

30. P.W.4 is the sister of P.W.2 and since she had deposed in her evidence like that of the father, the same is not repeated by this Court once again.

31. P.W.5, Neighbour of P.W.1 had heard about the missing of P.W.2. P.W.7 (Manager of Dhanasree Finance) in his evidence had stated that on 25.09.2009 one Hillaludeen and the Appellant / Accused came to his shop and mortgaged one pair of anklet for Rs.650/- which was identified by him, M.O.1 (series).

32. P.W.8 had accompanied the then Inspector of Police with a view to identify the Appellant / Accused and P.W.2. As per Ex.P.3, Seizure Mahazar, the Police had recovered the dress from P.W.2. In fact, the Appellant / Accused gave a confession and the admitted portion of the same was Ex.P.4. Police had seized the silver anklet from the Finance Company, as per Ex.P.5, Seizure Mahazar.

33. P.W.9 (Doctor) had examined the Appellant / Accused on 23.10.2009 and gave Ex.P.6 Potency report. P.W.10 (Doctor) in his evidence had deposed that he took X-ray, Ex.P.7 on the Appellant / Accused and found that he was of age between 22 to 25.

34. P.W.11 (Headmistress of the School) gave Transfer Certificate, Ex.P.8 to P.W.2. P.W.13 (Doctor) had examined P.W.2 (victim Girl) on 28.09.2009 and found that the hymen was not intact and the vagina permits two fingers and there is no symptoms for pregnancy, and Ex.P.10 was Accident register.

35. P.W.14 (Radiologist) had given Ex.P.9, X-ray report and he opined that the age of P.W.2 was between 14 and 17.

36. It is the evidence of P.W.15, Assistant Director of Forensic Department that he received the case properties,

namely, Yellow colour sarree etc., and found in item nos. 1 and 2 the blood stain and found no blood stain in Item No.3. In fact the Item Nos. 1 and 2 were sent for Serology Report and found that human group was inconclusive and that the said reports were marked as Ex.P.11 and Ex.P.12. As a matter of fact, vaginal smear and pubic hair were sent for Forensic examination and there was no spermatozoa found and Ex.P.13 was the report.

37. P.W.17 (Judicial Magistrate No.1, Coimbatore) had recorded the statement of P.W.2 victim under Section 164 of Cr.P.C., and the Statement File is marked as Ex.P.15.

38. In this connection, it may not be out of place for this Court to significantly point out that P.W.6 (witness to the observation mahajar) had turned 'Hostile' and his signature was alone marked as Ex.P.2.

39. P.W.16 (then, S.I. of Police) attached to P10 Selvapuram Police station had verified the complaint given by Baskaran, which was registered in CSR No.207 of 2007 by the then Head Constable, Muthuraz (when he was incharge of the police station). In fact P.W.16 visited P.W.2's house and made case enquiries with the neighbours and other material witnesses and came to the conclusion that P.W.2, victim was a minor at the time of occurrence and a case was registered in P.S. Crime No.1088 of 2009 under the caption 'girl missing' the printed FIR was marked as Ex.P.15.

40. P.W.12 (then Head constable) attached to P-10 Selvapuram Police Station had accompanied then, Inspector of Police, to Madurai based on secret information and found that the Appellant / Accused and P.W.2 were in the house of Jayaseelan and at the time of arresting the Appellant / Accused, the Appellant had given a confessional statement and based on the said confession, one pair of anklet was redeemed from the Pawn Broker shop. The then Inspector of Police (P.W.18) had prepared observation mahazar (Ex.P.2) and seized the dresses (Ex.P.3) from P.W.2 under seizure mahazar before that the confession was recorded in the presence of concerned witnesses and other seizure and other records were prepared in the presence of relevant witnesses. The Inspector of Police had examined the material witnesses and P.W.2 and the Appellant / Accused and sent them for medical examination as well as for Radiology test and transmitted the case properties to the Forensic Lab and secured the report.

41. P.W.18 (Inspector of Police) who took up the further investigation of the case had deposed that after examining the official witnesses like Doctors, who had examined the Appellant / Accused and the P.W.2 etc., finally laid charge sheet against the Appellant / Accused under Sections 366 and 376 of Indian Penal code.

42. As far as the present case is concerned, it is to be pointed out that P.W.2 (Victim - Minor) in her evidence had categorically deposed that the Appellant / Accused gave her cinema cassettes (containing songs and movie and cassettes of the Actors) and only in cross examination she had spoken about the details relating to movies. In fact, she was abducted by the Appellant / Accused and taken to various places. To put it precisely, in her chief examination, P.W.2 had in a crystalline fashion had deposed that after the date of Ramzan, on 22.09.2009 at about 7.30 a.m. in the morning when she was proceeding to her company, at that time, Appellant / Accused came dashing her in a silver colour bike and threatened her by asking her to come and live with him otherwise he would throw acid on her and he would consume cyanide and die and therefore, she got frightened and sat on the bike. Apart from that she was taken to Chinniyampalayam in the same bike and to one Raghuman's house at Kalingapuram in the bus, she was also sexually assaulted by the Appellant / Accused for three days and thereafter, taken to Madurai where the Appellant / Accused's friend Jayaseelan is residing.

43. In the present case, P.W.2 had deposed in her evidence about the manner in which the Appellant / Accused had hugged her, kissed her forced her and did some acts against her wish etc., In spite of her refusal, the Appellant / Accused had forcibly committed rape on her.

44. The evidence of P.W.2 is cogent, coherent and worthy of existence, in the considered opinion of this Court. Although P.W.1 being minor at the time of occurrence was under the threat / fear and in fact even the consent of P.W.2 under the fear / threat and that too in a compelling situation would not anyway come to the aid of the Appellant / Accused, in the considered opinion of this Court.

45. D.W.1 (friend of the Appellant) had worked previously at Narasimma Mills, Coimbatore and from the residence of DW1, P.W.2 was brought. Based on the confession of the Appellant / Accused admitted portion, the same was proved through P.W.8 and M.O.1, Anklet was recovered.

46. Admittedly, the Appellant's father (P.W.1) is a handicapped person running sundal business in tricycle. P.W.2's mother is mentally retarded person. Since P.W.2 (affected / victim) had given a clear cut evidence about the conduct of the Appellant / Accused in ravishing her, her evidence inspires the confidence of this Court and same is accepted.

47. D.W.2 (Brother-in-Law of the Appellant), his evidence was to the effect that on the date of occurrence, he along with

Appellant / Accused went to the Appellant / Accused's mother house etc., and that the Appellant / Accused was taken to the police on 24.09.2009.

48. It is to be borne in mind that the gravamen of offence under Section 366 of IPC is 'Abduction or Kidnapping'. The term 'Abduction' is defined under Section 362 of IPC, which means that by force or deceitful method in and by which a minor is induced to go from a place. In reality, kidnapping presupposes taking or enticing a minor from a lawful guardianship. Even when a minor is induced to go with the Accused allured by any means of offer is nothing but taking or enticing.

49. It is true that an offence under Section 366A of IPC is entirely distinct from the one as per Section 366 of IPC. The words 'illicit intercourse' in Section 366A of IPC refers to sexual intercourse between a man and a woman, who are not husband and wife as per decision Kesar Mal V. Emperor reported in AIR 1932 Lah. 555. In reality, the onus is on the Prosecuting Agency to establish that an Accused intended that the girl would be compelled or seduced to illicit intercourse with someone other than himself or that an accused knew that it was likely that she would be either forced or seduced. As a matter of fact, the existence of a particular or specific knowledge is a vital element in respect of an offence Section 366A of IPC (vide decision Manik Molla V. Emperor reported in AIR 1945 Calcutta page 432). However, if the charge is under Section 366A of IPC, then, kidnapping is not an essential element. It is to be relevantly pointed out that while kidnapping, abduction is a part of an offence under Section 366 of IPC, its latter portion i.e., 'Inducement' is the common factor in Section 366 and 366A of IPC.

50. Be that as it may, in the light of the qualitative and quantitative discussions before this Court and on taking note of the entire attendant facts and circumstances of the present case in an encircling fashion comes to a resultant conclusion that the Respondent / Prosecution had proved the charges under Sections 366A and 366(i) of IPC against the Appellant / Accused beyond all shadow of doubt. In this regard, this Court is in complete agreement with the view taken by the trial court.

51. In fact, the trial Court for an offence under Section 366A of IPC, it convicted the Appellant / Accused to undergo sentence of seven years Rigorous Imprisonment and imposed a fine of Rs.10,000/- etc., likewise the Appellant / Accused in respect of offence under Section 376(i) of IPC was awarded with a punishment of seven years imprisonment and imposed a fine of Rs.50,000/- (on payment of the same had directed the said amount to be given as compensation to the victim under Section 357 of Cr.P.C.,)

52. Considering the fact that the Appellant / Accused as well as P.W.2 are living with their respective families as on date and this Court taking note of the present facts and circumstances of the case is of the considered view that the award of Seven Years Rigorous Imprisonment in respect of an offence under Section 366A of IPC and Seven Years Rigorous Imprisonment for offence under Section 376(i) of IPC imposed by the trial Court are slightly on the higher pedestal and in the interest of justice reduces the same to that of Five years Rigorous Imprisonment each. The sentences are ordered to run concurrently. The period already undergone by the Appellant is ordered to be set off under Section 428 of Cr.P.C., In other respects, the Judgment of the trial Court is not yet displaced by this Court. Consequently, the Criminal Appeal succeeds in part.

53. In fine, the Criminal Appeal is allowed in part. The Judgment of the trial court dated 18.03.2014 in S.C.No.1 of 2010 stands modified in above terms.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

To

1. The Sessions Judge
Magalir Neethimandram
(Mahila Court), Coimbatore
2. -Do- Thro' The Principal Sessions Judge
Coimbatore
3. Judicial Magistrate No 5
Coimbatore
4. -Do- Thro' The Chief Judicial Magistrate
Coimbatore
5. The Superintendent,
Central Prison, coimbatore
6. The Inspector of Police
B 10, Selvapuram Police Station
Coimbatore

7. The Public Prosecutor,
High Court
Madras

8. The Record keeper
V.R. Section
High Court, Madras

+1 CC to Mr. C. Prabakaran, Advocate sr 15630

Crl.A.No. 182 of 2016

GJ (CO)
sp/28/3



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