

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.03.2017

CORAM

THE HONOURABLE MR. JUSTICE M.VENUGOPAL

Crl.A.No. 713 of 2016 and
Crl.M.P.No.10222 of 2016

Prathap

... Appellant / Accused

Vs.

State rep. By
the Inspector of Police,
Conoor Police Station,
Coonoor.

... 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 against the Appellant on 18.04.2016 in S.C.No.21 of 2014 on the file of Magalir Neethimandram (F.T.M.C.) at Uthagamandalam and acquit him from all the charges.

For Appellant :Mr.O.A.Dinesh Kumar

For Respondent :Mr.K.Mathan

Government Advocate (Crl.Side)

J U D G M E N T

The Appellant / A.1 has preferred the instant Criminal Appeal before this Court as against the Judgment dated 18.04.2016 in S.C.No.21 of 2014 passed by the Learned Sessions Judge (Mahila Court, Fast Track) Udhagamandalam.

2. The Learned Sessions Judge (Mahila Court, Fast Track) Udhagamandalam while passing the impugned Judgment in S.C.No.21 of 2014 on 18.04.2016 at Paragraph No.32 had categorically observed that "the Appellant / A1 had kidnapped the 14 years old girl (P.W.2) from the custody of her parents and further P.W.2 was kidnapped without the knowledge of her parents (P.W.1 and P.W.3) and for more than six months kept her under his custody and on numerous occasions forcibly had sexual intercourse with her and also made her pregnant and these offences were proved by the Respondent / Prosecution without contradictions". Further, the Appellant / A.1 was found not guilty in respect of an offence under Section 366A of IPC. Finally, the Appellant / A.1

was convicted and sentenced to undergo Two Years Rigorous Imprisonment in respect of an offence under Section 363 of IPC and also he was imposed with a fine of Rs.5,000/-, in default of payment of fine, he was directed to undergo further six months Simple Imprisonment.

3. In regard to the offence under Section 376(1) of IPC was concerned, the Appellant / A.1 was found guilty in respect of that offence and he was convicted and sentenced to undergo Seven Years Rigorous Imprisonment and further he was directed to pay a fine of Rs.5,000/-, in default of payment of said fine amount, he was directed to undergo Two Years Simple Imprisonment. The sentences were ordered to run concurrently. However, the Appellant / A.1 was found not guilty in respect of an offence under Section 366A read with 109 of IPC and therefore he was acquitted under Section 235(1) of Cr.P.C.,

4. Being dissatisfied with the Judgment dated 18.04.2016 in S.C.No.21 of 2014 passed by the trial Court, the Appellant / A.1 has preferred the present Criminal Appeal by contending that in the instant case, the Complainant / P.W.1 and P.W.2 had deposed before the trial Court that their daughter, viz., P.W.2 was in love with the Appellant / A.1 and in fact, the Appellant / A.1 loved P.W.2 for the past three years.

5. The Learned Counsel for the Appellant urges before this Court that in Ex.P.1- Complaint (dated 02.09.2012), P.W.1 (Father of P.W.2) had admitted that his daughter P.W.2 was in love with the Appellant and she accompanied the Appellant on her free Will and therefore no offence is made out against the Appellant.

6. The Learned Counsel for the Appellant proceeds to take a stand that based on P.W.1's (Complainant) request, the Inspector on 18.12.2012 had altered a charge from 'Girl Missing' to that of Section 366(A) of IPC. In this connection, the Learned Counsel for the Appellant / A.1 brings it to the notice of this Court that the Inspector (P.W.16) arrested Suri @ Suriyakanthan, A.2, Sherly, A.3, Sabastin A.4, Rafeal, A.5 and Antony, A.6 on 29.12.2012.

7. The Learned Counsel for the Appellant takes a plea that P.W.16 (Inspector of Police) took up the further investigation of the case in Conoor P.S. No.385 of 2012 and after examining the relevant witnesses and recording their statements, arrested A.2 to A.6 at 9.30 a.m., on 29.12.2012 at Konoor Mores Garden Junction and later altered the Section into 366(A) and 376(1) of IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 read with 108 IPC from 'Girl Missing' on 18.12.2012. Subsequently, after completion of the

investigation, he laid a charge sheet against the Accused concerned.

8. Added further, the Learned Counsel for the Appellant contends that P.W.2, P.W.3 and P.W.12 had deposed before the trial Court that P.W.2, viz., Reshma after returning from the school had left Kavya, stating that she had left her note book and she was to get them and moved towards Moor's garden and when she saw the Appellant / A.1 she had compelled him to take her to some other place, not knowing where to proceed, the Appellant / A.1 went to his uncle's house at Sandinalla E.B. Quarters at Ooty.

9. According to the Learned Counsel for the Appellant that when the Appellant / A.1 wanted to return home, P.W.2 (victim girl) had refused and requested him to marry her and she had started protesting and refused to go back home. Further, the Learned Counsel for the Appellant / A.1 brings it to the notice of this Court that the Appellant / A.1 had married P.W.2 (Reshma) on 29.08.2012. Indeed both the Appellant and P.W.2 went to Mysore and stayed in a lodge and from there, they proceeded to Bangalore and that on 30.08.2012, they went to Salem and stayed in a rented house for one month. Apart from that, they went to Chennai from Salem to the Appellant / A.1's friend's house and stayed in a rented house there for a week.

10. Continuing further, the Learned Counsel for the Appellant contends that the Appellant / A.1 and P.W.2 proceeded to Thiruppur and they stayed there for 1 ½ months with the Appellant's brother, Antony (A.6).

11. The Learned Counsel for the Appellant proceeds to state that the Appellant / A.1 was engaged in Antony's (A.6), friend Dhamodaran Handloom at Karukampalyam and Devanthatham at Kaniyar, Coimbatore and both the Appellant / A.1 and P.W.2 had stayed in a room allotted by P.W.6 prior to being arrested dated 24.02.2013 and later they were proceeded to Conoor Town Police Station.

12. The Learned Counsel for the Appellant invites the attention of this Court to the evidence of P.W.7 (Doctor) who had issued Ex.P.5 (Age Fixation Certificate) in and by which P.W.2's age was determined to be above 16 years and below 18 years on the date of her examination on 27.05.2013. Besides this, P.W.5 (Doctor) had also mentioned in her AR Copy, Ex.P.3 that Reshma (P.W.2) was of 14 years and that her pregnancy test proved positive. In fact, in Ex.P.3, P.W.5 had opined that P.W.2 (Reshma) had lost her virginity and also the Doctor had found that 'no evidence for recent sexual intercourse'.

13. The forceful contention advanced on behalf of the Appellant / A.1 is that D.W.1 (Padma) had deposed that she had warned Reshma (P.W.2) not to talk with Appellant / A.1 and informed P.W.2's mother (P.W.3) not to allow P.W.2 to talk with the Appellant / A.1, but, they had not heeded to her words.

14. In this connection, the Learned Counsel for the Appellant / A.1 submits that all the letters written by P.W.2 (Reshma) and her sister (Pavithra) were submitted by D.W.1 (Padma) and was marked as Ex.D.1 to D.3 and therefore, it is candidly quite clear that P.W.2 (Daughter of P.W.1) was in love with the Appellant / A.1 and she had decided to marry him and to live as husband and wife and therefore, she had consented in the sexual intercourse with the Appellant / A.1 and because of these reasons, no offence under Section 376(1) of IPC was made out.

15. While summing up, the Learned Counsel for the Appellant / A.1 takes a stand that the victim girl (P.W.2) had accompanied the Appellant / A.1 on her own free Will and since the Appellant / A.1 and P.W.2 had loved each other, they had decided to marry and in the instant case, no case was made out to point out that P.W.2 was given a promise or assurance or any tempting offer by the Appellant / A.1 thereby forcing her to leave her parental home. As such, a plea is taken on behalf of the Appellant that there was no kidnapping of P.W.2 (victim) by the Appellant and that the prosecution had not proved the offence in question.

16. The Learned Counsel for the Appellant cites the decision of the Hon'ble Supreme Court between S.Varadarajan V. State of Madras reported in AIR 1965 at Page 942 whereby and whereunder it is observed as follows :-

"There is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of S.361. Where the minor leaves her father's protection knowing and having capacity to know the full import of what she was doing, voluntarily joins the accused person, accused can be said to have taken her away from the keeping of her lawful guardian, Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. If evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl. But that part falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking."

At Special Page 944 wherein at Paragraph No.7 it is observed as under:

" The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that "taking" of Savitri out of the keeping of her father has not been established. The offence of "kidnapping from lawful guardianship" is defined thus in the first paragraph of s. 361 of the Indian Penal Code.

"Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what, we have to find out is whether the part played by the appellant amounts to "taking", out of the keeping of the lawful guardian, of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the

house of his relative K. Natarajan ,She still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub- Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or ,anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her own side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping ,of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited -different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city

and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area. The learned Judge of the High Court has referred to the decision in Abdul Sathar V. Emperor, 54 Mad LJ 456 (AIR 1928 Mad 585) in which it was held that where the evidence disclosed that, but for something which the accused consented to do and ultimately did, a minor girl would not have left her husband's house, or would not have been able to leave her husband's house, there was sufficient taking in law for the purpose of S.363 and expressing agreement with this statement of the law observed: "In this case the minor, P.W. 4, would not have left the house but for the promise of the appellant that he would marry her." Quite apart from the question whether this amounts to blandishment we may point out that this is not based upon any evidence direct or otherwise. In 54 Mad LJ 456: (AIR 1928 Mad 585) Srinivasa Aiyangar J., found that the girl whom the accused was charged with having kidnapped was desperately anxious to leave her husband's house and even threatened to commit suicide if she was not taken away from there and observed :

"If a girl should have been wound up to such a pitch of hatred of her husband and of his house or household and she is found afterwards to have gone out of the keeping of her husband, her guardian, there must undoubtedly be clear and cogent evidence to show that she did not leave her husband's house herself and that her leaving was in some manner caused or brought about by something that the accused did."

In the light of this observation the learned Judge considered the evidence and came to the conclusion that there was some legal evidence upon which a court of fact could find against the accused. This decision, therefore, is of little assistance in this case because, as already stated, every essential step was taken by Savitri herself ; it was she who telephoned to the appellant and fixed the rendezvous, she walked up to that place herself and found the appellant waiting in the car; she got into the car of her own accord without the appellant asking her to step in and permitted the appellant to take her wherever he liked. Apparently, her one and only intention was to become the appellant's wife and thus be in a position to be always with him."

17. The Learned Counsel for the Appellant relies on the decision of the Yunusbhai Usmanbhai Shaikh V. State of Gujarat reported in 2016 CrI.L.J.717 at Special Page 718 wherein it is observed that minor girl had admitted that she had accompanied the applicant on her own free will / volition and they decided to marry as they loved each other. Further, in the said decision it is held that no case was made out even prima facie to show that the girl had received a promise or assurance or any tempting offer from the applicant by virtue of which she was forced to leave her parental home. In short, in the said decision, it is laid down that there was nothing to even prima facie to show 'taking' of the girl by the accused and therefore, the question for application of Section 363 of IPC does not arise as there was no kidnapping of the girl.

18. Per contra, it is the submission of the Learned Government Advocate (CrI.Side) for the Respondent / Prosecuting Agency that before the trial Court on behalf of the Respondent / Prosecuting Agency, witnesses P.W.1 to P.W.16 were examined and Ex.P.1 to P.17 were marked. On behalf of the Accused, D.W.1 was examined and Ex.D.1 to Ex.D.3 were marked. Moreover, it is represented that the trial Court on an appreciation of the entire oral and documentary evidence available on record came to a resultant conclusion that the Appellant / A.1 was guilty in respect of an offence under Sections 363 and 376 of IPC (Instead of 366A of IPC) and imposed upon him with a punishment of Two Years Rigorous Imprisonment besides of imposition of fine of Rs.5,000/- etc., Also, the trial Court had found the Appellant / A.1 guilty in respect of offence under Section 376 (1) of IPC and imposed him with a punishment of Seven Years Rigorous Imprisonment and also awarded him a fine of Rs.5,000/- etc., and the said finding of the trial Court is free from any legal infirmities.

19. Coming to the evidence of P.W.1 (father of P.W.2) it is to be pointed out by this Court that P.W.1 in his evidence had deposed that his elder daughter, Reshma (P.W.2) went to Santhi Vijaya School for Studying and that she had not returned to the house till 6.00 p.m., and even after searching her at the school etc., he had not found her and therefore he went to Conoor Town Police Station and gave Ex.P.1- complaint by affixing the photo of his daughter (P.W.2).

20. It is the further evidence of P.W.1 that he does not know to read and therefore, he was not in a position to know about the contents of the complaint, but the signature in Ex.P.1 belongs to him.

21. In fact P.W.1 (father) (in his cross examination) had stated that he does not know that his two daughters had loved the Appellant / A.1 and further deposed it was not correct to state that since his two daughters had loved the Appellant / A.1, a false case was foisted against the Accused.

22. P.W.2 (victim girl) in her evidence had deposed that the Appellant / A.1 took her in his bike on 28.08.2012 by informing her that he would take her to her house, but he took her to his Chitti's house viz., Pappa's house and on the next day, the aunt helped them in boarding the Mysore bus and at Mysore both of them stayed at a lodge and while staying at the lodge, he had sexual intercourse for once and later from there, she was taken to Chennai, where she along with the Appellant stayed in the Appellant / A.1's friend Malkarnik's house and later independently they stayed in a rented house for a month and separately at Thiruppur they stayed in a rented house.

23. P.W.3 (Mother of P.W.2) in her evidence had deposed before the trial Court that even after lodging a complaint to trust her daughter for three months they searched for whereabouts of the daughter and after lapse of three months, they filed a Petition before this Court. Also that she had stated in her evidence that one day, her daughter (P.W.2) spoke to her through phone but she had not informed her as to the place where she was residing, but on an enquiry made with the cell phone, it came to light that the said phone was from Andhrapradesh State and when a search was made on the said phone's address, no one was found.

24. It is the evidence of P.W.4 (Teacher) that P.W.2 (Victim girl) was reading in a school, viz., Shanthi Vijaya School at X Standard and till 28.08.2012, P.W.2 came to the school and she was in the school and that she remained in the school till 5.30 p.m., in the evening and she had not turned up thereafter.

25. It is the evidence of P.W.5 that she examined P.W.2, who was in good conscious condition and on examination of her urine, she found that P.W.2 was pregnant. Further (in cross examination) she had stated that when she was asked P.W.2 as to who was responsible for her pregnancy, she had not answered her query and if fetus was aborted, then, it could not be found as to who was responsible for the affected person's pregnancy.

26. P.W.6 in his evidence had deposed that the Appellant / A.1 had worked under him for 1 ½ months and further he stayed in the room constructed by him and further he had seen the wife of the Appellant / A.1 and that he does not know about her family.

27. P.W.7 (Radiologist) in her evidence had stated that P.W.2 was brought to the hospital with a view to find out her age as per requisition of Ex.P.4, and that for P.W.2 - 3 X-rays were taken and that she had given Ex.P.5, Age Determination Certificate whereby she had stated the age of P.W.2 was between 16 to 18 .

28. It is the evidence of P.W.8 that he along with P.W.1 is accompanied in a contract job and that on 24.02.2013 morning, he phone up to P.W.1 and informed him that there was no cement and that P.W.1 informed him to come to the police station and he went to the police station along with Kanakaraj.

29. It is the evidence of P.W.9 that he had married P.W.2's father's sister daughter and that he is an autodriver and he was informed that P.W.2, who went to school on 28.08.2012 was missing and that he went to the police station along with P.W.1 and his mother-in-law.

30. P.W.10 (brother of P.W.1) in her evidence had deposed that P.W.1 is her brother and that two years before on 28th August, P.W.2 went to school had not returned which was informed to her.

31. P.W.11 (Doctor) in his evidence had deposed that he examined that Appellant / A.1 for potency test and issued Ex.P.8 certificate (three in number). Further he had opined in his certificate that the Appellant / A.1 is a fit person to indulge in intercourse.

32. P.W.13 (Doctor) in his evidence had deposed that when he was on duty on 27.02.2014, the Appellant / A.1 was brought to Conoor Police Station by Head Constable, Ramesh and he examined his blood group which was found to be 'O Positive' and he had issued Ex.P.9, Certificate and that in the said certificate he had wrongly mentioned the age as 49.

33. It is the evidence of P.W.14 (Assistant Sub Inspector) that on 02.09.2012 when he served as Assistant Inspector at Conoor Police Station at about 2.30 in the evening, P.W.1 (Murugan) presented himself before the police station and gave a written complaint and based on the said complaint, a crime No.385 of 2012 under the caption 'Girl Missing', Ex.P.10, FIR

was registered and a copy of the said FIR was sent to the concerned authorities.

34. It is the evidence of P.W.15 that soon after receipt of the FIR from the Assistant Inspector (P.W.14) he visited the place of occurrence examined witnesses Murugan, Rani and others and recorded their statements and further on 03.09.2012, he examined witnesses Selvi and others and further that on 13.09.2012, he examined witnesses Selvi and since he got transferred to Negamam Police station, he handed over the case file to P.W.16 (Inspector of police)

35. P.W.16 took up the case for further investigation in Crime No.385 of 2012, after examining concerned witnesses and after completion of investigation laid a charge sheet under Sections 366A, 376(1) of IPC and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 read with 108 IPC.

36. It is the evidence of D.W.1 that P.W.3 (Mother of P.W.2) is her Sister and that P.W.2 (Victim girl) and the Appellant / A.1 was in acquaintance and further that she informed her sister P.W.3 about the same and for the past three years she is not in talking terms with P.W.3.

37. It is to be noted that to constitute an offence under Section 363 of IPC, the following ingredients are required:

(i) That the accused did:

(a) Forcible compulsion or inducement by deceitful means;

(b) The object of such compulsion or inducement must be the going of a person from any place;

(ii) Also that the evidence required to prove the offence under Section 363 of Indian Penal Code is that the prosecution ought to prove that the Accused conveyed the victim beyond the limits of India

(b) That his removal was without the consent of the victim or of any person legally authorised to consent removal or that the accused had either taken or enticed away (voluntary accompaniment) a minor;

(b) The said minor if a male was under 16 years of age and if the female was under 18 years of age on the day of enticing or taking;

(c) That the said enticing or taking was made out of the keeping of a lawful guardian or a defact guardian lawfully entrusted with the keeping of the minor, without the consent of the guardian or that the accused had either enticed away or takes away the person of unsound mind etc.,

38. In order to enable the Court to draw a presumption as per Section 114A of the Indian Evidence Act, 1872, it is essential to establish that the commission of 'Sexual Intercourse' by an Accused on the Prosecutrix and it was done without her consent. Further more, the aspect as to whether 'Sexual Intercourse' was done with or without consent of a victim is the question of fact to be proved by means of evidence in a given case before applying the ingredients of Section 114 A of the Indian Evidence Act as per decision of Hon'ble Supreme Court between Deepak V. State of Haryana reported in 2012 CrI.L.J. at Page 2049.

39. It is to be pointed out that ordinarily prosecutrix is placed on a different level than an injured witness. As a matter of fact, the prosecutrix suffers not only emotionally but also psychologically, as opined by this Court. Besides this, if a girl (victim) does not resist intercourse in consequence of 'Misapprehension' or 'Misconception of Fact', this would not amount to her consent. In this connection, this Court worth recalls and recollects the decision of Hon'ble Supreme Court between Dilip V. State of Madhya Pradesh (2013) 14 Supreme Court Cases 331 at Special Page 336 wherein at Paragraph No.16, it is observed as follows:-

"16. In case, the prosecutrix was below 16 years of age at the relevant time, the issue of consent becomes totally irrelevant. Even the issue of consent is no more res integra even in a case where the prosecutrix was above 16 years of age."

40. In the present case, it is the evidence of P.W.2 (Victim girl) that her date of birth was on 17.08.1998 when she was reading Xth Standard at Shanthi Vijaya School and when she was going near the house of Parvathy Teacher, at that time, the Appellant / A.1 on 28.08.2012 came there and informed her that he would take her, he came in bike. It is the further evidence of P.W.2 that when she was in her mother's shop, the Appellant / A.1 used to come there and frequently talk with her and based on the said trust, she talked to him, but, the Appellant informed her to love him otherwise he would murder her parents and only because of this threat, she wrote letter since the Appellant / A.1 insisted upon the letter, being given to him, she wrote the letter.

41. P.W.2 in her evidence had clearly mentioned about the place where the Appellant / A.1 had taken her and further she had also deposed as to the number of days where she had stayed in the respective individual's house. Moreover, P.W.2 had also deposed in her evidence that when she was at Thiruppur in a rented house, the Appellant / A.1 had sexual intercourse daily with her and inspite of refusal in this regard because of her ill health, yet, the Appellant / A.1 had sexual intercourse with her. Also that she had stated in her evidence that when she fell down in her Mother's (P.W.3) house, she got aborted.

42. In the instant case, P.W.2 (Victim Girl) had stated in her evidence (During cross examination) in a clear cut fashion that she was loving the Appellant / A.1 for the past 3 years and that she had sent message through her mother's (P.W.3) phone to him. Further, she had accompanied the Appellant / A.1 on 28.08.2012 in his bike without any protest or demur or any resistance. Therefore, this Court comes to an inevitable conclusion that the offence under Section 363 of IPC namely, 'Kidnapping' is not made out against the Appellant / A.1. As such, the contra finding rendered by the trial Court that the Appellant / A.1 was guilty in respect of an offence under Section 363 of IPC is not correct in the eye of Law. Accordingly, the imposition of punishment, i.e., Two Years Rigorous Imprisonment and imposition of fine of Rs.5,000/- awarded by the trial Court upon the Appellant/ A.1 are set aside by this Court to prevent a miscarriage of justice.

43. In so far as the offence under Section 376(1) of IPC is concerned, it is to be pointed out by this Court that P.W.5 (Doctor) had examined P.W.2 and issued Ex.P.3 - A.R.Copy and a cursory glance of Ex.P.3 indicates the following:-

Urine Pregnancy Test -Positive

P/A - Soft

L/e - Hymen Not intact

P/V - Cervix freely admits 2 fingers,

Cervix, uterus AV, Bulky, Mobile, Ff no
bleeding / Discharge IV

Answers :-

1. Reshma has lot her virginity

2,+3 - Referred to Radiology Department for USG
requisition and Age reference

4. No evidence for recent sexual intercourse.

44. Besides that, P.W.2 (Victim) had also deposed in her evidence that how she was ravished by the Appellant / A.1 inspite of her refusal to have intercourse with him, the Appellant / A.1 had forcibly had intercourse with her at several places where he had taken P.W.2 along with him because of the

Appellant / A/1's conduct on indulging in sexual intercourse with P.W.2, she become pregnant and infact it is the evidence of P.W.2 that she had informed the Appellant / A.1 about her pregnancy and he inturn informed his parents and later the police had brought P.W.2 to her house. Moreover, she was kept in a ' Home' for a day and also she was taken to the Court and to the hospital and on one day she fell down in her mother's house, she got aborted and further that his mother, (P.W.3) took her to hospital for treatment.

45. In view of the fact that the Appellant / A.1 had sexual intercourse with P.W.2 and this Court taking note of the fact that the gist of offence under Section 376 of IPC is rape and in the instant case, the Appellant/ A.1 had ravished P.W.2 against her consent, this Court comes to a resultant conclusion that the offence under Section 376(1) of IPC is made out against the Appellant/ Accused and therefore he was rightly convicted. But considering the facts and circumstances of the present case and also this Court bearing in mind yet another fact that in Ex.P.5, A.R, (Age Fixation Certificate), the Doctor had opined that P.W.2 was above 16 years but below 18 years, this Court is of the earnest opinion that the imposition of punishment of Seven (7) years awarded by the trial Court on the Appellant / A.1 is marginally on the higher side, therefore, this Court taking note of the fact that the Appellant / A.1's father is getting frequent heart attack, reduces the punishment to that of Five (5) Years Rigorous Imprisonment in respect of an offence under Section 376(1) of IPC (instead of seven years already awarded by the trial Court).

46. Insofar as the imposition of fine of Rs.5,000/- in respect of an offence under Section 376(1) of IPC, the same is not displaced by this Court. Consequently, the Criminal Appeal succeeds in part. In fine, the Appeal is allowed in part and the connected Miscellaneous Petition is closed. The Judgment of the trial Court dated 18.04.2016 in S.C.21 of 2014 stands modified in the above terms. It is open to the Appellant / A.1 to file necessary Criminal Miscellaneous Application before the trail Court to the credit of S.C.No.21 of 2014 under Criminal Rules of Practice and to seek refund of fine amount of Rs.5,000/- paid in respect of an offence under Section 363 of IPC, since he is acquitted by this Court.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

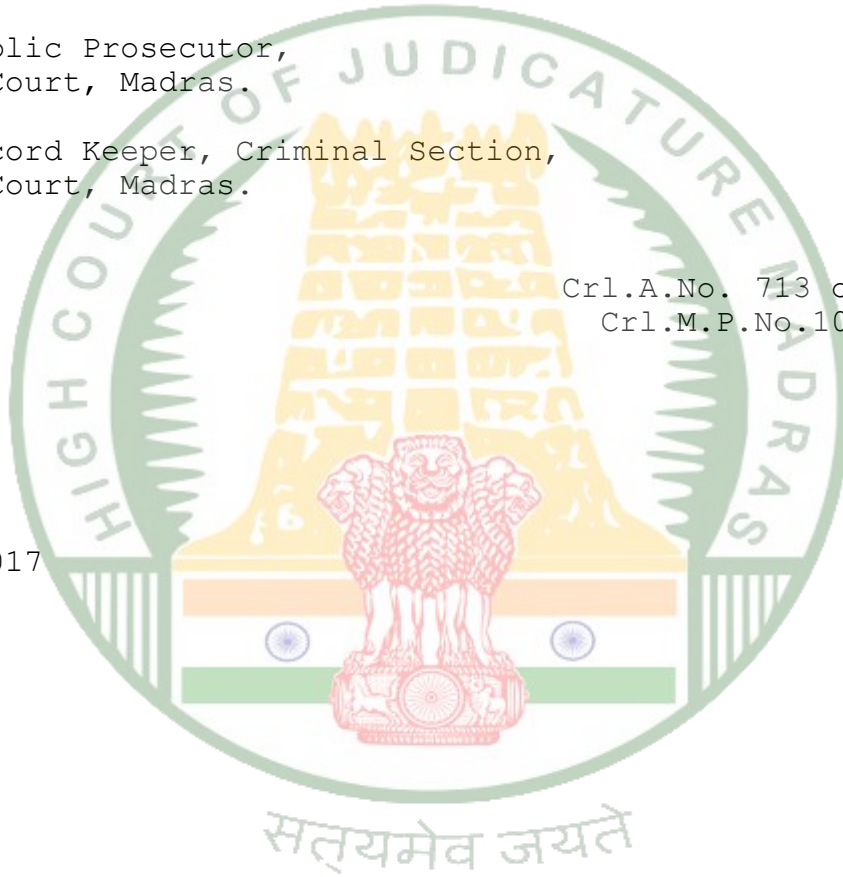
Sub Assistant Registrar

ssd
To

1. State rep. By
the Inspector of Police,
Conoor Police Station,
Coonoor.
2. The Magalir Neethimandram (F.T.M.C.)
Uthagamandalam Uthagamandalam.
3. The Public Prosecutor,
High Court, Madras.
4. The Record Keeper, Criminal Section,
High Court, Madras.

Crl.A.No. 713 of 2016 and
Crl.M.P.No.10222 of 2016

sr[col
srg 7/4/2017



WEB COPY