

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 10.01.2017

Delivered on : 23.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.BASKARAN

Criminal Appeal No.677 of 2012
and
MP.No.2 of 2014

Ashok Raja

... Appellant/Accused

-vs-

State By:

Inspector of Police,
H-3, Tondiarpet Police Station,
(Crime No.388/2006)

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Cr.P.C., against the conviction and sentence passed on him (i) under Section 366A IPC to undergo 10 years Rigorous Imprisonment and a fine of Rs.10,000/- in default to undergo six months simple imprisonment. (ii) under Section 344 IPC to undergo 3 years Rigorous Imprisonment and a fine of Rs.5,000/- in default to undergo 3 months simple imprisonment and (iii) under Section 376 (1) to undergo 10 years Rigorous Imprisonment and a fine of Rs.10,000/- in default to undergo 6 months simple imprisonment passed in S.C.No.384 of 2007, on the file of the Sessions Judge, Mahalir Neethi Mandram (Mahila Court) Chennai, by its Judgment dated 10.09.2012.

For Appellant : Mr.I.C.Vasudevan for
Mr.T.Maganathan

For Respondent : Mr.E.Raja, Additional Public Prosecutor

JUDGMENT

The appellant is the sole accused in S.C.No.384 of 2007 on the file of Mahalir Neethi Mandram (Mahila Court) Chennai. He stood charged for the offences under Sections 366A, 344 and 376 (1) IPC. The trial Court by its judgment dated 10.09.2012 found him guilty under all the above said Sections, convicted and sentenced him to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.10,000/- in default to undergo six months simple imprisonment under Section 366A IPC, to undergo 3 years

Rigorous Imprisonment and a fine of Rs.5,000/- in default to undergo 3 months simple imprisonment under Section 344 IPC and to undergo 10 years Rigorous Imprisonment and a fine of Rs.10,000/- in default to undergo 6 months simple imprisonment under Section 376(1). Aggrieved over the same, the appellant has come forward with this appeal, seeking to set aside the conviction and sentence imposed by the trial Court.

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

The accused is a resident of Chennai and aged about 23 years. The alleged victim girl-P.W.2 was studying in 9th standard at Dhanalakshmi High School, Chennai and went to school on 10.07.2006 and thereafter, she has not returned home. Her father P.W.1-Jothilingam lodged a complaint with the respondent police on 11.07.2006 about missing of his daughter. While he was searching for his missing girl, on 02.08.2006 at about 10.45 hours, the respondent police who deposed as P.W.10 found the missing girl and the accused and secured them, conducted an enquiry and it came to light that the victim girl was taken away by the accused under threat and detained her in the village called Idaikkal near Thenkasi, Tirunelveli District, there the victim girl was raped by the accused. Both the victim girl and the accused were sent for medical examination and the accused was taken into custody. Thereafter, the Investigating Officer-P.W.10 went to the said Idaikkal Village, examined the witnesses and recorded the statement, after conducting medical examination of the victim as well as the accused. After examining the doctors, who were conducted medical test on them, the police filed a final report against the accused herein. The father of the victim girl who deposed as P.W.1 stated that he was living with his wife, three daughters and a son in Chennai and his first daughter the alleged victim girl in this case was aged about 14 years at the time of occurrence and she was studying in 9th std. On 10.07.2006, she left for school at 8.30 a.m. but failed to return back in evening as usual. After searching for her in school and other places and enquired about her in native places, the victim girl did not return home. He went to Tondiarpet Police Station on 11.07.2006 noon and lodged Ex.P1-Complaint. He further stated that on 02.08.2006, he received intimation from the police that his girl was secured.

3. The victim girl who deposed as P.W.2 stated that she was studying in 9th std and knew the accused, who regularly used to come to her maternal grand mother's home. She also stated that her grand mother's home is next to her house and the accused used to give her sweets regularly. On 10.07.2006, while she was going to school, the accused followed her and asked her to come with him. When she hesitated, the accused offered her that she will get whatever she wants and compelled her to come with him. Accordingly, she went with the accused to Koyambedu Bus Stop, from there she was taken in a bus. When she expressed her

apprehension, the accused told her that already he had informed the victim girl's father over phone and took her to Tirunelveli and thereafter to Thenkasi and kept her in a house at Idaikkal Village. When she asked him as to why she was taken there, the accused told her that he will speak to her father. While she was at the house in Idaikkal Village, the accused threatened her and had physical relationship for five times with her. When she insisted to go home, the accused stated that he is not having money to go back and thereafter on 01.08.2006, a friend of the accused gave money to him and on her request, she was taken to Chennai by the accused. On the next day, viz., 02.08.2006, when they were getting down at Maharani Bus Stop in Chennai at about 10.45 hours, the police secured them and later sent them for medical examination. She also produced her birth certificate-Ex.P2.

4. The Investigating Officer of the case, who deposed as P.W.10 stated that while he was on duty at Tondiarpet Police Station on 11.07.2006, P.W.1 Jothilingam appeared before him and lodged a complaint that his daughter is missing from 10.07.2006. On receipt of the same, he registered a case in Crime No.388 of 2006 and the said FIR is Ex.P10. Thereafter, he took up the investigation and secured the accused along with the victim girl on 02.08.2006 at 10.45 hours near Maharani bus stop and enquired them. After enquiring the victim girl, it came to light that she was forcibly taken to Idaikkal Village under threat by the accused where she was raped by him. Thereafter, P.W.10 altered the case into one under Sections 344, 363 and 376 IPC and submitted the Alteration Report-Ex.P11. Subsequently, the investigating officer submitted a requisition for medical examination and accordingly sent the accused as well as the victim girl for medical examination.

5. P.W.4 - Dr.Santhakumar stated that on 03.08.2006 while he was working in Stanley Medical College and Hospital, examined one Ashokraja as per Ex.P3-Requisition Letter and issued Ex.P4 Certificate stating that the concerned person is not an impotent and fit for physical relationship. Another doctor, Kuppalakshmi who deposed as P.W.7 examined the victim girl and stated that on 03.08.2006 while she was working in R.S.R.M. Hospital, she examined the victim girl aged about 15 years brought by the police as per the Requisition Letter-Ex.P6 in respect of S.C.No.384 of 2007 and on examination, she found the victim girl of a normal physic and in good conscious condition. In the medical certificate-Ex.P8 issued by her, she has stated as follows:- "Cervix pointing downwards Uterus antverted smaller than normal size. No discharge per vaginum. Specimen taken Vaginal Smear(2) Vaginal Swab (2) and Hair clipping sent for examination". The Accident Register issued by her is produced as Ex.P7.

6. The Investigating Officer-P.W.10 further stated that he

went to Idaikkal Village on 03.08.2006, prepared a Observation Mahazar-Ex.P12 and Rough Sketch-Ex.P13 of the occurrence spot and examined the witnesses and recorded the statement. Thereafter, he continued his investigation and recorded the statement of the medical examiners and on completion of investigation, filed a final report against the accused.

7. Based on the above materials, the trial Court framed charges as detailed in the judgment of the trial Court and the same was denied by the accused. In order to prove the case, the prosecution examined 10 witnesses and produced 13 documents. No material object was marked. On the defence side, no oral or documentary evidence was produced.

8. On the basis of oral and documentary evidence placed before it, the trial Court found the accused guilty of the offence under Sections 366A, 344 and 376(1) IPC and convicted and sentenced him to undergo imprisonment and pay fine as stated earlier. Aggrieved over the same, the accused has come before this Court with this appeal.

9. The learned counsel appearing for the appellant contended that the trial Court has failed to appreciate the evidence in proper manner and wrongly convicted the accused. The alteration found in date of the complaint and the endorsement in the FIR was not taken into consideration and the said correction is material alteration which would go to the root of the case and the same is fatal to the prosecution case. The trial Court has failed to appreciate the admission of the victim girl in a cross examination that no one has done anything on her physically. The fact that the medical evidence also did not support the case of the prosecution about the alleged rape of the victim girl is not taken into account by the trial Court. The fact that the victim girl informed P.W.7-Doctor that she was kidnapped by six persons at knife point, but in the complaint as well as in the evidence before this Court, the accused alone is implicated was not taken into consideration by the trial Court. The place of occurrence also is not established. None of the witness from the alleged place of occurrence Idaikkal Village has been examined to prove that the said occurrence took place in that Village. The contradiction in the evidence of P.W.2, P.W.3 & P.W.7 about how the victim girl was taken away is also not taken into consideration by the trial Court. The fact of the previous enmity between the family of the complainant and the appellant/accused is not taken into account. There was no other independent witness apart from the interested witnesses, P.W.1 and P.W.3 - parents of the victim girl are examined to prove the case of the prosecution. Hence, the appellant seeks to set aside the conclusion arrived by the trial Court and set him at liberty by allowing this appeal.

10. The fact that the victim girl/P.W.2-Abirami was a minor at the time of occurrence is clearly established by Ex.P2-Birth Certificate produced by her, wherein the Date of Birth of the victim girl is shown as 05.02.1992. Therefore, the victim girl was aged about 14 years at the time of the alleged occurrence is clearly established by the prosecution. It is also admitted that the accused is the son-in-law of the sister of the victim girl's mother. Even though, P.W.2, the victim girl denied any physical assault on her body by the accused in her cross-examination which was conducted nearly three years after completion of her chief examination, she has categorically stated in her chief examination that while she was on her way to school on 10.07.2006, the accused asked her to come with him and in spite of her refusal, she was induced by him to go along and she was taken to Idaikkal Village near Thenkasi in Tirunelveli District by the accused in a bus. She also stated that she was kept in a vacant house of the accused friend from 11.07.2006. P.W.2-Abirami also stated that on 01.08.2006, the accused took her back to Chennai and on their arrival near Maharani bus stop on 02.08.2006 at about 10.45 hours, she was secured by the police. The victim girl P.W.2 was examined in chief on 24.10.2009 but her cross-examination was conducted only on 13.03.2012. In her cross-examination, P.W.2 stated that on 10.07.2006, she saw the accused and four other persons, who are unknown to her and she was taken in a Auto rickshaw to Koyambedu bus stand and thereafter she was taken to unknown place and she was away from her home for 20 days. She also stated that she was detained in the same place but she was not physically assaulted by the accused or the other four persons. In her cross examination, she stated as follows: "எதிரியோ மற்ற 4 நபர்களோ என்னை உடல் ரீதியாக எதுவும் செய்யவில்லை. என்னை எதுவும் செய்யவில்லை. கூட்டி கொண்டு வெளியில் விடாமல் வைத்திருந்தார்கள். வைத்திருந்தது உண்மை. வேறு எதுவும் செய்யவில்லை", She also stated that the accused is her own uncle.

11. The complainant-P.W.1, who is the father of the alleged victim girl deposed that his daughter went missing from 10.07.2006 and he was informed by the respondent police on 02.08.2006 that his daughter has been rescued. Likewise, the mother of the victim girl who deposed as P.W.3 stated that her daughter did not return home from school on 10.07.2006 and in spite of searching in various places, they were not able to find her and subsequently on 02.08.2006, they were informed by the respondent police that the missing girl has been secured along with the accused herein. On such intimation from the respondent police, both P.W.1 and P.W.3 went to the police station and met their daughter. The Investigating Officer/PW-10 stated that after registering the FIR on 11.07.2006, he proceeded with the investigation and subsequently on 02.08.2006 secured the victim girl along with the accused herein at 10.45 a.m. near Maharani Bus Stop, T.H. Road, Chennai. Thus, it is

clear from the evidence of P.W.1, P.W.2, P.W.3 and P.W.10 that the victim girl went missing from 10.07.2006 and she was secured only on 02.08.2006.

12. Thus, P.W.2 stated that the accused is her uncle and neither the accused nor the four other persons have done any harm to her body and admitted that she has been detained by them in an unknown place. It is therefore clear, that the victim girl was away from her home and she was detained in an unknown place. However, she has categorically stated in her evidence in chief that she was taken to Idaikkal Village and detained there from 11.07.2006 to 01.08.2006. In such circumstances, even though no one has been examined from Idaikkal Village to prove the said allegation, but the fact that the victim girl has been detained in an unknown place against her will is clearly established by PW2 evidence. Further, it is also clear that the accused took away PW2 from the lawful custody of her parents without their knowledge and against the wish of the minor victim girl. However, there is nothing on record to show that the accused took away PW2 to force her to have illicit intercourse with him and other persons. Hence, no offence under Section 366A IPC is made out on him by the trial Court. However, in view of wrongful confinement of the minor victim girl after taking her away from her parents, the accused is guilty of the offence punishable under Section 365 IPC, instead of 366A IPC.

13. According to the prosecution, the accused had intercourse with the minor victim girl forcibly against her will. While, the alleged victim/P.W.2 stated in her chief-examination, that the accused had physical intercourse with her five times and detained her in the said occurrence spot, in contrast, in her cross-examination, PW2, the victim girl stated that she was detained in a place by the accused and four others. Further, in her cross examination, PW2 categorically stated that no physical harm was done to her. She denied any physical relationship with the accused. In such circumstances, a doubt arises as to whether really the victim girl was physically abused by the accused as claimed by the prosecution.

14. The alleged victim girl in her chief-examination stated that she was taken by the accused herein to the Idaikkal Village by bus and kept in a house belonging to the accused friend from 11.07.2006 and there the accused had physical relationship with her five times, after threatening her with dire consequences. Thereafter on 01.08.2006, when she pleaded with the accused, he took her to Chennai and on next day morning i.e. 02.08.2006, while they were getting down at Maharani Bus Stop, the police secured them. However, in cross-examination, P.W.2 stated that she was taken in a Auto to Koyambedu bus stand by the accused and four other persons and she was taken to unknown place and she did not remember the name of the place. She also stated

that she was away from her home for 20 days and in spite of her request, the accused kept her in the same place and subsequently she was secured from that place on 02.08.2006 by the police. Further, the victim P.W.2 categorically stated that the accused is her uncle and no one had done any physical harm to her. Thus, P.W.2 contradicts her own version in the chief by stating that she was only detained in a unknown place and no physical harm was done to her. Thus, as rightly pointed out by the learned counsel for the accused, PW2 is giving different versions in her evidence about the occurrence and as such her evidence lacks credibility.

15. In such circumstances, the learned counsel appearing for the appellant contended that P.W.2 is not a reliable witness and she is giving contradictory statements only because no occurrence as alleged by the prosecution took place in reality. Thus, in the light of the above said discussion, this Court is of the view that PW2 evidence cannot be treated as reliable one in the absence of any corroboration.

16. Further, P.W.2 in her evidence also admitted that she was taken to the Doctor for medical examination. PW7-the Doctor, who examined the victim girl stated that the private parts of the victim girl was normal and no injury was found over the same. P.W.7 further stated that the hymen was toned and due to that the victim girl seems to have been raped. However, P.W.7 also stated that the victim girl informed her about being taken away by her cousin sister's husband (accused herein) and four other persons and she was detained in a house for two weeks. It is also stated by P.W.7 that the victim girl told her that she was raped five times. As stated above, according to the medical evidence no external injury is found and it also admitted by P.W.7 due to cycling, there is a possibility of hymen being toned. Thus, while PW7 has deposed about PW2 informing him about the physical assault on her by the accused, the same cannot be accepted as PW2 herself has given contradictory evidence as stated earlier. Further, on medical side also PW7 evidence is not categorical about the victim girl PW2 being physically abused as alleged by the prosecution.

17. The learned counsel appearing for the appellant further contended that if the victim girl was forced to have physical relation against her will forcibly, she would have suffered physical injury but in the case on hand PW2 has not suffered any external injury as per medical expert-PW7 evidence. Pointing it out the appellant contends that the finding of the trial Court, that the victim girl PW2 was raped by the accused is unsustainable. In such circumstances, taking into consideration the fact, that the victim girl herself has denied any act of rape by the accused and in the absence of any external injuries found on her body and the fact that the victim girl has stated totally different versions about being raped in contrast to what was told by her to PW7 that the accused as well as four other

persons raped her, this Court finds that the case of the prosecution that the victim girl was raped by the accused is unsustainable, as the said allegations is not proved beyond reasonable doubt. The findings of the trial Court that the accused is guilty and the reasons stated for arriving at such conclusion that the accused committed the offence under Section 376 IPC is not based on correct appreciation of available evidence and the same is liable to be set aside.

18. Admittedly, the victim girl was aged about 14 years at the time of the alleged occurrence. It is evident from her deposition that she was taken away on inducement by the accused from the custody of her parents. It is also clear from her evidence that she was detained in unknown place against her wish. The victim girl has stated before P.W.7-Doctor and also in her cross-examination that she was taken by the accused and four other persons and detained in another place. It is thus clearly established that PW2 was taken away from the lawful custody of her parents without their consent and knowledge.

19. The learned counsel appearing for the appellant contended that the prosecution has not investigated about the other persons allegedly associated with the sole accused herein, but lodged the charge sheet only against the only accused herein and that itself will create doubt about the alleged occurrence. However, the victim girl has categorically stated that the accused was present on the occurrence date and she was asked by him to go along and the accused gave assurance that he will inform her father about the same and as she went with him, she was subsequently detained by him, in spite of her request to let her go. As stated earlier, the evidence of P.W.1, P.W.3 and P.W.10 also established the fact that the victim girl was missing from her home from 10.07.2006 to 02.08.2006. It is apparently clear from the evidence of the victim girl, that she was taken away by the accused and detained by him at a place away from her natural guardian against her wish.

20. It is therefore clear, that the said act of the accused will only attract the offence under Section 365 IPC and not the offence under Section 366A IPC, under which the trial Court has found him guilty. There is nothing on record to show that the accused took away the victim girl and she had been forced or seduced to illicit intercourse with another person. In such circumstances, as the victim girl was taken away on inducement by the accused from the lawful custody of the natural guardian and detained in another place for more than 20 days, the accused is liable to be punished under Sections 344 & 365 IPC instead of 366A IPC as held by the trial Court.

21. It is contended by the learned counsel appearing for the

appellant that due to personal and family enmity, false complaint is lodged against the accused. However, P.W.3, the mother of the victim girl stated that her sister converted into another religion and due to that, she did not attend the marriage of the accused, but whenever the accused visits the victim girl's grand-mother home, he used to talk with the victim girl. P.W.2 also stated that there is no property dispute between her parents and the accused, because her parents have no property at all. Similarly, the alleged victim girl stated that the accused is her uncle, and he is now married and having a child. P.W.2 further stated that the accused used to visit her grand-mother home, which is adjacent to her house and used to give her sweets, which she will receive without the knowledge of her father. It is also seen from the evidence of P.W.1 that his mother-in-law's home is adjacent to his house and the accused used to visit his mother-in-law's home. P.W.1 also admits that his wife and his daughter knew the accused and they used to talk whenever the accused visits his mother-in-law's home. Thus, it is clear from the above said evidence that the accused used to meet the victim girl and her mother in the adjacent house of the complainant and the prosecution has not let in any evidence to prove any enmity on the ground of the property dispute between the accused and the complainant. In such circumstances, the contention of the learned counsel appearing for the appellant / accused, that the complainant has falsely lodged a complaint due to family dispute is unsustainable.

22. The learned counsel for the appellant also pointed out that PW5 and PW9, the alleged witnesses to the confession statement given by the accused have turned hostile and failed to support the prosecution. Further, it is also pointed out that in Ex.P1 Complaint the date when PW2 went missing is originally written as 10.06.2006 and subsequently, corrected as 10.07.2006. The same is admitted by PW1-the complainant and PW10-the Investigation Officer of the case. Further, it is also pointed out that in the endorsement made by the Sub-Inspector of Police in Ex.P1 Complaint also similar correction is found. This according to the appellant occurred only because false complaint was lodged against the accused. In the absence of any acceptable explanation for such correction the contention of the appellant appears to be probable.

23. In view of the afore said reasons, this Court has come to the irresistible conclusion that the judgment of trial Court is unsustainable and it is to be modified as no offence under Sections 366A and 376 IPC is made out, but only offence under Section 365 IPC is established by the prosecution.

24. In the result, the appeal is partly allowed in the

following terms:

(a). The conviction and sentence imposed on the appellant/accused under Section 376(1) IPC is set aside and he is acquitted from the said charges.

(b). The conviction and sentence imposed on the appellant/accused under Section 366A is modified into Section 365 of IPC and the conviction and sentence imposed on the appellant/accused under Section 344 IPC is hereby confirmed.

The appellant is undergoing imprisonment from 10.09.2012 and the accused is in jail till date (more than 4 years). Hence considering the attendant circumstances, this Court is of the considered view that the period of sentence already undergone by the appellant/accused would be sufficient punishment to meet ends of Justice under Section 365 IPC. As far as the fine amount is concerned, since the conviction for the offence u/s.344 IPC is confirmed, there is no modification with regard to the fine amount Rs.5000/- imposed on the appellant/accused. Further, the conviction under Section 366A is modified into under Section 365 IPC and thereby, the fine amount Rs.10,000/- imposed by the trial court found sufficient. In view of the conviction under Section 376(1) IPC is set aside, the fine amount Rs.10,000/- imposed on the appellant/accused is directed to be refunded. Connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Mahalir Neethimandram,
Mahila Court, Chennai.
2. The Inspector of Police,
H-3, Tondiarpet Police Station,
Chennai.
3. The Public Prosecutor Office,
High Court, Madras.

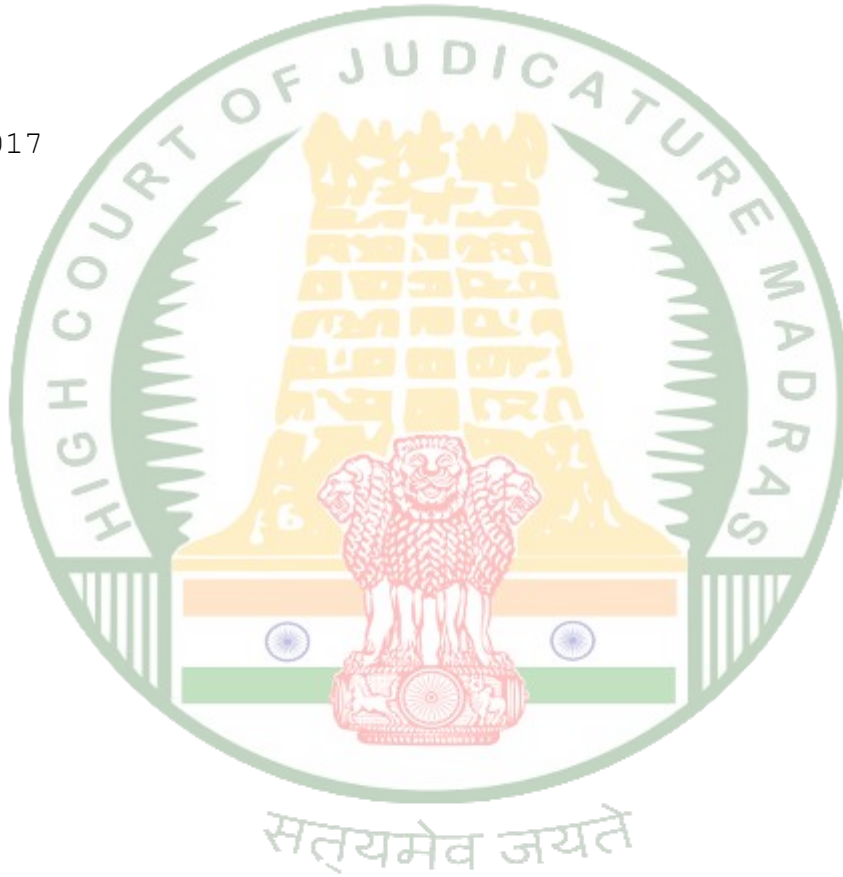
4.The Superitendent
Central Prison
Puzhal Chennai

copy to
The Section Officer,
Criminal Record Section,
High Court, Madras.

+1 cc to M/s.T.Maganathan Advocate sr 11505

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