

BAIL SLIP

The Appellant herein/Accused viz Naveen Kumar S/o. Sarathi was directed to be released on bail as per order of this court dated 24.11.2011 made in MP. 1 of 2011 in CrI.A. No. 152/2011.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09..11..2016
Pronounced on : 28..04..2018

CORAM

THE HON'BLE MR.JUSTICE P.VELMURUGAN

Criminal Appeal No.152 of 2011

Naveen Kumar ... Appellant/Accused

-Versus-

State Rep. by
Inspector of Police (Ponnai Circle),
Melpadi Police Station,
Vellore District.

... Respondent/Complainant

Appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 against the judgment of conviction and sentence made in Sessions Case No. 260 of 2009 dated 20.12.2010 by the learned Additional District and Sessions Judge, Fast Track Court, Vellore.

For Appellant : Mr.R.John Sathyam
For Respondent : Mr.R. Ravichandran,
Government Advocate.

JUDGEMENT

The sole accused in Sessions Case No.260 of 2009 on the file of the learned Additional District and Sessions Judge, Fast Track Court, Vellore is the appellant herein. He stood charged for the offence under Sections 366A and 376(1) of IPC. When the appellant was questioned as to the charge, he pleaded not guilty and therefore, he was put on trial. The learned Additional District and Sessions Judge, Fast Track Court, Vellore, after full-fledged trial, found the appellant guilty of offence under Sections 366A and 376(1) of IPC. The appellant was accordingly

convicted and sentenced to undergo rigorous imprisonment for a period of three years with a fine of Rs.1,000/- in default to undergo rigorous imprisonment for a period of three months for the offence under Section 366-A of IPC and to undergo rigorous imprisonment for a period of seven years with a fine of Rs.1,000/-in default to undergo rigorous imprisonment for a period of three months for the offence under Section 376(1) of IPC and the above said sentences shall run concurrently. Challenging the above said judgment of conviction and sentence, the appellant is before this Court with this criminal appeal.

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

That on 26.12.2008 at about 9.00 hrs at Magimandalam (Manthoppu) village, when P.W.4/minor victim girl/Aarthima was proceeding towards her school, the appellant with the intention of compelling her for marriage and sexual intercourse, kidnapped her from and out of her lawful guardian/father of P.W.1/Venkatesan and the witness Pancharathnam who are residing at Mariyamman Koil Street, Arunthathiyar Colony, Magimandalam to Chennai and at Chennai, they stayed in an unknown place. On 01.01.2009, at about 9.00 hrs. at Avadi Murugar Temple, the appellant compelled the P.W.4/victim girl for marriage and tied 'Thali' on her neck inspite of her resistance performed the marriage and after that on the same night in the said unknown place the appellant compelled P.W.4 and committed sexual intercourse against her will and consent. Therefore, P.W.9/Inspector of Police, Ponnai Circle filed a final report against the appellant under Sections 366 & 376 (1) of IPC.

3. The learned Additional District and Sessions Judge, Fast Track Court, Vellore after following the procedure, framed the charges. The appellant has pleaded not guilty and denied the charges framed against him. Before the learned Additional District and Sessions Judge, Fast Track Court, Vellore, in order to prove the case of the prosecution P.W.1 to P.W.9 were examined and marked Exs.P.1 to P.10 and M.O.1/X-ray (2 nos.). On the side of the appellant, no one has been examined as witnesses.

4. Out of the above said witnesses, P.W.1/Venkatesan and Pancharathnam are the father and mother respectively of P.W.4/Arthima. He had three daughters and one son and P.W.4/Aarthima is their 1st daughter. The victim P.W.4/Aarthima was studying X Standard at Government Girls' High School at Thadhiredy Palli. P.W.4 had gone to school on 26.12.2008 at 9.00 hours and did not return back to home till evening and P.W.1 had searched her in several places and learnt that the appellant is used to talk with his daughter P.W.4/Aarthima and he would have kidnapped her. P.W.1 had also enquired with

P.W.2/Swaminathan and one Margan to know about his daughter's whereabouts. P.W.2/Swaminathan, the Village Head (Nattamai) had stated that the appellant was following P.W.4/Aarthima. P.W.1 lodged Ex.P.1 complaint with the police.

5. On 18.02.2009, P.W.1 received information from the police that they have secured his daughter and P.W.1 rushed to the police station and had seen his daughter who wept and stated that she was raped by the appellant. Later, P.W.4/Aarthima/victim girl was produced before the Court and from the Court, P.W.1 took the custody of his daughter.

6. P.W.7/Murugan/Sub-Inspector of Police, Melpadi on receipt of Ex.P.1 complaint, registered a case in Crime No.12 of 2009 U/s 366 and 376(1) of IPC. The printed FIR dated 23.01.2009 is marked as Ex.P.8. P.W.7/Sub-Inspector of Police took up the investigation, rushed to the place of occurrence and prepared Ex.P.2/observation mahazar in the presence of P.W.2/Swaminathan and one Margan. Rough sketch was marked as Ex.P.9. He recorded the statements of the witnesses P.W.1/Venkatesan, Pancharathinam, Rajinikanth, Swaminathan and Margan and searched P.W.4/Aarthima/victim girl at several places and on 18.02.2009 at 11.00 hours near Ammoor Sugar factory, he had seen the victim girl with the appellant and arrested the appellant. The appellant voluntarily given a confession statement in the presence of P.W.2 and one Mani. P.W.7/Sub-Inspector of Police brought them to the police station and recorded the statement of P.W.4/victim girl. The appellant and P.W.4/victim girl were sent to the hospital for medical examination through Court. P.W.3/Kalpana/Headmistress of the Government Girls' High School, Thadiredypalli has issued a Certificate, Ex.P.3 regarding the age of the victim girl based on a requisition made by P.W.7/Sub-Inspector of Police.

7. P.W.5/Dr.Vasanthamoorthy/Civil Surgeon had examined the appellant on 06.03.2009 at 12.30 hrs. on receipt of Ex.P.4/requisition letter and Ex.P.5 letter of Judicial Magistrate-I, Walajapet and issued Ex.P.6/Medical report in which he opined that there is nothing to suggest that the individual is impotent.

8. P.W.6/Dr.Sumithalakshmi/Civil Surgeon had examined P.W.4/victim girl and issued Ex.P.7/Medical Certificate.

9. P.W.8/Dr.Vijayalakshmi, Radiologist examined P.W.4/victim girl after taking X-rays M.O.1 series and issued Ex.P.10/Radiological report.

10. P.W.9/Loganathan/Inspector of Police took up the matter for further investigation, recorded the statements of

P.W.5/Dr.Vasanthamoorthy, P.W.6/Dr.Sumithalakshmi and P.W.8/Dr.Vijayalakshmi. After completing the investigation, P.W.9/Inspector of Police laid the charge sheet against the appellant under Sections 366 and 376 (1) of IPC.

11. The learned Additional District and Sessions Judge, Fast Track Court, Vellore, after completing prosecution evidence, the incriminating evidence was put to the appellant under Section 313(1)(b) of Cr.P.C., he denied the same as false evidence and no witness was examined on the side of appellant and no documents were marked. After considering the oral and documentary evidence, the trial Court found that the appellant was guilty and convicted him for the offence under Sections 366 and 376(1) of IPC and sentenced him as stated above. Aggrieved against the order of conviction and sentence passed by the trial Court, the appellant has preferred the present appeal.

12. Heard the learned counsel appearing for the appellant and the learned Government Advocate(Crl. Side) appearing for the respondent and perused the available records.

13. The learned counsel for the appellant would submit that the entire case of the prosecution rests on the inimical and interested testimonies of P.W.1 and P.W.4. Their evidences are brimming with embellishments and exaggerations. Hence, it is unsafe to rely on such witnesses. The learned counsel further submit that the evidence of P.W.4 categorically suggests that the victim has completed 16 years and running 17 years and the evidence of P.W.4 while narrating the facts in cross-examination clearly spells out the answer regarding her age is not an aberration and establishes the fact that she is mature enough to spell out of the consequences of the acts and further the ossification test performed by P.W.8 corroborated the version of P.W.4 that she is above 16 years and below 18 years of age. Thus, the above evidence clearly establishes the fact that P.W.4 is an adult as per Sec. 376 (sixthly) of the Indian Penal Code. The learned counsel also submit that the trial Court grossly erred in convicting the appellant for the offence under Section 366A of IPC. Hence, he prayed for allowing of the appeal.

14. Resisting the same, learned Government Advocate (Crl. Side) submits that the victim girl/P.W.4 was aged about 16 years at the time of occurrence and P.W.3/headmistress was examined, through her Ex.P6 was marked. As per Ex.P6, age of P.W.4 was between 15 to 16 years, so she was not aged above 16 years. The trial Court has considered all the aspects in proper perspective and rightly convicted and sentenced the appellant. Therefore, he prayed for dismissal of the appeal.

15. Considered the rival submissions made on both sides and perused the materials available on record.

16. Now this Court has to decide whether P.W.4 was aged above 16 years or below 16 years at the time of occurrence?. As per the case of prosecution, while P.W.4 was proceeding to school, the appellant/accused had kidnapped the victim girl/P.W.4 on 26.12.2008 at 9.00 a.m. and she was wrongly confined in the house and by tying thali, the appellant/accused had sexual intercourse with her.

17. According to the learned counsel for the appellant/accused, the victim girl/P.W.1 was aged above 16 years and she is a consenting party and by voluntarily accompanying with the appellant, she gave consent for marriage and had sexual intercourse.

18. According to P.W.1 and P.W.4, the age of the victim girl at the time of incident was below 16 years. To prove the age, the prosecution examined P.W.3/Kalpana, the then Head Mistress who had filed Ex.P.3 birth certificate in which the date of birth of the victim is mentioned as 12.12.1993. P.W.8/Dr.Vijayalakshmi, the Radiologist had opined that the age of the victim was above 16 years and below 18 years. Since, the victim girl was aged below 18 years at the time of occurrence and offence under Section 366A is attracted. If the girl was aged less than 16 years, her consent is immaterial. Once it is proved the girl was below 16 years of age, the question of consent does not arise. The offence of kidnapping and rape were said to have been taken place on 26.12.2008 and on subsequent dates. So, the victim girl had completed only 15 years and 14 days on the date of occurrence. P.W.3 had issued Ex.P.3 based on the school records which shows that the victim was born on 12.12.1993. So, the date of birth mentioned in the birth certificate is conclusive proof, unless it is contrary proved. Report of the Doctor is only opinion that is not conclusive proof. The defence has not proved that the date of birth mentioned in Ex.P3/birth certificate. Therefore, from the evidence of prosecution, inspite of her resistance, the victim was forcibly compelled for marriage and there is no evidence to prove that she has consented for marriage and sexual intercourse, even assuming she consented for the same will not give any effect. Hence, the age of P.W.4/victim girl on the date of occurrence is below 16 years.

19. P.W.4 had stated that she was raped by the appellant on the night when the appellant tied the sacred thread around her neck and she had further stated in her chief examination that at Bangalore, against her will, the appellant had raped her. The

evidence of P.W.5/Dr.Vasanthamoorthy and Ex.P.6/Medical certificate are sufficient to hold that the appellant is potent and capable to perform the sexual intercourse with a girl. P.W.6/Dr.Sumithalakshmi who had examined P.W.4 and issued Ex.P.7/Medical certificate in which she had opined that the victim girl had sexual intercourse in the past and that the individual is not a virgin. The evidence of P.W.1, the evidence of P.W.5 and P.W.6 coupled with the Potency certificate, Ex.P.6 and Medical Certificate, Ex.P.7 are sufficient to hold that the victim girl was raped by the appellant.

20. The learned Additional District and Sessions Judge (Fast Track Court), Vellore after hearing both sides and on the scrutiny of records coupled with the evidence of the prosecution witnesses, the offence committed by the appellant squarely comes under Section 366A of IPC and not under Section 366 of IPC, since the age of the victim was below 16 years on the date of occurrence i.e., 26.12.2008 on which the appellant enticed the victim girl by deceitful means against her will. For both the offences under Section 366 and 366A of IPC, the punishment is same and hence, no separate charge need be framed for the offence under Section 366A of IPC and the appellant will not be prejudiced if the appellant is convicted under Section 366A of IPC.

21. It is well settled that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a Doctor. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family.

22. In view of the above findings, the prosecution has proved the guilt of the accused/appellant for the offence under Sections 366A and 376(1) of IPC beyond reasonable doubt. This Court does not find any valid reasons for reducing the sentence imposed on the appellant/accused by the trial Court, hence the quantum of sentence imposed by the trial Court is hereby confirmed. Therefore, the judgment of conviction and sentence passed by the trial Court does not warrant any interference and the same is hereby confirmed and the appeal deserves to be dismissed and hence, it is hereby dismissed.

23. In the result, the Criminal Appeal stands dismissed, confirming the judgment of conviction and sentence dated 20.12.2010 made in S.C.No.260 of 2009 on the file of the Additional District and Sessions Court (Fast Track Court), Vellore. The trial Court is directed to take effective steps to

secure the custody of the appellant/accused to undergo the remaining period of sentence.

Sd/-
Assistant Registrar (CS VIII)

//True copy//

Sub Assistant Registrar

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To

1. The Additional District & Sessions Judge,
Fast Track Court,
Vellore.
2. The Inspector of Police (Ponneri Circle),
Melpadi police Station,
Vellore District.
3. The District Munsif - cum- Judicial Magistrate - I,
Walajapet.
4. do- Thro The Chief Judicial Magistrate,
Vellore (for information)
5. The Superintendent, Central Prison,
Vellore.
6. The Public Prosecutor
High Court, Madras.
7. The Record keeper,
Criminal Section,
High Court, Madras.

Cr1. Appeal No.152 of 2011

NRJK (CO)
GN (17/05/2018)

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