

Bail Slip

The Appellant/Accused namely Chandramohan S/o.Kalimuthu, was directed to be released on bail vide order dated 21/12/2009 made in Crl.M.P.No.1/08 in Crl.Appeal No.440/2008 passed by this Hon'ble Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Delivered On: 11.01.2019

Reserved On: 07.01.2019

CORAM

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

Crl.A.No.440 of 2008

And

Crl.M.P.No.250 of 2019

Chandramohan

... Appellant

Vs.

State rep. by
Inspector of Police,
All Women Police Station,
Thudiyalur,
Coimbatore District.
(Crime No.11 of 2004)

... Respondent

Prayer:

Appeal filed under Section 374(2) of Cr.P.C. against the judgment and order of conviction passed in S.C.No.204 of 2005 by order dated 02.06.2008 on the file of the learned Sessions Judge, (Mahalir Neethimandram), Coimbatore, convicting the appellant for offences under Section 376 of IPC and sentenced him to undergo 10 years rigorous imprisonment and to pay a fine of Rs.2,500/- and in default to undergo R.I. for six months, for the offence under Section 366(A) IPC he was sentenced to undergo 10 years R.I. with a fine of Rs.2,000/- in default six months imprisonment and prays that the same may be set aside.

For Appellant : Mr.R.Sankarasubbu

For Respondent : Mr.R.Ravichandran
Government Advocate (Crl. Side)

J U D G M E N T

The appellant has filed this appeal seeking to set aside the judgment in S.C.No.204 of 2005 passed by the learned Sessions Judge, Mahalir Neethimandram, Coimbatore on 02.06.2008.

2.The appellant is the accused in the case in S.C.No.204 of 2005. The sum and substance of the prosecution case is as follows: P.W.1 is the father of the victim girl Saranya/ P.W.2 and a resident of Moolathurai. P.W.2/ prosecutrix was studying IX Standard in the Government Higher Secondary School, Sirumugaipudhur. The accused is residing at Moolathurai in the next street where the house of P.W.1 is situated. On 05.04.2004, P.W.2/ prosecutrix went to School as usual and did not return to the house till late evening. While the prosecutrix was on her way back to the house in Moolathurai from School in her bicycle, the accused intercepted her knowing that she is a minor girl and induced her to accompany him by giving hope that nobody will separate them after marriage and persuaded her to leave the house.

3.Thereafter, with the insistence of marriage, the accused forcibly accompanied the prosecutrix in the bicycle to Sirumugai. From there he took the prosecutrix to Mettupalayam in a two wheeler namely, TVS 50 Moped bearing Registration No.TN 37 Z 2752. From Mettupalayam, the accused took the prosecutrix to Thiruppur Nallur in a Moffusal bus without the consent and knowledge of the victim's parents. Thereafter the accused had sexual intercourse with the prosecutrix at 8 p.m. forcibly by making her to believe that he became her husband.

4.On 06.04.2004 at 7.00 a.m. the accused tied thali on the neck of the prosecutrix at a Vinayagar Temple at Nallur Thiruppur and made the prosecutrix to believe that the accused is the husband to her to whom she is lawfully married and he had sexual intercourse with her during the night hours in the house of one Ramachandran who is the younger brother of the accused's father. In the meanwhile, the accused came to know that the parents of the prosecutrix were searching for the prosecutrix. Hence, the accused threatened the prosecutrix not to disclose about the sexual intercourse he had with her to anybody and also threatened her with dire consequences.

5.Thereafter, the said Ramachandran and one Muruganathan who is also brother of the accused's father advised the accused to surrender before the Police Station. Accordingly, they took the victim and the accused to Mettupalayam and dropped them near the Police Station on 07.04.2004. The accused and the victim surrendered before P.W.15/ the then Head Constable attached to

the All Women Police Station, Thudiyalur. The victim was rescued by the Police and the same was intimated to her parents.

6.P.W.1 and P.W.3 who are the parents of the prosecutrix went to All Women Police Station, Thudiyalur and lodged Ex.P.1/ Complaint. P.W.15 received the complaint and registered a case in Crime No.11 of 2004 under Section 363 of IPC and handed over the case file to the Sub Inspector of Police for investigation.

7.P.W.16/ Sub Inspector of Police attached to All Women Police Station, Thudiyalur, took up the case for investigation. During the course of investigation, P.W.16 arrested the accused and intimated the factum of arrest to his parents and after complying with the necessary formalities, she forwarded the accused to the Court for remand. She also seized M.O.1 and M.O.2 from the accused in the presence of

P.W.10 and P.W.11. P.W.16 also seized M.O.3 to M.O.6 from the victim in the presence of P.W.9. Thereafter, P.W.16 examined the said Ramachandran and father of the accused and recorded their statements. P.W.16 also examined the victim girl and recorded her statement. On 12.04.2004, P.W.16 submitted Ex.P.16/ Alteration report altering the charge from Section 363 IPC to Section 366-A and 376 of IPC and handed over the case file to the Inspector of Police for further investigation.

8.On 09.04.2004, the victim was produced before P.W.13/ Doctor. P.W.13 conducted medical examination on the victim girl and noticed no injury or scar marks over the body and issued Ex.P.9/ Accident Register opining that the victim had lost her virginity.

9.On 12.04.2004, the victim was produced before P.W.7/ Doctor for Radiological examination. P.W.7 radiologically examined the victim and issued Ex.P.3/ Radiological report opining that the victim might be above the age of 16 years and below the age of 17 years.

10.P.W.17/ Inspector of Police received the case file and took up the same for further investigation. On 15.04.2004, P.W.17 examined P.W.1/ father of the victim and P.W.5 and recorded their statements. Thereafter, P.W.17 also examined the other witnesses and recorded their statements. On 24.04.2004, P.W.17 examined P.W.2/ victim girl and recorded her statement. P.W.17 also examined P.W.12/ Head Master of the Government Higher Secondary School, Sirumugaipudhur and also obtained Ex.P.7/ Transfer Certificate.

11.During the course of investigation, on 23.07.2004, the accused was examined by a Medical Board to find out the potency

of the accused. The Potency Test Report issued by them has been marked as Ex.P4. Thereafter, P.W.17 conducted a detailed investigation.

12.After conducting a detailed investigation, P.W.17 laid a final report as against the accused for the offence under Sections 366-A and 376 of IPC before the learned Judicial Magistrate, Mettupalayam. The case was committed to the Court of Sessions, Coimbatore Division by the learned Judicial Magistrate, Mettupalayam and the same was taken on file by the Trial Court in S.C.No.204 of 2005.

13.When the Trial Court questioned the accused under Section 313 of Cr.P.C., in respect of the incriminating circumstances available

against him in the evidence, he denied the same as not true and opted to examine defence witnesses. Thereafter, the Trial Court framed charges against the accused under Sections 366-A and 376 of IPC and trial was proceeded against the accused.

14.On the side of the prosecution, 17 witnesses were examined as P.W.1 to P.W.17 and 15 documents were marked as exhibits Ex.P.1 to Ex.P.15. Six material objects were also marked as M.O.1 to M.O.6. On the side of the appellant/ accused two witnesses were examined and two documents were marked as exhibits.

15.After elaborate trial, the Trial Court convicted the accused for the offence under Sections 366-A and 376 of IPC and sentenced him to undergo 10 years rigorous imprisonment and to pay a fine of Rs.2,000/- in default to undergo 6 months simple imprisonment for the offence under Section 366-A of IPC and to undergo 10 years rigorous imprisonment and to pay a fine of Rs.2,000/- in default to undergo 6 months simple imprisonment for the offence under Section 376 of IPC and ordered the sentences of imprisonment to run concurrently. Aggrieved by the said conviction and sentence, the appellant / accused has filed this appeal before this Court.

16.Heard the arguments advanced on either side and perused the materials placed on record.

17.The learned counsel appearing for the appellant would submit that P.W.2 is the victim girl and she had love affair with the accused and both were known to each other and on her own volition, she accompanied the accused for the purpose of marriage. He would further submit that though there was allegation that prior to the marriage, the appellant had sexual intercourse with the victim girl, except P.W.2, no other

witnesses were examined to prove the sexual intercourse.

18.The learned counsel appearing for the appellant would further submit that though the prosecution has marked the Birth Certificate of the victim/ Ex.P.2 dated 14.04.2004 and Transfer Certificate of the victim/ Ex.P.7 dated 28.06.2004, the date of birth in both the Certificates differ and would further submit that Ex.P3/ Radiological report shows that the victim might be above the age of 16 years and below the age of 17 years. He would further submit that when the victim girl is above the age of 16 years, she is capable of understanding the sexual relationship with the accused. However, all

these things were not considered by the Trial Court. Hence, the conviction and sentence passed by the Trial Court is unsustainable one.

19.The learned counsel appearing for the appellant would further submit that even after conviction, the appellant had love affair with the victim girl. He would further submit that the victim girl after attaining the age of majority voluntarily accepted the marriage that had taken place between herself and the accused and that the accused tied thali on her neck at a Vinayagar Temple. He would further submit that in an earlier occasion on 21.12.2009, the victim girl appeared before this Court and expressed her willingness to live along with the accused as husband and wife and hence, this Court vide order dated 21.12.2009 suspended the substantive sentence of imprisonment.

20.The learned counsel appearing for the appellant would further submit that after the victim girl attained the age of majority, marriage between the appellant and the victim girl was solemnized in the presence of elders. He would further submit that P.W.1/ father of the victim, P.W.2/ victim girl and P.W.3/ mother of the victim have filed affidavits dated 04.01.2019 sworn before a Notary Public stating

that the P.W.2/ victim girl and the appellant/ accused are living together and seeking to release the appellant from the case. Accordingly, he prayed for allowing the appeal.

21.Per contra, the learned Government Advocate (Crl. Side) would submit that earlier though the parties have agreed to accept the marriage between the accused and the victim girl, thereafter, the accused deserted the victim girl. Thereafter, the victim girl married one Karthick. He would further submit that at present the victim girl is not living with the appellant. The Trial Court after considering the materials and after elaborate discussions, has passed conviction and sentence

as against the accused. Hence, the well considered judgment of the Trial Court need not be interfered with. Accordingly, he prayed for dismissal of the appeal.

22. In the light of the above submissions, now it has to be analyzed whether the prosecution has proved the guilt on the accused beyond all reasonable doubt or not.

23. Perusal of the entire records reveals that P.W.1 is the father of the victim girl Saranya/ P.W.2 and a resident of Moolathurai. P.W.2/ prosecutrix was studying IX Standard in the Government Higher Secondary School, Sirumugaipudhur. The accused was residing at Moolathurai in the next street where the house of P.W.1 is situated. On 05.04.2004, P.W.2/ prosecutrix went to School as usual and did not return to the house till late evening. Hence, P.W.1 searched for her. However, he was not able to find his daughter/ victim. However, on enquiry, a boy adjacent to his house informed him that the accused along with one Anandhan had kidnapped his daughter. Immediately, he informed the same to the Police. Thereafter on 07.04.2004, on information, P.W.1 went to the All Women Police Station, Thudiyalur and lodged the Complaint.

24. The evidence of P.W.2/ prosecutrix clearly indicate that on the date of occurrence, she was studying IX Standard in the Government Higher Secondary School, Sirumugaipudhur. While she was on her way back to the house in Moolathurai from School in her bicycle, the accused intercepted her and informed her that her friend is waiting for her arrival. Believing his words, she followed the accused and she was made to wait and the accused left the place and returned in a two wheeler with one Anandhan. Thereafter, the accused hide her bicycle in some other place and took her along with the said Anandhan in the two wheeler and they reached Mettupalayam.

25. The evidence of P.W.2/ prosecutrix further reveal that thereafter the accused took P.W.2 to Thiruppur. On the way, the Prosecutrix questioned the accused as to why he is taking her to a long distance. However, the accused caught hold of her hands and dragged her with him and she was made to stay in his friend's house at Thiruppur. There the accused had sexual intercourse with her by force. The next day, the accused tied thali on her neck at a Vinayagar Temple and taken her to the house of one Ramachandran who is the younger brother of the accused's father and he had sexual intercourse with her during the night hours. Thereafter, on advice, she went along with the accused to the All Women Police Station, Thudiyalur. Thereafter P.W.1/ father of the victim came to the Police Station and taken her to the house.

26.P.W.3 is the mother of the prosecutrix and P.W.4 is the brother of the prosecutrix and their evidence corroborate with the evidence of P.W.1. P.W.5 one Anandhan is the eye witness and his evidence clearly indicate that he accompanied the accused. However, he denied abduction and he was declared as hostile witness.

27.P.W.6 is also an eye witness to the occurrence. In his evidence, he clearly indicate that on 05.04.2004, he along with his friend found P.W.2 was accompanied by the accused and one Anandhan and they travelled in a two wheeler. Thereafter, they informed the same to the parents of the victim. In his cross examination also P.W.6 confirmed the travelling of P.W.2 along with the accused and one Anandhan. The evidence of P.W.6 corroborated with the evidence of P.W.1 to P.W.4.

28.In order to prove the age of the prosecutrix, her Birth Certificate/ Ex.P.2 dated 14.04.2004 and Transfer Certificate/ Ex.P.7 dated 28.06.2004 were marked by the prosecution. However, the date of birth in both the Certificates differ and Ex.P.3/ Radiological report shows that the victim might be above the age of 16 years and below the age of 17 years. This Court need not believe the Radiological report. However, the evidence let in by the prosecution witnesses corroborate with each other that the victim girl was a minor on the date of occurrence.

29.The essential ingredients required to attract offence under Section 366-A of IPC are that the accused induced a girl; that the person induced was a girl under the age of 18 years; that the accused has induced her with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse; such intercourse must be with a person other than the accused; and that the inducement caused the girl to go from any place or to do any act.

30.In the present case, the prosecutrix/ P.W.2 left the house along with the accused knowing well that she is accompanying the accused and she was not forced to have sexual intercourse with another person other than the accused. P.W.5 who accompanied the accused and the prosecutrix, in his evidence has deposed that the accused had love affair with the prosecutrix and that the accused spread the news to other friends. P.W.5 has also deposed that he warned the accused and on 05.04.2004 he saw the accused and prosecutrix proceeding towards Sirumugai Village. Thereafter, P.W.5, accused and the prosecutrix travelled in the TVS Moped and reached Mettupalayam. Thereafter, they went to Thiruppur in bus.

31.From the deposition of P.W.5, it is known that the prosecutrix travelled along with the accused in the two wheeler

along with P.W.5, however, she neither raise any alarm nor sought help of other persons for rescuing her from the accused. Even in the bus she neither raise any alarm nor sought help of general public for rescuing her from the accused. P.W.6 also in his evidence has deposed that on 05.04.2004 he saw the accused and prosecutrix travelling in a two wheeler along with P.W.5. The evidence of P.W.6 shows that the prosecutrix with her consent has gone along with the accused. It is also admitted that she had sexual intercourse with the accused.

32.As per clause 'sixthly' of Section 376 of IPC, sexual intercourse with a woman with her or without her consent when she is under 16 years of age, amounts to rape. Hence, in the present case, considering the age of the prosecutrix the conviction under Section 376 of IPC cannot be faulted with. However, since the victim was not forced to have sexual intercourse with another person the conviction under Section 366-A of IPC is not sustainable.

33.The learned counsel appearing for the appellant contends that after the victim girl attained the age of majority, marriage between the appellant and the victim girl was solemnized in the presence of elders and would further contend that since P.W.2/ victim girl and the appellant/ accused are now living together happily and they also have a child, this Court may impose the sentence for a term less than 7 years.

34.In order to confirm the prosecution version, this Court also interacted with the prosecutrix directly. During the interaction, it was revealed that after the prosecutrix attained the age of majority, marriage between the prosecutrix and the accused was solemnized. Thereafter, the accused left the prosecutrix. Thereafter, the prosecutrix married one Karthick. Even the said Karthick left her. However, the appellant/ accused once again accepted her and now they are living together and running their matrimonial life. The parents of the victim also confirmed that the appellant/ accused and the prosecutrix are now living together and requested the Court to pardon the appellant.

35.In support of his contentions, the learned counsel appearing for the appellant relied upon the following decisions:

(i) The decision of the Hon'ble Apex Court reported in (2008) 3 SCC 381 (Iqbal Versus State of Kerala), the relevant portion of which reads as follows:

"6.In support of the appeal, learned counsel for the appellant submitted that the evidence of the victim PW2 clearly shows that she was in love with the appellant and had gone with him on her own will. Letters

(Ex. D1

to D3) clearly established this fact. It was further submitted that the evidence of PW2 indicated that though victim and appellant were in love, the parents objected to it. It is also pointed out that in the cross-examination she had admitted that she had sexual intercourse with the appellant on her own free will and consent and there was no force used. The High Court, however, found that girl victim was aged about 13 years and 9 months and, therefore, the consent was of no consequence so far as allegation of rape is concerned. The conviction as recorded by the Trial Court was affirmed. However, on special circumstances which had weighed, the High Court imposed the sentence below the prescribed minimum, reduced the sentence to three years rigorous imprisonment and fine of Rs.10,000/- in respect of the offence punishable under Section 376 IPC. However, his conviction and sentence relating to Section 366A was affirmed. The sentences imposed were directed to run concurrently. As noted above, the stand of the appellant was that there was no rape involved and in any view, Section 366A has no application.

7. So far as the legality of conviction for offence punishable under Section 376 IPC is concerned, Section 375 IPC needs to be noted. The same reads as follows:

375. Rape.- A man is said to commit "rape" who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First. - Against her will.

Secondly. - Without her consent.

Thirdly. - With her consent, when her consent has been obtained by putting her on any person in whom she is interested in fear of death or of hurt.

Fourthly. - With her consent, when the man knows he is not her husband, and that her consent is given because she believed that he is another man to whom she is or believed herself to be lawfully married.

Fifthly. - With her consent, when, at the time of giving such consent, by reason

of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome the nature and consequences of that to which she gives consent.

Sixthly. - With or without her consent, when she is under sixteen years of age."

8. Clause 'sixthly' clearly stipulates that sexual intercourse with a woman with her or without her consent when she is under 16 years of age, amounts to rape. The evidence on record clearly establishes that the victim was less than 16 years of age and, therefore, the conviction for offences punishable under Section 376 IPC cannot be faulted.

9. The residual question is of applicability of Section 366A IPC. In order to attract Section 366A IPC, essential ingredients are (1) that the accused induced a girl; (2) that the person induced was a girl under the age of eighteen years; (3) that the accused has induced her with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse; (4) such intercourse must be with a person other than the accused; (5) that the inducement caused the girl to go from any place or to do any act.

10. In the instant case, the admitted case of the prosecution is that girl had left in the company of the accused of her own will and that she was not forced to sexual intercourse with any person other than the accused. The admitted case is that she had sexual intercourse with the accused for which, considering her age, conviction under Section 376 IPC has been maintained. Since the essential ingredient that the intercourse must be with a person other than the accused has not been established, Section 366A has no application."

(emphasis supplied)

(ii) The decision of the Hon'ble Apex Court reported in (2017) 15 SCC 591 (Mahendra Subhashbhai Vankhede Versus State of Gujarat and others), the relevant portion of which reads as follows:

"8.On the other hand the decision in State of Punjab v. Rakesh Kumar is applicable to this case. In this case at hand, there is no dispute as to the fact that the accused was nineteen years of age at the time of the incident. Additionally it is born out of the record that the accused and the girl had a love affair and she had left her parents house voluntarily without any force. Further it is pointed out that both of them stayed together for around ten days and the nature of sexual intercourse was consensual. Moreover the appellant herein has already undergone the period awarded (two years nine months) by the trial court.

9.In consideration of peculiar facts and circumstances herein, and as the incident relates to the date prior to the amendment of IPC 1 which came into force on 03.02.2013, and for special reasons sentence less than seven years was imposable, we think that the trial court has rightly imposed a lesser sentence. It is to be noted that after the High Court had enhanced the sentence, the accused has further undergone a sentence of six months (in all more than three years) which we feel is sufficient to meet the ends of justice. In light of the above, we allow the appeal and direct the appellant to be released forthwith, if not required in any other case."

(iii) The decision of the Hon'ble Apex Court reported in (2008) 12 SCC 33 (State of Punjab Versus Rakesh Kumar), the relevant portion of which reads as follows:

"6.Undisputedly, the victim was less than 16 years of age at the time of occurrence. Evidence also shows that the victim and accused were in love and the victim admitted that she had sexual intercourse with the accused because of that. That of course has no relevance because of her age being less than sixteen years. The father of the victim had also filed an affidavit before the High Court that since the victim is settled in life a liberal view may be taken so far as sentence is concerned.

7.Considering all these facts, as was

done in Iqbal v. State of Kerala, Criminal Appeal No.1463 of 2007 decided on 24.10.2007, the sentence is fixed at 3 years RI and fine of Rs.10,000/- to be deposited within three months. In case of default in making deposit, default sentence shall be one year. In case deposit is made, a sum of Rs.8,000/- shall be paid to the victim."

36.In view of the above, the conviction under Section 376 of IPC is confirmed. However, the conviction under Section 366-A of IPC is set aside. In the present case the marriage inbetween the accused and the prosecutrix was solemnized after the prosecutrix attained the age of majority and as on today they are living happily and they also have a child. In consideration of the peculiar facts and circumstances of the case and as the incident relates to the date prior to the amendment of IPC which came into force on 03.02.2003 and for the special adequate reasons as stated above, this Court is inclined to reduce the sentence of imprisonment imposed on the appellant. However, this Court is inclined to increase the fine amount to a sum of Rs.4,000/-.

37.In the result, the criminal appeal is partly allowed. The conviction and sentence imposed by the learned Sessions Judge, Mahalir Neethimandram, Coimbatore, in S.C.No.204 of 2005 under judgment dated 02.06.2008 as against the appellant for the offence under Section 366-A of IPC are set aside. The appellant is acquitted from the charge under Section 366-A of IPC. The conviction imposed by the learned Sessions Judge, Mahalir Neethimandram, Coimbatore, in S.C.No.204 of 2005 under judgment dated 02.06.2008 as against the appellant for the offence under Section 376 of IPC is confirmed, however, the sentence imposed on the appellant for the offence under Section 376 of IPC is modified to that of the period of imprisonment already undergone by the appellant/ accused. However, the fine amount is increased from Rs.2,000/- to Rs.4,000/-. The appellant shall pay the fine amount of Rs.4,000/- in default, he shall undergo 3 months rigorous imprisonment. Consequently, the connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar (CS-III)

//True copy//

Sub Assistant Registrar

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To

1.The Sessions Judge, Mahalir Neethimandram, Coimbatore.

2. Inspector of Police, All Women Police Station,
Thudiyalur, Coimbatore District.

3. The Superintendent, Central Prison, Coimbatore.

4. The Public Prosecutor, High Court, Madras.

+1cc to Mr.R.Sankarasubbu, Advocate SR.No.3366

Crl.A.No.440 of 2008

And

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RSV(CO)

GMV(05/02/2019)