

**BAIL SLIP**

The Appellant/Accused namely, S.Babu, S/o.Sriram Aasari, was directed to be released on bail as per order of this Court dated 10.02.2010 and made in MP(MD)No.1 of 2010 in CrI A(MD)No.31 of 2010 on the file of this Court.

WEB COPY

EFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 12.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

CrI.A(MD)No.31 of 2010

Babu

... Appellant /Accused

Vs

State represented by,
The Inspector of Police,
Ponnamaravathy Police Station,
(In Cr.No.2 of 2008)
Pudukkottai District.

... Respondent/Complainant

PRAYER: Criminal Appeal is filed under Section 374 of Cr.P.C., to admit this appeal on file and call for the records from the Mahila Court, Pudukkottai and set aside the Judgment of Mahila Court, Pudukkottai passed by the learned Sessions Judge, Mahila Court, Pudukkottai, Pudukkottai District in S.C.No.65 of 2009, dated 22.01.2010 by allowing this appeal.

For Appellant

: Mr.A.Prasanna Rajadurai
for Mr.S.Muthal Raj

For Respondent

: Mrs.S.Bharathi
Government Advocate (CrI.side)**JUDGMENT**

The appellant herein was found guilty of the offences under Sections 376 and 366 of IPC and sentenced to seven years rigorous imprisonment for the offence under Section 376 of IPC and sentenced to four years rigorous imprisonment for the offence under Section 366 of IPC, vide Judgment dated 22.01.2010 in S.C.No.65 of 2009 on the file of the Sessions Judge, Mahila Court, Pudukkottai. Questioning the same, this appeal has been filed.

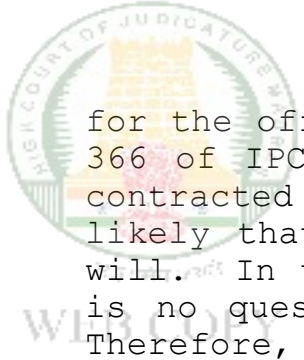
2.The prosecution case is that on 29.11.2007, at about 02.00 p.m., the appellant herein took away the victim girl from the lawful custody of P.W.1 and went to Kerala and during his stay there, for more than 45 days, he had sexual intercourse with the victim girl. In this regard, Ex.P1-Complaint was lodged by P.W.1 before the Sub Inspector of Police, Poonamaravathy Police Station on 29.11.2007 itself. Based on Ex.P1, Crime No.2 of 2008, was registered on 05.01.2008 for the offence under Section 366(a) of IPC(Ex.P10). The



defacto complainant filed a Habeas Corpus Petition before the High Court and ultimately, the victim girl surfaced on 28.01.2008. Investigation continued and final report came to be filed before the learned Judicial Magistrate, Thirumayam for the offences under Sections 376, 366 and 366(a) of IPC against the appellant herein. Cognizance of the offences was taken and since the case was exclusively triable by the trial Court, it was committed to the Sessions Court in P.R.C.No.52 of 2008. It was ultimately made over to the Sessions Judge, Mahila Court, Pudukkottai in Session Case No.65 of 2009. Charges were framed against the accused under the aforesaid provisions and the accused pleaded not guilty and claimed to be tried. In support of the prosecution case as many as 13 witnesses were examined. Ex.P1 to Ex.P13 were marked. On the side of the accused, no evidence was adduced. The learned trial Judge, by Judgment dated 22.01.2010, found the accused guilty of the offence under Sections 376 of IPC and under Section 366 of IPC and sentenced him as mentioned above. Challenging the same, this appeal has been filed.

3.The learned counsel appearing for the appellant reiterated all the contentions set out in the appeal memorandum. His core contention is that charge against the appellant can be said to be established, only if it is shown that the appellant gave a false promise to marry and had sexual intercourse with the victim on that basis. He drew my attention to the testimony of the victim girl herself in this regard. The victim girl had clearly stated in her evidence that the accused/appellant herein had an intention to marry her. She would further state that but for the intervention of the parents of the accused, he would not have left her also. She conceded that her father had given a police case and that, as a result, the parents of the accused were detained and subjected to torture. The relationship between the parties appears to have suffered crack on account of this developments. The appellant's counsel would make a claim before this Court that even though twelve years have lapsed, the appellant continuous to remain single. The appellant's counsel, in this regard, drew my attention to the decision of this Court reported in **2010 (2) CTC 723 (Swami @ Ramakrishnan Vs. State by Inspector of Police, G2 Puthumanthu)**.

4.On a careful reading of the evidence of P.W.2, it is evident that P.W.2 had voluntarily gone herself and that, it cannot be said that there was no awareness of the moral quality of the act and inherent risk involved it. She had admitted the love affair with the appellant. She had voluntarily gone with the appellant. Her evidence further reinforces the appellant's claim that he always had an intention to marry her and that it was only on account of the criminal case filed by the father of the girl, their entire plan got thwarted. In these circumstances, I am of the view that the trial Court ought not to have convicted the appellant for the offence under Section 376 of IPC. The impugned Judgment of the Court below is liable to be set aside on this score. Now the question that arises for consideration is whether the conviction of the appellant



for the offence under Section 366 of IPC can be sustained. Section 366 of IPC will come into play only if the woman is kidnapped or contracted with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will. In this case, P.W.2 was ready to marry the appellant. There is no question of compelling or doing anything against her will. Therefore, on the very face of it, Section 366 of IPC is not attracted. But then, the appellant cannot go scot free. Section 361 of IPC reads that whoever takes or entices any female under eighteen years of age, out of the keeping of the lawful guardian of such minor without the consent of such guardian, is said to kidnap such minor from lawful guardianship. Section 363 of IPC prescribes the punishment as imprisonment for a term that may extend to seven years. In this case, the victim girl was born on 04.05.1990. The occurrence had taken place on 29.11.2007.

5.The learned counsel appearing for the appellant would claim that on that date, the victim was aged 17 years five months and 25 days. She was virtually on the verge of attaining minority. Even though technically she was a minor, she was very much having the discretion to take a decision. In this regard, the learned counsel appearing for the appellant would contend that even though a claim was made that the victim was born in the year 1990 and that on the occurrence date, she was below the age of 18, no proof was forthcoming. The school leaving certificate of the victim girl was not marked by the prosecution. What was marked was only Ex.P3-Age Certificate given by the Radiologist. The Radiologist had opined that the victim girl was above the age of 14 years but below the age of 18 years. The Radiologist was examined as P.W.6. To a specific question posed in the cross examination, the Radiologist fairly answered that his assignment was only an approximate one. P.W.2, while being cross examined, was suggested that even in the year of 2007, she had attained the age of 19. Thus, it is beyond dispute that the prosecution had not placed any clinching material proving the age of the victim as below 18 on the occurrence date.

6.In this regard, the learned counsel appearing for the appellant drew my attention to the decision of the Hon'ble Supreme Court reported in **2015 (4) Crimes 45(SC) (Sate of Madhya Pradesh Vs. Munna @ Shambhoo Nath)**. The Hon'ble Supreme Court, following an earlier decision, held that the conviction of the appellant cannot be based on the approximate date, which is not supported by any record and that it would be quiet unsafe to base conviction on an approximate date. The case on hand is quite similar. The age of the victim has not been established beyond reasonable doubt as below 18 on the occurrence date. Therefore, I am of the view that it would be most unsafe to sustain the conviction imposed on the appellant for the offence under Section 366 of IPC. Looked at from any angle, the conviction imposed by the Court below cannot be sustained. The impugned Judgment is set aside. This criminal appeal is allowed. The appellant is acquitted. The fine amount, if any, paid by him shall be refunded forthwith. The bail bond, if any, executed by the



appellant shall stand cancelled.

WEB COPY

// True Copy //

Sd/-

Assistant Registrar (Crl Side)

Sub Assistant Registrar(CS)

rmi

To

- 1.The Sessions Judge, Mahila Court, Pudukkottai.
- 2.The Principal Sessions Judge, Pudukkottai.
- 3.The District Munsif cum Judicial Magistrate, Thirumayam.
- 4.The Chief Judicial Magistrate,
Pudukkottai.
- 5.The Superintendent,
Central Prison, Trichy.
- 6.The Inspector of Police,
Ponnamaravathy Police Station,
Pudukkottai District.
7. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Copy to: The Section Officer,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai.(2 COPIES)

+1 CC to M/s.NA.PALANIYANDI, Advocate (SR-75068[F] dated 12/07/2019)

Crl.A(MD)No.31 of 2010
12.07.2019

KK/SAR/04.09.2019/4P-11C/