

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.02.2020

CORAM:

THE HONOURABLE MR. JUSTICE G.R.SWAMINATHAN

Crl.A.No.273 of 2018
and
C.M.P.Nos.6540 & 6541 of 2018

Shalmi @ Sirajudeen

.. Appellant

Vs.

State rep.by
The Inspector of Police,
Annur Police Station,
Coimbatore District.

.. Respondent

PRAYER: Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code, 1973 to set aside the judgment of the Sessions Judge, Mahalir Court, Coimbatore dated 22.12.2017 passed in Spl.C.C.No.27 of 2014 in erroneously convicting the Appellant herein under Section 366 I.P.C. convicted 7 years and fine 2,500/- default fine one month Rigorous Imprisonment and Section 3(a) r/w.4 of the POCSO Act 2012 7 years and fine Rs.2,500/- default fine 1 month Rigorous Imprisonment.

For Appellant : M/s.Philip Ravindran Josudoss

For Respondent : M/s.L.Charles Prem Kumar
Government Advocate (Crl.Side)

JUDGEMENT

This appeal is directed against the judgement dated 22.12.2017, passed by the learned Additional District and Sessions Judge, Mahalir Court, Coimbatore, in Spl.C.C.No.27 of 2014, holding that the appellant is guilty of the offences punishable under Section 366 I.P.C. and Section 3(a) r/w 4 of the POCSO Act 2012 and sentencing him to seven years Rigorous Imprisonment and to pay a fine of Rs.2,500/-, in default, to undergo one month Simple Imprisonment.

2. The case of the prosecution is as follows:

The victim girl aged 12 years was studying in 8th standard in Government Higher Secondary School, Annur. The appellant developed friendship with her. On 18.01.2014 at about 8.30 pm., when the victim girl went for purchasing grocery, the appellant is said to have kidnapped her to his grandfather's house and had sexual intercourse with her for about four days. Since the girl was missing, the girl's mother Kalaiselvi (PW.1) lodged a complaint before the Inspector of Police, Annur Police Station. A missing complaint was lodged in Crime No.2 of 2014 on the file of Annur Police Station on 19.01.2014. The girl was finally secured on 23.01.2014. The girl was sent for Medical Examination. The respondent / Police conducted investigation and after completing the usual formalities lodged a final report before the Magalir court, Coimbatore. The case was taken on file as Spl.C.C.No.27 of 2014, charges were framed against appellant under Section 366 IPC and Section 3 (a) r/w 4 of POCSO Act, 2012. The appellant denied the charges. The prosecution has examined 14 witnesses and marked Ex.P1 to Ex.P9. On the side of the accused, no evidence was adduced.

3. The learned trial Judge, by the impugned judgment dated 22.12.2017 held that the prosecution proved the case beyond all reasonable doubt and convicted and sentenced the appellant as aforesaid. Questioning the same, this appeal has been filed.

4. Heard the learned counsel on either side.

5. The learned counsel appearing for the appellant at the very outset submitted that the appellant was actually born on 13.05.1996, as is evident from the birth certificate issued by the Mettupalayam Municipality. Though the appellant was a juvenile, this plea was not seriously taken before the Court below.

6. Section 94 of the Juvenile Justice Act speaks about the determination of age. It gives priority to the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available, and in the absence thereof, the birth certificate given by the local bodies would be taken note of. Even though the school certificate of the appellant / accused was not marked, the learned Public Prosecutor, on instructions, submitted that according to it, the date of birth of the accused was 13.05.1995 only. In terms of Section 94 of Juvenile Justice Act, the school certificate will prevail over the certificate issued by the local body. Of course, neither of the certificates were marked before the court below.

7.The learned counsel appearing for the appellant submitted that having regard to the evidence on record, he is not questioning the finding of the trial court against the appellant for the offence under Section 366 of I.P.C., and that he would confine his arguments for setting aside the conviction and sentence under Section 3 (a) r/w.4 of the POCSO Act 2012.

8.The case of the prosecution is that the victim girl was detained in the house of the grandfather of the accused for about 5 days i.e., from the night of 18.01.2014 till 23.01.2014. PW.1, the mother of the victim had claimed that on 23.01.2014, she was informed by her relative namely Manonmani that her daughter was in the house of the grandfather of the accused.

9.PW.1 would claim that with the help of the Police and the neighbours, the house was broke open and the victim was rescued. This stand of the PW.1 is not in consonance with the evidence of the Police witnesses. It is their case that the victim girl returned home entirely on her own. The evidence of the victim girl was to the effect that when she was asked to bring milk by her grand mother, she came out of the house and at that time, the accused placed the handkerchief on her face and made her unconscious. She deposed that when she regained consciousness, she came to know that she was taken to the house of the grandfather of the accused and was subjected to sexual intercourse by the appellant for four days.

10.As rightly pointed out by the learned counsel appearing for the appellant, this testimony of the victim is highly unbelievable. It is evident from evidence that the house of the grandfather of the accused is a small one. The victim girl claimed that she heard the voice of the grandparents of the accused. The Investigation Officer did not even bother to examine the grandparents of the accused. It is not the case of the victim that the grandparents had gone away on haj pilgrimage and that the house was otherwise available for the accused. It is not so. According to her, they were present in the house. Therefore, the non examination of the grand parents of the accused by the Investigation Officer is truly fatal to the prosecution case. It is again admitted by the prosecution witness that the house of the grandfather of the accused was located in a very busy and congested residential locality. Had the victim been really taken there by the accused and she was confined for four days, it would definitely have attracted the attention of the neighbours.

11.According to the prosecution, the victim was secured on 23.01.2014. The victim was thereafter taken for medical examination. I carefully went through the testimony of the victim. According to the prosecution, the act of sexual

intercourse had happened in the house of the grandfather of the accused. I have already come to the conclusion that this is highly unbelievable. Of course, it is obvious that the victim girl had gone missing from 18.01.2014. In fact, an F.I.R., had already been registered in this regard. I do not agree with the suggestion made by the accused during the course of cross examination of the prosecution witness that the victim wanted the appellant to marry her and since he refused, the case on hand came to be registered. The victim is a Christian and the appellant is a Muslim. The father of the victim had passed away long back. The victim was aged just 12 years. Therefore, no mother would give a girl-missing complaint if she was actually at home.

12.As rightly pointed out by the learned counsel for the appellant, the evidence of P.W.10-Headmaster was to the effect that the victim girl came to school on 18.01.2014 and 19.01.2014 and from 20.01.2014 she did not come to school, but the FIR states that the victim was missing on 18.01.2014 onwards. That gives rise to a doubt as to whether the appellant could have taken the victim, along with him, on the night of 18.01.2014.

13.The learned counsel for the appellant states that the appellant was in prison during trial also and the total period of incarceration comes to three years and that the appellant has married another girl and also begotten a girl child. From his birth certificate, it is seen that he was a juvenile when the occurrence took place. Hence, this Court is of the opinion that interest of justice would be served by modifying the sentence of the appellant to the period already undergone by him.

14.At this juncture, the learned counsel for the appellant on instructions gives an undertaking that the appellant will keep away from the victim and her family and not come in contact with the victim girl under any circumstances. The said submission is taken on record to ensure safety and honour of the victim girl.

15.The conviction and sentence imposed on the appellant/accused by the Sessions Judge, in Spl.C.C.No.27 of 2014, by the judgment, dated 22.12.2017 for the offence under Section 3(a) r/w 4 of the POCSO Act 2012 is hereby set aside. The conviction imposed on him under Section 366 of IPC is confirmed. The sentence of imprisonment alone is reduced to the period already undergone. The appellant/accused is directed to be set at liberty, forthwith, unless his presence is required in connection with any other case.

16.In the result, this Criminal Appeal is partly allowed.
Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-IV)

// True Copy//

Sub Assistant Registrar

Pns

To

1.The Inspector of Police, Annur Police Station,
Coimbatore District.

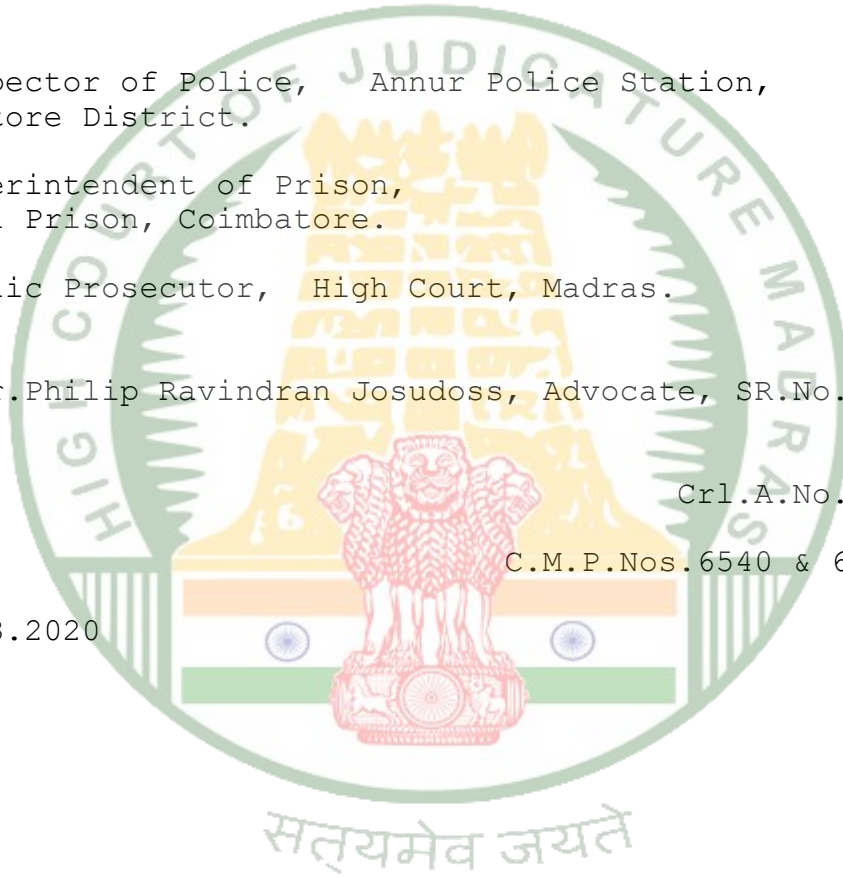
2.The Superintendent of Prison,
Central Prison, Coimbatore.

3.The Public Prosecutor, High Court, Madras.

+1cc to Mr.Philip Ravindran Josudoss, Advocate, SR.No.15462.

Crl.A.No.273 of 2018
and
C.M.P.Nos.6540 & 6541 of 2018

RK(CO)
CSR: 04.03.2020



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