

Bail Slip

Prakash the appellant herein (accused in S.C.No.250/12 on the file of the (Mahila Court) Sessions Judge, Coimbtore) was released on bail by the order of this court dated 6.11.2014 and made in MP.No.1/2014 in Crl A.334/2014 pending on the file of this court.

IN THE HIGH COURT OF JUDICIATURE AT MADRAS

DATED : 30.11.2020

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Crl.A.No.334 of 2014

Prakash,
S/o.Late Duraisamy

...Appellant/Sole Accused

versus

The State Rep. by
Inspector of Police,
Kinathukadavu Police Station,
Pollachi, Coimbatore District.

...Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, to set aside the judgment of conviction and sentence passed by the learned Sessions Judge, Magalir Neethimandram (Mahila Court), Coimbatore dated 01.03.2014 in S.C.No.250 of 2012.

For Appellant : Mr.B.Thirumalai
for Mr.S.Nagarajan

For Respondent : Mr.S.Karthikeyan
Additional Public Prosecutor

J U D G M E N T

The present Criminal Appeal has been filed by the appellant to set aside the judgment of conviction and sentence passed by the learned Sessions Judge, Magalir Neethimandram (Mahila Court), Coimbatore dated 01.03.2014 in S.C.No.250 of 2012.

2. The appellant herein is the sole accused in the above referred case. He stood charged for the offences under Sections 366 and 376(1) of IPC. By a judgment dated 01.03.2014, the learned Sessions Judge, Magalir Neethimandram (Mahila Court), Coimbatore, convicted the appellant under Section 366 of IPC and sentenced to undergo Rigorous Imprisonment for seven (7) years and to pay a fine of Rs.5,000/-, in default to undergo Simple Imprisonment for six(6) months. Further, he was convicted under Section 376(1) of IPC and sentenced to undergo ten (10) years Rigorous Imprisonment and to pay a fine of Rs.50,000/-, further ordered to give the said amount to the victim girl under Section 357 Cr.P.C. The trial Court also ordered the sentences to run concurrently.

3. Challenging the said conviction and sentence, the accused is before this Court, by way of filing the present Criminal Appeal.

4. The case of the prosecution, in brief, is as follows;

4.1. P.W.1-Kaliammal, is the mother of the victim girl. At the time of occurrence, the victim girl was aged about 15 years. On 12.04.2010, after knowing the missing of the victim girl, she lodged a complaint under Ex.P.1 before the Kinathukadavu Police Station, for which, the police has not taken any action. In the complaint, she has stated that her daughter was having love affair with the accused. After some time from the date of occurrence, the victim girl got returned with the accused and thereafter, the police official sent the victim girl for medical examination.

4.2. When at the time of occurrence, P.W.10, the victim girl was studying 9th standard in the Government School. On 12.04.2010, at about 11.00a.m., happens to be a Monday, she along with the accused went to Palani and in Palani Adivaram, the accused tied yellow thread and he has taken the victim to a house belongs to one Chinnan, the friend of the accused. On the very same day, the accused inserted his male organ into the vagina of the victim and out of her will, she was sexually exploited. Further, 3 times, the accused had sexual contact with the victim and after one month i.e. on 13.05.2010, the accused brought the victim to Kinathukadavu wherein the police arrested the accused and secured the victim girl.

4.3. On receipt of the complaint given by P.W.1, P.W.9-Palanisamy, the then Sub Inspector of Police, on 23.04.2010, at about 5.00p.m., registered a case in Crime No.370 of 2010 for an offence under Section 363 of IPC. The printed F.I.R. was marked as Ex.P.6. After registration of the case, he has sent the

F.I.R. to P.W.11 for further investigation.

4.4. P.W.11, the then Inspector of Police, Kinathukadavu Police Station, on receipt of the F.I.R. visited the scene of occurrence and in the presence of P.W.5-Gnanasekaran, he prepared observation mahazar under Ex.P.2 and drawn rough sketch under Ex.P.7. One Murugan was also signed in the observation mahazar along with P.W.5. He examined the witnesses and recorded their statements.

4.5. During investigation, on 13.05.2010, P.W.11 arrested the accused and sent him for judicial custody. Further, after securing the victim girl, he altered the section of law from Section 363 to Sections 366 and 376 of IPC. The alteration report was marked as Ex.P.8. He has taken steps to send the victim girl and the accused for medical examination and thereafter also made arrangements for sending the victim girl to Juvenile Home.

4.6. In the meanwhile, after receiving the requisition from P.W.11, P.W.6-Dr.Thilagavathi examined the victim girl and found no external injuries over her body. On the date of examination, as the victim was having menses, the pubic hair and vaginal smear have been collected and sent for chemical test. In this regard, she issued accident register copy under Ex.P.3.

4.7. Similarly, P.W.8-Dr.Prasannakumar, examined the accused in connection with the potency of the accused and on examination, nothing was available to infer that the accused is an impotent. His report in this regard was marked as Ex.P.5.

4.8. In turn, P.W.7-Dr.Parthasarathy, a Scientific Assistant from Forensic Department, Coimbatore, received the vaginal smear and public hair collected from the private part of the victim girl and could not detect any semen. In this regard, he issued the report under Ex.P.5.

4.9. In continuation of investigation, P.W.11 sent requisition to the Headmistress of the Government Higher Secondary School, Kinathukadavu, for issuing the age certificate to the victim girl and after receiving the same, P.W.12-Loganayaki, Headmistress has given Ex.P.9, the true extract from the school records where the victim girl studied. Further, she had issued a xerox copy of the Transfer Certificate of the victim girl under Ex.P.10. On receipt of the same, P.W.11 examined the Doctors, who have examined the victim and the accused and also the forensic department officials. Thereafter, he handed over the case records to his successor for further investigation.

4.10. P.W.13-Ravikumar, the then Inspector of Police,

Kinathukadavu Police Station, made further investigation and after completion of the investigation, he laid charge sheet against the accused for the offences under Sections 366 and 376 (1) of IPC.

5. Based on the above materials, the trial Court framed charges under Sections 366 and 376(1) of IPC and the accused denied the same. In order to prove their case, on the side of the prosecution, as many as 13 witnesses were examined as P.W.1 to P.W.13 and 10 documents were exhibited as Exs.P.1 to Ex.P.10.

6. Out of the said witnesses, P.W.1-Kaliammal is the mother of the victim girl, she speaks about the missing of her daughter and about the lodging of the complaint before Kinathukadavu Police Station. According to her, before the occurrence, the accused and her daughter fell in love with each other.

7. P.W.2-Muthusamy is the father of the victim girl, has deposed as stated by P.W.1.

8. P.W.3-Manivannan and P.W.4-Manickam are the residents of the same locality, in which, the alleged occurrence had happened. They had stated about the missing of the victim girl.

9. P.W.5-Gnanasekaran, is the witness to the observation mahazar. According to him, he signed as a witness in the observation mahazar, which was prepared by P.W.11.

10. P.W.6-Dr.Thilagavathi deposed that as per the requisition given by P.W.11, she examined the victim girl and found no external injuries over her body. Further, she collected the pubic hair and vaginal smear and sent it for chemical test.

11. P.W.7-Dr.Parthasarathy, a Scientific Assistant from Forensic Department, Coimbatore, has stated about the examination of vaginal smear. According to him, the vaginal smear collected from the victim girl did not have any semen.

12. P.W.8-Dr.Prasannakumar, speaks about the examination of the accused in connection with the potency of the accused.

13. P.W.9-Palanisamy, the then Sub Inspector of Police, Kinathukadavu Police Station, has stated about receiving of the complaint from P.W.1 and about the registration of the case in Crime No.370 of 2010.

14. P.W.10, the victim girl gave evidence before the

trial Court as on 12.04.2010, at about 11.00a.m., she went along with the accused to Palani and in Palani Adivaram, the accused herein tied a yellow thread and on the same day, in the house belongs to one Chinnan, the accused committed sexual intercourse with her.

15. P.W.12-Loganayaki, working as Headmistress, speaks about the issuing of school records relates to the victim girl.

16. P.W.11 and P.W.13 are the police officers stated about the preparation of the observation mahazar, rough sketch, examination of the witnesses, securing the accused and the victim girl and about the filing of the final report, after concluding the investigation.

17. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. However, he did not choose to examine any witness nor did he mark any documents on his side.

18. The learned Sessions Judge, Magalir Neethimandram (Mahila Court), Coimbatore, after perusing all the above materials and on considering the arguments advanced by either side, convicted and sentenced the appellant as stated supra. Aggrieved over the said conviction and sentence, the appellant is before this Court with this appeal.

19. I have heard Mr.B.Thirumalai, representing for Mr.S.Nagarajan, learned counsel appearing for the appellant and Mr.S.Karthikeyan, learned Additional Public Prosecutor appearing for the State. I have also perused the records carefully.

20. The learned counsel appearing for the appellant would contend that the evidence of prosecution witnesses are having lot of contradictions, the evidence put forth by the victim girl is clear that the alleged occurrence had happened only after getting consent from her. The evidence given by the medical officer is also not in accordance with the case of the prosecution. He prayed to set aside the conviction and sentence passed by the trial Court.

21. On the other hand, the learned Additional Public Prosecutor appearing for the respondent police would submit that the evidence given by P.W.12 and Ex.P.9, Ex.P.10, the copy of the transfer certificate pertains to the victim girl proves the fact that at the time of occurrence, the victim girl has not attained majority. Therefore, though the victim girl has given consent, the same was immaterial for considering the offence committed by the accused. According to him, interference of this Court is not necessary in the conviction and sentence passed by

the trial Court and accordingly, he prayed for dismissing the appeal.

22. I have considered the rival submissions made on either side and perused the records carefully.

23. Initially, in respect to the alleged marriage, which was solemnised in Palani, P.W.10, who is the victim girl has stated before the trial Court as on the date of occurrence, both herself and the accused ran away from there Village and after reaching Palani, in Palani Adivaram, the accused tied thali to her. The said evidence appears that she has also consented for the said marriage.

24. In this regard, the learned Additional Public Prosecutor appearing for the State would contend that though the marriage has been solemnised with the consent of the victim girl, at the time of marriage, the victim girl has not completed the age of 16 years and therefore, the said consent alleged to be given by the victim girl cannot be taken into account for accepting the status of marriage. He would further contend that since the alleged marriage had happened to the victim was at the age of 15 years and 10 months, the said marriage is not legally valid and also the same has not been solemnised as per Hindu rites and customs.

25. In this regard to prove the age of the victim girl, the birth certificate of the said girl has not been produced before the trial Court, only the certificate issued by the school authorities were marked as Ex.P.9 and Ex.P.10. As per the said certificate, the date of birth of the victim girl is 03.06.1994. Though the entries made in the school certificate is not a conclusive proof in respect to the age, P.W.1, the mother of the victim girl, who is the competent person to speak about the age of the girl has stated that at the time of occurrence, the victim girl was aged about 15 years.

26. In this regard, the said evidence given by P.W.1 in respect to the age of the victim girl is corresponding to the entries made in the certificate issued by the school authorities. Therefore, as per the entries made in the certificate at the time of occurrence, the victim girl has completed the age of 15 years and 10 months. Accordingly, since the said entries are found relevant to the evidence given by P.W.1, this Court decide that at the time of occurrence, the victim girl has not completed the age of 16 years.

27. In the said circumstances, in respect to the findings arrived at by the trial Court in respect to the offence under Section 366 of IPC, on conjoint reading of the evidence given by P.W.10-victim girl and P.W.12-Loganayaki, it appears

that during the time of occurrence, the accused induces the victim girl to go to Palani and afterwards, he tied a thali. In this occasion, it is necessary to see Section 361 of IPC, which reads as follows;

"361. Kidnapping from lawful guardianship. - Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation. - The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception. - This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

28. Accordingly, applying the said provision with the relevant act of Section 366 of IPC, no doubt during the time of occurrence, the accused kidnapped the victim girl for the purpose of marrying her. Therefore, the ingredients, which are all necessary for the offence under Section 366 of IPC is available here.

29. Legally speaking, a marriage in which either the girl is below 18 years of age, or the boy is below 21 years of age is child marriage. The previous law titled Child Marriage Restraint Act, 1929 had provisions only for restraining the solemnization, not for prevention or prohibition of child marriages.

30. In our country, the essential condition for the validity of any marriage is solemnization of the religious ceremonies prescribed by the religion to which the parties belong. Thus saptpadi for Hindus is the necessary requirement, which if completed make a marriage valid in the eyes of law provided the parties are of sound mind and don't fall within the prohibited degrees of relationship with each other.

31. Here, it is a case, though the accused and the victim girl belongs to the same community, necessary religious ceremonies prescribed by the religion is not fulfilled in the marriage alleged to be performed between the victim girl and the

accused. Further, at the time of marriage, the victim girl not completed the age of 16 years. Accordingly, I am of the considered opinion that the marriage performed between the victim girl with the accused is void one.

32. Secondly, in respect to the offence under Section 376(1) IPC, when at the time of giving evidence as P.W.10, the victim girl has stated before the trial Court as on the date of marriage, the accused forcibly made sexual intercourse with her. On the other hand, the said statement has not been stated before the Investigating Officer at the time of investigation.

33. More than that, after the alleged incident, both the accused and the victim girl stayed in a house, which belongs to one Chinnan for a considerable period. In the meantime, the victim girl has not taken any effort to seek help from others or even trying to ran away from the said house. Therefore, the said attitude of the victim girl proves that the alleged sexual intercourse had happened only with the consent of the victim girl.

34. In this regard, Section 375 IPC, reads as follows;

"375. Rape. - A man is said to commit "rape" if he -

(a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

First. - Against her will.

Secondly - Without her consent.

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

Fourthly. - With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is

another man to whom she is or believes 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 substance, she is unable to understand the nature and consequences of that to which she gives consent.

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

Seventhly. - When she is unable to communicate consent."

35. Therefore, as per the definition, since the victim girl has not completed the age of 18 years at the time of occurrence, according to 6th description, we have to conclude that the accused herein committed an offence of rape, since it was already held that the marriage between the victim girl and the accused is void one and therefore, at the time of occurrence, the victim girl is not a legally wedded wife of the accused. Hence, the offences arrived at by the trial Court under Sections 366 and 376(1) IPC are within four corners of law and there is no infirmity found in the said findings. Accordingly, I am of the considered opinion that during the relevant point of time, the accused herein committed the offences under Sections 366 and 376(1) IPC.

36. Coming to the quantum of sentence, the learned counsel for the appellant would contend that for the past several years, the present appellant facing this case and thereby, he prays to show some leniency in the matter of sentence. According to him, as of now, both the victim girl and the accused married themselves and got separated along with respective spouses.

37. Hence, considering the above submission with the relevant records, it is true after the alleged occurrence from the year of 2014, the appellant faces the trial and appeal in this case. Therefore, on considering the same, this Court modified the sentence as 5 years instead of 7 years and to pay a fine of Rs.1,000/- for the offence under Section 366 of IPC. In respect of offence under Section 376(1) IPC, this Court modified the sentence as 7 years instead of 10 years and to pay a fine of Rs.1,000/-, in default to undergo 3 months Simple Imprisonment. Since the appellant / accused is on bail, the trial Court is directed to take steps to secure the presence of the accused to

commit him to prison to undergo the remaining period of sentence, if any. It is ordered to run the sentences concurrently. Fine amount, if any paid is directed to be adjusted. Further, the period of sentence already undergone by the appellant / accused shall be given set off under Section 428 Cr.P.C.

38. In the result, this Criminal Appeal is partly allowed. The conviction and sentence imposed upon the appellant / accused by the learned Sessions Judge, Magalir Neethimandram (Mahila Court), Coimbatore dated 01.03.2014 in S.C.No.250 of 2012 is hereby modified.

Sd/-
Assistant Registrar (CJ Conf.)

//True Copy//

Sub Assistant Registrar

To

1. The Sessions Judge,
Magalir Neethimandram (Mahila Court),
Coimbatore.
2. The Inspector of Police,
Kinathukadavu Police Station,
Pollachi, Coimbatore District.
3. The Superintendent of Police,
Central Prison, Coimbatore.
4. The Public Prosecutor,
High Court, Madras.

+1cc to Mr.S.Nagarajan, Advocate, S.R.No.38375

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