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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.03.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.333 of 2020

Pasuvalingam

... Appellant

-Vs-

The State Represented by its
The Inspector of Police,
Kondalampatti, Womens Police Station,
Salem District.

... Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, to call for the records in S.C.No.193 of 2014 on the file of the Mahalir Needhimandram, Salem District order dated 15.02.2018 and set aside the said conviction and sentence.

For Appellant : Mr.A.Jotheswaran,
Legal Aid Counsel

For Respondent : Mr.R.Suryaprakash,
Government Advocate [Crl. Side]

JUDGMENT

This Criminal Appeal has been filed against the Judgment of conviction and sentence passed by the learned Sessions Judge, Mahalir Neethimandram, Salem in S.C.No.193 of 2014, dated 15.02.2018.

2.The respondent Police have registered a case in Crime No.1 of 2012, for offence under Sections 417, 376, 506(ii) of IPC against the appellant on the complaint (Ex.P1) given by the victim girl (PW.1). After completing investigation, the respondent police laid a charge sheet before the learned Judicial Magistrate (Additional Mahila Court), Salem and the same was taken on file as P.R.C.No.5 of 2014. Since the offence is triable by the Court of Session, the learned Judicial Magistrate, (Additional Mahila Court), Salem committed the case



to the District and Sessions Judge, Salem and the same was taken on file in S.C.No.193 of 2014. Thereafter, the learned District and Sessions Judge, Salem made over the case to the learned Sessions Judge, Magalir Neethimandram, Salem for disposal.

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3.After completing the formalities under Section 207 Cr.P.C., since there was a prima facie material to frame charges against the appellant, the learned Sessions Judge framed charge under Sections 366, 376(1), 506(ii) IPC.

4.After completing the trial and hearing the arguments advanced on either side and also considering the oral and documentary evidence, the trial Judge found the appellant guilty for offence punishable under Sections 366, 376(i) and 506(i) of IPC and convicted and sentenced him as follows:-

- For offence under Section 366 IPC, the appellant shall undergo seven years Rigorous Imprisonment and to pay a fine of Rs.10,000/-, in default to undergo 6 months Simple Imprisonment.
- For offence under Section 376(i) IPC, the appellant shall undergo seven years Rigorous Imprisonment and to pay a fine of Rs.50,000/-, in default to undergo 6 months Simple Imprisonment.
- For offence under Section 506(i) IPC, the appellant shall undergo two years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo 3 months Simple Imprisonment.

5.Challenging the above said Judgment of conviction and sentence, the appellant has filed the present appeal before this Court.

6.The learned counsel appearing for the appellant would submit that the date of occurrence is 19.04.2011, at about 02.00 p.m., whereas the complaint (Ex.P1) was lodged only on 24.01.2012. On the next day of lodging the complaint, the victim girl was given birth to a male child. The learned counsel for the appellant would further submit that even though the complaint (Ex.P1) has shown that it was written by the victim girl (PW1), the mother of the victim girl (PW4) has stated that she gave oral complaint to the Police and Police has reduced the same into writing and therefore, there is contradiction even in lodging the complaint. Further, the complaint given by the mother of the victim girl (PW4) has not produced before the trial Court and hence, there was a suppression. On the next day of lodging the complaint i.e., on 25.01.2012, the victim girl has given birth to a male child. It



is doubtful that being a girl, she has not intimated her pregnancy to anyone for nine months. The victim girl has stated that due to threat of the appellant, she did not inform the penetrative sexual intercourse committed by the appellant. Even the mother of the victim girl (PW4) has stated that she was not aware of the occurrence and also as to whether her daughter was pregnant.

7.The learned counsel for the appellant would further submit that it is not believable that every month a girl normally after attaining puberty, has to attend menses. But the victim girl has stated that she gave birth to a male child on the next day of lodging the complaint (Ex.P1) that means nine months after the occurrence. However, it is not believable that either she would have intimated to her mother about the missing of menses, or at least consulted the Doctor or intimated to his close friends. The victim girl has stated that she used to get menses once in three months. It is not possible that if the victim girl was pregnant after the occurrence, she would not have got menses once in three months. At the time of giving the complaint (Ex.P1), the victim girl was already nine months. Therefore, the victim girl voluntarily suppressed her pregnancy and did not inform the same to anyone.

8.The learned counsel for the appellant would further submit that there are contradictions regarding missing of the brother of the victim girl on the date of occurrence. From the statement of the victim girl (PW1) and her mother (PW4), which were recorded under Section 164 Cr.P.C., it could be seen that the victim girl is an educated person and she must have either Birth Certificate or School Certificate. Neither the Birth Certificate or the School Certificate of the victim girl were marked and only, the prosecution has marked the Conduct Certificate (Ex.P27) of the victim girl. The Doctor (PW16), who examined the victim girl and issued the age certificate (Ex.P26) has stated that the age of the victim girl is above 18 years and below 20 years at the time of occurrence. Therefore, if the age of the victim girl is above 16 years, she has given consent for sexual intercourse, which would not fall under Section 376 IPC. Further, the prosecution has not established the threaten made by the appellant at the time of occurrence. Even if the appellant threatened the victim girl at the time of occurrence, she should have informed either to her parents or close friends, but she did not inform the same to anyone. It is very clear that the victim girl has voluntarily given consent for sexual intercourse with the appellant and that is the reason, she has not informed the same to anyone.

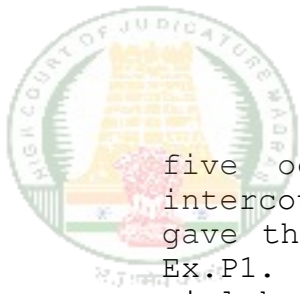
9.The learned counsel for the appellant would further submit that the date of giving the complaint and the person who has



written the complaint and who identified the appellant and the arrest of the appellant are highly doubtful. There are material contradictions between the evidence of the victim girl (PW1) and the mother of the victim girl (PW4). The mother of the victim girl (PW2) in chief examination has stated when she returning to home after lodging the complaint, she saw the appellant and informed the same to the Police and the Police came there and arrested the appellant near the Railway Gate. But in cross examination, she has stated that after two days of lodging the complaint, she identified the appellant and informed the same to the Police and the Police arrested him. Further, the evidence of the Doctor (PW16) and the age certificate (Ex.P26) are not conclusively proved that the age of the victim girl is above 18 years and below 20 years. Therefore, the exact age of the victim girl (PW1) at the time of occurrence has not proved by the prosecution. Even there are contradictions and suspicion between the statements of the victim girl and her mother given before the Police and their evidence given before the trial Court. The evidence of PW5 to PW8 are not supported the case of the prosecution.

10.The learned counsel for the appellant would further submit that the mother of the victim girl (PW4) very well knew about the pregnancy of her daughter, but she did not ask her immediately. The mother of the victim girl (PW4) stated that she and her daughter (PW1) were living together in the same roof, but it is unbelievable that the mother of the victim girl came to know about the pregnancy of her daughter at the stage of 9th month. The learned counsel would submit that the learned Sessions Judge failed to consider the material contradictions and mechanically convicted the appellant only on conjectures and on sympathy, and therefore, the judgment of conviction and sentence passed by the trial Court against the appellant, is liable to be set aside.

11.Mr.R.Suryaprakash, learned Government Advocate (Crl. side) appearing on behalf of the respondent Police would submit that at the time of occurrence, the age of the victim girl is only 17 years and she was a minor. Prior to the occurrence, one of the brother of victim girl was found missing. Taking advantage of the said fact, when the victim girl was alone, the appellant called her on the pretext that her brother is in his custody and asked her to come to home and take away her brother. Believing the same, the victim girl (PW1) had gone to the house of appellant and the appellant pushed her inside the house and laid on her and had forcible sexual intercourse and also threatened her that if she disclose the same to anyone, he would take away her life and also her family members. Therefore, the victim girl did not inform the sexual act committed by the appellant to anyone. Subsequently, the appellant on four to



five occasions, threatened the victim girl and had sexual intercourse, due to which, she became pregnant. Thereafter, she gave the complaint to the respondent and the same was marked as Ex.P1. On the next day of lodging the complaint, the victim girl has given birth to a male child. During investigation, the victim girl (PW1) and her mother (PW4) were examined by the Investigating Officer and the blood samples were taken from the victim girl, appellant and a child born to the victim girl for DNA test.

12.The learned Government Advocate (Crl. Side) would further submit that during trial, the victim girl was examined as PW1 and her mother was examined as PW4. The mother of the victim girl has narrated events and she did not aware of the fact that her daughter was found pregnant. After discussing with the family members, the victim girl and her mother went to the Police Station and lodged a complaint (Ex.P1). During investigation, the blood samples were taken from the victim girl, the child born to the victim girl and the appellant for DNA test. The Scientific Officer (PW10) conducted test on the collected blood samples and given DNA test report (Ex.P12) that the appellant is the biological father of the male child born to the victim girl. Further, the Doctor (PW16) conducted physical and radiological examination and found that at the time of occurrence, the age of the victim girl was above 18 years below 20 years. Even assuming that the victim girl was given consent, the age of the appellant at the time of occurrence was 40 years and he was already married and also threatened the victim girl and had forcible sexual intercourse. At the time of occurrence, the victim girl was in the custody of the parents/lawful guardian, hence, the appellant has committed the offence under Section 366 IPC. Since the appellant had sexual intercourse by threatening and asked the victim girl not to reveal the same to anyone, it falls under Section 376(i) IPC. Therefore, the trial Court has rightly convicted the appellant, and the appeal is liable to be dismissed.

13.Heard the learned counsel appearing for the appellant and the learned Government Advocate [Crl. Side] appearing for the respondent and also perused the materials available on record.

14.The case of the prosecution is that at the time of occurrence, the victim girl was a minor, aged about 17 years and she was living with her parents. Prior to occurrence, the brother of the victim girl Ramesh was found missing and he did not come to home after work. On 19.04.2011, at about 02.00 p.m., when the victim girl was alone, the appellant called her on the pretext that her brother Ramesh in his custody and asked her to come to home and take her brother. Believing the same, the victim girl (PW.1) had gone to the house of the appellant



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and when she entered the house, the appellant pushed her inside and closed the door and closed her mouth by using cloth and pushed her laid down and committed the forcibly sexual assault and also threatened her not to reveal the same to anyone, otherwise, he would take away her life and also her family members. Sensing fear, the victim girl did not inform the act of the appellant to anyone and the victim girl went to college as usual. Thereafter, the appellant again had committed the penetrative sexual assault on the victim girl for four to five times. After three months, the mother of the victim girl (PW4) asked the victim girl that why her stomach was big. The victim girl (PW1) informed her mother (PW4) that the appellant forcibly had sexual intercourse with her for 4 to 5 times. Therefore, the victim girl and her mother lodged a complaint (Ex.P1) to the respondent Police on 24.01.2012. On the next day i.e., 25.01.2012, at night hours, a male baby was born to the victim girl.

15. Based on the complaint (Ex.P1) given by the victim girl (PW.1) an FIR in Crime No.1 of 2012 was registered for offence under Sections 417, 376, 506(ii) of IPC. After completing investigation, the respondent police laid a charge sheet before the learned Judicial Magistrate (Additional Mahila Court), Salem and the same was taken on file in P.R.C.No.5 of 2014. Since the offence is triable by the Court of Session, the learned Judicial Magistrate, (Additional Mahila Court), Salem committed the case to the District and Sessions Judge, Salem and the same was taken on file in S.C.No.193 of 2014. Thereafter, the learned Principal District and Sessions Judge, Salem made over the case to the learned Session Judge, Magalir Neethimandram, Salem.

16. During the trial, in order to prove the case of the prosecution, on the side of the prosecution, as many as 16 witnesses were examined as PW1 to PW16 and 27 documents were marked as Exs.P1 to P27 and no material object was exhibited. After completing the evidence of prosecution witnesses, when incriminating circumstances were culled out from the prosecution witnesses put before the accused, he had denied as false. On the side of the defence, 2 witness were examined and three documents were marked.

17. After considering the evidence on record and hearing on either side, the learned Sessions Judge, Magalir Neethimandram, Salem vide judgment dated 15.02.2018 in S.C.No.193 of 2014, convicted and sentenced the appellant as stated above.

18. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.



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19. Against the appellant, the trial Court has framed charges under Sections 366, 376(i) and 506(ii) IPC. In order to prove the charges framed against the appellant, on the side of the prosecution, 16 witnesses were examined, out of which, the victim girl was examined as PW1 and her mother was examined as PW4.

20. A reading of the evidence of the victim girl, she has clearly narrated the entire happenings that prior to the date of occurrence, the brother of the victim girl Ramesh was found missing and the victim girl and her family members searched him on various places. On 19.04.2011, at about 02.00 p.m., when she was alone in her home, the appellant called her and informed that his brother is available in his house. Hence, the victim girl had gone to the house of the appellant and the appellant pushed her into the house and closed the door and closed her mouth by using cloth and pushed her laid down and committed the offence of penetrative sexual intercourse and also threatened her not to reveal the same to anyone, otherwise, he would take away her life and also her family members. Sensing fear, the victim girl did not reveal the same to anyone.

21. The mother of the victim girl was examined as PW.4 and she has stated that in the year 2011 one of her son Ramesh was missing, at that time, she was searching her son and the victim girl was alone in the house. In the year 2012, she came to know that her daughter was pregnant and when she enquired her, she informed happenings and thereafter, she along with her daughter lodged the complaint (Ex.P1) on 24.01.2012. On the next day of lodging the complaint, the victim girl gave a birth to male baby on 25.01.2012. During investigation, the respondent Police have taken steps to collect the blood samples of the appellant, the victim girl (PW.1) and also the male baby born to the victim girl. The blood samples were collected and sent to Forensic Science Department, Chennai for DNA test. The Scientific Officer (PW.10) conducted DNA test and issued report, which was marked as Ex.P12. A reading of Ex.P12, it clearly shows that as per the opinion of PW.10, the appellant is the biological father of the male child born to the victim girl. Therefore, the penetrative sexual assault committed by the appellant towards the victim girl is proved by the prosecution and no independent witness is necessary for the same.

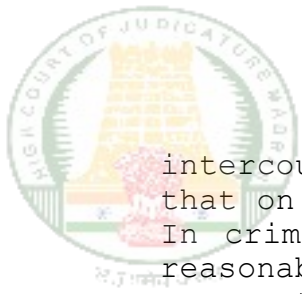
22. Now, the questions raised is whether the age of the victim girl is below 18 years and whether it is a consented sexual intercourse or under threat. In order to prove the age of the victim girl (PW.1), during trial, the prosecution produced two documents viz., the age certificate and the Conduct Certificate and the same were marked as Exs.P26 & P27. Ex.P26 is the age certificate issued by the Doctor (PW.16), Department of Forensic Medicine, Salem. As per Ex.P26, the age of the victim



girl on the date of giving the certificate dated 23.01.2014 is above 18 years and below 20 years. Ex.P27 is the Conduct Certificate issued by Salem Sowdeswari College, Salem, in which, the date of birth of the victim girl is mentioned as 21.01.1994 and the date of occurrence is on 19.04.2011. Therefore, on the date of occurrence, the victim girl was only 17 years and 3 months of age and she has not completed the age of 18 years and she was a minor.

23.As already stated, as per DNA report (Ex.P12), the appellant is the biological father of the male child born to the victim girl. Therefore, a minor girl, who below the age of 18 years was subjected to sexual assault. At the time of occurrence, the appellant threatened the victim girl not to reveal the occurrence to anyone, otherwise, he would take away her life and also her family members. As per Section 375 of IPC prior to the Amendment of the year 2013, if the victim girl is above 16 years and if the appellant with her consent had a sexual intercourse, it is not an offence under Section 366 IPC. In this case, the victim girl (PW.1) has stated that she did not give any consent for sexual intercourse and also stated that the appellant had sexual intercourse under threat and therefore, it is the appellant, who has to prove on the consent of the victim girl, he had sexual intercourse with her. In order to prove the same, on side of the defence, during trial, the appellant examined two witnesses (DW.1 & DW.2). DW.1 and DW.2 have stated that the appellant is not the cause for the pregnancy of the victim girl and due to her illegal relationship with her friends in the college, she got pregnancy and therefore, cause for pregnancy of the victim girl is some body else, not the appellant. The DNA test report (Ex.P12) clearly shows that the appellant is the biological father of the male child born to the victim girl. It is not the case of the appellant that the victim girl has given consent for sexual intercourse. Since no such defence was taken by the defence that the appellant had a sexual intercourse on the consent of the victim girl, it could be seen that the appellant had committed the offence against the consent of the victim girl.

24.The victim girl has clearly stated that the appellant forcibly had a sexual intercourse and also threatened that if she reveal the same to anyone, he would take away her life and also her family members. Though the victim girl and her mother have suppressed about the pregnancy of the victim girl, the facts remains that on the date of occurrence, the victim girl is below the age of 18 years and she was a minor and the victim girl was taken by the appellant without the consent of the lawful guardian/parents and therefore, he has committed the offence under Section 366 IPC. The evidence of the victim girl (PW.1) is coupled with the DNA test report (Ex.P12), it is clearly proved that the appellant has committed the penetrative sexual



intercourse with the victim girl and the appellant has not proved that on the consent of the victim girl he had sexual intercourse. In criminal case, the prosecution has to prove the case beyond reasonable doubt against the accused. In this case the prosecution proved that at the age of 18 years, the victim girl was subjected to penetrative sexual assault by the appellant. The DNA test proved that the appellant is the biological father of the baby of the victim girl (PW.1) and therefore, he has committed the penetrative sexual intercourse on the victim girl without her consent by threat.

25.The appellant has to come under the exception of Section 375(6) of IPC that with or without her consent, he had sexual intercourse with the victim girl aged about 16 years of age. Prior to the Amendment of the year 2013, if the accused had sexual intercourse with the victim girl above the age of 16 year, it will not fall under Section 375 of IPC and the punishable under Section 376 of IPC. But, it is for the appellant to establish that the appellant with consent of the victim girl, he had sexual intercourse. Merely because the victim girl has not disclosed the fact till the birth of a child and prior to the date of giving birth to a child, the offence committed by the appellant cannot be rejected. The victim girl has clearly stated the reason for not disclosing the penetrative sexual intercourse committed by the appellant.

26.Therefore, on a perusal and consideration of the evidence of the victim girl (PW.1), her mother (PW.4), the Scientific Officer (PW.10) and the Doctor (PW.16), the complaint (Ex.P1), DNA test report (Ex.P12), the age certificate of the victim girl (Ex.P26) and her Conduct Certificate (Ex.P27), and all other oral and documentary evidence on record, this Court finds that the prosecution has proved its case beyond reasonable doubt that the appellant kidnapped the victim girl and forcibly by threat had penetrative sexual intercourse with her due to that she gave a birth to a male baby.

27.Hence, this Court can safely come to the conclusion that the appellant has kidnapped and raped the victim girl and therefore, the prosecution has established its case beyond reasonable doubt. In the light of the above discussion, this Court does not find any merit in this appeal and the appeal is liable to be dismissed.

28.Accordingly, this Criminal Appeal is dismissed and the judgment of conviction and sentence passed by the trial Court is confirmed. The trial Court is directed to secure the accused and commit him to prison to undergo the sentence if he is outside.



29. The counsel who argued the appeal for the appellant was appointed by the Legal Services Authority from the legal aid panel, hence he is entitled for fees as per rule.

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Sd/-
Assistant Registrar (CS-VIII)

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Sub Assistant Registrar

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To

1. The Sessions Judge,
Mahalir Neethimandram,
Salem.
2. The Inspector of Police,
Kondalampatti, Womens Police Station,
Salem District.
3. The Public Prosecutor,
High Court, Madras.

CrI.A.No.333 of 2020

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