

Bail Slip

The Appellant/Accused Namely D.Selvakumar S/o.DharmanNadar Male was released on Bail as per order of this court dated 29/06/2016 made in Crl.MP(MD) 842/2016in Crl.A(MD) No.25/2016

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 24.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE **R.PONGIAPPAN**

Crl.A. (MD) No. 25 of 2016

D.Selvakumar

: Appellant/Accused

Vs.

The State of Tamil Nadu
Rep.by the Inspector of Police,
Eraniel Police Station,
Kanyakumari District.
Crime No.40 of 2013.

: Respondent/Complainant

PRAYER: The Criminal Appeal is filed under Section 378 of the Code of Criminal Procedure, to set aside the conviction and sentence, dated 12.08.2015 made in S.C.No.112 of 2013, on the file of the Fast Track Mahila Court, Nagercoil.

For Appellant : Mr.C.K.M.Appaji

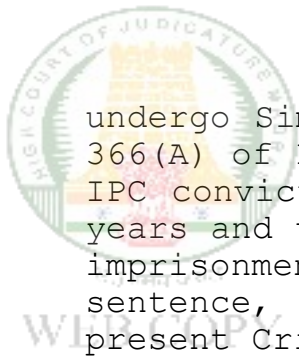
For Respondent : Mr.E.Antony Sahaya Prabahar
Government Advocate (Crl.side)

JUDGMENT

The present Criminal Appeal is directed against the conviction and sentence, dated 12.08.2015, made in S.C.No.112 of 2013, on the file of the Fast Track Mahila Court, Nagercoil.

2. The appellant is the sole accused. He stood charged for the offences punishable under Sections 366(A) and 376 of IPC. The accused denied the charges as false and opted for trial. Therefore, he was put on trial on the charges.

3. After full-fledged trial, the learned Fast Track Mahila Judge, Nagercoil, came to the conclusion that the appellant was found guilty for the offences punishable under Sections 366(A) and 376 (2) (h) of IPC. After concluding as above, the trial Court has convicted the accused and sentenced to undergo Rigorous Imprisonment for 8 years and to pay a fine of Rs.10,000/-, in default, to



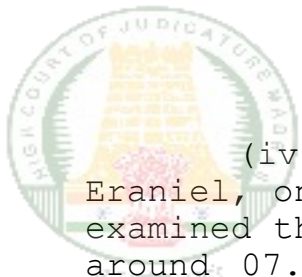
undergo Simple Imprisonment for 1 year for an offence under Section 366(A) of IPC and further for the offence under Section 376(2)(h) of IPC convicted and sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs.10,000/- in default, to undergo simple imprisonment for 1 years. Challenging the said conviction and sentence, the appellant is before this Court, by way of filing the present Criminal Appeal.

4. The relevant facts of the case, which gave rise to filing of this appeal are necessary to be recapitulated for the disposal of this appeal:-

(i) P.W.-4-X- is the victim girl. P.W.1-Leelabai is her mother. Both P.W.1 and P.W.4 are working as labourer in a Cashew-nut Factory, which situated near to their residence. In the same factory, the accused Selvakumar was working as a Van driver. Previous to the occurrence, while at the time, the victim girl was attending the duty, the accused voluntarily came there and chat with the victim girl in respect of the sexual aspects. On 14.12.2012 after chatting with P.W.4 as above, the accused made assurance as after getting permission from his parents, he would marry her. The said incident was seen by P.W.5 and then she condoned the attitude of the accused. In this occasion, on 16.01.2013 due to stomach pain, P.W.4 is not attended the regular work in the Cashew-nut factory and stayed in her home. But, at the same time, her mother and sister were gone to attend the regular work. In the said circumstances, after knowing the absence of P.W.1, around 09.00 a.m., the accused came there and compelled the victim girl to go away for solemnizing the marriage. At that time, P.W.4 did not know the marital status of the accused. However, around 09.30 a.m., due to the compulsion made by the accused, P.W.4 went to the bus-stand and thereafter, both the accused and the victim girl went to Tuticorin. In Tuticorin, in a house belongs to the parents of the accused, the accused after removing the dresses, sexually assaulted P.W.4 and thereafter, on 17.01.2013 after worshipping the God in Tiruchendur Temple, both of them went to accused brother's house at Thanjavur, wherein, also the accused committed the same offence. Thereafter, on 20.01.2013 they returned to Vadaseri Bus Stand and when at the time they are in the bus stand, the police secured them.

(ii) In the meantime, P.W.1, who is the mother of P.W.4, after knowing the fact that her daughter was missing, she lodged a complaint (Ex.P1) before the P.W.11, who is the Inspector of Police, Eraniel.

(iii) P.W.11-Hari Krishna Perumal, the then Sub-Inspector of Police, Eraniel Police Station, after receipt of the said complaint, registered a case against the accused in Cr.No.40/2013 for an offence under Section 366-A of IPC. The printed FIR was marked as Ex.P5. After registration of the said case, he handed over the copy of the FIR to P.W.14-Sankareswaran, for investigation.



(iv) P.W.14-Sankareswaran, the then Inspector of Police, Eraniel, on receipt of the FIR, took the same for investigation. He examined the witnesses and recorded their statements. On 20.01.2013 around 07.00 a.m., in Vadaseri Bus Stand in the presence of one Vijayakumar and Kumaradoss, he arrested the accused and recorded the confession statement from the accused.

(v) Similarly, in the same place, he secured the victim girl and recovered M.O.1 to M.O.6. He examined the victim girl and recorded her statement. After recording the statement from the victim girl, he altered the section of law from 366(A) of IPC to 366 (A) and 376 of IPC. The alteration report was marked as Ex.P.11. He submitted an application before the learned Judicial Magistrate, Eraniel under Ex.P12 and Ex.P13 praying to pass an order for sending the victim girl and the accused for medical examination.

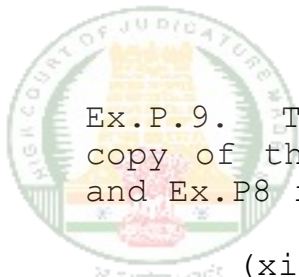
(vi) Thereafter, in view of the reference issued by the learned Judicial Magistrate, Eraniel, P.W.7 Yasotha, the then Head Constable, All Women Police Station, had produced the victim girl before P.W.12-Dr.Selva Priya for medical examination.

(vii) On production of the victim girl, P.W.12-Dr.Selva Priya on 21.01.2013 examined the victim girl. On 28.01.2013 she collected the Swab from the victim girl and forwarded the same for chemical examination. Thereafter on receipt of report, P.W.12-Dr.Selva Priya issued a certificate stating that there is no evidence to rule out no recent sexual intercourse in this patient. The report issued by P.W.12 was marked as Ex.P6.

(viii) Similarly, P.W.9-Dr.Rajesh, attached with Government Medical College Hospital, Aasaripallam, examined the accused and issued the certificate under Ex.P2 that there is nothing to suggest that the person is incapable of performing sexual intercourse. Further, he examined the victim girl and issued the age certificate as the age of the victim girl is between 16 to 18 years. The said certificate was marked as Ex.P3.

(ix) In continuation of investigation, P.W.14 submitted an application before the learned Judicial Magistrate under Ex.P14 for examining the semen swab which were collected from the victim girl. On examination, P.W.10-Ratha Ramani, the then Deputy Director of Forensic Science Department, Tirunelveli, states that no semen was detected from the vaginal hair collected from the victim girl.

(x) Further, P.W.14-submitted an application before the learned Chief Judicial Magistrate praying to record 164 Cr.P.C., statement from the victim girl. In turn, in view of the order passed by the learned Chief Judicial Magistrate, P.W.13- Thangavel, the then Judicial Magistrate No.I, Nagercoil recorded 164 Cr.P.C., statement from the victim girl and the same has been marked as



Ex.P.9. The order passed by the Chief Judicial Magistrate and the copy of the summon issued to the victim girl were marked as Ex.P7 and Ex.P8 respectively.

(xi) Conclusively after the receipt of the copy of the said documents, P.W.14 came to the positive conclusion that the accused herein is liable to be convicted under Section 366(A) and 376 of IPC and filed a final report against the accused, accordingly.

5. Based on the above materials available, the trial Court framed the charges for the offences punishable under Section 366 (A) and 376 (2)(h) of IPC. The accused denied the charges and opted for trial. Therefore, the accused was put on trial.

6. During the course of trial proceedings, in order to prove the case of prosecution, as many as 14 witnesses have been examined on the side of the prosecution as P.W.1 to P.W.14 and 14 documents were exhibited as Ex.P1 to Ex.P14, besides, 6 Material Objects [M.O.1 to M.O.6].

7. Out of the above said witnesses, P.W.1-Leelabai, who is the mother of the victim girl, speaks about the occurrence as during the relevant point of time, before the occurrence, the accused chat with P.W.4 with sweet words as he is intended to marry the victim girl. She has further stated that on 15.12.2012 after came to the knowledge about the occurrence through P.W.3-Santhi and P.W.2-Thulasi, she lodged a complaint before the police.

(i) P.W.2-Tulasi speaks about the occurrence as the public who are residing in the said locality speaks as on 16.01.2013 both the accused and P.W.4 found together in Kurunthankode bus stand.

(ii) P.W.3-Santhi is a resident of same locality gave a similar evidence as given by P.W.2.

(iii) P.W.4-victim girl speaks about the occurrence as alleged by the prosecution.

(iv) P.W.5-Krishnakumari, who is also a labour working in the same Cashew-nut factory, alleged eye witness to the occurrence, gave evidence as on 14.12.2012 the accused herein came into the factory and chat with P.W.4 in respect of the sexual aspects. According to her, the said act of the accused was discouraged and she warned the accused. After saying as above, she has not supported the case of the prosecution and therefore, she was treated as hostile witness.

(v) P.W.6-Kumaradhas is a witness attested in the confession statement given by the accused.

(vi) P.W.7-Yasotha, the then Head Constable, gave evidence as 21.01.2013 she has produced the victim girl before the doctor for



(vii) P.W.8-Thanislas, the Special Sub-Inspector of Police, deposed about the production of accused before the doctor for medical examination.

(viii) P.W.9- Dr.Rajesh gave evidence in respect of the examination of accused and also in respect of age of the victim girl.

(ix) P.W.10-Ratha Ramani, the then Deputy Director of Forensic Science Department speaks about the examination of hair and Vaginal smear collected from the victim girl.

(x) P.W.11-Hari Krishna Perumal speaks about the receipt of complaint from P.W.1 and about the registration of the case.

(xi) P.W.12-Dr.Selva Priya speaks about the examination of victim girl and about the issuance of certificate.

(xii) P.W.13-Thangavel, the then Judicial Magistrate No.I, Nagercoil, gave evidence as in view of the direction given by the Chief Judicial Magistrate, he recorded the statement from P.W.4.

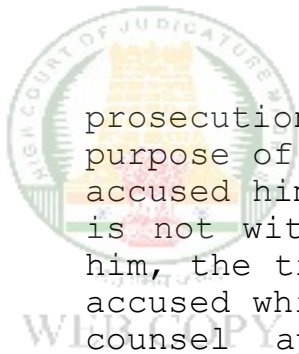
(xiii) P.W.14-Sankareswaran, the then Special Sub-Inspector of Police, speaks about the investigation, securing the accused and the victim girl and about the filing of final report.

8. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C., he denied the same as false. However, he did not chose to examine any witness or mark any document on his side.

9. Having considered the materials placed before him and on considering the arguments advanced by the learned counsels appearing on either side, the learned Fast Track Mahila Court, Nagercoil, came to the conclusion that the accused is guilty under Section 366(A) and 376 of IPC, convicted and sentenced as stated supra. Aggrieved by the said conviction and sentence, the appellant is before this Court with this appeal.

10. I have heard Mr.C.K.M.Appaji, learned counsel appearing for the appellant/accused and Mr.E.Antony Sahaya Prabakar, learned Government Advocate (Crl.side) appearing for the State. I have also perused the records carefully.

11. The learned counsel appearing for the appellant would contend that while at the time of occurrence, the victim girl has completed the age of 16 years. Further, the alleged rape committed by the accused is nothing but consensual one and therefore, it cannot be termed as the accused committed an offence punishable under Section 376 of IPC. Further, as per the case of the



prosecution, the alleged act committed by the accused may be for the purpose of committing sexual intercourse with the victim girl by the accused himself and therefore, the said act committed by the accused is not within the purview of Section 366(A) of IPC. According to him, the trial Court without considering those aspects convicted the accused which is erroneous one. After arguing as above, the learned counsel appearing for the appellant prays to set aside the conviction and sentence rendered by the trial Court.

12. Per contra, the learned Government Advocate (Crl.side) appearing for the respondent would contend that though the doctor, who examined the victim girl, had given certificate that the age of the victim girl is between 16 to 18, in respect to her age, P.W.4 gave evidence as her age is 15 years at the time of occurrence. Further, when at the time of disposing the case, the trial Court observed that as per the birth certificate the victim girl has not completed the age of 16 years at the time of occurrence. Therefore, even assuming that the alleged act committed by the accused is with the consent of the victim girl, being the reason that the victim girl has not completed the age of 16 years, the said consent given by the victim girl is not a consent under exception six of 375 of IPC. Therefore, interference of this Court in the findings arrived at by the trial Court does not require.

13. I have considered the rival submissions made by the learned counsel appearing on either side.

14. Initially, in respect to the conviction and sentence awarded to the appellant under Section 366(A) of IPC is not in dispute that the whole evidence put forth by the prosecution reveals the fact that only with an intend to committ sexual intercourse with P.W.4 by himself, the accused kidnaped the victim girl. In this regard, for proving the offence under Section 366(A) of IPC, the prosecution has to show that the victim girl was induced with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with any other person. In this regard, Section 366(A) of IPC reads as follows:-

"366-A. Procuration of minor girl-Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine."

15. Herein, it is a case, as per the evidence given by P.W.4, after kidnaping her, the accused himself made illicit intercourse with the victim girl and not with any other person. Therefore, the service.sports.gov.in/service.sports.gov.in



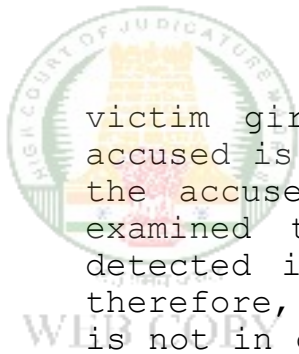
366(A) of IPC. The trial Court without considering the said aspect, convicted the accused for the said section and therefore, the same is liable to be set aside and hence, the conviction and sentence awarded by the trial Court under Section 366(A) of IPC is set aside.

16. In respect of the conviction and sentence under Section 376 of IPC, primarily we have to decide as what was the age of the victim girl at the time of occurrence. In the regard, P.W.9-Dr.Rajesh, who examined the victim girl, issued a certificate under Ex.P3 stating that the age of the victim girl is between 16 to 18 years, however, the opinion given by the expert under Section 45 of the Indian Evidence Act, is not a conclusive proof, it needs corroboration. In this regard, the victim girl when at the time of giving evidence as P.W.4 has stated before the trial Court as her age is 15 years at the time of occurrence. In fact, in respect of the said evidence, during her cross-examination, there was no denial on the side of the accused that she has completed 16 years at the time of occurrence. On the other hand, on go through the judgment rendered by the trial Court, in paragraph-14, it seem that the birth certificate of the victim girl has been produced before the learned Judicial Magistrate, wherein, it was stated that the date of birth of the victim girl is 04.06.1998, therefore, the same shows that at the time of occurrence, she has been completed 14 years 7 months and 12 days only. Though the said birth certificate is not marked as exhibit on the side of the prosecution, considering the fact that in respect to the age of victim girl, the evidence given by P.W.1 and P.W.4 is not under challenge that means there was no denial on the side of the accused, I am of the considered opinion that during the time of occurrence, the victim girl has not completed the age of 16 years.

17. Further, in this regard, P.W.1 Leelabai, the mother of the victim girl, who is the competent person to say about the age of the victim girl, had given evidence as at the time of occurrence, the victim girl is aged about 15 years. Therefore, no doubt, the said evidence given by P.W.1 and P.W.4 shall be the correct one and accordingly, this Court determined the age of the victim girl as 15 years at the time of occurrence. In the said circumstances, in view of Section 376 exception 6 of IPC even assuming that the victim girl has consented for sexual intercourse, the said consent given by the victim girl is not a consent under law.

18. Further, the evidence given by P.W.4 is narrow and inspire the confidence of this Court that when at the time of occurrence, the accused after removing her dresses, against her will had committed sexual intercourse for three times. Therefore, the said evidence is sufficient to hold that the alleged act committed by the accused is nothing but against the will of P.W.4.

19. It is the submission made by the learned counsel appearing for the appellant is that the whole evidence given by the



victim girl reveals the fact that the offence committed by the accused is consensual one, for which, it is not necessary to convict the accused under Section 376 of IPC. Further, the Doctor, who examined the victim girl, gave evidence as there is no semen detected in the vaginal smear collected from the victim girl and therefore, the same concludes that the evidence given by the expert is not in correspondence with the evidence given by the victim girl. Therefore, in this aspect also the conviction awarded by the trial Court is liable to be set aside.

20. On considering the said submissions with relevant records, it is true, the whole evidence given by the victim girl, projected the case as during the relevant point of time, she travelled with accused nearly for four days and only in the said situation, the alleged occurrence had takes place. In the said occasion, if the victim girl is forced to commit sexual intercourse, it is for her to report the said incident immediately before the police found in Tuticorin. As per her evidence, after indulging in sexual intercourse in Tuticorin, she has been travelled to Thanjavur along with the accused, wherein, also the same act was continued. However, as rightly pointed out by the learned Government Advocate, being the reason that the consent obtained by the accused from the girl, who is not completed the age of 16 years, is not within the meaning of consent. This Court is not in a position to accept the contention what raised by the counsel for the appellant. In otherwise, in order to know the occurrence, except the evidence given by P.W.4, no other evidence is available from the side of the prosecution.

21. In this connection, it is useful and necessary to see the judgment of the Hon'ble Apex Court in **Vijay alias Chinee vs. State of Madhya Pradesh** reported in **2010 (8) Supreme Court Cases 191**, our Hon'ble Apex Court has held as follows:-

"11. In State of Punjab v. Gurmit Singh this Court held that in cases involving sexual harassment, molestation, etc. the court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case."

22. Further, the judgment in **Dola alias Dolagobinda Pradhan and another vs. State of Odisha** reported in **2018 (18) Supreme Court Cases 695** our Hon'ble Apex Court has held as follows:-

" Conviction on basis of sole testimony of prosecutrix, general rule and exceptions thereto

If the version of the prosecutrix is believed, basic truth in her evidence is ascertainable and if it is found to be credible and consistent, the same would form the basis of



conviction. Corroboration is not a sine a qua non for a conviction in a rape case."

23. Therefore, applying the ratio laid down in the above referred judgment with the case in hand, is clear and narrow that the solitary testimony of victim girl (P.W.4) is sufficient to hold that during the time of occurrence, the accused herein committed an offence of rape and therefore, he is liable to be convicted under the said provision. The trial Court also concluded the same in favour of the prosecution and convicted as above. In the said circumstances being the reason that the appellant herein had faced the trial in this case for the past 17 years, I am of the view that some leniency must shown in awarding the sentence.

24. Accordingly, in the light of the above discussions, conviction and sentence awarded to the appellant under Section 366 (A) of IPC is set aside. In respect of 376 of IPC the appellant is convicted and sentenced to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for 6 months. The bail bond, if any, executed by the appellant/accused shall stand cancelled. The Trial Court is directed to secure the appellant and commit him to prison for undergoing the remaining period of sentence.

25. In the result, this Criminal Appeal is partly allowed.

Sd/-

Assistant Registrar (CS-I)

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Sub Assistant Registrar(CS)

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To:-

1.The Judge, Fast Track Mahila Court,
Nagercoil.

2.The Judicial Magistrate,
Eraniel.

3.The Chief Judicial Magistrate,
Kanyakumari @ Nagercoil.

4.The Inspector of Police,
Eraniel Police Station,
Kanyakumari District.

5.The Superintendt Central Prison, Palayamkottai.

<https://hcservices.ecourts.gov.in/hcservices/>



6.The Additional Public Prosecutor,
Madurai Bench of Madras High Cout,
Madurai.

Copy to

The Section Officer,
Criminal Section(Records),
Madurai Bench of Madras High Court,
Madurai.

**Crl.A(MD)No.25 of 2016
24.08.2021**

RK (14.09.2021) 10P 9C