



Bail Slip

The Petitioner/Appellant namely Selvakumar, male was released on bail as per Order of this Court dated 27/02/2017 made in Crl.MP (MD)No.9865/2016 in Crl.A(MD)No.347/2016.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 18.06.2021

Pronounced on : 03.09.2021

CORAM

THE HONOURABLE MR.JUSTICE **SATHI KUMAR SUKUMARA KURUP**

Crl.A.(MD)No.347 of 2016

Selvakumar

... Petitioner

Vs.

State Rep. by
The Inspector of Police,
Seithur Police Station,
Virudhunagar District.
In Crime No.476 of 2009

... Respondent

Prayer:- This Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code to call for the records and set aside the conviction and sentence imposed by the Fast Track Mahila Court, Virudhunagar District at Srivilliputtur in S.C.No.87 of 2010 on 22.08.2016 and allow this Criminal Appeal.

For Appellant : Mr.M.Jothi Basu

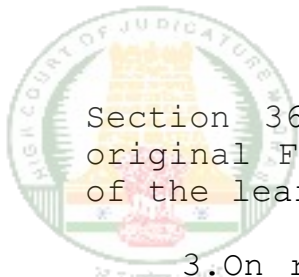
For Respondent : Mr.T.Senthil Kumar,

Government Advocate (Crl. Side)

JUDGMENT

This Criminal Appeal is filed to set aside the conviction and sentence imposed by the Fast Track Mahila Court, Virudhunagar District at Srivilliputtur in S.C.No.87 of 2010, dated 22.08.2016.

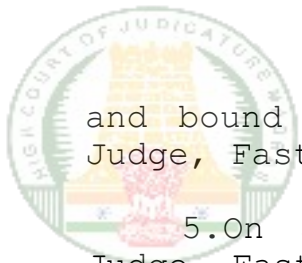
2.The case of the prosecution is that the accused/Selvakumar was a neighbour of Irulappan. He was already married and living with his wife. He was acquainted with the family of Irulappan. Irulappan had a daughter and son. One day the victim girl, who is the daughter of Irulappan was found missing from her house. Therefore, Irulappan searched her in the houses of his relatives and acquaintances. Since the whereabouts were not known and as he could not find her, he preferred a complaint under Ex.P1 to Seithur Police Station regarding the missing of his minor daughter. The complaint was filed along with the copy of transfer certificate under Ex.P2 of the minor girl as proof of the status of minor girl. On receipt of the complaint under Ex.P1, P.W.9/Head Constable, Ayyanar Samy of Seithur Police Station registered a case of missing person under



Section 366(A) of I.P.C., in Crime No.476 of 2009 and sent the original F.I.R. under Ex.P7 and complaint under Ex.P1 to the Court of the learned Judicial Magistrate, Rajapalayam.

3. On receipt of the FIR and copy of the complaint, P.W.10, who is the Inspector of Police, Seithur Police Station, proceeded with the investigation. He had examined P.W.1/Irulappan and his wife/P.W.2/Kaliammal and their son/P.W.3 and went to the residence of P.W.1 and prepared observation mahazar under Ex.P3 and rough sketch under Ex.P8 in the presence of the witnesses namely., Iyappan and Thangam. On 04.12.2009 at about 10.00 a.m., he had arrested the accused/Selvakumar at Seithur Bus Stand and secured the minor girl. He had forwarded the accused/Selvakumar and the minor girl to the learned Judicial Magistrate with request for medical examination along with the remand request against the accused/Selvakumar. After obtaining letter from the learned Judicial Magistrate, the accused/Selvakumar and the victim girl were forwarded to the Government Hospital for medical examination along with police escort. P.W.7/Dr.Uma Maheswari, Medical Officer attached to the Government Hospital, Rajapalayam, had examined the victim girl and issued medical report regarding the examination of the victim girl under Ex.P4.

4. P.W.8/Dr.Suresh, Medical Officer attached to the Government Hospital, Rajapalayam, had examined the accused and issued the medical report under Ex.P5. On the basis of the direction given by the learned Judicial Magistrate, Rajapalayam, he had issued potency certificate under Ex.P6. After medical examination, P.W.10, the Inspector of Police had altered the case and issued alteration report to the learned Judicial Magistrate. He examined the wife of the accused/Rajeswari/P.W.4 and recorded her statement. He also went to the school where the victim girl studied and obtained age certificate from the Head Master of the school/P.W.6 regarding the age of the minor girl under Ex.P2. He had examined P.W.7 and P.W.8, who had examined the accused and minor girl and issued the medical report and recorded their statements. He had also examined the police officials who had accompanied the accused and the victim girl to the Government Hospital, Rajapalayam, to secure medical report regarding the medical test under Ex.P4, Ex.P5 and Ex.P6. After procuring the medical certificate from P.W.7 and P.W.8 and after procuring the medical report of the minor girl, P.W.10 had arrived at a conclusion that the accused herein had sexual intercourse with the minor girl. Therefore, the case was altered to offence under Section 376 of I.P.C. He laid the charge sheet before the learned Judicial Magistrate, Rajapalayam. The learned Judicial Magistrate, Rajapalayam, on taking cognizance of the final report filed by P.W.10, had committed the case to the Court of Sessions at Srivilliputtur. On receipt of the records and on appearance of the accused, the learned Principal Sessions Judge had numbered the case as S.C.No.87 of 2010 and made over the case to the Court of the learned Principal Sessions Judge, Fast Track Mahila Court, Srivilliputtur



and bound over the accused to the Court of the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur.

5. On appearance of the accused before the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur and on perusal of the records and materials connected with the case, the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur framed charges under Section 366(A) and 376 of I.P.C. The accused was examined under Section 313(1) of Criminal Procedure Code regarding indiscriminating evidence put against him. The accused denied the indiscriminating evidence against him and pleaded not guilty and claimed to be tried. Thereupon, the trial was fixed.

6. During the trial, the prosecution had examined 10 witnesses as P.W.1 to P.W.10 and marked Ex.P1 to Ex.P8 and no material object was marked. On the side of the respondent, no one was examined and no documentary evidence was marked.

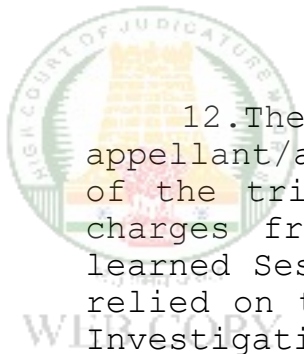
7. After the evidence of prosecution was closed, the prosecution advanced their arguments. After hearing the arguments of the prosecution and defence, the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, on appreciation and assessment of the evidence of the prosecution, had arrived at a conclusion that the charges framed under Sections 366(A) and 376 of I.P.C., had been proved by the prosecution beyond all reasonable doubt.

8. The learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, had by judgment dated 22.08.2016 found the accused guilty of the charges under Sections 366(A) and 376 of I.P.C., and convicted the accused and sentenced him to undergo seven years rigorous imprisonment and fine of Rs.25,000/-, in default of fine amount, to undergo six months simple imprisonment for the offence under Section 366(A) of I.P.C., and to undergo seven years rigorous imprisonment and fine of Rs.25,000/-, in default of fine amount, to undergo six months simple imprisonment for the offence under Section 376 of I.P.C. The period already undergone from the date of arrest ie., 04.12.2009 to 08.01.2010 was set off under Section 428 of Criminal Procedure Code.

9. Aggrieved by the judgment of conviction and sentence of imprisonment to undergo seven years rigorous imprisonment and fine of Rs.25,000/- each for the offence under Sections 366(A) and 376 of I.P.C., the accused had filed this criminal appeal.

10. Heard Mr.M.Jothi Basu, learned counsel for the appellant and Mr.T.Senthil Kumar, learned Government Advocate (Crl. Side) for the respondent.

11. The learned counsel for the appellant submitted that the learned Trial Judge had failed to appreciate the evidence as per the provisions of the Indian Penal Code.

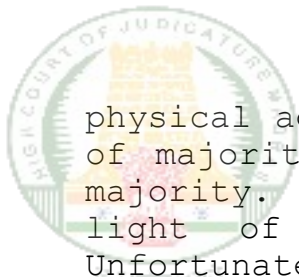


12.The main point of attack by the learned counsel for the appellant/accused is that the victim girl was not alive on the date of the trial. Therefore, in the absence of the victim girl, the charges framed against the accused is not proved. Instead, the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, had relied on the statement of the minor victim girl as recorded by the Investigation Officer/P.W.10/Jeyakumar and the evidence of the Investigation Officer/P.W.10, convicted the accused. Further, it is the case of the learned counsel for the appellant that the victim was not a minor girl as stated by the prosecution. The evidence regarding the proof of age was marked as Ex.P2. That was issued from the school. On the alleged date of occurrence, she had attained majority and she had completed 17 years and 11 months. Therefore, it should be presumed that she had attained majority. This fact was ignored by the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur. When the minor was examined by the police, she had stated that she went with the accused on her own volition and that she had stated the same to the learned Judicial Magistrate also, when she was brought before the Court. Therefore, the charge under Section 366(A) is not attracted. P.W.1, who is the father of the victim girl, in his cross examination admitted that the date of birth of the victim girl was given to the Head Master of the School/P.W.6 by him. P.W.4 is the wife of the accused. She had stated that she had objected to the victim girl coming to her house and talking with the accused. P.W.5/Thangam is the witness to the observation mahazar. P.W.6 is the Head Master of the School. P.W.7 to P.W.10 are official witnesses.

13.As per the arguments of the learned counsel for the appellant/accused, the charges against the accused under Section 366 (A) of I.P.C., does not stand to judicial scrutiny as the victim girl on the date of occurrence had completed 17 years and 11 months. Therefore, it is to be presumed that the victim girl had attained the age of majority. In support of his contention, the learned counsel for the appellant relied on the following Rulings:-

1. ***Lalta Prasad Vs. State of M.P*** reported in 1979 SCC (Crl) 954.
2. ***Jinish La Sah Vs. State of Bihar*** reported in 2003 SCC (Cri) 396.
3. ***Tejram Patil Vs. State of Maharashtra*** reported in 2015 (2) MWN (Cr.) 363 SC.

14.Mr.T.Senthil Kumar, learned Government Advocate (Crl. Side) by way of reply to the arguments of the learned counsel for the appellant/accused submitted that the arguments put forth on behalf of the accused cannot be accepted as the victim girl had not completed the age of majority. The maturity of a child undergoing mental and physical change varies from individual to individual. Some individuals attain the age of majority before attaining the

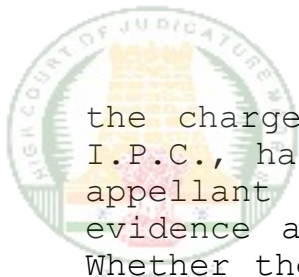


physical age of majority. Where as some individuals attain the age of majority one or two years after attaining the physical age of majority. Therefore, the age of majority is to be analyzed in the light of the medical evidence available before the Court. Unfortunately, the victim died before the trial. If this defence was taken, when the victim was alive, she would have been examined medically by a Psychiatrist to determine her mental competency. The age of maturity gives a presumption that the person who attained the age of majority can decide matters that affect their decisions. They are able to weigh the results of their decisions that they take and its aftermath and its repercussion. Only then the person who attained the age of majority can be considered as mature. In the age of 17 and 18 very many variables, therefore, the argument put forth on the side of the appellant that the charges under Sections 366(A) and 376 of I.P.C., are not attracted will not hold good.

15.The rulings cited by the learned counsel for the appellant/accused will not help the case and the rulings regarding the status of the minor that was decided way back in the year 1979 by the Hon'ble Supreme Court is not applicable to the present case. The age of majority was considered as 16 years then. After the legislation of the Juvenile Justice (Care and Protection of Children) Act, 2015 was enacted, the age of majority is considered as 18 years. After the enactment of Juvenile Justice (Care and Protection of Children) Act, the ruling cited by the learned counsel for the appellant/accused relying on the judgment of the Hon'ble Supreme Court of the year 1979 will not help the case of the accused. Therefore, it has to be rejected.

16.The learned Government Advocate (Crl. Side) also submitted that the victim was living separately with this accused after the accused was let out on bail in the sessions case, which ended in conviction. Thereafter, he had murdered her and a case was registered against him for the offence under Section 302 of I.P.C., and in that case, he was acquitted but he cannot wriggle out from the presumption available before this Court that he had cleverly done away with her to escape from the legal complications arising out of his conduct in kidnapping the victim aged 17 years, who had not attained the age of majority and who had been in acquaintance with the accused, who was already married and having his own family in his residence next to the house of the family of the victim girl. When that be the case, the accused is aware of his action and how the case will be considered in a Court of law. Therefore, he had clearly done away with the victim girl to escape from punishment and from the evidence through the victim after his lust was exhausted against the victim girl. That circumstance is also to be considered in this case.

17.The main point of attack of the learned Government Advocate (Crl. Side) is that the contention that since the victim girl was
<https://hccservices.courts.gov.in/> the findings given by the learned Trial Judge that



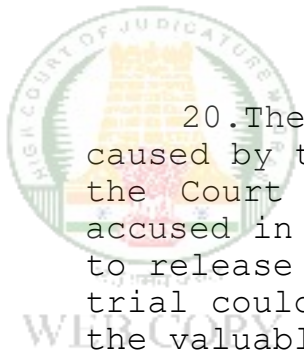
the charges against the accused under Sections 376 and 366(A) of I.P.C., had been proved is not sustainable. The contention of the appellant that the learned trial Judge had not appreciated the evidence as per the Indian Evidence Act also cannot be accepted. Whether the victim was alive or not alive, P.W.10, the Inspector of Police, who is the first Investigation Officer is competent to speak about the evidence given by the victim girl under Section 161 of Criminal Procedure Code. He had recorded the statement of the victim girl when she was secured along with the accused at Seithur Bus Stand and subjected to judicial process of forwarding her to the medical examination through the orders of the learned Judicial Magistrate to determine her age, medical examination regarding sexual intercourse and also subjecting the accused after remand of the accused by the learned Judicial Magistrate to medical examination regarding his potency on request of P.W.10. Accordingly, P.W.7/Dr.Uma Maheswari had examined the victim and issued Ex.P4. She had in her evidence clearly stated that on examination by the doctor, the victim had admitted that she had sexual intercourse with the accused. P.W.7-Dr.Uma Maheswari in her report under Ex.P4 had clearly stated that the hymen was ruptured. It is pertinent to note that the accused was arrested and the victim was secured in the company of the accused. Therefore, the accused cannot claim that he did not have sexual intercourse with her. It is also to be presumed that from the date on which the minor girl was missing from the custody of the parents/P.W.1 and P.W.2, after lodging the complaint under Ex.P1, the registration of the case under Ex.P7 and till the victim was secured in the company of the accused and on the date of his arrest by P.W.10, the Inspector of Police, they had been together. Therefore, there is a strong presumption in favour of the prosecution that except the accused no one had access to have sexual intercourse with the victim minor girl.

18.Regarding the claim of exemption by the accused also cannot be accepted. He is already married with P.W.4/Rajeswari and living with his family. When that be the case, he had taken the victim minor girl on the pretext of marriage. A girl having mental maturity will not be carried away on the promise by the accused. The accused had cleverly misused the relationship of a minor girl, who is unable to guess about her actions and its subsequent repercussions, had been taken to Tirupur on the pretext of getting her employment and had intercourse with her till she was secured by P.W.10. Therefore, the charge under Section 366(A) of I.P.C., is attracted against the accused, even though the victim was not alive. The Court can safely rely on the evidence of P.W.10, who was the Investigation Officer to whom the victim had voluntarily given a statement that she had intercourse with the accused. Further, P.W.10, the Investigation Officer obtained medical report from P.W.7 to prove the same. The report issued by P.W.7/Dr.Uma Maheswari under Ex.P4 is also available before the Court. Further, P.W.7/Uma Maheswari herself had deposed regarding the medical condition of the victim that her hymen was ruptured. There are evidences



available that the accused had sexual intercourse with the victim girl. There are materials available before the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur to convict the accused for the offence under Section 376 of I.P.C. Therefore, the words used by the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, that 161 statement of the victim is to be treated as dying declaration, even though not accepted by this Court, still the charge against the accused under Section 376 of I.P.C., is proved. There are proof of materials through the learned Trial Judge through the deposition of the Investigation Officer, who heard from the victim, who is not alive on the date of trial to contradict her statement by the accused. The accused is to face the consequence of not making the victim girl available before the Court. He cannot be extended the benefit of the absence of the victim to contradict her statement to gain advantage to get an escape route from the clutches of law for his criminal action.

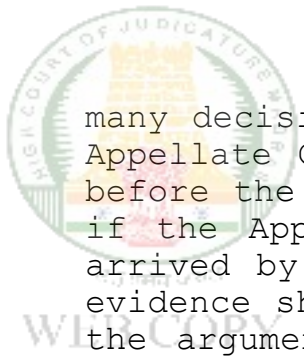
19. In normal circumstances, when the witnesses are not available, the statement given by the witness to the Investigation Officer cannot be taken for consideration by the Court of law as the accused has the right to cross examine the witness to contradict his case. Here in the present case, the accused loses those right because of his own actions. He had destroyed the evidence of the victim girl to contradict the statement of victim under Section 161 of Criminal Procedure Code using his own defence. Therefore, in that part, the Court can rely not as a "dying declaration" but as "a statement made by the victim to the police officer". The objection of the learned counsel for the appellant/accused regarding reliance placed upon by the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur on the statement of the victim under Section 161 of Criminal Procedure Code is not maintainable on the ground that the accused himself was responsible for the disappearance of the evidence of the victim/prosecutrix. The Court can rely on the proceedings in the session case, wherein the accused stood charged under Section 302 of I.P.C., for the murder of the victim/prosecutrix in this case. Even though he was acquitted based on reasonable doubt, still the Court can take judicial notice that at the time of the death of the victim girl, the accused was alone in his house, where the victim girl was alleged to have been murdered by setting her on fire as per the prosecution case. The occurrence had taken place in the house where the accused was living with the prosecutrix, after his release in the sessions case on bail, in which he was arrayed as accused for offence under Sections 366(A) and 376 of I.P.C. Therefore, the contention of the learned counsel for the appellant/accused that the learned Trial Judge had treated the 161 statement as dying declaration even though not accepted by this Court, still the learned Trial Judge was right in placing reliance on the same, even though the accused could not contradict the victim through her cross examination as a witness before the learned Sessions Judge, Fast Track Mahila Court,



20.The absence of prosecutrix as a witness before the Court was caused by the action of this accused alone. That can be utilized by the Court in not granting the defence that is available to the accused in any criminal case. The conduct of the accused subsequent to release on bail by this Court in S.C.No.87 of 2010 and before the trial could commence, he was living with the prosecutrix, therefore, the valuable defence in that particular case that the victim was not available and that therefore, he was unable to contradict the statement recorded by the Investigation Officer/P.W.10 of the victim under Section 161 of Criminal Procedure Code cannot also be accepted. By his own conduct, the accused loses his right of defence in the light of the sessions case in which the accused was acquitted for proof beyond reasonable doubt, the benefit of doubt is extended to the accused. That much alone he can use as his defence. Nothing prevented the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, from taking judicial notice of the conduct of the accused herein after release on bail in S.C.No.87 of 2010 during the pendency of the trial resulting in cohabitation with the victim and doing away with her life, which resulted in sessions case.

21.Under those circumstances, the arguments regarding the non appreciation of evidence as per the Indian Evidence Act by the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, has to be rejected. The learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, had appreciated the materials available before him and assessed it accordingly. The learned Sessions Judge had acted on the evidence of P.W.10, who had mentioned about the 161 statement recorded from the victim/prosecutrix, which is treated as direct evidence by the victim to the police officer. Further proof of the same is also available through the evidence of P.W.7 under Ex.P4, the report of the Dr.Uma Maheswari, who had examined the status of the victim along with same the evidence of P.W.8, who medically examined the accused and who had given potency certificate. Therefore in all these circumstances, there are sufficient materials available before the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur to arrive a safe conclusion that the charges against the accused under Sections 366(A) and 376 of I.P.C., have been proved by the prosecution beyond all reasonable doubt and therefore, there is no perverse findings available before this Court to interfere with the findings of the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur to set aside the judgment of conviction and sentence recorded by him.

22.The learned Government Advocate (Crl. Side) further submitted that the finding of the learned Trial Judge on proper appreciation of the evidence has more weight before the Appellate Court because, the learned Trial Judge has the benefit of observing the demeanor of witnesses before him and the accused appeared before him. Whereas, that benefit is not available to the learned



many decisions laid down rules regarding disposal of appeals by the Appellate Court that on the same set of evidence that is available before the Trial Court and on appreciation of same set of evidence, if the Appellate Court comes to a contrary finding, the findings arrived by the learned Trial Judge based on proper appreciation of evidence shall not be disturbed lightly. Under those circumstance, the arguments of the learned counsel for the appellant/accused is rejected and the findings arrived by the learned Sessions Judge, Fast Track Mahila Court,, Srivilliputtur has to be confirmed and the appeal is to be dismissed.

23.On consideration of the rival arguments put forth by the learned counsel for the appellant/accused and the learned Government Advocate (Crl. Side), this Court on careful consideration of the evidence recorded by the learned Trial Judge from P.W.1 to P.W.10 and Ex.P1 to Ex.P8 and on a perusal of the judgment of the Trial Court, this Court is unable to accept the arguments put forth by the learned counsel for the appellant/accused that the charges under Sections 366(A) and 376 of I.P.C. against the accused is not proved.

24.As per the arguments put forth by the learned Government Advocate (Crl. Side), the age of the victim girl on the date of occurrence was below 18 years is proved under Ex.P2. Therefore, she had not completed 18 years. The other ground taken by the learned counsel for the appellant/accused that the charge under Section 376 of I.P.C., has not been proved also cannot be accepted. The evidence of the victim was not available before the Court on the date of trial. She was dead. At the same time, the Court can take judicial notice of the fact that the very same accused stood charged for the offence under Section 302 of I.P.C., for the death of the victim/prosecutrix. It is the case of the prosecution that in the sessions case in which he was acquitted, he was living with the victim/prosecutrix, when she died. The charge of murder when he was facing trial before the trial Court was not proved beyond reasonable doubt by the prosecution. Therefore, the benefit of doubt was extended to the accused as per the criminal jurisprudence followed in this country. At the same time when a judicial proceeding connected with this judicial proceeding is available before the Court, the Court can take judicial notice and draw presumption against the accused, if that case was pending trial, still the Court can take judicial notice that the accused is before the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, standing trial for charges under Sections 366(A) and 376 of I.P.C., is facing trial for murder of the victim/prosecutrix that much presumption can be drawn under Section 114 of the Indian Evidence Act.

25.It is pertinent to extract Section 32 of the Indian Evidence Act which reads as under:

"32.Statements, written or verbal, of
facts made by a person who is dead, or



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who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1)When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

The prosecutrix had given statement to the Investigation Officer-P.W.10-Jeyakumar, regarding sexual intercourse with the accused. When the trial commenced in the Court of Sessions, the prosecutrix was not available. Under those circumstances, the presumption under Section 114 of the Indian Evidence Act has a special reference to explanation (g) comes into play.

26.It is also pertinent to extract Section 114 of the Indian Evidence Act which reads as under:

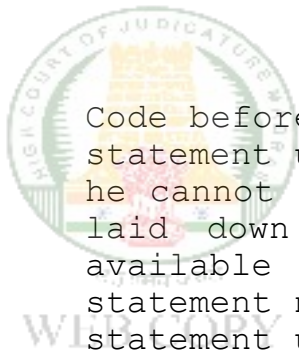
"114.The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

...

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;"

The Court can draw presumption that the statement recorded by P.W.10-Investigation Officer was true since the prosecutrix was not available before the Court to be contradicted in cross-examination by the accused that the judicial and official acts have been regularly performed. Therefore, the statement recorded by P.W.10-Investigation Officer from the prosecutrix has to be treated as presumed to be true.

27.Under the provisions of the Indian Evidence Act, the statement made by the witness, who is not found or who is not alive on the date of trial can be looked into by the learned Trial Judge. This principle is also applicable in this case. The learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, had in his judgment used the word "dying declaration" regarding the statement



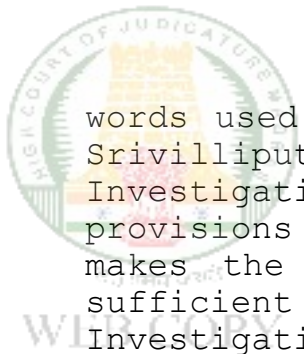
Code before the Investigation Officer/P.W.10/Jeyakumar. As far as a statement under Section 161 of Criminal Procedure Code is concerned, he cannot treat the same as evidence. That is the established rule laid down by the Hon'ble Supreme Court when the witness is available before the trial Court, the accused can contradict the statement made by the witness to the Investigation Officer. So the statement under Section 161 of Criminal Procedure Code had that much value only as evidence before the Court.

28.The Court can rely upon the evidence of the investigation officer/P.W.10/Jeyakumar as to the statement made by the victim to the Investigation Officer that she was living with the accused and she had sexual intercourse with the accused. The evidence of P.W.10/Investigation Officer is a hear-say evidence. He heard directly from the prosecutrix/victim. That much evidence can be relied upon by the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, regarding the offence under Section 376 of I.P.C., charged against the accused.

29.There is further proof available to the learned Sessions Judge, Fast Track Mahila Court, through the evidence of P.W.7/Dr.Uma Maheswari and P.W.8/Suresh, who had issued the medical report under Ex.P4, Ex.P5 and Ex.P6. P.W.7 recorded that the hymen is ruptured and the victim was subjected to sexual intercourse. Further materials from P.W.8, who examined the accused and issued medical report under Ex.P5 and Ex.P6 regarding the potency. He had stated that accused is potent to have sexual intercourse.

30.As submitted by Mr.T.Senthil Kumar, learned Government Advocate (Crl. Side) that the accused was arrested at Seithur Bus Stand by Investigation Officer/P.W.10. At that time, the victim/prosecutrix was in the company of the accused. From the date on which the victim was missing and till the victim was secured and the accused arrested, it is to be presumed that she had been with the company of the accused. Therefore, when the accused alone had the accessibility and amenability to reach the victim, the victim is stated to have been subjected to intercourse. Then the Court shall presume that this accused and none else had sexual intercourse with the victim. There are sufficient materials to arrive at a safe conclusion that except the accused none had sexual intercourse with the victim. Therefore, the offence under Section 376 of I.P.C., charged against the accused is proved beyond reasonable doubt.

31.The words used by the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur in treating the 161 statement of the victim as dying declaration is not accepted by this Appellate Court. If it is to be treated as dying declaration, it should be recorded immediately before the death of the individual concerned and also regarding the cause of death made by the said injured witness. The victim in her 161 statement had not stated about imminent threat or



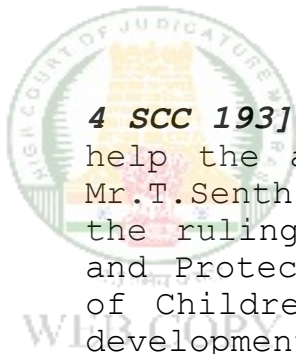
words used by the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, regarding 161 statement of the victim to the Investigation Officer/P.W.10 cannot be acted upon as per the provisions of the Indian Evidence Act under the heading "witness who makes the statement is available before the Court" after making sufficient statement. The prosecutrix had given statement to the Investigation Officer/P.W.10-Jeyakumar, regarding sexual intercourse with the accused. When the trial commenced in the Court of Sessions, the prosecutrix was not available. Under those circumstances, the presumption under Section 114 of the Indian Evidence Act has a special reference to explanation (g) comes into play.

32.The statement made by the witness to the Investigation Officer under Section 161 of Criminal Procedure Code cannot be considered by the Court as the accused cannot have the right of defence to contradict each and every statement made by such witness to the Investigation Officer through cross examination. This is valuable defence.

33.This defence available to the accused in all other criminal cases is not available to the accused/appellant herein, due to his own actions in destroying the evidence and the witness before ever the trial could commence before the Trial Court. The Court can act on the subsequent conduct of the accused after release on bail when the case was pending investigation in Crime No.476 of 2009 on the file of the Seithur Police Station in connection with this sessions case in S.C.No.87 of 2010. After he was released on bail, he was living with the victim. When the victim died, naturally doubt arises against the accused. The investigation commenced. Based on the investigation report charges laid against the accused for the offence under Section 302 of I.P.C. When the trial had completed in the subsequent sessions case under Section 302 of I.P.C. in S.C.No.200 of 2013, on appreciation of evidence, the learned Trial Judge in the case in S.C.No.200 of 2013 acquitted the accused based on the principle, benefit of doubt. That is the acceptable principle of criminal jurisprudence. That cannot be used to wriggle out from those charges under Sections 336(A) and 376 of I.P.C. in this sessions case in S.C.No.87 of 2010.

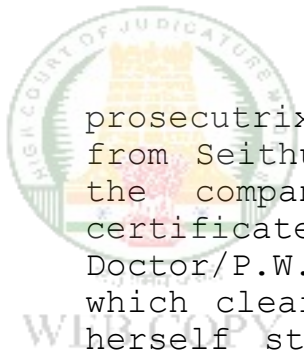
34.Even if the sessions case in S.C. No.200 of 2013 had not been taken for trial before the completion of the trial in S.C.No.87 of 2010, still the accused who is facing charge of murder of the victim can be considered regarding the circumstances against the accused. It can be relied upon by the prosecution to prove the charge against him in S.C. No.87 of 2010. The Court can rely it for the purpose of drawing strong adverse inference against the accused, as per Section 114 (g) of the Indian Evidence Act.

35.The reliance placed upon the reported ruling of the Hon'ble Supreme Court in the case of **Lalta Prasad -vs- State of M.P. [(1979)]**
<https://hcservices.mca.gov.in/hcservices/>



4 SCC 193] by the learned counsel for the appellant/accused will not help the appellant/accused herein because as rightly submitted by Mr.T.Senthil Kumar, learned Government Advocate (Crl. Side) that was the ruling prior to the legislation of the Juvenile Justice (Care and Protection of Child) Act and the legislation of the Prevention of Children from Sexual Offences (POCSO) Act which are subsequent developments in law and not only that the reported decision in **Lalta Prasad** case cited supra, the law as it stood then was the age less than 16 is treated as age of minority. In the reported case, the prosecution was unable to prove the age of the victim/prosecutrix as less than 16. The Court relied on the prosecutrix filling up the deposition form by the prosecutrix as 19 years on the date when she was examined before the trial Court and in that case, the prosecutrix was betrothed to the accused and there was evidence that the accused had been taken the prosecutrix to seduce her to illicit intercourse. In the case before this Court or the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, the accused was already married. He had taken the victim girl who is the daughter of his neighbour P.W.1 and P.W.2 on the pretext of getting her a job at Tiruppur without the knowledge of P.W.1 and P.W.2. The victim girl who had not completed the age of 18. As per the law prevailing now, only completion of age of 18 is considered as age of majority. On the date of occurrence the victim girl/prosecutrix is alleged to have completed 17 years and 11 months. Therefore, the defence of the accused is that she had already attained the age of majority cannot be accepted. As rightly pointed out by the learned Government Advocate (Crl. Side) that if there had been dispute regarding her mental age, the Court might have referred the prosecutrix to the Psychiatrist to determine her mental age but unfortunately, she was alleged to have been murdered by the accused to escape from the case of kidnapping and rape. Therefore, the decision in **Lalta Prasad** case cited supra relied on by the learned Counsel for the appellant/accused will not be helpful to the appellant and hence, rejected.

36. Similarly, in the reported decision of the Hon'ble Supreme Court in the case of **Jinish Lal Sah -vs- State of Bihar [(2003) 1 SCC 605]**, the age of the prosecutrix, as per her father's evidence was 19 years on the date of occurrence. As per the evidence of the prosecutrix, she was only 14 years on the date of occurrence. As per the medical examination conducted by Doctor/Medical Officer in the Government Hospital, her age based on her bones, was 17 years. Therefore, the Court arrived at a conclusion that the prosecution was unable to prove the age of the prosecutrix in the reported case that she is a minor. Also in the reported decision, the prosecutrix had willingly gone away with the accused and there was no evidence that the accused forced the victim/prosecutrix to have illicit sexual intercourse with her. In the case before, the learned Sessions Judge, Fast Track Mahila Court, the victim/prosecutrix was missing from the house of P.W.1 and P.W.2 parents of the

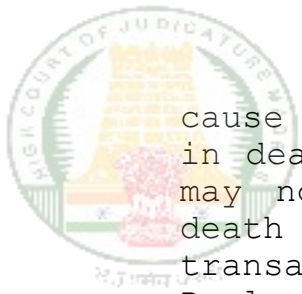


prosecutrix. The Investigation Officer had arrested the accused from Seithur Bus Stand. When the accused was arrested, he was in the company of the prosecutrix. Therefore, not only that certificate of medical examination issued under Ex.P4 by the Doctor/P.W.7 claims that she was subjected to sexual intercourse, which clearly says that the hymen was ruptured and prosecutrix had herself stated to P.W.7-Doctor that she was subjected to sexual intercourse by the accused. Therefore, as rightly pointed out by the learned Government Advocate (Crl. Side) that the decision in ***Jinish Lal Sah's*** case cited supra also will not be helpful to the appellant/accused.

37.It is the contention of the learned Government Advocate (Crl. Side) that the appellant was arrayed as accused in the murder of the prosecutrix. Prior to the date of alleged murder, the accused in this case was released on bail in this case pending trial. This accused had been living with the prosecutrix by setting up a separate home and in that home, he is alleged to have committed murder of the prosecutrix with an ulterior motive to escape from the clutches of law regarding kidnapping of minor and rape of minor. In the murder case, the accused was acquitted on benefit of doubt. Still the contention of the accused can be presumed from the fact that during trial in this case, the prosecution was unable to produce the prosecutrix as competent witness to speak against the accused was not alive to depose evidence. Still the materials were available before the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur through the evidence of Doctor and through the evidence of Investigation Officer/P.W.10 in this case. Therefore, the submission of the learned Counsel for the appellant/accused that the charges under Sections 366A and 376 of IPC are not proved against the accused is rejected in the light of the materials available before the learned Sessions Judge, Fast Track Mahila Court, and in the light of the arguments of the learned Government Advocate (Crl. Side).

38.On a perusal of the judgment of the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, it is found that the learned trial Judge had treated the statement under 161 Cr.P.C. made by the deceased prosecutrix before the Investigation Officer as "dying declaration" and based on which, she had convicted the accused. Therefore, the learned Counsel for the appellant/accused had relied on the decision of the Hon'ble Supreme Court in the case of ***Tejram Patil Vs. State of Maharashtra*** reported in **2015 (2) MWN (Cr.) 363 (SC)**. The relevant portion of the said judgment reads as under:

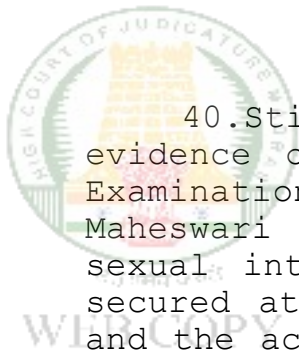
"EVIDENCE ACT, 1872 (1 of 1872), Sections 32 & 6 - Dying Declaration - Relevancy and admissibility of, in respect of cause of death of another person - As per Section 32, statement made by a dead person admissible in respect of



cause of death or circumstances of transaction resulting in death of person making such statement - Such statement may not by itself be admissible to determine cause of death of any other person - But, where circumstances of transaction resulting in death of person making Dying Declaration, as also death of any other person, same will be relevant about cause of death of any other person - Dying Declaration in such a case integral part of circumstances resulting in death of other person, therefore relevant for death of such other person also - As per Dying Declaration of "P", Accused poured kerosene on "S" and set her on fire - "P" intervening and receiving burns injuring in process which resulted in her death, held, integral part of same transaction - Dying Declaration of "P, held, admissible as to circumstances of transaction which included circumstances resulting in death of "S".

EVIDENCE ACT, 1872 (1 of 1872), Section 32 - Dying Declaration - Reliability of Dying Declaration made before Police Officer - Dying Declaration recorded by Police Officer can be relied upon, even in absence of certification by Doctor as to fitness of mind of declarant, if Court is satisfied about fit mental state of deceased to make statement and recording of same - No material before Court to satisfy itself as to fit condition of deceased to make declaration - Deceased - "S" sustained 100% burns and was in Hospital at time of making alleged statement - Medical fitness of declarant not certified - Statement not bearing signature or thumb mark of deceased - Trial Court justified in discarding same - High Court in Appeal erred in accepting same."

39.It is the contention of the learned Counsel for the appellant/accused that the statement under Section 161 Cr.P.C. made by the prosecutrix before the Investigation Officer does not mention about the cause of death and she was alive on the date when the Investigation Officer had secured her and arrested the accused. Therefore, the discussion of the learned trial Judge regarding the statement under Section 161 Cr.P.C. made by the victim/prosecutrix cannot be treated as "dying declaration". The word "dying declaration" used by the learned trial Judge does not attract the ingredients of dying declaration as per the decision in **Tejram Patil Vs. State of Maharashtra** case cited supra. The submission of the learned Counsel for the appellant/accused regarding the expression used in the discussion in the judgment of the Sessions Judge, Fast Track Mahila Court, Srivilliputtur, that the statement under Section 161 Cr.P.C. made by the victim/prosecutrix before the Investigation Officer is treated as "dying declaration" cannot at all be accepted.



40. Still the charge against the accused is proved through the evidence of P.W.7-Dr.Uma Maheswari, who had issued Ex.P4-Medical Examination Report of the prosecutrix. The evidence of P.W.7-Dr.Uma Maheswari states that the prosecutrix had informed that she had sexual intercourse. It is to be noted that the prosecutrix was secured at Seithur Bus Stand on 04.12.2009 along with the accused and the accused was arrested on 14.12.2009, as per the evidence of Jayakumar, P.W.10-Investigation Officer. He had recorded the statement of the victim/prosecutrix under Section 161 Cr.P.C. Since the prosecutrix was not before the Court, the statement under Section 161 Cr.P.C. made by the prosecutrix before the Investigation Officer can be considered by the Court.

41. To contradict the statement of the prosecutrix, the prosecutrix ought to have been examined as a witness before the Court but on the date of examination and commencement of trial from 28.08.2015 and concluding on 10.05.2016, the prosecutrix was not alive. Therefore, her statement could not be contradicted in the cross-examination on behalf of the accused. This had affected the valuable right of defence available to the accused in this case.

42. The accused cannot claim valuable right of defence regarding the absence of the prosecutrix because when he was on bail he had set up a separate family with the prosecutrix and during such time, he is alleged to have committed the murder of the prosecutrix with ulterior motive to escape from the clutches of law. Therefore, S.C. No. 200 of 2013 was pending against him before commencement of the trial in the case in S.C.No.87 of 2010. The trial in the murder case concluded and on benefit of doubt he was acquitted. Still this Court can draw adverse inference against the accused for his conduct in eliminating the prime witness who might have deposed incriminating evidence against him, had she been alive. Therefore, the statement under Section 161 Cr.P.C. made by the victim/prosecutrix before the Investigation Officer can be considered by the Court through the evidence of P.W.10 who had recorded the statement under Section 161 Cr.P.C. and further the evidence of P.W.7-Dr.Uma Maheswari who had examined the prosecutrix. That will be sufficient to arrive at a logical conclusion regarding the charges made against the accused/appellant that he had kidnapped the minor girl with an ulterior motive to have sexual intercourse with her and he had committed sexual intercourse on the minor girl. Therefore, the charges under Section 366(A) of I.P.C. and 376 of I.P.C. had been proved through the materials available before the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur.

43. The argument of the learned Counsel for the accused/appellant that to prove the charges under Sections 366(A) and 376 of I.P.C., the victim of the crime is the main witness who was not examined by the prosecution before the trial Court will not hold good. This line of argument cannot be accepted by any Court of



44.If this line of argument is accepted, then in every criminal case the accused will indulge in elimination of the witness and destroy the evidence. Therefore, in the light of the principle of fair trial, the conduct of the accused, who was arrested for the offences under Sections 366(A) and 376 of I.P.C. and in the same case, after release on bail cohabited with the minor girl and eliminated her, cannot be condoned by the Court. Therefore, the judgment of conviction recorded by the learned trial Judge does not warrant any interference.

45.The point for consideration is answered against the appellant/accused and in favour of the prosecution.

46.In the result, this Criminal Appeal is dismissed and the conviction and sentence passed by the learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, sentencing the accused to undergo 7 years Rigorous Imprisonment and to pay fine of Rs.25,000/-, in default, to undergo six months simple imprisonment for the offence under Section 366(A) of I.P.C. and sentencing him to undergo 7 years Rigorous Imprisonment and to pay fine of Rs.25,000/-, in default, to undergo six months simple imprisonment for the offence under Section 376 of I.P.C. are confirmed. The learned Sessions Judge, Fast Track Mahila Court, Srivilliputtur, is directed to issue warrant to secure the accused and forward him to the prison to undergo the remaining period of sentence. The period of detention already undergone by the appellant/accused shall be set off under Section 428 of Criminal Procedure Code.

Sd/-

Assistant Registrar (P & A)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

ias/SRM

To

- 1.The Judicial Magistrate, Rajapalayam.
- 2.Do Through The Chief Judicial Magistrate,
Srivilliputtur At Virudhunagar District.
- 3.The Judge,
Fast Track Mahila Court,
Virudhunagar District,
At Srivilliputtur.



4.The Inspector of Police,
Seithur Police Station,
Virudhunagar District.

5.The Superintendent,
Central Prison,
Madurai.

6.The Additional Public Prosecutor
Madurai Bench of Madras High Court
Madurai.

Copy to:

The Section Officer,
Criminal Section (Records),
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.G.M.LAW OFFICE, Advocate (SR-28141[F] dated 03/09/2021)

Crl.A. (MD) .No.347 of 2016
03.09.2021

SR(CO)/RS (08.10.2021) 18P 10C