



BAIL SLIP

The Petitioner/Appellant namely Ravi @ Ravichandran S/o, Pitchiyan was released on bail by the order of this Court dated 24.02.2017 made in CRL.MP(MD).No. 835/2017 in CRL.A(MD).No. 23/2017.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 16.07.2021
DELIVERED ON : 01.10.2021

CORAM

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

CRL.A.(MD)No.23 of 2017

Ravi @ Ravichandran : Appellant/Accused No. 1
Vs.

State represented by
The Inspector of Police,
Pappanadu Police Station,
Thanjavur District.
(Crime No.313 of 2012)

: Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, to call for the records in Special Sessions Case No.04 of 2013 on the file of the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thanjavur, Thanjavur District and to set aside the judgment, dated 25.11.2016 and acquit the Appellant of the charges levelled against him.

For Appellant :Mr.A.Thiruvadi Kumar
For Respondent :Mr.T.Senthil Kumar

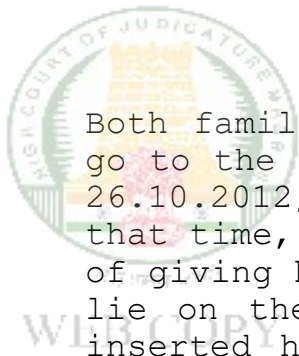
JUDGMENT

This Appeal is filed by the Accused No.1, as against the judgment of learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thanjavur, Thanjavur District, in Special Sessions Case No.04 of 2013, dated 25.11.2016.

2.Heard Mr.A.Thiruvadi Kumar, learned Counsel for the Appellant and Mr.T.Senthil Kumar, learned Government Advocate (Crl.side) appearing for the respondent.

3.The brief facts relevant to the consideration of the Court as per the case of the prosecution are as follows:

3.1.The victim herein was an eight years old child at the time of occurrence, ie., on 26.10.2012. The Accused 1 to 6 are residing on the same street opposite to the house of the victim's family.

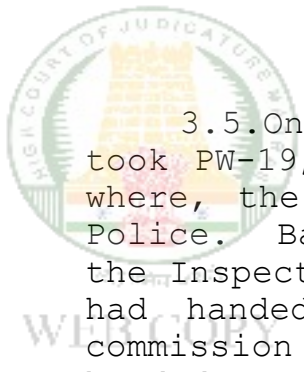


Both families are known to each other and the victim child used to go to the house of the Accused. On the date of occurrence, ie., on 26.10.2012, the victim girl was playing in front of her house. At that time, the Accused No.1 invited her to his house under the guise of giving her chocolate and took the child to his house and made her lie on the floor and removed her clothes including underwear and inserted his penis on the vagina of the victim girl. The victim girl cried in pain. The parents of the victim girl, on hearing the cries of the victim girl, came to the house of the Accused. Accused No.1, Accused No.2, who is the wife of Accused No.1 and A3 to A6, who are his relatives, threatened the victim and her mother from getting out of the house and prevented them from lodging complaint with the police. Therefore, the offence under Sections 341, 376, 506(2) and 109 IPC r/w Sections 3(a) and 4 of Protection of Children from Sexual Offence Act had been attracted.

3.2.On 29.10.2012, at 21.00 hours, the mother of the victim girl, PW-1, Manjula, had preferred the complaint, after three days from the date of occurrence, ie., on 26.10.2012, to PW-18, Somasundaram, Sub Inspector of Police, Pappanadu Police Station, under Ex-P1 and he registered a case in Cr.No.313 of 2012 for the offence under Sections 341, 342, 506(2), 376(2)(f) and 109 IPC under Ex-P2 and sent the original complaint under Ex-P1 and FIR under Ex-P22 to the learned Judicial Magistrate, Orathanadu and a copy of complaint and FIR was placed before PW-19, Karthikeyan, Inspector of Police, Pappanadu Police Station, for further investigation.

3.3.On receipt of the same, PW-19, the Inspector of Police, had proceeded to the scene of occurrence and stayed there for the night. On 30.10.2012 by morning 06.00 am, in the presence of witnesses, PW-5, Ravi and PW-4, Baskaran, he had prepared the observation mahazer under Ex-P23, and rough sketch, under Ex-P24. He had examined PW-1, mother of the victim girl, Manjula and father of the victim girl, Ilangovan and other witnesses, PW-3, Sumathi, PW-4, Bhaskar, PW-5, Ravi, PW-6, Govindaraj and recorded their statements.

3.4.The child victim was forwarded for medical examination with woman Special Sub Inspector of Police, PW-15, Latha, to Orathanadu Government Hospital. The Medical Officer at Orathanadu Government Hospital, had advised PW-15, Special Sub Inspector of Police, to take the child victim to Raja Mirasudhar Medical College and Hospital, Thanjavur. The Accused were absconding. Therefore, PW-19, the Inspector of Police, on secret information, came to know that the Accused were available near Kothaiyakadu Bridge and he arrested A1, Ravi @ Ravichandran and other Accused, Rajendran and Indrajith. In the presence of PW-7, Uthirapathi and PW-6, Govindaraj, on arrest, the Accused No.1, Ravi @ Ravichandran, had voluntarily given a confession statement, which was recorded by PW-19, the Inspector of Police.



3.5. On the basis of the confession statement, the Accused No.1 took PW-19, the Inspector of Police, to Mannardugi Bus stand, from where, the other Accused were arrested by PW-19, the Inspector of Police. Based on the same confession, the Accused No.1 took PW-19, the Inspector of Police, to the house of the Accused, where from, he had handed over the dresses worn by him at the time of the commission of the crime. The Accused No.1, Ravi @ Ravichandran, had handed over blue colour checked lungi and full sleeve black colour shirt in the presence of PW-6, Govindaraj and PW-7, Uthirapathi, which was seized by PW-19, Inspector of Police, in the presence of the said witnesses under seizure mahazer in Ex-P26. PW-19, the Inspector of Police, had examined the mahazer witnesses and recorded their statements. On arrest of the Accused No.1, Ravi @ Ravichandran, and other Accused Indraajith and Rajendran, PW-19, the Inspector of Police, had requested for remand of the Accused and the Accused were forwarded to the learned Judicial Magistrate, Orathanadu.

3.6. PW-19, the Inspector of Police, had addressed the learned Judicial Magistrate, Orathanadu to forward the seized materials, the dresses worn by Accused No.1 and the minor victim girl, for forensic examination. The seized articles were forwarded to the learned Judicial Magistrate under Form-95 under Ex-P27. On the basis of the same, the learned Judicial Magistrate had addressed the Regional Forensic Science Laboratory, Thanjavur, for examination of the articles, MO-1 to MO-5. The seized articles were sent to the Regional Forensic Science Laboratory, Thanjavur, through PW-14, Mano Sekar and PW-16, Pitchai.

3.7. The Accused No.1 was forwarded to the hospital along with the requisition of the learned Judicial Magistrate, Orathanadu for medical examination. The Medical Officer, at Thanjavur Medical College Hospital, after examination of Accused No.1, Ravi @ Ravichandran, had reported that the Accused is not willing to cooperate with the medical examination.

3.8. PW-19, the Inspector of Police, had addressed the Head Mistress of the Panchayat Union Elementary School, Thirumangalakottai, where, PW-2 the victim girl, had studied, to obtain the age certificate, as per the school records of the minor victim girl. Accordingly, PW-12-Arunmozhi, Head Mistress of the School, had issued the age certificate, under Ex-P20 and as per the school records, the date of birth of the victim girl is 09.07.2004. PW-19, the Inspector of Police, had addressed the learned Chief Judicial Magistrate, Thanjavur, to nominate a learned Judicial Magistrate to record 164 Cr.P.C. statements of victim girl, PW-2 and PW-1, the mother of the victim girl. Accordingly, the learned Chief Judicial Magistrate, Thanjavur, nominated a learned Judicial Magistrate and accordingly, the learned Judicial Magistrate had recorded the 164 Cr.P.C. statements of victim girl, PW-2 and PW-1,



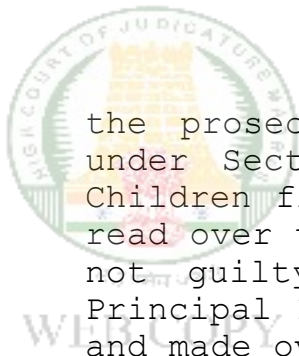
the mother of the victim girl.

3.9.PW-19, the Inspector of Police, had examined the police officials, who had taken the seized articles to the Forensic Department and had escorted the Accused to the Medical College Hospital, Thanjavur, for medical examination and the woman Special Sub Inspector of Police, who had taken the minor victim girl for medical examination to Government Medical College Hospital, Thanjavur and obtained the examination report under Ex-P14.

3.10.The statements of police officials, PW-13, Kalaiselvi, Grade-I Police Constable, PW-15, Latha, Special Sub Inspector of Police, PW-16, Pitchai, Head Constable, PW-18, Somasundaram, Sub Inspector of Police, were recorded by the PW-19, Inspector of Police. PW-19, the Inspector of Police, had visited the Thanjavur Medical College and Hospital and examined the PW-10, Gunaseelan, who had examined the Accused and Dr.Sudha, who had examined the victim girl, and recorded their statements. PW-19, the Inspector of Police, also examined the Forensic Experts, PW-11, Aavina and PW-17, Dr.Rajesh. After completion of the investigation, PW-19, the Inspector of Police, had laid final report under Section 341, 342, 506(2), 376(2)(f) and 109 IPC r/w 3(a) and 4 of POCSO Act, before the Court of the learned Judicial Magistrate, Orathanadu, under Section 173(2) IPC.

3.11.On laying of the final report by PW-19, the Inspector of Police, the Court of the learned Judicial Magistrate had taken cognizance of the offences under Sections 341, 342, 506(2), 376(2)(f) and 109 IPC r/w 3(a) and 4 of Protection of Children from Sexual Offence Act, and numbered the case as P.R.C.No.9 of 2015 and issued summons to the Accused. On appearance of the Accused, A1 to A6, the learned Judicial Magistrate, Orathanadu, had furnished the copies of the final report to A1 to A6 under Section 207 Cr.P.C., and examined the Accused under Section 209 Cr.P.c., regarding the trial to be committed to the Court of Sessions, since the offences are triable by the Court of Sessions and forwarded the case records to the Court of the Sessions and the Accused 1 to 6 were bound over to appear before the learned Principal District and Sessions Judge, Thanjavur. The A1 to A6 were questioned regarding their financial capacity to engage a Counsel, if not, the State has to engage a Counsel for them, for which, the Accused stated that they are capable for engaging the Counsel. Accordingly, the case records in P.R.C.No.9 of 2013 were forwarded to the learned Principal District and Sessions Judge, Thanjavur.

3.12.On receipt of case records in P.R.C.No.9 of 2013 from the learned Judicial Magistrate, Orathanadu, the learned Principal District and Sessions Judge, Thanjavur, renumbered the case in S.C.No.04 of 2013. On appearance of the Accused, the learned Principal District and Sessions Judge, Thanjavur, had, on hearing



the prosecution and the Counsel for the Accused, framed charges under Sections 342, 506(1) IPC and Section 4 of Protection of Children from Sexual Offence Act against Accused. The charges were read over to the Accused and explained in Tamil and A1 to A6 pleaded not guilty and claimed to be tried. Therefore, the learned Principal District and Sessions Judge, Thanjavur, had ordered trial and made over the case to the Court of the learned Special Judge for the offences against the Women and Children.

3.13. On receipt of the case records from the learned Principal District and Sessions Judge, Thanjavur, the learned Special Judge, had ordered trial. During trial, the prosecution had examined the witnesses, PW-1 to PW-19 and marked Ex-P1 to Ex-P27 and MO-1 to MO-5. The mother of the victim, PW-1, Manjula, had deposed regarding the occurrence and lodging of the complaint under Ex-P1. PW-2, the minor victim girl, had narrated the incident in her deposition. PW-3, Sumathi, PW-4, Bhskar, PW-5, Ravi, PW-6, Govindaraj, PW-7, Uthirapathi, PW-8, Thangarasu, PW-9, Dr. Sudha, who had examined the child victim at Government Medical College Hospital, Thanjavur, PW-10, Dr. Gunaseelan, who had examined the Accused No.1, Ravi @ Ravichandran, PW-11, Avina, Forensic Expert at Regional Forensic Science Laboratory, Thanjavur, had deposed in her evidence regarding forensic examination of the materials under MO-1 to MO-5 and issuance of the Biological report under Ex-P17 and Serology report under Ex-P18, and biological report under Ex-P19. PW-12, Arunmozhi, Head Mistress of Panchayat Union Elementary School, Pappanadu, had in her evidence deposed regarding the issuance of Ex-20, the age certificate of the minor victim girl as per the school records. PW-14, Head Constable, Mano Sekar, who had deposed regarding taking A1, Ravi @ Ravichandran, from Pattukottai Sub Jail along with another Police Constable, Pitchai and produced him before the Government Hospital, Orathanadu, regarding the medical examination of the A1, Ravi @ Ravichandran. They had obtained the medical report from the Medical Officer at Government Hospital. PW-15, Latha, Woman Sub Inspector of Police, in her evidence, had deposed regarding the accompanying the minor victim girl to the Government Medical College Hospital, Thanjavur and after medical examination, received the report from the Government Medical College Hospital, Thanjavur.

3.14. PW-16, Pitchai, had deposed regarding the articles seized from the house of the Accused in MO-1 to MO-5 and taking them to the Forensic Department on the letter of request addressed by the learned Judicial Magistrate, Orathanadu, producing the articles MO-1 to MO-5 to the Forensic Department for analysis. PW-17, Dr. Rajesh, had deposed in his evidence regarding the examination of the minor victim girl and directing the Woman Sub Inspector of Police to take the minor victim girl to Government Medical College Hospital, Thanjavur for detailed examination. PW-18, Somasundaram, Sub Inspector of Police, Pappanadu Police Station, had in his evidence, deposed regarding the receipt of the complaint from PW-1, Manjula,



mother of the victim girl, under Ex-P1 and registration of the FIR under Ex-P22 and forwarding the original complaint under Ex-P1 and original FIR under Ex-P22 to the Court of the learned Judicial Magistrate, Orathanadu.

3.15. PW-19 had in his evidence deposed regarding the receipt of the FIR under Ex-P22 and copy of the complaint under Ex-P1 and proceeding to the scene of occurrence and collecting materials under MO-1 to MO5, preparation of observation mahazer, seizure mahazer, rough sketch and addressing the letter to the Government Hospital, Orathanadu and letter of request to forward the articles to the Forensic Department to the learned Judicial Magistrate, Orathanadu and the request letter to the learned Chief Judicial Magistrate, Thanjavur, to nominate a learned Judicial Magistrate to record the 164 Cr.P.C., statements of PW-1, Majula, mother of the victim girl and PW-2, minor victim girl, recording the statement of witnesses, arrest of the Accused and forwarding the Accused to the medical examination along with police escort, taking the Accused to the scene of occurrence, seizure of articles under MO-1 to MO-5 in the presence of witnesses and laying of final report before the learned Judicial Magistrate, Orathanadu.

3.16. On perusal of the deposition of PW-1 to PW-19 and on consideration of the materials, Ex-P1 to Ex-P27 and MO1 to MO-5, the learned Special Judge had examined the Accused under Section 313(1) of the Cr.P.C., regarding the incriminating evidence against them. The A1 to A6 denied the incriminating evidence against them. A1 to A6 had not offered any explanation regarding their plea. After evidence of the prosecution was closed and after proceedings under Section 313 Cr.P.C., the learned Sessions Judge for the offences against the Women and Children, Thanjavur, on consideration of the written arguments submitted by the learned Counsel for the Accused, by his judgment, dated 25.11.2016, had convicted A1, Ravi @ Ravichandran, for the offence under Sections 376(2)(f) IPC and sentenced him to undergo ten years rigorous imprisonment and fine of Rs.1,000/- in default to undergo three months simple imprisonment. The period already undergone in remand from 30.10.2012 to 30.01.2013 by A1 was set off under Section 428 Cr.P.C. A2 to A6 were acquitted from all the charges by the learned Special Judge for the offences against Women and Children, Thanjavur. A1 was also acquitted for the offence under Sections 341, 342 and 506(1) of IPC. Aggrieved by the judgment of conviction and sentence of imprisonment awarded against A1, he had filed this Appeal.

4. As per the submissions of Mr.A.Thiruvadi Kumar, learned Counsel for the Appellant, the main point of attack is that on the date of the alleged occurrence, the Protection of Children from Sexual Offence Act, 2012, had not come into force. The learned Trial Judge had framed the charges under Sections 3(a) and 4 of Protection of Children from Sexual Offence Act, 2012, along with the



offences under Sections 341, 342, 506(1) and 109 IPC. The Protection of Children from Sexual Offence Act, 2012, had not come into effect on the date of the alleged occurrence, ie., 26.10.2012. The Protection of Children from Sexual Offence Act, 2012, came into force only from the date of notification, ie., from 14.11.2012. Therefore, the charges framed under Sections 3(a) and 4 of Protection of Children from Sexual Offence Act, 2012, was agitated before the learned Trial Judge. On consideration of the same, the learned Trial Judge had on assessment of the evidence convicted the Accused No.1 for the offence under Section 376(2)(f) IPC, whereas, the Accused was not afforded an opportunity to make his defence effectively for the charges under Section 376(2)(f) IPC. Therefore, the judgment of conviction and sentence of imprisonment awarded against the Accused No.1 is illegal and perverse.

5. In support of his arguments, Mr.A.Thiruvadi Kumar, learned Counsel for the Appellant/Accused No.1 relied on the following rulings of this Court:

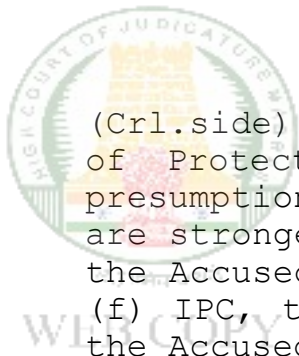
(1)Crl.A.(MD)No.27 of 2016 in Sureshkumar vs State represented by the Inspector of Police dated 24.11.2016; and

(2)Crl.A.(MD)No.343 of 2016 in Ulaganathan vs State represented by the Inspector of Police, dated 31.07.2020.

6. Mr.T.Senthil Kumar, learned Government Advocate (Crl.side), disputed the arguments of Mr.A.Thiruvadi Kumar, learned Counsel for the Appellant stating that the final report was filed under Section 173 Cr.P.C., attracting the offences under Sections 341, 342 and 376 (2)(f) and 109 IPC and also under Sections 3(a) and 4 of Protection of Children from Sexual Offence Act, 2012. The learned Trial Judge had inadvertently not framed the charge under Section 376(2)(f) of IPC. While recording the evidence, the ingredients of both Sections 376(2)(f) IPC and ingredients of Sections 3(a) and 4 of Protection of Children from Sexual Offence Act, 2012, was already on record. While examining the Accused 1 to 6 under Section 313 Cr.P.C., the learned Trial Judge had specifically mentioned the provisions under Section 376(2)(f) of IPC to all the Accused. Therefore, the Accused No.1 is not all prejudiced.

7. Also, Mr.T.Senthil Kumar, learned Government Advocate (Crl.side), drew the attention of this Court to the Ruling of the Honourable Supreme Court, in **(2004) 5 SCC 334, in Dalbir Singh vs State of Uttar Pradesh**, wherein, the Honourable Supreme Court had clearly stated that for the offence under Sections 304(B) IPC, presumption is stronger against the Accused and in favour of the prosecution. When the Trial Court comes to the conclusion that the ingredients of Section 306 IPC is attracted, it need not frame a charge under Section 306 IPC and also a conviction recorded under a lesser offence of Section 306 IPC is not prejudiced to the Accused. The judgment pronounced with a lesser punishment against the Accused is not illegal.

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(Crl.side) argued that similarly for offences under the provisions of Protection of Children from Sexual Offence Act, 2012, the presumptions against the Accused and in favour of the prosecution are stronger, whereas, under the provisions of IPC, the innocence of the Accused is presumed. Even for the offences under Section 376(2)(f) IPC, the presumptions in favour of the prosecution and against the Accused are stronger. There is no distinction.

8. Therefore, based on the arguments submitted by the learned Counsel for the Accused before the learned Trial Judge, the learned Trial Judge had not convicted the Accused No.1 for the offence under Sections 3(a) and 4 of Protection of Children from Sexual Offence Act, 2012, whereas, from the materials available before the Court, there is sufficient materials to convict the Accused for the offence under Section 376(2)(f) IPC. Therefore, the learned Trial Judge had correctly convicted the Accused for the offence under Section 376(2)(f) IPC, even though there was no charge under Section 376 IPC, which is a lesser charge from the point of view of Protection of Children from Sexual Offence Act, 2012. Therefore, the Accused is no way prejudiced. The reliance placed by Mr.A.Thiruvadi Kumar, learned Counsel for the Appellant on the ruling of this Court in (1) Crl.A.(MD)No.27 of 2016 in Sureshkumar vs State represented by the Inspector of Police dated 24.11.2016; and (2) Crl.A.(MD)No.343 of 2016 in Ulaganathan vs State represented by the Inspector of Police, dated 31.07.2020, are not at all applicable to the facts of this case and the same has to be rejected.

9. Also, Mr.T.Senthil Kumar, learned Government Advocate (Crl.side) relied upon another ruling of Honourable Supreme Court reported in **2001 SCC (Crl) 358**, in **Shamnsaheb M.Multtani vs State of Karnataka**:

"A.Criminal Procedure Code, 1973 - Ss. 464(1) and 222, 221- Non-framing of or omission to frame charge in respect of an offence -When can accused be convicted of that offence - Test- Whether failure of justice occasioned thereby - "Failure of justice " - Meaning - Accused charged under S.302 IPC but prosecution failure to prove that charge, instead ingredients of S.304-B IPC found established though no charge had been framed thereunder- Held, conviction under S.304-B IPC without affording opportunity to accused to enter on his defence and disprove the presumption raised thereunder read with S.113-B, Evidence Act would result in failure of justice - Hence conviction under S.304-B cannot be recorded in absence of of charge thereunder - Accused to be put on notice and to be allowed to enter his defence against the charge under S.304-B - Words and Phrases - "Failure of justice".

B.Penal Code, 1860 - S.304-B r/w Evidence Act, 1872,

Ss. 113-B & 4 - Dowry death - Ingredients - Expressions



"shall be deemed to have caused her death" in S.304-B, "court shall presume" in S.113-B and "it shall regard such fact as proved" in S.4 - Implication of - Statutory compulsion is on court to presume - Onus lies on accused to disprove that presumption by adducing evidence and/or by cross-examination of the witnesses - This is in contrast to the position under S.302 where onus does not shift on the accused - So where no charge framed under S.304-B and no notice of offence thereunder issued to accused and instead charge under S.302 IPC alone framed, held, conviction Under S.304-B without affording opportunity to accused to discharge the onus which lies on him would result in serious miscarriage of justice.

C.Criminal Trial - Natural justice - Applicability of rule of audi alteram partem - Test of failure of justice in such situations, explained."

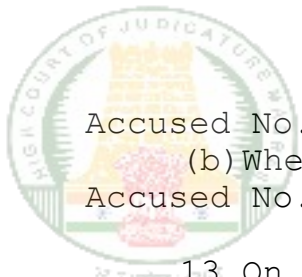
10.Also, Mr.T.Senthil Kumar, learned Government Advocate (Crl.side) relied on another ruling of the Honourable Supreme Court reported in **AIR Online 2020 SC 900**, in the case of **Rohtas and another vs State of Haryana**:

"34-Indian Evidence Act (1 of 1872), S.3- Unlawful assembly and attempt to murder - Proof - Accused persons allegedly inflicted blows on complainant's body using axes, thereby causing serious injuries on his legs, hand and head - Medical experts' deposition clearly explicated that weapons used and injuries inflicted were more than sufficient to cause death in ordinary course of nature - Conduct of accused persons manifest their intention to inflict bodily injury knowing fully that such injuries would ordinarily lead to death of complainant - Gravity of injuries is beyond doubt - Not only there were seven injuries, some of which were deep cuts on vital parts of body including head but accused persons broke all bones of complainant's feet below knee - incident was not in spur of moment - conviction, proper."

11.Based on the above Rulings, Mr.T.Senthil Kumar, learned Government Advocate, submitted that the judgment of the learned Special Judge for the offences against Women and Children, Thanjavur, dated 25.11.2016, is to be upheld. This appeal lacks merits and is to be dismissed.

12.Points for consideration:

(a)Whether the learned Trial Judge had erred in framing the charge under Sections 3(a) and 4 of Protection of Children from Sexual Offence Act, 2012, without framing alternate charge under Section 376 IPC and while pronouncing the judgment convicting the



Accused No.1 for the offence under Section 376(2)(f) IPC?

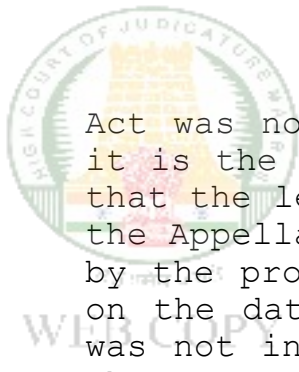
(b) Whether the judgment of conviction recorded against the Accused No.1 under Section 376(1) IPC is sustainable in law?

13. On perusal of the evidence available before the learned Trial Judge and on perusal of the judgment of the learned Trial Judge, it is found that the learned Trial Judge had analysed the evidence, as per the provisions of Indian Evidence Act. Also, the learned Trial Judge had considered the written submissions filed by the learned Counsel for the Accused and based on such arguments, the technicalities of law involved was considered. On the date of alleged occurrence, i.e., on 26.10.2012, the Protection of Children from Sexual Offence Act, 2012, was not in force. It came into effect only from the month of November, 2012. Whereas, when the investigation proceeded and the charge sheet was laid before the Court of the learned Judicial Magistrate, Orathanadu, the Protection of Children from Sexual Offence Act, 2012, had come into effect.

14. As per Article-21 of Constitution of India, an Act whether amended or a new enactment, which had come into force, cannot be applied to a case pending before the Court on the date of notification of the Act. If the Act is beneficial to the Accused, it can be applied to the facts of the case pending before the Court. If the Act is stringent against the Accused, the said Act cannot be applied to the facts of the case, when the case pending before the Court. Here, the Protection of Children from Sexual Offence Act, 2012, is a stringent legislation brought about by an Act of Parliament to curtail the ever increasing offences of sexual assault committed against minor child by adults, whereby, children suffer mental strain and psychological problem throughout their life for the cruel acts committed by adults against the minor children. Only to curtail them, new legislation was enacted by an Act of Parliament and it was notified on 14.11.2012.

15. The charge sheet in this case was laid before the Court of the learned Judicial Magistrate on 13.02.2013. So there is nothing wrong in framing the charge by the learned Trial Judge under POCSO Act has already come into effect. On the date of filing of the charge sheet also, the Protection of Children from Sexual Offence Act, 2012, had come into effect. The argument of the learned Counsel for the Accused regarding the effect of the new legislation on a case already pending before the Court will not be attracted in this case, as Protection of Children from Sexual Offences Act, 2012 had come into force during the pendency of the investigation. The act of the Accused, attracting the provisions of Protection of Children from Sexual Offences Act, 2012, was on 26.10.2012. But the charge sheet was laid on 13.02.2013 before the Court of the learned Judicial Magistrate. Therefore, there is nothing wrong.

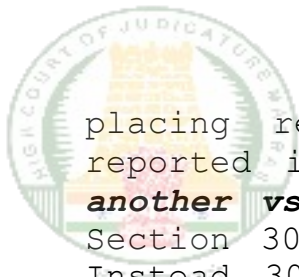
16. The alleged offence occurred on 26.10.2012 whereas the POCSO



Act was notified in the Gazette of India on 14.12.2012. Therefore, it is the argument of the learned counsel for the Appellant/Accused that the learned Trial Judge ought not to have framed charge against the Appellant/Accused under Section 4 of the POCSO Act, as it is hit by the provision of the constitution of India under Article-21, as on the date of the alleged occurrence of the crime, the POCSO Act was not in force. Therefore, the learned Trial Judge after hearing the arguments of the learned counsel for the Accused had not convicted the Accused under Section 4 of the POCSO Act, even though the ingredients of the offence is attracted in the evidence of prosecution witnesses.

17. On perusal of the statute, Indian Penal Code as amended by Criminal Law Amendment Act 2013, it is found that Section 376 had been amended including the definitions in various Sub-clause as (a) to (n) in Section 376 (2) had come into force from 03.02.2013. Therefore, the conviction of the Accused under Section 376 (2) (f) by the learned trial Judge, even though there was no charge framed against the Accused under Section 376 (2) (f) had at the time of framing charge but, awarding sentence lesser to the offence of 376 was pressed into service by the learned trial Judge which also attracts the provisions Article-21 of the constitution of India, because the Criminal Law amendment was notified on 03.02.2013. Therefore, the conviction and sentencing of the Accused under Section 376 (2) (f) by the learned Trial Judge is hit by the provisions of the Article-21 of the constitution of India. At the same time, there is evidence that the Accused had committed the offence. Therefore, the conviction of the Accused by the learned trial Judge is upheld. The sentence imposed by the learned Sessions Judge under Section 376 (2) (f) is modified as 376 alone as it stood prior to the amendment.

18. Still, the learned Trial Judge had considered the defence plea that the Protection of Children from Sexual Offence Act, 2012, cannot be applied to the facts in this case, as on the date of the occurrence, i.e., on 26.10.2012, the Protection of Children from Sexual Offence Act, 2012, had not come into effect. That was considered by the learned Trial Judge. Also, the learned Trial Judge had, in his detailed discussion, considered the ingredients that are available against the Accused. For the offence committed under Section 376(2)(f) IPC against a minor, even though the Protection of Children from Sexual Offences Act, 2012, had not come into force, the stringent law of provision regarding the presumption in favour of the minor victim and against the Accused for offence under Section 376 IPC was available before the Court. For convicting the Accused under Section 376(2)(f) IPC, which is a lesser charge than a charge under Sections 3(a) and 4 of Protection of Children from Sexual Offences Act, 2012, the Accused need not be granted an opportunity of being heard, as rightly pointed out by Mr.T.Senthil Kumar, learned Government Advocate (Crl.side), by



placing reliance on the judgment of Honourable Supreme Court reported in **AIR Online 2020 SC 900**, in the case of **Rohtas and another vs State of Haryana**, where the Accused was charged under Section 302 IPC, but the prosecution failed to prove the charge. Instead 304(B) IPC found established, though no charge had been framed thereunder, conviction under 304 IPC, without affording opportunity to the Accused to place his defence and disprove the presumption placed therein, had affected the right of the Accused. Therefore, the conviction recorded under Section 304(B) IPC, where, there are strong presumption against the Accused, was considered by the Honourable Supreme Court and the conviction recorded under Section 304(B) IPC by the Trial Court in Karnataka was set aside as Section 304(B) IPC is stringent against the Accused, whereas, the general Law under Section 304(B) IPC, the Accused is presumed innocent.

19.Mr.T.Senthil Kumar, learned Government Advocate (Crl.side) relied on this judgment stating that the same yard stick applies in this case. Here, the presumption in favour of the prosecution is stronger under Protection of Children from Sexual Offences Act, 2012, whereas, under Section 376(2)(f) IPC, the Accused is presumed innocent, is not available even in cases under 376 IPC. Therefore, the presumption favouring the Accused is not available. Therefore, the Accused in this case had not been prejudiced, applying the ratio laid down in **2001 SCC (Cri) 358**, in **Shamnsaheb M.Multtani vs State of Karnataka**.

20.In **(2004) 5 SCC 334**, in **Dalbir Singh vs State of Uttar Pradesh**, relied upon by Mr.T.Senthil Kumar, learned Government Advocate (Crl.side), the charges were framed under Sections 498A, 302 and 304(B) IPC and the Accused was convicted for the offences under Section 306 IPC, where, the charges were framed under Sections 302, 498A 304(B) IPC, but not under Section 306 IPC. The conviction under Section 306 IPC was upheld by the Honourable Supreme Court, as it is a lesser offence and ingredients of Section 306 IPC were already available to the Accused. This ratio in **(2004) 5 SCC 334**, in **Dalbir Singh vs State of Uttar Pradesh**, relied upon by the learned Government Advocate can be squarely applied to the facts of this case. The ingredients of Section 304(B) IPC, where presumption is in favour of the prosecution. Under Section 306 IPC, the presumption is in favour of the Accused. Likewise, under Protection of Children from Sexual Offences Act, 2012, the presumption is in favour of the prosecution, whereas, under Section 376 IPC, the presumption is in favour of the Accused. Therefore, the Trial Judge had convicted the Accused for a lesser offence. Therefore, the Accused need not be afforded an opportunity.

21.Further, Mr.T.Senthil Kumar, learned Government Advocate (Crl.side), submitted that if at all the Court considered the Accused had been prejudiced, the Court, as an Appellate Court, may

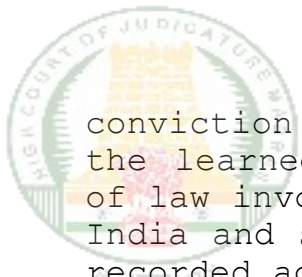


remit the case with specific direction only to examine the defence witness to disprove the presumption against the Accused, to enable the Accused to use his defence regarding the presumption against the Accused. Only that much can be granted by this Court. Based on the arguments of the learned Counsel for the Appellant, this Court need not set aside the judgment of conviction recorded under Section 376 (2) (f) IPC, even though there was no charge framed against the Accused under the said offence under IPC.

22. Based on the Rulings of Honourable Supreme Court, the arguments of Mr. T. Senthil Kumar, learned Government Advocate (Crl. side) is found acceptable and reasonable. As rightly pointed out by him, even though charge under Sections 3(a) and 4 Protection of Children from Sexual Offences Act, 2012, is a stringent offence against the Accused, where, presumption is against the Accused and in favour of the prosecution. Whereas, the charge under Section 376 (2) (f) IPC, is a lesser offence, compared to Protection of Children from Sexual Offences Act, 2012. Therefore, as held in the second judgment of the Honourable Supreme Court relied on by Mr. T. Senthil Kumar, learned Government Advocate (Crl. side), even though the charge framed in that case for offence under Section 302, 304(B) and 498A IPC, the learned Trial Judge in the second judgment had convicted the Accused for offence under Section 306 IPC alone based on ingredients available before the Court. That ratio is found acceptable and applicable to the facts in this case, similar, to 304 (B) IPC, which is in favour of the victim of dowry harassment and against the husband.

23. Here, Protection of Children from Sexual Offences Act, 2012, is in favour of the minor victim of sexual offence and against the Accused. The Accused has to discharge his burden by proving his innocence. Instead Section 376 IPC is a lesser offence as per IPC, the Accused is presumed innocent, until otherwise proved guilty. Regarding the offences under Section 376 IPC, when the deposition or evidence of the prosecutrix or the victim of crime inspires confidence of the Presiding Judge, the conviction, based on the solitary evidence, is to be accepted. Not only that, when the learned Trial Judge had appreciated the evidence and based on appreciation of evidence, had convicted the Accused on the assessment of evidence is found reasonable by the Appellate Judge, the Appellate Judge shall not disturb the findings of the learned Trial Judge, because, the learned Trial Judge had the benefit of observing the demeanor of the witnesses, which is not available to the Appellate Court. Therefore, the findings of the learned Trial Judge has to be given more weightage than the Appellate Judge.

24. Here, the Accused/Appellant herein cannot claim that the finding of the learned Trial Judge is perverse, as his relatives, A2 to A6 had been acquitted from the charges by the learned Trial Judge. Therefore, there are sufficient materials to record



conviction against the Accused No.1. Therefore, the submission of the learned Counsel for the Appellant regarding the technicalities of law involved in this case under the provisions of Constitution of India and seeking the Court to set aside the judgment of conviction recorded against the Accused No.1 on the ground that the Accused was not afforded an opportunity to put forth his defence effectively for the offence under Section 376(2)(f) IPC is found unacceptable in the light of the judgments of the Honourable Supreme Court relied upon by Mr.T.Senthil Kumar, learned Government Advocate reported in **(2004) 5 SCC 334, in Dalbir Singh vs State of Uttar Pradesh**, where, the Accused was convicted under Section 306 IPC, even though there was no charge framed under Section 306 IPC. That ratio is applicable in this case.

In the light of the reported in Ruling of the Honourable Supreme Court, **(2004) 5 SCC 334, in Dalbir Singh vs State of Uttar Pradesh**, relied upon by Mr.T.Senthil Kumar, learned Government Advocate (Crl.side), the points for consideration are answered against the Appellant/Accused and in favour of the Prosecution.

Therefore, in the light of the above rulings, the reliance placed by the learned Counsel for the Appellant regarding the judgment of this Court in (1)Crl.A.(MD)No.27 of 2016 in **Sureshkumar vs State represented by the Inspector of Police** dated 24.11.2016; and (2)Crl.A.(MD)No.343 of 2016 in **Ulaganathan vs State represented by the Inspector of Police**, dated 31.07.2020. is found acceptable and applicable to this case.

The conviction of the Accused is upheld, the sentence alone is modified. Sentence of ten years imposed on the Accused as per the Section 376 (2) (f) of IPC is altered as under Section 376 IPC. Accordingly minimum sentence of seven years is imposed. The fine already imposed by the learned trial Judge is confirmed.

In the result, this appeal is dismissed as having no merits.

The judgment of learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thanjavur, Thanjavur District, in Special Sessions Case No.04 of 2013, dated 25.11.2016, convicting the Accused/Appellant under Section 376 (2) (f) of the Indian Penal Code is modified as the amendment to Section 376 IPC brought out in Indian Penal Code through the Criminal Law (Amendment) Act 2013 (13 of 2013) was notified on 03.02.2013, subsequent to the occurrence of this offence alleged in this case. The offence alleged against the Accused/Appellant is modified as offence under Section 376 IPC prior to amendment.

The Sentence of imprisonment imposed by the learned Sessions Judge, under Section 376 (2) (f) of IPC is modified as offence under Section 376 IPC. Therefore, instead of 10 years Rigorous Imprisonment and fine of Rs.1,000/- in default to undergo three



months simple imprisonment. It is modified as seven years Rigorous Imprisonment and fine of Rs.1,000/- (Rupees One Thousand Only).

The learned Sessions Judge, Fast Track Mahila Court, Thanjavur is directed to issue warrant to secure the Accused, to forward him to Prison to undergo remaining period of sentence. The period of detention already undergone by the Accused is set off under Section 428 of Code of Criminal Procedure.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

Cmr

To

- 1.The Sessions Judge, Mahalir Neethimandram
(Fast Track Mahila Court), Thanjavur, Thanjavur District.
- 2.The District Munsif cum judicial Magistrate
Orathanadu, Thanjavur District.
3. The Chief Judicial Magistrate,
Thanjavur at Kumbakonam.
- 4.The Inspector of Police,
Pappanadu Police Station,
Thanjavur District.
5. The Superintendent,
Central Prison, Tiruchirappalli.
6. The Additional Public prosecutor,
Madurai Bench of Madras High Court, Madurai

Copy to

The Section Officer, Criminal Section, (2C)
Madurai Bench of Madras High Court, Madurai

+1 CC to M/s.N.SUBRAMANI, Advocate (SR-31053[F] dated 04/10/2021)

CRL.A. (MD)No.23 of 2017
01.10.2021

PS (CO)

KB(24.11.2021) 15P 10C

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