



Crl.A.No.648 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :12.10.2022

Pronounced on : 27.10.2022

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Criminal Appeal No.648 of 2014

David Inbaraj

.. Appellant

/versus/

State, Rep. by Inspector of Police,
S-11, Tambaram Police Station,
Tambaram, Chennai 600 045.
Crime No.772/2013

.. Respondent

Prayer:- Criminal Appeal has been filed under Section 374 of Cr.P.C., and order IV of the Madras High Court A.S Rules, to call for the records and to allow the appeal by setting aside the judgment of the Hon'ble Judge, Mahila Court, Chengalpattu in Spl.Case.No.10/2014 on 19.11.2014 and to set aside the conviction and sentence imposed on the accused.

For Appellant : Mr.T.R.Ravi

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For Respondent : Mr.R.Kishore Kumar,
Government Advocate, (Crl.Side)

J U D G M E N T

The appellant herein is the sole accused. During the year 2013, while the accused was serving as a Pastor in the local church, P.W-2, a minor at that time used to attend the Church since her family members belong to the said church. Taking advantage of his position as Pastor, the accused allured and enticed P.W-2 with gifts and promise of luxury life and kidnapped her on 16/04/2013 from the lawful custody of her parents with an intention to exploit her sexually. He took her to various places like Siliguri, Nagaland and Hosur and under threat and force, had sexual intercourse with P.W-2 on several occasions for nearly 7 months. On the complaint of P.W-1, who is the father of the victim girl and by P.W-3, who is the wife of the accused, police traced the accused and P.W-2 at a lodge in Hosur and later, secured on 14/12/2013. He was tried for committing offences punishable under section 363 I.P.C and Section 4 of POCSO Act.

2. The Trial Court after appreciating the evidence, held the accused



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guilty and sentenced him to undergo 10 years R.I and to pay fine of Rs.10,000/- in default 1 year R.I for offence under Section 4 of POCSO Act. Sentenced him to undergo 5 years R.I and to pay fine of Rs.2000/- in default 6 months R.I for offence under Section 363 I.P.C. The term of imprisonment was ordered to run concurrently. The period of imprisonment undergone pending trial ordered to set off under Section 428 of Cr.P.C.

3. The appeal is directed against the above judgement of conviction and sentence on the ground that the trial Court erred in convicting the accused based on the erroneous premises that P.W-2 was a minor girl at the time of occurrence and she was forcible taken away from the custody of her parents. Also the trial Court erred in holding that P.W-2 was subjected to forcible intercourse under threat.

4. The Learned Counsel for the appellant raising doubt about the genuineness of Ex.P-2, the birth certificate which was not part of the documents filed along with the final report but introduced at the time of examination of witnesses without any explanation for not producing it along with the final report



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contended that, Ex.P-2 is a fabricated document. Without ascertaining the age of P.W-2, the prosecution proceeded with an erroneous assumption that P.W-2 is a minor. Later, after commencement of examination of witnesses, realising the fatal omission, Ex.P-2 the birth certificate was produced by the Public Prosecutor with a memo stating that the Investigating Officer, due to inadvertence omitted to file the birth certificate. In fact, how the birth certificate came into possession, itself not proved and none of the prosecution neither the defacto complainant P.W-1 through whom it was marked nor the Investigating Officers' P.W-9 and P.W-10 had deposed about how and when the birth certificate Ex.P-2 was obtained. The Trial Court has come to an erroneous conclusion that the age of P.W-2 was 17 years at the time of alleged occurrence based on Ex.P-2 which was issued on 16/06/2003 but not produced along with other documents relied by the prosecution. During the course of investigation, P.W-10 the Investigating Officer had made a request to the Learned Judicial Magistrate to sent the victim girl for medical examination to ascertain her age. Though the Court has granted the request no attempt made by the Investigating Officer to subject the victim girl for ossification test. Further, P.W-8 a doctor working at Chengalpet Medical College Hospital has issued the Accident



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register Ex.P-5 and Ex.P-6 for the victim girl P.W-2, but in Ex.P-5 there is correction in the name of the patient and in Ex.P-6, the time of the admission not mentioned. Neither in the Ex.P-5 nor in Ex.P-6, there is indication that it was prepared by P.W-8. However, the said witness P.W-8 obliged to depose before the Court though her name not even form part of the list of witnesses relied by the prosecution.

5. The Learned Counsel for the appellant submitted that it was voluntary elopement by P.W-2, who was a major. Her parents know well that she has gone with the appellant for better future. They did not give complaint immediately though the father of P.W-2 was in Police Department. P.W-2 was in touch with her family members through e-mail and same is proved through Ex.D-1 to Ex.D-6. In the absence of evidence that P.W-2 was a minor and she was taken away by the appellant forcible, the trial Court judgment of conviction requires reversal based on the judgments rendered in ***S.Varadarajan -vs- State of Madras reported in (AIR 1965 SC 942)*** and Suresh @ Suresh kumar -vs- State Rep. by the Inspector of Police (date of judgment 03/09/2021, Madras High Court, Madurai



6. Per contra, the Learned Government Advocate on behalf of the State submitted that, the accused is a married man with a child. From 17/04/2014 he was missing. Beside Ex.P-1 the complaint by P.W-1, the wife of the accused also gave complaint reporting his missing and also suspecting affair with P.W-2 the daughter of P.W-1, who also gone missing at the same time. The appellant who is Pastor had a influence over the minor girl and her family. Taking undue advantage of his eclectic authority, enticed the minor girl and took her away against the knowledge of her lawful guardian. For nearly 7 months the minor girl was under his custody and had sexual intercourse forcible against her wish. P.W-8, the doctor, who medically examined P.W-2, had deposed that the victim girl was accustom to sexual activities and she has told that for the past 6 months, she had been subjected to sexual harassment by a known person.

7. The Learned Government Advocate further submitted that the cases cited by the appellant Counsels are in respect of adolescents out of infatuation



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eloped voluntarily against the wishes of their lawful guardians. Whereas, in the instant case, a married man having a child deserted his family and abusing his moral influence over the minor girl has enticed the minor girl to leave her parents and go along with him. For nearly 7 months he had been roaming with the minor girl from place to place and exploiting her sexually. He was secured after his wife filed H.C.P. before the Hon'ble High Court. Therefore, the reasoning found in the judgement cited has no application or relevancy to the case in hand.

8. Heard the Learned Counsel for the appellant and the Learned Government Advocate for the respondent/State. Records perused.

9. The Criminal law has been set in motion on the complaint given by P.W-1 on 17/04/2013 reporting the missing of his daughter from 16/04/2013, who left the home informing that she is going to the Employment Office but did not return back. Based on the said complaint marked as Ex.P-1, Initially, F.I.R for women missing registered in Crime No:772/2013. Two months thereafter, Mrs.Sonia Princess W/o.David Inbaraj – the appellant herein, had given a written



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complaint dated 15/05/2013 (Ex.P-13) informing that her husband left the home on 16/04/2013 saying he is going to Sivakasi for a Church meeting but till date did not return home. He is totally out of communication and not attending to any of the phone calls. Based on this complaint, F.I.R in Crime No.925/2013 registered on 18/05/2013 for man missing. Since her husband (the appellant herein) could not be traced, Sonia Princess has filed H.C.P.No.1308/2013 before the High Court to bring the body of her husband alleging the police is not showing any interest in investigating her complaint in Crime No:925/2013 since the daughter (PW-2) of the Sub-Inspector of Police (P.W-1) attached to that Police Station have close relationship with her husband and he used to frequently visit the house of the Sub-Inspector to meet his daughter and she fears threat to her life at the hands of PW-1. The testimony of P.W-2, indicates that she has gone with the appellant, believing his words that he will provide her a comfortable life. However, they were able to sustain for nearly 7 months at places like West Bengal, Assam and Nagaland by selling her jewels which she was wearing when she left her parents on 16/04//2013.

10. The appellant to show that he was at Mumbai on 11th April, 2013



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had marked Ex.D-1 flight ticket and Ex.D-3 the extract of e-mail dated 28/08/2013 alleged to have been sent to P.W-2 by Ms.Jenifer Nancy, the sister of PW-2. Neither of this document help the appellant to probablise his innocence. In fact, Ex.D-3 goes to read that P.W-2 had been gone with Pastor(the accused/appellant) against the wishes of her family members and they are eager to see her back.

11. Assuming P.W-2 left on her own voluntarily without any threat or force and consented for sexual intercourse with the appellant, unless such consent is a valid consent, the guilt of the accused appellant cannot be wiped off. If P.W-2 proved to be a minor, so presumed consent deemed to be invalid. In the instant case, Ex.P-2 is the birth certificate issued by the Tambaram Municipality indicating P.W-2 Jerlin Jenova born on 20/09/1996 to Manoharan (P.W-1) and Jesintha Bakya Selvi (PW-3). Some doubt is thrown about this document for being introduced at the time of trial while examining PW-1. However, the reason for delay is explained by prosecution through its witnesses.

12. The birth certificate Ex.P-2 is the certified copy of the public



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document and presumed to be genuine on production of the certified copy. The Investigating Officer ought to have collected the certified copy of the Birth Certificate and produced along with the final report, unfortunately he has omitted to collect and file it in the course of investigation. Even in the absence of Ex.P-2, it is the consistent case of the prosecution that P.W-2 was a minor aged about 17 years at the time of occurrence. Ex.P-2 has enhanced, the case of the prosecution regarding the age of the girl. The introduction of Ex.P-2 during the examination of P.W-1 is not by surprise or without affording opportunity to the appellant to challenge its genuineness. The appellant had extensively cross examined P.W-1 as well as the Investigating Officer regarding Ex.P-2. The genuineness of Ex.P-2 not at all impeached.

13. Therefore, this Court holds that the prosecution has proved beyond doubt that P.W-2 was below 18 years when the accused took her away from her parents on 16/04/2013. Being a minor, taking her against the knowledge and consent of her lawful guardian is an offence punishable under Section 363 I.P.C. PW-2 had deposed that, she was raped several times by the accused/appellant when



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she was under the illegal custody of the appellant for 7 months. The medical evidence also does not rule out sexual assault. Hence, the presumption is against the accused who failed to discharge the burden through Ex.D-1 to Ex.D-6.

14. In the said facts and circumstances, this *Criminal Appeal is dismissed.* The judgment of conviction and sentence passed by the Learned Judge, Mahila Court, Chengalpattu District in Spl.Case No.10 of 2014, dated 19.11.2014, is confirmed. The appellant shall be secured to under the remaining period of sentence. The period of imprisonment already undergo shall be set off under Section 428 of Cr.P.C.

27.10.2022

Index :Yes/no
Speaking order/non speaking order
bsm

DR.G.JAYACHANDRAN,J.

bsm

To :
1. The Mahila Court, Chengalpattu District.

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2. The Inspector of Police, S-11, Tambaram Police Station,
Tambaram, Chennai 600 045.
3. The Public Prosecutor, High Court, Madras.

Pre-delivery Judgment made in
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27.10.2022