



WEB COPY



Crl.A.No.346 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.04.2023

CORAM:

THE HONOURABLE Dr.JUSTICE **G.JAYACHANDRAN**

Criminal Appeal No.346 of 2020

State

By the Inspector of Police,
Kottucherry Police Station,
Karaikkal, through
The Public Prosecutor for
Puducherry

.. Appellant

/versus/

Suresh @ Palanivelu

.. Respondent

Criminal Appeal has been filed under Section 378 of Criminal Procedure Code praying to set aside the judgment of the learned District and Sessions Judge, Karaikkal, dated 09.08.2019 in S.C.No.04 of 2016, thereby acquitting the respondent/accused of the charges under Sections 363, 420 and 376 of I.P.C., and award maximum punishment.

For Appellant : Mr.K.S.Mohandass
Public Prosecutor (Puducherry)

For Respondent : Mr.R.Vivekananthan



Crl.A.No.346 of 2020

WEB COPY

JUDGMENT

This Criminal Appeal is filed by the State aggrieved by the order of acquittal by the Sessions Court holding that the prosecution has failed to prove the charges against the accused under Sections 363, 420 & 376 I.P.C.

2. The sum and substance of the prosecution case is that on 05.10.2012 at about 19.45 hours, the daughter of PW.1, who was pursuing her 12th standard was questioned by PW.1 suspecting that his ATM card which is being misused and a sum of Rs.45,000/- has been withdrawn using his pin number, as his daughter alone knows the pin number of his ATM card. Soon after the occurrence, his daughter went missing. Hence he gave a complaint to the respondent police and placed the complaint [Ex.P1]. Based on his complaint, FIR [Ex.P2] was registered. Since the daughter of the *de facto* complainant was aged below 16 years old, investigation was conducted on the premise that the victim girl is a minor. Based on the information received, the victim girl was secured later. Thereafter, it was found that she had taken her father's



Crl.A.No.346 of 2020

ATM card and given it to the accused, with whom she was in love. The accused in turn has withdrawn a sum of Rs.45,000/- using the ATM card of the *de facto* complainant and purchased two wheeler. Furthermore, he had enticed the victim girl to go with him and he had taken her from Karaikkal to Chidambaram and stayed with her from 08.10.2012 till 26.10.2012 and had also sexual intercourse with her.

3. To prove the charges, the prosecution has examined 19 witnesses, marked 15 exhibits and 2 Material Objects.

4. The victim girl had substantially proved the case against the accused regarding his enticement to leave the parents and join him on the promise that he will allow her to pursue her study further, which has been prevented by her parents suspecting that she is having affair with the accused. She has also stated that she is 16 years old and had intercourse 2 or 3 times with the accused, since the accused told her that if she gives birth to a child, the parents will accept their love affair and marriage. However, when she was produced before the doctor, during the course of



Crl.A.No.346 of 2020

investigation, she had informed the doctor that she is a virgin and never accustomed with sexual intercourse. The medical report of the victim girl has been marked as Ex.P7 which has been spoken by PW.14 and the same indicates that at the time of physical examination by the doctor, she informed the doctor that she is a virgin. When this was confronted by the girl during cross examination, she has explained that she was not conscious and therefore, she was not sure whether she was subjected to intercourse or not, that was the reason she has told the doctor that she is a virgin during the examination.

5. The Trial Court, after considering the evidence, particularly the testimony of PW.8, has concluded that the victim girl/PW.8 was the one who forced the accused to take her from the custody of her parents, since PW.8 was suspected by her parents and she was not allowed to attend the school. Further, the alleged sexual intercourse was admittedly a consensual affair, therefore, on the date of occurrence, the law does not penalised a person, who had indulged sexual intercourse with consent provided the partner is aged above 16 years.



Crl.A.No.346 of 2020

WEB COPY

6. As far as this case is concerned, though the prosecution has stated that the girl was below 16 years old, no document is produced by the prosecution to prove her age. When a specific question was put to the Investigating Officer during the cross examination whether has he obtained age certificate of the victim girl from the Municipality, he answered positively but the said certificate was not produced for proper appreciation. On this ground, the Trial Court has acquitted the accused holding that the prosecution has not proved the victim girl was aged below 16 years for punishing the accused and also the alleged sexual intercourse was with consent. Therefore, Section 376 IPC will not get attracted. The State has preferred the appeal on the ground that the Trial Court had failed to consider that the victim girl/ PW.8 was enticed by the accused and he has taken her away from the lawful custody of her parents, which squarely attracts Section 363 IPC. Further, the accused has taken her to various places, tied thali and had intercourse with her making her to believe that if she conceives and delivers a child, her father will accept their marriage. By that time, he has already deceived



Crl.A.No.346 of 2020

the victim child and stealthily grabbed the ATM card of PW.1/ father of the victim girl and using the pin number has also withdrawn a sum of Rs.45,000/- from the account. PW.8 has stated that her jewels were also pledged by the accused while living together and he has spent the money. Therefore, the intention to cheat the victim girl has also been made out to punish him under Section 420 IPC. Wherein, the Trial Court has miserably failed to appreciate the law and facts properly.

7. The sum and substance of the submissions made by the State/ the appellant herein is that the ATM card of PW.1 was stealthily taken by her daughter to draw only Rs.1,000/- to meet out the medical expense of her parents. But the accused deceived PW.8 and withdrawn a sum of Rs.45,000/- between 14.09.2012, 15.09.2012 and 16.09.2012 and further he made the PW.8 to believe that if they have intercourse and deliver a child, the parents will permit them to live together as husband and wife and the accused also had intercourse with her with a false promise and inducement.



Crl.A.No.346 of 2020

WEB COPY

8.The learned counsel for the accused/respondent per contra submitted that the prosecution has not first of all placed any documents to show that the victim girl is aged below 16 years to attract Section 363 IPC as defined under Section 361 IPC, which reads as below:

*361. Kidnapping from lawful guardianship —
Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*

Further, PW.8 has admittedly said that she has left her house on her own volition and married the accused in a temple and lived with him in one of the relatives house of the accused at Villupuram. On 26.10.2012, the father and the police took her away. She did not say anything against the accused to indicate that he induced her or by false promise he had intercourse with her without her consent. While the factum of sexual intercourse itself is not proved by the prosecution and the victim girl has also not consistently spoken about that the accused, the accused cannot



Crl.A.No.346 of 2020

be convicted. The Trial Court has rightly acquitted him from all those charges.

9. As far as charge under Section 420 IPC is concerned, the money admittedly has been withdrawn using the ATM card of PW.1. To show that the card was misused by the accused and the money had been withdrawn. Apart from the statements of accounts, there should be some evidence to show that on 14.09.2012, 15.09.2012 & 16.09.2012, the ATM card was not in the possession of PW.1 and the money was withdrawn by the accused using the pin number. The prosecution should have proved this facts by letting CCTV camera footage or through any other reliable evidence. The complainant has stated that he found the ATM card missing in the month of September 2012, when he had gone to ATM to withdraw Rs.1,000/- and later he found that on 14.09.2012, 15.09.2012 & 16.09.2012, sum of Rs.45,000/- has been withdrawn by somebody else using his card. He therefore, suspecting his daughter, he enquired her and thereafter, on 05.10.2012 her daughter went missing. But, he had given a complaint only on 11.10.2012 after 6 days of his



daughter missing.

10. The prosecution has miserably failed to prove that the accused has withdrawn money using ATM card of PW.1. There is no proof that ATM along with pin number was obtained by the accused inducing the complainant or his daughter. There is no proof that the accused has obtained gain by the said alleged inducement. Therefore, the ingredient of Section 420 IPC., is not attracted and not been proved by the prosecution. Therefore, the Trial Court has rightly acquitted the accused for the offence under Section 420 IPC also.

11. Heard the learned counsels and perused the documents.

12. The main ingredient, which ought to have been proved by the Prosecution, to prove the charges under Sections 363 and 376 IPC., are (i) the age of the victim and (ii) whether there was any sexual intercourse and if so, with consent or without consent. If the prosecution had proved that the victim girl is below 16 years old, the consent would



Crl.A.No.346 of 2020

have been immaterial and it would have been sufficient for the prosecution to prove that there was sexual intercourse between PW.8 and the accused. Whereas in this case, the prosecution has not placed any document to prove the age of the victim girl except oral evidence of PW.8 that she was 16 years old.

13. The learned Public Prosecutor (Puducherry) representing the State would submit that at the time of occurrence, the victim girl was pursuing 12th standard and therefore it should be presumed that she was below 16 years at the time of occurrence. The Trial Court has rightly rejected this submission since it does not have any legal sanctity. The age of the victim girl is not a matter of presumption, it has to be asserted through evidence.

14. As far as the charge under Section 420 IPC is concerned, as rightly pointed out by the learned counsel for the respondent no proof for inducement or obtaining unlawful gain been proved by the prosecution. Statement of account *per se* will not be sufficient to prove



Crl.A.No.346 of 2020

WEB COPY

that the money was withdrawn by the accused, since no attempt was made by the prosecution that the said money was withdrawn by the accused using the through ATM. Regarding Section 376 IPC is concerned, the Trial Court after appreciating the evidence of victim and other evidence, was doubtful that there was any sexual intercourse with the accused and PW.8, when they were in Villupuram staying in their relative's house. When the said doubt is plausible, in an appeal, High Court need not substitute its own view to reverse the acquittal order in the appeal.

15. Hence, this Criminal Appeal stands dismissed accordingly.

05.04.2023

Index : yes/no
Internet:yes/no
Speaking order/ Non speaking order
rpl

To

1.The District and Sessions Judge, Karaikkal

Dr.G.JAYACHANDRAN,J.



WEB COPY



Crl.A.No.346 of 2020

rpl

2.The Inspector of Police,
Kottucherry Police Station,
Karaikkal

3.The Public Prosecutor (Puducherry),
High Court, Madras.

Crl.A.No.346 of 2020

05.04.2023