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CRL.A.(MD).No.114 of 2016



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 07.06.2023

CORAM

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

CRL.A.(MD).No.114 of 2016

1.Thirumurugan
2.Thamilarasi
3.Ammakannu
4.Rajeswari

... Appellants/Accused Nos.1 to 4

Vs.

State,
Represented by,
The Inspector of Police,
Manamadurai Police Station,
Sivagangai District.
(Crime No.448 of 2009).

... Respondent/Complainant

PRAYER : Criminal Appeal filed under Section 374(2) of Cr.P.C to set aside the Judgment and conviction dated 29.03.2016 made by the learned Sessions Judge, District Fast Track Mahalir Neethimandram, Sivagangai in S.C.No.74 of 2011 and acquit the appellants/accused.

For Appellants : Mr.S.Sankar
for Mr.S.Karthick

For Respondent : Mr.T.Senthil Kumar
Additional Public Prosecutor



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JUDGMENT

This appeal has been preferred as against the Judgment, dated 29.03.2016 on the file of the learned Sessions Judge, District Fast Track Mahalir Neethimandram, Sivagangai in S.C.No.74 of 2011, thereby convicted the appellants for the offence under Section 376 r/w 109 of I.P.C.

2.The case of the prosecution is that on 01.07.2009 at about 11.00 a.m., the victim was kidnapped by the accused persons and forcibly got married to the first accused. Thereafter, the first accused on compulsion raped her.

3.Based on the complaint, the respondent registered the F.I.R in Crime No.448 of 2009 for the offences under Sections 341, 366 and 376 of I.P.C as against six accused persons. During the investigation, the fifth accused died and filed a final report as against other accused persons. After completion of the investigation, the respondent filed a final report and the same has been taken cognizance by the trial Court in S.C.No.74 of 2011 on the file of the learned Sessions Judge, District Fast Track Mahalir Neethimandram, Sivagangai and framed charges as against the first



accused for the offences under Sections 114, 341, 343, 323 r/w 34, 366 and 376 of I.P.C., as against accused Nos.2 to 4 and accused No.6 for the offences under Sections 114, 341, 343, 323 /rw 34, 366, 376 r/w 34 of I.P.C.

4.On the side of the prosecution, they had examined P.W.1 to P.W.13 and marked Exs.P.1 to P.9. The prosecution also produced material objects M.O.1 and M.O.2 and on the side of the accused, no one was examined and no documents were exhibited.

5.On perusal of the oral and documentary evidence, the trial Court found the first appellant guilty for the offence punishable under Section 376 of I.P.C and found the appellants 2 to 4 guilty for the offence punishable under Section 376 r/w 109 of I.P.C. The trial Court acquitted the sixth accused. The first appellant was sentenced to undergo seven years Rigorous Imprisonment and to pay a fine of Rs.2,000/- and in default to undergo three months Rigorous Imprisonment for the offence punishable under Section 376 of I.P.C. The appellants 2 to 4 were sentenced to undergo three years Rigorous Imprisonment each and to pay a fine of Rs.1,000/- each and in default to undergo three months Rigorous Imprisonment each for the offence punishable under Section 376 r/w 109 of I.P.C. Aggrieved by the same, the appellants preferred the present appeal.



6.The learned counsel appearing for the appellants would submit that it was an arranged marriage between both the families of the first accused and the victim. The victim stayed with the first accused for two weeks. Only because of the intervention made by the maternal uncle of the victim girl, a false complaint has been foisted as against the appellants as if she was kidnapped and got married to the first accused and thereafter, he raped her. The victim lived with the first accused happily for two weeks and had physical relationship. He also produced photographs which were taken during their marriage. Even assuming that the first appellant committed rape on the victim, the complaint was lodged only after two days from the date of the alleged occurrence. The appellants and the victim's family are very close relatives. The victim failed to support the case of the prosecution in letter and spirit. On physical verification, the Doctor opined that there were no injuries found on the body of the victim and there was no evidence of rape. All the relatives and parents of both the family went to the Temple and got married. In fact, all the relatives had stayed together for two weeks and the victim along with the first accused stayed together for two weeks. That apart, the prosecution failed to prove the age of the victim, as she was only 15 years old at the time of occurrence. Though the birth certificate and school certificate were very much available, the prosecution failed to produce any evidence in order to



prove the age of the victim. Therefore, the victim had consented to physical relationship and as such, the offence under Section 376 of I.P.C would not at all attract as against the first appellant. In so far as the charges against the appellants 2 to 4 are concerned, the trial Court framed charges for the offence under Section 376 r/w 34 of I.P.C., whereas, they were convicted by the trial Court for the offence under Section 376 r/w 109 of I.P.C. Sections 34 and 109 of I.P.C are distinct offences and as such, without any charge as against the appellants 2 to 4, they cannot be convicted by the trial Court. Without considering the above facts and circumstances, the trial Court mechanically convicted the appellants and therefore, prayed for acquittal of the appellants.

7.Per contra, the learned Additional Public Prosecutor appearing for the respondent would submit that in order to bring the charges to home, the prosecution had examined P.W.1 to P.W.13 and marked Ex.P.1 to Ex.P.9. The victim was examined as P.W.2 and she categorically deposed that she was kidnapped by the accused and the first appellant tied Thali in the Temple. When they were compelled to get married to the first accused, she refused and thereafter, she was under lock and key in the room. Thereafter, she was kidnapped to the Temple at Ramanathapuram. During the night, they conducted some poojas and also compelled her to go to Temple



the next day to get married to the first accused. She further submitted that she was born on 04.04.1994 and at the time of occurrence, she was only 15 years old. They stayed at Manzoor for two days and she was raped by the first accused. Therefore, the prosecutrix categorically deposed to attract the offence under Section 376 of I.P.C as against the first appellant. The other appellants also accompanied the first accused and kidnapped the victim and helped him to have physical relationship with the victim. Therefore, the trial Court rightly convicted the appellants and prayed for the dismissal of the appeal.

8. Heard the learned counsel appearing on either side and perused the materials available on record.

9. According to the case of the prosecution, the victim was kidnapped by the accused on 01.07.2009 and the first appellant got married to the victim on 02.07.2009 and thereafter, he committed rape on her. The mother of the victim lodged a complaint on 04.07.2009. However, the victim stayed along with the first appellant for 16 days. After their marriage, they went to the relative's house and stayed there. Admittedly, the prosecution failed to prove the age of the victim by proper evidence. The trial Court concluded that the prosecutrix is below the age of 16 years. The



exception provided under Section 375(2) of I.P.C., and it specifically excludes from the definition of rape any sexual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age is not raped, when she is a consenting party. If the prosecutrix is a minor, her consent is not valid consent.

10. On perusal of the deposition of P.W.2 clearly shows that she had stayed with the first appellant for two days and so many times, they had physical relationship. Therefore, the offence under Section 376 of I.P.C is not at all attracted as against the first appellant. The prosecution failed to produce any age certificate or school certificate in order to prove the age of the prosecutrix as below 16 years. Further, on medical examination, the Doctor certified that there are no external or internal injuries on the body of the prosecutrix. It clearly establishes that the prosecutrix is a consented party and there is no forcible physical relationship as alleged by the prosecution. The medical opinion reads as follows:-

"Conscious, oriented, vitals – normal. No injuries. Breast developed. Axillary hair present. No injuries in the breast. PA soft. Examination of genitalia. Pubic hair normal. Vulva normal. No injuries. No foreign hair. Hymen absent. Introitus admits two fingers freely. Vagina normal. No injuries. Vaginal



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smear taken for spermatozoa – No spermatozoa.”

11.Thus, it is clear that the prosecutrix does not appear to have put any resistance to the alleged rape committed on her by the first appellant. From this, the only irresistible inference can be that the prosecutrix was a consenting party, which would be reinforced by other circumstances. Therefore, this Court is satisfied that the trial Court had made an absolutely wrong approach to this case, has failed to consider the striking circumstances which demolish the prosecution case and has committed gross error in not examining the possibility of consent merely on the ground that the same was not pleaded by the appellants. Such an approach, therefore, clearly vitiates the order of conviction by the trial Court.

12.Insofar as the appellants 2 to 4 are concerned, they were neither tried for an offence under Section 376 of I.P.C nor for an offence under Section 376 r/w Section 109 of I.P.C. However, surprisingly, the trial Court convicted them for the offence under Section 376 r/w 109 of I.P.C without even framing any charge under Section 109 of I.P.C. Section 211 of Cr.P.C., is very clear that without framing a charge, no one can be convicted and it causes serious prejudice to the accused. Section 211(4) of Cr.P.C



specifically requires that the law and Section of the law against which the offence is said to have been committed shall be mentioned in the charge. Therefore, the failure to frame a charge with regard to the substantive offence of Section 109 of I.P.C has certainly prejudiced the appellants 2 to 4 before the trial Court. They were called upon to face the trial only for the offence punishable under Section 376 r/w 34 of I.P.C. In the absence of a charge being framed against the appellants 2 to 4 under Section 376 r/w 109 of I.P.C., it would certainly cause prejudice to the appellants 2 to 4. It was not permissible for the trial Court to convict the appellants 2 to 4 for the offence punishable under Section 376 r/w 109 of I.P.C and it is illegal and it cannot be sustained against them.

13.It is also seen from the complaint, which was marked as Ex.P.1 signed by P.W.1 and P.W.3. Therefore, it is a joint complaint by P.W.1 and P.W.3. It is unknown to the code of the Criminal Procedure and it cannot be also sustained. Section 200 of Cr.P.C contemplates the examination of the complainant. A Magistrate taking cognizance of an offence on complaint shall examine on oath of the complainant. If there are more than one complaint, it will be difficult for the Magistrate to form an opinion for taking cognizance of an offence. This applies to the power of



attorney of two complaints also. Therefore, the joint complaint given by two persons is not maintainable and cannot be sustained.

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14. That apart, the appellants produced photographs and it is clear that both the family members arranged the marriage between the victim and the first appellant. They got married in the Temple and lived together for two weeks. Only on the interception of the maternal uncle of the victim, a complaint was lodged and the same was registered by the respondent that too for the offence under Sections 341, 366 and 376 of I.P.C. Therefore, the offence under Section 376 of I.P.C is not at all attracted as against the accused persons. Further, the charges were framed under Section 376 r/w 34 of I.P.C as against the appellants 2 to 4. In fact, Section 34 of I.P.C itself cannot be attracted as against them, since they had no common intention to rape the victim. The offence under Section 109 of I.P.C would be proper against them. However, the trial Court framed the charge under Section 376 r/w 109 of I.P.c Therefore, the conviction under Section 376 of I.P.C as against the first appellant and the conviction under Section 376 r/w 109 of I.P.C cannot be sustained as against the appellants 2 to 4 cannot be sustained as against them. Hence, the conviction and sentence imposed by the Courts below are liable to be set aside.



15. Accordingly, the Judgment made in S.C.No.74 of 2011 dated 29.03.2016 on the file of the learned Sessions Judge, District Fast Track Mahalir Neethimandram, Sivagangai is set aside and the Criminal Appeal is allowed. The appellants/Accused Nos.1 to 4 are acquitted. Bail bond if any executed by the appellants/Accused Nos.1 to 4 shall stand cancelled and a fine amount if paid is ordered to be refunded to the appellants/Accused Nos.1 to 4 forthwith.

07.06.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes
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To

1. The Sessions Judge,
District Fast Track Mahalir Neethimandram,
Sivagangai.
2. The Inspector of Police,
Manamadurai Police Station,
Sivagangai District.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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