



CRL. A. No.568/2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
09.07.2024	25.07.2024

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

CRL. A. NO.568 OF 2021

Kumar

.. Appellant

- Vs -

The State, rep. by
The Inspector of Police
Tharamangalam Police Station
Salem District.

.. Respondent

Criminal Appeal filed u/s 374 (2) Cr.P.C. praying this Court to set aside the judgment dated 16.9.2021 made in S.C. No.201 of 2014 on the file of the Mahalir Neethimandram (Mahila Court), Salem.

For Appellant : Mr. S.Karthikeyan

For Respondent : Mrs. G.V.Kasthuri, APP

JUDGMENT



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The conviction and sentence imposed by the learned Sessions Judge, Mahalir Neethimandram (Mahila Court), Salem, in S.C. No.201/2014, vide judgment dated 16.9.2021 is put in issue by the appellant by filing the present appeal.

2. The appellant was charged and tried for the offences u/s 366 and 376 (1) IPC and after trial, the court below found the appellant guilty of the offences u/s 366 and 376 (1) IPC and convicted the appellant and sentenced him to rigorous imprisonment for a period of seven years together with a fine of Rs.1,000/-, in default to undergo rigorous imprisonment for a period of one year for the offence u/s 366 IPC and for the offence u/s 376 (1) IPC, the appellant was convicted and sentenced to rigorous imprisonment for a period of ten years together with a fine of Rs.1,000/-, in default to undergo rigorous imprisonment for a period of one year. The sentences were ordered to run concurrently and the period of incarceration already suffered by the appellant was directed to be set off u/s 428 Cr.P.C. Aggrieved by the aforesaid conviction and sentence, the present appeal has been preferred by the appellant.



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3. The short facts leading to the filing of the present appeal are as under :-

P.W.s 1 and 2 are the father and mother of P.W.5, who is the victim girl.

P.W.3 is the cousin of P.W.1, while P.W.4 is the maternal uncle of P.W.1. P.W.5 was aged about 16 years on the occurrence day, viz., 5.2.2010. She had completed 9th standard, but could not get through 10th standard and, therefore, was attending tutorials to write the 10th examination.

4. It is the case of the prosecution that on 5.2.2010, at about 12 'O' clock midnight, when P.W.5 was burning the midnight oil studying for the exams and P.W.s 1 and 2 were away from their home, the appellant had kidnapped P.W.5 forcefully and taken her in his motorcycle to the residence of his maternal uncle's daughter at Palavadi, where the appellant had forceful sexual intercourse with P.W.5.

5. P.W.s 1 and 2, who were away from their home, on coming to know about the missing of P.W.5 came back to their village and after extensive search along with their relatives, reliably learnt that the appellant had kidnapped P.W.5 and had ensconced her at Palavadi at his uncle's daughter's place and, therefore,



WENT there on the next day morning, but it is the further case of the prosecution that the appellant not only did not let off P.W.5, but also restrained P.W.s 1 and 2 from leaving the said village and, thereafter, P.W.s 1 and 2 were able to come from the said village only on 7.2.2010, whereinafter, the complaint, Ex.P-1 was lodged by P.W.1 with P.W.11.

6. On 8.2.2010, when P.W.11, the Sub Inspector of Police, at was the police station, P.W.1 appeared before him and gave the written complaint, Ex.P-1, which was received by P.W.11 and a case in Crime No.82/2010 was registered u/s 147, 448, 363 and 109 IPC and prepared the FIR, Ex.P-13, the printed FIR was forwarded to the Judicial Magistrate, Omalur and copies were forwarded to the higher officials.

7. P.W.12, the Inspector of Police, at the relevant time, on receipt of the printed FIR in crime No.82/2010, took up investigation. At about 3.00 p.m. on 8.2.2010, P.W.12 went to the scene of occurrence, where, in the presence of P.W.4 and other witnesses, prepared the observation mahazar, Ex.P-2 and drew rough sketch, Ex.P-14, attested by witnesses. P.W.12 examined P.W.s 3 and 4



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and other witnesses and recorded their statements. On 9.2.2010, at about 8.00 a.m., P.W.5 appeared before P.W.12 and gave a statement, which was recorded into writing. The dress worn by P.W.5 were recovered under Form-91, viz., Ex.P-15. On the basis of the statement of P.W.5 and also on the basis of the investigation conducted till then, P.W.12 altered the section of offence to one u/s 366 and 376 IPC and prepared Ex.P-16, alteration report.

8. Continuing with the investigation, on the same day, at about 9.30 a.m., the appellant, who had appeared along with P.W.5 was arrested in the presence of witnesses at which time, the appellant came forward to give a voluntary confession statement, which was reduced into writing in which the appellant affixed his signature, which document is Ex.P-3. The clothes worn by the appellant at the time of having sexual intercourse with P.W.5 were recovered under Ex.P-17, viz., Form-91 and the same were sent to Court under Ex.P-18, Form-91. M.O.s 1 to 5 are the clothes, which were worn by the appellant, which were recovered under Ex.P-18. P.W.12 caused requisition letters, Exs.P-19 and P-20 to the Judicial Magistrate for subjecting P.W.5 and the appellant for medical examination.



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9. P.W.12 continued with his investigation and examined witnesses and recorded their statements. On 5.5.2010, P.W.12 gave a requisition letter, Ex.P-21, to the Judicial Magistrate to subject the seized objects for chemical examination. Upon his transfer, further investigation in the case was handed over to P.W.13.

10. P.W.13 on taking up further investigation, revisited the investigation already conducted by P.W.12. P.W.13 examined P.W.s 1 to 4 and other witnesses. P.W.13 took steps to obtain age certificate for P.W.5 and accordingly approached the Headmistress of the Government Girls High School, Tharamangalam and submitted a requisition and obtained Ex.P-12. He also examined the Headmistress, P.W.8 and recorded her statement. P.W.12 examined the doctors, P.W.s 9 and 10, who had examined P.W.5 and the appellant and recorded their statements. On completion of investigation, P.W.13 filed the final report against the appellant for the offences u/s 363, 366 and 376 (I) IPC before the Judicial Magistrate, Omalur, on 8.3.2012.



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11. To establish the charges levelled against the accused, the prosecution examined P.W.s 1 to 15 and marked Exs.P-1 to P-23 and marked M.O.s 1 to 5.

12. On completion of the evidence on the side of the prosecution, the accused was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him in the evidence tendered by the prosecution witnesses. He denied all the incriminating circumstances. On the side of the defence, neither any oral evidence was adduced nor any documents were marked.

13. The trial court, on consideration of oral and documentary evidence and other materials, convicted and sentenced the accused as aforesaid aggrieved by which the present appeal has been filed by the appellant.

14. Learned counsel appearing for the appellant submitted that the case of prosecution with regard to the offence u/s 366 IPC has not been proved, as even P.W.5, the victim, has clearly spoken that she went along with the appellant.



When P.W.5 had voluntarily gone with the appellant, the offence u/s 366 IPC cannot stand.

15. It is the further submission of the learned counsel that once the offence of kidnap fails, the offence u/s 376 IPC, which is a consequence of Section 366 IPC cannot be said to have happened.

16. It is the further submission of the learned counsel that P.W.3, the uncle of P.W.5 had deposed that he saw P.W.5 going along with the appellant on the night of 5.2.2010, yet he did not raise any alarm, which creates a grave doubt about the case projected by the prosecution. Therefore, it is the submission of the learned counsel that there is no evidence to prove the offence of kidnapping and in fact, there is no material placed by the prosecution to show as to how P.W.5 was secured. In the absence of any material to show that P.W.5 was secured, the ingredients to attract kidnapping cannot be sustained.

17. It is the further submission of the learned counsel that the delay in lodging the complaint by P.W.1 is detrimental to the case of the prosecution.



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Though it is the specific case of P.W.1 that he came to know about the missing and kidnapping of his daughter P.W.5 by the appellant on 5.2.2010, however, for reasons best known, no complaint was lodged till 8.2.2010 and the complaint had been lodged after a period of four days, which delay casts a serious doubt as to the veracity of the complaint. It is the further submission of the learned counsel that though the delay is sought to be explained by stating that P.W.s 1 and 2 were illegally detained by the appellant, however, there is no material to substantiate the same and the said statement is conspicuously absent in Ex.P-1 and also in the statement recorded by the investigating agency u/s 161 Cr.P.C. Therefore, the delay in the lodging of the complaint is detrimental to the case of the prosecution.

18. It is the further submission of the learned counsel that no document, barring the school certificate, which is a typed document, was produced by the prosecution to prove the age of P.W.5. The said document is not a contemporaneous record, which cannot form the basis for fastening the offence u/s 376 IPC on the appellant. It is the further submission of the learned counsel that though the school records show that P.W.5 was born in the year 1994, which



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date, again does not tally with the date spoken to by P.W.5, further the doctor, P.W.10 has deposed otherwise, stating that the victim would be above 17 years and below 18 years and the contradiction in the date of birth of the victim cannot form the basis to implicate the appellant u/s 376 IPC.

19. Per contra, learned Addl. Public Prosecutor appearing for the respondent submitted that the age of the victim/P.W.5 had been established through Ex.P-8, the certificate issued by P.W.8, the Headmistress of the school in which P.W.5 had studied, which is on the basis of the school records, clearly prove that the year of birth of P.W.5 is in the year 1994, which shows that the victim was aged only 16 years on the date of occurrence. It is further submitted that even otherwise, the doctor, P.W.10, who had examined P.W.5 had in his opinion, Ex.P-12, clearly stated that the victim is above 17 years, but below 18 years of age, which would clearly bring the offence u/s 376 IPC against the appellant. Therefore, the court below has rightly held against the appellant insofar as the said offence is concerned.



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20. It is the further submission of the learned Addl. Public Prosecutor that the delay in lodging the complaint cannot be put against the prosecution, as it is the clear deposition of P.W.1 that when he went to the place of the appellant at Palavadi, he was detained and not allowed to leave the place and after coming from the said place on 7.2.2010, P.W.1 had lodged the complaint with the police authorities. Therefore, the delay would not in any way affect the prosecution case.

21. It is the further submission of the learned Addl. Public Prosecutor the offence of kidnapping the minor has clearly been established by the prosecution through the evidence of P.W.5 who had stated that the appellant took her against her wishes to Palavadi and had sexual intercourse with her. All the aforesaid materials have been clearly appreciated by the court below while finding the appellant guilty and the conviction and resultant sentence does not require any interference at the hands of this Court.



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22. This Court gave its careful consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record.

23. Two charges have been framed and the accused had been convicted and sentenced under both the charges. The charges relate to kidnapping followed by perpetration of rape on the victim.

24. To find out whether the charge relating to kidnapping u/s 366 IPC is made out, which according to the court below has been made out, this Court perused the evidence of the victim, P.W.5 as well as P.W.1, the father of the victim, who had lodged the complaint, Ex.P-1. A perusal of the evidence of P.W.1 reveals that on 5.2.2010, P.W.s 1 and 2 had been out of the village to attend a function and upon hearing that P.W.5 is missing, P.W.s 1 and 2 had rushed back to the village. According to the deposition of P.W.1, he had searched for P.W.5 along with his relatives and on coming to know about the fact that P.W.5 was taken by the accused to Palavadi to his uncle's daughter's house, P.W.1 had gone over there. The deposition of P.W.1 before the Court is very clear, in that he had



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deposed that the accused had taken P.W.5 along with him to Palavadi. There is no whisper of kidnapping in the deposition of P.W.1.

25. P.W.1, in the complaint, Ex.P-1, had made a passing reference that the accused and other members of his family had kidnapped P.W.5 and taken her to Palavadi. There is no deposition by P.W.1 that P.W.5 was kidnapped. In this regard, a perusal of the deposition of P.W.3, who was present at the house of P.W.1 at his request to take care of his children reveals that when P.w.3 and the brother of P.W.5 were sleeping in the house, at which time, P.W.5 was reading, when P.W.3 got up around 12.00 midnight, he found that P.W.5 was not available in the house. It is his further deposition that when he came out and saw, he saw the accused and his brother Balan taking P.W.5 in the motorcycle.

26. It is the further deposition of P.W.3 in chief that when they went to Palavadi to bring back P.W.5, the accused had kept her in a secluded place and she was not found in the house. However, in cross examination, P.W.3 had deposed that P.W.s 1 and 2 were talking with P.W.5 and only thereafter, the accused had taken her and secluded her. In fact, it is the further deposition of



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P.W.3 that P.W.s 1 to 3 along with other persons went to Palavadi and called P.W.5 to come back. However, P.W.3 had denied the suggestion that inspite of their calling P.W.5 refused to come along with them.

27. Even a bare appreciation of the aforesaid evidence explicitly reveal that P.W.5 was taken in a motorcycle by the accused, which was witnessed by P.W.3. P.W.3, at no point of time, had deposed that P.W.5 was resisting the accused while being taken in the motorcycle. From the above, it is clear that the kidnap alleged in Ex.P-1 complaint by P.W.1 is an afterthought of the prosecution witnesses and has not been made out through any tangible oral evidence on the side of the prosecution.

28. Further, a perusal of the deposition of P.W.5, the victim reveals that when the victim was in her house on 5.2.2010, at about 12.00 midnight, the accused took her to his uncle's daughter's house at Palavadi. It is not the deposition of P.W.5 that inspite of her resistance, she was removed from her house. Only such act would fall within the four corners of kidnap. However, the deposition of P.W.5 is silent about the arrival of P.W.s 1 to 3 on the next day and



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her conversation with them. Though P.W.5 had stated in cross that her mouth was closed with a cloth and, therefore, she could not raise her voice, however, it should not be lost sight of that the distance between the place of residence of P.W.5 and Palavadi is about 65 Kms., however, all through the way, P.W.5 had not sought for help from any person enroute.

29. Further, it should not be lost sight of that upon production of P.W.5 before the police authorities, P.W.5 was not enquired and no statement was obtained from P.W.5 and for the first time, her deposition was recorded in court. In the absence of any statement obtained from P.W.5 by the police authorities at the earliest point of time, giving much credence to the isolated statement of P.W.5 that her mouth was closed with cloth when she was taken by the accused runs counter to her deposition in chief, as P.W.5 had not deposed anything with regard to she being taken after gagging her mouth. In fact, the deposition of P.W.5 in chief is to the effect that she was taken from her home by the accused. In spite of the fact that her uncle P.W.3 and her brother were very much available in the house, P.W.5 had not raised any alarm nor made any commotion before her alleged kidnap.



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30. If really P.W.5 was forcefully moved from the scene of occurrence, she would have raised alarm or made commotion to attract the attention of others, as the scene of occurrence is a residential area surrounded by houses, which is clear from the deposition of P.W.5. In view of the glaring inconsistencies in the deposition of the victim, this Court can safely conclude that P.W.5 had left the house on her own volition with the accused and the evidence with regard to she being gagged is an improvement after she was handed over custody to her parents. In the light of the above, the offence of kidnapping by the accused has not been established by the prosecution. Therefore, the conviction and sentence imposed on the appellant u/s 366 IPC cannot be sustained and it deserves to be set aside.

31. Coming to the offence of rape alleged to have been committed by the accused on P.W.5, the said offence falls u/s 376 IPC. To constitute an offence of rape, the following ingredients as provided for u/s 375 IPC should be fulfilled, which is as under :-



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“375. Rape — A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

First — Against her will.

Secondly — Without her consent.

Thirdly — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly — With or without her consent, when she is under eighteen years of age.

Seventhly — When she is unable to communicate consent.

Explanation 1 — For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2 — Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of



verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1 – A medical procedure or intervention shall not constitute rape.

Exception 2 – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

(Emphasis Supplied)

32. Only if any of the aforesaid acts are established to have been committed by a person, the offence of rape could be held to have been committed against the victim so as to attract the punishment codified for rape u/s 376 IPC.

33. The question of consent, in the present case, does not arise, as kidnap is not established, but merely because the victim had gone along with the accused, it cannot be inferred that consent was given. Barring the issue of consent, whether any other ingredient is attracted, which constitutes the act of



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the accused having sexual intercourse with the victim to fall under the act of rape is the question that falls for consideration before this Court.

34. It is the stand of the learned counsel for the appellant that the age of the victim had not been established and that the certificate, Ex.P-8, issued by the Headmistress cannot be the basis to construe that the date of birth of the victim was in the year 1994. The offence had happened between 5.2.2010 to 8.2.2010. On the said date, if the month and year of birth of P.W.5 is taken to be as April/May, 1994, as either seen from the certificate Ex.P-8 or spoken to by P.W.5 then definitely, the age of the victim would be only 16 years.

35. It is to be pointed out that the certificate issued by the Headmistress of the school is based on school records. School records are contemporaneous documents on which reliance could be placed to establish the age of the victim. Even otherwise, it is the deposition of the victim, P.W.5 that she was born on 31.5.1994. Therefore, her age as per the certificate and her deposition is only in the region of 16 years on the date of occurrence.



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36. Be that as it may. In the absence of the birth certificate of P.W.5, the victim, P.W.5 was subjected to medical examination by the court on the request of the respondent and P.W.10, the doctor, had conducted medical examination of P.W.5 so as to ascertain the age of P.W.5. In this regard, after medical examination, P.W.10 had issued Ex.P-12 in which P.W.10 had opined that P.W.5 is aged above 17 years but below 18 years. The expert was not cross-examined on the opinion issued by him. Therefore, from Exs.P-8, P-12 and the deposition of P.W.s 8 and 10, it could safely be concluded that P.W.5 was below the age of 18 years, therefore, the act of alleged sexual intercourse on P.W.5 would fall within Section 375 (1) IPC and the act would constitute rape as P.W.5, on the date of occurrence was below eighteen years of age and, therefore, any act of sexual intercourse with or without consent of P.W.5 would constitute rape. Therefore, the sexual intercourse alleged to have been had by the accused with P.W.5 would definitely be termed as rape so as to attract the punishment u/s 376 IPC.

37. However, the ancillary question that arises is whether P.W.5 was subjected to sexual intercourse. There is no quarrel with the fact that P.W.5 was studying 10th standard and is aged below 18 years, more particularly, according to



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her, she is 16 years of age. It is the specific deposition of P.W.5, in her evidence in cross has specifically admitted that the accused had sexual intercourse with her. In spite of searching cross examination, the defence was not able to break that portion of the testimony of P.W.5 with regard to the sexual intercourse that the accused had with P.W.5.

38. Whether rape was perpetrated on P.W.5 stands answered through the deposition of P.W.9, the doctor, who in her evidence of P.W.9, admitted that when she examined P.W.5 she found that the hymen of P.W.5 was ruptured and that P.W.5 has had sexual intercourse. A suggestion was put to P.W.9 in cross that if P.W.5 had involved herself in strenuous work, there is a chance of hymen getting ruptured and, therefore, it could not be said that she had sexual intercourse which was the cause of tearing of hymen to which there was a categorical denial by P.W.9 by stating that though hymen could have ruptured due to hard and strenuous work by P.W.5, however, the vagina of P.W.5 had let in two fingers, which would otherwise not happen if P.W.5 had not been subjected to sexual intercourse. Therefore, the subjection of P.W.5 to sexual intercourse stands established.



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39. However, it should also not be lost sight of that P.W.5 cannot also be absolved in entirety of subjugation to the act of the accused, as she had accompanied the accused without any resistance. However, the inclination of P.W.5 to have sexual intercourse by consenting to the said act cannot be the subject matter of dissection by this Court, as P.W.5 being below 18 years of age on the date of occurrence, the question of her giving consent or not is immaterial, as any act with a girl below 18 years of age would constitute an act of rape as provided for u/s 375 IPC.

40. One other aspect, which assumes significance from which an inference can be drawn that P.W.5 was subjected to sexual intercourse by the accused is that when P.W.s 1 to 3 and other elders of the village went to Palavadi to bring back P.W.5, the accused did not let her to go along with her parents. However, only after complaint was lodged with the police authorities, the accused brought her directly to the police station from where she was sent along with her parents. However, she was not subjected to medical examination immediately, but requisition was given to the Judicial Magistrate for medical examination and upon



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orders of the Judicial Magistrate, P.W.5 was subject to medical examination.

During medical examination, swabs were taken of the vagina of P.W.5, however, no traces of semen were found, however, the tearing of the hymen had resulted in the opinion of P.W.9 along with admission of two fingers by the vagina led P.W.9 to depose that she was subjected to sexual intercourse.

41. If really the accused had not subjected P.W.5 to sexual intercourse, nothing would have prevented him from sending P.W.5 along with her parents when they came to Palavadi to take back their daughter. Further, no defence has been taken by the accused that he had not brought her to Palavadi. The accused had not explained as to why he had taken P.W.5 to Palavadi. When the accused had kept silent all along for three days and only upon complaint had brought P.W.5 to the police station where she was handed over to her parents, the only inference that could be drawn from the said act of the accused is that the accused had wanted to obliterate any traces of semen that would be found in the person of P.W.5, if she was subjected to medical examination at the earliest. When there is no explanation from the accused as to the reason for taking P.W.5 with him to Palavadi, that too in the wee hours of 5.2.2010, the only inference



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that could be drawn from the same is that relationship between the accused and P.W.5 had resulted in P.W.5 accompanying the accused and the accused subjecting P.W.5 to satisfy his lust. Therefore, in the absence of any contra material to show that P.W.5 could have been subjected to sexual intercourse by any other person other than the accused, the categorical deposition of the doctor, P.W.9 coupled with the act of the accused in not letting P.W.5 to go along with her parents on 6.2.2010, definitely leads this Court to hold that the accused had sexual intercourse with P.W.5 which alone was the cause of tearing of the hymen. Therefore, the act of the accused with P.W.5 in having sexual intercourse definitely comes within the ambit of Section 375 IPC and, accordingly, attracts the punishment provided for u/s 376 IPC. Therefore, the conviction of the appellant u/s 376 IPC does not suffer any infirmity and, accordingly, the conviction stands confirmed.

42. In the result, the criminal appeal is allowed in part by setting aside the conviction and sentence recorded u/s 366 IPC, but confirming the conviction and sentence awarded by the court below u/s 376 IPC. Fine amount imposed on the appellant u/s 376 IPC is also confirmed. It is reported that this Court had granted



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suspension of sentence pending the appeal. The court below is directed to take steps to secure the presence of the appellant and commit him to prison to undergo the balance period of punishment imposed upon him. The period of imprisonment already undergone by the appellant shall be set off as provided for u/s 428 Cr.P.C.

25.07.2024

Index : Yes / No

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To

1. The Sessions Judge
Mahalir Neethi Mandram
(Mahila Court)
Salem.
2. The Inspector of Police
Tharamangalam Police Station
Salem District.
3. The Public Prosecutor
High Court, Madras.



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M.DHANDAPANI, J.

GLN

**PRE-DELIVERY JUDGMENT IN
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