

Bail Slip
Crl.A.No.366/2009

the Petitioner/Accused namely Viswanathan Age 28 years S/O. Ammasai @ Saminathan was directed to be released on bail by the order of the court, dated 21/07/2009 and made in Crl.MP.1 of 2009 in Crl.A.No.366 of 2009.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 28.02.2017

CORAM:

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Crl.A.No.366 of 2009

Viswanathan ... Appellant/ Accused

Vs.

State by
The Inspector of Police,
Palladam Police Station,
Palladam,
Coimbatore District.
(Crime No.800 of 2002) ... respondent/ Complainant.

Criminal appeal preferred under Section 374(2) Cr.P.C., against the judgment dated 09.06.2009 passed by the learned Sessions Judge, Magalir Court, Coimbatore in S.C.No.27 of 2008.

For Appellant : Mr.R.Singaravelan, Senior Counsel
For Respondent : Mrs.M.F.Shabana
Government Advocate(Crl. Side)

JUDGMENT

The sole accused, in S.C.No.27 of 2008, on the file of the learned Sessions Judge, Magalir Court, Coimbatore, is the appellant herein. He stood charged for the offence under Sections 366-A and 376(1) IPC. The Trial Court, after trial, by Judgment dated 09.06.2009, convicted the accused for both the charges and sentenced him to undergo Ten years rigorous imprisonment and imposed a fine of Rs.1000/- in default to undergo rigorous imprisonment for one year under Section 366-A IPC and sentenced him to undergo Ten years rigorous imprisonment and imposed a fine of Rs.1000/- in default to undergo rigorous imprisonment for one year under Section 376 (1) IPC. Challenging the above said conviction and sentence, the appellant/accused is before this Court with this Criminal

Appeal.

2. The case of the prosecution, in brief, is as follows:

P.W.3 is the victim in this case. P.W.1 is father and P.W.2 is mother of P.W.3. They are all residing at Madhampudhur Village, Poonthottam at Palladam Taluk. P.W.3 is a minor girl aged about 17 years, working in one V.K.S. Textile Mill, in the Cone winding Section, the accused also working in the same company. From 09.11.2002, P.W.3, was found missing and P.Ws.1 and 2 searched for her. Then, on 16.11.2002, P.W.1 has given complaint[Ex.P1] before the respondent police. Thereafter, once again on 18.11.2002, P.W.1 has given another complaint before the respondent police stating that the accused has kidnapped his daughter.

(ii) P.W.8, the Sub Inspector of Police, working in the respondent police station, on receipt of the complaint from P.W.1, registered a case in Crime No.800 of 2002, for the offence under Section 366-A IPC, prepared first information report [Ex.P5] and sent the same to the higher officials.

(iii) P.W.9, the Inspector of Police, attached to the respondent police station, on receipt of the first information report, commenced investigation, examined the witnesses and recorded their statements. On 18.11.2002, he arrested the accused near Udakkalpalayam Bus stand. Then, he examined P.W.3, recorded her statement, and after investigation altered the first information report, including the offence under Section 376 IPC, and sent the alteration report to the Judicial Magistrate Court. He sent P.W.3 for medical examination and recovered the dresses worn by P.W.3 as well as the accused under seizure mahazar.

(iv) P.W.4, the Senior Civil Surgeon, working in the Government Hospital, Tiruppur, examined P.W.3 and given Accident Register[Ex.P2]. At the time of examination, P.W.3 told her that on 09.11.2002 she left her house along with the accused and they also got married near Thekkupalayam at Pollachi. Then both of them staying at accused sister house for 10 days and during that period she had sexual intercourse with the accused. P.W.4 has given a opinion that Hyman of the prosecutrix was absent and vagina easily admits two fingers and she did not found any external injuries.

(v) P.W.9 continued the investigation, sent the material objects for chemical examination. Then, he sent the accused for medical examination. Since he transfer from the respondent police station, he handed over the investigation to P.W.10. P.W.10, the Inspector of Police, continued the investigation, obtained report from Forensic Lab, examined the witnesses and recorded their statements and after completion of investigation, he laid charge sheet.

3. Based on the above materials, the Trial Court framed charges as detailed above and the accused denied the same as false. In order to prove the case of prosecution, as many as 10 witnesses were examined and exhibited 8 documents

and six material object were marked.

4. Out of the said witnesses examined, P.W.1 is the father of the victim girl. According to him, his daughter was working in V.K.S. Textile Mill in a Cone winding Section, she was found missing on 09.11.2002 and they were searched her. Subsequently, on 16.11.2002 he has given complaint before the respondent police station. Then, on 18.11.2002 the respondent police secured both the accused and victim girl and handed over his daughter to him. P.W.2 is the mother of P.W.3. She spoke about the missing of P.W.3 and subsequently she came to know that the accused has kidnapped her. Then, they file a complaint before the respondent police station. P.W.3 is a victim girl. According to her, she is aged about 17 years, she know the accused, both of them working in the same company. The accused expressed his willingness to marry her, and on 09.11.2002, the accused took her to his sister house at Pollachi and on 10.11.2002, both of them got married. Then, the accused took her to his house at Odukkalpalayam and on the same day, the accused had sexual intercourse with P.W.3, as her husband and till 18.11.2002, they were staying in the house and during that time, the accused had intercourse with her several time. Then, based on the complaint given by her parents, the police arrested the accused. Thereafter, she got married another person and she is having two children, now she is living with her husband. P.W.4 is the Doctor working in the Government Hospital, Tiruppur. She examined P.W.3 and given Accident Register [Ex.P2]. According to her, at the time of examination, P.W.3 told her that she got married to the accused and they had sexual intercourse for several times. P.W.5 is the resident of P.W.1's village. According to him, P.Ws.1 and 2 told him that P.W.3 was found missing and thereafter he came to know that the accused has kidnapped her and he also informed the same to P.Ws.1 and 2. P.W.6 is Assistant Director working in the Forensic Lab Department, Coimbatore. He examined the material objects and given certificate[Ex.P3]. P.W.7 is the Head Constable attached to the respondent police station. He accompanied with P.W.3 for medical examination. P.W.8 is the Sub Inspector of Police attached to the respondent police station. On receipt of the complaint from P.W.1, registered the case, prepared first information report and sent the same to the higher officials. P.W.9 is the Inspector of Police attached to the respondent police station. On receipt of the first information report, commenced investigation, examined the witnesses and recorded their statements and handed over the investigation to P.W.10. P.W.10 continued the investigation, arrested the accused and sent the accused for medication examination, examined the witnesses and recorded their statements and after completion of investigation, he laid charge sheet.

5. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. His defence was a total denial. The accused examined

his father as D.W.1 and marked birth certificate Ex.D1 and no material object was marked on his side. According to D.W.1, the accused is his son and he was born on 25.06.1986, and to prove the same, he also marked the birth certificate as Ex.D1. According to him, at the time of occurrence, the accused was minor aged about 16 years.

6. Having considered all the above, the Trial Court convicted the accused for the offences as stated in the first paragraph of this judgment. Challenging the above conviction and sentence, the accused is before this Court with this appeal.

7. I have heard Mr.S.Singaravelan, the learned Senior Counsel appearing for the appellant and Mrs.M.F.Shabana, learned Government Advocate(Crl. Side) appearing for the respondent and perused the materials available on record.

8. The learned Senior Counsel appearing for the appellant would submit that the prosecution has failed to prove the age of the victim girl (P.W.3), as a minor at the time of occurrence. Except the oral evidence of P.Ws.1 to 3, there is no material available on record to establish that the victim girl(P.W.3) is minor at the time of occurrence. Apart from that P.W.3 is also not subject to any radiology test to prove that she was a minor. In his cross examination, P.W.1 stated that the age of P.W.3, is more than 20 years at the time of occurrence. P.Ws.1 and 2 also in their cross examination stated that P.W.3 studied up to 7th standard and after completion of 7th standard, they came to Palladam and then they are residing at Palladam for nearly 11 years. Hence, from their evidence it could be seen that the age of the victim girl(P.W.3) is more than 20 years at the time of occurrence. Apart from that P.W.4, the Doctor in her evidence has stated that she cannot confirm the age of P.W.3 is 17 years, but it may be more than 17 years. In the absence of any proof to establish the correct date of birth of P.W.3, it cannot be held that she was a minor at the time of occurrence. Apart from that at the time of occurrence, the accused was minor and prove the same, the birth certificate of the accused was marked and his father was also examined as D.W.1, but, the trial Court mechanically rejected the same without any valid reasons. The learned Senior Counsel appearing for the appellant further submitted that P.W.3 had clearly stated that on her own volition she went along with the appellant and she has also married the accused and both of them staying at Pollachi and during that period she had intercourse with the accused and hence the charge of rape is not proved by the prosecution. Hence, he prays for allowing this appeal.

9. Per contra, the learned Government Advocate(Crl. Side) appearing for the state would submit that from the evidence of P.Ws.1 to 3 and 4, it has been clearly established that the age of the victim girl (P.W.3) is only 17 years, and

she was a minor at the time of occurrence. Hence, the appellant is liable to be convicted under Section 366-A IPC, since P.W.3 being a minor girl, the consent is immaterial, the trial Court considering the oral and documentary evidence in a proper perspective convicted the accused and she sought for dismissal of this appeal.

10. I have considered the rival submissions.

11. The first and foremost question is to be decided in this appeal is whether at the time of occurrence P.W.3 was a minor or not. In order to prove that P.W.3 was minor, the prosecution has examined P.Ws.1 to 3, namely, father and mother of the victim girl and also the victim, apart from their oral evidence, there is no documentary evidence was available either in the form of birth certificate or school certificate, and the victim girl was also not subject to any radiology test to prove her approximate age. In his cross examination, P.W.1 has stated that his marriage took place 30 years prior to the occurrence and after three years of his marriage, P.W.3 was born in the year, 1984. P.W.2 was admitted in a school and completed her 7th standard at Musiri. In her cross examination, P.W.2 has stated that the victim has completed 7th standard, and after she completed 7th standard, they came to Palladam and now they were residing at Palladam more than 11 years. In her cross examination, P.W.3 also stated that she has completed 7th standard, and after two years completing 7th standard, they came to Palladam and they were residing at Palladam for more than 11 years. From their evidence, it could be seen that P.W.3 must be more than 20 years at the time of occurrence. Even though, P.W.4 the Doctor, while examined P.W.3, in her cross examination she stated that she cannot say that the victim is aged about 17 years and her age may be more than 17 years. In view of the above shaky oral evidence of P.Ws.1 to P.W.3 and in the absence of any other documentary evidence like birth certificate or School certificate, it is highly unsafe to hold that P.W.3 was a minor at the time of occurrence. In the above circumstances, I am of the considered view that the prosecution has failed to prove that P.W.3 was minor at the time of occurrence.

12. The next question to be decided in this case is whether the appellant/accused has kidnapped the victim and committed an offence under Section 366-A IPC. Considering the evidence of P.W.3/the victim girl, the accused wanted to marry her, P.W.3 on her own volition went along with the accused to Pollachi, stayed at the sister's house of the accused, then they got married on 10.11.2002, both of them stayed there up to 18.11.2002, during that period they had intercourse several times and the parents of P.W.3 gave complaint before the respondent police and based on the same, the respondent police arrested the accused. In her cross examination, P.W.3 stated that both the accused and the victim girl(P.W.3) went

together in a bus to Pollachi and they stayed in the sister's house of the accused, then they got married. Apart from that at the time of medical examination, by P.W.4 Doctor, she has stated that she went along with the accused to Pollachi, and stayed at his sister's house and they had intercourse five times. From the evidence of P.W.3, it could be seen that there is no kidnap or abduction, but P.W.3, on her own volition went along with the accused and got married and thereafter only appellant had intercourse with the consent of P.W.3. In the above circumstances, it cannot be held that the appellant had abducted P.W.3, and raped her. Hence, the charge under Sections 376(1) and 366-A IPC, were not proved by the prosecution.

13. So far as the contention of the learned Senior Counsel appearing for the appellant regarding the age of the accused is concerned, even though the birth certificate of the appellant was marked through D.W.1, the father of the accused. In the above said birth certificate, the name of the accused was not found place and only the parents name alone found place. To establish the birth certificate, except the father of the accused, no other evidence was available to prove that Ex.D1 is that of the appellant. Since the name of the accused has not found place in the birth certificate, and except the evidence of D.W.1, no other evidence is available to show that he was a minor, it cannot be held that the appellant/accused was minor at the time of occurrence.

14. In the above circumstances, I am of the considered view that the prosecution has failed to prove the charges levelled against the accused. Hence, the appellant/accused is entitled for acquittal. The Court below without considering the evidence in proper perspective convicted the appellant and it is liable to be set aside.

15. In the result, the Criminal Appeal is allowed. The conviction and sentence imposed on the Appellant in S.C.No.27 of 2008 dated 09.06.2009 on the file of the learned Sessions Judge, Magalir Court, Coimbatore is set aside and the appellant/accused is acquitted from the charges levelled against him and bail bond, if any, executed by him shall stand cancelled and the fine amounts paid by him is ordered to be refunded forthwith.

Sd/-

ASST. REGISTRAR

/TRUE COPY/

SUB ASST. REGISTRAR

To

- 1.The Judicial Magistrate Palladam
2. The Chief Judicial Magistrate Coimbatore.
3. The Superintendent, Central Prison Coimbatore.

4.The Public Prosecutor,
High Court,
Madras.

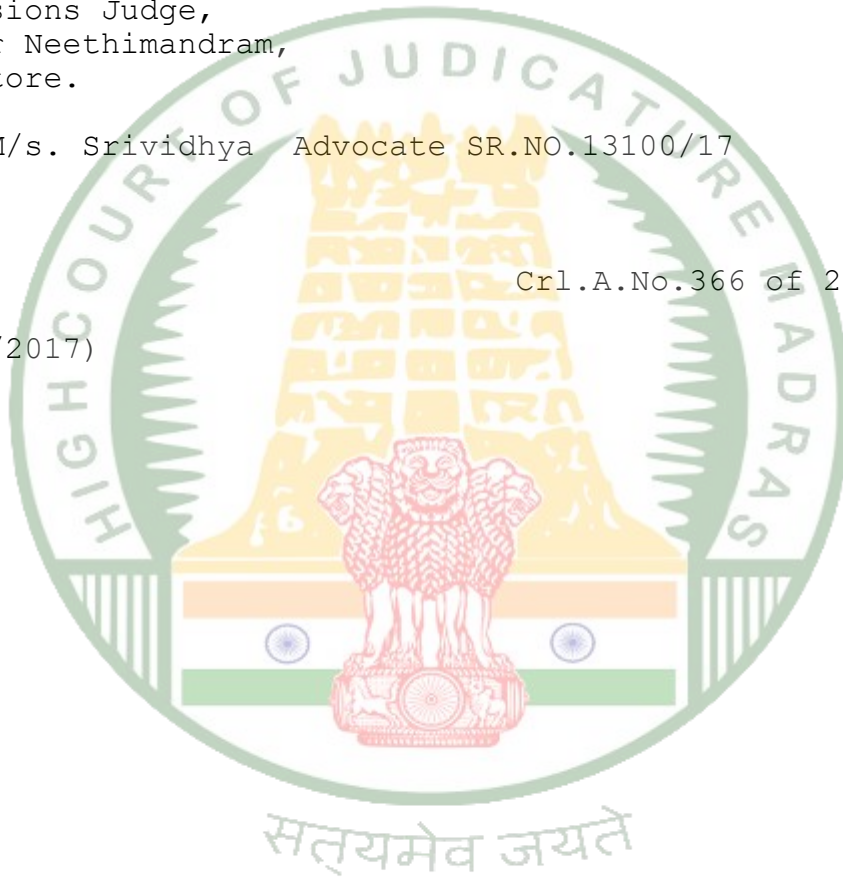
5.The Inspector of Police,
Palladam Police Station,
Palladam,
Coimbatore District.

6.The Sessions Judge,
Mahalir Neethimandram,
Coimbatore.

+1 CC to M/s. Srividhya Advocate SR.NO.13100/17

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VC (20/11/2017)



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