

Kannan Vs. State Rep. By

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Court : Chennai

Decided On : Dec-23-2014

Judge : Judge

Appellant : Kannan

Respondent : State Rep. By

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED: 23.12.2014 CORAM THE HONOURABLE Ms.JUSTICE R.MALA Criminal Appeal (Md.No.287 of 2007 Kannan .Appellant versus State rep.

by The Inspector of Police, Kanyakumari Police Station in Crime No.435 of 2005 .Respondent Prayer:Criminal Appeal filed under Section 374 Cr.P.C., against the judgment dated 30.03.2007 passed in S.C.No.101 of 2006 by the Assistant Sessions Judge cum Chief Judicial Magistrate, Nagercoil, set aside the conviction and sentence and acquit the appellant.

!For Appellant : Mr.V.Kathirelu, senior counsel for Mr.K.Prabhu ^For Respondent : Mrs.S.Prabha, G.A.(Crl.

Side) Judgment reserved : 19.12.2014 Judgment pronounced : 23.12.2014 :

JUDGMENT

The Criminal Appeal is arising out of the judgment of conviction and sentence, dated 30.03.2007 passed in S.C.No.101 of 2006 by the Assistant Sessions Judge cum Chief Judicial Magistrate, Nagercoil, Madurai, to set aside the conviction and sentence and acquit the appellant, whereby the appellant/accused was found guilty for the offences under Sections and convicted and sentenced to undergo 7 years rigorous imprisonment and to pay a fine of Rs.10,000/- in default to undergo one year rigorous imprisonment for the offence under Section 363 of I.P.C. and also convicted and sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.20,000/- in default to undergo one year rigorous imprisonment for the offence under Section 376 of I.P.C.

The short facts necessary for the disposal of this appeal can be stated thus: (a) P.W.3 Rajeswari @ Vasanthi is the victim girl.

P.Ws.1 and 2 are her parents.

The appellant/accused is the cousin brother of P.W.3.

P.Ws.4 and 5 are the parents of the appellant/accused.

P.W.2 and P.W.5 are own sisters. P.W.6 is the brother of the appellant.

P.W.9 Kalaiselvi is the wife of the appellant/accused are own sisters. P.W.3 was studying in 10th standard at the time of occurrence.

The appellant/accused used to visit the house of P.W.3 and he used to take her to school in his motorcycle.

It is also alleged that the accused took P.W.3 to various places viz., Hotel, Theater and he purchased clothes for P.W.3 with the permission of her parents.

Since the appellant is the sister's son of P.w.2 and cousin brother of P.W.3, P.Ws.1 and 2 were not suspected the character of the accused.

(b) While so, on 28.06.2005, as usual the accused took P.W.3 to school.

But, in the evening, she did not return back to home and she was found missing.

The accused told P.W.3 that he did not want to live and he was going to commit suicide and took P.W.3 in his house and they gone to Trivandrum, Mundakayam, Kottayam, Kumili and Cumbum and stayed at Sasthan Nadai Coffee estate for two months, where the appellant had sexual intercouRs.without her consent.

Since P.W.1 was found missing, P.W.1 made enquiry with one Agasthiya, who is the daughter of one Baskar and studying along with her daughter.

She replied that P.W.3 had gone to Kerala with Kannan, who is the accused and she had stated that she would not come to school in future.

P.W.1 searched her daughter in various places viz., Tiruchendur and Kerala.

Since, she was not found, P.W.1 has given a complaint Ex.P1, before Kanyakumari police station.

(c) On 20.07.2005, P.W.14 Mr.Jesudoss, Head Constable received Ex.P1 complaint and registered a case in crime No.435 of 2005 for the offence under Section 366(A) of I.P.C.and prepared Ex.P7 fiRs.information report and sent the same to Court and higher officials.

(d)P.W.17 Mr.Paulpandi, Sub Inspector of Police took up the case for investigation and recorded the statement of witnesses and put up the file before the Inspector of Police for further investigation.

P.W.18, Mr.V.B.Rajendran, Inspector of Police took up the case for further investigation and on 16.11.2005 at about 09.00 a.m.he arrested the accused along with P.W.3 and sent them for medical examination.

(e)On 18.11.2005, P.W.11 Dr.Meena treated P.W.3 as per the requisition of the Judicial Magistrate i.e.Ex.P3 and took X-ray to ascertain her age and issued Ex.P2, medical certificate opined that P.W.3 was above 15 and below 16 years of age.

X-rays are marked as M.O.1 series.

P.W.16 Mr.Cornelius Devaprakasam, Headmaster has issued Ex.P8 school certificate, wherein the date of birth of P.W.3 has been mentioned as 02.12.19909.

P.W.13 Dr.Sanathi has also treated P.W.3 and issued Ex.P6 would certificate, opined that she was pregnancy for 7 weeks.

(f)On 18.11.2005, P.W.12 Dr.Rajesh treated the accused as per the requisition of the Judicial Magistrate i.e.Ex.P5 to ascertain his potency and issued Ex.P2, medical certificate opined that there was nothing to suggest that the accused in incapable of perfrm sexual intercourse.

(g)Thereafter, P.W.18 recorded the statement of witnesses and after completing his investigation, he filed a charge sheet against the accused under Sections 363 and 376 of I.P.C.4.The learned Judge after following the procedure, framed necessary charges against the accused.

Since the accused pleaded not guilty, P.W.1 to P.W.18 were examined and Exs.P.1 to P.10 and M.O.1 were marked .

Accused was questioned under Section 313 Cr.P.C.about the incriminating evidence and circumstances.

Accused denied the same and stated that a false case has been foisted against them.

D.Ws.1 and 2 were examined on the side of the defence.

5.On considering the oral and documentary evidence, the learned Sessions Judge found the accused was guilty for the offence under Sections 363 and 376 of I.P.C.convicted and sentenced him as stated above.

Challenging the said judgment of conviction and sentence, he filed the present appeal.

6.Challenging the conviction and sentence passed against the appellant herein, the learned senior counsel appearing for the appellant would submit that P.W.3 has voluntarily accompanied the accused and hence, the ingredients of Section

366 of I.P.C.has not been made out.

To substantiate the same, he relied on the decision of the Apex Court reported in AIR 1965 SC942?.

S.Varadarajan versus State of Madras.

7.He would further submit that the margin of error in age ascertained by radiological examination is two years on either side and as per the evidence of P.W.11 Dr.Meena, the age of P.W.3 is above 15 and below 16 and hence she may be above 16 years and she has consented for taking away her and for sexual intercourse.

To substantiate the same, he relied on the decision of the Apex Court in 1982 Cri.

L.J.1777 ?.

Jaya Mala V.

Home Secretary, Government of Jammu Kashmir and others and prayed for setting aside the conviction and sentence.

8.Resisting the same, the learned Government Advocate (criminal side) would submit that P.W.3 is the victim girl and to prove that her age is below 16 years.P.W.16 Headmaster has been examined and school certificate has been marked as Ex.P8, which show that her date of birth is 02.12.1990, whereas, the occurrence was said to have taken place only on 28.06.2005 and on that date, she has completed his 14 years and the trial Court has considered all the aspects in proper and perspective manner and has come to the correct conclusion that the victim girl was 14 years and hence, the conviction and sentence passed against the appellant does not warrant interference.

She relied on some portion of the decision of the Apex Court in Tarkeshwar Sahu V.

State of Bihar, in which, the Full Court Judgment has been referred and submitted the accused is having intention to kidnap P.W.3 and taken her various places and

had sexual intercourse with her and thereby committed rape and since P.W.2 is below 16 years even though she has given consent, it amounts to rape and hence, the trial Court has correctly held that the appellant is guilty for the offence under Sections 363 and 376 of I.P.C and hence, he prayed for the dismissal of the appeal.

9. Considering the rival submissions made by both sides and perusal of the typed set of papers the admitted facts of the case are that P.Ws.1 and 2 are the parents of P.W.3 and P.Ws.4 and 5 are the parents of the appellant/accused.

P.W.6 is the brother of the accused and P.W.9 is the wife of the accused.

P.W.7 is the sister of P.Ws.2 and 5.

P.W.8 is the friend of accused.

His cousin was examined as P.W.15.

P.Ws.4 to 8, 10 and 15 were treated as hostile.

10. Now, before adverting the facts of the case, it is appropriate to consider the decision relied upon by the learned senior counsel for the appellant/accused.

The learned senior counsel has taken me to the paragraph No.9 of the decision reported in AIR 1965 Supreme Court 942 ?.

S. Varadarajan V.

State of Madras, wherein, it was held that there is a distinction between "taking and allowing a minor to accompany a person and would submit that the evidence of P.Ws.1 to 3 would show that the appellant/accused usually took P.W.3 to school in his motorcycle and the parents, who are the lawful guardian of P.W.3 have also permitted the minor girl to accompany the appellant/accused and hence, the ingredients of Section 361 of I.P.C. has not been made out.

It is appropriate to incorporate paragraph No.9 of the said decision.

"It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person.

The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of S.361 of the Indian Penal Code.

We would limit ourselves to a case like the present where the minor alleged to have been taken the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person.

In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian.

Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian."

11. Now, it is appropriate to incorporate Section 361 of I.P.C.?

1. Taking or enticing a minor or a person of unsound mind.

2. Minor if male must be under 16 and if female must be under 18.

3. Act of taking or enticing must be keeping out of lawful guardianship of such minor or person of unsound mind.

4. Such taking or enticing must be without consent of such lawful guardian.

It is also appropriate to incorporate the second part of ingredients of Section 363 of I.P.C.

2. Ingredients of kidnapping from lawful guardianship: 1. Person kidnapped was a minor being below 16 or 18 either male or female respectively.

2. Person kidnapped was in keeping of a lawful guardian.

3. Accused took or enticed from such keeping.

4. He did it without the consent of lawful guardian.

Now, this Court has to decide the age of the P.W.3/victim girl.

P.W.16, Headmaster, in his evidence has stated that the date of birth of P.W.3 is 02.12.1990.

Therefore, on the date of occurrence she has completed 14 years. It is true P.W.11 Dr.Meena has given a report stating that the victim girl is above 15 and below 16 years of age.

The learned senior counsel appearing for the appellant/accused would rely on the decision reported in 1982 Cri.L.J.1777 ?.

Jaya Mala V.

Home Secretary, Government of Jammu and Kashmir and others wherein, it was held that the margin of error in age ascertained by radiological examination is two years on either side and submit that since the doctor has given her age as 15 years it may be 17 years or 13 years. But, the above argument does not hold good.

Because, in this case, the Headmaster of the school was examined as P.W.16 and the school certificate of P.W.3 has been filed and the same was marked as Ex.P8.

Whereas, in the above decision, the birth certificate of the victim has not been filed before the Court and only the age of the minor has been ascertained only by medically on the basis of X-ray and radiologically.

In such circumstances, I am of the view that the above decision is not applicable to the facts of the present case.

Since the school certificate of P.W.3 is available, this Court ought to have accepted that the date of birth of P.W.3 is 02.12.1990 as per Ex.P8, school certificate.

12. The learned senior counsel would submit that even though P.W.16 has been examined and through him Ex.P8 has been marked, the person, who furnished the details of date of birth of P.W.3 has not deposed before this Court and P.W.1, who

is the father of P.W.1 has also not deposed about the date of birth of P.W.3 and hence, Ex.P8 cannot be looked into.

The said argument does not hold good, because P.Ws.1 and 2, who are the parents of the victim girl has stated that at the time of occurrence, she was studying 10th standard and in respect of her age, no cross examination has been done and hence, I am of the view that the trial Court Court has rightly accepted Ex.P8 and come to the correct conclusion that the date of birth of P.W.3 is 02.12.1990 and she completed her 14 years of age and running 15 years of age and admittedly, she was minor.

Since the victim was below 16 years of age, it is appropriate to consider the decision relied on by the learned senior counsel and the point to be considered is as to whether P.W.3 has consented to go along with the appellant/accused herein.

As already stated in earlier paragraphs, the distinction between "taking" and allowing a minor to accompany a person is vital.

But, here, it is true P.Ws.1 to 3 have deposed that P.W.3 has accompanied the accused for school, since P.Ws.1 to 3 are hailing from the rustic village that too illiterate people and the accused is none other than the cousin brother of P.W.3 and the mother of the appellant and the mother of P.W.3 are own sisters and he had already married and he was provided with motorcycle.

In the decision in AIR1965 Supreme Court 942- S.Varadarajan versus State of Madras, it has been specifically mentioned that the girl is at the age of 17 and she is a senior college student and she is at the verge of attaining majority.

But, here, in the present case, the victim was studying in 10th standard that too in the village.

13.Furthermore, considering the fact of the present case along with the said decision, in the said decision, the victim has left the house of her guardian at 10.00 a.m.and telephoned to the appellant therein asking him to meet her on a certain road in that area and then went to that road herself and by the time, she got there the appellant had arrived there in his case and she got into it and went along with

the appellant.

But, here, P.W.3 herself stated that on the fateful day, the accused/appellant came and take her school and on the way to school, he himself stated that he do not want to live and he was going to be committed suicide and took her to his house and from Vadasery bus stand, he took her to Trivandrum, Kottayam, Mundakayam, Kumili and Cumbum, where he had sexual intercouRs.voluntarily without her consent.

In such circumstances, I am of the view that the above decision is not applicable to the facts of the present case.

14.It has been held by the Apex Court that the conviction can be based on the sole testimony of the victim, if found to be worthy of credence and reliable and for that no corroboration is required.

It has often been said that oral testimony can be classified into three categories, viz., (I) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable not wholly unreliable.

In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration.

Therefore, this Court has to scrutinize the evidence of P.W.3 with great care and caution and to decide whether her evidence is wholly reliable?.Perusal of the chief and cross examination of P.W.3 would shot that her evidence is natural, cogent and trustworthy and hence, her evidence is wholly reliable.

15.It is true, the alleged occurrence was said to have been taken place on 28.06.2005 and the complaint has been given on 20.07.2005 and the victim and the appellant were secured only on 16.11.2005.

Admittedly, there was no love affair between the victim girl and the appellant.

Because, the appellant is the cousin brother of P.W.3 and hence, the parents allowed him to take P.W.3 to school.

Perusal of P.Ws.1 and 2 would show that that was not the fiRs.occasion for the accused to take P.W.3 to various places.

Perusal of the evidence of P.W.3 would also show that she was taken by the appellant to Hotel, Cinema Theatre and purchased clothes for her.

In such circumstances, I am of the view that the evidence of P.W.3 is wholly reliable.

16., it is pertinent to note that the alleged occurrence was said to have been taken place on 28.06.2005 and they were secured on 16.11.2005 and on that, P.W.3 was pregnancy for 7 weeks and that factum has been corroborated by P.W.13 Dr.Santhi.

Since the appellant was the cousin brother of P.W.3 and he had already married one Kalaiselvi, the parents of P.W.3 had not suspected the character of the appellant.

Since they searched the appellant and P.W.3 and their whereabouts were not known to them, they gave a complaint on 20.07.2005.

Besides, the Apex Court has held that in Hindu family, if a lady has been missing, it is a stigma to that family and they will not easily go to the police station and give a complaint and hence, the delay in giving the complaint is not fatal to the case of prosecution.

17.The other relatives viz., P.Ws.4,5 and 6 turned hostile.

P.W.9 Kalaiselvi, who is the wife of the appellant would depose in her evidence that her husband was having affair with P.W.3.

Perusal of her evidence would show that she is having enmity with her husband and she also has given a complaint against her husband for demand of dowry and hence, her evidence is also not trust worthy and no relevance can be placed on her evidence and that cannot be looked into.

18.P.W.12 Dr.Rajesh, by whom the appellant was physically examined has deposed that the appellant is capable for performing sexual intercourse.

P.W.13 Dr.Shanthi has also deposed in her evidence that P.W.3 was pregnancy for 7 weeks.

P.W.3 also has deposed that when the appellant and P.W.3 were secured, P.W.3 was pregnancy for two months.

19.As already stated, the evidence of P.W.1 is trustworthy and as per the dictum of the Apex Court, it need not require any corroboration.

The evidence of P.W.3 has clearly proved that the appellant, with an intention to kidnap P.W.3, he kidnapped P.W.3, who was below 16 years of age, when he took her school and intimated that he would commit suicide and took her to Trivandrum, Mundakayam, Kottayam, Kumili and stayed there for a period of two months and he took her to Cumbam, where he had sexual intercouRs.and that has been proved by P.W.13 Dr.Sanathi and even though she has given consent for the same, the same would amount to rape and hence, the prosecution has proved the guilt of the the accused for the offence under Sections 363 and 376 of I.P.C.and the trial Court has also considered all the aspects in a proper perspective and come to the correction conclusion and convicted the accused and hence, I do not find any reason to interfere the judgment of conviction and passed against the appellant.

20.In fine, The Criminal Appeal is dismissed judgment of conviction and sentence dated 30.03.2007 passed in S.C.No.101 of 2006 by the Assistant Sessions Judge cum Chief Judicial Magistrate, Nagercoil, is hereby confirmed.

The learned Assistant Sessions Judge cum Chief Judicial Magistrate is directed to take steps to secure the appellant and send him jail to undergo the remaining period of sentence.

The bail bonds executed by appellant, if any, shall stand cancelled.

23.12.2014 At 10.30 a.m.At the time of pronouncement of judgment, the learned senior counsel appearing for the appellant would submit that since the court finds

that the conviction is sustainable, he pleaded leniency in the quantum of sentence imposed by the trial Court.

Hence, the sentence imposed under Section 363 of I.P.C.is hereby confirmed.

In respect of sentence under Section 376 of I.P.C., 10 years imprisonment has been reduced to seven years and the fine amount is hereby confirmed and both the sentences are ordered to run concurrently and the period already undergone shall be give set off.

23.12.2014 Index:Yes Internet:Yes arul To 1.The Inspector of Police, Kanyakumari Police Station 2.The Asitant Sessions Judge cum Chief Judicial Magistrate, Nagercoil.

3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai.

R.MALA,J.

arul Pre-Delivery judgment made in Criminal Appeal No.287 of 2007 23.12.2014

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