

IQBAL
v.
STATE OF KERALA

OCTOBER 24, 2007

[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

Penal Code, 1860—ss. 366A, 375 and 376—Kidnapping and Rape—Of girl of less than 14 years of age—With her consent—Conviction by courts below—On appeal, held: Accused liable to be convicted u/s 376—Intercourse with woman of less than 16 years age, even if with consent, would amount to rape—However, he is liable to be acquitted u/s 366 A—Essential ingredient for attracting s. 366A not established.

Appellant-accused with a co-accused was charged u/ss 366A and 376 r/w s. 34 IPC. Prosecution case was that both the accused in furtherance of their common intention of kidnapping, procured a girl of less than 14 years of age (PW 2) and thereafter appellant-accused committed rape on her. In trial, accused tried to prove that she was in love with appellant-accused; that she went with the accused on her own will; and that intercourse was committed with consent. Trial court convicted both the accused under the offences charged. High court confirmed conviction of the appellant-accused, and acquitted the co-accused of all the charges. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1. Clause 'sixthly' of Section 375 IPC clearly stipulates that sexual intercourse with a woman with her or without her consent when she is under 16 years of age, amounts to rape. The evidence on record clearly establishes that the victim was less than 16 years of age and, therefore, the conviction for offence punishable under Section 376 IPC cannot be faulted. [Para 8] [659-H; 660-A]

A **2. In order to attract Section 366A IPC, essential ingredients are (1) that the accused induced a girl; (2) that the person induced was a girl under the age of eighteen years; (3) that the accused has induced her with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse; (4) such**
B **intercourse must be with a person other than the accused; (5) that the inducement caused the girl to go from any place or to do any act. In the instant case, the admitted case of the prosecution is that girl had left in the company of the accused of her own will and that she was not forced to sexual intercourse with any person other than**
C **the accused. The admitted case is that she had sexual intercourse with the accused for which, considering her age, conviction under Section 376 IPC has been maintained. Since the essential ingredient that the intercourse must be with a person other than the accused has not been established, Section 366A has no application.**

D **[Paras 9 and 10] [660-B-D]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1463 of 2007.

E From the Judgment and final Order dated 27.09.2006 of the High Court of Kerala at Ernakulam in Crl. A. No. 708 of 1998.

U.U. Lalit, M. Gireesh Kumar and Vijay Kumar for the Appellant.

The Judgment of the Court was delivered by

F **DR. ARIJIT PASAYAT, J. 1. Leave granted.**

G 2. The challenge in this appeal is to the judgment of the learned Single Judge of Kerala High Court dismissing the appeal filed by the appellant, while directing the acquittal of the co-accused. Both the accused were convicted by the learned IInd Additional Assistant Sessions Judge, Thrissur for offences punishable under Sections 366A and 376 read with Section 34 of the Indian Penal Code, 1860 (in short 'IPC').

H 3. Custodial sentence of two years and fine of Rs.10,000/- with default stipulation, sentences of three years and fine of Rs.3,000/- were with default stipulation for the offences punishable under Sections 376 and 366A read with Section 34 IPC respectively.

4. The background facts, as projected by prosecution in nutshell are as follows: A

On 18.10.1993 at 7.00 a.m. both the accused, in furtherance of their common intention of kidnapping, induced and procured a minor teenage girl (P.W.2), who had not attained the age of 14 and seduced her to have illicit intercourse with the first accused and first accused took her to Mahadevapuram in Coimbatore District and committed rape in the house of CW8 at Mahadevapuram. Since PW2 did not come back to her house, after making necessary enquiries, PW1, father of PW2, went to Cheruthuruthy Police Station and lodged first information statement and originally man-missing case was registered as Crime No.96 of 1993. The girl was not found out. Finally, a criminal M.C. was filed before the High Court and on the basis of the direction of the High Court, the Circle Inspector of Police found out PW2 and subsequently arrested the accused, continued the investigation and charge was laid. The girl was produced before the Judicial First Class Magistrate's Court, Wadakkancherry on 30.11.1993 and it was recorded that she had stated to the Magistrate that she was studying in ninth standard and she was staying with her father. She was taken from the tuition center while she was going to Akshaya Tuition Centre, Ceruthuruthy. She stated that she went with Iqbal, appellant and first accused, on her own will to Coimbatore on 18.10.1993 from Akshaya Tuition Centre. They were friends. Friend of first accused, namely, Sasi was also with them. They changed the vehicles and finally second accused, Sasi did not accompany them till Coimbatore. She also stated that she had intercourse with Iqbal, first accused, at Coimbatore and not with any other persons, that she was aged thirteen years and six months at that time and she was with Iqbal till she was produced before the Court. Statement under Section 161 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') given by her to the police was also more or less on the same lines. But, before the Court, she deposed in examination-in-Chief that she and her friend PW4 went to the tuition center and an autorikshaw came there. From the autorikshaw, A2 Sasi and A1 Iqbal, got down and A1 told her to get into the autorikshaw to tell something and on his persuasion she got into the autorikshaw and both of them took her to a place called Kolappully. Thereafter, A2 brought a car and they went upto Palakkad and A2 Sasi left. From there, they went B
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A to Coimbatore by bus. They took food and A1 took her to a hotel and forced her for intercourse and thereafter they went to cinema etc. Thereafter, they came to the house of CW8 and they were staying in that house. During cross-examination main endeavour of the accused was to show that she came with him on her own will. Letters written by PW2, B Exts. D1 to D3, were also produced and marked to show that PW2 and A1 were in love and that was not allowed by the parents. Further, in cross examination, he asked specifically whether she agreed for intercourse willingly to show that intercourse was committed with consent. Evidence of PW4 also supports the evidence of PW2. Evidence of PWs 8 and 9 C doctors show that she had intercourse. Evidence shows that she went with her own will and intercourse also was done voluntarily and not by force. It is clear from the evidence that they were in love and wanted to marry, but parents of PW2 objected. Hence, they together eloped and there is no kidnapping. School certificate as well as the deposition of father of D PW2 shows that she was aged only 13 years and nine months at the time of incident. Hence, consent cannot be taken as valid.

5. Placing reliance on evidence of PW2, who is the victim, the learned Trial Court found both the accused persons guilty and sentenced them as aforesaid. In appeal, the High Court by the impugned judgment, noted E that the charges have been established so far as the appellant is concerned, while directing the co-acquittal of the co-accused.

6. In support of the appeal, learned counsel for the appellant submitted that the evidence of the victim PW2 clearly shows that she was in love with the appellant and had gone with him on her own will. Letters F (Ex. D1 to D3) clearly established this fact. It was further submitted that the evidence of PW2 indicated that though victim and appellant were in love, the parents objected to it. It is also pointed out that in the cross-examination she had admitted that she had sexual intercourse with the G appellant on her own free will and consent and there was no force used. The High Court, however, found that girl victim was aged about 13 years and 9 months and, therefore, the consent was of no consequence so far as allegation of rape is concerned. The conviction as recorded by the Trial Court was affirmed. However, on special circumstances which had H weighed, the High Court imposed the sentence below the prescribed

minimum, reduced the sentence to three years rigorous imprisonment and fine of Rs.10,000/- in respect of the offence punishable under Section 376 IPC. However, his conviction and sentence relating to Section 366A was affirmed. The sentences imposed were directed to run concurrently. As noted above, the stand of the appellant was that there was no rape involved and in any view, Section 366A has no application. A
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7. So far as the legality of conviction for offence punishable under Section 376 IPC is concerned, Section 375 IPC needs to be noted. The same reads as follows:

375. Rape.- A man is said to commit "rape" who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six exceptions:- C

First – Against her will.

Secondly- Without her consent. D

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

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

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 the nature and consequences of that to which she gives consent. F

Sixthly – with or without her consent, when she is under sixteen years of age. “ G

8. Clause 'sixthly' clearly stipulates that sexual intercourse with a woman with her or without her consent when she is under 16 years of age, amounts to rape. The evidence on record clearly establishes that the H

A victim was less than 16 years of age and, therefore, the conviction for offences punishable under Section 376 IPC cannot be faulted.

B 9. The residual question is of applicability of Section 366A IPC. In order to attract Section 366A IPC, essential ingredients are (1) that the accused induced a girl; (2) that the person induced was a girl under the age of eighteen years; (3) that the accused has induced her with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse; (4) such intercourse must be with a person other than the accused; (5) that the inducement caused the girl to go from any place or to do any act.

C 10. In the instant case, the admitted case of the prosecution is that girl had left in the company of the accused of her own will and that she was not forced to sexual intercourse with any person other than the accused. The admitted case is that she had sexual intercourse with the accused for which, considering her age, conviction under Section 376 IPC has been maintained. Since the essential ingredient that the intercourse must be with a person other than the accused has not been established, Section 366A has no application.

D 11. In the result, the conviction for offence punishable under Section 366A IPC is set aside while the conviction and sentence imposed in respect of offence punishable under Section 376 IPC is maintained.

E 12. The appeal is allowed to the aforesaid extent.

F K.K.T.

Appeal Partly allowed.