

BAIL SLIP

Azhagunathan, Appellant herein/accused in SC.No.37/06 on the file of the Asst.Sessions Judge, Panruti, was released on bail by the order of this Court dt.19.11.2008 and made in MP.No.2/08 pending in CrI.A.No.782/07 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.03.2015

CORAM:

THE HONOURABLE MS. JUSTICE R. MALA

Criminal Appeal No.782 of 2007

Judgment reserved on: 10.03.2015

Judgment pronounced on:13.03.2015

Azhagunathan .. Appellant/Accused

vs.

State Rep. By
The Inspector of Police
Panruti Police station
Panruti, Cuddalore District.
Cr.No.755 of 2005.

.. Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374 (2) of Cr.P.C., against the judgment of conviction and sentence dated 25.07.2007, made in S.C.No.37 of 2006 on the file of the learned Assistant Sessions Judge, Panruti.

For Appellant : Mr.S.Saravanakumar

For Respondent : Mr.V.Arul

Government Advocate (crl.side)

J U D G M E N T

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This Criminal Appeal arises out of the judgment of conviction and sentence dated 25.07.2007, made in S.C.No.37 of 2006 on the file of the learned Assistant Sessions Judge, Panruti, whereby the accused/the appellant herein was convicted and sentenced as follows:

offence under Section	Sentence
376 IPC	To undergo ten years rigorous imprisonment and to pay a fine of Rs.1,000/- in default in payment to undergo one year rigorous imprisonment.
394 IPC	To undergo ten years rigorous imprisonment and to pay a fine of Rs.1,000/- in default in payment to undergo one year rigorous imprisonment.
The sentence are ordered to be run concurrently.	

2.The case of the prosecution based on the prosecution witnesses is as follows:

(i)On the side of the prosecution, P.W.1 to P.W.14 were examined, Exs.P1 to P16 and M.O.1 to M.O.10 were marked.

(ii)P.W.1/Thavamani, the victim girl is a resident of Thiruvathigai Village and she is a Coolie. On 29.07.2005 at about 11.00 a.m., she took the bullocks to her land for grazing and she also collected grass for the animals. At about 4.00 p.m., she called her relative P.W.2/Chinnathambi to help her to lift the grass bundle. Since, P.W.2 was 80 years old, he sent the appellant/accused who accompanied him. At that time, the appellant/accused strangled her, slapped on her face and caused injuries with nails, pushed her down and committed rape against her will and consent. P.W.1 became unconscious and the appellant/accused left the place after committing the robbery of her jewels. P.W.1's husband P.W.3/Murugan returned home after his regular work and came in search of his wife/P.W.1. P.W.3 found his wife unconscious in the land. Then, he took his wife and she informed about the rape committed by the appellant/accused. P.W.3 informed his brother P.W.4/Ramalingam and took P.W.1 to Panruti Government Hospital, where P.W.9/Dr.Jayachandran, Panruti Government Hospital examined P.W.1 and issued Accident Register Copy/Ex.P.8

(ii)P.W.14/Venkatachalapathy, Inspector of Police, Panruti Police Station received a message from Panruti Government Hospital and he went there and received the complaint/Ex.P.1 from P.W.1. Then, P.W.14 returned to the Police Station and registered a case against the accused in Cr.No.755 of 2005 under Section 376 and 379 IPC and prepared the printed FIR/Ex.P.15. Again he went to the Panruti Government Hospital and recorded the statement of the victim girl, P.W.1 and recovered her clothes M.O.1 to M.O.3 under seizure mahazar/Ex.P.2 in the presence of witnesses, P.W.5/Balaraman and P.W.6/Murugan. He examined the said witnesses and recorded their statements. On 31.07.2005, P.W.14 went to the place of occurrence and prepared the observation mahazar/Ex.P.3 and drew rough sketch/Ex.P.16 in the presence of witnesses, P.W.7/Chandrasekar and one Parasuraman. Then, P.W.14 seized the broken bangles of P.W.1, which is marked as M.O.4, from the place of occurrence under seizure mahazar/Ex.P.4 in the presence of above said witnesses. Then, P.W.14

submitted a requisition to the learned Judicial Magistrate to send P.W.1/the victim girl for medical examination.

(iii) P.W.11/Dr.Senthamizhselvi, examined the victim girl/P.W.1 and found that the hymen got ruptured. She further submitted that no evidence of spermatazoa seen, either motile or non-motile. She issued the Accident Register Copy/Ex.P.10. Then P.W.11 referred the victim girl/P.W.1 to Radiology Department to find out her age.

(iv) On 30.07.2005, P.W.12/Dr.Natarajan, Radiologist, examined the victim and Ex.P.12/x-rays were taken and Ex.P.11 certificate was issued stating that the age of the victim girl might be between 20 and 40.

(v) On 31.07.2005, P.W.14/Venkatachalapathy, Inspector of Police, Panruti Police Station arrested the appellant/accused at Thiruvathigai Ayyanar Koil and recorded his confession in the presence of P.W.8/Velayutham and other witnesses. The admissible portion of confession is marked as Ex.P.6. On the basis of confession of the accused, M.O.5 to M.O.7, Gold jewels of P.W.1 was recovered under seizure mahazar/Ex.P.5 from the place identified by the accused. Thereafter, the appellant/accused was brought to the police station at about 3.30 p.m., and his clothes/M.O.8 to M.O.10 were recovered under seizure mahazar/Ex.P.7 in the presence of above said witnesses. Then, he submitted a requisition to send the accused/appellant herein for medical examination and also submitted a requisition on 26.08.2005 to send the seized materials for chemical analysis.

(vi) P.W.13/Dr.Siva Subramanian, examined the accused on 02.08.2005 and issued Ex.P.14 Medical Report stating the accused would be about 29 years of age and he is not an impotent.

(vii) On 13.09.2005 P.W.10/Rajalakshmi examined the seized materials as per the requisition sent by the learned Judicial Magistrate, Panruti and issued a Report/Ex.P.9 Medical Report.

(viii) P.W.14 examined all the witnesses and recorded their statements. After completing the investigation, filed the charge sheet against the accused/appellant herein under Sections 376 and 394 IPC.

3.The Trial Court placed the incriminating evidence before the accused under Section 313 of Cr.P.C. and the accused denied the same in toto. On the side of the defence, no oral evidence was examined and no documentary evidence was marked. After considering the oral and documentary evidence, the trial Court convicted the accused/appellant herein for the offence under Sections 376 and 394 IPC and sentenced him as stated above. Aggrieved over the same, the first accused/appellant has preferred this appeal.

4.Challenging the conviction and sentence passed by the trial Court, the learned counsel appearing for the appellant/accused raised the following points, namely:

(i)The evidence of P.W.1 is not an admissible evidence.

(ii)There is contradiction between ocular evidence of P.W.1 and P.W.11.

(iii)As per the evidence of P.W.1, the appellant/accused was arrested on 29.07.2005. So, the date of arrest as mentioned by P.W.14 on 31.07.2005 is false and hence, the recovery is also false.

(iv)The non-examination Chandrasekar and Parasuraman, who are alleged to be the eye witnesses is fatal to the case of the prosecution.

(v)The scene of occurrence mentioned in Ex.P.8 and also the evidence of P.W.1 is contradictory with each other and that has not been considered by the Trial Court.

(vi)He relied upon the decision reported in 2010 (12) SCC 115 (Abbas Ahmad Choudhary vs. State of Assam) and submits that even in the case under Section 376 IPC, the prosecution ought to have prove the guilt of the accused beyond reasonable doubt.

(vii)Hence, he prayed for acquittal.

5.Resisting the same, the learned Government Advocate (Crl. Side) would submit that the evidence of P.W.14/Venkatachalapathy, Inspector of Police, Panruti Police Station has been corroborated by P.W.8/Velayutham. He further submitted that there is no evidence for giving false evidence against the appellant/accused and the evidence of prosecutrix itself is sufficient to convict the accused. He would further submit that the Trial Court has considered all the aspects in proper perspective and came to the correct conclusion. Hence, he prayed for dismissal of the appeal.

6.Considered the rival submissions made on both sides and perused the typed set of papers.

7.The case of the prosecution is that on 29.07.2005 at about 11.00 a.m., P.W.1, who is the wife of P.W.3/Murugan, went to the land for grazing the bullocks and also to collect grass for cattles. At about 4.00 p.m., when she collected the grass, she called her relative P.W.2/Chinnathambi to help her to lift the grass bundle. Since, he was 80 years old, P.W.2 sent the appellant/accused to help P.W.1 for lifting the grass bundle. At that time, the alleged occurrence said to have taken place. The appellant/accused raped P.W.1 and since she became unconscious the appellant taken her jewels, namely, nose screw, earring and also Thali i.e. M.O.,5 to M.O.7. When her husband, P.W.3 came there at about 4.30 p.m., he witnessed that P.W.1 was unconscious and he has taken steps to restore her conscious and called his brother P.W.4/Ramalingam. Then, they took P.W.1 to hospital, where P.W.9/Dr.P.Jayachandran treated her.

It is well settled dictum of the Hon'ble Apex Court that in the cases like rape, delay in preferring complaint is not fatal. Likewise, the corroboration of evidence of victim is not mandatory

provided that the evidence of prosecutrix (victim) inspire confidence. It is true that in the case like rape no eye witness will be possible.

8.The learned counsel appearing for the appellant also pointed out the evidence of P.W.14. P.W.14 has deposed that Chandrasekar and Parasuraman are the eye witnesses for the alleged occurrence and their non-examination is fatal to the case of the prosecution. But P.W.1, who is the victim, has deposed that there was no eye witness for the alleged occurrence. In such circumstances, I am of the view that there is no eye witness for the alleged offence of rape. Hence, merely because P.W.14 has deposed that one Chandrasekar and Parasuraman are the eye witnesses for the alleged rape cannot be taken into consideration. Therefore, the arguments advanced by the learned counsel appearing for the appellant that the Chandrasekar and Parasuraman are the eye witnesses and their non-examination is fatal to the case of the prosecution does not merit acceptance.

9.Now, this Court has to consider the evidence of P.W.1. P.W.1 is the victim girl and she is a married woman. Considering her chief and cross examination along with other materials, it is pertinent to note that as soon as P.W.9/Dr.Jayachandran seen this P.W.1, he has deposed that P.W.1 alleged to have physically attacked at 5.00 p.m. with hand near Thiruvathigai Gate on 29.07.2005 by a known person and he has mentioned that there is blent injuries in chest.

10.The learned counsel appearing for the appellant would submit that at first P.W.1 was taken to the hospital where she has stated that she was assaulted but in the complaint which was given on the same day, she has stated that she was subjected to rape. So, her evidence is not trustworthy. He further submitted that in Ex.P.9, the scene of occurrence has been mentioned as near Thiruvathigai Gate, whereas the case of the prosecution is that she was subjected to rape in the field. So, there is a contradiction between evidence of P.W.9 and P.W.1. Hence, her evidence cannot be looked into.

11.P.W.2/Chinnathambi, in his evidence, has deposed that after inspecting the land he came near the land and the accused also accompanied him after irrigating his land, at the time when both of them were proceeding, P.W.1 requested P.W.2 to lift the grass bundle. Since, he was unable to do the same, he sent the appellant/accused to help her. But, after P.W.3 intimated the fact that his wife/P.W.1 was subjected to rape, he came to know about the incident. But on perusal of evidence of P.W.1, P.W.3 and P.W.4, no reason has been assigned for discarding their evidence and nothing has been posed as to why he was falsely implicated in this case. P.W.1, in her chief itself has stated that because of shyness, she has not mentioned that she was subjected to rape. It is appropriate to consider the judgment of the Trial Court, wherein it was rightly held that non-disclosing about the rape at earlier point of time is not fatal to

the case of the prosecution. He also relied upon the judgment reported in 1995 SCC (Cr1.) 977 (Karnel Singh vs. State of M.P), wherein it was stated that Indian Women are shy and hesitant to complain of such assaults and if the prosecutrix happens to be a married woman, she will not do anything without informing her husband. So the delay in preferring a complaint is not fatal. It was also stated that the victim girl/P.W.1 felt shy in telling the real information to the Doctor within two hours from the time of occurrence and on that basis, the Trial Court has held that the evidence of P.W.1 is reliable.

12. That finding is not correct because in Ex.P.8 itself it was mentioned that P.W.1 has brought by her husband, P.W.3 to the hospital. P.W.3 has stated that as soon as he went to the place of occurrence, he witnessed that his wife/P.W.1 was unconscious. So, he taken steps to restore her conscious and after that, she intimated that she was subjected to rape. So, at the time of giving information she ought to have mentioned that she was subjected to rape. Further that factum was corroborated by P.W.11 by stating that there is no evidence of rape. In such circumstances, I am of the view that the evidence of P.W.1 itself is not wholly reliable. So, the factum of rape has not been proved by the prosecution beyond all reasonable doubt.

13. The learned counsel appearing for the appellant would also relied upon the decision reported in 2010 (12) SCC 115 (Abbas Ahmad Choudhary vs. State of Assam), wherein it was held that in the cases like rape, the statement of prosecutrix must be given primary consideration, but, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape. It is also appropriate to incorporate paragraph No.11 of the judgment, which reads as follows:

"11. We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully."

14. Considering the above citation along with the evidence of P.W.1, P.W.9 and P.W.11 and also Ex.P.8 and Ex.P.10, I am of the view that the prosecution has not proved that the accused is guilt under Section 376 IPC. Hence, the judgment of conviction and sentence passed by the Trial Court against the appellant/accused under Section 376 IPC fails.

15. Now this Court has to decide whether the conviction and sentence passed against the accused under Section 394 IPC is sustainable?

16.The learned counsel appearing for the appellant has taken me to the evidence of P.W.1, wherein it was stated that on 29.07.2005 itself the accused was in Police Station and P.W.3 also corroborated the same. But whereas P.W.14 alone has deposed that the appellant/accused was arrested on 31.07.2005 and M.O.5 to M.O.7 were seized under Ex.P.5 and the admissible portion of the confession of the accused has been marked as Ex.P.6. So, the evidence of P.W.1, P.W.3 and P.W.4 has revealed that the accused was in the Police Station on 29.07.2005 itself. So, the arrest of the accused on 31.07.2005 is unacceptable. Furthermore it is pertinent to note that it is the case of the prosecution that complaint has been given on 29.07.2005 at 19.45 hours and in that, the weight of the Thali has been over written. In pursuance to that, FIR has been registered and in that also, the weight of the Thali has been over written in Column Nos.9 and 12. In the seizure mahazar also, the weight of the Thali has been over written which was alleged to be came into existence on 31.07.2005 at 2.15 p.m. But whereas FIR has reached the Court on 30.07.2005 at 1.30 p.m. Considering the correction in Ex.P.1/complaint, Ex.P.5/Seizure Mahazar of M.O.5 to M.O.78 and Ex.P.15/FIR would show that all the documents came into existence on the same day, which will probablises the argument advanced by the learned counsel appearing for the appellant that the accused was in Police Station on 29.07.2005 itself. Hence, the prosecution has miserably failed to prove that the accused was arrested and the material objects were seized from the accused on 31.07.2005. It is well settled dictum of the Hon'ble Apex Court that it is the duty of the prosecution to prove that the accused is guilty for the charges levelled against him beyond reasonable doubt, but accused may keep silent. Hence, I am of the view that the Trial Court has not considered all the aspects in proper perspective and so, the conviction and sentence passed against the accused under Section 394 IPC is unsustainable.

17.As stated supra, the prosecution has not proved that the accused is guilty under Sections 376 and 394 IPC beyond all reasonable doubt and the benefit of doubt is given in favour of the appellant and he was acquitted from the charges levelled against him. Hence, the judgment of conviction and sentence passed by the Trial Court under Sections 376 and 394 IPC is hereby set aside.

18.In fine,

(i)The Criminal Appeal is Allowed.

(ii)Judgment of conviction and sentence passed by the learned Assistant Sessions Judge, Panruti in S.C.No.37 of 2006 dated 25.07.2007 is hereby set aside.

(iii)The appellant is acquitted from the charges levelled against him.

(iv)The fine amount paid by the accused is ordered to be refunded to him.

(v)Bail bond, if any executed by the appellant/accused shall stand cancelled.

Sd/-

Assistant Registrar

Dated:18.3.15

True Copy

Sub Assistant Registrar

To

1.The Assistant Sessions Judge,
Panruti.

2.do thro' The District Sessions Judge, Cuddalore.

3.The Inspector of Police
Panruti Police station
Panruti, Cuddalore District.

4.The Public Prosecutor
High Court, Madras.

5.The Superintendent,
Central Prison,Puzhal, Chennai.

+1 cc to Mr.S.Saravana Kumar, Advocate,SR.14373.

ksj(co)

krd 18/3

सत्यमेव जयते

Pre-delivery judgment made in

Criminal Appeal No.782 of 2007

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