

**BAIL SLIP**

The Appellant/Sole Accused Viz Nambirajan, S/o, Shanmugavel, male, Was directed to be released on bail as per order this court dated 12.04.2012 and made in MP(MD)NO.1/2012 in CrI.A.(MD)No.325/2011

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 23.07.2015

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
CRIMINAL APPEAL (MD).No.325 of 2011

Nambirajan : Appellant/ sole accused

Vs.

State through
The Inspector of Police,
Nanguneri All Women Police Station,
Nanguneri
Tirunelveli District.
Crime No.4 of 2008

: Respondent/Complainant

PRAYER: Appeal is filed under Section 374(2) of the Code of Criminal Procedure against the judgment dated 11.10.2011 made in S.C.No.235 of 2009 on the file of the learned Sessions Judge (Mahila Court) Tirunelveli.

For Appellant : Mr.S.Palanivelayutham

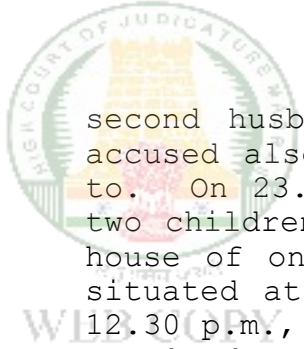
For Respondent : Mr.C.Mayilvahana Rajendran
Addl.Public Prosecutor

JUDGMENT

The appellant is the sole accused in S.C.No.235 of 2009 on the file of the learned Additional Sessions Judge, Mahila Court, Tirunelveli. He stood charged for offence under Sections 450, 376(1) IPC and Section 4 (B) of the Tamil Nadu Prohibition of Harassment of Women Act, 2002. By judgment dated 11.10.2011, the trial Court acquitted the appellant from the charge under Section 4(B) of the Tamil Nadu Prohibition of Harassment of Women Act, 2002 and had convicted him under Sections 450 and 376(i) IPC. The trial Court sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for one year for the offence under Section 450 IPC and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for one year for the offence under Section 376(1) IPC. Challenging the same, the appellant is before this Court with this appeal.

<https://hcservices.ecourts.gov.in/hcservices/> 2. The case of the prosecution in brief is as follows:

P.W.2 - Mrs.Punitha is the mother of the victim girl. The victim girl was born to her through her first husband. P.W.1 is her



second husband. Through P.W.1, P.W.2 has got two other children. The accused also belongs to the same village, to which, P.Ws.1 and 2 belong to. On 23.05.2008, P.Ws.1 and 2 had gone for fruit business. The other two children were taken by them. The victim was, therefore, left in the house of one Mrs.Lakshmi (P.W.3) for safety purpose. P.W.3's house is situated at a small distance from the house of P.Ws.1 and 2. At about 12.30 p.m., P.Ws.1 and 2 had returned to the village. They went straight to the house of P.W.3. But the victim girl was not there. When they enquired, P.W.3 stated that the victim girl had left for their house. Therefore, P.Ws.1 and 2 rushed to their house. When they reached the house, they heard the alarm raised by the victim girl. When they quickly rushed into the house, they found the victim girl lying with her dress materials in disarray. On seeing them, the accused scaled down the wall and fled away from the scene of occurrence.

2.1. The victim girl, by birth, is mentally retarded. She cannot speak also. Therefore, she was not in a position to say anything as to what had happened to her. She only murmured two words 'Anna, Anna' that means 'brother, brother'. From the manner, in which, the victim girl was lying half naked, P.Ws.1 and 2 believed that she had been raped by the accused. Thereafter, P.Ws.1 and 2 with the assistance of an Advocate, who is their relative, went to the office of the Superintendent of Police to make a complaint. But they could not meet the Superintendent of Police. Therefore, they went to All Women Police Station at Nanguneri and presented a complaint.

2.2. P.W.17 was the then Sub Inspector of Police attached to All Women Police Station at Nanguneri. According to her, on 27.05.2008, P.W.1 appeared and presented a written complaint (Ex.P1) at 12 noon. She registered a case in Crime No.4 of 2008 under Section 376 IPC. Ex.P1 is the complaint and Ex.P20 is the FIR. She forwarded both the documents to Court and took up the case for investigation. She immediately proceeded to the place of occurrence and prepared an observation mahazar and a rough sketch showing the place of occurrence. Then, she examined P.Ws.1 to 3 and few more witnesses and recorded their statements. According to her, since the victim girl was not in a position to speak, as she is mentally retarded, she could not record her statement. On the same day at 5.00 p.m., according to her, she arrested the accused at V.K.Nagar, Mangammal Road. Then, she forwarded the victim girl as well as the accused to the Doctor for medical examination.

2.3. P.W.7 - Dr.Esther Kamala Rani examined the victim girl on 29.05.2008 at 4.40 p.m. Her mother told her that the victim girl had been raped by a known person. When she examined, she found no sign of rape at all. The hymen was not intact and the vaginal cavity freely allowed two fingers to move. There were no seminal stains found on the body of the victim girl. Therefore, she gave opinion that there was no sign of recent intercourse. But, however, she opined that the victim girl had undergone sexual intercourse with somebody, which is evident from the absence of hymen. Ex.P5 is the Accident Register and Ex.P6 is the wound Certificate issued by her.

2.4. P.W.8 - Dr.Nellaiappan examined the victim girl to give opinion about her age. On examination, he gave opinion that the victim girl had completed 16 years of age, but not completed 18 years of age. Ex.P8 is the Certificate issued by him.

2.5. P.W.9 - Dr.Gunasekara Rajan examined the accused on 30.05.2008 in order to ascertain his age. According to the examination held by him revealed that the accused had completed 21 years of age but not completed 25 years of age. Ex.P9 is the Certificate issued by him.

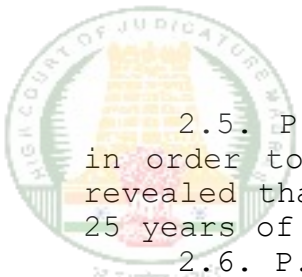
2.6. P.W.10 - Dr.Selvamurugan, examined the accused on 29.05.2008 and gave opinion that he was capable of performing sexual intercourse with a woman. Ex.P12 is the Certificate issued by him. P.W.11 - Dr.Gajendra Varman examined the smears taken from the victim girl. On conducting the chemical examination on the smears, P.W.11 opined that there was neither spermatozoa nor semen found in the said smears taken from the victim girl. The dress materials worn by the victim girl at the time of occurrence were seized by the police and they were sent for chemical examination.

2.7. P.W.12 is the Scientific Assistant at the Regional Forensic Sciences Lab conducted examination on these five dress materials, namely, nighty, petticoat, panty, shirt and chimmis. During examination, she found that there was seminal stains on the petticoat alone. Ex.P16 is the Certificate issued by her. On completing the investigation, charge sheet was laid in the case against the accused.

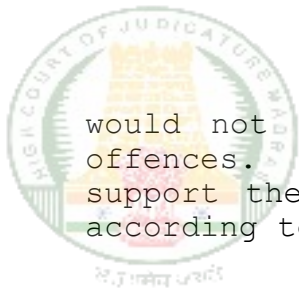
2.8. Based on the above materials, the trial Court framed charges and the accused denied the same. In order to prove the case of the prosecution, the prosecution had examined as many as 18 witnesses and marked as many as 21 documents besides 7 material objects. Out of the said witnesses, P.Ws.1 and 2 have spoken to the fact that when they reached the house, they found the accused scaling down the wall and the victim girl half naked with her dress in disarray. P.W.3 - Mrs.Lakshmi has spoken to the fact that on the crucial date, the victim girl was at her house, but later, left her house. P.W.4 has turned hostile and he has not supported the case of the prosecution in any manner. Similarly, P.W.5 also has turned hostile. P.W.6 has spoken about the observation mahazar and rough sketch and the recoveries made from the victim girl. P.Ws.7,8,9,10 and 11 are the Doctors, who have examined either the victim girl or the accused as narrated already. P.W.12 has spoken that seminal stains were found only in the petticoat. P.W.17 has spoken about the investigation done and P.W.18 has spoken about the final report filed by her. When the above incriminating materials were put to the accused, he denied the same as false. However, he did not choose to examine any witnesses on his side nor marked any documents. Having considered all the above, the trial Court convicted the accused under Section 450 and 376(i) IPC and accordingly punished him. That is how, the appellant is before this Court with this appeal.

3. I have heard the learned counsel for the appellant and the learned Additional Public Prosecutor for the respondent State and I have also perused the records carefully.

4. The learned counsel for the appellant would submit that the FIR in this case is hit by Section 162 of Cr.P.C., as the original complaint and investigation made by P.W.1 had been suppressed. He would further submit that absolutely there is no evidence to prove the charge of rape. He would also submit that the circumstances relied on by the prosecution



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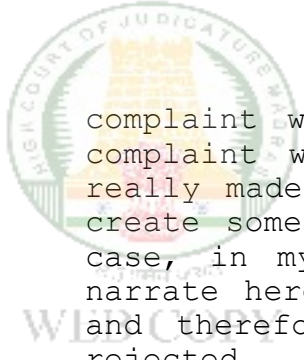
would not clinchingly go to prove that the accused had committed the offences. He would also submit that the medical evidence also does not support the case of the prosecution in any manner. For these reasons, according to the learned counsel, the accused is entitled for acquittal.

5. But the learned Additional Public Prosecutor would vehemently oppose this appeal. According to him, the victim is a mentally retarded girl and therefore, she could not be examined. He would further submit that she was not able to speak, as she was dumb. Therefore, according to him, the prosecution has relied on the evidence of P.Ws.1 and 2, who have vividly spoken about the entire occurrence. According to these witnesses, when they reached their house, the accused was found scaling down the wall and the victim girl was crying for help and she was half naked. He would further submit that the chemical analysis report had stated that there were seminal stains on the petticoat of the victim girl. The conduct of the accused in scaling down, according to the learned Additional Public Prosecutor, would also go to prove his guilty mind. Having regard to all the above, according to the learned Additional Public Prosecutor, the trial Court has convicted him rightly under both the charges, which does not require any interference at the hands of this Court.

6. I have considered the above submissions.

7. The alleged occurrence in this case was on 23.05.2008. According to P.W.2, immediately after the occurrence, she along with P.W.1 had gone to the office of the Superintendent of Police with the help of an Advocate. But they could not meet the Superintendent of Police and therefore, they went to the Nanguneri All Women Police Station and presented the complaint on the same day. It is her further evidence during cross examination that on receiving the complaint, the police went in search of the accused and brought him to the police station, kept him in the police station for four days, during which, enquiry was held and finally, after four days, a case was registered. But according to P.W.17, P.Ws.1 and 2 came to the police station for the first time only on 27.05.2008 and gave a written complaint. This contradiction has not been explained away by the prosecution at all. Had it been true that a complaint was really given by P.W.1 on 23.05.2008 itself, then, the present complaint, which was allegedly made on 27.05.2008 is hit by Section 162 Cr.P.C. and the same cannot be used for corroborating the evidence of P.W.1, because the earlier information said to have been given to the police on 23.05.2008 has been suppressed. It can be contended that the accused is entitled for acquittal in normal course, when the Court finds that the original information has been suppressed thereby creating doubt in the case of the prosecution. It is only a rule of prudence. It is not the universal law that as and when the original complaint has been suppressed, that the entire case of the prosecution should be rejected.

8. In my considered view, on proof of the suppression of the earliest information, the case of the prosecution may be doubted. If the said doubt arising out of the said suppression is cleared by the prosecution, the suppression may not be any impediment for the Court to proceed further to appreciate the other evidences and to render a finding. In the instant case, though it is stated during cross examination of P.W.2 that a



complaint was made on 23.05.2008 itself, but according to P.W.17, the complaint was made only on 27.05.2008, assuming that a complaint was really made on 23.05.2008, in my considered opinion, it may go only to create some doubt in the case of the prosecution. But, in the instant case, in my considered opinion, for the reasons, which I am going to narrate hereinafter, the said doubt has been cleared by the prosecution and therefore on this score, the case of the prosecution cannot be rejected.

9. According to P.Ws.1 and 2, when they reached the house, the victim girl was crying for help and at the same time, the accused was found fleeing away from the scene of occurrence by scaling down the wall. The conduct of the accused in scaling down the wall and escaping from the scene of occurrence would clearly go to prove his guilty mind. This would go to prove that he had only trespassed into the house with a view to commit some crime. That crime in the instant case must be relating to the victim girl. This is evident from the fact that the victim girl was crying for help. These circumstances would go to prove that the accused had done some harm to the victim girl, who is mentally retarded.

10. Now, the next question is what was the harm that was caused by the accused to the victim girl making out an offence. According to the prosecution case, the harm caused to the victim girl by the accused was rape. But I find that there is no clinching evidence to prove the same. P.Ws.1 and 2 had not seen the accused actually raping the victim girl. They only found him scaling down the wall. The victim girl is not in a position to say anything about the occurrence. Therefore, whether the accused had raped her or not is to be ascertained only from the circumstances available. One of the circumstances is the medical evidence. The Doctor, who examined the victim girl, has stated that there was no sign of recent intercourse at all. But she found that the hymen was not intact. But, from and out of that it cannot be said that at the crucial time of occurrence, she was subjected to sexual intercourse. The vaginal smear and other smears had been taken from the body of the victim girl contained no seminal stains. This is the opinion given by the Forensic expert. There were no external injuries found on the victim girl. In the light of these scientific evidences, more particularly, the evidence of the Doctor, who examined the victim girl, it cannot be safely held that she had been raped by the accused.

11. If no rape, then, what was the harm caused to the victim is to be ascertained. Could it be said that the harm caused was an attempt to commit rape? In my considered view, that is also not possible, because there is no evidence that the accused did any harm sexually to satisfy the requirements of Section 375 IPC. The learned Additional Public Prosecutor would submit that there was semen found on the petticoat of the victim girl, which would go to show that she would have been raped or an attempt would have been made to rape her. But, unfortunately, the serology report shows that the group of semen was inconclusive. Thus, absolutely there is no evidence that the seminal stains found on the petticoat was that of the accused. From the fact that the hymen of girl was not intact, the argument of the learned counsel for the appellant that the seminal stains would have been that of some one else cannot be ruled out. It is not explained to the Court as to why the respondent police did not take any steps to forward the dress materials for DNA examination so as to ascertain whether the semen was that of the accused or not. Although the said scientific method is available, the investigating officer has failed to refer the material objects for such examination.



12. To satisfy the judicial conscience of this Court, today, this Court requested the learned Additional Public Prosecutor to cause the presence of the Deputy Director, Regional Forensic Sciences Laboratory, Madurai. The expert would say that at this length of time, since the seminal stain has already been exhausted, it will not be possible to conduct any DNA examination on the dress materials of the victim girl. In these circumstances, the argument of the learned Additional Public Prosecutor that the seminal stains found on the petticoat of the victim girl would go to prove rape cannot be accepted. Similarly, it is difficult to safely arrive at a conclusion that the accused would have made an attempt to commit rape on the victim girl.

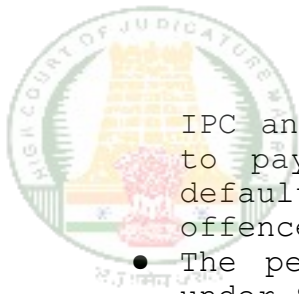
13. The learned Additional Public Prosecutor would next contend that the harm caused to the victim girl by the accused would be atleast an offence falling under Section 354 IPC. In this argument, I find force. Though there is no direct evidence to prove the offence of outraging the modesty, there are clinching circumstances to prove the same. The victim girl was half naked, her dress was in disarray and she was crying. Simultaneously, the accused was found scaling down the wall fleeing from the scene of occurrence. These circumstances would clinchingly go to prove that the accused had outraged the modesty of the victim girl. Therefore, in my considered view, the offence committed by the accused falls within the ambit of Section 354 IPC. For committing the said offence, the accused had trespassed into the house of P.W.1, which makes out an offence under Section 451 IPC.

14. Now, turning to the quantum of punishment, the learned counsel for the appellant would submit that the appellant is a poor man and he has got a big family to take care of. He would further submit that he has got children, who are also to be educated by him. The learned counsel would further submit that if he is sent to prison at this length of time, it would ruin the entire family.

15. Having regard to these mitigating circumstances and the aggravating circumstances, namely, the nature of the crime committed, more particularly, the fact that a mentally retarded girl has been harmed, I am not inclined to show any leniency in the matter of sentence. In my considered view, sentencing the appellant to undergo rigorous imprisonment for three years for the offence under Section 354 IPC with fine of Rs.3,000/-, in default, to undergo rigorous imprisonment for one month and to undergo rigorous imprisonment for one year and to pay a fine of Rs.3,000/-, in default, to undergo rigorous imprisonment for one month for the offence under Section 451 IPC, would meet the ends of justice.

16. In the result, the appeal is partly allowed in the following terms:

- The conviction and the sentence imposed on the appellant under Sections 376(i) and 450 IPC are set aside, instead, he is convicted for the offences under Sections 354 and 451 IPC and he is sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.3,000/-, (Rupees three thousand only) in default, to undergo rigorous imprisonment for one month for the offence under Section 354



IPC and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.3,000/- (Rupees three thousand only), in default, to undergo rigorous imprisonment for one month for the offence under Section 451 IPC.

- The period of sentence already undergone by him shall be set off under Section 428 Cr.P.C.
- The sentences shall run concurrently.
- The fine amount paid already, shall be adjusted towards the fine imposed vide this judgment.
- The trial Court shall take steps to secure the accused and to commit him to prison to undergo the remaining period of sentence.

Sd/-

Assistant Registrar(Writs)

/True copy/

Sub Assistant Registrar

RR

To

1.The Sessions Judge, (Mahila Court) Tirunelveli.

2.The Inspector of Police,
Nanguneri All Women Police Station,
Nanguneri ,Tirunelveli District.

3.The Superintendent, Central Prison, Palayamkottai.

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

+one cc to M/s.S.Palani velayutham, Advocate in SR.No.41056.

CRL.A.(MD) No.325 OF 2011
23.07.2015

CSL 20/08/2015

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