

BAIL SLIP

That the Petitioner herein/2nd Accused Viz., Chinnathambi, S/o.Subramani, was directed to be released on bail as per the Order of this Court dated 20.06.2016 and made in Crl.M.P.No. 5444 of 2016 in Crl.A.No.355 of 2016 and made herein.

That the Petitioner herein/1st Accused Viz., Nelson Mandela @ Raja, was directed to be released on bail as per the Order of this Court dated 11.07.2016 and made in Crl.M.P.No.6459 of 2016 in Crl.A.No.437 of 2016 and made herein.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.08.2016

CORAM

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
and
THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal Nos.355 and 437 of 2016

Chinnathambi ... Appellant/2nd Accused in
Crl.A.355/2016
Nelson Mandela @ Raja ... Appellant/1st Accused in
Crl.A.437/2016

-Vs-

State
Rep. by the Inspector of Police
D-4, R.K.Pet, Police Station,
Thiruvallur District.

... Respondent in both
Appeals/Complainant

These Criminal Appeals have been preferred to set aside the conviction and sentence imposed vide judgment dated 27.04.2016 made in S.C.No.266 of 2014 on the file of the Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court) Tiruvallur, by allowing these appeals.

For Appellants
in Crl.A.No.355/2016 : Mr.V.Parivallal
Crl.A.No.437/2016 : Mr.R.John Sathyan

For Respondent : Mr.E.Raja
Additional Public Prosecutor

C O M M O N J U D G M E N T
(Judgment of the Court was delivered by S.NAGAMUTHU, J.)

The appellant in CrI.A.No.437 of 2016 is the first accused and the appellant in CrI.A.No.355 of 2016 is the 2nd accused in S.C.No.266 of 2014 on the file of the Magalir Neethi Mandram (Fast Track Mahila Court) Tiruvallur. They stood charged for offences under Sections 341 and 302 r/w 34 IPC. By judgment dated 27.04.2016, the Trial Court convicted them under both the charges and sentenced them to undergo simple imprisonment for one month and to pay a fine of Rs.500/- each in default to undergo simple imprisonment for one week for the offence under Section 341 IPC and to undergo imprisonment for life and to pay a fine of Rs.2000/- each in default to undergo simple imprisonment for four months for the offence under Section 302 r/w 34 IPC. Challenging the said conviction and sentence, the appellants are before this Court with these appeals.

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

The deceased in this case was one Ms.Gayathri, aged about 17 years. She is the daughter of Mr.Elumalai (P.W.1). She was studying in a local school in 12th standard. Every day, she used to go to school in her bicycle and return in the evening. She also used to go to tuition centre at 5.00 a.m. everyday. The tuition centre was situate at Ammaiarkuppam village. The distance between the house of the deceased and the tuition centre is roughly around 1 km.

3. It is alleged that on 21.05.2011, when the deceased was returning from her school, the Accused 1 and 2 herein along with one Gunasekar @ Mannar (juvenile in conflict with law) intercepted her and eve-teased her. The deceased informed the same to her parents. Her parents reprimanded them in public. The Accused 1 and 2 and the said Gunasekar @ Mannar got wild over the said incident. It is alleged that therefore, they decided to do away with the deceased.

4. It is further alleged that on 11.07.2011 early in the morning at 5.00 a.m., as usual, the deceased left her home for the tuition centre in her bicycle. But she did not reach the tuition centre. It is alleged that when she was passing through the pumpset belonging to one Shanmugam near the lake area, these two accused along with the juvenile Gunasekar @ Mannar intercepted her, closed her mouth with a piece of cloth and pushed her into the open well. The deceased drowned in the water and died. Her bicycle and notebooks were lying by the side of the road near the well. The accused fled away from the scene of occurrence. P.W.1, the father of the deceased came to know that the bicycle and the notebooks were lying near the well.

The other children, who proceeded to the tuition centre subsequently, found the cycle and the notebooks. They took the bicycle and the notebooks to the tuition centre and handed over the same to the tuition teacher. The tuition teacher in turn informed the same to P.W.1. P.W.1 along with his relatives went in search of the deceased. They found the dead body of the deceased in the well. There was a banian cloth inserted into the mouth of the dead body. P.W.1 went to the Police Station on 12.07.2011 at 12.00 noon and made a complaint. P.W.16, the then Inspector of Police on receipt of the said complaint registered a case in Crime No.232 of 2011 under Section 302 IPC. Ex.P19 is the FIR. FIR was registered against the second accused and three other persons by name Gajendran, Shankar and Raja. P.W.1 had raised suspicion against those four persons and that is how their names have been mentioned in the FIR as suspects. P.W.16 then forwarded both documents to the Court viz., Ex.P1 - Complaint and FIR - Ex.P19, which were received by the learned Magistrate at 8.10 p.m., on 12.07.2011.

5. P.W.16 took up the case for investigation. He went to the place of occurrence and prepared an Observation Mahazar and a Rough Sketch in the presence of P.W.4 and another witness. He lifted the dead body from the well and conducted inquest on the body of the deceased. The body was identified by P.Ws.1 to 3. After inquest, he forwarded the body for post-mortem.

6. Post-mortem was conducted by Dr.Vivekanandan on 13.07.2011 at 10.00 a.m. Since Vivekanandan was not available, P.W.10 - Dr.B.Lakshmi Narasiman has given evidence based on the post-mortem certificate and the opinion offered by Dr.Vivekanandan. According to the medical opinion, the death of the deceased was due to shock and probably, due to kicking on the private parts of the deceased. According to the further medical opinion, death was due to drowning.

7. P.W.16, during the course of investigation, arrested these two accused and one Gunasekaran on 02.08.2011 at 1.00 p.m. On such arrest, the first accused gave voluntary confession, in which he disclosed the place where he had hidden the Chudidhar Oni of the deceased. P.W.16 recovered the same under the Mahazar in the presence of witnesses. Then on returning to the Police Station, he forwarded the accused to the Court and handed over the Material Objects also to the Court. Then investigation was taken over by the successor of P.W.16. P.W.17 made a request to the Court to send the Material Objects for chemical examination. The report revealed that on all the material objects, there were human blood stains. On completing the investigation, the successor of P.W.17 laid charge sheet against the accused.

8. Based on the above materials, the Trial Court framed charges against the accused as detailed in the first paragraph of this judgment. The accused denied the same. In order to prove the case of the prosecution, on the side of the prosecution, as many as 17 witnesses were examined and 22 documents were exhibited; besides 7 material objects were marked.

9. Out of the said witnesses, P.W.1 - the father, P.W.2 - the mother and P.W.3 - the brother of the deceased have stated about the previous occurrence on 21.05.2011 and they have further stated that the deceased left for tuition class on 11.07.2011 early in the morning at 5.00 a.m. in her bicycle and thereafter, she did not return. They found the dead body of the deceased at 6.30 a.m. on 12.07.2011 in the well. P.W.1 has further spoken about the complaint made by him to the Police. P.W.4 has spoken about the preparation of Observation Mahazar, Rough sketch and recovery of material objects in the place of occurrence. P.Ws.5 to 8 have turned hostile and they have not supported the case of the prosecution in any manner. P.W.9 has spoken about the arrest, confession allegedly made by the first accused and the consequential recovery of Chudidhar Oni. P.W.10 has spoken about the post-mortem conducted and the final opinion regarding the cause of death. P.W.11 has spoken about the material objects. P.W.12 - Constable has stated that he took the dead body to the doctor and handed over the same for post-mortem. P.Ws.13 to 15 have spoken about the chemical analysis conducted and their report. P.Ws.16 and 17 had spoken about the investigation done and final report filed.

10. When the above incriminating materials were put to the accused under Section 313 Cr.P.C, they denied the same as false. However, they did not chose to examine any witness on their side. Their defence was a total denial.

11. Having considered all the above, the trial Court convicted the accused as detailed in the first paragraph of this judgment and that is how the appellants are before this Court with this appeal.

12. We have heard the learned counsel for the appellants and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

13. The learned counsel for the appellants would submit that absolutely, there is no evidence against the accused. The Trial Court has convicted these accused relying on the statements of

the witnesses allegedly recorded during the course of investigation by the Inspector of Police under Section 161 of the Code of Criminal Procedure.

14. We have gone through the judgment of the Trial Court and the entire evidence let in by the prosecution. As we have already pointed out, PWs.5 to 8 have turned hostile and they have not stated anything incriminating about the accused. A perusal of the judgment of the Trial Court would go to show that the Trial Court in Paragraph 17 of the judgment has extensively extracted the statement of P.W.1 made under Section 161 Cr.P.C. and treated the same as substantive evidence. In paragraph 18 of the judgment, the Trial Court has simply reproduced the statement of P.W.2 made under Section 161 Cr.P.C. and treated the same as substantive evidence. In Paragraph 19 of the judgment, the Trial Court has simply extracted the substance of the statement of P.W.3 under Section 161 Cr.P.C and treated the same as substantive evidence. In Paragraph 20 of the judgment, the Trial Court has again extracted the substance of the statement of P.Ws.1 to 3 made under Section 161 Cr.P.C and discussed elaborately about the same. In Paragraph 21 of the judgment, the Trial Court has again extracted the substance of the further statement of P.W.1 made to the Investigating Officer under Section 161 Cr.P.C., treated the same as substantive evidence and acted upon the same. In Paragraph 22 of the judgment, the Trial Court has discussed elaborately about the statements of P.Ws.1 to 6 made under Sections 161 Cr.P.C to the Investigating Officer, discussed about the same and treating the same as substantive evidence has come to the conclusion that involvement of the accused has been proved. In paragraph 23 of the judgment, the Trial Court has extensively extracted the substance of the Statements of P.Ws.7 and 8 recorded under Section 161 Cr.P.C and has come to the conclusion that P.Ws.7 and 8 have chances to witness the occurrence. Though these witnesses have turned hostile and they have not stated anything incriminating, the Trial Court relying on the statements made under Section 161 Cr.P.C has concluded that they had witnessed the occurrence. In Paragraph 24 of the judgment, the Trial Court has referred to the statements of P.Ws.5 and 6 extensively and from out of the same has come to the conclusion that from these statements made under Section 161 Cr.P.C., it has been established that P.W.5 had seen these two accused moving from the scene of occurrence. In the same paragraph, the Trial Court has again discussed elaborately about the statements of P.Ws.7 and 8 made under Section 161 Cr.P.C and has held that they had seen the occurrence. In the same paragraph, the Trial Court has dealt with the statement of P.W.5 made under Section 161 Cr.P.C and has come to the conclusion that P.W.5 had also seen the occurrence. At the end of the said paragraph, the Trial Court

has relied on the statement of P.W.1 under Section 161 Cr.P.C and has stated that P.W.1 had seen these two accused near the place of occurrence. Not stopping with that, the Trial Court has again discussed elaborately about the inquest report (vide Ex.P21) in Paragraph 25 of the judgment. The Trial Court has lamented that in the said inquest report, the panchayatdars had concluded that the deceased had been raped and murdered and thrown into the well. The Trial Court thereafter referred to the statement of P.W.9 - one of the panchayatdars and has held that the statement made under 161 Cr.P.C is contrary to the conclusion arrived at by the panchayatdars. The Trial Court found fault with the panchayatdars for taking such a view and has also found fault with the Inspector of Police for leaving certain columns in the printed inquest form blank.

15. From the foregoing narration, it is crystal clear that the Trial Court has treated the statements of witnesses made under Section 161 of the Code of Criminal Procedure to the Investigating Officer during the course of examination as substantive evidence and from out of the same, the Trial Court has come to the conclusion that these two accused had committed murder of the deceased and thrown the dead body into the well. As we have already pointed out, absolutely, there is no evidence incriminating these accused. There is no evidence at least to show that these accused were found anywhere near the place of occurrence at all. Thus, in our considered view, the conviction on these two accused based on the statement of witnesses recorded under Section 161 Cr.P.C is illegal.

16. It is rather unfortunate that a Sessions Judge, who is empowered to impose even death penalty is unaware of this fundamental principle of criminal law that the statements made under Section 161 Cr.P.C could be used only to contradict the maker of the respective statement, if he is examined as prosecution witness, except for the purposes of Sections 27 and 32 of the Evidence Act. As a matter of fact, when a miscellaneous petition was filed by the petitioner seeking suspension of sentence, the learned counsel for the petitioner brought to our notice that the Trial Court has convicted the accused relying on the statement of witnesses made under Section 161 Cr.P.C. Then we called for remarks from the learned Judge. The learned Judge in her remarks submitted interalia as follows:-

"I humbly submit this piece of arguments made me to discuss on Section 161 Cr.P.C. Statement of the witnesses.

...While discussing this aspect, as the Learned Defence Counsel based his arguments on Section 161 Cr.P.C. Statement, even though I have not relied on Section 161 Cr.P.C. Statement, I was

constrained to explain the circumstances discussing on the evidence of PW3 as stated above and on Section 161 Cr.P.C. Statement of PW6 Kumari, the aunt of deceased stating on 22.05.2011 also the accused had teased, the deceased. That there are several occasions, where the accused had teased the deceased. However, in Page No.20 in Paragraph No.22 of my judgment, I have stated "As the motive is spoken by the witnesses to be the enmity developed when the Accused are warned for teasing the deceased, this Court feels that the evidence of Prosecution witnesses supports the prosecution case" and on that proved circumstances alone, I have convicted the accused. "

17. On going through the explanation, we felt that the learned Judge had not realised the illegality committed by her and she was ignorant of this fundamental principle of legal provision. Therefore, we have directed the Registry to send the learned Judge to Tamil Nadu State Judicial Academy to attend training programme for the next three sessions. We are highlighting this aspect because we are pained to note that some of the learned Judges do not realise their onerous responsibility to do justice to the litigants within the frame work of law.

18. At the end, we have to state that in this case, absolutely, there is no evidence against the accused. The prosecution has failed to prove the case beyond reasonable doubt. Thus, the appellants are entitled to acquittal.

19. The Criminal Appeals are allowed and the conviction and sentence imposed on the appellants by the Trial Court in S.C.No.266 of 2014 are hereby set aside and the appellants are acquitted. Fine amount, if any, paid by the appellants, shall be refunded to them. Bail bond, if any, shall stand discharged.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

svki

To

- 1.The Inspector of Police
D-4, R.K.Pet, Police Station,
Thiruvallur District.
- 2.The Judicial Magistrate,
Tiruttani.
- 3.Do- Through the Chief Judicial Magistrate,
Tiruvallur.
- 4.The Sessions Judge,
Magalir Neethi Mandram
(Fast Track Mahila Court)
Tiruvallur.
- 5.Do- Through the Principal Sessions Judge,
Tiruvallur.
- 6.The Superintendent,
Central Prison,
Puzhal, Chennai.
- 7.The District Collector,
Tiruvallur.
- 8.The Director General of Police,
Mylapore, Chennai 04.
- 9.The Public Prosecutor
High Court, Chennai.

+1cc to Mr.R.John Sathyan, Advocate, S.R.No.44691
+1cc to Mr.V.Parivalavan, Advocate, S.R.No.44811

Criminal Appeal Nos.355 and 437 of 2016

UG(CO)
CA(14/09/2016)

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