

Bail Slip

The Petitions/Accused Viz., Rajamanickam, S/O Angamuthu aged 50 years and Kaliammal, W/O Rasamanickam aged 45 years were released on bail as per order of this Court dated 19.3.2013 and M.P.No.1/2013 in Crl A.No.199 of 2013.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 28.03.2016

CORAM

THE HONOURABLE MR. JUSTICE M.JAICHANDREN

AND

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

CRL.A.No.199 of 2013 and CRL.A.No.665 of 2014

1. Rajamanickam, 50 years,
S/O.Angamuthu.

2. Kaliammal, 45 Years,
W/O.Rajamanickam.

... Appellants/A3 & A4 in
Crl.A.No.199 of 2013

[Both are residing at:
Korakattur,
Gobichettipalayam,
Erode District]

Sakthivel, 23 Years,
S/O. Mr.Kaliyappan,
Door No.193 D, Abirami Nagar,
Behind A.P Nagar, Gandhi Nagar Post,
Thiruppur District.

.. Appellant in
Crl.A.No.665 of 2014

Vs

State by
The Inspector of Police,
Gobichettipalayam Police Station,
Erode District.

.. Respondent/
Complainant in both Crl.Appeals

Appeals filed u/s.374 Cr.P.C., against the Judgment of conviction and sentence passed by the learned Additional Sessions Judge, Erode at Gobichettipalayam, in S.C.No.192 of

2012 dated 01.03.2013.

For Appellants	: Mr.N.Manokaran
in Crl.A.199 of 2013	
For Appellant in	: Mr.Philip Ravindran Jesudoss
Crl.A.No.665 of 2014	
For Respondent	: Mr.M.Maharaja,
in both appeals	Addl. Public Prosecutor

COMMON JUDGMENT

[Judgment of the court was delivered by S.NAGAMUTHU, J.]

The appellants herein are the accused 1, 3 and 4 in S.C.No.192 of 2012 on the file of the learned III Additional Sessions Judge, Erode at Gobichettipalayam. The 2nd accused Surya @ Silambarasan died during trial and thus, the charges against him stood abated. The 3rd accused Rajamanickam died on 09.08.2015 during the pendency of the appeal in Crl.A.No.199 of 2013. The trial court framed charges under Sections 363 and 376 of I.P.C. against the 1st accused and under Section 363 read with 109 of I.P.C. against the accused 2 to 4. By judgment dated 01.03.2013, the trial court convicted the 1st accused under Sections 363 and 376 of IPC and the accused 3 and 4 under Section 363 read with 109 of IPC and sentenced the 1st accused to undergo rigorous imprisonment for seven years and to pay a fine of Rs.1,000/-, in default, to undergo simple imprisonment for 3 months for the offence under Section 363 of I.P.C., and to undergo imprisonment for life and to pay a fine of Rs.1,000/-, in default, to undergo simple imprisonment for 3 months for the offence under Section 376 of IPC and sentenced the accused 3 and 4 to undergo rigorous imprisonment for 6 months and to pay a fine of Rs.500/-, in default, to undergo simple imprisonment for 3 months for the offence under Section 363 read with 109 of IPC. Challenging the said conviction and sentence, the appellants are before this Court with these appeals.

2. Since the 3rd accused Rajamanickam/1st appellant in Crl.A.No.199 of 2013 died on 09.08.2015, during the pendency of the appeal, which is evident from the Death Certificate issued by the Registrar of Births and Deaths, Salem City Municipal Corporation, Salem, the appeal as against him stands abated.

3. The case of the prosecution in brief, is as follows:-

(a) P.W.2 is the victim of kidnapping and rape. She was aged about 17 years and 6 months at the time of occurrence. She has studied up to 11th standard. After that, she was employed in a private concern. When she was on her way to her company or her way back home, the accused 1 and 2 used to follow her and disturb her. Two or three times before the day of occurrence at

about 8.00 p.m., when she was returning from her work site, the 1st accused intercepted her and wanted her to marry him. She refused and returned home. She informed the same to her mother. Thereafter, her mother P.W.1 stopped her from going for work. While so, on 14.04.2010, at about 11.00 a.m., P.W.2 had gone to a nearby temple for worshipping. At that time, the accused 1 and 2 came to the bus stop in a Omni Van. They forcibly took her into the van. The van proceeded to a temple. In the van, the accused 3 and 4 were available. On reaching the temple, the 1st accused tied Thali around her neck thereby performing marriage between him and the victim girl. Then, all the four accused, took the victim in the same van to a lodge at Erode. Leaving the accused 1 and 2 and the victim girl in the lodge, the accused 3 and 4 left the lodge in the van. In the lodge, it is alleged that a room was booked in which the 1st accused and the victim girl stayed, but the 2nd accused slept outside the room. During such stay, it is alleged that much against her will, the 1st accused had sexual intercourse with P.W.2. They stayed in the lodge for 2 days. According to P.W.2, the 1st accused repeatedly raped her. Then, the accused 1 and 2 took her to Salem and booked a room in a lodge. There, they stayed for 3 days. The 2nd accused used to stay outside. The 1st accused, in that room also, repeatedly had sexual intercourse with the victim girl against her will. After 3 days, since they had no money, they vacated the room. Thereafter, the victim went to Coimbatore to the house of P.W.7 and one Murugeswari and told Murugeswari that she had come to Coimbatore to stay with her for some time, since there was a quarrel between her and her mother. P.W.7 is the husband of Murugeswari. P.W.2 stayed at the house of P.W.7 for about 20 days.

(b) In the meanwhile, P.W.1 made a complaint to the police that the victim was kidnapped by these four accused. On 17.04.2010 at 9.30 p.m., on receipt of the said complaint, P.W.13, the then Sub-Inspector of Police, registered a case in Cr.No.285 of 2010 under Section 366 of IPC. The registration of the said case came out in all newspapers. On seeing the news in a Local Newspaper, P.W.7 took P.W.2 to her house and left her with her parents. The case was taken up for investigation by P.W.15.

(c) On 18.04.2010, P.W.15 examined the parents of P.W.2 and few more witnesses. On 10.05.2010, the victim was produced before him on being taken back to her parental home by P.W.7. P.W.15 prepared an Observation Mahazar and a Rough Sketch at the place from where she was taken. He recorded the statement of P.W.2. Then, he forwarded P.W.2 for medical examination.

(d) P.W.11 Doctor Malarvizhi examined P.W.2 on 11.05.2010 at 02.25 p.m. Ex.P.4 is the Accident Register. She found the following :

'External genitalia normal. Pubic hairs sparse. Vaginal Orifice admits one index finger. No external injuries seen. Hymen not intact. Breast Normal. No abnormal vaginal discharge.'

She gave opinion that there was no sign of any rape on P.W.2.

(e) P.W.15 forwarded the 1st accused also for medical examination. P.W.10 Doctor examined him and gave opinion that he was capable of performing sexual intercourse with the women. Ex.P.3 is his report.

(f) Then, the investigation was taken up by P.W.16 who succeeded P.W.15. P.W.16 made a request to the Doctor for assessing the age of the victim. According to Doctor Sivakumar P.W.14, who examined P.W.2, the victim had completed 18 years of age, but not completed 20 years of age. Ex.P.10 is his certificate. On completing the investigation, P.W.16 laid charge sheet against all the accused.

4. Based on the above materials, the Trial Court framed charges as detailed in the first paragraph of the Judgment. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 16 witnesses were examined and 11 documents were also marked. No material object was marked.

5. Out of the said witnesses, P.W.1 is the mother of the victim, who has stated about the earlier occurrence in which the 1st accused offered to marry the victim. She has further stated that she stopped P.W.2 from going for work. She has also stated that P.W.2, who had gone to the temple at the day of occurrence, had not returned. Thereafter, according to her, she made a complaint on 17.04.2010. P.W.2 the victim girl has spoken vividly about the entire occurrence as narrated herein above. P.W.3 is the brother-in-law of P.W.2. He has also stated only about the earlier occurrence in which the 1st accused offered to marry her. He has further stated that the victim P.W.2 was found missing from 14.04.2010 onwards and thereafter, she returned from Coimbatore. P.W.4 is a villager who has stated that he helped others to search for the victim girl. He has not stated anything incriminating against the accused. P.W.5 has also stated that he was informed about the missing of the victim girl and thereafter, he went in search of her along with others. P.W.6 has stated that she heard that P.W.2 had been kidnapped by somebody. She has further stated that on 15.04.2010 at 09.30 a.m., the 2nd accused called her over phone and informed that he had arranged for marriage between the 1st accused and the victim and the marriage was accordingly celebrated.

6. P.W.7 is the husband of Murugeswari to whose house, the victim girl had gone on 19.04.2010 at 06.30 p.m. He has further stated that till 08.05.2010, the victim girl stayed at his house and thereafter, on knowing that a case has been registered, he took the victim girl to her parental home and left her there. P.W.8 is the husband of the Local Panchayat Board President. He has also stated that he heard about the occurrence. He has stated that on one day, when he enquired the 2nd accused, he told that the victim girl had been married to the 1st accused. P.W.9 has spoken about the preparation of the Observation Mahazar. P.W.10 has spoken about the medical examination conducted by him on the 1st accused and his opinion that the 1st accused was not an impotent. P.W.11 has spoken about the medical examination conducted by him on P.W.2. According to her, there was no sign of rape. P.W.12 is a Court Clerk, who has forwarded the victim girl for medical examination as requested by the Inspector of Police. P.W.13 has spoken about the registration of the case on the complaint of P.W.1. P.W.14 has spoken about the assessment of age of the victim girl made by him. According to him, going by the Ossification Test, he opined that the deceased had completed 18 years of age and not completed 20 years of age. P.Ws.15 and 16 have spoken about the investigation done by them.

7. When the above incriminating materials were put to the accused u/s.313 Cr.P.C., they denied the same as false. Their defence was a total denial. However, they did not choose to examine any witness nor mark any document on their side.

8. Having considered all the above, the Trial Court convicted the accused 1, 3 and 4 as detailed in the first paragraph of the judgment. Challenging the said conviction and sentence, the appellants are before this Court.

9. We have heard the learned Counsel for the appellants/accused 1 and 4 and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

10. According to the case of the prosecution, the victim girl was aged at 17 years and 9 months. As per Ex.P.8, the School Certificate issued, her date of birth is 16.07.1992. Thus, as on the date of the alleged occurrence, she had completed 17 years and 9 months. But, P.W.14 Doctor Sivakumar, on conducting the Ossification Test has opined that P.W.2 had completed 18 years of age, but not completed 20 years of age. Having appreciated these two evidences, we may come to the conclusion that she was at the verge of attaining majority as on the date of occurrence.

11. It is in the evidence of P.W.2 that 2 ½ months before the occurrence, the 1st accused approached her and wanted to marry her. It was only thereafter, she was stopped from going for the work. She has stated that on the day of occurrence at about 11.00 a.m., she informed her mother that she was going to a temple for worshipping. Thus, under the pretext of going to the temple, she had gone to the bus stop. The accused 1 to 4 had gone in a Omni Vani to the said bus stop. It is not explained to the Court as to how the accused could know that she had gone to the said bus stop. This would give rise to a inference that there would have been some understanding between the 1st accused and P.W.2 that she should come to the bus stop at 11.00 a.m. on the day of occurrence. This inference is not out of mere surmise. This inference is based on lot of circumstances about which we are going to discuss a little later.

12. From the bus stop, the van straightaway went to a temple. In the temple, it is stated that the 1st accused tied Thali around the neck of the victim girl so as to perform the marriage. Had it been true that she was not a willing party for the same, she would have resisted and raised alarm which would have attracted the people in the temple towards them. This did not happen. This would give an initial impression that P.W.2 was a consenting party.

13. From the temple, it is her evidence that all the 4 accused took her again in the very same van, travelled such a long distance to Erode. In Erode, the 1st accused booked a room in a lodge. P.W.2, during cross-examination had admitted that she did not raise any resistance for the same. She did not inform anybody in the lodge also about the same. Then, in the said lodge, in the room, she stayed with the 1st accused for two days. The 2nd accused was staying outside and the accused 3 and 4 had already left. It is not as though P.W.2 was locked inside. She was staying with the 1st accused and during that period, it is stated that the 1st accused had repeated sexual intercourse with her. Had it been true that she was not a consenting or willing party to the same, she would have certainly raised alarm which would have attracted the people working in the lodge. That also did not happen. This further gives an impression that P.W.2 was a consenting party.

14. After two days of their stay in the lodge in Erode, the accused 1 and 2 took her to Salem. Though they travelled in a bus, P.W.2 did not raise any resistance. In Salem also, a room was booked in the name of the 1st accused. It is alleged that in that room, they stayed together for 3 days. She had further

stated that both, day and night, he had sexual intercourse with her. There is no evidence that she resisted at any point of time. During their stay at the lodge, she did not raise any alarm. This conduct of P.W.2 would further go to strengthen the inference that she was the consenting party to all these happenings.

15. After 3 days of their stay in Salem, since there was no money with them to spend, she left the 1st accused on her own and went to the house of P.W.7. P.W.7's wife is Murugeswari. When Murugeswari enquired P.W.2 as to what for she had left the home, P.W.2 told her that she had fight with her mother and she had come to stay with her for 20 days. It is not explained to this Court as to what prevented her to inform Murugeswari, who was after all her friend that she was taken against her will and she was raped by the 1st accused. Had it been true that she was not a willing party, by all natural conduct, she would have reposed confidence in her friend and told about the entire occurrence. But, she told a different story to Murugeswari.

16. When P.W.2 was so staying in the house of P.W.7, on the complaint of P.W.1, a case was registered on 17.04.2010. Thus, there was a delay of 3 days even in preferring the complaint. This also creates a doubt in the case of the prosecution. After the news that a case had been registered came out in a local newspaper, P.W.7 took the victim to her parental home. Till then, she did not raise any objection. It is alleged that for the first time she told these events only to her mother on returning to her home. This conduct of P.W.2 would go to indicate that she was a willing and consenting party for going with the accused and to have sexual intercourse with the 1st accused.

17. As per the definition of rape under Section 375 of IPC, since she had completed 16 years of age as on the date of occurrence and since there is enormous evidence to prove that she was a consenting party to have sexual intercourse with the 1st accused, the act of the 1st accused in having sexual intercourse, even if it is true, would not make out an offence under Section 376 of IPC.

18. Above all, the medical evidence clearly shows that there is no sign of rape at all. Further, no witness had been examined and no document has been produced to prove the stay of the victim girl along with the 1st accused in the lodge in Erode as well as in Salem. These infirmities have not been explained away by the prosecution.

19. Now turning to the offence under Section 366 of IPC, as we have already narrated, P.W.2 had studied up to 11th standard. She was 17 years and 9 months old at the time of the occurrence. But the Medical Certificate shows that she had completed 18 years of age. Assuming that there was 3 months short of attaining the majority, the conduct of P.W.2, in going along with the 1st accused happily on her own, would go to show that there was no kidnapping at all. For this, the learned Counsel for the 1st accused Mr.N.Manokaran, would rely on a decision of the Hon'ble Supreme Court in S.Varadarajan Vs. State of Madras reported in AIR 1965 SC 942 wherein the Hon'ble Supreme Court has held that a girl at the verge of attaining majority, if goes on her own accord, there is no taking in terms of Section 366 of IPC and thus, the act of the accused would not make out any offence. In paragraph 9 of the judgment, the Hon'ble Supreme Court has held as follows:

'9. 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 purpose 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 by 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 keeping 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 any active participation by him in the formation of the intention of the minor to leave the house of the guardian.'

In the instant case also, P.W.2 was capable of taking decision and she was fully matured enough. Therefore, applying the said principle of law as held in paragraph 9 of the aforesaid judgment, we hold that in the instant case, the offence of kidnapping has also been not proved. Thus, the appellants are entitled for acquittal.

20. In the result, the appeals are allowed. The conviction and sentence imposed on the appellants/accused 1 and 4 are set

aside and they are acquitted from all the charges. The bail bonds, if any, executed by them, shall stand discharged. The fine amount, if any, paid, shall be refunded to the respective accused. So far as the 3rd accused Rajamanickam is concerned, the Criminal Appeal No.199 of 2013 stands dismissed as abated.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1. The Inspector of Police,
Gobichettipalayam Police Station,
Erode.
2. The III Additional Sessions Judge,
Erode at Gobichettipalayam.
3. -Do- Thro The Principal Sessions Judge,
Erode.
4. The Public Prosecutor,
High Court, Chennai.
5. The Superintendent,
Central Prison,
Coimbatore.
6. The Director General of Police,
Chennai-4.
7. The Collector,
Coimbatore.
8. The Superintendent,
Central Jail (Special Cell for Women)
Coimbatore.

+1 cc to M/S.N.Manokaran, Advocate sr.19243

Cr1.A.Nos.199 of 2013 and
665 of 2014

mp[co]
srg 29/04/2016