



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Monday, the Twenty Second day of August Two Thousand Sixteen

PRESENT

The Hon`ble Dr.Justice P.DEVADASS

CRL MP(MD) No.3029, 3030 & 3031 of 2016
IN
CRL A(MD) No.120 of 2016

LAKSHMANA KUMAR ... APPELLANT/ACCUSED NO.3
PETITIONER in CRL MP(MD) No.3029/
2016/CRL A(MD) No.120 of 2016
SELVAM ... APPELLANT/ACCUSED NO.2
PETITIONER in CRL MP(MD) No.3030/
2016/CRL A(MD) No.120 of 2016
SARAVANAMUTHU ... APPELLANT/ACCUSED NO.1
PETITIONER in CRL MP(MD) No.3030/
CRL A(MD) No.120 of 2016

Vs

1 THE DEPUTY SUPERINTENDENT OF POLICE,
THOOTHUKUDI TOWN SUB DIVISION,
THALAMUTHU NAGAR POLICE STATION,
CR.NO. 332/2013
THOOTHUKUDI DISTRICT.

... RESPONDENT IN ALL CRL MPs

Petition praying that in the circumstances stated therein and in the petition filed therewith the High Court will be pleased to suspend the Execution of sentence by granting bail in S.C.No. 158/2014 dated 15.03.2016 on the file of the learned IInd Additional District and Sessions Judge, Tirunelveli, Tirunelveli District till the disposal of the Crl.A.

Prayer in CRL MP(MD). 3030/ 2016 :

To suspend the Execution of sentence by granting bail in S.C.No. 158/2014 dated 15.03.2016 on the file of the learned IInd Additional District and Sessions Judge, Tirunelveli, Tirunelveli District till the disposal of the Crl.A.

Prayer in CRL MP(MD). 3031/ 2016 :

To suspend the Execution of sentence by granting bail in S.C.No. 158/2014 dated 15.03.2016 on the file of the learned IInd Additional District and Sessions Judge, Tirunelveli, Tirunelveli District till the disposal of the Crl.A.

Order : This petition coming on for orders upon perusing the petition filed in support thereof and upon hearing the arguments of M/S R.PRABHU, Advocate for the petitioner and Mr.P.KANNDASAMY, Government Advocate, (Crl.Side) on behalf of the Respondents the



court made the following order:-

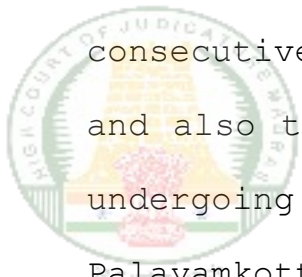
As these appeal bail petitions have been directed by connected accused in the same sessions case with reference to the same Judgment, they were tagged together, heard together and are being disposed of by this common order.

2. A1 / Saravanamuthu (Crl.M.P.(MD) No.3031 of 2016), A2 / Selvam (Crl.M.P.(MD) No.3030 of 2016) and A3 / Lakshmana Kumar (Crl.M.P.(MD) No.3029 of 2016 in S.C.No.158 of 2014, in the Court of the learned II Additional Sessions Judge, Tirunelveli, while assailing their conviction and sentence, are seeking appeal bail.

3. Before the Trial Court, they stood charged under Sections 354, 342, 376 r/w 511, 323 (2 counts) I.P.C., and Section 3(1)(XI) and 3(2)(V) of SC/ST (PoA) Act.

4. Appreciating the evidence let in, the Trial Court found them guilty and sentenced them as detailed below:

Accused	Conviction	Sentence
A1	354-B I.P.C.	7 Years R.I. + Fine Rs.1,00,000/-, i/d 18 Months S.I.
	342 I.P.C.	1 Year R.I. + Fine Rs.1,000/-, i/d 2 Months S.I.
A2	354-B I.P.C	7 Years R.I. + Fine Rs.1,00,000/-, i/d 18 Months S.I.
	342 I.P.C.	1 Year R.I. + Fine Rs.1,000/-, i/d 2 Months S.I.
A3	354-B I.P.C	7 Years R.I. + Fine Rs.1,00,000/-, i/d 18 Months S.I.
	342 I.P.C.	1 Year R.I. + Fine Rs.1,000/-, i/d 2 Months S.I.



consecutively. Thus, totally, each were to be in jail for 8 Years and also to pay a total fine of Rs.1,01,000/- each. Now, they are undergoing their respective sentences in the Central Prison at Palayamkottai.

WEB COPY

6. P.W.1 is residing in T.Saveriyarpuram in Mappillaiyoorani Panchayat in Thoothukudi District. His daughter P.W.3 is a deaf and dumb. She has a son. She has become a widow. P.Ws.4 and 5 are grandchildren of P.W.1.

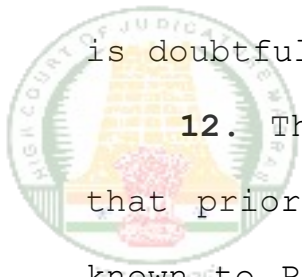
7. The accused were alleged to have attempted to rape P.W.3. On 18.11.2013, P.W.3 had gone to graze the goats near Gomuspuram. She was accompanied by P.Ws.4 and 5. At about 3 p.m., A1 to A3 forcibly took her and tried to rape her. By that time, P.W.1 came and shouted at them. They ran away.

8. The Trial Court mainly relying on the evidence of P.Ws.1, 3 to 5 has convicted and sentenced them as already stated.

9. The learned counsel for the petitioners contended that the prosecution has failed to establish its case beyond all reasonable doubts. The testimony of P.Ws.1, 3 to 5 and other witnesses cannot be believed.

10. The learned counsel for the petitioners further contended that P.W.1 was then 70 years old and has poor eye sight. He cannot be believed to have seen the occurrence at a distance of 150 Feet.

11. The learned counsel for the petitioners further contended that prior to the lodging of F.I.R., P.W.1 did not know father's name of the accused. He came to know about those names only on the next day from the News Papers. However, in the F.I.R., their



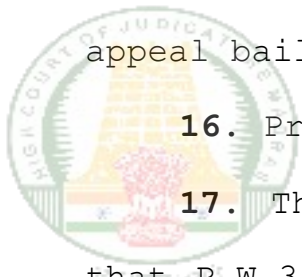
is doubtful.

12. The learned counsel for the petitioners further contended that prior to the occurrence, the identity of the accused is not known to P.Ws.1, 3 to 5. They have identified the accused for the first time in the Court. Prior to that, no Test Identification Parade (T.I.P.) was conducted. In such circumstances, their such identification of the accused cannot be believed. In this connection, the learned counsel for the petitioners cited **Noorahammad and others v. State of Karnataka [(2016) 2 SCC (Cri) 97 = (2016) 3 SCC 325]**.

13. The learned counsel for the petitioners further contended that P.W.3 is a deaf and dumb. She cannot write and read. Unless her evidence is recorded in sign-language, her testimony cannot be accepted. Thus, in this case, her testimony has to be rejected. In this connection, the learned counsel for the petitioners cited **State of Rajasthan vs. Darshan Singh @ Darshan Lal [CDJ 2012 SC 391]**.

14. The learned counsel for the petitioners further contended that while the charge was under Section 354 I.P.C., however, without a charge under Section 354-B I.P.C., they were convicted and sentenced under Section 354-B I.P.C. This is against law.

15. The learned counsel for the petitioners further contended that the petitioners are having *prima facie* case. Throughout the Trial Court proceedings, they were on bail. Since the date of Judgment, namely, 15.03.2016, they are inside the jail. They are having permanent residence. They will not abscond. They will not flee away from justice. In such circumstances, they may be granted



appeal bail.

16. Prosecution filed counter.

17. The learned Government Advocate (Criminal Side) contended that P.W.3 is a victim in a sexual offence case. The identity of the accused is well imprinted in her mind. She will not forget them. She had identified them in the Court. It is substantive evidence. She has also been corroborated by the other eye-witnesses, namely, P.Ws.1, 4 and 5. No motive has been suggested to reject her testimony.

18. The learned Government Advocate (Criminal Side) further contended that in the facts and circumstances of this case, not conducting of T.I.P. is not fatal to the prosecution case. There is ample evidence linking the accused with this case. Prosecution has established its case beyond all reasonable doubts. The decisions cited are not applicable to the facts of this case.

19. The learned Government Advocate (Criminal Side) further contended that the petitioners were accused of having committed heinous offence. There is no *prima facie* case in their favour. In the facts and circumstances, they do not deserve appeal bail.

20. I have anxiously considered the rival submissions, perused the averments in the appeal bail petitions, counter filed by the prosecution, Trial Court's judgment and the piece of evidence referred to by both sides and the relevant materials on record.

21. In the facts and circumstances, now the question is whether the petitioners could be granted appeal bail under 389(1) Cr.P.C.

22. In ***Azhagudurai v. State by Inspector of Police [(2016) 3***



WEB COPY

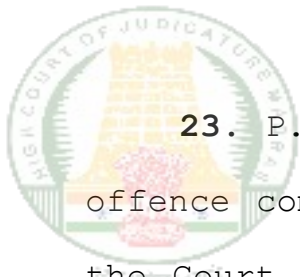
"14. Regular bail in a non-bailable offence in fit cases were granted by the Magistrate under Section 437 Cr.P.C. While other Courts and the High Court exercises concurrent jurisdiction to grant bail in non-bailable cases under Section 439 Cr.P.C.

15. The remand prisoners, under-trials could seek bail under the said provisions during pre-conviction stage of a criminal case. During that stage, it is pertinent to note that the presumption of innocence of an accused is intact because everyone is presumed to be innocent till the guilt alleged against the accused is proved beyond all reasonable doubts. However, once conviction is recorded, the said presumption is replaced by a Criminal Court judgment. Thereafter, also the conviction person can seek bail under Section 389(1) Cr.P.C.

16. Thus, the consideration for the grant of bail to an accused during the pre-conviction stage (before judgment) and post-conviction stage (after judgment) are different.

17. So far as appeal bail under Section 389(1) Cr.P.C. is concerned, the Court has to find out is there any prima facie case in favour of the petitioner. While doing so, the Court should not indulge in meticulous examination of the evidence of the accused because the main appeal is not heard. It is still pending.

18. To find out the prima facie case, the Trial Court has to refer to the findings recorded by the trial Court and the relevant evidence referred to. Further, it must also take into account the nature of the accusation made as against the accused."



23. P.W.3 is the real victim in this case. It is a case of an offence committed against a woman. In such cases, the approach of the Court should be different. The victim in such a case shall be treated as an injured witness. Even without corroboration, her evidence can be acted upon provided it is natural, consistent, cogent and believable. However, there must be strong, cogent and acceptable reason to reject her testimony. If a possible, probable motive has been suggested on the part of the victim to implicate the accused, then her testimony could be rejected.

24. P.W.3 is a deaf and dumb. As per Section 118 of the Evidence Act, she is a competent witness. She did not know how to read and write. In such circumstances, as per Section 119 of the Evidence Act, she can give evidence, which she can make it intelligible by a sign-language. But, it should have been recorded with the assistance of an Interpreter.

25. It is relevant here to note the following observations of the Hon'ble Supreme Court made in **Darshan Singh @ Darshan Lal** (supra):

"19. In Meesala Ramakrishnan v. State of A.P., (1994) 4 SCC 182, this Court has considered the evidentiary value of a dying declaration recorded by means of signs and nods of a person who is not in a position to speak for any reason and held that the same amounts to a verbal statement and, thus, is relevant and admissible. The Court further clarified that 'verbal' statement does not amount to 'oral' statement. In view of the provisions of Section 119 of the Evidence Act, the only requirement is that witness may give his



WEB COPY

evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of Section 3 of the Evidence Act. Signs and gestures made by nods or head are admissible and such nods and gestures are not only admissible but possess evidentiary value.

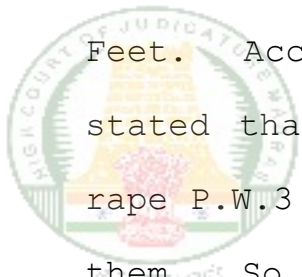
20. Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing if literate or through signs and gestures if he is unable to read and write.

A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the intended message.

26. Now, in this case, in the Trial Court, P.W.3 gave her evidence in sign-language, which has been recorded with the assistance of P.W.2, a Teacher in the Good Shepherd School for Deaf, Thoothukudi. In such circumstances, recording of her evidence cannot be faulted nor because of her physical disability her evidence could be eschewed.

27. P.W.1 has lodged the F.I.R. He is the father of P.W.3.

<https://hservices.ecourts.gov.in/hservices/> P.W.1 was then 70 years old. In his evidence, he had stated that he had seen the accused at the occurrence place at a distance of 150



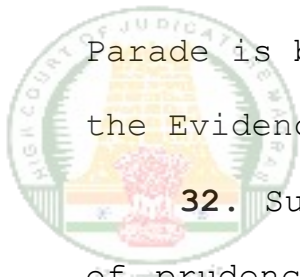
Feet. According to him, he has good sight upto 50 Feet. He had stated that he had seen the accused when they were attempting to rape P.W.3 and he had shouted at them. So, then P.W.1 was very near them. So, it cannot be said that he could not have witnessed the occurrence.

28. P.W.1 knows the accused, because they belongs to his Street. But, he did not know their father's name. It is probable as one will not be knowing father's name of all the persons residing in his Street. P.W.1 came to know about their father's name only from the Dailies. However, in the F.I.R., father's name of the accused have been mentioned. That does not mean that P.W.1 had not at all seen the occurrence.

29. P.Ws.4 and 5 / grandchildren of P.W.1, though did not know the names of the accused, knows them as they used to seen them in a Tea Stall.

30. P.W.3 is a grown-up woman. A mother. The occurrence took place around 3 p.m. It was not in darkness, it was in broad daylight. Prior to the occurrence, she did not know them. She was forcibly taken by the accused. They have tried to rape her. They have tried to disrobe her. In such circumstances, their countenance will be well imprinted in her mind. It will not fade away from her memory. She will not forget their faces.

31. Identification of the accused in the Court for the first time by a witness is Court Identification. It is substantive evidence. When prior to the occurrence the identity of the accused is not known to the victim or witness, to corroborate such Court



Parade is being conducted. It is a relevant fact under Section 9 of the Evidence Act.

32. Such corroboration is not a rule of law. It is only a rule of prudence. It concerned with the probative value of the Court Identification. It is to test the veracity of the identification of the stranger accused in the Court by a victim, witness. In the absence of such corroborative piece of evidence, the first time Court identification of a stranger accused will raise doubt with regard to the veracity of the testimony of the identifying witness. That is how, in certain circumstances, not conducting of Test Identification Parade assumes signal importance.

33. In **Noorahammad** case (supra) itself, the Hon'ble Supreme Court has pointed out certain exceptional circumstances as to this requirement of holding a T.I.P. Where there was opportunity for the victim to observe the face and features of the accused, availability of source of light and evidence of the victim is such that it is believable even without T.I.P., the Court accept the identification of the accused in the Court for the first time by the victim.

34. In the present case, prior to the occurrence, P.W.3 did not know the accused. Admittedly, in this case, no T.I.P. was conducted. When the occurrence lasted for few minutes, the accused were spotted at the occurrence place by P.W.3. It was in broad daylight, then there was sufficient source of light and the Court was impressed by the evidence of P.W.3. In the facts and circumstances, time of occurrence, evidence of P.W.3 even without prior to T.I.P., the Court Identification of the accused for the



35. Now, in the present case, there is no acceptable reason or occasion or need for P.W.3 to implicate the petitioners in an heinous offence risking her very womanhood. No iota of material or any acceptable reason that to wreck vengeance or with some ulterior motive, P.W.3 or P.W.1 had roped the accused in this case. Very serious accusations have been made against the accused. Incriminating evidence has been adduced as against them. There is no *prima facie* case as against them.

36. Already there was a charge under Section 354 I.P.C., as against the accused. Its graver form is Section 354-B I.P.C. The ingredients of which have been brought out in evidence by the prosecution. In such circumstances, non-framing of a charge under Section 354-B I.P.C., may not be a signal point enuring benefit to the accused.

37. In view of the foregoings, this case is not a fit case for grant of appeal bail.

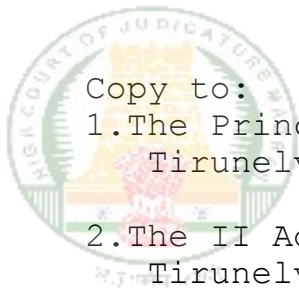
38. Thus, these criminal miscellaneous petitions are dismissed.

39. However, it is made clear that the observations made in this order are made only for the limited purpose of disposal of the appeal bail petitions and it has nothing to do with the disposal of the main criminal appeal.

sd/-
22/08/2016

/ TRUE COPY /

Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.



Copy to:

- 1.The Principal Sessions Judge,
Tirunelveli.
- 2.The II Additional Sessions Judge,
Tirunelveli.
- 3.The Chief Judicial Magistrate,
Thoothukudi.
- 4.The Judicial Magistrate No.II,
Thoothukudi.
- 5.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 6.The Deputy Superintendent of Police,
Thoothukudi Town Sub-Division,
Thoothukudi.
- 7.The Inspector of Police,
Thalamuthu Nagar Police Station,
Thoothukudi.
8. The Superintendent, Central Prison,
Palayamkottai

+1. C.C. to M/S K.PRABHU Advocate SR.No.46469

jam/23.08.16/AAL-MPA/SAR I /12P-10C

ORDER

IN

CRL MP(MD) No.3029 3030 & 3031 of 2016

IN

CRL A(MD) No.120 of 2016

Date :22/08/2016