

Bail Slip

The Appellant/Accused namely Kamaraj was directed to be released on bail as per order of this Court dated 14/12/2004 made in Crl MP No.10755/2004 in Crl.A No.1270 of 2004.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 19.09.2019
Pronounced on : 04.11.2019

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.A.No.1270 of 2004 and
Crl.M.P.Nos.1 of 2014 and 10232 of 2018

Kamaraj ... Appellant
Vs.

State, represented by,
Inspector of Police,
Mudaliarpur Police Station,
Pondicherry.
(Crime No.262 of 2000)

... Respondent

PRAYER: Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to set aside the conviction and sentence imposed in S.C.No.32 of 2002 dated 06.09.2004 on the file of the Additional Assistant Sessions Judge, Pondicherry.

For Appellant : Mr.R.Sankarasubbu

For Respondent : M/s.V.Balamurugan
Additional Public Prosecutor,
Puducherry

JUDGMENT

This appeal arises out of the conviction and sentence imposed by the learned Additional Assistant Sessions Judge, Pondicherry in S.C.No.32 of 2002 dated 06.09.2004, wherein the appellant was tried for the offence punishable under Sections 366-A and 376 of IPC. The learned trial Judge has convicted the appellant for offence under Section 366-A and sentenced him to undergo 10 years rigorous imprisonment and to pay a fine of Rs.5,000/- in default, sentenced to undergo one year rigorous imprisonment and for the offence under Section 376 of IPC, the appellant was sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.5,000/- in default, sentenced to undergo one year rigorous imprisonment.

2.The facts, as projected by the prosecution are as follows:

2.1.The victim/PW4 was studying in Wisemen Higher Secondary School, Pondicherry in 10th std and she normally goes to school at 08.30 a.m and return back at 06.30 p.m after attending tuition. On 17.10.2000, the victim/PW4 did not return back home and her mother/PW2 informed PW1/father of the victim, who was working as Cashier in RTO Office at Erode about same. PW1 informed his wife/PW2 to search her and he reached Pondicherry on 18.10.2000 at about 03.30 a.m. Thereafter, PW1 and PW2 made desperate search and came to know that their neighbour Kamaraj/appellant was also missing. PW1 lodged complaint [Ex.P1] before PW9 on 19.10.2000 at about 11.15 a.m, who registered F.I.R [Ex.P9] in Crime No.262 of 2000 for the offence under Section 363 of IPC. The date of birth of the victim/PW4 is 24.04.1986 as per the school record [Ex.P5]. Thereafter, on registration of the case, search was made. On 08.11.2010, the appellant and the victim were secured from Pondicherry bus stand. On investigation, it was revealed that the victim was lured and kidnapped by the appellant on the pretext of meeting her father/PW1 in Erode. But, she was taken to New Delhi by the appellant, where the appellant forcibly tied Thali and had forcible penetrative sexual assault on her. Further, the victim/PW4 was threatened by the appellant not to inform her parents and their life would be put to danger. Finally on 08.11.2000, the victim and the appellant reached Pondicherry, from where they were secured. During this period, the victim/PW4 was subjected to penetrative sexual assault. The appellant and the victim were sent for medical examination. PW8 recorded 164 Cr.P.C statement of the victim [Ex.P8]. On recording the statement of witnesses and collection of documents, charge sheet came to be filed against the appellant for the offence under Sections 363, 366-A and 376 of IPC.

3.Before the trial Court, prosecution examined 10 witnesses and marked 11 exhibits. None were examined and no exhibits were marked on the side of the defence.

3.1.PW1, father of the victim/PW4 was working as Cashier in RTO Office at Erode. He used to visit his house in Pondicherry once in a month. PW1's wife/PW2 and his daughter and son were living in Muthayalpet, Pondicherry. Both PW1's son and daughter/PW4 were studying in Wisemen Higher Secondary School, Pondicherry. On 17.10.2000, his daughter/PW4 did not return back home after attending tuition. PW2 informed the same to him. Thereafter, PW1 reached Pondicherry on 18.10.2000 at about 03.30 a.m made efforts in search of his daughter and found the neighbour/appellant was also missing. Hence, PW1 lodged the complaint on 19.10.2000 [Ex.P1] before PW9.

3.2.PW2, mother of the victim informed PW1 about missing of their daughter from 17.10.2000, made enquiries with the appellant's wife and came to know that the appellant was also missing on the same day and she immediately contacted and informed her husband/PW1.

3.3.PW3 the neighbour stated that on 08.11.2000 at about 08.30 a.m, when he went to police station, the appellant gave confession and he is the witness to the confession along with one Nagaraj.

3.4.PW4, victim has stated on 17.10.2000 when she was on her way to school in her cycle, the appellant waylaid her and induced her to come along with him to Erode to see her father/PW1. On the pretext of meeting her father/PW1 at Erode, she was taken to Villupuram bus stand and then to Gingee and later to Chennai and from there to New Delhi, where the appellant was previously employed for some time. The appellant took the victim to Indirapuri a place at New Delhi and took a house for rent, where Tamilians were residing. Later the appellant took her to a temple of Malai Manthir, where he forcibly tied Thali and thereafter the appellant brought her to the rented house and had forcible sexual intercourse with her. Right from the beginning of the Journey, the victim had questioned the appellant about the travel and she wanted to return back to Pondicherry. The appellant by giving one reason or other had finally taken the victim to New Delhi, where she was forcibly subjected to sexual assault by him, on several occasions. PW4 complained of severe pain and illhealth and finally on 05.11.2000 they travelled back to Chennai by Train and reached Chennai on 07.11.2000 and stayed at a lodge for one day. Thereafter, on 08.11.2000 they reached Pondicherry and police secured them. From the Police station parents of the victim were informed and thereafter she was taken to medical examination and 164 Cr.P.C statement [Ex.P8] was recorded by the learned Judicial Magistrate, Puducherry.

3.5.PW5, Doctor attached to Government Maternity Hospital, Pondicherry on 08.11.2000 examined the victim, issued [Ex.P2] the medical report of the victim. PW5 found that the victim was a minor aged about 14 years, as per the Radiological evidence. PW5 opined that the victim had sexual intercourse as per the public health laboratory report. During the physical examination, PW5 found "hymen lax with everted edges and vagina admits two fingers easily". PW6, Doctor examined the appellant and issued potency certificate [Ex.P3].

3.6.PW7, Principal of Wisemen Higher Secondary School issued [Ex.P4] study certificate of the victim and transfer certificate [Ex.P5]. As per the school records, the date of birth of the victim is 24.04.1986.

3.7.PW8, the Judicial Magistrate, Puducherry received the request from the Investigating Officer for recording the statement of the victim [Ex.P6], sent summons to the victim [Ex.P7] and recorded her 164 Cr.P.C statement on 25.11.2000 [Ex.P8].

3.8.PW9, Investigating Officer on 19.10.2000 at about 11.50 a.m received the complaint [Ex.P1] from PW1, registered an F.I.R [Ex.P9] in Crime No.262 of 2000, arrested the accused, sent both the appellant and the victim for medical examination on 08.11.2000, recorded 164 Cr.P.C statement of the victim [Ex.P8], examined the witnesses, recorded their statement and filed alteration reports [Ex.P10 and Ex.P11], conducted major part of the investigation and handed over the case diary to the Successor/PW10 on his transfer on 31.03.2011.

3.9.PW10, the Sub Inspector of Police took up investigation on the transfer of PW9 from 31.03.2011. Thereafter, PW10 examined the school authorities, obtained Transfer Certificate [Ex.P5], recorded the statements of Doctors, who examined the victim and the appellant and filed the charge sheet against the appellant for the offence under Sections 363, 366-A and 376 of IPC.

4.The contention of the learned counsel for the appellant is that the victim's birth certificate has not been produced and her age has not been properly proved in this case. Further from [Ex.P2], it is found that the victim's age is 14 years according to radiological evidence and below 18 years according to dental age. It cannot be certainly held that the victim is a minor. In Ex.P2, the victim girl stated that she willingly ran away with the appellant and there is no question of abduction or kidnapping. It is also submitted that as per Ex.P2, the vaginal swab of the victim shows spermatozoa, which cannot be true for the reason that the victim was on mensuration for a period of five days, when she was examined.

5.The learned counsel for the appellant further contended that as per Forensic Medicine Book authored by Dr.K.S.Narayan Reddy, the collection of swab was not as per procedure and further profuse bleeding from the vagina during the mensuration period will wash out all the seminal contents and spermatozoa. Further, relied on the book authored by Anil Agarwal and another authored by R.K.Marya, he submitted that as per Ex.P2, the victim was five days of mensuration period on the day of examination and during the period approximately 35ml of blood and another 35ml serous fluid are lost along with Necrotic endometrial tissue and in the medical report there is nothing to show the swab was taken in the prescribed method as per the forensic medicine text books. Further, in view of the flow of blood during mensuration period and due to previous bleeding during this period, the chances of presence of spermatozoa cannot be there. On the other hand in Ex.P2 one of the observation is that the vaginal swab showed presence of Spermatozoa. Hence, the evidence of PW5 is contrary to the forensic medicine guidelines.

6.He further submitted that PW1 was not aware of missing of his daughter and it was only PW2, who informed about the same and no reason had been given for inordinate delay in lodging the complaint [Ex.P1]. Further, in this case the bicycle and the dress of the victim were not seized and sent for laboratory. Further, it is the case that on the fateful day the victim has gone to school in uniform. When she was secured she was wearing Chudidhar and no investigation was carried out in New Delhi to prove that the victim and the appellant were residing in Indirapuri, New Delhi, where she was sexually assaulted.

7.PW1 and PW2 enimically disposed against the appellant that PW1 had taken a loan from one Munuswamy the appellant in support of Munusamy had a fight with PW1. Hence, the appellant had been falsely implicated in this case. The victim/PW4 could have gone with someone else and had physical relationship, for which the appellant could not be attributed with the charges of rape. The more serious is the offence, the investigation must be diligent and the offence has to be proved beyond all reasonable doubt as per law. In this case, there are lot of infirmities and due to motive prevailing between the appellant and PW1, the appellant has been falsely implicated. The lower Court without properly appreciating the medical evidence had convicted the appellant.

8.The learned counsel for the appellant relied upon the following citations:-

(i) For the point for determination of age of the victim was around 17 years of age, as could be seen from the Ex.P2, the learned counsel for the appellant relied on the first three cases:-

1."Jaya Mala Versus Home Secretary, Government of Jammu & Kashmir and others reported in (1982) 2 Supreme Court Cases 538". It has been held that Radiological and Orthopedic Test can take judicial notice that margin of error in age ascertained by such examination is two years on either side.

2."Gaurav Kumar Alias Monu Versus State of Haryana reported in (2019) 2 SCC (Cri) 314". It is held the determination of age of the victim by birth certificate from municipal authority, from school first attended or matriculation or equivalent certificate. In the absence of these medical opinions by a duly constituted medical board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such medical board.

3."Alamelu and another Versus State represented by the Inspector of Police reported in (2011) 2 Supreme Court Cases 385. It is held that the medical evidence showing age of girl to be between 17 and 18 years and X-ray report giving approximate age to be between 17 and 18 years and transfer certificate of a government school showing age not having been

duly proved by witnesses who signed it and held prosecution failed to prove that girl was a minor at relevant date.

4."Birad Mal Singhvi Versus Anand Purohit reported in 1988 (Supp) Supreme Court Cases 604. It is held that proof of entries in scholar's register and secondary school examination records are all evidentiary value to prove age of the candidate in absence of evidence of any person on whose information the date of birth had been entered in the school records.

5."Narbada Devi Gupta Versus Birendra Kumar Jaiswal and another reported in (2003) 8 Supreme Court Cases 745. It is held that proof of contents of documents, mere production and marking of a document as exhibit not enough and execution has to be proved by admissible evidence.

6."Ravinder Singh Gorkhi Versus State of U.P reported in (2006) 5 Supreme Court Cases 584. It is held that relevancy of entry in public record/register and conditions to be fulfilled before a document to be admissible under Section 35 of the Indian Evidence Act.

7."Radhu Versus State of Madhya Pradesh reported in (2007) 12 Supreme Court Cases 57". It is held that as regards the apprehension of evidence of prosecutrix, the Courts should determine the false charges of rape are not uncommon and there are some rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability.

8."Arul Versus State of Inspector of Police reported in (2019) 3 MLJ (Crl) 6". It is held that no valid and satisfactory explanation for delay of four months in preferring complaint.

9."Gorakshya Arjun Mahakal Versus State of Maharashtra reported in 2019 (2) Crimes 706 (Bom.). It is held that witness may lie, but circumstances will not lie and fact that prosecutrix had voluntarily missed classes and decided to accompany the appellant.

9.The learned Additional Public Prosecutor appearing for the respondent submitted that in this case PW4 is a minor girl which has been proved from the evidence of PW7/Principal of the Wisemen Higher Secondary School, where the victim studied and Ex.P4 and Ex.P5 are the school certificates, which are prepared from the records of the school. As per the school records [Exs.P4 & P5] the victim's date of birth is 24.05.1986. It is also to be seen that the victim studied 10th std and she discontinued her studies due to the act of the appellant. PW4 had categorically stated that while she was proceeding to school on 17.10.2000, she was lured and taken

away by the appellant, who is none other than the neighbour a known person on the pretext of meeting her father at Erode. From there she was taken to various places and finally to New Delahi, where she was raped, which is in conformity to the evidence of PW5/Doctor who examined her. Further, the evidence of PW4 is in conformity to 164 Cr.P.C statement [Ex.P8] of the victim recorded by the learned Judicial Magistrate, Puducherry/PW8. In a case of rape, the evidence of the victim is alone sufficient. In this case, the evidence of the victim as well as the medical evidence and 164 Cr.P.C statement [Ex.P8] of the victim are in conformity to the case. The submission of the learned counsel for the appellant in disputing Ex.P2 are not raised during trial. For the first time, such a plea has been made. Even in questioning the accused under Section 313 of Cr.P.C, the appellant had merely denied and no explanation or reason given to show that he is falsely implicated in this case. It is a proved fact that from 17.10.2000 to 08.11.2000 the victim/minor girl was with the appellant and during that period she was subjected to forcible penetrative sexual assault. Hence, the trial Court on considering the evidence and materials has rightly convicted the appellant.

10.The learned Additional Public Prosecutor relied upon the following citations:-

1."State Of Chhattisgarh Versus Lekhram reported in (2006) 5 Supreme Court Cases 736". Having sexual intercourse with consent of prosecutrix was of no consequence when it has been proved that the prosecutrix is a minor of 14 years age.

2."Saravanan & Others Versus State rep by Inspector of Police reported in CDJ 2017 MHC 2658". The age of the child to be determined as per Section 94 of the Juvenile Justice (Care and Protection of Children) Act states that the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination board, if available to be taken into consideration. In the absence of the birth certificate of the municipal authority, by an ossification test or any other latest medical age determination test to be conducted. In this case, the school certificates of the victim have been marked as Ex.P4 and Ex.P5.

11.This Court considered the rival submissions and perused the materials available on record.

12.PW4/victim is a minor girl and her date of birth is 24.04.1986 as could be seen from Ex.P4 and Ex.P5. The evidence of PW1, PW2, PW5, PW7 and Ex.P2 are in conformity to the same and it is proved that the victim is of 14 years age and was studying 10th at the time of occurrence. PW1 and PW2 stated about the victim was missing from 17.10.2000 and the appellant was also found missing on the same time. On 08.11.2000, the victim and the appellant were secured by PW9,

which has been confirmed by PW4 and PW3. Hence, it is proved that from 17.10.2000 to 08.11.2000 the victim was in the custody of the appellant. The evidence of PW4 is categorical about she being taken to New Delhi, where in a house both the appellant and PW4 were staying and during their stay, the appellant forcibly tied Thali and later he had committed forcible sexual assault on her. They reached Pondicherry on 08.11.2000, immediately she was sent for medical examination. PW5/Doctor attached to Government Maternity Hospital, Pondicherry examined the victim/PW4 and found the following:-

"On inspection P/A : Soft NAO

P/S : Hymen lax with everted edges.

P/V : Lax introitus, Vag introitus admits two fingers easily and gloved fingers stained with blood tinge ut AV NS fornices free

P/R : NAD"

13.Further, it is also mentioned that the hymen of the victim was found to be lax with everted edges and the vaginal shows presence of spermatozoa. Thus, the medical evidence is in conformity to the statement of prosecutrix.

14.The contention of the appellant that the victim had come out with the appellant voluntarily and she was not kidnapped cannot be countenanced, for the reason that the victim is a minor girl of 14 years age as could be seen from Ex.P2. The appellant is of 33 years age, who had two children, kidnapped the victim as if he is taking her to meet her father at Erode, but taken her to Chennai, from there to New Delhi and during their stay at New Delhi he had forcible sex with her. Further, he contended that as per Ex.P2, the victim was under mensuration period for five days. During the period of mensuration the presence of spermatozoa is remote. In a case of forcible sexual assault, proof of emission is not indispensable. The absence of spermatozoa is no proof that the connection has not taken place. It may have been removed by washing or by discharges. Hence, the doubt caused by the appellant with regard to vaginal presence of spermatozoa is not a material substance. The evidence of prosecutrix is sufficient and further from Ex.P2 it is seen that hymen lax with everted edges and vagina admits two finger easily, confirming that the victim was subjected to penetrative sexual assault.

15.Thus from the evidence of PW1, PW2, PW4 and PW5 this Court comes to the conclusion that the victim was a minor girl of 14 years of age, who had been kidnapped and kept in confinement at New Delhi and forced to sexual relationship by the appellant which amounted to rape. Thus the prosecution has proved the guilt of the appellant beyond all reasonable doubt with cogent evidence and materials. The trial Court on proper analysis of the evidence and materials had given cogent

reasoning in convicting the appellant and there is no ground to intervene.

16.In view of the above, this Court finds that there is no reason to interfere with the Judgment passed by the learned Additional Assistant Sessions Judge, Pondicherry in S.C.No.32 of 2002, dated 06.09.2004. The conviction and sentence of the trial Court is conformed. Hence, the Court below is directed to take appropriate steps to secure the appellant to undergo his remaining period of sentence, if he is in outside.

17.In the result, this Criminal Appeal stands dismissed. Consequently, the connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar
To

- 1.The Additional Assistant Sessions Judge,
Pondicherry.
- 2.The Principal Sessions Judge,
Pondicherry.
- 3.The Judicial Magistrate No.I,
Pondicherry.
- 4.-Do- Thro The Chief Judicial Magistrate,
Pondicherry.
- 5.The Superintendent,
Central Prison, Pondicherry.
- 6.The Inspector of Police,
Mudaliarpur Police Station,
Pondicherry.
- 7.The Section Officer,
Criminal Section, High Court, Madras.

+1cc to the Government Pleader Pondicherry, Sr.21295
+1cc to Mr.R.Sankarasubbu, Advocate Sr.91611

Cr1.A.No.1270 of 2004

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