

Bail Slip

That the Appellant/Accused namely Seelan Joseph, aged 36, S/o Clement, was directed to be released on bail as per order of this Court dated 8/2/2011 in Crl.M.P.NO.1/11 in Crl.A.No.784 of 2008.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.10.2018

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRL.A.No.784 of 2008

and

M.P.No.1 of 2011

Seelan Joseph ..Appellant/Accused

Vs

State: Inspector of Police,
V-4, Rajamangalam Police Station,
Crime No.1282 of 2003,
Chennai - 600 099. ...Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C., against the judgment dated 22.09.2008 convicting the appellant under Sections 376(1) and 506(2) of the Indian Penal Code and sentenced to undergo 10 years Rigorous Imprisonment in respect of Section 376(1) of the Indian Penal Code and also imposed a fine of Rs.2,000 each with a default sentence of 2 years rigorous imprisonment and also convicted for offence under Section 506(2) of the Indian Penal Code and sentenced to undergo 3 years Rigorous Imprisonment by the learned Additional Sessions Judge (Magaleer Needhi Mandram) Chennai in S.C.No.164 of 2007.

For Appellant : Mr.M.Marudhachalam

Legal Aid Counsel

For Respondent : Mrs.T.P.Savitha

Government Advocate (Crl.Side)

JUDGMENT

This Criminal Appeal is preferred by the appellant/accused against the judgment of conviction and sentence passed by the learned Additional Sessions Judge (Magaleer Needhi Mandaram) Chennai whereby the learned trial Court convicted and sentenced the appellant/accused for the offences under sections 376(1) and 506(ii) of IPC to undergo 10 years rigorous imprisonment and fine of Rs.2,000/- each with a default to undergo 2 years rigorous imprisonment and for the offences under section 506(ii) of IPC to undergo, 3 years rigorous imprisonment in S.C.No.164 of 2007 dated 22.09.2008.

2. Brief case of appellant/accused is that:

The prosecution case is that the defacto complainant PW1 Nagavalli, whose husband working in Southern Railways had expired and on compassionate grounds she got employment in ICF. The appellant/accused Seelan Joseph, who is an auto driver, having an illicit intimacy with PW1 Nagavalli and they both lived as husband and wife. According to PW1, the appellant/accused used to carry three children of the PW1 including Akila PW2, the PW1 further states that the appellant/accused daily at first used to take the PW1 from her house and dropped in ICF and then he will take PW2 along with other children of PW1 and according to PW1, the appellant/accused to drop the children of the PW1 at School except Akila PW2 and take her back to home and have intercourse with her and thereby caused pregnancy 3 months which was found by PW1 and she preferred the complaint before the respondent police and the same was registered in Crime No.1282 of 2003 under sections 376, 506(ii) of IPC on 12.09.2003. The printed FIR is Exhibit-P8. PW8, the Inspector of Police receiving the complaint inspected the scene of occurrence and examined the witnesses namely Mani and Palani and with their presence drawn rough sketch and observation mahazar Exhibit-P9. Further the investigation officer examined the witnesses Nagavalli, Akila, Subramani, Neelavathi, Rani, Chandra, Panneerselvam, Sarangan, Mani and palani and recorded their statements. On 13.9.2003 at about 7.00 A.M. PW8, Investigating Officer arrested the appellant/accused and remanded to judicial custody, Both were taken to the KMC Hospital and examined by Doctors PWs-6 and 7 and recorded their statements. On completion of the investigation, PW8 filed the final report on 11.06.2004 under sections 376 and 506(ii) of IPC.

3. During the trial, the prosecution examined PWs-1 to 8 and marked Exhibits-P1 to P9. The accused was questioned under section 313 of Cr.P.C. and he denied his complicity. No witnesses have been examined on the side of accused.

4. After completion of trial, the learned Additional Sessions Judge (Magaleer Needhi Mandaram) Chennai convicted the appellant/accused and sentenced him to undergo 10 years rigorous imprisonment in respect of section 376(1) of IPC and fine of Rs.2,000/- each with a default to undergo 2 years rigorous imprisonment and also convicted under section 506(2) of IPC to undergo 3 years rigorous imprisonment made in S.C.No.164 of 2007 dated 22.09.2008.

5. Aggrieved over the same, the appellant/accused filed a criminal appeal.

6. The learned counsel for the appellant/accused submits that the evidence of PW1, PW2 and PW5 is full of embellishments and inconsistencies that would get to the root of the prosecution case. The trial Court ought not to have placed reliance on the tainted and untrustworthy evidence of the material witnesses.

7. The learned counsel for the appellant/accused submits that he frequents the house of PW1. It is the admitted case of the prosecution that PW1. It is the admitted case of the prosecution that PW1 admits that she and the accused lived as husband and wife. This fact is corroborated by the evidence of PW3, an independent witness, who would state that PW1 and the accused were living as one family. Hence the accused never had any relationship with PW2.

8. The learned counsel for the appellant/accused submits that the trial Court ought to see a very pertinent admission is cross-examination, wherein, PW 1 admitted that it was the accused who informed PW1 that PW2 was pregnant, on an earlier occasion. Further it was the accused who took PW2 to the hospital and signed the necessary papers. PW1 would state that the accused told the doctor that the maternal uncle of PW2 was responsible for PW2's pregnancy. Whereas PW1 retorted stating to the doctor it was the accused who had impregnated PW2. Under such circumstance, the evidence of PW5 assumes significance, where he has admitted that he knew that PW2 was aborted and even thereafter the accused often came to the house of PW1 and they did not oppose to the same. If really accused was the cause of PW2's pregnancy, then accused would not have been allowed to come to the house and had sexual intercourse with PW 2 and made her pregnant. Hence the prosecution witnesses had someone to protect making the accused the scapegoat.

9.The learned counsel for the appellant/accused submits that it is admitted case of the prosecution that the child was born to accused and none other than the accused is responsible for the pregnancy. The only method known to law and recognized by law to rebut any factual presumption would be to subject the appellant/accused to genetic paternity test. It is emphatically asserted by the accused that he never had any relationship with PW 2 and only at the instance of PW1 such a serious allegation has been leveled against the accused and hence he was not responsible for the paternity of the child born to PW2. The accused had preferred a petition in CrI.M.P.No.9786 of 2008 on the date the case was posted for judgment to reopen the case so as to invoke Section 45 of the Evidence Act and was turned down by the trial Court assigning reasons without address in the prayer. This has caused serious prejudice to the accused. Hence in order to secure the ends of justice and invoking the principles of natural justice, the petitioner ought to have given an opportunity to prove his innocence.

10.The learned counsel for the appellant/accused submits that the trial Court ought to have seen that the accused was not in a position to afford a lawyer, hence trial Court was pleased to refer the case to the state legal services authority and a free legal aid counsel was appointed to defend the accused. It is submitted that the legal aid counsel did not take proper instructions and cross examined the material witnesses. While so, without taking proper instructions, had suggested to PW2 that the sexual intercourse with PW2 was on consent, which is contrary to facts and not on instructions. Further without bearing in mind the legal ramifications that the consent of a girl below the age of 16 years cannot be a legal excuse or a defense. The fact that such a suggestion was put to the witness came to light only after PW8 the investigating officer was examined. Hence PW8 was recalled and it was suggested as per the instructions of the accused that he denied any relationship with PW2. As a result the accused is seriously prejudiced.

11.The learned counsel for the appellant/accused submits that the trial Court ought to have seen that even assuming for a moment, without admitting, that the prosecution had proved the sexual relationship between the accused and PW2. It is well brought on evidence that PW2 was a consenting party to the act. It is pertinent to see that the prosecution failed to prove the age of PW2 to be below 16, so as to bring home the guilt of the accused under section 376 of the Indian Penal Code. It is significant to see that the prosecution has marked the school Transfer Certificate Ex.P2 the original of Ex.P2 was not marked

and with no explanation to offer regarding inability to produce the original. Hence, Ex.P2 is not admissible in evidence. Further the copy of Ex.P2 was not provided to the appellant/accused under section 207 of the code of criminal procedure. Further as admitted by PW6, the doctor the ossification test could not be performed since PW2 was pregnant, under such circumstances, where there is virtually no evidence the age and the fact the defense was able to demonstrate that PW2 was consenting adult. The prosecution failed to prove its case against the appellant/accused.

12.The learned counsel for the appellant/accused submits that the accused had contemporaneous material in hand to show the age of PW 2 to be more than 18 years during 2003 and the documents were Xerox copies. The originals could not be produced due to the fact, which the accused was not in a position to engage a private counsel to effectively explain to him the legal remedies that were available to him.

13.The learned counsel for the appellant/accused submits that the trial Court to have seen that the alleged arrest and confession is stage managed and is the handy work of the investigating agency and there is no qualified corroboration to the alleged arrest and recovery from the accused. Hence the mere arrest does not advance the case of the prosecution.

14.The learned counsel for the appellant/accused submits that the trial Court ought to have seen that the investigation is shoddy and lopsided and brimming with embellishments to suit the case of the prosecution. There are serious lapses in the investigation and further there is suppression of material facts that would prove the innocence of the accused.

15.The learned counsel for the appellant/accused submits citations for supported of his submissions.

- 1) 2017 (3) MLJ (Cr1) 533
- 2) 2015 (2)MWN (Cr1) 195
- 3) 2006 (2) CTC 642

16.The learned Government Advocate (Criminal Side) appearing for the respondent supported the findings of the trial Court and sought for dismissal of the appeal.

17.I heard Mr.M.Marudhachalam, learned Legal Aid Counsel for the appellant and Mrs.T.P.Savitha, learned Government Advocate (Criminal Side) for the respondent and perused the entire materials available on record.

18.The case of the prosecution is that there was a love affair between the appellant/accused and the defacto complainant and it is contended that the prosecutrix is a major as per the accident register Exhibit P4. The prosecution case has not been proved that she is a minor. There is no ossification test conducted in order to prove the case. It is a consensual sex, victim girl had a consent to have sex with the appellant/accused since she is major, consensual sex is not an offence. The transfer certificate is not the conclusive proof to prove the age. Because in the transfer certificate the authority noted at the time of admission in the school made by the parents without any basis and the learned trial Court ought to have obtained the first school joining certificate as per the juvenile justice act and rules.

19.PW6 Doctor who deposed in this case has not stated the age of the prosecutrix except her opinion. Hence the opinion of Doctor is uncertainly. The fact of the victim girl at the time of preparing complaint the age of the girl is 18 years.

20.It cannot be denied and there are contradictions in the material particulars between the evidence of the prosecution witnesses. The learned lower Court misread the evidence without appreciating the evidences of the witnesses. PW6 doctor deposed that the prosecutrix was 7 months pregnant and her age would be 15 years. Further the learned trial Court failed to ascertain the age of the deceased as per the provisions and rules contained in the juvenile justice act. Therefore the allegation about the offence of rape is not made out and occurrence is said to have taken place in the year 2002 and complaint was given in the year 2003 only and there is absolutely no explanation for such an inordinate delay.

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21.It is pertinent to note that even the accident register Ex.P4 reveals that the victim is aged about 18 years and it is also disclosed from the evidence of PW2 that the appellant/accused and herself had sexual relationship for a long time.

22.In the result:

(a) This Criminal Appeal is allowed and the conviction and sentence imposed on the appellant/accused by the learned Additional Sessions Judge, (Magaleer Needhimandaram) Chennai made in S.C.No.164 of 2007, dated 22.9.2008, is set aside.

(b) The appellant/accused is acquitted from all the charges;

(c) The bail bond if any executed by the appellant/accused shall stand discharged. The fine amount if any paid by the appellant/accused shall be refunded to the accused;

(d) The Legal Aid Authority attached to the High Court, Madras, is directed to pay a sum of Rs.5,000/- to the Legal Aid Advocate Mr.M.Marudhachalam.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1.The Metropolitan Magistrate,
No.VIII, George Town, Chennai.

2.The Chief Metropolitan Magistrate,
Egmore, Chennai (for information)

3.The Additional Sessions Judge,
(Magaleer Needhimandaram)
Chennai.

4.The Superintendent,
Central Prison, Puzhal, Chennai.

5.The Inspector of Police,
V-4, Rajamangalam Police Station,
Crime No.1282 of 2003,
Chennai - 600 099.

6.The Public Prosecutor,
High Court, Madras.

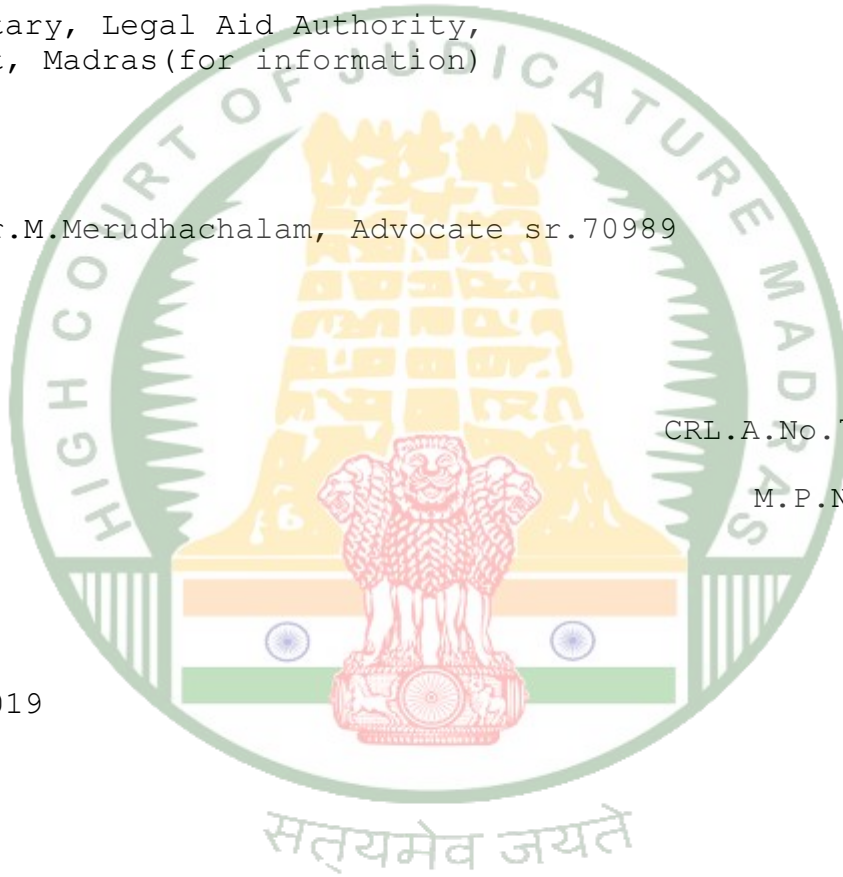
Copy to

The Secretary, Legal Aid Authority,
High Court, Madras(for information)

+1cc to Mr.M.Merudhachalam, Advocate sr.70989

CRL.A.No.784 of 2008
and
M.P.No.1 of 2011

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srg 8/3/2019



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