

BAIL SLIP

The Appellant/Sole Accused was directed to be released on Bail in and by the order of this Court dated 01-04-2010 made in MP No.01/2010 in CrI. A.No.203 of 2010 on the file of the High Court, Madras.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.03.2018

DELIVERED ON : 09.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.203 of 2010

Mohan Kumar ... Appellant/Sole Accused

Vs

State : Rep. by its  
Inspector of Police,  
All Women Police Station,  
Athur, Crime No.12/2006. ... Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code, to set aside the conviction and sentence imposed on the Appellant by the learned Sessions Judge, Mahila Court, Salem in S.C.No.250 of 2008 dated 25.02.2010.

For Appellant : Mr.K.V.Sridharan

For Respondent : Mrs.T.P.Savitha  
Government Advocate (CrI.Side)

JUDGMENT

The instant criminal appeal is preferred by the appellant who is the sole accused and faced a charge of the offence punishable under section 376(1) of Indian Penal Code and was convicted by the learned trial Court on 25.02.2010 in Sessions Case No.250 of 2008, on the file of the learned Sessions Judge, Mahila Court, Salem, Salem District.

2.The learned trial judge at the conclusion of the trial found the accused/appellant as guilty and thereby recorded conviction and imposed a sentence of 7 years of rigorous

imprisonment and also imposed a fine of Rs.1,000/-, in default to undergo rigorous imprisonment of 3 months of the appellant by recording conviction imposed upon the appellant.

3. Feeling aggrieved over the findings of the learned trial Court, the appellant has preferred the instant appeal by raising several grounds in the memorandum of grounds of appeal.

4. The case of the prosecution is that on 07.09.2006, at about 10.00 p.m., the victim girl, who is PW-1, aged about 17 years, as per the exhibit P-14 was subjected for sexual molestation by the appellant in a cattle-shed of one Aanaiammal and left her in lurch and this is the genesis of the case. The available records would show that PW1 lost her father in her tender age and she was in the care of her uncle, PW3. On the day of the occurrence a car festival was celebrated in that locality. Except PW-1, all the inmates of the house had gone to the car festival. At about 10.00 p.m., when PW-1 was alone in the residence of PW-3, the appellant/accused enticed her and thereby taken to her to the place of occurrence which is a cattle-shed of one Aanaiammal, where the accused compelled her to marry him, but the same was not accepted by PW-1, instead she informed him that she would give her reply only after the consent of her uncle and mother. Unfortunately, she was subjected for physical relationship, when she raised alarm, the appellant won over her by pressing a hand kerchief in her mouth. Further, it is seen from the complaint Ex.P-1 that after the occurrence, PW-1 was intimidated by the appellant to the extent that she would not inform the occurrence to anyone, which had driven PW-1 away from her residence to a nearby place. Later after two days, she was found by PW-8 near her shop and she informed one Angu, who is the distant relative of PW-1 and thereafter she was entrusted to PW-3. In turn, PW-2 was informed, who is the mother of PW-1 and she was in Mumbai for employment. On the information, she came down to Salem and thereafter Ex.P-1 was lodged on 15.09.2006. By receiving Ex.P-1, the printed F.I.R. Ex.P-8 was registered by PW-10, the Investigation Officer of the case.

5. Thereafter, PW10 by completing the investigation filed final report before the learned Judicial Magistrate No.1, Aathur, Salem District by furnishing copies under Section 207 of Cr.P.C. In turn, the case was committed to the file of the learned Principal District Judge, Salem and thereafter made over to the file of the Mahila Court, Salem for trial.

6. It is seen from the records that to prove the case, prosecution has examined PW1 to PW10, marked Exs.P1 to P14 by produced M.O.s-1 and 2. On the other hand, no oral and documentary evidence were let in by the accused. At the conclusion of trial, the accused was found guilty and accordingly, he was sentenced to undergo 7 years of R.I. and was

imposed fine of Rs.1,000/-, in default sentence of 3 months was imposed. Feelings aggrieved over the conclusion of the learned trial judge; the appellant has preferred the instant appeal.

7. According to the learned counsel for the appellant though it is the case of 376 of I.P.C., the evidence of the prosecution found unreliable and no reliance can be placed upon the evidence of the PW1. Before go into the merits of the case this Court has to decide the age of the victim. It is found and undisputed as per EX.P14 that the PW-1 has completed her 16<sup>th</sup> year, but has not completed her 17<sup>th</sup> year. So, the age of the PW-1 is ascertained as she has completed her 16<sup>th</sup> year. When this Court scrutinized the evidence of PW-1, it has disclosed that on the day of the alleged occurrence, the appellant came to her residence, and requested her to come along with him. PW-1 has not deposed that she has resisted or refuted the call of the appellant/accused.

8. Per contra, she had gone along with him to a nearby cattle-shed belongs to one Aanaiammal. Further, her evidence would show that even at the time of the commission of offence, she did not resist the act of the appellant which would show and transpire that she was the consenting party. However, suggestion was put forth that no such occurrence was taken place, but followed by property dispute, the accused was trapped in the instant case. Further, immediately after the occurrence that is on 07.09.2006, PW-1 left her home and as per the evidence of PW-8, PW-1 was found after 2 days, but no complaint was lodged by PW-3 for her disappearance. At the same time, the evidence of PW-4, who is also a relative of PW-1 has deposed that PW1 was rescued from the custody of the accused. This would also ascertain that PW-1 was offered herself to the domain of the appellant/accused. On the other hand, the case of the appellant/accused before the learned trial Court is due to the property dispute between father of the appellant/accused and the uncle of PW1, the appellant has been roped into the case. PW-1 has admitted in her cross examination that she did not aware of the contents of the complaint, but, the details of the complaint was explained her by PW-3 only. Even 10 days prior to the occurrence, there was a dispute between the PW-3 and family members of the appellant/accused.

9. That apart even the complaint was lodged as per the instructions of PW-3. So, the total appreciation of evidence of PW-1 does not inspire the confidence in the mind of this Court. Though this Court is very conscious that the offence under section 376 of IPC is no doubt an offence as against society, but the same is to be subjected for judicial scrutiny. When pw-1 is not able to depose even about the contents of the complaint and without knowing the contents of the complaints, she put her signature alone, then every possibility is there to rope an innocent in a criminal case.

10. However, no doubt that PW-1 was in the care and custody of PW-3. It is the admitted case that on the day of occurrence PW-3 entrusted the custody of PW-1 to her grandmother PW-6, to witness a car festival. But, the evidence of PW-6 would disclose that she also went to see the car festival along with her grandchildren born through PW-3. Thereafter, it is also to be noted that as to why no complaint was lodged either immediately after the disappearance of PW-1 or after the occurrence came to the knowledge of PW-3. Though it is stated that the complaint was lodged after PW-2 came down to Salem from Mumbai this explanation is found unsatisfactory. At the same time, the delay of about 10 days in lodging complaint is immaterial for a case of offence punishable under section 376 of IPC, but the delay must be explained.

11. It is equally important to appreciate the medical evidence. In the instant case, the doctor who examined the PW-1 certified that PW-1 gets accustomed herself for sexual intercourse. It would show that she was having the habit of having several intercourse. As per the medical evidence, no external injuries were found upon PW-1. It is alleged that the offence is said to have committed in a cattle-shed and as per the evidence of PW-3, the bangles worn by the PW-1 were broken and found in the place of occurrence. But, they have not been recovered by the Investigation Officer through mahazar. On the other hand, as per Exhibit P-9, the observation mahazar, has not disclosed that in the place of occurrence, broken bangles were found. This would also create doubt over the case of the prosecution.

12. At the same time, the learned Government Advocate (Criminal Side) would submit that an innocent girl has been molested by the appellant under the pretext of marriage, knowing the fact that the PW-1, has not completed the age of 18 years. So, responsibility is to be casted upon the appellant/accused and the finding of the learned trial Court is not liable for any interference. This Court is very well entitled to interfere in the findings of the learned Trial and can re-appreciate the evidence of the prosecution as appeal is a continuation of trial, but the instant case the role played by the appellant/accused has been proved. As far as delay is concerned a mere 10 days cannot be termed as serious lacuna especially, in the instant case, the complaint was lodged immediately after the arrival of PW-2 from Mumbai. Moreover, the evidence of the prosecution would point out the accused alone is the cause for the commission of the offence, and then there is no doubt about the involvement of the accused in the commission of offence. Then no leniency can be shown in the offence of such kind. Moreover, it is also pointed out by the learned Government Advocate (Criminal Side) when suggestion was put forth upon PW-3 about the case is pending between the father of the appellant

and PW-3, the same was denied by him then the duty is casting upon the appellant/accused to prove the same by furnishing reliable materials. The failure of the accused to prove the same would automatically falsify the suggestion of the accused which also deeply affect the defence case. Hence, he prays for the dismissal of the appeal.

13.I heard Mr.K.V.Sridharan, learned 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.

14.The instant case is a case against woman that too as against a young girl. As for the evidence of PW-1, appellant took PW-1 to a nearby cattle-shed where she was subjected for sexual inter-course. It is seen from the records that the appellant/accused is not only denied the charge, he also pleaded that this is a wrongful prosecution followed by a property dispute between the family members of the appellant/accused and PW-3. The evidence of PW-1 would disclose the property dispute between the two family. The scrutiny of the evidence of PW-1 in this regard would disclose that the accused has proved the existence of the property dispute between the two families. At the same time, in all other prospects, the evidence of PW-1 is subjected for judicial scrutiny, it came to light that PW-1 did not aware of the contents of the complaint, admittedly Exhibit P-1 complaint was not written by her. At the same time, Exhibit P-1 was belatedly prepared on the instruction of PW-3. The delay is not been explained. Though it is stated that the arrival of PW-2 from Mumbai was the cause for the delay which is unacceptable.

15.Further, PW-1 had not resisted the act of the accused at any point of time even during the occurrence. Since PW-1 has completed her 16<sup>th</sup> year, a doubt has been created by the appellant/accused that PW-1 would have been a consented party. As for as offence punishable under section 376 of IPC no doubt that sole testimony of prosecutrix would be enough to record the conviction. But, the testimony must inspire confidence in all its-prospective. Here in the instant case when PW-1 did not aware of the complaint and did not resist the call of the appellant/accused but she had admitted the property dispute between the two families. In addition to that no external injuries are found on PW-1, perhaps it is not necessary to incur external injuries during the commission of sexual violence, but, at the same time the offence in the instant case is said to have committed in a cattle-shed. So, every possibility is there if the offence is resisted by the girl who might have sustained external injuries. Moreover, the evidence of the doctor who examined PW-1 would disclose that PW-1 gets accustomed to have sexual intercourse. So, in any angle this Court is not able to

appreciate the case of the prosecution by placing reliance upon the evidence of PW-1.

16. Apart from that the evidence of PW-4 assumes much importance. In the chief examination itself she has stated that PW-1 was beaten up by her relatives as she was with the appellant/accused. There is much difference between the offence punishable under section 376 of IPC and the commission of offence with the consent of the prosecutrix. At this juncture it is useful to refer section 375 of IPC along with the Criminal Law Amendment Act, 2013 which came into effect on 03.02.2013.

"375. Rape - A man is said to commit "Rape" if he-

a) Penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or

b) Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

First - Against her will.

Secondly - Without her consent.

Thirdly - With her consent when her consent has been obtained by putting her or any person in who she is interested, in fear of death or of hurt.

Fourthly - With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to who she is or believes herself to be lawfully married.

Fifthly - With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under eighteen years of age.

Seventhly - When she is unable to communicate consent.

Explanation 1. - For the purpose of this section, "vagina" shall also include labia majora.

Explanation 2- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1- A medical procedure or intervention shall not constitute rape.

Exception 2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

State Amendment- (Manipur) - In Section 375,

a) In clause sixthly, for the word "sixteen", substitute "fourteen"; and

b) In the exception, for the word "fifteen", substitute "thirteen". - Manipur act 30 of 1950, section 4. [These State Amendments were made prior to the enactment of the Criminal Law (Amendment Act, 1983) (43 of 1983.)

59. Substituted by Act 43 of 1983, S. 3, for the heading "of rape" (w.e.f.25-12-1983).

60. Substituted by the Criminal Law (Amendment) Act, 2013 (13 of 2013), S. 9, for Ss. 375, 376, 376-A, 376-B, 376-C and 376-D (w.r.e.f.3-2-2013). Prior to their substitution, Ss. 375, 376, 376-A, 376-B, 376-C and 376-D read as under:- "375. Rape - A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First -Against her will.

Secondly - Without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given

because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under sixteen years of age."

17. So, as the PW-1 was 17 years old at the time of occurrence which would fall in one of the circumstances prior to the Criminal Amendment Act, (Act No.13 of 2013) in the 6<sup>th</sup> category. The learned trial Court has not dealt with the case in a proper manner by putting proper appreciation of evidence of PW-1. The delay also would play vital role in addition to the property dispute between the two families.

18. Therefore, in the considered opinion of this Court, the prosecution has failed to prove the charge against the appellant/accused. Hence, this Court is under the compelling necessity to acquit the accused.

19. In the result:

(a) the Criminal Appeal is allowed by setting aside the conviction and sentence imposed on the appellant/accused in S.C.No.250 of 2008 dated 25.02.2010, on the file of the learned Sessions Judge, Mahila Court, Salem, Salem District;

(b) the appellant/accused is acquitted from all the charges and the fine amount, if any, paid by the appellant/accused shall be refunded;

(c) the bail bond, if any, executed by the appellant/accused is hereby cancelled.

Sd/-

Assistant Registrar (CS-IX)

//True copy//

Sub Assistant Registrar

vs

To

1. The Sessions Judge, Mahila Court, Salem.

- do - Through The Principal Sessions Judge, Salem

2. Inspector of Police, All Women Police Station, Athur,

3. The Judicial Magistrate -I, Athur.

4. The Superintendent, Central Prison, Coimbatore

Copy To :

The Section Officer, Criminal Section High Court, Madras-104.

Criminal Appeal No.203 of 2010

SSD (CO)

GMV (27/11/2018)



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