

Bail Slip

M.Thirumalai

...Appellant/accused

The above said appellant was directed to be released on bail as per order of this court dated 19/1/07 made in Crl.Mp.No.1/07 in Crl.A.798/07 on the file of this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	13.08.2018
Pronounced on	03.10.2018

Coram

The Honourable Ms.Justice P.T.ASHA

Criminal Appeal No.798 of 2007

M.Thirumalai

...Appellant/accused

Versus

Inspector of Police,
R7, K.K.Nagar Police Station,
(Law and Order),
Chennai.
Crime No.1419/2004

...Respondent/complainant

This Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure praying to admit the Appeal and call for the records from the Trial Court in S.C.No.213 of 2006 on the file of Learned Magalir Sessions Judge, Chennai and set-aside the conviction and sentence passed by the Magalir Sessions Judge, Chennai.

For Appellant : Mr.M.Sankar

For Respondent : Mr.G.Ramar,
Govt. Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal arises against the judgment of the learned Magalir Sessions Judge, Chennai in S.C.No.213 of 2006, dated 16.05.2007. The accused/appellant herein was convicted for the offences punishable under Sections 506(ii), 452, 366(A)

and 376(1) I.P.C and was sentenced to 3 years R.I for the offence punishable under Section 506(ii), 3 years R.I and fine of Rs.1,000/- for the offence under Section 452 and in default 1 year R.I, for the offence under Section 366(A), he was sentenced to 5 years R.I together with a fine of Rs.1,000/- and in default 1 year R.I. As regards the offence under Section 376(1), the accused was sentenced to 10 years R.I and a fine of Rs.2,000/- and in default 2 years R.I. The said imprisonment was to run concurrently and the time already spent by him in prison under the provisions of Section 420 of Cr.P.C was to be taken into account.

2. The case of the prosecution is as follows:

On 22.12.2004, at around 07:30 p.m, accused/appellant had trespassed into the house of the minor victim when her parents were away, kidnapped the said minor victim and took her with him in Auto to Murugan Temple at Kundrathoor where he forcibly tied a mangalsutra around her neck at 08:30 p.m. He had later taken the minor victim to his sister's house in Sriperumpudhur and kept her confined from 22.12.2004 to 24.12.2004 and had sexually assaulted her. The minor victim's mother had lodged a complaint wherein she had contended that her daughter who was aged 17 years and who had studied upto 6th Standard, was working in an Export Company in Eekaathuthaangal. In her complaint, she had further stated that her daughter would leave for work in 09:00 a.m in the morning and returned at 06:00 p.m. in the evening. During this period, the minor victim girl had come in contact with the accused/appellant. On coming to know about this relationship, her parents had stopped her(minor victim girl) from going to work. While so, on 22.12.2004, at about 07:30 p.m, the complainant's husband had not returned from work and the complainant had also gone to the nearby shop, at that time, only the minor girl was alone in the house. When the complainant returned at 08:00 p.m, she realised that her daughter was not at home. She had searched for her everywhere and had ultimately given a complaint to the Inspector of Police, R7, K.K.Nagar Police Station (Law and Order), Chennai in which she had expressed her suspicion about the accused/appellant. The reason for this suspicion was an account of the fact that the accused/appellant had come to their house and demanded their daughter for marriage and when they had refused to the same, the accused threatened that he would kidnap their daughter/minor victim girl. She therefore informed the Police that she suspected accused/appellant's hand in the disappearance of her daughter. On the basis of the complaint, Ex.P.1 given by P.W.1, mother of the victim girl, the respondent Police registered the First Information Report in FIR No.1419 of 2004 i.e, Ex.P.10.

3. The respondent Police on completion of the investigation filed a final report and the same was taken cognizance by the

trial Court and the trial Court had framed charges under Section 506(ii), 452, 366(A) & 376(1) of I.P.C. The Magalir Court, Chennai had put the accused/appellant on trial as he had pleaded not guilty to the charges. The incriminating evidence was put forth to the accused person by questioning him under Section 313 of I.P.C and the same was denied by the accused person. The learned Judge after analyzing the evidence, convicted the accused/appellant of all the charges. Aggrieved by the same, the accused/appellant has filed the above Appeal.

4.1. Mr.M.Sankar, the learned counsel appearing on behalf of the accused/appellant would contend that the victim was not a minor and that she was a major and she had on her free will and volition, left with the accused. She had consented to the marriage as well. He would further submit that the accused/appellant had not sexually assaulted her but that it was consensual. He would also state that Auto driver who is stated to have taken the accused and minor victim to Murugan Temple at Kundrathoor and thereafter, to the accused sister's house at Sriperumpudhur, had not been examined and the accused's sister has also not been examined which would clearly show that there was no kidnapping or threat by the accused.

4.2. He would further contend that the victim is not a minor and he would place reliance on the cross examination of P.W.6, Dr.Ravishankar who would stated that the age of the victim as opined by him could be two years less or more than that mentioned in the certificate. He also drew the attention of this Court to the evidence of P.W.3, Dr.Sugumar who has deposed that she had not found any injuries on account of the alleged sexual assault and further stated that she has had sexual intercourse, as her hymen is not intact. He also relied on the evidence of the P.W.2, minor victim girl who had admitted that she was in the relationship with the accused for two years and that she had only made a feeble resistance while getting into the Auto and thereafter, she had not shouted for help. He would also contend that the evidence of P.W.9, E.Velu would clearly show that the investigation has not been properly conducted and neither the sketch nor the Mahazar had been prepared.

5.1. The learned counsel for the accused/appellant would therefore argue that the prosecution had not proved the case beyond reasonable doubt. Ex.P.7 was the report given by P.W.6 wherein he had stated that on examination of the victim, it was found that the victim was above 16 years but below 18 years. Relying upon the admission in the cross-examination of P.W.6 that the age shown in the report could be more or less two years only strengthens the case of the appellant/accused that the victim was not a minor at the time of the alleged offence. He

would contend that the Birth Certificate, Ex.P.15 had been issued by the Head Quarters Deputy Tahsildhar, Saidapet, Chennai and the same cannot be looked into.

5.2. He relied on the judgment, Alamelu and Another Vs. State reported in (2011) 2 SCC 385 in support of his argument, where the Honourable Supreme Court has held that the age of a minor girl cannot be fixed on the basis of a Transfer Certificate as there was no reliable evidence to vouch the safety in accordance of the date of birth and the same analogy would apply in the case of the birth certificate. He had also pressed into service the judgment, Ram Kumar Vs. State of Haryana reported in (2006) 4 SCC 347 to state that subsequent events have to be taken into account by this Court before convicting the accused/appellant since according to the accused/appellant, the victim got married.

6. Mr.G.Ramar, learned Government Advocate (Crl.side) appearing for the respondent would contend that the Ex.Ps.7 & 5 would clinchingly prove that the victim was a minor at the time of the occurrence and therefore, the trial Court was correct in convicting the accused/appellant on all grounds. He would further submit that the minor victim herself deposed about her age and the minor's deposition cannot be ignored in support and about the events that had been transpired. He would rely on the judgment of the Honourable Apex Court in the case of State of Maharashtra Vs. Chandraprakash Kewalchand Jain reported in AIR 1990 SC 658 to submit that once the minor had deposed, her evidence need not be corroborated by an independent evidence.

7. Before proceeding to discuss the judgment under Appeal, it is necessary to extract the various Sections under which the accused/appellant was charged.

Section 506 of I.P.C reads as follows:

"506. Punishment for criminal intimidation - Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

If threat be to cause death or grievous hurt, etc. - and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or [imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute

unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

Sections 366(A) & 452 of I.P.C reads as follows:

"366-A. Procuration of minor girl - Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine."

"452. House-trespass after preparation for hurt, assault or wrongful restraint - Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear or hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

Section 376(2)(i) of I.P.C reads as follows:

"376. Punishment for rape -
(2) Whoever, -
(i) commits rape on a woman when she is under sixteen years of age;"

8. From a perusal of the evidence of P.W.2, the minor victim girl, it appears that no force was employed by the accused to take her away from her home and it appears that she had voluntarily left her residence. It is also seen from the cross-examination of P.W.1, when the Police had initially taken custody of the minor victim girl, she had expressed her reluctance to go to her parental home with her mother and she had to be put up in the foster home. This would indicate that the minor victim girl was not under the influence of the accused/appellant but had willingly left with the accused/appellant. There was no criminal intimidation by the accused. The evidence of P.W.3 would further prove that the victim girl was not subjected to sexual assault on the fateful day for which the accused has been charged but on the contrary P.W.3 would depose that from the examination of the minor girl it is seen that she has had indulged in sexual activity earlier

as her hymen is not intact.

9. From the above narration, it is clear that the victim had gone with the accused/appellant on her own free will and volition and therefore, the accused/appellant cannot be stated to have committed offences under Section 506(ii) & 452 of IPC. As regards offence under Section 366(A) of IPC, it is not the case of the prosecution that the accused induced the minor victim girl out her home in order that she has illicit intercourse with another person. On the contrary, it is the case of prosecution that accused/appellant had kidnapped the minor victim and sexually assaulted her. Considering the fact that this Court has already held that the victim girl had voluntarily left with the accused and the accused has not committed an offence under Section 366(A) of I.P.C.

10. As regards the offence under Section 376(1) of IPC, from a perusal of Ex.P.7 coupled with Ex.P.15, it is clear that the victim girl is aged 17 years and 5 months on the date of the offence. The minor girl has studied upto 6th Standard, Ex.P.15, Birth Certificate issued under Section 17 of the Registration of Births and Deaths Act, 1969 by the Government of Tamil Nadu indicates that the victim girl was born on 13.07.1987 and the name of her parents has been given. This is a public document and the original has been produced by the complainant, mother of the victim girl. Therefore, it is clear that the victim girl was less than 18 years of age.

11. Section 375 of I.P.C as amended by Act 13 of 2013 states that a man is said to have committed rape, if the victim is under 18 years of age whether with her consent or without her consent. The Amendment Act has come into effect from 03.02.2013. Prior to the amendment, the 6th Description to Section 375 of I.P.C as it stood was as follows:

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

The offence in question is alleged to have taken place on 22.12.2004 much prior to the Amendment Act. The victim girl was aged 17 years and 5 months as per Ex.P.15 on the date of the occurrence of the offence.

12. In the light of the above, the accused has not committed the offence of rape under Section 375 of I.P.C and therefore, conviction under Section 376(i) of I.P.C is also set aside.

13. In the result, this Criminal Appeal is allowed. The conviction and sentence passed by learned Magalir Sessions Judge, Chennai, passed in S.C.No.213 of 2006 on 16.05.2007, are set aside and accused/appellant is acquitted of all charges. Fine amount, if any, paid shall be refunded to him.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

- 1.The Magalir Sessions Judge,
Magalir Sessions Court,
Chennai.
- 2.The Inspector of Police,
R7, K.K.Nagar Police Station,
(Law and Order),
Chennai.
- 3.The Metropolitan Magistrate,
XXIII, Saidapet, Chennai.
- 4.The Chief Metropolitan Magistrate,
Egmore, Chennai.
- 5.The Superintendent,
Central Prison, Puzhal
chennai.
- 6.The Public Prosecutor,
High Court,
Madras.

+1cc to Mr.M.Sankar, Advocate sr.no.68461

Cr1.A.798 of 2007

nr 25/10/2018