

Bail Slip

The Appellant/Accused made by Kalaiarasan, S/o.Tamilzarasan, was directed to be released on bail as per order dated 04/08/2011 in Crl.MP.1/2011 in Crl.Rc.No.1040/11 on the file of this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 24.04.2018

ORDERS PRONOUNCED ON : 10.07.2018

CORAM

THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

Crl.R.C.No.1040 of 2011

Kalaiarasan ... Petitioner/Appellant

versus

The State of Tamilnadu,
Rep. by The Inspector of Police,
All Women Police Station,
Villupuram. ... Respondent/Respondent

Prayer: Criminal Revision Petition is filed under Section 397 and 401 of the Code of Criminal Procedure, to call for the records in C.A.No.17 of 2011 dated 20.07.2011 on the file of the learned Principal Sessions Judge, Villupuram, confirming the order of conviction passed by the learned Judicial Chief Magistrate / Assistant Sessions Judge, Villupuram in S.C.No.321 of 2008 dated 29.01.2011 and set aside the same.

For Petitioner : Mr.M.Devaraj

For Respondent : Ms.T.P.Savitha
Government Advocate [Crl. Side]

O R D E R

This Criminal Revision is directed against the judgment rendered by the learned Principal Sessions Judge, Villupuram, in Crl.A.No.17 of 2011 dated 20.07.2011, wherein, the conviction and sentence awarded by the learned Chief Judicial Magistrate / Assistant Sessions Judge, Villupuram in S.C.No.321 of 2008 dated 29.01.2011 in favour of the revision petitioner is

confirmed.

2. The facts leading to the filing of this present revision petition are summarised as follows:

2.1. P.W.1 [Amsavalli] is the resident of Panankuppam Village. Since her 3 sisters were married and settled and her father had been to Andhra Pradesh to do coolie work, the victim [P.W.1] residing alone in her house. Further, the mother of the said Amsavalli is no more. The petitioner [Kalaiarasan] is the native of the same village. He saw the victim [P.W.1] occasionally and developed intimacy with her and later on, he promised that he would marry her and found pleasure in roaming around her. Initially, the victim did not respond to the demand of the accused but on the day of occurrence at about 7.00p.m., the petitioner stormed into the house of the victim in a drunken mood by saying that he would marry her lest he would commit suicide by taking insecticides. Due to the repeated words of the petitioner, the victim was leaning towards him. So, they felt very free from visiting several places. On 24.11.2007, the petitioner came to the house of the victim and compelled her for physical contact. The victim tried her level best to prevent invasion of her, who ultimately succumbed to the lust. Thereafter, the petitioner promised repeatedly that he would not marry anybody except her by saying so he successfully enjoyed the victim till 4.00a.m. on the next day. In the course of same transaction, the petitioner and the victim visited the house of P.W.3 [Kanniappan] and on one occasion, they stayed at the house and also had intercourse. Even after giving sufficient advise by P.W.3, the petitioner repeatedly had sexual intercourse with the victim [P.W.1] in the neighbouring sugarcane field. When the fact of pregnancy of the victim was came to light, the petitioner repeated that it could not be possible as only after taking pills he had intercourse with her.

2.2. The fact of such pregnancy was known to the neighbours of the victim [P.W.1], and thereafter to her father, Sundaramoorthy [P.W.2]. At that time, the petitioner contacted the victim [P.W.1] over phone through P.W.9 [Panchali] and offered to give Rs.15,000/- for aborting the fetus but the victim did not yield for the request made by the petitioner. Finally, on 10.04.2008 at about 9.00a.m. the victim [P.W.1] along with his father [P.W.2] went to the All Women Police Station and lodged a complaint before the Sub Inspector of Police [P.W.15] under Ex.P.1. Based on the complaint given by P.W.1, a case has been registered in Crime No.5 of 2008 for the offences under Sections 417, 376 and 506[iii] I.P.C. Ex.P.7 is the First Information Report. Subsequent to the registration of the case, P.W.15 went to the scene of occurrence and prepared a Observation Mahazar [Ex.P.2] and Rough Sketch [Ex.P.8] in the

presence of witnesses Egarajini [P.W.4] and one Natarajan. She examined the witnesses Sundaramoorthy [P.W.2], Radhika [P.W.5], Amaravathy [P.W.6], Muralidoss [P.W.8] and Panchali [P.W.9] and recorded their statements. On the same day, at about 12.30p.m. the revision petitioner was arrested and forwarded to the Court for remand. P.W.15 produced the victim [P.W.1] before the jurisdictional Magistrate, with a request to refer her for medical examination. Similarly, she made a request to the Court to forward the accused for medical examination. P.W.13 [Dr.Baskaran] was examined the potential nature of the petitioner and issued a report under Ex.P.5. Likewise, P.W.14 [Dr.Sakthipriya] was examined the victim [P.W.1] and issued a report under Ex.P.4.

2.3. In the course of investigation, based on the request of the prosecution, D.N.A. Test was conducted for the victim [P.W.1], revision petitioner and the child said to have been born out of their relationship. After concluding the investigation, P.W.17 [Shankar], the Inspector of Police filed a Charge Sheet for the offences under Sections 417, 376 and 506 [ii] I.P.C.

2.4. In the Trial Court, on the side of the prosecution 17 witnesses were examined as P.W.1 to P.W.17, besides 9 documents were exhibited as P.1 to P.9. In order to dispute the contents of the documents, on the side of the petitioner nobody was present to put forth the case of the petitioner. At the end of the trial, the learned Judicial Magistrate came to the conclusion that the petitioner was found guilty for the offences under Sections 417, 376 and 506 [ii] I.P.C. for which, he awarded conviction and sentence to pay a fine of Rs.1,000/-, in default to undergo 3 months simple imprisonment for the offence under Section 417 IPC; sentenced to undergo five years Rigorous Imprisonment with a fine of Rs.15,000/- [out of which Rs.12,000/- has to be paid to the victim as compensation], in default to undergo 3 months rigorous imprisonment for the offence under Section 376 I.P.C; and sentenced to undergo 3 months Rigorous Imprisonment for the offence under Section 506 [ii] I.P.C. As against the said conviction, the petitioner filed the Criminal Appeal [Crl.A.No.17 of 2011] before the learned Principal Sessions Judge, Villupuram.

2.5. After elaborate enquiry, on 20.07.2011, the learned Principal Sessions Judge, Villupuram, dismissed the Appeal and confirmed the sentence awarded by the learned Magistrate. Now, in order to check the correctness of the above concurrent judgments, the petitioner filed the present revision before this Court.

3. Today, when the revision petition is taken up for hearing, I heard the arguments of Mr.M.Devaraj, learned counsel appearing for the petitioner and M/s.T.P.Savitha, learned Government Advocate [Criminal Side] appearing for the State. I have perused the grounds of revision and also the judgments rendered by the Courts below.

4. The first and foremost contention raised by the learned counsel appearing for the petitioner is that the alleged offence of rape had been completed only after getting consent from the victim [P.W.1]. At the time of physical contact, the age of the victim [P.W.1] was 20-21 years, thereby, being a matured girl, she voluntarily gave consent. Hence, the conviction of the petitioner for the offence under Section 376 I.P.C. is nothing but erroneous one.

5. On considering the said argument with the materials placed before this Court, it is true that at the time of getting consent from the victim [P.W.1] she was aged about 20-21 years, as per the evidence given by P.W.7 [Dr.Veeramuthu]. However, being a motherless girl, we cannot accept that a girl aged about 20-21 years is knowing the human life entirely.

6. In this regard, the learned counsel appearing for the petitioner relied on the judgment of our Honourable Apex Court in UDAY vs. STATE OF KARNATAKA reported in [2003] 4 SCC 46 wherein, it has held as follows :

"There is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. The tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances."

7. In the said case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the petitioner. Further, she aware of the fact that since they belonged to different castes, marriage was not possible. Even after knowing the said fact, the prosecutrix freely, voluntarily and consciously consented to having sexual intercourse with the petitioner, thereby, the Honourable Apex Court has held that the said consent is voluntary.

8. In the case at hand, the victim is a poor illiterate girl. She is residing alone without any help from others even from the family members. At the same time, the petitioner is the

relative of the girl. On the date of occurrence, he compelled the victim [P.W.1] by saying he would not marry anybody except her and even in case the marriage was protested by his family members. Moreover, after knowing the pregnancy of the victim girl, the petitioner advised her to abort the fetus. Furthermore, he attempted to settle the dispute by way of paying Rs.15,000/- through P.W.9 [Panchali]. Though the said circumstances shows that the consent which had been obtained by the petitioner was not a voluntary one. The said consent given by the victim [P.W.1] under misconception of fact that the petitioner would marry her.

9. Further, in respect of D.N.A. Test, P.W.16 [Prof.Thirumathi.Kamalachi] stated in her evidence that the revision petitioner is the biological father of the child now born to the victim [P.W.1]. With regard to the accuracy of D.N.A. Test, the judgment of a Division Bench of this Court in SUSHIL MANDAL vs. STATE, REP. BY THE INSPECTOR OF POLICE AND OTHERS reported in 2014 SCC OnLine Mad 7362 wherein, it has observed as follows:

"17.....We take judicial notice of the fact that DNA profiling begets 99.99% accurate results which has prompted the Supreme Court also to say that it will even dislodge the presumption under Section 112 of the Evidence Act [See: Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014 (1) Scale 99)]. We cannot allow the anxieties of Sushil Mandal to dislodge the scientific opinion arrived at by the TNFSCL, Chennai and CDFD, Hyderabad merely on the basis of opinions expressed in some treatises."

10. The next point that the learned counsel appearing for the petitioner would submit that the evidence given by the prosecutrix is in the form of unrealistic and unbelievable stage without noting the said aspect, the First Appellate Court confirmed the conviction, which is nothing but illegal. Further, he submitted that the offence under Section 417 I.P.C. is not made out as per the evidence given by the victim [P.W.1]. Accordingly, he prayed to allow the revision petition for the offence under Section 417 I.P.C.

11. On considering the arguments advanced by the learned counsel appearing for the petitioner, the ingredients required to constitute offence of cheating under Section 417 I.P.C. are as follows:

"(1) there should be fraudulent or dishonest

inducement of a person by deceiving him,
(2)(a) the person so deceived should be induced to deliver any property to any person or to consent that any person shall retain any property, or (b) the person so deceived should be intentionally induced to do or not to do anything which he could not do or until he were not so deceived, and
(3) in cases covered by 2(b), the act or omission should be one which causes, or is likely to cause, damage or harm to the person induced in body, mind or property."

12. In the said circumstances, the revision petitioner after knowing the situation of the victim girl induced her for committing the physical contact by saying that he would marry her. The victim [P.W.1] stated in her cross-examination that after knowing the pregnancy, the petitioner did not intend to complete the marriage. Now according to the evidence given by P.W.9 [Panchali] as already stated the petitioner has attempted to abort the fetus which would clearly shows that he is having the intention of deceiving the victim [P.W.1].

13. It is settled position for proving the offence under Section 376 I.P.C. solitary testimony of the prosecutrix is sufficient. In this case also, the victim [P.W.1] clearly stated the words used by the petitioner before the occurrence. Even after giving birth to a child, being the relative of the victim and also knowing the poverty situation of the victim, the petitioner had not taken any steps for marriage with the victim. So, all these circumstances shows that the act committed by the petitioner for the offences under Sections 376 and 417 IPC alone. The trial Court as well as the First Appellate Court clearly considered those aspects and came to the conclusion that the petitioner was found guilty for the offences stated above.

14. With regard to the offence under Section 506[ii] I.P.C., it is true that the witnesses examined on the side of the prosecution did not say anything about the criminal intimidation made by the petitioner towards the victim [P.W.1]. So, the convicting the petitioner for the said offence needs interference.

15. In the light of the above discussions, the conviction and sentence awarded by the Trial Court as well as the First Appellate Court to the petitioner for the offence under Section 506[ii] I.P.C. is set aside. In respect of the offences under Sections 376 and 417 I.P.C., the conviction and sentence awarded by the Courts below are confirmed. The Trial

Court is directed to take steps to secure the custody of the revision petitioner/accused for undergoing the remaining period of sentence.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

sri
To

- 1.The Principal Sessions Judge,
Villupuram.
- 2.The Chief Judicial Magistrate/Assistant Sessions Judge,
Villupuram
- 3.The Inspector of Police
All Women Police Station,
Villupuram
- 4.The Judicial Magistrate II, Villupuram
- 5.The Superintendent,
Central Prison, Cuddalore.
- 6.The Public Prosecutor,
High Court, Madras.
- 7.The Record Keeper,
Criminal Section,
High Court, Madras.

+1cc to Mr.M.Devaraj, Advocate SR.No.45011

KK(CO)
sm:23.7.2018

Cr1.R.C.No.1040 of 2011

WEB COPY