

Bail Slip

The Appellant/Accused viz., Sundaramoorthy S/o.Rasu, was directed to be released on bail as the order dated 23/06/09 in MP.No.1/09 in CrI.A.No.200/2009, on the file of this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.03.2018

CORAM:

THE HON'BLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.200 of 2009

Sundaramoorthy ... Appellant/Accused

Vs.

State: rep. by its
Inspector of Police,
Virudhachalam Police Station,
Cuddalore District. ... Respondent/Complainant
(Crime No.15/07) - Kammapuram Police Station)

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C., to allow this appeal by setting aside the Judgment dated 30.03.2009 in S.C.No.149 of 2008 passed by the Sessions Judge (Mahila Court), Cuddalore.

For Appellant : Mr.G.Anabayachozhan

For Respondent : Mrs.T.P.Savitha

Government Advocate (Crl.Side)

JUDGMENT

This Criminal Appeal is directed against the Judgment of conviction and sentence made by the learned Sessions Judge, (Mahila Court), Cuddalore in S.C.No.149 of 2008, dated 30.03.2009.

2.The Appellant is the sole accused in S.C.No.149 of 2008 was charged with offences punishable under sections 363, 366, 376(1) and 417 of IPC. The Learned Trial Judge found guilty of the accused of the offences under sections 363, 366, and 376 of

IPC and acquitted the accused from the charge of section 417 of IPC. The trial Court convicted and sentence the accused to undergo 7 years R.I. and also to pay a fine of Rs.10,000/-, in default to undergo R.I. for 3 months for the offence under Section 376(1) of IPC, accused is sentenced to undergo 7 years R.I. and also to pay fine of Rs.2500/- and in default to undergo 3 months Rigorous Imprisonment for the offence under Section 366 of IPC and the accused was sentenced to undergo 3 years Rigorous Imprisonment and also to pay a fine of Rs.2,500/, in default to undergo 3 months Rigorous Imprisonment for the offence under Section 363 of IPC. The total fine amount of Rs.15,000/- was directed to pay as compensation to victim under Section 357 of Cr.P.C. The Sentences are ordered to run concurrently.

3.The case of the prosecution is that on 30.03.2007 the victim girl (PW2) attended 3rd paper of 10th Public Exam at Fatima School at Virudhachalam and came out at 1.00 p.m. At that time the accused insisted that if the victim girl is admitted elsewhere in 11th standard, they will be separated and therefore the accused insisted her to accompany him and he further with false promise of marriage kidnapped the victim girl from Virudhachalam to Madras and he taken rented house at Kovilpathagai, Avadi, Madras where both lived together for 7 months. The accused also tied Thali to the victim girl and had sexual intercourse with the victim girl and out of it she became pregnant. At the time of occurrence, the victim was minor being 15 year old, the accused was studying 11th standard. The father of the victim girl on coming to know about missing of his daughter searched her for 2 days and thereafter he had taken a love letter from the victim's school bag and from it he came to know his daughter's love affair.

4.Hence on 02.04.2007, he lodged Exhibit-P1 complaint before the respondent police alleging that the appellant / accused has kidnapped his daughter. Thereupon a case in Cr.No.15 of 2007 for the offence under Section 363 of IPC was registered against the accused. After 7 months the accused and the victim girl came back to the police station where the victim girl stated that the accused had sexual intercourse by giving false promise to marry her. Thereafter PW-7, Sub-Inspector of Police sent the victim girl for medical examination and PW-13 Doctor having examined the victim issued Ex-P14, Medical Certificate stating that the age of the victim would be 16 to 17 years. Thereafter, PW-7, the Sub-Inspector of Police altered the FIR and conducted investigation and filed final report by including charges of for the offences under sections 366, 376(1) and 417 of IPC. Thereafter final report was laid before the Learned Judicial Magistrate No.II, Virudhachalam and the same was taken on file

in PRC.No.52 of 2007. As the offences being exclusively triable by the Court of Sessions, the case was committed to the learned Principal Sessions Judge, Cuddalore and the same was made over for Trial and disposal before the Trial Court namely Sessions Judge, (Mahila Court), Cuddalore and was taken on file in S.C.No.149 of 2008.

5.The prosecution in order to prove the charges examined PW1 to PW13, marked Exhibits-P1 to P14 and material objects M.O.1 and M.O.2 were produced. There is no witness and exhibits produced on the side of the accused.

6.Upon considering oral and documentary evidence produced by the prosecution, the Trial Court find guilty of accused for the charges framed against the accused, excepting the charge under Section 417 of IPC. The accused was questioned over imposition of sentence to which he pleaded lesser sentence. Thereafter the Learned Trial Judge convicted and sentenced the accused for the offences punishable under sections 363, 366 and 376(1) of IPC as stated above.

7.I have heard Mr.G.Anabayachozhan, learned counsel appearing for the appellant and Mrs.T.P.Savitha, learned Government Advocate (Criminal Side) for the respondent and perused the entire materials available on record.

8.It is seen from the records that PW1 is the father of the victim who deposed that her daughter was found missing on 30.03.2017 after finishing her third paper of 10th standard Public Exam. On deep search the victim's father found a love letter from the victim's school bag and thereafter he made a complaint before the respondent police and the same was registered in Crime No.15 of 2007 against the accused for the offence of Kidnapping. It is further deposed by him that after 7 months PW-2, the victim girl and the accused returned back to the respondent Police Station, his daughter told him that and the accused by giving false promise, had sexual intercourse with her and she conceived.

9.PW-2, Victim girl deposed that she is the daughter of PW-1 and she had love affair with the accused. Since her parents decided to admit her somewhere else in 11th, the accused compelled her to accompany with him and hence both of them went to Chennai, by bus from Virudhachalam. At Avadi in Kovilpathagai area, the accused took a rental house and there the victim and accused lived together as husband and wife and the accused had sexual intercourse against her consent. She further deposed that on 18.04.2007 she and the accused came to Kammapuram Police Station and before PW-7, the Sub-Inspector of Police stated that

as they lived as husband and wife and out of it she became pregnant. Thereafter she was sent for medical examination by PW-7 to the Government Hospital, Cuddalore.

10.PW3 is the brother-in-law of PW1 and he deposed that he do not know anything about the occurrence and later he came to know that the villagers had spoken about the love affairs of PW-2 and the accused and both of them went to Chennai and they returned back after 3 months.

11.PW4 is the sister of PW1 and she also corroborated the evidence of PW1.

12.PW5, the Headmistress of Ko-Adhanoor Government High School deposed that PW-2 was studying 10th standard at the time of occurrence and she produced Ex-P3 in respect of date of birth of PW2. In Ex-P3 Certificate the date of birth of victim girl was mentioned as 18.05.1992.

13.PW7 is the Sub-Inspector of Police at Kammapuram Police Station deposed that he received Ex-P1 complaint from PW1 and registered FIR and had took up the investigation and sent the victim for medical examination.

14.PW8, the Assistant Headmaster of Government Higher Secondary School, Virudhachalam, deposed that the accused was studied 11th standard in the said school at the time of occurrence and he produced Exhibit-P5 Certificate in respect of date of birth of the accused.

15.PW9 Dr.Sundaraj, Civil Assistant Surgeon of Government Hospital, Cuddalore deposed that he examined the accused and found that accused is potent and to the effect Ex-P7, Medical Certificate was marked.

16.PW11, Dr.S.Natarajan deposed that he examined the victim girl on 22.10.2007 Radiologically and come to the conclusion that she has completed 17 years and not completed 18 years. Ex-P11, Radiological Report was issued by him. He also examined the accused and found that the accused has completed 20 years. Radiological report of the accused is Ex-P12.

17.PW13, Dr.Srimathi attached to Government Hospital, Cuddalore deposed that on 22.10.2017 she examined the victim girl and found that her hymen was torn and two fingers easily entered into her private part and at the time of examination the victim was found 6 week pregnant and vaginal smear was taken and so no semen was detected. She further deposed that on physical examination of victim girl, she could be aged between 16 and 17 and there is no evidence of recent sexual intercourse and she was not raped.

18.The Learned Counsel for the appellant would submit that PW1 deposed that her daughter was found missing, he gave Exhibit-P1 complaint only 02.04.2007 after 3 days after the date of alleged occurrence. Further Exhibit-P1 complaint and Ex-P4 the printed copy of FIR were sent to Judicial Magistrate Court only on 04.04.2007 and remind received by the Court on 04.04.2007 at 10.30 a.m. Hence, there is a delay of 2 days in reaching F.I.R. to the Court. For the above said delay there is no explanation from the prosecution.

19.The learned counsel would further submit that prosecution has not produced the birth certificate of victim girl, even assuming birth certificate was not registered or not available, they could have produced the horoscope of PW2. In this case no such attempt was made by the prosecution to produce the above documents to prove the correct age of the victim girl. It is further contended that the question of Kidnap does not arise, since the appellant and victim loved each other and in actual both stayed at Kovilpathagai at Aavadi for 7 months and therefore it cannot be stated that the accused had sexual intercourse against the Will of victim. Further the perusal of the cross examination of PW-2 it would fairly disclose that there is no such attempt of kidnap made by accused. In cross examination the very first sentence of deposition of PW2, it is seen that she and the appellant are lovers and both of them out of love with each other and came to contact during bus travel to their respective schools. In fact she deposed that the accused tied Thali to her and the accused is her husband. It is pertinent to mention here that she has made clear during her cross that the accused is her husband till that moment. Citing the above facts, the Learned Counsel for the appellant would strenuously contend that no offence of kidnap, rape or cheating will arise against the accused / appellant. This Court has carefully perused the entire evidence of PW2 and also find that there is no allegation put forth against the appellant that she was kidnapped.

20. Per contra, the learned Government Advocate (Criminal Side) would submit that the witnesses examined by the prosecution have categorically deposed that how the occurrence taken place and the narration of the prosecution witnesses in respect of the manner of the occurrence is unambiguous and very clear. The discussion of the learned trial judge has never crossed the evidence available in connection with the occurrence. Further it is pointed out by the learned Government Advocate (Criminal Side) that the grounds raised in the memorandum of appeal have not made out any points for consideration. So, according to the learned counsel the appeal itself is not fit for consideration, hence he prays for the dismissal of the appeal.

21. Now coming to the other facet of argument of the Learned Counsel for the appellant in as much as age of the victim is concerned, this Court has carefully considered the documents produced on the side of prosecution to prove the age of the victim, except Ex-P3 dated 18.10.2007 marked through PW-5. From the above, the prosecution attempted to establish the victim was minor and her date of birth as per School record was 18.05.1992 and her age was 15 year. In this regard it is to be noted that PW-11 Radiologist Doctor stated that the victim girl might have completed 17 years and her age is 18 years at the time of medical examination. Further PW-13 Dr. Srimathi deposed that the age of the victim girl would be 16 to 17 years. In order to rebut the evidence of PW-11 and PW-13 doctors, the prosecution has not taken any steps to prove the real age of the victim girl. Admittedly the prosecution has not filed the birth certificate or horoscope of the victim girl. Further, no school certificate was produced. In the absence of production of any authenticated document to establish the age of victim girl, this Court by taking into consideration of the radiology report of doctor, is of opinion that the victim would have completed 17 years.

22. In this regard it would be useful to refer the unreported Judgment of this Court made in Crl.A.No.9 of 2009, dated 17.02.2017, in the case of Shankar -Vs- State rep. by the Inspector of Police, wherein it is held as follows that:

"10. It is a specific case of the prosecution is that P.W.5 is a minor girl at the time of occurrence and the first accused kidnapped and induced her and compelled her to marry him and thereafter he committed rape. But the age of the victim girl is disputed by the accused and contending that at the time of occurrence she was major.

11. Since the age of the victim is under dispute,

first I take up the issue with regard to the age of the P.W.5/victim girl. In order to prove the age of P.W.5, the prosecution marked the certificate issued by P.W.14, the Headmaster, working in the Government High School, Kannaur, where, the victim girl was studied and the certificate was marked as Ex.P8. In the above certificate, it is stated that the certificate was issued on 16.07.2007, and the date of birth of P.W.5 is 20.06.1992. But, the learned counsel appearing for the appellant would contend that it is not a birth certificate or transfer certificate issued by the School. It is only a certificate given by the Headmaster. In the said certificate it is stated that the date of birth is 20.06.1992 without reference any document, apart from that Ex.P8, the certificate was issued only to the parents of P.W.5, the respondent police separately applied for birth certificate from another Headmaster, namely, one Rajarajan and he has also issued a separate certificate, and he has also given statement under Section 161 Cr.P.C. at the time of investigation, P.W.16, the Sub Inspector of Police also admitted the same his cross examination that he sent a request to the Headmaster, and obtained the certificate from the Headmaster on 19.07.2007, but the same was not marked by the prosecution, P.W.17, the Inspector of Police also in his cross examination has stated that he recorded the statement of Headmaster, namely, Rajarajan and he was not examined by the prosecution before the Court. P.W.14, the Headmaster also admitted that he has issued Ex.P8, certificate to the of P.W.5 on 16.07.2007. Even though it is admitted that the respondent police obtained another certificate from the Headmaster, namely, Rajarajan on 19.07.2007, the said certificate was not marked before this Court and the Headmaster Rajarajan was also not examined before the trial Court But the certificate issued to the parents of the victim girl on 16.02.2007 was marked before this Court as Ex.P8, therefore, it create a doubt about the genuineness of the certificate. Apart from that Ex.P8 is only a certificate issued by P.W.14, without reference to any record, and it has no evidentially value, hence much importance can be given to Ex.P8.

12. The other material available to establish the age of victim in the Radiological report. P.W.15, the Doctor working in the Government Hospital, Cuddalore has examined P.W.5 and he has given opinion that the age of P.W.5 is between 16 to 18 years and she was also subject to radiology test P.W.11, the Radiologist, working in the Government Hospital, Cuddalore. He has examined P.W.5 and he was of the opinion that the age of P.W.5 is above 17 years and below 18 years. It is settled that a Radiological report would only point out the age approximately with a

variation of two years, and the margin of error in age has also been judicially recognized. The Hon'ble Supreme Court in JAYAMALA Vs. HOME SECRETARY, GOVERNMENT OF JAMMU AND KASHMIR AND OTHERS, reported in 1982(2)SCC 538, is held as follows:

However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.

13. In the above facts and circumstances of the case, the age of the girl could not be fixed on the basis of the certificate issued by the Headmaster, P.W.14, the Radiology report for fixing the age of the victim is above 17 years and below 18 years and giving margin of error of two years, the victim is above 18 years and she cannot be considered as minor at the time of occurrence. In the above circumstances, I am of the considered view that the prosecution has failed to prove that the victim girl was minor at the relevant date.

14. Now, I have to consider whether the accused has abducted the victim girl and compelled her to marry him and committed rape. To prove the same, the prosecution examined the victim girl as P.W.5. From the evidence of P.W.5, it is clear that the accused did not abduct her, but P.W.5 and on her own volition went along with the first accused. According to her, on 15.07.2007, at about 9.00 pm., she took Rs.1000/- cash and two set of dresses and then she went out of the house and gone to the Veppur Koot Road, where, the accused 1 to 3 are waiting and both the first accused and P.W.5 boarded in a bus and gone to Chennai, where they have got married, and living as husband and wife for nearly three months. After three months, they came to Seithiyathoppu and police arrested them. From the evidence of P.W.5, it could be seen that P.W.5 only on her own volition went along with the first accused and gone to Chennai and got married and both were living husband and wife nearly for three months. In the above circumstances, the prosecution has failed to establish the offences under Sections 363 and 366 IPC. So far as charge under Section 376 IPC, it is clear from the evidence of P.W.5 that only after marriage, A-1 and P.W.5 had sexual intercourse, and P.W.5 being a major who was a consenting party for the same, and A-1 cannot be convicted for the offence under Section 376 IPC and in the above circumstances, the appellant is entitled for acquittal. In the above circumstances, I am of the considered view that the prosecution has failed to prove the case beyond any reasonable doubt. Hence, the appellant is entitled for acquittal".

23.The facts and circumstances of the above cited case of this Court is identically one and the same and the said Judgment is squarely applicable to the facts of the present case also. This criminal appeal is also liable to be allowed by applying the principles of law laid down in the above cited unreported Judgment.

24.In the present case also the age of the victim girl could not be fixed on the basis of the certificate issued by the Headmaster, PW-11, the Radiology report for fixing the age of the victim is above 17 years and below 18 years and giving margin of error of two years, the victim is above 18 years and she cannot be considered as minor at the time of occurrence. In the above circumstances, I am of the considered view that the prosecution has failed to prove that the victim girl was minor at the time of date of occurrence.

25.More so, this Court is able to see from Ex-P14 Medical Certificate issued by PW-13 doctor that the victim girl was not raped as has no external injury was found. Therefore this Court could safely come to the conclusion that there was no rape over the victim girl. Hence the conviction and sentence made on accused under sections 366 and 376 (1) of IPC is found to be improper and hence liable to be set aside.

26.Further, the records disclose that the victim girl and accused belong to different castes and they loved and lived together. However at the intervention of their respective parents and relatives, they are forced to depart and live separately in the village and the above complaint was lodged. The same is ascertained from the evidence of PW-2. That for their separation at the instance of the relatives and community barrier cannot be a tool to rope the accused into the charges of rape or kidnap. Hence, I am not in agreement with the judgment of the trial Court.

27.In view of the forgoing discussion, I have no hesitation to hold that the prosecution failed to prove the case beyond reasonable doubt and hence, the accused is acquitted from the charges by giving him benefit of doubt.

28.In the result:

(a) this Criminal Appeal is allowed and the conviction and sentence imposed on the appellant in S.C.No.149 of 2008, dated 30.03.2009 on the file of the learned Sessions Judge, (Mahila Court), Cuddalore is set aside;

(b) the appellant/accused is acquitted from all the charges levelled against him;

(c) the bail bond, if any, executed by him shall stand cancelled and the fine amounts if any, paid by him is ordered to be refunded forthwith.

Sd/-
Assistant Registrar(CS-VI)

//True copy//

Sub Assistant Registrar

vs

To

1. The Judicial Magistrate No II, Vridhachalam
2. - do - through 'The Chief Judicial Magistrate, Cuddalore
3. The Officer Incharge Brostone School, Pudukottai.
4. Inspector of Police, Virudhachalam Police Station,
Cuddalore District, Kammapuram Police Station
5. The Sessions Judge, Mahila Court, Cuddalore.
6. The Public Prosecutor, High Court, Madras.

Crl.A.No.200 of 2009

KK(CO)
GMY(21/12/2018)