

BAIL SLIP

The Appellant viz., Suresh @ Chandrasekaran, aged about 23 years, S/o.Kannan @ Kannusamy (Accused in S.C.No.415 of 2007 dated 11/06/2008 on the file of the Mahila Court, Cuddalore) was released on bail on 15.07.2008 in CrI.M.P.No.1/2008 in CrI.A.No.522/2008.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.02.2018

DELIVERED ON : 02.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Criminal Appeal No.522 of 2008

Suresh @ Chandrasekaran ... Appellant / Accused

Vs

State by Inspector of Police,
Neiveli Township Police Station,
Cuddalore Dist. ... Respondent / Complainant
(Cr.No.173/2007)

Prayer: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code, against the Judgment of the Learned Mahila Court, Cuddalore made in S.C.No.415 of 2007 dated 11.6.2008, convicting the accused under Section 363 IPC and sentencing him to undergo 3 years Rigorous Imprisonment and to pay a fine of Rs.5,000/- in default to undergo 3 months Rigorous Imprisonment.

For Appellant : Mr.A.Arasu Ganesan

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

JUDGMENT

This Criminal appeal is preferred by the appellant against the Judgment of the Learned Mahila Court, Cuddalore passed in S.C.No.415 of 2007 dated 11.6.2008 wherein the learned trial judge acquitted the appellant against the charges framed under section 366,376 and 417 of IPC and convicted and sentenced to

undergo 3 years Rigorous Imprisonment for the offence under section 363 of IPC and to pay a fine of Rs.5,000/- in default to undergo 3 months Rigorous Imprisonment.

2.The brief case of the appellant:

The case of the prosecution is that the appellant is residing at Thenkuthu village and PW 4 is the victim girl aged about 16 years. During the academic year 2006-2007 she was studying Lab Technician course and her college is situated 7 Km away from her house. She used to go to the college at 9.00 AM and returned by 4.00 PM by her cycle and the appellant came and told that he loves her and she should love him. On 3.5.2007 at 9.00AM she proceeded to cuddalore for writing examination. Since that was the last examination, PW 4 along with her friends went to Cuddalore beach and returned to her village at Thenkuthu middle school at 5.00 PM. The appellant was standing with his cycle. He pulled her to the hidden place in the school and the appellant told her to sit in the cycle. She refused. The appellant by showing a knife threatened her on fear and took her in his cycle to his friend Ramamoorthy's house at R.C.Colony. After leaving the cycle, the appellant taken her in a Government Bus and boarded at Melmaruvathur. Both stayed there for three days. During the night hours, the appellant taken her to a pond. The appellant threatened her to come over there. On her refusal the appellant told that he will murder her. Thereafter against her will the appellant raped her for two days. Since the appellant had no money on 6.5.2007 at morning hours he telephoned to his friend Arumugam at Ramanathapuram. Arumugam asked the appellant to come over to Sadamunishwarar temple at Vadakuthur. From Melmaruvathur, the appellant taken her to Neyveli Arch gate by Kumbakonam bus. The appellant left her near Arch gate and went to the temple to get cash from Arumugam and PW4 was standing there for 1½ hrs. The Inspector of Police came there with the appellant and the appellant identified her to the Inspector. The appellant was carrying his cloth and her cloth in a bag. The appellant lungi is M.O.1, PW4's petticoat is M.O.2 and nighty is M.O.3.

3.PW1 pavadai is the father of victim girl. On 3.5.2007 his daughter PW4 Meenchi went to Cuddalore for writing examination at 9.00 AM and his daughter did not return till evening. He searched her in several places. He heard that at 5.00 PM the appellant taken his daughter in a cycle. Therefore he gave a complaint in Exhibit P1 in the police station. At the time of occurrence, the age of PW4 could be 16 or 17 years. PW8 Noorbhasha is the Headmaster of Vadlur girl's Higher Secondary school. As per the school records PW4 meenachi was admitted in 6th std in 2000 and during the year 2005 she appeared for the 10th standard examination. He issued a transfer certificate

Exhibit P11 on 30.5.2005. As per the school records her date of birth is 18.6.1989.

4.PW9 Tmt.Padma received a complaint from PW1 on 4.5.2007 at 6.00 PM and registered a case. Printed FIR is Exhibit P12. PW2 Kanakalakahsmi attached to Government Hospital Cuddalore on a requisition Exhibit P2 from the Judicial Magistrate examined PW4. On 7.5.2007 she had no external injuries. Two fingers easily entered into her vagina. Vaginal smear was taken and sent for chemical examination and no spermatozoa detected. She appears to be 17 to 18 years. She could have had sexual intercourse. She issued a medical certificate Exhibit P3. PW3 Vijaya Anad Thambhaiya attached to Government Hospital. Cuddalore examined the appellant and found that he is potent. His age could be 22 years. Letter from Judicial Magistrate is Exhibit P4 Medical certificate of the appellant Exhibit P5 PW7 Dr.Natrajan Radiologist attached to Government Hospital Cuddalore Radiologically examined PW4 and came to the conclusion that she has completed 17 years and not completed 18 years. Radiological report is Exhibit P1 four Xrays are M.O 4 series. He also examined the appellant and found that he has completed 20 years of age Radiological report is Exhibit P10 four X rays are M.O.5 series PW 10 Kalitheerthan Inspector of Police taken up the case for investigation and on 4.5.2007 at 7.00PM he went to the place of occurrence and prepared an observation mahazar Exhibit P13 in which PW5 seshachalam's signature Exhibit P6 was obtained. He drew rough sketch Exhibit P14. He examined the witnesses pavadai Seshachalam and Ezhumalai. On 6.5.2007 at 10.00AM, in front of Sadamunishwarar temple at Vadakuthu, the appellant/accused was presented along with the victim girl and he gave a confession statement and the admissible portion of the confession statement is Exhibit P15 in which PW6 Rajendran's signature in Exhibit P7 was obtained. From the appellant M.O.1 lungi M.O.2, Petti coat M.O.3 nighty were recovered by a recovery mahazar Exhibit P16 in which PW6 Rajendiran's signature in Exhibit P8 was obtained. Case properties were sent to the learned Judicial Magistrate and Court by Form 95. Thereafter he examined Meenachi, Sivamurugan and Rajendiran. The FIR was altered from 366(A) and 376 of IPC and alteration report is Exhibit P17. The victim girl was handed over to her parents.

5.On 7.5.2007 IO sent a requisition Exhibit P18 for medical examination of the victim girl. He also sent a requisition Exhibit P19 for medical examination of the appellant. PW11 Ponjeyaraman Inspector of Police taken up the case for further investigation and examined the witnesses Dr.Vijaya Ananda Thambhaiya, Dr.Natraj and Head constable Chakravarthy, women police constable Aboorvam and Headmaster Noorbasha. After completing the investigation, filed the charge sheet against the appellant under Sections 366,376 and 417 of IPC.

6. On the side of the prosecution, 11 witnesses were examined. PW1 is the father of the victim girl who have the complaint PW4, is the victim girl. PW2 is the doctor who medically examined the victim girl. PW3 is the doctor who medically examined the appellant. PW7 is the doctor who radiologically examined the victim girl and the appellant and fixed their age. PW5 is the witness to the statement and recovery mahazar. PW8 is the Headmistress who issued Transfer Certificate of the victim girl. PW9 is the Sub Inspector of Police who received a complaint from PW1 and registered a case. PW 10 is the Inspector of Police who investigated the case. PW11 is the Inspector of Police who further investigated the case and filed the charge sheet.

7. On committal, the case was taken up for trial by the learned trial Court. The trial Court framed charges as against the appellant/accused under Sections 366, 376 and 417 of IPC. The appellant denied the charges. During trial, as many as 11 witnesses were examined on the side of the prosecution and 19 documents were exhibited and no material objects were marked. On completion of recording of evidence on the side of the prosecution, the appellant was questioned under Section 313 of Cr.P.C. wherein he denied the evidences of the prosecution witnesses and stated that the victim girl loved him for the past two years and after knowing that the parents of the victim girl made arrangements for her marriage and fearing that, the victim girl telephone to the appellant to come to Cuddalore Beach and insisted for marriage or otherwise she would commit suicide and therefore by the consent of the victim girl, both went to their relatives house at Karanodai and stayed for their two days and on third day police came and taken them and arrested him.

Having considered all the above, the trial Court found the Appellant guilty for the offence under Section 363 of IPC and sentenced him to undergo 3 years Rigorous Imprisonment and imposed a fine of Rs.5,000/- in default to undergo Rigorous Imprisonment of 3 months and acquitted the appellant under Sections 366, 376 and 417 of IPC. Hence, the present appeal.

8. I heard Mr.A.Arasu Ganesan, 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.

9. The learned counsel for the appellant submits that the Court below erred in convicting the appellant on the interested and discrepant testimony of the prosecution witnesses.

10.The learned counsel for the appellant submits that the Court below erred in convicting the appellant under Section 363 of IPC without any substantial materials against the appellant since he has been charged for offence under Sections 417, 366 and 376 of IPC, but all the charges have been acquitted and discharged from the above said offence as all the witness have deposed before the Trial Court in favour of the Appellant, even the victim girl also has deposed before the trial Court about the apparent consent given by her to go with the appellant and stayed 3 days with the appellant to perform the marriage.

11.The learned counsel for the appellant submits that the Court below ought to have seen that the Learned Judge has acquitted the appellant under section 417,366 and 376 IPC, because of the victim had given consent and voluntarily eloped with the appellant to perform the marriage. In view of the number of judgments are held in the Hon'ble Supreme Court and Hon'ble High Courts that once consent is there and age of the victim girls is more 16 years, the question of commission under section 366 does not arise. Accordingly the radiological report submitted before the learned trial Judge it reveals that the age of the victim girl completed 17years and running 18years. Therefore above 16 years girl given her consent and voluntarily eloped with the appellant the offence under Section 366 does not arise.

12.The learned counsel for the appellant submits that the Lower Court ought to have seen that the prosecution case is that the appellant said to have taken the girl in his bi-cycle from the occurrence place to go to the bus stand through the high-way road which Two Kilo Metres away from the occurrence. But at that time number of vehicles and buses were coming and going and houses, shops were there in both sides in the high way, at that time the victim girl did not take any efforts to escape from the clutches of the appellant. It clearly shows that she willingly and voluntarily eloped with the appellant since they were in love for the past two years. This aspect has not been considered by the Trial Court.

13.The learned counsel for the appellant submits that the Court below ought to have seen that PW1 who is the father of the victim girl said in his evidence before the trial Court when he admitted the victim girl in the primary school, at that time he had given the date of birth only by approximately and also not given the date of birth certificate of the victim girl before the school authority. This aspect has not been considered in the trial Court.

14.The learned counsel for the appellant submits that the Lower Court ought to have seen that the victim girl said to have been kidnapped by the appellant and taken her in the Government Bus and got down at the Melmaruvathur Temple where they stayed for two days, day and night and third day when they returned to their native place, at that time the respondent police, secured the victim girl and arrested the accused near the residence of the victim girl, but when the victim girl stated in the cross examination "I along with the appellant straight away came to Chennai koyambedu Bus stand on 3.5.2007 from where they went to Karanodai village near the Koyambedu Bus stand and stayed three days at the appellant's relative's house and the appellant taken steps to perform the marriage in the presence of his relatives, at that time the respondent police brought her along with the accused to the police station in the private car. In spite of this material contradiction, the Learned Trial Judge convicted the accused without any basis.

15.The learned counsel for the appellant submits that the learned trial Court ought to have seen that the PW8 School Headmaster had deposed before the trial Court that the date of birth of the victim girl was recorded in the Transfer Certificate as 18.6.1989. But the date of birth certificate was not available in the school registry and accordingly the age has not been ascertained either by school certificate or the parents of the victim girl. Under the circumstances the learned trial Judge has convicted the appellant under Section 363 of IPC without any basis.

16.The appellant cited the following decisions in support his submissions:

- 1) 1996(2) CrL. 279 Aulat and another - Appellants V State of Madhya pradesh
- 2) AIR 2010 SCC 392 Sunil V State of Haryana
- 3) AIR 1965 SCC 942 S.Varadarajan Appellant V State of Madras Respondent.

17.The learned Government Advocate (Criminal Side) supported the judgment passed by the learned trial judge and opposed the contentions raised by the appellant.

18.The learned counsel for the appellant vehemently submitted that the learned trial judge ought to have appreciated the school register which shows that the PW4 victim girl's date of birth as 18.6.1989. The occurrence said to have taken place

on 3.5.2007. In view of that there is only 45 days lesser to complete the 18 years of the victim girl. But the law is settled by the Hon'ble Supreme Court and Hon'ble High Courts that the margin of 2 years should be given in favour of the appellant.

19. Having considered the submission of the rival party, even according to the prosecution, the age of the victim was between 16 to 18 years. The margin of error is always there and taking into consideration of the decision rendered by the Hon'ble Apex Court reported in AIR 1982 SCC 1297, this Court is of the opinion that it is a case where the prosecution has failed to prove that the victim girl was a minor.

20. Further on careful scrutiny of the evidences adduced by the prosecution, it is clear that PW4 voluntarily leaves the roof of her guardian and went out of her house with the appellant makes clear that there is a passive consent from the victim girl and this does not amount to taking or enticing of the victim. There is an essential distinction between the words taking and enticing a minor to accompanying a person. In this case, the victim alleged to have been taken by the appellant left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the appellant. In such a case, I do not think that the appellant can be said to have taken the victim away from her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the appellant person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian. Where witness makes two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witness.

21. In the instant case, the act of the appellant, upon the appreciating the facts of the case, as held by the learned trial Court, fall under section 363 of IPC. In a criminal trial, the accused must be put on notice to the charge framed by the trial Court. In this case, the appellant was acquitted in respect of all the charges framed against him but he was convicted in respect of 363 of IPC as an alternative charge without notice. Thus in my opinion, the trial Court committed a grave error of law in convicting the appellant/accused under Section 363 of IPC without framing charge under the aforesaid offence against the appellant and without affording him any opportunity to defend the said charge and hence the recorded conviction of the appellant under Section 363 of IPC cannot be sustained and is liable to be set aside.

22.From what has been discussed above, it is seen that the judgment of the trial Court is not based on the evidence on record and is against the settled principles of law and the same is contrary to the facts brought before the Court. In this case, the learned Sessions Judge has arrived at an erroneous conclusion.

23.In the result:

(a) this Criminal Appeal is allowed by setting aside the conviction and sentence imposed in S.C.No.415 of 2007 dated 11.06.2008, on the file of the learned Mahila Court, Cuddalore;

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

(c) the bail bond, if any, executed by him shall stand cancelled and the fine amount, if any paid by the appellant/accused shall be refunded.

Sd/-
Assistant Registrar(CO)

//True Copy//

vs
To

Sub Assistant Registrar

- 1) The District Munsif cum Judicial Magistrate, Neyveli.
- 2) - do - through The Chief Judicial Magistrate, Cuddalore.
- 3) The Sessions Judge, Mahila Court, Cuddalore.
- 4) The Inspector of Police, Neyveli Township Police Station, Cuddalore District.
- 5) The Public prosecutor, High Court, Madras
- 6) The District Collector, Cuddalore.

+1 cc to Mr.A.Arasu Ganesan, Advocate, S.R.No.952

Judgment made in
Criminal Appeal No.522 of 2008

PPA(CO)
SSM(30/01/2019)