

BAIL SLIP

The Accused viz., Kumar, S/o.Lucaus was enlarged on bail on 30.10.2008 made in M.P.No.1 of 2008 in CRL A NO.743 of 2008 on the file of the High Court, Madras.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.02.2019

CORAM:

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.A.No.743 of 2008

Kumar

... Appellant

/Vs/

State, rep by,
The Inspector of Police,
Yercaud Police Station
Salem District.

... Respondent

PRAYER: Criminal Appeal filed under section 374 (2) of the Criminal Procedure Code, set aside the judgement and conviction made in S.C.No.368 of 2006 dated 23.07.2008 on the file of the Sessions Judge, Mahila Court, Salem.

For Appellant : Ms.V.Sengodi for
Mr.R.Sankaransubbu

For Respondent : Mr.K.Prabakar
Additional Public Prosecutor

J U D G M E N T

This Criminal Appeal is filed by the appellant/accused against the judgement passed by the trial Court finding him guilty under Section 451 of IPC and convicting and sentencing him to undergo Rigorous Imprisonment for one year and to pay a fine of Rs.500/-, in default of payment of fine to undergo three months Rigorous Imprisonment and also finding him guilty under Section 354 of IPC and convicting and sentencing him to undergo Rigorous Imprisonment for two years and to pay a fine amount of Rs.500/-, in default to undergo three months Rigorous Imprisonment. The trial Court ordered both the sentences to run concurrently and the period already undergone by the

appellant/accused was directed to be set off under Section 428 Cr.P.C. The appeal has been filed challenging the said conviction and sentence.

2. PW.1 is Bhavana A.Metha, Complainant, PW.2 is Aswin Metha, husband of PW.1, PW.3 is Nanda Kishore, Friend of PW.2, PW.4 is Vasanthakumar Jain, Friend of PW.2, PW.5 is Subramaninan, Friend of PW.2, PW.6 is Thangadurai, Receptionist of Hotel, PW.7 is Kumar, Hotel Staff, PW.8 is Devendhiran, Hotel Staff, PW.9 is Ravikumar, Hotel Personal Officer and PW.10 is Arjunan, Investigating Officer.

3. The case of the prosecution in brief, is that PW.1 Bhavana A.Metha was staying as a guest in Room No.301 in Sterling Resorts within the jurisdiction of the respondent police. On 02.08.2005 at 11.15 p.m., the appellant/accused who was working as a Room Boy in the Sterling Resorts under the guise of cleaning in the room against the wishes of PW.1, trespassed into the room and had switched off the E.B Main Box and pushed PW.1 on the bed, with an intention to commit rape and attempted to remove her dress and pulled her blouse. Based on the complaint given by PW.1, the respondent police registered a case against the appellant/accused for the offences under Sections 376 r/w 511 of IPC, 354 of IPC and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, 1998.

4. The respondent, after completing investigation, filed the final report before the learned Judicial Magistrate No.5, Salem. After summoning the appellant/accused on complying with the procedure contemplated Section 207 of Cr.P.C and finding that the case was triable by a Court of Sessions, the case was committed to the Sessions Judge, Mahila Court, Salem and he had made over the case to the Sessions Judge, Mahila Court, Salem. The case was taken up in S.C.No.368 of 2006, and the learned Trial Judge framed charges against the appellant/accused for the offences under Sections 451 and 376 r/w Section 511 of IPC. When the appellant/accused was questioned under Section 313 Cr.P.C he denied the charges and sought for trial. On the side of prosecution, PW.1 to PW.10 were examined and Exs.P1 to P4 were marked and no materials objects are marked and no evidence, was let in on the side of the defence. The learned trial Judge after completion of trial and taking note of the evidence convicted and sentenced the appellant/accused as stated above.

5. The learned counsel for the appellant/accused would submit that the entire case of the prosecution is embellished with contradictions and several discrepancies. She would further submit that the learned Trial Judge failed to take into consideration the defects in the prosecution case and thereby, erred in convicting the appellant/accused. She would further

submit that at the out set, the occurrence was said to have happened on 02.08.2005 at 23.15 hours and the complaint had been given only on 03.08.2005 at 4.00 hours, after a delay of five hours. She would also submit that the First Information Report had further reached the Court only at 8.45 p.m., on 03.08.2005. Admittedly PW.1 does not know Tamil and English and admittedly as per PW.1, she has stated about the incident in Hindi and one Subramanian had translated in Tamil to the respondent police. Strangely, in the case, neither the persons who have written the complaint in English nor the the said Subramanian who is stated to have translated her version in Tamil to the Inspector of Police, have been examined in this case. She would also submit that as per PW.2, one Gupta is the person, who is stated to have written the complaint in English and he has not been examined. She would further submit that the statement of PW.1 was given in Hindi to one Subramanian and the said Subramanian has instructed one Gupta and the said Gupta had given the complaint in English. Admittedly, the complaint is nothing but a hear-say evidence of Subramanian who has once again stated to the said Gupta and he had written in English and non examination of the Said Gupta before the Court is fatal to the case of the prosecution. There is nothing on record to show that the said Gupta had extracted the actual version of the complaint given by PW.1.

6. The learned counsel for the appellant/accused would further submit that as per Ex.P1, the complaint had been attested by one Boopalan, who is the Resort Manager and Ravikumar, who is the Personal Officer of Sterling Resorts and non examination of the said Boopalan causes a doubt in the prosecution case. She would further submit that though the said Ravikumar has been examination as PW.9, he has not stated anything about having attested the complaint. She would further submit that as per the complaint, the appellant/accused is stated to have asked one Vijayakumar, to help her to reach the room and the said Vijayakumar, who was taking tenure with two others is stated to have directed the appellant/accused to escort her to her room. Non examination of the said Vijayakumar also causes a doubt in the prosecution case. She would further submit PW.2 to PW.5 are interested witnesses, since they are either the close relatives of PW.1 or subordinate workers of her husband and thereby, their evidence cannot be believed.

7. The learned counsel for the appellant/accused in the alternative would submit that the date of occurrence on 03.08.2005 and the appellant/accused was aged about 20 years and that the appellant/accused was not having any previous case against him at that time and that the appellate Court ought to have invoked and extended the benefits of the Probation of Offenders Act.

8. The learned Additional Public Prosecutor appearing for the respondent would submit that the appellant/accused was working as a Room Boy in Sterling Resorts, Yercaud, Salem and that on the date of occurrence, despite the resistance of PW.1, the appellant/accused had trespassed into her room where PW.1 was staying and attempted to rape her and thereby, outraged her modesty, thereby, the Trial Court taking into consideration the evidence of all the witnesses, has rightly convicted the appellant/accused for the offence under Section 354 of IPC. He would further submit that non examination of the scribe of the complaint is not fatal by the prosecution, since Subramanian who is stated to have translated the version of PW.1 in Hindi, has been examined and he has stated that on his interpretation, the complaint has been given by the said Gupta in English and thereby, the evidence of PW.1 is corroborated.

9. At this juncture, the learned counsel for the appellant/accused would submit that it is the admitted case of the prosecution that PW.1 does not know either Tamil or English, whereas, her evidence has been recorded in Tamil without any memorandum of the learned Trial Judge and that had caused grave prejudice to the appellant/accused. In respect of the above submission the learned Additional Public Prosecutor would submit that neither the appellant nor the counsel for the appellant has raised any objection during the course of the trial and as per Section 465 (2) of Cr.P.C, since, the objection had not been raised at the earlier stage of the proceedings, the objection cannot be now raised at this stage.

10. I have gone through the evidence and materials on record. PW.1 has cogently described about the incident that had occurred on the fateful day. She has no reason to falsely implicate the appellant/accused in the crime. Further, the evidence of PW.1 has been corroborated by the evidence of the other witnesses. In respect of ground of delay in filing complaint, the occurrence had happened in a hill station and the victims are strangers to the place and that the complaint has been given on the next day early morning at 4.00 a.m., and thereby, much significance cannot be attached to delay in lodging the complaint.

11. In view of the above evidence on record this Court is of the view and opinion, the Trial Judge has rightly found the appellant/accused guilty. At this juncture, the learned counsel for the appellant/accused would submit that the appellant was only aged about 20 years at that time and that the learned Trial Judge ought to have invoked and extended the benefits of the Probation of Offenders Act. She would also submit that the appellant/accused is first offender at that time and that he is married and settled with his wife and he has got two children

and that he is the sole bread winner of the family. She would also submit that the appellant/accused was in judicial custody for about 45 days and that this Court shall take into consideration that long time has lapsed the appellant/accused may be rendered the benefit of the Provisions of the Probation of Offenders Act. She would also submit that in similar circumstances, in the case of Vidyadharan Vs. State of Kerala reported in 2004 (1) SCC 215, the Honb'le Apex Court. While convicting the appellant/accused for offence under Section 354 of IPC had modified the period of sentence to the sentence of period already undergone.

12. Taking into consideration that the incident is the year 2005 and it is reported that the appellant/accused is married and he has got two children, this Court while confirming the conviction and modifies the sentence to the period already undergone by him. Taking into account the facts of the case and submissions made by the learned counsel on both sides, the appeal is partly allowed, while confirming the conviction passed by the learned Sessions Judge, Mahila Court, Salem in S.C.No.368 of 2006 dated 23.07.2008, the sentence is accordingly modified to the period already undergone by him. The appeal is accordingly partly allowed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge, Mahila Court, Salem.
2. The Judicial Magistrate No.III, Salem.
3. The Inspector of Police,
Yercaud Police Station, Salem District.
4. The Superintendent of Police, Salem District.
5. The Public Prosecutor, High Court of Madras.
6. The Section Officer,
Criminal Section, High Court of Madras.

+1 cc to M/s.R.Sankara Subbu, Advocate Sr.No.15474

Crl.A.No.743 of 2008

RSV(CO)
CSL/01.04.2019