

Bail Slip

The Petitioner/ Appellant /Accused,namely Kittan @ Kittusamy S/o.Thannasi was released on bail on 22.02.2011 in MP.NO.1/11 IN Crl.A.No.193 of 2010 on the file of this Hon'ble court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 18.02.2019

PRONOUNCED ON: 19.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.A.No.193 of 2010

Kittan @ Kittusamy

Appellant/Single Accused

Vs

State by Inspector of Police

All Women Police Station, Kinathukadavu Police Station

Coimbatore

Respondent/Complainant

Prayer:- This Criminal Appeal is filed, against the judgement of conviction and sentence, dated 10.03.2010, made in SC.No.309 of 2008, by the District Judge, Mahalir Neethimandram (Mahila Court), Coimbatore.

For Appellant : Mr.B.Kumarasamy

For Respondent : Mr.K.Prabakar, APP

JUDGEMENT

This Criminal Appeal is filed, against the judgement of conviction and sentence, dated 10.03.2010, made in SC.No.309 of 2008, by the District Judge, Mahalir Neethimandram (Mahila Court), Coimbatore, convicting and sentencing the Appellant/ accused, for the offence under Section 376 of IPC, to undergo ten years Rigorous Imprisonment and to pay a fine of Rs.1000/-, in default, to undergo six months Rigorous Imprisonment.

2. The case of the Prosecution has arisen on the basis of the complaint, Ex.P1, dated 04.10.2007, given by PW.1, who is the father of the victim girl, Parthiba, aged about 17 years at that time, alleging that he is working as a coolie and on 3.10.2007, he and his wife went out of

their house, to see his cousin, who was sick at that time and they came back to the house at 9.30 p.m. and at that time, on seeing them, the victim girl, cried and shivered and when questioned her, she had informed that the accused came to the house and forcibly raped her. Hence, the Respondent Police, after investigation, has laid a charge sheet, against the Appellant under Section 376 of IPC.

3. The case was taken on file in SC.No.309 of 2008, by the District Judge, Mahalir Neethimandram (Mahila Court), Coimbatore and necessary charges were framed. The accused denied the charges and sought for trial. In order to bring home the charges against the accused, the prosecution examined PW.1 to PW.12 and also marked Exs.P1 to P13 and Mos.1 to 6.

4. PW.1, who gave the complaint, Ex.P1, is the father of the victim girl. PW.2 is the Doctor, attached to the Government Hospital, Coimbatore, who examined the victim girl on 7.10.2007 at 6.00 p.m. PW.3 is the Doctor of the same Hospital, who examined the Appellant, on 16.11.2007, regarding his potency. PW.4 is the victim girl. PW.5 is the relative of PW.1. PW.6 is the neighbour and relative of PW.1. PW.7 is the person, who accompanied PW.1 to the Police Station and wrote the complaint, Ex.P1. PW.8 is also the resident of that area, who attested the observation mahazar, Ex.P6. PW.9 is the Sub Inspector of Police, who, on the complaint, Ex.P1 given by PW.1, on 4.10.2007, registered a case in Cr.No.287 of 2007, under Section 376 of IPC and prepared Ex.P7, First Information Report and sent the case papers to the concerned Higher Officials and the Court concerned. PW.10 is the Inspector of Police, who took up the case for further investigation and examined the witnesses and recorded their statements. On transfer of PW.10, PW.11, Inspector of Police, All Women Police Station, Perur, conducted further investigation, examined the witnesses and recorded their statements and after completing investigation, on 03.08.2008, filed a final report against the Appellant/accused under Section 376 of IPC.

5. Ex.P1, dated 4.10.2007 is the complaint, given by PW.1. Ex.P2, dated 9.10.2007 is the forensic report. Ex.P3, dated 7.10.2007 is the accident register. Ex.P4, dated 16.11.207 is the medical report with respect to potency of the accused. Ex.P5, dated 4.10.2007, is the signature of PW.7 in Ex.P1. Ex.P6, dated 4.10.2007, is the observation mahazar. Ex.P7, dated 4.10.2007, is the First Information Report. Ex.P8, dated 4.10.2007 is the rough sketch and Ex.P9, dated 4.10.2007, is the seizure mahazar. Ex.P10, dated 30.06.2008 is the letter sent by the concerned court to the Forensic Department. Ex.P1 is the

letter, seeking chemical analysis. Ex.P12 is the chemical analysis report, dated 13.08.2008. Ex.P13, dated 26.05.2009 is the age certificate of the victim girl, given by the Radiologist.

6. On completion of the evidence on the side of the prosecution, the accused was questioned under Section 313 Cr.PC as to the incriminating circumstances found in the evidence of prosecution witnesses and the accused has come with the version of total denial and stated that he has been falsely implicated in this case.

7. The court below, after hearing the arguments advanced on either side and also looking into the materials available on record, found the accused/appellant guilty and awarded punishments as referred to above, which is challenged in this Criminal Appeal.

8. This court heard the submissions of the learned counsel on either side.

9. The learned counsel for the Appellant would submit that though a conviction for rape can be based on the sole testimony of the Prosecutrix, even without any corroboration, it should be unimpeachable, beyond reproach and inspire confidence, whereas it is not so in this case and that the court below erred in convicting the accused, based on inconsistent material evidence available on record, including the medical evidence, which is not supporting the case of the Prosecution. He would submit that there is an unexplained inordinate delay in lodging the complaint, in as much as though the occurrence was said to have taken place on 03.10.2007 at 11.00 a.m., the complaint was given only on 04.10.2007 at 8.30 a.m. He would further submit that the entire evidence of PW.1, PW.4, PW.5 and PW.6 are against the normal human conduct and hence, their evidence is highly suspicious and unreliable and cannot be a basis for conviction and that they are interested witnesses, who have motive to depose against the accused. He would further submit that non examination of independent witnesses is fatal to the case of the Prosecution and that the evidence of PW.2 would show that the occurrence did not take place as alleged by the Prosecution and that there is no evidence to prove the age of the victim girl.

10. The learned counsel for the Appellant would submit that on a perusal of Ex.P1 and the deposition of PW.1, it is clear that Ex.P1, complaint is not only embellished, but also tainted with falsity and it is also an exaggerated one, in order to wreck vengeance against the Appellant by falsely implicating him. The exaggerated complaint had been made in order to seek an undesired

sympathy and PW.4 the victim has been falsely stated to be a mentally retarded person, whereas it is not so. He would further submit that the evidence of the victim girl, PW.4 and PW.5 are diametrically contrary to each other and would further falsify the entire case of the Prosecution regarding the incident.

11. The learned counsel for the Appellant would further submit that even assuming that the occurrence is accepted as true, it can only at the most suggest a case of consensual relationship, rather than a case of rape. He would submit that it is the case of PW.4, the victim that on the day of the occurrence, she was watching TV and the Appellant/ accused had come to her house and sat near her and pushed her and lay near her and removed her dress and removed his dress and committed sexual intercourse with her and only after PW.5 came to the house, he went away and that only after seeing PW.5, she got perturbed and frightened and it is the further evidence of PW.4 that only after PW.6 came to her house, the Appellant/ accused left the house. He would also submit that the Honourable Supreme Court in several cases has held that there are circumstances where false cases are foisted due to enmity and also after aborted consensual acts after being known to others. In this case, admittedly, there had been no resistance by the victim till PW.5 had come to the house. Further, PW.1 himself admitted that the land, in which he was working, was leased out to the Appellant/ accused by its owner, in respect of which, there were disputes between them. He would further submit that admittedly, the Appellant and the witnesses are relatives and that the evidence of PW.5, is self-contradictory, in as much as, though she is related and known to the Appellant/ accused and the victim, she has stated that some stranger was in the house at the relevant point of time. The evidence of PW.6 is that when he had gone to the house of PW.1, he had seen both the victim girl, and the Appellant / accused, watching Television, which is totally contrary to the case of the Prosecution. Though there are other relatives, living in that area, no other witnesses have been examined. The conduct of the victim as well as the Appellant/ accused said to have been deposed by the other witnesses at the time occurrence, does not favour the case of the Prosecution that the offence of rape had been committed.

12. The learned counsel for the Appellant would further submit that as per Section 14 of the Indian Evidence Act, the court may presume the existence of any fact which it thinks would likely to have happened regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case. He would further submit that the Prosecution has not proved its case beyond all reasonable doubts, by letting in cogent and convincing

evidence. He would further submit that taking into consideration the overall evidence of the witnesses and the attending circumstances, particularly, the evidence of the prosecutrix, PW.4, which does not inspire confidence, the impugned judgement of conviction and sentence is not sustainable and therefore, the Appellant is entitled for acquittal.

13. On the other hand, the learned Additional Public Prosecutor for the Respondent, while supporting the impugned judgement of conviction and sentence, would submit that the Prosecution has proved its case by adducing clear and cogent evidence and that there are no infirmities or discrepancies or inconsistencies in the evidence adduced by the Prosecution. He would further submit that the case of the Prosecution is also corroborated by the medical evidence.

14. The learned Additional Public Prosecutor would further submit that it is a case of rape and that the evidence of the prosecutrix, PW.4 is cogent and inspires confidence. He would also submit that since because the medical evidence does not support the case of rape and that there are no external injuries on the victim, the evidence of the prosecutrix cannot be doubted. He would further submit that considering the evidence, both oral and documentary, in a proper perspective, the Trial Court had rightly convicted and sentenced the Appellant/accused, by the impugned judgement, which warrants no interference by this Court.

15. I have given my careful and anxious consideration to the rival contentions put forward by either side and thoroughly scanned through the entire evidence available on record and also perused the impugned judgement of conviction, including the authorities cited on either side.

16. The points to be decided are as to (i) whether the evidence of the prosecutrix, PW.4 inspires confidence to base conviction, (ii) whether the Prosecution has proved its case beyond all reasonable doubts, by cogent and convincing evidence and (iii) whether the Trial Court is right and justified in convicting the Appellant/accused.

17. The entire perusal of the records shows that the case of the Prosecution mainly rests on the testimony of the prosecutrix, PW.4 and PW.5 and PW.6, who are stated to have gone to the house of PW.1, at the time of the alleged occurrence. PW.1 is the father of the victim girl. PW.5 is the relative and PW.6 is the neighbour and also a cousin of PW.4. The Appellant / accused is the relative of PW.1. PW.1 himself admitted that the land in which he was working was leased out to the Appellant/accused by its owner, in respect of which there were disputes arose between them. Hence, there is a reason to believe that PW.1, PW.4 and PW.5 who are close relatives, have motive

to depose against the Appellant/ accused.

18. In the case on hand, admittedly PW.1 has given an exaggerated complaint, falsely stating that his daughter, the victim, PW.4 is a mentally retarded girl, whereas it is not so. The alleged occurrence is said to have happened in the noon time. The victim has not raised any objection. Further, though the Appellant/ accused is stated to be a person, belonging to the Village and also a distant relative to the witnesses. PW.4, in her chief examination, had stated as if a stranger was found in the house, whereas, in his cross examination, she had stated that the Appellant/ accused is a relative of them. PW.6 has stated that when he had come to the house of PW.1, after the occurrence, he had seen the victim and the appellant/ accused, watching Television. If an offence had been committed by the Appellant/ accused against the wishes of the prosecutrix, it would be the natural conduct of the accused to get away from the scene of occurrence rather sitting inside the house. Further, it is the admitted case of PW.1 that after they come back to the house, they have enquired the Appellant/ accused and only in the next day morning, they have given the complaint to the Respondent Police. Further, the medical evidence does not support the case of the Prosecution. Though it is true that the Law permits that testimony of a prosecutrix can be accepted without any corroboration, without materials papers, for she has to be placed on a higher pedestal than an injured witness, on a scrutiny of the evidence let in by the Prosecution makes it difficult to accept the version of the prosecutrix. Since the evidence of the prosecutrix coupled with the other evidence on record does not inspire confidence.

19. It is the admitted case of PW.1 that at the time of lodging the complaint, he has stated that his daughter is a mentally retarded girl, but whereas in his evidence, he has deposed that she was mentally a sound person and that she has also been examined in court and she has also answered the questions in the witness box, thereby, making it clear that due to previous enmity, in order to wreck vengeance on the Appellant/ accused, an exaggerated complaint has been given, wherein a normal girl had been falsely projected as a mentally retarded girl and that she was raped against her will.

20. Further conduct of the prosecutrix, PW.4 at the time of the occurrence creates a doubt in the Prosecution case. It is seen from her evidence that admittedly, she has neither resisted nor raised a hue and cry, at the time of occurrence and only after seeing PW.5, she got perturbed and frightened. PW.5 says that when she had come to the house, the appellant/ accused ran away whereas it is the evidence of PW.6 that he had seen them watching the Television together. PW.4 has further deposed

that on coming to know the occurrence, her parents did not fight with the Appellant, but only reprimanded him. PW.5, who is the cousin sister of PW.4, in her evidence has deposed that when she saw the occurrence, PW.4 did not raise any alarm, hue and cry.

21. Another important factor, which raises a serious doubt regarding the veracity of the case of the Prosecution is the evidence of PW.6, who is a neighbour to PW.1. PW.6, in chief examination, has deposed that when he went to the house of PW.4, he saw the Appellant/ accused inside the house, except which, nothing is elicited from his evidence, given in chief. But, in the cross examination, PW.6, has deposed that he saw the Appellant/ deceased watching the Television along with PW.4, which would falsify the evidence of PW.4 and PW.5 and ultimately, the case of the Prosecution.

22. There is no doubt that the offence of rape is very serious offence and also inhuman on the part of any person committing such a sexual assault on innocent victim girls. It is equally also no doubt true and well settled in law that conviction can be based on the sole testimony of prosecutrix, if her evidence does not suffer from infirmities or is not improbable and is found to be trustworthy and reliable. If the offence is proved, the accused should be punished with adequate sentence. But, at the same time, the Court should also guard against false and frivolous cases.

23. In this case, there is evidence to the effect that the Prosecution party was inimical to the accused, inasmuch as admittedly there were disputes between PW.1 and the accused/ Appellant, regarding the leased out lands, where the PW.1 was working and thereby, it can be inferred that the complaint Ex.P1 came into existence with a view to wreck vengeance on the Appellant/ accused, coupled with the fact of exaggeration in the complaint that the victim was falsely projected as a mentally retarded girl.

24. As also contended by the learned counsel for the Appellant, it is not a case of rape against will, but a case of consensual act, which got aborted since PW.5 had come to the house of PW.4, which is well founded from the evidence of PW.4, PW.5 and PW.6 that at the time of occurrence in the house of PW.4, PW.6 saw the victim girl, along with the Appellant, both watching Television. Nowhere, in her evidence, PW.4 has stated that when the accused had sexual intercourse with her, she attempted to resist his move or that she had expressed her unwillingness. It is therefore, not possible to accept the finding of the court below that merely because the victim has stated that she was raped, it follows that there was forced sexual intercourse against the will of the victim and overpowering her resistance. It is also elicited from evidence that the victim girl did not raise hue and cry at

the time of occurrence. Apart from that, though according to the evidence of the witnesses, there are other relatives, living in that area, no other witnesses have been examined to speak about the offence, which is fatal the case of the Prosecution.

25. Another glaring infirmity, which raises a serious doubt regarding the veracity of the case of the Prosecution, is that as per the medical evidence, there was no detection of spermatozoa and semen as well and that there were no injuries on the private parts of PW.4. PW.4 had stated in her evidence that she was raped forcibly. But, admittedly, as per the evidence of PW.2, Doctor, Geetha, the victim was aged about 17 years and hymen was not intact and that there was no external or internal injuries either all over the body or on her private parts and that no spermatozoa or semen was found in the smear examination conducted. According to the said medical evidence, there was no symptoms of any struggle or resistance made by PW.4.

26. As per Ex.P13, the age of the victim was fixed at 17 years. PW.12, the Radiologist, who was examined with regard to her age, had stated that the age of the victim as per the radiological report was above 17 years and below 18 years and she had also stated that the age could be either plus or minor two years. No other evidence has been let in by the Prosecution to prove the age of the victim, by marking documents required under the Law to prove the age as per Rule 12(3) of the Juvenile Justice (Care and Protection) Rules, 2007 and in such circumstances, the medical opinion can be relied on as per the decision reported in 2015 7 SCC 773 (State of MP Vs. Anoop Singh). The occurrence had happened prior to the amendment. Admittedly, the age of the victim was 17 years and hence, she was competent to give her consent.

27. In 2016 1 SCC 696 (State of MP Vs. Munna), the Honourable Supreme Court has held that when there is evidence, establishing sexual intercourse to be consensual and when it is not proved by the Prosecution beyond reasonable doubts that the age of the victim was less than 16 years, at the time of the incident, it can be inferred that the victim was competent to give her consent and the question of rape does not arise.

28. Another point raised by the learned counsel for the Appellant is that there was a delay in preferring the complaint. Though the occurrence was said to have been taken place on 03.10.2007 at 11.00 a.m. the complaint had been given by PW.1, who is the father of the victim girl on 04.10.2007 at 8.30 a.m. Though in rape cases, much relevance cannot be given to delay, considering the sociological conditions prevailing in the Country, however taking into consideration the facts of this case, the delay in this case creates a doubt in the case of the

Prosecution.

29. In the decision of the Honourable Supreme Court reported in 2003 SCC Cri. 775 (Uday Vs. State of Karnataka), it was held that the Court must also weigh the evidence, keeping in view the fact that the burden is on the Prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

30. In 2008 2 SCC Cri 207 (Radhu Vs. State of MP), the Honourable Supreme Court, while holding that the finding of guilty in a case of rape can be based on the uncorroborated evidence of the Prosecutrix and that her testimony should not be rejected on the basis of minor discrepancies and contradictions, had held that the absence of injuries on the private parts of the victim will not by itself falsify the case of rape nor can be construed as evidence of consent, however, at the same time, the Courts should bear in mind that false charges of rape are not uncommon and that there are rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. The Honourable Supreme Court had further held that whether there was rape or not would depend ultimately on the facts and circumstances of each case.

31. In 2000 3 SCC 454 (Rang Bahadur Singh Vs. State of UP), it was held as under:-

"The time-tested rule that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilt of the accused beyond reasonable doubt a conviction cannot be passed on the accused. A criminal court cannot afford to deprive liberty of the appellants, lifelong liberty, without having at least a reasonable level of certainty that appellants were the real culprit." सत्यमेव जयते

32. Reliance is also placed on the decision of this Court, reported in 2007-1-LW-Crl.18 (Mirthagai Ali Vs. State), wherein it was held that the evidence of PW.1, prosecutrix does not at all inspire confidence, as her version not only falsified by the evidence of her own mother/ PW.2, but also falsified by the medical evidence. In the case on hand, when considered the entire Prosecution case, I find that the evidence of the witnesses, namely, PW.1, PW.4, PW.5 and PW.6 is highly suspicious and does not inspire confidence, as the victim girl has not suffered any injury, much less any marks of violence were found on her, coupled with the medical evidence, as narrated above and that the Prosecution could not substantiate the charges levelled against the Appellant under Section 376 of IPC.

33. Taking into consideration the exaggerated complaint, the enmity between the father of the victim and the Appellant/accused and the evidence of PW.4, PW.5 and PW.6, with regard to the conduct of the appellant/ accused at the time of occurrence and after the time of occurrence, coupled with the delay in lodging the complaint, this Court finds that it would not be safe to convict the appellant/ accused on the above said materials.

34. Further, the infirmities and the discrepancies pointed out above and the circumstances in this case cast a shadow of doubt over the veracity of the Prosecution, which is not sufficient to sustain an order of conviction solely on the basis of the testimony of PW.4, which is not trustworthy and does not inspire confidence. Having carefully scrutinized the evidence on record, I am satisfied that the Prosecution has not proved its case beyond all reasonable doubt and consequently, the appellant is entitled to the benefit of doubt and the impugned judgement of conviction and sentence is unsustainable in law.

34. In the result, this criminal appeal is allowed. The impugned judgement of conviction and sentence are set aside. The Appellant is acquitted of the charges levelled against him. The bail bond, if any executed by the Appellant, shall stand cancelled and the fine amount, if any paid by the Appellant, shall be refunded to him.

Sd/-

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

Srcm

To:

- 1.The Judicial Magistrate, Pollachi.
 - 2.The Chief Judicial Magistrate, coimbatore.
 - 3.The District Judge, Mahalir Neethimandram (Mahila Court), Coimbatore.
 - 4.The Superintendent, Central Prison, Coimbatore
 - 5.The Inspector of Police, All Women Police Station, Kinathukadavu Police Station, Coimbatore
 - 6.The Public Prosecutor, High Court, Madras
 - 7.The Director General of Police, Mylapore, Chennai. 4.
 - 8.The Collector, Coimbatore District.
 - 9.The Superintendent of Police, Coimbatore District
 10. The section officer, Criminal Section, High court, Madras
- +lcc to Mr. B.Kumarasamy, Advocate SR.No. 25837

CrI.A.No.193 of 2010

A.SK(03/04/2019)

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