

Bail Slip

The Appellant in CRL.A.No.373/10 VIZ Vijayakumar S/o.Kamatchi was directed to be released on bail as per order of this Court dated 29.06.2010 in MP.NO.1/10 IN CRL A.NO.373/2010.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.04.2019

CORAM:

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA
Crl.A.No.373 of 2010

1.Vijayakumar

2.Indirani

Appellants

/Vs/

The State by

The Inspector of Police

B5, Singanallur Police Station, Law and Order

Coimbatore.

Respondent

PRAYER: Criminal Appeal filed under section 374(2) of the Criminal Procedure Code, to set aside the Judgement in S.C.No.12 of 2007 passed by the Magalir Court, Coimbatore dated 04.06.2010.

For Appellants : Mr.Rajan for
Mr.B.Nedunchezhiyan

For Respondent : Mr.K.Prabakar

Additional Public Prosecutor

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J U D G M E N T

This Criminal Appeal is filed by the appellants/accused against the judgement dated 04.06.2010 in S.C.No.12 of 2007 passed by the trial Court, finding the 1st appellant/accused guilty under Section 294(b) of IPC and convicting and sentencing him to pay a fine of Rs.250/-, in default, to undergo one week Simple Imprisonment and finding him guilty under Section 323 IPC and convicting and sentencing him to pay a fine of Rs.1,000/-, in default, to undergo one month Simple Imprisonment and finding him guilty under Section 355 IPC and convicting and sentencing him to pay a fine of Rs.500/-, in default, to undergo one month Simple Imprisonment, and also finding him guilty under Section 313 IPC and convicting and sentencing him to undergo Rigorous Imprisonment for four years and to pay a fine amount of Rs.500/-, in default to undergo one month Simple Imprisonment and finding the 2nd appellant/accused guilty under Section 294(b) IPC and convicting and sentencing her to pay a fine of Rs.250/-, in

default, to undergo one week Simple Imprisonment and also finding her guilty under Section 323 IPC and convicting and sentencing her to pay a fine amount of Rs.1,000/-, in default to undergo one month Simple Imprisonment. The trial Court ordered the sentences to run concurrently and the period already undergone by the appellants/accused were directed to be set off under Section 428 Cr.P.C.

2. The case of the prosecution is that on 14.06.2006 at 8.00 a.m., the appellants/accused have come in front of the house of PW.1 and abused PW1, using filthy words, causing disrepute to her in the eye of the public and in continuation of the same occurrence, the appellants/accused had voluntarily assaulted PW.1 with hands and kicked her and further in order to cause miscarriage to PW.1 assaulted her with slippers on her body and also on her stomach, knowing that she was pregnant and thereby, caused miscarriage to her. The respondent, after completion of investigation filed the final report against the appellants/accused for the offences under Sections 294(b), 323, 355 and 313 of IPC.

3. The learned Magistrate, after compliance of procedure under Section 207 Cr.P.C and having found that the case was triable by the Court of Sessions committed the case to the District Sessions Judge, Coimbatore and in turn the case was made over to the Mahila Court for Trial.

4. On appearance of the appellants/accused and after perusal of the records and hearing both sides, the charges were framed against the 1st appellant/accused for the offences under Sections 294(b) 323, 355 and 313 of IPC and the charges were framed against the 2nd appellant/accused for the offences under Sections 294(b) and 323 of IPC. On being questioned about the charges, the appellants/accused denied the charges and sought to be tried. In order to prove the case of the prosecution, the respondents have examined 13 witnesses as PW.1 to PW.13 and marked as Exs.P1 to P8 and MO.1. No evidence was let in on the side of the defence. The Trial Court, after questioning the appellants/accused under Section 313 Cr.P.C and after hearing the counsel convicted the appellants/accused as stated above.

5. The learned counsel appearing for the appellants would submit that the incident had occurred during a quarrel, which ensued while fetching water in a public Tap. He would further submit that though the charges have been framed against the appellants/accused for offence under Section 313 of IPC, stating that the appellants/accused committed the offence with the knowledge that the victim was pregnant, no evidence had been let in by the prosecution, to prove that the appellants/accused had knowledge of the victim being pregnant and that they had with an intention to cause miscarriage, had beaten her with the slippers on the stomach. He would further submit that it is a case and case in counter and that the 2nd appellant/accused was assaulted in the same incident,

resulting in her sustaining injuries and on the complaint made by the 2nd appellant/accused, a case in Crime No.654 of 2006 was registered against PW.1 and PW.2, for the offence under Section 323 of IPC. He would further submit that the prosecution had not placed all the records including the complaint given by the 2nd appellant/accused. He would also submit that a duty is cast upon the prosecution to point out clearly the genesis of the occurrence and thereby, enabling the Court to find out the truth and fix the aggressors and on failure of the prosecution to place the records of the counter case, the Trial Court ought to have given benefit of doubt and had acquitted the appellants/accused.

6. The learned counsel for the appellants/accused would submit that the charge against the appellants/accused under Section 313 IPC cannot be sustained against the appellants/accused, since Section 313 IPC is applicable in different circumstances against persons responsible for miscarriage with or without the consent of the woman and that such a provision will not be applicable to the present case on hand where the occurrence is alleged to have taken place in a sudden fight/quarrel when the accused had no knowledge that the victim was pregnant and that there was no intention on the part of the accused to cause miscarriage. In support of the above submission the learned counsel for the appellant would rely on the decision reported in 1994 Cr.L.J 1708 in Suresh Chander and another Vs.State.

7. The learned counsel for the appellants/accused would further submit that in this case none of the independent witnesses in the locality had supported the prosecution version. Further, it is a case and case in counter and the 2nd appellant/accused was also injured in the incident and the prosecution has deliberately suppressed the genesis of the case and has not presented the true version in which the 2nd appellant/accused was injured there by creating a doubt in the prosecution version. In support of the above submissions, he would rely on the decision of this Court reported in 2009 (1) MNN (Cr.) 423 DB (Sulian alias Chinnathambi and another Vs.State of Tamil Nadu.

8. The learned Additional Public Prosecutor appearing for the respondent would submit that though the evidence is lacking with regard to the aspect of the accused having knowledge of the victim being pregnant and their intention to cause miscarriage, the prosecution otherwise by cogent, oral and medical evidence proved that the appellants/accused are responsible for causing miscarriage of PW.1, who was pregnant by three months. He would further submit that though the charge against the appellants/accused under Section 313 of IPC may not be sustained, the appellants/accused can alternatively be convicted for the offence under Section 325 of IPC. Further, the trial Court finding that the prosecution by cogent materials had proved the other charges has rightly convicted the accused.

9. What is to be seen is whether the prosecution has proved its case beyond reasonable doubt and whether the trial court is right in convicting the accused based on available evidence.

10. Now analyzing the evidence in the case, PW.1 is the victim Umarani and as per her evidence, she got married ten months back and that she was residing at Madurai and that she became pregnant and while she was pregnant by three months, she had come to her mother's house at RVL Colony, Singanallur. The appellants/accused are neighbors and she had deposed that on 14.06.2006 at 7.30 a.m., she gone to fetch water in the public Tap and that the 1st appellant/accused had questioned her fetching more water and had abused her with filthy language, due to which there was a quarrel and thereby, PW.1 had gone back to her house crying and her father, mother, sister and brother had questioned her and at that time the appellants/accused had come to her house and that once again, abused her in a filthy language and assaulted with her hands and beaten her with a slipper on her stomach and she got pain in her stomach, which resulted in bleeding. Thereafter, PW.1 was taken to the hospital, where the Doctor opined that she suffered miscarriage, due to the assault by the appellants/accused.

11. PW.2 is the father of PW.1 and he had also spoken about the quarrel and the corroborated PW.1 regarding the assault by the appellants/accused and he further deposed that they took PW.1 to the hospital, where she was admitted and PW.11 had visited the hospital and obtained the statement from her, based on which, the case was registered and the statement was marked as Ex.P1. PW.2 has corroborated evidence of PW.1 and he had stated that after the occurrence, she had taken PW.1 in a bus and admitted her in the Government General Hospital and the Doctor who had treated PW.1 had informed that his daughter PW.1 suffered miscarriage and that on the next day, he was enquired by the Police. Further, he had deposed that on the complaint given by the 2nd appellant/accused, a case was registered against him and his daughter.

12. PW.3 is the witness for the Mahazar. PW.4 is the sister of PW.1 and she has corroborated the evidence of PW.1 and PW.2. PW.5 is an independent witness and he had deposed about the quarrel between PW.1 and the appellants/accused and that he had intervened and asked them not to fight. However, he has not supported the prosecution case with regard to the assault of PW.1. PW.6 is the brother of PW.1, who has corroborated evidence of PW.1, PW.2 and PW4. PW.7 is a neighbour living at RVR Colony, Singanallur and he had spoken about having witnessed the quarrel in the morning and that with regard to the subsequent incident, he had also stated that PW.1 had sustained injuries and suffered miscarriage.

PW.8 is the neighbour and he turned hostile.

13. PW.9 is the Doctor working in the Government Hospital, Coimbatore and he had deposed that on 14.06.2006, while he was duty in the Emergency Ward, PW.1 came along with PW.2 and that he had informed him that she was assaulted by two known persons with slippers and that while he examined her she was found to be three months pregnant and that suspecting that there could have been miscarriage, had admitted her in the Emergency Care and thereafter, she was referred to the gynecologic Department and based on the opinion, he had issued the injury certificate, stating that the injuries were grievous in nature. The accident register was marked as Ex.P5 and further, he deposed that after PW.1 was admitted as an in-patient, he had intimated the Police.

14. PW.10 is the Gynecologist In-charge of the Gynecologist Department and she is the professor of Gynecology in the Medical College Hospital, Coimbatore and she had deposed that on 16.06.2006, PW.1 was referred from the Emergency Department to the Gynecologist Department for further management and that PW.1 had informed her that she was pregnant and due to the assault by two unknown persons, she was having bleeding. She had suspected that PW.1 would have suffered miscarriage and after examining her, she had found PW.1 bleeding and thereafter, she had conducted DNC and the medical certificate recorded the treatment given to PW.1 and was marked as Ex.P6.

15. PW.11 is the Civil Surgeon, Medical College Hospital, Coimbatore and he had spoken about having referred PW.1 for further treatment. PW.12 is the Sub Inspector of Police, who had on intimation from the hospital, visited the hospital and obtained a statement from PW.1, based on which a case in Crime No.462 of 2006 was registered against the appellants/accused for the offences under Sections 294(b), 323, 355 and 313 of IPC. After registering a case, he had handed over the file to PW.13.

16. PW.13, took up the case for further investigation. PW.12 had spoken about the case registered against PW.1 and her father on the complaint given by the 2nd appellant/accused, in Crime No.654 of 2006 for the offence under Section 323 IPC in respect of the very same incident. PW.12 is the Investigating Officer, who took up the investigation on the same day and he had visited the scene of occurrence and prepared the observation Mahazar - Ex.P3 and the Sketch - Ex.P8 in the presence of witness one Ganesan Selvaraj, Recovered M.O.1 one slipper under mahazar Ex.P4 and thereafter, on the next day went to the hospital and obtained statement from PW.1. Thereafter, examined the witnesses Rajendran, Vasanthi, Rajathi, Murugan and PW.8/Murthi and recorded their statements. M.O.1 was sent to the Court in Form 95. Hereafter, on 15.06.2006, he arrested the 1st

appellant/accused in front of Singanallur Bus Stand and sent him to remand and thereafter, on 16.06.2006 went to the scene of occurrence and enquired the witness one Rani and on 30.06.2006 arrested the 2nd appellant/accused and thereafter, after examining the Doctors and filed final report against the appellants/accused for the offences under Sections 294(b), 323, 355 and 313 of IPC.

17. On analyzing the evidence on record this court is able to see that the prosecution has by clear and cogent evidence, proved that the victim/PW.1 suffered miscarriage, due to the assault by the 1st appellant/accused and also proved that PW.2 has abused her with filthy language. However none of the witnesses have deposed that the appellants/accused had knowledge about the victim/PW.1 being pregnant and that the accused had intention to cause miscarriage. Admittedly, PW.1 the victim was pregnant by three months and that none of the witnesses have spoken that the pregnancy was also visible and as rightly suggested by the learned counsel for the appellants/accused, none of the witnesses including PW 1 had stated that the accused assaulted her with the intention to cause the miscarriage.

18. In Suresh Chander and another Vs.State reported in 1994 Cri.L.J.1708 it has held as follows:-

"4. It has next been argued in the alternative that the appellants under the circumstances should have been convicted under Section 313, I.P.C. After perusal of Section 313 of the penal Code I am of the opinion that the accused, under these circumstances, of the case, could not be held to be guilty of an offence punishable under Section 313 I.P.C., which is applicable in different circumstances by persons being responsible for miscarriage with or without the consent of the woman. Such a provision would not be applicable in a case where the occurrence is alleged to have taken place by giving reckless beating without the intention of causing miscarriage."

19. Further in the case of Sulian alias Chinnathambi and another Vs.State of Tamil Nadu reported in 2009 (1) MWN (Cr.) 423 (DB) of this Court has held as follows:-

"11. In view of the ratio laid down by the Hon'ble Supreme Court, this case has to be considered. All the Eyewitnesses examined by the prosecution are closely related to each other and the deceased. It is well-settled that the Eyewitnesses of close relatives cannot be discredited, provided their evidence is cogent, consistent and trustworthy and stands close scrutiny. In the instant case, though a case was registered in Crime No.624 of 2002, on the

basis of the complaint given by the first accused. The prosecution has not placed all the records including the complaint. When a case and counter has arisen in the course of same transaction, it is the duty of the prosecution to place the records relating to both the cases and further duty is caused upon the prosecution to point out clearly the genesis of the occurrence, and thereby, enabling the Court to find out the truth and fix the aggressors. Further out of five injuries sustained by the first accused, two of the injuries are cut injuries, one on the right fore arm and another on the right skeletal region on the skull. Out of the three injuries sustained, by the second accused, one is the cut injury on the right thigh and another one lacerated wound over the right parietal region of scar. Though the injuries are described as simple injuries by the Doctors, having sustained injury on the skull. It can not be termed only as minor and superficial injuries. In view of the non-explanation of the injuries sustained by the accused and also due to failure on the part of the prosecution by not placing all the records pertaining to the counter case, this Court is to draw the inference that the prosecution has not presented the true version and the origin of the occurrence is not established and the Eyewitnesses have deliberately suppressed the part of the transaction in which the accused are injured. In the said circumstance, it is very unsafe to convict the accused placing reliance on the evidence of Eyewitnesses."

20. The learned counsel for the appellants/accused would further submit that the provisions of Section 313 IPC cannot be applicable to the case on hand, when the occurrence alleged to have taken place was due to an assault after a quarrel when the accused were not having any knowledge of the victim being pregnant and they having no intention to cause miscarriage. He would further submit that though the 1st appellant/accused can be convicted for an alternate charge, the appellants/accused cannot be convicted for having voluntarily caused grievous injuries on her, in view of the explanation to Section 322 of IPC, when there was no intention or knowledge that is likely to cause grievous injuries on the victim. He would reiterate once again that it was quarrel during fetching water in a public Tap and that there is absolutely no evidence that the appellants/accused had knowledge that the victim was pregnant and that they intentionally assaulted to cause the miscarriage and in such circumstances, he would pray for a lesser sentence.

21. In this context, useful reference can be made to Section 322 IPC, which reads as follows:-

322. Voluntarily causing grievous hurt.-
Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt."

Explanation.-A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind."

22. Now taking into consideration, the evidence on record there is no evidence to prove that the accused had knowledge of pregnancy and intention to cause miscarriage, however, the prosecution has proved by cogent evidence that the victim/PW.1 had suffered miscarriage due to the incident which happened on 14.06.2006 where the accused assaulted the victim. As stated by the counsel for the appellants/accused, the prosecution has failed to prove that the appellants/accused had knowledge of the victim being pregnant and that the 1st appellant/accused assaulted her with the knowledge and intention to cause miscarriage and further the knowledge and intention to cause grievous injury to her.

23. In view of the above, this Court is of the opinion, the conviction of the 1st appellant/accused under Section 313 of IPC cannot be sustained. However, the 1st appellant/accused having committed offence under Section 321 of IPC is liable for punishment under Section 323 of IPC and the conviction in respect of the other offences are sustained.

24. In the result, this Criminal Appeal is partly allowed. The impugned judgment of conviction and sentence, dated 04.06.2010 made in S.C.No.12 of 2007, on the file of the Mahila Court, Coimbatore, convicting the 1st appellant/accused for offence under Section 313 IPC is set aside and in the alternate the first appellant is convicted for offence under Section 323 IPC to undergo imprisonment for three months and to pay a fine of Rs.500/- and in default to undergo one month Simple Imprisonment and the conviction and sentence in respect of other offences are confirmed. The fine amount, if any, paid by the 1st appellant for the offence under Section 313 IPC is directed to be refunded to him. However, in respect of the other offences, the impugned judgment of conviction and

sentence imposed on the 1st appellant is confirmed. In so far as the 2nd appellant is concerned the impugned judgment of conviction and sentence is confirmed.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Judge,
Magalir Court, Coimbatore.
- 2.The Judicial Magistrate No.III,Coimbatore.
- 3.do The Chief Judicial Magistrate,Coimbatore.
- 4.The superintendent,Central Prison, Coimbatore.
- The Inspector of Police,
B5, Singanallur Police Station, Law and Order
Coimbatore.
- 6.The Public Prosecutor, High Court of Madras.

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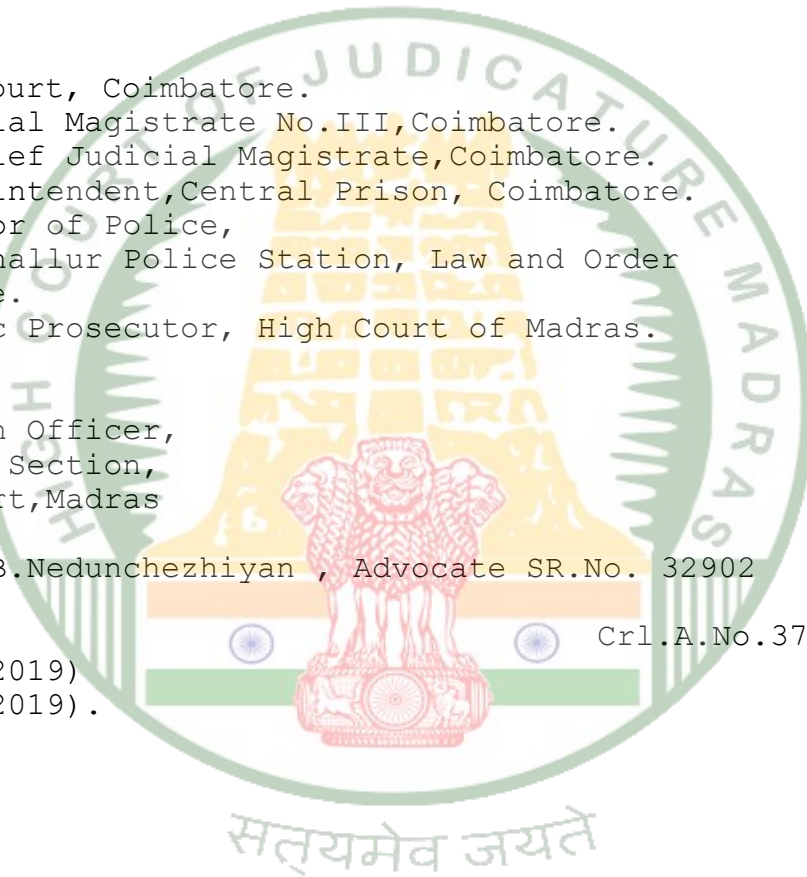
The Section Officer,
Criminal Section,
High Court,Madras

+1cc to Mr.B.Nedunchezhiyan , Advocate SR.No. 32902

Crl.A.No.373 of 2010

A.SK(11/07/2019)

A.SK(30/07/2019).



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