

Bail Slip

The Petitioner/Accused Viz., Vincent Raja S/o Abishekam was released on bail as per the order of this Court dated 26/02/2013 in M.P.No.2 of 2012 in Crl.A.No.745 of 2012 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.12.2019

CORAM :

THE HONOURABLE MR. JUSTICE P.N. PRAKASH

Crl.A.No.745 of 2012

Vincent Raja ... Appellant/Accused

Vs.

The State by
The Inspector of Police,
(Law and Order)
K-2, Ayanavaram Police Station,
Chennai - 600 023. ... Respondent/Complainant

Prayer : Criminal Appeal filed under Section 374(2) Cr.P.C., praying to set aside the judgment passed in S.C.No.6 of 2010 on the file of the Magalir Neethimandram (Magalir Court), Chennai, dated 09.10.2012.

For Appellant :Mr. B. Kumarasamy

For Respondent:Mrs. Kritika Kamal. P.
Government Advocate (Crl. Side)

J U D G M E N T

This Criminal Appeal has been filed to set aside the judgment dated 09.10.2012, passed in S.C.No.6 of 2010 on the file of the Magalir Neethimandram (Mahila Court), Chennai.

2.It is the case of the prosecution that, on 15.08.2018, the appellant mixed sedatives in Bun-Butter-Jam and fed the victim girl "X", and deflowered her, when she was not fully conscious, in the thatched terrace of his friend Senthil's (P.W.3's) house at Door No.66, Dr.Ambedhkar Nagar, 2nd Street, Ayanavaram,

Chennai - 600 023. It is also alleged that, even thereafter, the appellant had sex with her twice. When Esther (P.W.1), the mother of "X", came to know of it, she lodged a written complaint (Ex.P1) on 08.10.2008 to the police, based on which, Rajasekaran, (P.W.12), Inspector of Police, Ayanavaram Police Station, registered a case in Crime No.773 of 2008 on 08.10.2008, for the offence under Section 376 IPC, against the appellant and prepared the printed F.I.R. (Ex.P15).

3.Rajasekaran (P.W.12) took up investigation of the case and went to the place of occurrence and prepared Observation Mahazar (Ex.P16) and Rough Sketch (Ex.P17) in the presence of witnesses, Israel (P.W.5) and Surathammal (P.W.6). On the request of the Investigating Officer, Mrs.Jayanthi (P.W.8), XIX Metropolitan Magistrate, Chennai, recorded the statement of "X" under Section 164 Cr.P.C. and the same was marked as Ex.P2. "X" was medically examined by Dr.M.Vidyasankari on 10.10.2008 and the examination report (Ex.P12) shows the absence of hymen and Dr.M.Vidyasankari has opined that there is no evidence of recent sexual intercourse. The appellant was examined by Dr.Gokularamanan (P.W.7), who, in his evidence as well in the examination report (Ex.P4), has stated that the appellant is not impotent and is capable of coitus. The age certificate (Ex.P5) shows that the age of the appellant would be between 22 and 25 years.

4.After completing the investigation, the police filed a final report in P.R.C.No.25 of 2009, before the V Metropolitan Magistrate, Egmore, Chennai, for the offence under Section 376 IPC, against the appellant. On appearance of the appellant, the provisions of Section 207 Cr.P.C. were complied with and the case was committed to the Court of Session in S.C.No.6 of 2010 and was made over to the Mahila Court, Chennai, for trial.

5.The trial Court framed a charge for the offence under Section 376 IPC against the appellant. When questioned, the appellant pleaded 'not guilty'.

6.To prove the case, the prosecution examined 12 witnesses and marked Exs.P1 to P18. When the appellant was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same. No witness was examined nor any document marked on the side of the appellant.

7.After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated

09.10.2012, convicted the appellant of the offence under Section 376 IPC and sentenced him to undergo rigorous imprisonment for seven years and pay a fine of Rs.5,000/- in default to undergo simple imprisonment for three months.

8.Challenging the conviction and sentence, the appellant filed the present appeal through Mr.T.S.N.Prabhakaran, Advocate.

9.At the time of admission of this appeal, this Court granted suspension of sentence and bail in M.P.No.2 of 2012 in C.A.No.745 of 2012 on 26.02.2013. When the matter was taken up for final disposal on 06.12.2019, this Court passed the following order :

"On 05.12.2019, Mr.T.S.N.Prabhakaran, learned counsel for the appellant submitted that he has returned the bundle in the year 2013 itself. Therefore, this Court directed the Registry to print the name of the appellant in the cause list and posted the matter on 06.12.2019.

2. Today, though the name of the appellant is printed in the cause list and his name was called out thrice by the Office Assistant, there is no representation for the appellant.

3. This Court deprecates the dilatory tactics adopted by the appellant in getting suspension of sentence and bail and thereafter, not contending the appeal.

4. In such view of the matter, the suspension of sentence and bail granted by this Court vide order dated 26.02.2013 in M.P.No.2 of 2012 in Crl.A.No.745 of 2012 shall stand cancelled. The trial Court is directed to issue warrant to secure the appellant and commit him to prison.

5. On that score, this appeal cannot be kept pending indefinitely. Therefore, this Court appoints Mr.B.Kumarasamy (Enrolment No.1156 of 1993), Advocate, to appear for the appellant. The Registry is directed to furnish a free copy of the typed set of papers to Mr.B.Kumarasamy.

Post the matter on 11.12.2019."

10.Heard Mr.B.Kumarasamy, learned counsel for the appellant and Mrs.P.Kritika Kamal, learned Government Advocate (Crl. Side), appearing for the respondent.

11.Mr.Kumarasamy contended that the evidence of "X" should be out rightly rejected, because, she had improved her case from time to time and that she did not state in her statement under Section 164 Cr.P.C. (Ex.P2) that the appellant gave her sedatives mixed in Bun-Butter-Jam on 15.08.2008 and ravished her. He further contended that "X" was more than 16 years of age at the time of the incident and therefore, the trial Court fell in error by giving a finding that "X" was less than 16 years of age at the time of occurrence. He strongly disputed the School Leaving Certificate (Ex.P14) and placed reliance on the judgment of the Supreme Court in Babloo Pasi v. State of Jharkhand and another [(2008) 13 SCC 133]. He placed reliance on Para Nos.27, 28 and 29 of the said ruling in support of his contention that the School Leaving Certificate should not have been the basis for determining the age of "X".

12.Per contra, Mrs.P.Kritika Kamal, fairly conceded that the prosecution had failed to prove satisfactorily the Bun-Butter-Jam theory, but, the evidence on record clearly shows that the date of birth of "X" is 02.01.1993 and as on the date of occurrence, i.e. on 15.08.2008, she was only 15 years and 9 months old and hence, consent is irrelevant.

13.This Court gave its anxious consideration to the rival submissions.

14.In the complaint (Ex.P1) given by Esther (P.W.1), it is alleged that the appellant had called "X" to the terrace of Senthil's (P.W.3) house, gave her Bun-Butter-Jam, in which, sedatives were mixed, due to which, "X" fell asleep and the appellant ravished her. Esther (P.W.1) admitted that this information was given to her only by "X", a month later. In this case, the F.I.R. was registered only on 08.10.2008 and not immediately after the occurrence. Of course, in a case of this nature, the delay in registration of F.I.R., by itself, cannot be a ground to disbelieve the entire prosecution case. "X" has stated that, after she was ravished by the appellant on 15.08.2008, she felt embarrassed and did not tell her mother about it and she disclosed it to her only later.

15.As rightly contended by Mr.Kumarasamy, the Bun-Butter-Jam theory does not find place in the statement of "X" under Section 164 Cr.P.C. (Ex.P2). The statement under Section 164 Cr.P.C. is not a substantive piece of evidence, but can be used only to corroborate or contradict the deponent under Section 157 or Section 145 of the Evidence Act, 1872, respectively.

16."X" was examined-in-chief on 25.11.2010 and was not cross-examined on the same day, but was recalled under Section 311 Cr.P.C. and was cross-examined only on 09.07.2012, which is two years thereafter. In the cross-examination of "X", she was confronted with her previous statement given under Section 164 Cr.P.C. (Ex.P2), as provided under Section 145 of the Evidence Act, 1872. Mr.Kumarasamy took this Court through the evidence of "X" and submitted that "X" had an affair with one Jaikumar and she ran away with him, which, she has admitted in the cross-examination and therefore, the evidence of "X" should not be implicitly accepted.

17.In this case, the incident in question had taken place during August, 2008. The chief-examination of "X" was in November, 2010. The cross-examination of "X" was in July, 2012. A reading of "X"'s evidence shows that, much after the incident in question, she had fell in love with one Jaikumar and had ran away with him. The profile of the family of "X" shows that they are dalits who have migrated from neighbouring Andhra Pradesh State to Chennai in search of employment. "X" was born in Andhra Pradesh and she was admitted to Corporation School in Nammalwarpet, Chennai, where she studied up to IX Standard and discontinued her studies with effect from 11.08.2008 as could be seen from her Transfer Certificate (Ex.P14). The huge gap between the date of incident and the date of cross-examination of a victim in the criminal Court, which has become a normal feature in our Criminal Justice System, cannot be put against the victim of a crime. A reading of the evidence of "X" shows that she was in love with the appellant and that the appellant used to take her in his motor bike to school and bring her back.

18.It is the specific case of "X" that, on 15.08.2008, Senthil (P.W.3), a common friend of "X" and the appellant, called "X" to come to the terrace of his house, where the appellant was present. However, Senthil (P.W.3) and his father Malakondaiyya (P.W.4) turned hostile to the prosecution case. Malakondaiyya (P.W.4), the father of Senthil (P.W.3), has stated that he knows the appellant and also "X" and has stated that he does not know anything about the case. Thus, on a thorough analysis of the evidence of the victim girl "X", it is clear that the appellant and "X" were in love with each other and they have had consensual sex on 15.08.2008 in the thatched portion of the terrace of Senthil's (P.W.3's) house.

19.Relying on Babloo pasi (supra), Mr.Kumarasamy attacked the School Leaving Certificate (Ex.P14) and submitted that there is no other material to prove the date of birth of "X".

20.The law laid down in Babloo pasi (supra) relates to determination of age of a juvenile accused under the Juvenile Justice (Care and Protection of Children) Act, 2015. In that context, the Supreme Court held that the Transfer Certificate ought not to have been taken as the criteria for determining the juvenility or otherwise of the accused and remanded the case back to the Juvenile Justice Board for re-enquiry. In the opinion of this Court, the principle in Babloo pasi (supra) cannot be imported to protect an accused for having ravished a minor girl. In this case, in the cross-examination of Esther (P.W.1), the mother of "X", she has clearly stated that her daughter was born on 02.01.1993. When the mother says that she had given birth to "X" on 02.01.1993, it cannot be easily brushed aside. Mr.Kumarasamy contended that the original Birth Certificate of "X" was not filed. When Esther (P.W.1) was confronted about this, she stated that "X" was born in Andhra Pradesh and they were not able to get the Birth Certificate in time from Andhra Pradesh. "X" has also stated in her evidence that she was born on 02.01.1993. Thus, for the sake of arguments, even if we keep aside the Transfer Certificate (Ex.P14), the evidence of Esther (P.W.1) and "X" that the date of birth of "X" is 02.01.1993, cannot be ignored. In such view of the matter, reckoning the date of birth of "X" as 02.01.1993, she was only 15 years and 9 months old on 15.08.2008, when the appellant had sex with her. This will clearly attract Section 376 IPC as it stood then.

21.Mr.Kumarasamy lastly contended that "X" was just short of three months for attaining the age of 16 and the appellant was also around 20 years at the time of the incident. Grippled by adolescence sickness, they fell in error.

22.There appears to be some force in the submission of Mr.Kumarasamy. This Court has rejected the Bun-Butter-Jam theory and has returned a finding that the duo has had consensual sex. However, this Court is constrained to convict the appellant, since, "X" was less than 16 years of age, when she was seduced. Section 376 IPC, prior to the amendment in the year 2013, empowered the Court to impose a sentence of imprisonment for a term of less than 7 years for adequate and special reasons. As alluded to above, this is not a case where the appellant had forcibly ravished "X", but a case of consensual sex. Taking into consideration the overall facts and

circumstances, this Court is of the view that, interest of justice will be served, if the sentence is reduced to three years rigorous imprisonment.

23.In view of the above discussion, the conviction of the appellant of the offence under Section 376 IPC is confirmed, but the sentence is reduced from seven years rigorous imprisonment to three years rigorous imprisonment.

24.In the result, this Criminal Appeal is partly allowed. The trial Court is directed to secure the appellant and commit him to prison for undergoing the sentence imposed upon him.

The Tamil Nadu Legal Services Authority is directed to pay Rs.10,000/- to Mr.Kumarasamy, as remuneration.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Sessions Judge,
Mahila Court,
Chennai.
- 2.The Inspector of Police,
(Law and Order)
K-2, Ayanavaram Police Station,
Chennai - 600 023.
- 3.The Public Prosecutor,
High Court, Madras.
- 4.The Tamil Nadu Legal Services Authority,
Chennai.
- 5.The XIII Metropolitan Magistrate,
Egmore, Chennai.

6.The Superintendent,
Central Prison, Puzhal, Chennai.

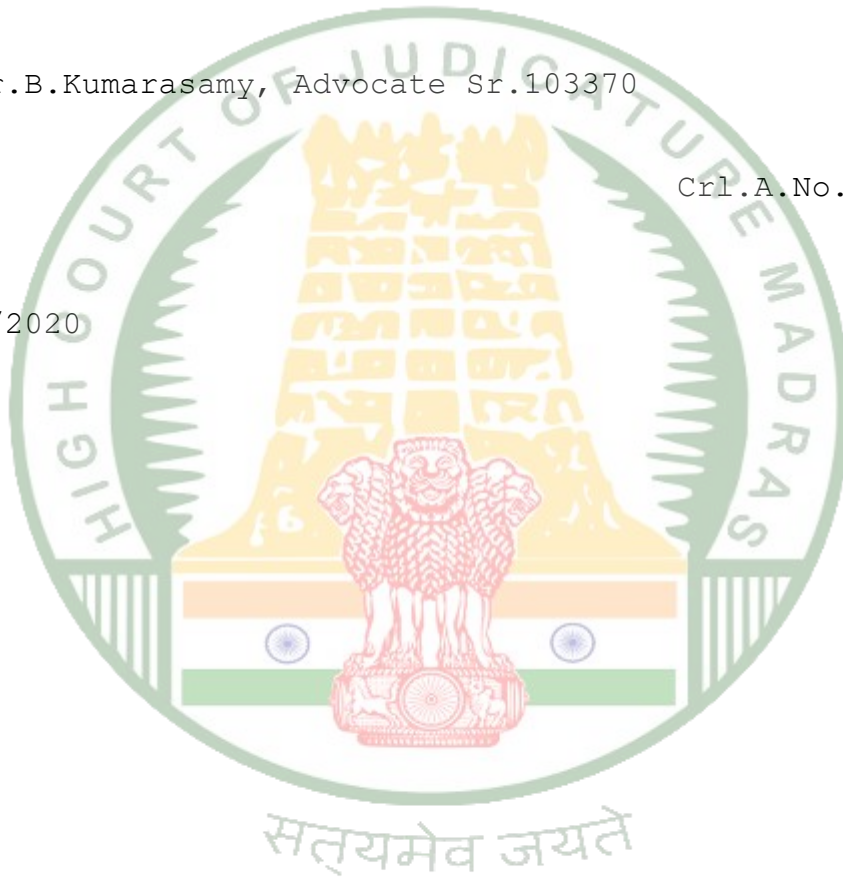
Copy to

The Deputy Registrar		
(Criminal Section),		with a direction to send back the
High Court, Madras.		original records to the trial Court

+1cc to Mr.B.Kumarasamy, Advocate Sr.103370

Crl.A.No.745 of 2012

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