

Bail Slip

The Accused/Appellant namely Kadalsenthil @ Senthil was directed to be released on bail as per order of this court dated 19/12/2017 made in CrI MP No.16159/17 in CrI A No.289/16.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 28.01.2019

CORAM

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

CrI.Appeal No.289 of 2016

Kadalsenthil @ Senthil ... Appellant/Accused

Vs

The State represented by
The Inspector of Police,
H-6, R.K.Nagar Police Station,
Chennai-600 021. ... Respondent/Complainant
(Cr No.687/2008)

PRAYER : Criminal Appeal is filed under Section 374 (2) Cr.P.C. against the judgment of conviction dated 29.02.2016 passed by the Mahila Sessions Court, Chennai in S.C.No.289 of 2013.

For Appellant : Mr.V.Rajmohan

For Respondent : Mr.P.Govindarajan, APP

JUDGMENT

This Criminal Appeal has been filed against the judgment dated 29.02.2016 passed by the Mahila Sessions Court, Chennai in S.C.No.289 of 2013, whereby the appellant/accused has been convicted under Section 376 and sentenced to undergo 7 years rigorous imprisonment with a fine of Rs.10,000/- in default, to undergo 3 years rigorous imprisonment and he has also been convicted under Section 417 IPC and sentenced to undergo 1 year rigorous imprisonment. However, the appellant/accused was not found guilty for the offence under Section 506 IPC and was acquitted.

2. The case of the prosecution is that PW.1 Pushparani was living her brother and she had become acquainted with the accused. According to PW.1, she being a handicapped, was in

requirement of a vehicle for mobility and she came to know that one Handicapped Association at Moolakothalam was distributing the cycles for the handicapped persons and approached the accused and he promised that he would arrange the vehicle within a short time. Thereafter, vehicle was provided by the accused and during the period of interaction, they developed relationship. According to PW.1, the accused had promised her to marry and therefore, had physical relationship with her in her house and also in the house of the accused and on the basis of physical relationship, she had conceived and gave birth to a child. However, the accused refused to marry her despite having physical relationship and hence a complaint was lodged finally on 7.10.2018 by her. At the time the complaint was lodged, PW.1 was six months pregnant. Thereafter, investigation was conducted by the police and a final report was filed, charging the accused for the offences punishable under Sections 376, 417 and 506(i) IPC.

3. In order to prove its case, the prosecution has examined 10 witnesses as Pws.1 to 10 and marked 13 documents as Exs.P1 to P13. None was examined and no documents were marked on the side of the defence.

4. PW.1 is the victim and the defacto-complainant. She has deposed that when she was living in Korukkupet, the accused had come to her house as they were in relationship and raped her on the assurance that he would marry her and also the accused called her to his residence and there also he raped her. Ultimately, the assurance given by the appellant to marry her did not fructify and therefore, a complaint was lodged by PW.1, which complaint was marked as Ex.P1 dated 7.10.2008. Further, her statement was recorded under Section 164 Cr.P.C. dated 13.4.2010 which was marked as Ex.P2. In furtherance of investigation, Observation Mahazar was prepared on 13.11.2008 which was marked as Ex.P3. Confessional statements of the accused was also obtained under Section 161 Cr.P.C. which were marked as Exs.P4 and P5. Thereafter, the matter was referred to Forensic Lab for DNA test, which documents were marked as Exs.P6 and P8. DNA report was obtained on 29.10.2009 from the Forensic Lab which is marked as Ex.P9. Printed FIR dated 13.11.2008 was marked as Ex.P10. Rough sketch was marked as Ex.P11. The requisition submitted by the Inspector of Police to the Court for conducting DNA test was marked as Ex.P12 and Ex.P13 was the requisition of the Inspector of Police to the Chief Metropolitan Magistrate for recording the statement of PW.1 under Section 164 Cr.P.C.

5. PW.1 who examined herself, has not stated in deposition nor in the complaint about the date and time of the occurrence in regard to sexual assault alleged to have been

committed by the accused. PW.2 who is the brother of PW.1, has deposed that when he was living in Korukkupettai, his sister was also living with him, however, he deposed that he did not know the accused at all. Only when she became pregnant, he was informed that the accused was responsible. Thereafter, due to quarrel in the house, PW.1 moved to a Govt.Home. PW.3 is another brother of PW.1 and he deposed that he did not know the accused. However, he had learnt that the accused used to come his brother's (PW.2) house and he was responsible for the pregnancy of his sister. PW.4 is Mahazar witness, who signed the document Ex.P3. PWs.5 and 6 are the witnesses who signed the confessional statements of the accused, however, they were treated hostile by the prosecution. PW.7 is the Assistant Director of Forensic Science Laboratory and she deposed that she received requisition from the Court to conduct DNA test and she gave the opinion that the paternity of the child born to PW.1 was not established at all implicating the accused. She deposed that the female child of PW.1 was not born to the accused. PW.7 issued a medical report to that effect, which was marked as Ex.P9. PW.8, the Sub Inspector of Police who conducted the enquiry on the basis of the complaint given by PW.1 on 7.10.2018. She being the Official witness, narrated on the basis of the complaint. PW.9 who is then Inspector of Police, gave deposition regarding registration of the complaint lodged by the defacto complainant/PW.1 and he prepared FIR and recorded the statement of PW.1 and visited the scene of occurrence and prepared Mahazar and rough sketch Exs.P10 and P11. PW.10 was another then Inspector of Police who took up further investigation from 29.9.2009, recorded confessional statements of the accused in the presence of the witnesses. The said witness gave a requisition letter for conducting DNA test.

6. On behalf of the defence, no witnesses were examined nor any documents were marked. Before the trial Court, it was pleaded on behalf of the defence, namely, the accused herein that it was the case of no evidence and right from the stage of charge sheet, the entire procedure had been violated. It was contended on behalf of the defence that the charge sheet did not contain the date, time and year of occurrence of alleged rape and therefore, the same was vital to the prosecution. The accusation by PW.1 was vague as she had not mentioned as to when sexual assault had taken place.

7. Moreover, there was no independent witness to establish the statement of PW.1 that the accused and PW.1 were in relationship. This was more so that her own brothers had clearly deposed that they have not seen the accused and they did not know her at all. One of the brothers who was living in the same house, had deposed that he had not seen the accused in the house. Further the paternity test which was conducted was not in

favour of the prosecution as there was a negative report which is clearly reflected in Ex.P9 and the Forensic Expert has also substantiated the contents of Ex.P9. There is other evidence which was available to show that PW.1 was in relationship with many others who used to visit her place where PW.2 was also living and PW.2 used to scold her for moving with other persons who come to their house quite often. Therefore, it was contended on behalf of the defence that the accused could not be held responsible for pregnancy since the paternity test has supported the case of the defence.

8. It was also contended on behalf of the defence that no independent witness had been examined to even remotely establish the factum of the accused promising PW.1 to marry her as they were in relationship. In fact, PW.1 herself has not deposed anywhere that she had informed either her friends or her siblings or relatives about her relationship with the accused at any point of time.

9. Except her own statement by PW.1, no other independent witness had been examined to support the case of the prosecution that PW.1 was misled into having physical relationship by the accused. Further, PW.1 was not sent for any medical examination and the complaint itself was lodged after several months. In any event, admittedly, no date, time and year of the occurrence has been mentioned when the alleged offence said to have taken place which is so vital for the prosecution to point the guilty of the accused.

10. The learned trial Court although accepted the fact that the DNA test did not support the prosecution, however proceeded to hold that such report need to be discarded. The trial Court in paragraph 35, has reasoned as under:

'35. Prosecution has palpably failed to discharge the initial burden to prove that the DNA was conducted in a proper manner. So, in these circumstances, based on the above reasons, this Court to serve the ends of justice, hesitates to rely upon the D.N.A. Test Report though it is a strong piece of evidence.'

11. According to the trial Court, the evidence of prosecutrix itself is sufficient no matter what DNA report says and the evidence as given by the prosecutrix in the instant case is sufficient enough to convict the accused. According to the trial Court, absence of details regarding the date and time of the occurrence in the charge sheet was not fatal and the other contentions raised on behalf of the defence were not worthy of consideration.

12. According to the trial Court, the evidence of prosecutrix alone is cogent and inspiring and hence proceeded to convict the accused. Unfortunately, the trial Court has failed to appreciate even the evidence of PW.1 which alone can have some substance to connect the accused with the offence, but it was not cogent or credible in order to rely on for the purpose of convicting the accused. In any event, the trial Court convicted the accused on the basis of the evidence of PW.1 alone overlooking all the contradictions as well as the absence of any worthwhile piece of evidence in order to establish the guilt of the accused.

13. The learned counsel appearing for the appellant/accused would submit at the outset that it is clear case of no evidence at all as PW.1 herself contradicting her statement in her examination since in her complaint, she states that she knows the accused for two years and they had love affair. In her cross-examination, she deposed that she knows the accused only for a year and also accepted that in the complaint what she stated that she knows the accused for two and three years was wrong. In regard to the accusation of rape committed in the house of the accused, her evidence was hardly credible for the reason that at that time, according to PW.1, appellant/accused's mother was there and she was asked to fetch tea and in her absence, sexual assault was committed. In cross-examination, she deposed that she had not seen the accused mother at all. According to her own statement, she had several friends and she has not revealed anyone about the relationship she had been having with the accused. Likewise, there are statements of PW.1 which contradicted each other and unfortunately, the trial Court has relied on her evidence alone as being cogent and inspiring for convicting the appellant/accused. The learned counsel would also submit that the brothers of PW.1 themselves have admitted that many persons from Handicapped Association used to visit their home and interacted with her sister and the brothers stated that they did not know the accused at all. Even one of the brothers who was living in the same house, had deposed that he had not seen the accused. But according to PW.1, rape was committed on her on several occasions in her house. In any event, the learned counsel would submit that paternity report was negative and did not support the prosecution and therefore, the prosecution has not proved its case at all muchless beyond reasonable doubt.

14. Per contra, the learned Government Advocate appearing for the respondent would submit that the trial Court has given its judgment based on the materials made available and the negative DNA test cannot be the basis for acquitting the appellant/accused. It appears from the circumstances of the case that PW.1 and the accused were in relationship and PW.1

became pregnant from the relationship and a child was also born from the said relationship. Obviously the appellant/ accused has enticed PW.1 into a physical relationship by promising to marry her. Therefore, the trial Court has relied upon the evidence of prosecutrix and convicted the appellant/accused for the offences under Sections 376 and 417 IPC. The judgment of the trial Court, therefore, does not require any interference of this Court.

15. Heard the learned counsel appearing for the appellant/accused and the learned Government Advocate appearing for the State and perused the evidence and materials placed on record.

16. As rightly contended by the learned counsel for the appellant/accused this is a case of no evidence at all for the following reasons, viz., that no time, date and year was mentioned in the complaint or in the charge sheet regarding the offence alleged to have been committed by the appellant/accused and in the absence of such details, the entire prosecution theory stands vitiated; that the complaint was lodged by PW.1 on the basis of vague assertion of herself without any proof at all. When there were so many contradictions in the evidence given by the prosecutrix herself, the prosecution atleast could have corroborated the evidence by independent witnesses. Unfortunately, in this case, the prosecution has not examined any independent witness to support the case of the prosecution.

17. One of the brothers of the victim, namely, PW.2 who was living in the same house, appeared to have not seen the accused at all in the house. When such is the case, how the accused could have committed sexual assault on PW.1 in her house needs to be explained by the prosecution. Moreover, PW.2 himself has stated that PW.1 used to have several visitors belonging to Handicapped Association. When such facts were mentioned, there appears to be a reasonable doubt as to who was responsible for the pregnancy of PW.1. In any event, paternity in regard to appellant/accused had been negatived. Unfortunately, the trial Court has completely erred in discarding the DNA report without any legal or factual basis at all. If the trial Court had any doubt about the veracity or correctness of the medical report, it ought to have ordered DNA test once again under the Court's supervision. Without doing so, it was certainly not open to the trial Court to ignore the DNA report particularly when the DNA test was ordered by the Court itself. The trial Court has miserably failed to follow the said procedure and misdirected itself by ignoring the report on the basis of its own presumption that DNA report was not acceptable. Such presumption is completely flawed and unacceptable by any legal standards. On this score alone, the verdict of the trial Court need to be reversed.

18. Further the trial Court has found the evidence of prosecutrix as cogent and reliable when actually the opposite was true. As pointed out above by the learned counsel for the appellant/accused that there were so many contradictions starting from the complaint and the chargesheet and the evidence in chief and cross-examination of PW.1 and overlooking all the contradictions and terming the evidence of PW.1 as cogent and reliable is legally unacceptable and uncalled for. It appears that the trial Court has presumed the guilt of the accused despite several lacunae in the prosecution. Such course adopted by the trial Court is dangerous to dispensation of criminal justice. The trial Court has to appreciate the case dispassionately and weigh the evidence of the prosecution as well as the defence, but it cannot overlook all the contradictions and discrepancies and convict the accused notwithstanding complete absence of evidence. Needless to mention that it is the duty of the trial Court to ensure that the prosecution has to prove the case to the hilt and in this case, the prosecution has failed to prove its case even remotely much less beyond the reasonable doubt and yet the trial Court strangely convicted the appellant.

19. The trial Court has also failed to appreciate that the conviction under Section 417 IPC is not warranted at all since no independent witness has been examined to show that there was a promise held out to the victim by the accused of marrying her and only on such inducement, the physical relationship had happened. Except the statement of PW.1 on that aspect, there was no other piece of evidence to corroborate the same. In any event, the commission of sexual assault, namely, rape on PW.1 itself is doubtful as date and time of occurrence has not been mentioned either in the complaint or in the charge sheet and the place in which the commission had taken place according to the prosecution was hardly believable. Admittedly, in her place where the commission of offence taken place, her brother was living in the same house, but his evidence was that he did not know the accused. In the second place, where the occurrence had taken place in the house of the accused, the accused mother, i.e. second wife of his father was there at that time and the accused asked her to fetch tea and in her absence, he committed rape. However, in her cross-examination, PW.1 stated that she had not seen the mother of the accused. All these aspects would point to the fact that the evidence of PW.1 was hardly credible enough to be relied on. But unfortunately, on the basis of solitary evidence of PW.1 alone, the trial Court convicted the appellant/accused. On the whole, the prosecution has not completely discharged its burden of proving the case effectively against the appellant/accused. The case of the prosecution has gaping holes and despite the same, the trial

Court unfortunately has proceeded to hold the appellant/accused's guilty of the offences under Sections 376 and 417 IPC.

20. For the foregoing reasons, the Criminal Appeal is allowed and the judgment of conviction and sentence passed by the Mahila Sessions Court, Chennai in S.C.No.289 of 2013 dated 29.02.2016 is hereby set aside. The appellant/accused shall be set at liberty forthwith if he is not required in any other crime. Fine amount if paid, is ordered to be refunded to the appellant forthwith.

Sd/-
Assistant Registrar (CS-V)

//True copy//

Sub Assistant Registrar

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To

1. The Metropolitan Magistrate,
No.XV George Town, Chennai.
2. The Chief Metropolitan,
Magistrate, Egmore, Chennai
3. The Mahila Sessions Judge, Chennai.
4. The Inspector of Police,
H-6, R.K.Nagar Police Station,
Chennai-600 021.
5. The Public Prosecutor, High Court, Madras
6. The Superintendent, Central Prison, Chennai.

CRL.APPEAL NO.289 OF 2016

EV(CO)
GMY(27/06/2019)