



BAIL SLIP

The Appellant namely RajendraKumar, S/o.Marimuthu, was released on bail as per the order of this Court dated 13.10.2009, made in Crl MP(MD)No.1 of 2009 in Crl A(MD)No.316 of 2009.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :27.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.A(MD)No.316 of 2009

Rajendra Kumar ... Appellant / Sole accused

Vs.

State represented by
The Inspector of Police,
All Women Police Station,
Tiruchendur,
Thoothukudi District.
[Crime No.18 of 2007]

... Respondent/ Complainant

PRAYER: Appeal filed under Section 374(2) of the Code of Criminal Procedure, to call for the records in S.C.No.30 of 2009 on the file of the Additional Sessions Judge/ Fast Track Court No.1, Thoothukudi, and to set aside the order dated 05.10.2009.

For Appellant : Mr.A.Thiruvadi Kumar
Respondent : Mrs.S.Bharathi,
Government Advocate (crl side)

JUDGMENT

This appeal is filed as against the conviction and sentence imposed on the appellant by the trial Court, namely, learned Additional Sessions Judge / Fast Track Court No.1, Thoothukudi, in SC No.30 of 2009.

2.The appellant is the sole accused in SC No.30 of 2009, on the file of the learned Additional Sessions Judge, [Fast Track Court No.1], Thoothukudi, wherein the appellant was tried for the offence under Section 376 IPC and the trial Court by order dated 05.10.2009 found the appellant guilty for the offence under Section 376 IPC and convicted and sentenced him to undergo ten years of rigorous imprisonment and to pay a sum of Rs.5,000/- as fine and in default of payment of fine amount, one year rigorous imprisonment was also ordered. As against the conviction and sentence imposed upon the appellant, the present appeal has been preferred.



3.The case of the prosecution in nutshell are as follows:

3.1.The appellant and the victim [PW1] namely, Ananthanayagi @ Sumathi were residents of Thiruvalluvar Colony, Nazareth and the victim [PW1] was working in a cotton mill at Coimbatore and the appellant was working in a mill at Pollachi. They were in love for nearly five years and the appellant called the victim over phone on 11.05.2007 and told her that he had obtained permission from his parents to marry her. Believing his words, the victim went to Nazareth. On 12.05.2007 at about 8.00am, both the appellant and the victim went to Tiruchendur, where the appellant had expressed his desire for staying together in a lodge. However, the victim refused that without marriage there cannot be any cohabitation. Therefore, the accused took her to the Subramaniaswamy Temple at Tiruchendur and he also assured that his parents would accept their marriage. In front of the kodimaram at the temple, the appellant tied thali on the victim. After the said marriage, they went back to their village and at about 4.30pm, the appellant came to the house of the victim [PW1] and compelled her to have sexual intercourse.

3.2.After four days, when the victim girl insisted for a proper marriage, the appellant refused to do so stating that he had proposed to marry another woman and therefore, the victim girl [PW1] along with her mother [PW3] informed the same to one Kalaiselvi [PW2], who is a Social Worker and on the advice of PW2, PW1 and PW3 went to All Women Police Station, Tiruchendur and lodged a complaint [Ex.P1]. The Head Constable [PW7] received the complaint Ex.P1 and registered the same in Crime No.18 of 2007 on 26.05.2007 against this appellant for the offence punishable under Sections 417, 376 and 506 (ii) IPC.

3.3.PW10 / the Inspector of Police of All Women Police Station at Tiruchendur, on receipt of the information went to the place of occurrence on 26.05.2007 at about 5.30pm and prepared the observation mahazar [Ex.P2] and rough sketch[Ex.P11] in the presence of Kalaiselvi [PW2] and another. He also recovered the nighty and in skirt of the victim girl and thereafter, he examined the witnesses PW1 to PW3 and other witnesses also were present and he arrested the accused 27.05.2007 at about 1.30pm, at Tiruchendur bus stop. The accused gave voluntary confession statement before the Investigating Officer [PW10] and the same was recorded in the presence of PW2. PW10 had also made a request for sending the accused for medical examination vide Exp12.

3.4.On 31.05.2007, the victim girl [PW1] was produced before Dr.Uthayabanu [PW.8] and she examined the victim girl and issued Accident Register [Ex.P7] that the victim girl gave history of one episode of sexual intercourse on 12.05.2007 and she was having regular menstrual period and there is no evidence of injury or bite



She also gave her opinion that hymen is absent and the vaginal canal admits one finger freely. Swab was also collected for chemical analysis. Dr.Manoharan [PW.9], who examined the accused has given a report [Ex.P9] that the accused is potent.

3.5. Thereafter, the further investigation was taken over by PW11 from 18.06.2007 and she examined the Doctors PW8 and PW9 and recorded their statements. She also recorded further statement from the victim girl. After concluding her investigation, she filed the final report as against the appellant.

4. During the trial the prosecution has examined 11 witnesses and marked 12 documents. Though the nighty and in skirt were recovered from the victim girl, neither they were sent for chemical analysis nor were produced before the trial Court.

5. The available prosecution evidence are as follows:

5.1. PW1 is the complainant / victim girl and she deposed about her alleged marriage, which took place at Tiruchendur on 12.05.2007 and further the commission of offence at her house on 4.30pm on the same day.

5.2. PW2 is a Social Worker, who helped PW1 and PW3 to prefer the complaint before the All Women Police Station, Tiruchendur and has also witnessed the preparation of observation mahazar and rough sketch, at the place of occurrence and she is also a witness for the arrest of the accused.

5.3. PW3 the mother of the victim girl [PW1], has stated about the subsequent incident that they have approached the accused and requested him to marry the victim girl.

5.4. PW4 is an Auto Driver, who took the accused and the victim girl [PW1] to Tiruchendur on 12.05.2007.

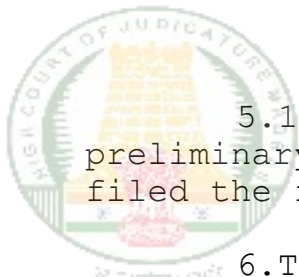
5.5. PW5 is the Police Constable, who produced the accused before the Doctor [PW9] for medical examination.

5.6. PW6 is the Woman Police Constable, who produced the victim girl before the Doctor [PW8] for medical examination.

5.7. PW7 is the Woman Police Constable, who registered the complaint in Ex.P1 on 26.05.2007.

5.8. PW8 is Dr.Uthayabau, who examined PW1 and issued accident register Ex.P7.

5.9. PW9 is Dr.Manoharan, who examined the accused and issued



5.10.PW10 is the Investigating Officer, who conducted the preliminary investigation and PW11 is the Investigating Officer, who filed the final report.

6.The incriminating materials from the prosecution case were put to the accused under Section 313 CrPC and the accused denied the same. Though the accused has stated that there are witnesses on his behalf, he has not examined any witness. In conclusion of the trial, the trial Court found the appellant guilty for the offence punishable under Section 376 IPC and convicted and sentenced him as stated supra.

7.Heard Mr.Thiruvadi Kumar, learned Counsel for the appellant and Mrs.S.Bharathi, learned Government Advocate (Crl Side) appearing for the State and perused the materials placed on record.

8.The learned Counsel for the appellant would submit that the offence under Section 376 IPC is not made out in this case, as the victim girl was aged about 25 years and even according to the victim, both went to Tiruchendur, where the accused tied the Thali and only thereafter, the accused had intercourse with the victim at her residence and therefore, the available evidence would attract only offence under Section 493 IPC and not under Section 376 IPC. But the trial Court has wrongly framed the charge under Section 376 IPC instead of 493 IPC and has erroneously convicted the appellant under Section 376 IPC.

9.Even before lodging the complaint Ex.P1, PW1 has lodged a complaint, three days prior to it and that complaint was lodged requesting the Police only to unite her with the appellant and that complaint has deliberately been suppressed by the prosecution. The fact that the complainant lodged the previous complaint sufficiently established by the prosecution.

10.Though the Doctor PW8 has recovered some swabs from the victim girl and the Investigating Officer has recovered the nighty and in skirt of the victim girl, those materials have not been sent for chemical analysis to ascertain whether there was any cohabitation between the accused and the victim girl on the date of occurrence and whether the accused is responsible for the commission of offence.

11.In The absence of any such test and the materials have been collected would definitely end in favour of the accused, the benefit of doubt has to be extended to the accused.

12.The learned Counsel for the appellant placed reliance upon the decision of the Hon'ble Supreme Court in ***Hasi Mohan Barman and Another Vs State of Assam and Another***, reported in ***(2008) 1 SCC (Cri) 161*** and the relevant portions are extracted hereunder :



"8. Section 320 of Code of Criminal Procedure says that the offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table. A perusal of Section 320 will show that the offence under Section 313 IPC is not compoundable. Therefore, the consent given by the wife PW-1 or the affidavit filed by her cannot be utilized for the purpose of recording a finding of acquittal in favour of the accused appellants.

9. There are some decisions of this Court wherein the factor of compromise between the accused and the complainant (or injured or person aggrieved) has been taken into consideration for reducing the sentence.

10. The first decision on this point was rendered by this Court in *Ram Pujaan and others vs. State of Uttar Pradesh* (1973) 2 SCC 456, wherein the trial court had convicted the accused under Section 326 IPC which is a non-compoundable offence and had sentenced the accused to four years R.I. The High Court took into consideration the compromise between the accused appellant and the injured and reduced the sentence to two years R.I. This Court, after observing that the fact of compromise can be taken into account in determining the quantum of sentence, reduced the sentence to the period already undergone which was little more than four months and further imposed a fine of Rs.1500/- on each of the appellants. *Surendra Nath Mohanty and another vs. State of Orissa* (1999) 5 SCC 238 is a decision of a Bench of three learned Judges. It was observed that in view of the legislative mandate contained in Section 320 Cr.P.C. an offence can be compounded only in accordance with the provisions of the said section. The Court followed the view taken in the case of *Ram Pujaan* (supra) and having regard to the fact that the parties had compromised and a period of ten years had elapsed from the date of the incident reduced the sentence of five years R.I. Imposed under Sections 307 and 326 IPC to the period of sentence already undergone which was three months and also imposed fine of Rs.5,000/-.

11. There are several other decisions of this Court wherein factor of compromise has been taken into consideration and the sentence has been reduced mostly to the period already undergone and they are *Bankat and another vs. State of Maharashtra* (2005) 1 SCC 343,



Badrilal vs. State of M.P. (2005) 7 SCC 55 and Jetha Ram and others vs. State of Rajasthan (2006) 9 SCC 255.

12. Following the view taken in the above noted cases we are of the opinion that the complainant and the principal accused having already married it will be in the interest of justice if the sentence is reduced to the period already undergone. The appeal is accordingly partly allowed. The conviction of the appellants under Section 313 IPC is maintained but the sentence is reduced to the period already undergone which appears to be about ten months. The fine imposed upon the appellants is also set aside. The appellants are on bail. Their sureties and bail bonds are discharged.

13. The learned Counsel for the appellant placed reliance upon the decision of the Hon'ble Supreme Court in **Ishwar Singh Vs State of Madhya Pradesh**, reported in **(2009) 2 SCC (Cri) 1153**, and the relevant portions are extracted hereunder :

"9. The learned counsel for the appellant stated that during the pendency of the proceedings before this Court, mutual compromise has been arrived between the parties, i.e. accused-Ishwar Singh on the one hand and the complainant-victim Devi Singh on the other hand.

10. An affidavit is also filed by the appellant-accused No.1 in this Court. In paragraph 3, it is stated;

"The accused petitioner and the complainant Devi Singh are members of the same community and reside permanently in the same village and are also related to each other. Now the relations between the accused and the complainant and their families are cordial and there is no surviving dispute of any kind between the parties. Father of the accused, Shankarlalji is uncle of the complainant. He is very old and due to old age he needs to be looked after by his son i.e. accused Ishwar Singh. If Ishwar Singh is released from jail in view of the cordial relations between the parties, both the families would be able to live together peacefully without any ill will".

It was, therefore, jointly prayed on behalf of the parties that the appellant may be released by treating the sentence already undergone by the appellant-accused as sufficient.

11. An affidavit is also filed by victim Devi Singh wherein he has stated that he is the complainant-injured. It is stated that the contents in the affidavit filed by appellant accused regarding compromise between accused No.1



and the complainant are true. A prayer was made by the learned counsel for the parties to dispose of appeal on the basis of compromise between the parties.

12. Now, it cannot be gainsaid that an offence punishable under Section 307, IPC is not a compoundable offence. Section 320 of the Code of Criminal Procedure, 1973 expressly states that no offence shall be compounded if it is not compoundable under the Code. At the same time, however, while dealing with such matters, this Court may take into account a relevant and important consideration about compromise between the parties for the purpose of reduction of sentence.

13. In *Jetha Ram v. State of Rajasthan*, (2006) 9 SCC 255, *Murugesan & Ors. v. Ganapathy Velar*, (2001) 10 SCC 504 and *Ishwarlal v. State of M.P.*, JT 1988 (3) SC 366 (1), this Court, while taking into account the fact of compromise between the parties, reduced sentence imposed on the appellant-accused to already undergone, though the offences were not compoundable. But it was also stated that in *Mahesh Chand v. State of Rajasthan*, AIR 1988 SC 2111, such offence was ordered to be compounded.

14. In our considered opinion, it would not be appropriate to order compounding of an offence not compoundable under the Code ignoring and keeping aside statutory provisions. In our judgment, however, limited submission of the learned counsel for the appellant deserves consideration that while imposing substantive sentence, the factum of compromise between the parties is indeed a relevant circumstance which, the Court may keep in mind.

15. In the instant case, the incident took place before more than fifteen years; the parties are residing in one and the same village and they are also relatives. The appellant was about 20 years of age at the time of commission of crime. It was his first offence. After conviction, the petitioner was taken into custody. During the pendency of appeal before the High Court, he was enlarged on bail but, after the decision of the High Court, he again surrendered and is in jail at present. Though he had applied for bail, the prayer was not granted and he is not released on bail. Considering the totality of facts and circumstances, in our opinion, ends of justice would be met if the sentence of imprisonment awarded to the appellant (Accused No.1) is reduced to the period already undergone.



16. For the foregoing reasons, the appeal deserves to be partly allowed and accordingly allowed by maintaining the conviction recorded by the trial court and confirmed by the Appellate Court but by reducing the sentence already undergone by the appellant. The sentence of payment of fine is not disturbed. If the appellant has not paid the amount of fine, he will pay such amount within 4 weeks.

14. Per contra, the learned Government Advocate (Crl Side) would submit that the prosecution has established its case beyond reasonable doubt and the prosecutrix [PW1] is the victim girl, who deposed before the Court that she was subjected to sexual intercourse at 4.40 pm, on the date of occurrence, i.e., on 12.05.2007 at her residence. The version of the PW1 is also corroborated by the evidence of PW2 Social Worker and PW3 mother of the victim. The Doctor, who examined the victim girl has also stated that there is a possibility of having sexual intercourse and therefore, the prosecution has established its case and there is no need to interfere with the order passed by the trial Court.

15. This Court has paid its best attention and anxious consideration to the rival submissions and also perused the materials placed on record.

16. As rightly pointed by the learned Counsel for the appellant, in this case, the appellant and the victim girl were in love with each other for more than five years and on the date of occurrence, both of them went to Tiruchendur Subramaniaswami Temple, where the accused intended to book a room at a lodge and to have cohabitation with the victim girl. However, the victim girl [PW1] has refused the same and replied that she would permit her for cohabitation, only after the marriage. Thereafter the accused took her to the Tiruchendur Temple and tied the Thali in front of the Kodimaram at Tiruchendur Temple. After the said marriage, the accused as well as the victim girl returned to their village on the same day at about 4.30pm, the accused went to the house of PW.1 and as a matter of right that he is the legally wedded husband of the victim, had cohabited with the victim.

17. Admittedly, in this case, the earlier complaint was lodged by PW1 prior to the complaint Ex.P1. The evidence of PW1 as well as her mother PW3 and the Investigating Officer strengthen the case of the defendant that prior to the present complaint, there was a complaint, wherein, only request was made to unite the victim girl with the accused. But the earlier complaint was not placed before the Court. Similarly, the semen swabs, which were taken while examination, have not been sent for chemical analysis. The clothes which were worn by the victim girl on the date of occurrence, namely, nighty and in skirt though recovered were not sent for chemical analysis.



18.Though there are certain discrepancies with regard to the establishment of the case insofar as the offence under Section 376 IPC is concerned, even the available evidence would attract the offence only under Section 493 IPC, not under Section 376 IPC.

19.It would be relevant to extract Section 493 IPC as follows:

493.Cohabitation caused by man deceitfully inducing a belief of lawful marriage.

"Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

20.Both the accused as well as the victim girl went to Tiruchendur and the accused tied the Thali on the victim girl in front of a Kodimaram in the Temple and accordingly, the victim girl was made to believe that she was married to the accused. Only after that by claiming that he is legally wedded husband, the accused is said to have committed the offence on the date of occurrence and therefore, the available evidence would only make an offence under Section 493 IPC and not under Section 376 IPC.

21.Accordingly, the conviction and the sentence imposed under Section 376 IPC is modified to that of offence under Section 493 IPC.

22.With regard to the sentence of imprisonment, the learned Counsel for the appellant produced the affidavits of the victim girl [PW1] and her brother her brother-in-law Ravichandran. After the occurrence both victim as well as the accused got married and they are living with their respective spouses. The respective spouses are also not aware of the earlier incident.

23.In view of the apprehension expressed by the victim [PW1] in the affidavit that if any conviction is imposed upon the appellant and it may be brought to the knowledge of his spouse and the same would affect her present marital life. It appears that the victim girl got married another man and having two children and similarly, the accused also married another woman and he is also having two children.

24.The affidavits filed by the victim girl and one Ravichandran are extracted hereunder:



"AFFIDAVIT FILED BY SUMATHI @ ANANTHANAYAGI

I, sumathi @ Ananthanayagi, W/o. Subramani, Hindu aged about 37 years residing at No.13/20, Cherankodu, Bandalur Taluk, Nilgiris, now temporarily at Pillaiyarpuram, Nagarajapuram, SIDCO Post, Coimbatore, Coimbatore District, do hereby solemnly affirm and sincerely state as follows:

1.I submit that I happen to be the victim/PW1 examined in S.C.No.30 of 2009 on the file of the learned Additional Sessions Judge (FTC No.1), Thoothukudi, Thoothukudi District and as such I am well acquainted with the facts of the case.

2.I submit that the love affair with the appellant/ Rajendra Kumar resulted in carnal copulation and thereafter we had to depart. I submit that the said occurrence took place in the year 2007 and subsequently, I had married one Subramani on 01.09.2013 and I am presently settled in Nilgiris. I submit that my husband is doing centring work and I am blessed with 2 children of which the son Tharun Kumar is aged about 2 ½ years and the younger daughter is 4 months old. I submit that I am presently at Coimbatore in the residence of my sister Chitradevika and I had come for post care pregnancy and I am temporarily residing at Coimbatore and I have permanently settled at Nilgiris. I submit that the present affidavit is voluntary and out of mine own will.

3.I submit that I understand that the appellant had been convicted for 10 years. I submit that at this point of time I am not very much interested in sending the appellant to jail which would ruin his marital life. I submit that the fact remains that I had also settled down in my life and the further fact remains that our life partners are conversant with our past. I submit that the fact remains that the further incarceration if any would ruin the future of the appellant and may also have an adverse impact on my matrimonial life in view of the fact that my brother-in-law is well known to the appellant and I would be frequently visiting my sister's house at Coimbatore.

4.I submit that the present affidavit filed by me in support of the appellant is voluntary and without any coercion. I submit that humbly pray that this Hon'ble Court may be pleased to reduce the sentence of the appellant to the period undergone. I submit that we have forgotten our past and we are leading a peaceful life and



there is no intervention by the appellant in my life. I submit that at present my family, viz, my brother-in-law and sister Chitradevika are settled in Coimbatore and the earnest effort had been taken by my brother-in-law Ravichandran to have a quietus.

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5.I therefore humbly pray that this Hon'ble Court may be pleased to accept the present affidavit and pass such other or further orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

XXXXXX

(Sumathi @ Ananthanayagi)

AFFIDAVIT FILED BY RAVICHANDRAN

I, Ravichandran, S/O.V.Packiyaraj, Hindu aged about 42 years residing at Pillaiyarpuram, Nagarajapuram, SIDCO Post, Coimbatore, Coimbatore District, do hereby solemnly affirm and sincerely state as follows:

1.I submit that I happen to be the brother-in-law of the victim/PW1 examined in SC.No.30 of 2009 on the file of the learned Additional Sessions Judge, (FTC No.1), Thoothukudi, Thoothukudi District and as such I am well acquainted with the facts of the case.

2.I submit that the fact remains that my sister-in-law Sumathi @ Ananthanayagi had married one Subramani on 01.09.2013 and she is presently settled in Nilgiris. I submit that her husband is doing centring work and they are blessed with two children of which the son Tharun Kumar is aged about 2 ½ years and the younger daughter is 4 months old. I submit that presently my sister-in-law is in coimbatore in my house for post care pregnancy and the appellant is known to me for more than a decade and I had taken the present efforts. I submit that the present affidavit is voluntary and out of mine own will.

4.I submit that the present affidavit filed by me in support of the appellant is voluntary and without any coercion. I submit that I humbly pray that this Hon'ble Court may be pleased to reduce the sentence of the appellant to the period undergone. I submit that we have forgotten the past incident and the fact remains that the victim/PW1 is presently settled in her life and the fact remains that the appellant is also married to one Gomathi on 15.09.2012 and he is blessed with 2 male children by name Abinash aged about 6 years and



Sawin aged about 5 years. I submit that we have been moving freely with the appellant and if any incarceration of the appellant would result in great hardship not only to the appellant but also his family. I submit that the wife of the appellant, viz., Gomathi has not been apprised of the past of the appellant and similarly my co-brother viz., husband of PW1/Anandanayagi @ Sumathi does not also know about the present prosecution case. I submit that the further custody of the appellant may cause disturbance to their future as well and as such I humbly pray that this Hon'ble Court may be pleased to give a quietus to the entire dispute.

I therefore humbly pray that this Hon'ble Court may be pleased to accept the present affidavit and pass such other or further orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice."

25.Considering the specific stand taken by the victim girl and also considering the fact that the offence under Section 493 IPC is triable only by Judicial Magistrate and also considering the submission of the learned Counsel for the appellant that the appellant has already undergone imprisonment for 1 ½ months, the sentence is modified to that of the period already undergone by the appellant.

26.The sentence has been reduced taking into account the fact that the appellant and the victim have married another person and also having children and they are also leading a peaceful life and taking into account the affidavit filed by the victim girl and her brother-in-law.

27.This Court makes it clear that this case is decided only on the given facts and circumstances, and this order cannot be taken as a precedent to any other case.

28.In the result,

- this Criminal Appeal is partly allowed;
- the conviction and sentence imposed on the appellant in S.C.No.30 of 2009 on the file of the learned Additional Sessions Judge/ Fast Track Court No.1, Thoothukudi, by order dated 05.10.2009, is modified to the extent indicated above.

Sd/-

Assistant Registrar ()

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/ /2020

Sub Assistant Registrar(CS)



To

1.The Additional Sessions Judge,
Fast Track Court, No.1, Tuticorin.

2. The Inspector of Police,
All Women Police Station,
Tiruchendur,
Thoothukudi District.

3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai

+1 CC to Mr.A. THIRUVADI KUMAR, Advocate (SR-90091[F] dated
27/09/2019)

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27.09.2019

VB(03.02.2020) 13P 5C