



BAIL AND CANCELLATION OF BAIL SLIP

CrI.A.(MD)No.82 of 2009

The Appellants/ Accused namely 1) Sreekanth, 2)Easu be and hereby were directed to be released on bail vide court order dated 27.04.2009 in MP(MD)No.1 of 2009 in CrI A(MD)No.82 of 2009 and Subsequently this Court cancelled bail vide court order dated 13.04.2019 made herein.

CrI.A.(MD)No.120 of 2009

The Appellant/ Accused namely Hakeem be and hereby was directed to be released on bail vide court order dated 23.04.2010 in MP(MD)No.1 of 2009 in CrI A(MD)No.120 of 2009 and Subsequently this Court cancelled bail vide court order dated 13.04.2019 made herein.

CrI.A.(MD)No.121 of 2009

The Appellant/ Accused namely Rabeek be and hereby was directed to be released on bail vide court order dated 26.04.2010 in MP(MD)No.1 of 2009 in CrI A(MD)No.121 of 2009 and Subsequently this Court cancelled bail vide court order dated 13.04.2019 made herein.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.12.2019

CORAM:

THE HONOURABLE MR.JUSTICE **B.PUGALENDHI**

CrI.A.(MD)Nos.82, 120 and 121 of 2009

CrI.A.(MD)No.82 of 2009

1. Sreekanth
2. Easu

... Appellants /
Accused Nos.3 and 4

versus

State Rep. by
The Inspector of Police,
S.V.Mangalam Police Station,
Sivagangai District
(Crime No.56/2003)

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Cr.P.C. against the Judgment dated 02.04.2009 made in S.C.No.125 of 2005 on the file of the learned Assistant Sessions Judge, Sivagangai.



For Appellants : Mr.Abdulkalam Azad
for M/s.R.M.Arun Swaminathan
For Respondent : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor

Crl.A.(MD)No.120 of 2009

Hakeem ... Appellant / Accused No.2

versus

State Rep. by
The Inspector of Police,
S.V.Mangalam Police Station,
Sivagangai District
(Crime No.56/2003)

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Cr.P.C. against the Judgment dated 02.04.2009 made in S.C.No.125 of 2005 on the file of the learned Assistant Sessions Judge, Sivagangai.

For Appellant : Mr.Karunanithi
For Respondent : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor

Crl.A.(MD)No.121 of 2009

Rabeek ... Appellant /Accused No.1

versus

State Rep. by
The Inspector of Police,
S.V.Mangalam Police Station,
Sivagangai District
(Crime No.56/2003)

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Cr.P.C. against the Judgment dated 02.04.2009 made in S.C.No.125 of 2005 on the file of the learned Assistant Sessions Judge, Sivagangai.

For Appellant : Mr.Antony S.Prabhakar
For Respondent : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor

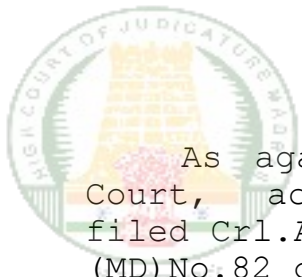
COMMON JUDGMENT

The appellants are the accused Nos.1 to 4 in S.C.No.125 of 2005 on the of the learned Assistant Sessions Judge, Sivagangai District. The trial Court framed charges as against the accused and gave its verdict as follows:



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Rank of the accused	Charges framed	Findings of the trial Court	Sentence imposed
A1-Rabeek	Under Sections 366-A and 376 IPC	Found guilty	(i) for the offence under Section 366-A IPC, sentenced to undergo 7 years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo three months simple imprisonment. (ii) for the offence under Section 376 IPC, sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.15,000/-, in default to undergo six months simple imprisonment.
A2-Hakeem	Under Section 366-A IPC	Found guilty	for the offence under Section 366-A IPC, sentenced to undergo 7 years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo three months simple imprisonment.
A3-Sreekanth	Under Section 366-A IPC	Found guilty	for the offence under Section 366-A IPC, sentenced to undergo 7 years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo three months simple imprisonment.
A4- Easu	Under Section 366-A IPC	Found guilty	for the offence under Section 366-A IPC, sentenced to undergo 7 years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo three months simple imprisonment.



As against the conviction and sentence imposed by the trial Court, accused No.1 filed Crl.A.(MD)No.121 of 2009, accused No.2 filed Crl.A.(MD)No.120 of 2009 and accused Nos. 3 and 4 filed Crl.A.(MD)No.82 of 2009.

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2. Since all the Appeals are arising out of the same sessions case, these appeals are taken up together for hearing and disposed of by a Common Judgment.

3. The brief case of the prosecution is as follows:

(i) P.W.1-Punitha is the daughter of P.W.2 and she was staying in her paternal uncle's [P.W.3's] house at Chelliyampatti Village for the purpose of learning tailoring. On 09.10.2003 around 9.00 p.m., P.W.1 went to attend call of nature, where she was abducted by the appellants/accused in an Ambassador Car, bearing Reg.No.TDL-7399. The accused tied her hand with a rope, gagged her mouth by a cloth, took her near a kanmoi and the first accused committed the offence of rape. Thereafter, the victim [P.W.1] was left on 10.10.2003 around 4.00 a.m., near her paternal uncle's house. In the mean time, P.W.3 and P.W.5, who are the paternal uncle and cousin of P.W.1, after knowing the incident, informed the victim's father [P.W.2]. After his arrival, a complaint was lodged before the S.V.Mangalam Police Station and the same was received by P.W.12-Sub-Inspector of Police and a case in Cr.No.56/2003 was registered for the offence under Sections 366A and 376 IPC, on 10.10.2003 at 9.00 p.m., as against one Rabeek [A1] and Hakkim [A2] and two other unknown persons. The printed FIR, registered in Ex.P9, reached the concerned Judicial Magistrate Court on 11.10.2003 at 11.45 a.m. On receipt of intimation about the case, P.W.13-Dharmaraj, Inspector of Police, S.V.Mangalam Police Station, visited the scene of crime on the same day and prepared observation Mahazar [Ex.P2] and rough sketch [Ex.P10] in the presence of P.W.7. He also referred the victim [P.W.1] for medical examination through a Constable. P.W.10-Dr.M.Rajanalini, a duty doctor at Government Hospital, Sivagangai District, examined the victim [P.W.1] on 13.10.2003 and issued Ex.P7-Certificate of Examination, wherein, she noted as follows:

"Patient was conscious, oriented and her vitals signs were normal. No obvious external injury, nail marks or scratch marks. Breast & pubic/axillary hair development normal. P/A :Sqt ; L/E : Hymen partially ruptured. Introitus allows 2 fingers freely. Swab taken.

(i) Her age according to Radiologist is below 18 and above 16 years.

(1) Her blood group is AB+ve

(2) No she is not a virgin

(3) Yes, she is capable of having sexual intercourse

(4) Yes, she has indulged in sexual intercourse."



(ii) P.W.13-Investigation Officer arrested the first accused on 14.10.2003 at Singampunari Bus Stop in the presence of P.W.8 and P.W.9. Based on the confession statement given by the first accused, he also arrested the third accused at Ponamaravathi Taxi Stand on the same day at about 5.00 p.m. and he recovered a white colour Ambassador Car bearing Reg.No.TDL 7399 [M.O.4] from the third accused in the presence of the said witnesses. He also arrested the fourth accused around 6.00 p.m. and the second accused at about 6.45 p.m.

(iii) The first accused was also subjected for medical examination. P.W.11-Dr.Ganesan examined the first accused and issued a Certificate of Examination in Ex.P8 stating that he is potent. P.W.13 has also made a request for identification parade on 17.10.2003 and identification parade was conducted by the learned Judicial Magistrate, Karaikudi [P.W.15] on 04.11.2003 at Sub Jail, Tirupattur. Both the third and fourth accused were identified by the victim in the presence of the learned Judicial Magistrate, Karaikudi [P.W.15].

(iv) P.W.16-Mr.P.Pounraj, Inspector of Police, S.V.Mangalam Police Station, took up further investigation on 20.10.2003 and he examined the Scientific Expert and filed his final report as against the accused persons for the offences under Sections 366A and 376 IPC on 26.03.2004 and the same was taken on file in PRC No.13/2004 and committed to the Court of Sessions and made over to the learned Assistant Sessions Judge, Sivagangai and tried in S.C.No.125 of 2005.

(v) During the trial, on the side of the prosecution, 16 witnesses were examined and 12 documents were marked as exhibits, besides 4 material objects.

(vi) The victim, Vanitha, was examined as P.W.1 and her father Muthusamy as P.W.2, her maternal uncle Perumal as P.W.3. P.W.4 and P.W.5 are wife and relative of P.W.3, who were examined for missing of P.W.1, the search made by them and lodging of complaint Ex.P1. P.W.7, P.W.8 and P.W.9, who are the witnesses for mahazar and the arrest of all the accused, did not support the case of the prosecution and therefore, they were treated as hostile. P.W.10 and P.W.11 are Doctors, who examined the victim girl and the accused No.1. P.W.12 is the Sub Inspector of Police, who registered the case. P.W.14 is the Scientific Expert. P.W.15 is the learned Judicial Magistrate, Karaikudi, who conducted the Identification Parade. P.W.13 and P.W.16 are the Inspectors of police, who conducted the investigation in this case.

(vii) The incriminating materials from the prosecution case were put to the accused under Section 313 Cr.P.C. and the accused denied the same. Though the accused have stated that they have witnesses on their side, they have not examined any one. In conclusion of trial, the trial Court found the accused guilty,



convicted and sentenced them as stated supra. As against the conviction and sentence, these appeals are filed.

4. When the appeals were taken up for hearing on 30.03.2019, the learned counsel for the first accused represented that he was not able to contact his client and file a memo stating that he is not willing to proceed with the appeal. The learned counsel for the second accused also represented that he was not ready with the appeal. It was also represented that a change of vakalat was filed for the accused Nos.3 and 4. The learned counsel, who entered appearance on change of vakalat, for the accused Nos.3 and 4 represented that since his vakalat has been returned, he need some more time to represent his vakalat and argue the case. Accordingly, at his request, the appeals were adjourned to 13.04.2019. But, on 13.04.2019, since there was no representation for the appellants, this Court cancelled the order of suspension granted in favour of the appellants.

5. Despite several opportunities given, the appellants have not proceeded with the appeals. Therefore, this Court, by order dated 09.09.2019 appointed Mr.Antony S.Prabhakar (Enrl.No.7579 of 1994), having more than 25 years of practice in the criminal side, as Legal Aid Counsel, to proceed with the appeals on behalf of the first accused.

6. Thereafter, when the appeals were taken up for hearing on 23.09.2019, Mr.Abdul Kalam Azad, learned counsel filed vakalat for accused Nos.3 and 4.

7. Heard Mr.Antony S.Prabhakar, learned counsel, who was appointed as Legal Aid Counsel, for the first accused and Mr.Karunanidhi, learned counsel for the second accused as well as Mr.Abdul Kalam Azad, learned counsel for the accused Nos.3 and 4 and Mr.K.K.Ramakrishnan, learned Additional Public Prosecutor appearing for the respondent.

8. The learned counsel for the accused has projected that the prosecution is foisted upon to squeeze the first accused to marry the victim P.W.1. The story projected by the prosecution is unbelievable and is not supported with any material. Further, the prosecution has not produced any material to substantiate the age of victim girl and the available evidence would expose that at the time of evidence, the victim girl was aged above 16 years and below 18 years. But, the age of the victim girl is projected by the prosecution as 14 years, whereas, P.W.10-Dr.Rajanalini, who examined the victim girl, in her certificate Ex.P7, mentioned the age of the victim girl, based on the report of Radiologist, as above 16 years and below 18 years. Though P.W.10-Dr.Rajanalini, relied on the report of the Radiologist for fixing the age of the victim girl, the Radiologist's report has not been placed before the Court. Further, as per the Doctor's report, there is no injury on the victim girl



and her age is mentioned as above 16 years. Therefore, no offence is made out as against the accused.

9. The learned counsel for the accused further submitted that though the accused were shown to be arrested on 14.10.2003, the witnesses for arrest and recovery, namely, P.W.8 and P.W.9 were treated as hostile. The victim has stated that some strangers have taken her to a remote place and committed the offence of rape. In the complaint [Ex.P1] itself, the names of the accused Nos.1 and 2 are mentioned, but, there is no reference as to how the victim know the names of the accused Nos.1 and 2. Further, it is stated that there was no sketch or mahazar for the place of occurrence and Athachi was also not produced before the Court. The learned counsel for the accused have also pointed out the contradictions among the witnesses and other lacunas. Therefore, the prosecution has not established its case beyond any reasonable doubt.

10. In support of the same, the learned counsel for the accused have also relied upon the following decisions of the Honourable Supreme Court in support of their contentions.

- (i) Jinish Lal Sah vs. State of Bihar (2003 (1) SCC 605);
- (ii) Sunil vs. State of Haryana (CrI. A.No.2308 of 2009 (arising out of SLP (Criminal) No.5779 of 2009); and
- (iii) State of Madhya Pradesh vs. Anoop Singh (CrI.A.No.442 of 2010).

11. Per contra, the learned Additional Public Prosecutor submitted that at the time of occurrence, the age of the victim girl was 14 years and the same was mentioned in Ex.P1-complaint itself. It is further submitted that even though there was no injury on the victim girl, that alone cannot be a ground to disbelieve the case of the prosecution. Even assuming that it is a consent one, even it is an offence under Section 376 IPC, since the age of the victim was below 16 years at the time of occurrence.

12. The learned Additional Public Prosecutor has also relied upon the evidence of P.W.14-Scientific Expert for the research of sperm on M.O.1 and M.O.2, top and bottom of Churidar, worn by the victim girl at the time of occurrence. Therefore, the prosecution has established its case beyond any reasonable doubt and hence, there is no ground to interfere with the orders of the trial Court. In support of his contention, he also relied upon the following decisions of the Hon'ble Supreme Court.

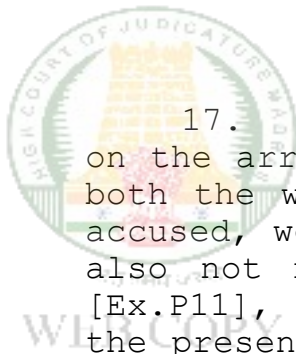
- (i) 2006 (1) SCC 283 (Vishnu @ Undrya vs. State of Maharashtra; and
- (ii) 2011 (2) SCC 550 (State of Uttar Pradesh vs. Chhotey Lal)

13. This Court paid its anxious consideration to the rival submissions made and also perused the materials placed on record.

14. The victim P.W.1 is the daughter of P.W.2 and she went to the occurrence village, three months prior to the occurrence and she was staying in her paternal uncle's [P.W.3's] house for the purpose of learning tailoring. On 09.10.2003, when she went to attend call of nature, she was abducted by the accused in an Ambassador Car (M.O.4), taken to a water body and was ravished by the first accused. On the next day morning around 4.00 a.m., she returned to P.W.3's house. A complaint in Ex.P1 was lodged before the S.V.Mangalam Police Station on 10.10.2003 at about 9.00 p.m. Though the complaint [Ex.P1] was received by the Sub Inspector of Police [P.W.12] on 10.10.2003, the printed FIR reached the Court only on 11.10.2003 at about 11.45 a.m. Therefore, there is a delay of 17 hrs. in reporting the incident and a further delay of 12 hrs. in FIR reaching the Court. The FIR [Ex.P9] registered for the offences under Sections 366(A) and 376 IPC ought to have been forwarded at the earliest, but, there is a delay of 12 hrs. in FIR reaching the Court and the Constable, who took the FIR to the Court was not examined by the prosecution.

15. Even though the Judicial Magistrate endorsed that he received the printed FIR [Ex.P9] on 11.10.2003, the Court seal is made only on 13.10.2003. By referring the same, the learned counsel for the accused submitted that the FIR reached only on 13.10.2003. Further, in the evidence of Doctor [P.W.10], she also stated that the victim girl was produced for examination only on 13.10.2003. Therefore, the contention of the learned counsel for the appellant is corroborated by the evidence of P.W.10. Whereas, the Investigating Officer, in his evidence, has stated that he received the intimation about the case on 11.10.2003, reached the village on the same day, examined the witnesses and also referred the victim girl [P.W.1] for medical examination through a woman constable. But, the victim girl was produced before the Doctor [P.W.10] only on 13.10.2003. However, the woman Constable, who is said to have taken the victim [P.W.1] to the Government Hospital, Sivagangai, has not been examined by the prosecution. Further, there are certain corrections made in the complaint [Ex.P1].

16. More over, the prosecution has projected its case that the victim girl was taken forcibly by all the four accused, gagged her mouth and taken her in a Car to a remote place and the first accused alone committed the offence of rape. But, the Doctor [P.W.10], who examined the victim girl, in her certificate [Ex.P7] mentioned that there was no obvious external injury, nail marks or scratch mark present. The victim girl was also subjected for examination by Radiologist. Based on the Radiologist's report, the Doctor [P.W.10], in her certificate- Ex.P7, mentioned that the age of the victim girl might be above 16 years and below 18 years. Therefore, the evidence of the Doctor [P.W.10] is also not supported the case of the prosecution.



17. Apart from the evidence, the prosecution has also relied on the arrest of the accused and their confession statements. But, both the witnesses, namely, P.W.8 and P.W.9, for the arrest of the accused, were treated as hostile. Further, the recovery mahazar was also not marked. The Scientific Expert [P.W.14], in his report [Ex.P11], stated that on examination of M.Os.1 and 2, he deducted the presence of semen. It is not known as to whether M.Os.1 and 2 belonged to the victim [P.W.1] and when it was recovered and in the presence of whom, it was recovered and when it was referred for medical examination. The victim, while lodging a complaint in Ex.P1, has not referred about these M.Os.1 and 2 in Ex.P1 and the Investigating Officer has not collected the semen from the first accused to match the semen of the first accused with the available semen, which was deducted from M.O.1 and M.O.2. Further, as stated by the learned counsel for the appellants, there is no reference as to how these accused are known to the victim girl and no reference in the complaint [Ex.P1].

18. From the above, it is clear that there are contradictions in the evidence of witnesses, which creates doubt on the case of the prosecution and the prosecution has not proved its case beyond any reasonable doubt. Therefore, the benefit of doubt is extended to the accused.

19. Accordingly, all the three appeals are allowed. The conviction and sentence imposed on the appellants/accused 1 to 4 in S.C.No.125 of 2005 dated 02.04.2009, on the file of the learned Assistant Sessions Judge, Sivagangai, are set aside. The appellants are acquitted of the charge framed against them. Fine amounts, if any, paid by the appellants shall be refunded to them. Bail bonds, if any, executed by them shall stand cancelled.

Sd/-

Assistant Registrar (Records)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

Ogy

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.



To

- 1.The Judicial Magistrate,
Thiruppathur, Sivagangai District.
- 2.The Chief Judicial Magistrate,
Sivagangai.
- 3.The Principal District & Sessions Judge,
Sivagangai.
- 4.The Inspector of Police,
S.V. Mangalam Police Station,
Sivagangai District.
- 5.The Assistant Session Judge,
Sivagangai.
- 6.The Superintendent, Central Prison, Madurai.
- 7.The District Collector,
Sivagangai.
- 8.The Director General of Police,
Mylapore, Chennai.
- 9.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

Copy to

- 1.The Section Officer,
Criminal Section, (2 copies)
Madurai Bench of Madras High Court,
Madurai (2 copies)
- 2.The Secretary
Legal Aid Service Authority,
Madurai Bench of Madras High Court,
Madurai.

Crl.A. (MD) Nos.82, 120 and 121 of 2009
20.12.2019

VB (05.02.2021) 10P 13C