



**Bail Slip**

The Appellant/ Accused namely Raja s/o Arumugam was released on bail by this Hon'ble Court made in MP(MD)No.1 of 2010 in CRL.A (MD)No.379 of 2010 dated 27.10.2010.

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**DATED: 23.07.2019**

**CORAM**

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN**

**Crl.A.(MD)No.379 of 2010**

Raja

... Appellant/ A1

Vs.

State represented by  
The Inspector of Police,  
Thuvakudy Police Station,  
Trichirappalli District.  
(Crime No.27 of 2008)

... Respondent / Complainant

**Prayer:** Criminal Appeal is filed under Section 374 of Cr.P.C, to set aside the judgment of conviction passed by the Additional Sessions Judge (Fast Track Court No.I), Trichy in S.C.No.172 of 2008, dated 29.09.2010 and acquit the appellant herein.

For Appellant : Mr.T.Senthil Kumar  
For Mr.T.A.Omprakash

For Respondent : Mr.A.Robinson  
Government Advocate (Crl. Side)

**J U D G M E N T**

The appellant was convicted for the offence under Section 304 (ii) of I.P.C. and sentenced to undergo seven years rigorous imprisonment vide judgment dated 29.09.2010 in S.C.No.172 of 2008, on the file of the learned Additional Sessions Judge, Fast Track Court No.I, Trichirappalli.

2.The case of the prosecution is that the appellant and one Chattu and the deceased/Vadivel were friends. The deceased had returned from overseas employment. On 20.02.2008, the deceased/Vadivel was having illicit intimacy with the victim/sister of the appellant at around midnight. This was seen by the accused and shocked by the same, the accused assaulted the deceased and



caused his instantaneous death. This was reported to the Inspector of Police, Thuvakudy Police Station, by Selvam/brother of the deceased at around 05.00 a.m. on 21.02.2008 vide Ex.P.1/complaint. Based on the same Ex.P.14/FIR in Crime No.27 of 2008 was registered against the appellant and Chattu for the offence under Section 302 and 506(ii) of I.P.C. Investigation was taken up and after completion of all the usual formalities final report was laid against the accused before the learned Judicial Magistrate No.VI, Trichy. Cognizance of the offence under Sections 341 and 302 r/w. 34 of I.P.C. was taken and since the case was exclusively triable by the Sessions Court, it was committed vide P.R.C.No.11 of 2008. The case was made over to the learned Additional Sessions Judge, Fast Track Court No.I, Trichirappalli, in S.C.No.172 of 2008. Charges were framed against the accused. Accused pleaded not guilty to the charges and claimed to be tried.

3.The prosecution examined as many as 10 witnesses and marked Exs.1 to 20. M.O.1 to M.O.13 were also marked. On the side of the accused, the sister of the appellant was examined as a witness.

4.The leaned Trial Judge by judgment dated 29.09.2010 acquitted the second accused/Chattu but found the appellant guilty for the offence under Section 304(ii) of I.P.C. and sentenced him to undergo seven years rigorous imprisonment. Challenging the same, this criminal appeal has been filed.

5.The learned counsel appearing for the appellant reiterated the contentions set out in the appeal memorandum and wanted this Court to reverse the judgment of the Court below.

6.Per contra, the learned Government Advocate (Crl. Side) submitted that the impugned judgment does not warrant any interference and wanted this Court to dismiss the appeal.

7.I carefully considered the rival contentions and perused the evidence on record.

8.The appellant's counsel would submit that the prosecution had come out with a false case by setting up eye witnesses. P.W.1 is the brother of the deceased. P.W.1 would claim that on 20.02.2008, he and his brother and the deceased/Vadivel were sleeping in his house and he got up at around 01.00 a.m. to answer the call of nature. Since his brother was not found next to him, he went to the house of the appellant, where he saw the appellant was hitting his brother with a lever. The appellant was said to have told the deceased that he was spoiling the name of his family by keeping illicit intimacy with the appellant's sister. The second accused hit the deceased with wooden log. P.W.1 graphically described what he claims to have seen. According to P.W.1, he thereafter went to the Police Station to lodge Ex.P.1/complaint. P.W.2, brother of the appellant, was said to be another eye witness. The learned Trial



Judge rightly disbelieved both these witnesses. I am in full agreement with the appellant's counsel submission that both the witnesses have been deliberately set up by the prosecution. The testimony of P.W.1 as well as P.W.2 will not inspire anybody's confidence.

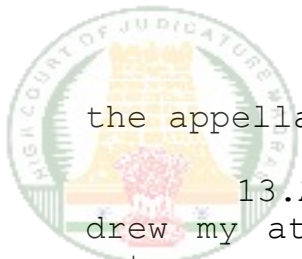
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9.The case of the appellant is that the deceased was his friend and that on the fateful night the deceased was drunk. When the appellant woke up during midnight upon hearing the alarm raised by his sister, he rushed inside and saw the deceased having sexual intercourse with his sister. He tried to extricate the deceased from his sister and there arose a scuffle between the appellant and the deceased. The appellant took a lever that was lying on the floor and hit the deceased on the back of his head and after the appellant realized that the deceased was dead, he went to the station and surrendered. The appellant's grievance is that instead of fairly accepting the surrender of the appellant and registering a case based on the same, the police chose to come out with a different version altogether.

10.The appellant's counsel drew my attention to the testimony of D.W.1/sister of the appellant. D.W.1 had supported the defence projected by the appellant. The incriminating circumstances were put to the appellant under Section 313 of Cr.P.C. The appellant apart from denying the same, filed a statement on the lines mentioned above.

11.The learned counsel for the appellant placed reliance on the decision of the Honourable Supreme Court reported in **1989 SCC (Cri) 464 (Kishore Shambhudatta Mishra V. State of Maharashtra)**. That was a case where two armed and drunken persons trespassed into the house of the accused and demanded money. The inmates, who had a right of self defence tried to ward off the intruders and in the process one of intruders was killed. The Honourable Supreme Court held that the inmate had clearly a right of private defence against the intruders and since the exact role played by the inmates was not known, it was difficult to hold any of them guilty for exceeding the right of private defence and proceeded to acquit them. The appellant's counsel also drew my attention to another decision reported in **(2008) 2 MLJ (Crl) 872 (Perumayee Vs. State of Inspector of Police)**. In the said case, the accused to save their daughter from molestation, killed the deceased. The Madras High Court held that the accused were entitled to the right of private defence.

12.The appellant's counsel further contended that there was a serious lacuna in the prosecution case. When the case of the prosecution was that there was illicit intimacy between the appellant's sister and the deceased and that enraged by the same, the appellant had committed the murder. The Investigating Officer ought to have examined the appellant's sister. Non-examination of



the appellant's sister was certainly fatal to the prosecution case.

13. At this stage, the learned Government Advocate (Crl. Side) drew my attention to the testimony of P.W.9/Doctor, who performed autopsy on the deceased. P.W.9/Postmortem Doctor had mentioned that the deceased was wearing a condom and that there was seminal discharge therein. The learned Government Advocate (Crl. Side) would contend that a person wanting to commit rape will not wear a condom. The fact that he was wearing a condom would *prima facie* indicate that there was a kind of consensual relationship between the deceased and the appellant's sister.

13. I concur with this submission of the learned Government Advocate (Crl. Side). The testimony of D.W.1/appellant's sister does not inspire the confidence of this Court at all. The presence of condom on the deceased completely belies the stand of the appellant's counsel that he came to rape her. The question that arises for consideration is that merely because I disbelieve the evidence of P.W.1, should I negative the plea put forth by the accused? As rightly contended by the appellant's counsel, the appellant's sister was a young girl aged about 14 years. Even if I assume that the relationship between the appellant's sister and the deceased was consensual, sexual intercourse with a minor girl should be construed only as rape notwithstanding the consent given by the minor. Therefore, when the deceased was having sexual intercourse with the appellant's sister, whether it is consensual or not, it should be treated only as rape. The appellant was therefore justified in attacking the deceased to stop him from committing the act. He was entitled to invoke the right of private defence. But then, it is well settled that while exercising the said right of private defence, one cannot act in a disproportionate manner. The appellant obviously knew that his friend was drunk. In fact the postmortem report/Ex.P.12 also mentions that alcohol was found in the stomach, liver and kidney of the deceased. It should not have been difficult for the appellant to have handled the deceased. But then, this Court must take note of the mental condition of the appellant. He obviously felt outraged and really provoked by the act committed by the deceased on his young sister, who was aged about 14 years. Therefore, this Court will have to necessarily view the conduct of the appellant with considerable indulgence. I have already held that the appellant was entitled to the right of private defence. But he had clearly exceeded his right. This is evident from the nature of injuries caused to the deceased. As rightly pointed out by the learned Government Advocate (Crl. Side), the appellant had hit on the back of his head. Even according to the appellant's sister, the appellant did not attack the deceased with M.O.1/lever, when he was performing the act. The whole thing occurred only thereafter. Therefore, this Court sustains the conviction and fine imposed on the appellant by the Court below under Section 304(ii) of I.P.C. of the mitigating circumstances mentioned above,



the sentence imposed on the appellant is modified to the period already undergone by him. With this modification in the matter of sentence, this criminal appeal is allowed.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

To:

- 1.The Additional Sessions Judge,  
Fast Track Court No.I, Trichy.
- 2.The Inspector of Police,  
Thuvakudy Police Station,  
Trichirappalli District.
- 3.The Chief Judicial Magistrate Trichy.
- 4.The Principal Sessions Judge, Trichy.
- 5.The Superintendent, Central Prison, Trichy.
- 6.The Judicial Magistrate No.VI, Trichy.
- 7.The Additional Public Prosecutor,  
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.T.SENTHILKUMAR, Advocate ( SR-76970[F] dated 23/07/2019

**Crl.A. (MD) No.379 of 2010**  
**23.07.2019**

ias

MS/25.09.2019/5P.9C