

BAIL SLIP

The Appellant/Accused viz., Sheriff @ Mohamed Rasool Sheriff, aged 28 years, S/o.Mohamed, was released on Bail vide Court order dated 18/02/2013 in CrI.M.P.No.1/12 in CrI.A.No. 806 of 2012.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.01.2020

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

CrI.A.No.806 of 2012

Sheriff @ Mohamed Rasool Sheriff .. Appellant/Accused

Vs.

State represented by
The Inspector of Police,
P-1, Pulianthope Police Station,
Chennai - 600 012. ... Respondent/Complainant

Criminal Appeal filed under Section 374 (2) Cr.P.C. against the judgment and order dated 10.10.2012 passed in S.C.No.160 of 2010 on the file of the Mahila Sessions Court, Chennai.

For Appellant : Mr.V.Sairam, counsel on record
Mr.R.Ganesh, Legal Aid counsel

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

JUDGMENT

Challenge in this criminal appeal is to the judgment and order dated 10.10.2012 passed in S.C.No.160 of 2010 on the file of the Mahila Sessions Court, Chennai.

2. The facts in brief leading to the filing of this case are as under:

2.1 The victim girl "X" (PW2) (name not disclosed for the sake of anonymity) was born on 04.07.1994 vide birth certificate (Ex-P2) issued by the Corporation of Madras. "X" had lost her father and was living with her mother (PW1) at door no.13/51, Narayanasamy Street, Pulianthope, Chennai. She

("X") has an elder brother and an elder sister. She ("X") was studying in XI standard in Muthaiya Chettiar Higher Secondary School in 2009.

2.2 The appellant was an auto driver and his services were engaged for picking up "X" to school and dropping her back everyday.

2.3 It is alleged that the appellant enticed "X" (PW2) and took her away from her mother Sameema Begum (PW1) on 15.07.2009 to various places outside the State until the police rescued her on 18.08.2009.

2.4 On the written complaint (Ex-P1) lodged by Sameema Begum (PW1), Shanmugam (PW18), Inspector of Police, registered a case in Crime No.336 of 2009 on 16.07.2009 at 16.00 hours for "girl missing" and prepared the printed FIR (Ex-P18). Even in the complaint (Ex-P1), Sameema Begum (PW1) has stated that she suspects the appellant, since the appellant was also not available in his house.

2.5 After "X" (PW2) was secured, she was subjected to medical examination by Dr.Geetanjali (PW13) on 20.08.2009 and the medical examination report was marked as Ex-P7. Dr.Geetanjali (PW13), in her evidence as well in the medical report (Ex-P7), has opined as follows:

"The victim girl "X" D/o. Sameema Begum, shows signs of defloration." The radiological examination for age determination was performed and Dr.Geetanjali (PW13) has opined that the age of "X" would be between 16 and 18.

2.6 The appellant was arrested and was medically examined by Dr.Balasubramanian (PW15), who, in his evidence as well in the medical examination report (Ex-P13), has stated that the appellant is not impotent.

2.7 After examining witnesses and collecting various reports, the police completed the investigation and filed a final report in P.R.C.No.263 of 2009 before the X Metropolitan Magistrate Court, Egmore, Chennai, for the offences under Sections 366-A , 376 and 506 (I) IPC, against the appellant.

2.8 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.160 of 2010 and was made over to the Mahila Sessions Court, Chennai, for trial.

2.9 The trial Court framed charges for the offences under Sections 366-A , 376 and 506 (I) IPC against the appellant and when questioned, the appellant pleaded "not

2.10 To prove the case, the prosecution examined eighteen witnesses, and marked twenty two exhibits and seven material objects.

2.11 When the appellant was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same. On behalf of the appellant, no witness was examined nor any document marked.

2.12 After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 10.10.2012 in S.C.No.160 of 2010, acquitted the appellant of the offence under Section 506 (I) IPC, but, convicted and sentenced him as follows:

Provision under which convicted	Sentence
Section 366-A IPC	Seven years rigorous imprisonment and fine of Rs.10,000/-, in default to undergo three months simple imprisonment.
Section 376 IPC	Seven years rigorous imprisonment and fine of Rs.5,000/-, in default to undergo three months simple imprisonment.

The aforesaid sentences were ordered to run concurrently.

2.13 Challenging the above conviction and sentences, the appellant has preferred the present criminal appeal.

3. On 06.11.2019, this Court passed the following order:

"This Court had appointed Mr.R.Ganesh, learned counsel nominated by the legal aid for the appellant. However, the appellant has engaged M/s.Raji and Rajan, who are now represented by Mr.V.Sairam, Advocate.

2. Mr.R.Ganesh has obtained the typed the set of papers from the Registry and he has handed over the same to Mr.V.Sairam in the open Court. However, the services of Mr.R.Ganesh to assist Mr.V.Sairam stands retained."

4. Heard Mr.V.Sairam, learned counsel on record for the appellant and Mr.R.Ganesh, learned Legal Aid counsel for the appellant and Mrs.P.Kritika Kamal, learned Government Advocate (Crl.Side) for the respondent/State.

5. The case of the prosecution hinges on the evidence of "X" (PW2).

6. "X" (PW2) was examined-in-chief on 20.08.2010. The free English translation of her evidence is as follows: "I am residing at Door No.13/31, Narayanasamy Street, Pulianthope, Chennai. We are living in the first floor portion of our grandfather's house. My brother and sister are living along with me. My father died. At the time of incident, I was fifteen years and was studying in XI standard at Muthaiya Chettiyar Higher Secondary School. I know the accused. I used to go by his auto to school. While going to school, the accused would praise my beauty and I would resist it. He told me that I should come wherever he insisted me to come, or else, he will spread rumours about me in the school and so, I was scared. On 15.07.2009, I had stomach ache and did not go to school. I was at home. My mother had gone for work. The accused came and told me that I should come to Doveton Cafe in Purasavakam. I said that I will not come. The accused threatened me that he will spread lies about me if I do not come. So, I told my grandmother that I am going to Purasavakam and went to Doveton Cafe around 4.00 p.m. The accused came there and took me in his auto. Thereafter, we took a bus and went to Tirupati. From Tirupati, we went to Mysore by bus. We took a room in Mysore, where, the accused ravished me against my will. Due to language barrier, I was scared to approach anyone. Like that, the accused took me to various places and had sex with me. After some time, there was no money with him and so, he pledged my 2 ½ sovereigns of jewels and took me to Nagpur, where, we stayed for a day. I started weeping and asked him to leave me back home. Once, he was away, I took his mobile phone and called my mother and told her that I am being kept in unknown places by the accused. As soon as the accused came in, I disconnected the call. I pleaded with the accused to take me back home. He brought me to Koyambedu bus stand and from there, we went to Wall Tax Road, where, the police caught us and we were taken to Pulianthope Police Station. The clothes that I was wearing are M.Os.1, 2, 3 and 4. I was medically examined."

7. In the cross-examination, it was suggested to "X" (PW2) that she wanted to desperately go with the accused and marry him, because, her mother was making arrangements for her marriage with an old man, which suggestion, she denied.

8. The defence was not able to make any serious dent in the testimony of "X" (PW2). However, the defence recalled her by filing an application under Section 311 Cr.P.C. and cross-examined her on 23.08.2010.

9. In the cross-examination on 23.08.2010, "X" (PW2) has stated that she had quarrelled with her mother (PW1) and had gone to her grandfather's house in Thoothukudi on 15.07.2009 and returned a month later.

that in the light of the evidence of "X" (PW2), the conviction of the appellant deserves to be set aside. This Court is unable to countenance this submission, because, it is obvious that she was brought under influence subsequently to speak against her own testimony given earlier.

11. The learned counsel for the appellant submitted that the medical examination of "X" (PW2) shows that she was more than sixteen years and hence, this is not a case of rape, but, a case of consensual sex. He also brought to the notice of this Court, the evidence of Dr.Geethanjali (PW13) that "X" (PW2) was above the age of sixteen at the time of the incident.

12. Refuting the above submission made by the learned counsel for the appellant, learned Government Advocate (Crl.Side) submitted that the prosecution has marked the birth certificate (Ex-P2) issued by the Corporation of Madras, which shows the date of birth of "X" (PW2) as 04.07.1994 and as on 15.07.2009, she was fifteen years and ten days. There appears to be force in the submission of the learned Government Advocate (Crl.Side).

13. This Court cannot rely upon the opinion evidence of Dr.Geethanjali (PW13) and reject the birth certificate (Ex-P2) issued by the Corporation of Madras, which was marked by Sameema Begum (PW1), "X's" (PW2's) mother.

14. That apart, the appellant himself has not denied that he had taken "X" (PW2) with him on 15.07.2009. His defence was that she had voluntarily come with him. However, this Court is inclined to accept the submission of the learned counsel for the appellant that "X" (PW2) was not forcibly deflowered by the appellant, because, they were in love with each other and she has gone with him on her own accord. Consent is irrelevant when the prosecutrix is less than sixteen years. In this case, as alluded to above in paragraph no.15, the girl was only fifteen years and ten days on 15.07.2009, when the appellant took her with him and had sex. Hence, his act will indubitably attract Section 376 IPC as it stood then.

15. The learned counsel for the appellant submitted that the appellant and "X" (PW2) are separately married and they have children and this aspect may be borne in mind by this Court for determining the quantum of sentence.

16. The offence in this case took place on 15.07.2009, when the un-amended Section of 376 IPC was in force. Though Section 376 IPC, as it stood then, provides for a minimum sentence of seven years rigorous imprisonment, it also empowers the Court to give lesser sentence for adequate and special reasons. The adequate and special reasons are that, "X" (PW2) was also in love with the appellant and together,

they had gone to various places.

17. As regards the conviction of the appellant under Section 366-A IPC, this Court is of the opinion that the appellant could, at the most, be convicted under Section 363 IPC and not under Section 366-A IPC.

As a result, the conviction of the appellant under Section 366-A IPC is set aside and he is convicted of the offence under Section 363 IPC. The substantive sentence of seven years rigorous imprisonment is reduced to three years rigorous imprisonment. The conviction of the appellant under Section 376 IPC is confirmed but the substantive sentence of seven years rigorous imprisonment is reduced to three years rigorous imprisonment. The sentences are ordered to run concurrently. The fine amount and default sentence imposed by the trial Court shall remain the same. This Court places on record its appreciation to Mr.R.Ganesh and directs the Tamil Nadu State Legal Services Authority, Chennai, to pay him the prescribed remuneration.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

nsd

To

- 1.The Metropolitan Magistrate X,
Egmore, Chennai.
- 2.The Chief Metropolitan Magistrate,
Egmore, Chennai.
3. The Mahila Sessions Judge, Chennai.
- 4.The Superintendent,
Central prison, puzhal, Chennai.
5. The Inspector of Police,
P-1, Pulianthope Police Station,
Chennai - 600 012.
6. The Member Secretary,
Tamil Nadu State Legal
Services Authority,
North Fort Road,
High Court Campus,
Chennai - 600 104.

7. The Public Prosecutor,
Madras High Court,
Chennai - 600 104.

8. The Deputy Registrar,
(Crl.Side)
Madras High Court,
Chennai - 104.

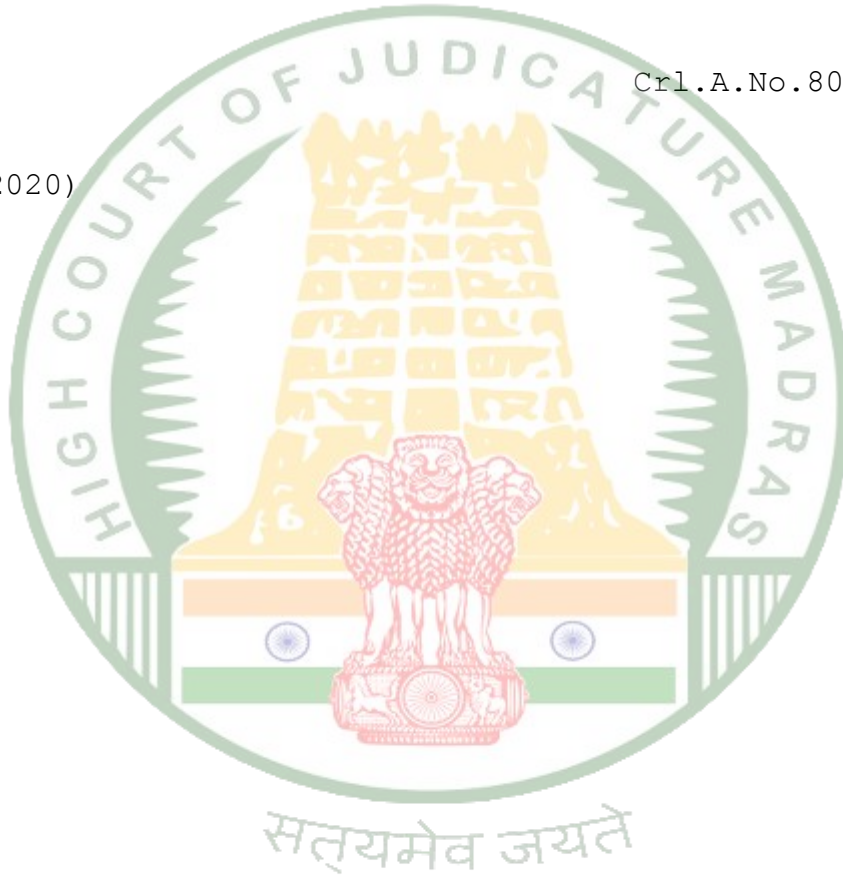
} with a direction to return
the original records to the
Court below concerned

+lcc to Mr.R.Ganesh, Advocate, S.R.No. 2462

+lcc to Mr.V.V.Sairaman, Advocate, S.R.No. 2343

Crl.A.No.806 of 2012

CA(CO)
GN(03/03/2020)



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