

BAIL SLIP

Senthil @ Irusa Gounder Accused in SC.No.158 of 2013 on the file of the Sessions Court/Fast Track Mahila Court, Erode was enlarged a Bail in MP.No.1 of 2015 in Crl.A.6 of 2015 by this Hon'ble Court, dated 13.04.2015.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:08.12.2020

CORAM

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

CRL.A.NO.6 OF 2015

Senthil @ Irusa gounder Appellant/Accused

Vs

The State by Inspector of Police,
Anthiyur Police Station,
Crime No.178/2010,
Erode District. Respondent/Complainant

PRAYER:

Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code praying to set aside the Judgment dated 03.12.2014 made in S.C.No.158 of 2013 on the file of the Sessions Court/Fast Track Mahila Court, Erode.

For Appellant : Mr.N.Manokaran.

For Respondent : Mr.S.Karthikeyan,
Additional Public Prosecutor.

J U D G M E N T

(through Video Conference)

The present Criminal Appeal has been filed to set aside the Judgment of conviction and sentence passed by the learned Sessions Judge, Fast Track Mahila Court, Erode dated 03.12.2014 in S.C.No.158 of 2013.

2.The appellant is the sole accused. He stood charged for the offence under Sections 366 and 376(2)(n) of Indian Penal Code. By Judgment dated 03.12.2014, the learned Sessions Judge, Fast Track Mahila Court, Erode convicted the appellant under Section 366 of Indian Penal Code and sentenced to undergo

rigorous imprisonment for a period of ten years and to pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for a period of two years and further convicted for the offence under Section 376(2)(n) of Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for a period of two years.

3.Challenging the said conviction and sentence, the appellant / accused is before this Court by filing the present Criminal Appeal.

4.The case of the prosecution in brief is as follows:

(i) PW1 viz., Thangavel is the father of the prosecutrix viz., Sathya. During the time of occurrence, she was studying XI in Government Girls Higher Secondary School, Andhiyur and her date of birth is 15.06.1994. The appellant viz., Senthil @ Iruasa Gounder is a driver by profession. On 09.04.2010 at about 9.30 A.M., when PW2 viz., Sathya was standing in the Pallipalayam Bus stand, the accused by using soothing words, took PW2 to Coimbatore and thereafter to Kochin. In Kochin, through one Ramachandran, he took house for rent and in one Vinayagar Temple, which is situated near to the house, the accused tied mangal sutra to the prosecutrix and thereafter, on 10.04.2010, against the will of the prosecutrix, the accused had sexual intercourse with her. He has continued the same till they returns to the native.

(ii) In the meantime, PW1 came to know that his daughter was eloped with the accused, he lodged complaint to PW10 under Ex.P1. PW10 viz., Biyas, the then Sub Inspector of Police on 12.04.2010 at about 10 A.M., received the complaint from PW1 and registered the First Information Report in Crime No.178 of 2010 under Section 366A of Indian Penal Code. The printed First Information Report has been marked as Ex.P.16. After the registration of the case, he handed over the copy of the First Information Report to PW11 for investigation.

(iii) PW11 viz., Subbaiah, the then Inspector of Police, Andhiyur Police Station took up the case for investigation. He visited the scene of occurrence and in the presence of PW5 viz., Rajamani and one Selvam, he prepared the observation mahazar and rough sketch which have been marked as Ex.P.17 and Ex.P.18. Further, he examined the witnesses and recorded their statements. On 18.04.2010, at about 1 P.M., when he was in rounds, he enquired the accused along with prosecutrix in the presence of PW5 and Selvam and recorded their statements. He recovered the dresses worn by PW2 through Form 91 which has been marked as Ex.P.19. Thereafter, he altered the Sections of law from 366A to 376 of Indian Penal Code and filed the

alteration report under Ex.P.20 before the learned Magistrate. Thereafter, he sent requisition to the learned Magistrate for the medical examination of the accused and the victim under Ex.P.21 to Ex.P.23.

(iv) Subsequently, upon the proceedings issued by the learned Magistrate under Ex.P.5, PW6 viz., Dr. Mythili attached with Government Hospital, Erode examined the prosecutrix and collected vaginal smear and pubic hair. She sent the same to Forensic Science Department, Coimbatore for chemical examination. Thereafter, upon the receipt of the report given by PW8, she came to the conclusion that the prosecutrix had sexual intercourse and sent a opinion under Ex.P.8. Similarly, upon the request of the learned Magistrate under Ex.P.9, PW7 viz., Dr. Ravichandar examined the accused and collected semen and hair for chemical examination. In respect to those materials, after obtaining the report under Ex.P.11, he concluded that the accused is capable of performing sexual intercourse and issued a report under Ex.P.12.

(v) In continuance of investigation, PW12 viz., Thangam, the then Inspector of Police, Andhiyur Police Station took up the case records for further investigation and examined the doctors. He recorded the further statements of prosecutrix and the accused and came to the positive conclusion that the accused has committed an offence under Sections 366 and 376(2)(n) of Indian Penal Code. He filed a final report against the accused for the above said offences.

6. Based on the above materials, the learned Sessions Judge, Fast Track Mahila Court, Erode framed charges for the offence under Sections 366 and 376(2)(n) of Indian Penal Code. The accused denied the same and opted for trial. Therefore, in order to prove the case of prosecution, twelve witnesses have been examined as PW1 to PW12 and twenty four documents were marked as Ex.P.1 to Ex.P.24.

7. Out of the said witnesses, PW1 viz., Thangavel is the father of the prosecutrix. He has spoken about the information which have been received by him in respect of the missing of his daughter. Upon receiving the same, he has lodged complaint before the police station praying to secure his daughter.

8. PW2 viz., Sathya is the victim girl in this case. She has stated that during the time of occurrence, the accused made obligation for marrying her and when the same was denied by her, he took her to Coimbatore and thereafter to Kochi and on 10.04.2010, he tied mangal sutra and compelled her for sexual intercourse. According to her, till both of them returned to Andhiyur, the accused constantly had sexual intercourse with her.

9.PW3 viz., Solai Gounder is the grandmother of the prosecutrix. She has stated that during the relevant point of time, the prosecutrix studied XI and on the date of occurrence, she has not returned to her house from school. Immediately, the same was informed to PW1.

10.PW4 viz., Subramaniam was working as Head Master in Government Girls Higher Secondary School, Andhiyur. He has stated that upon the request given by the Investigation Officer of this case, he issued the copy of the SSLC certificate of the prosecutrix.

11.PW5 viz., Rajamani is the neighbour of PW1. According to him, he attested in the observation mahazar and rough sketch prepared by the investigation officer.

12.PW6 viz., Dr.Mythili examined the victim girl and issued information in respect of the vaginity of the prosecutrix. PW7 viz., Dr.Ravichandar examined the accused and issued certificate stating that the accused is potent.

13.PW8 viz., Vasantha, who was working as Deputy Director of Forensic Sciences Department, Coimbatore has stated about the examination of vaginal smear and pubic hair of the prosecutrix. He also examined the semen and hair of the accused.

14.PW9 viz., Balashanmugam who was working as Deputy Director of Forensic Science Department, Coimbatore has stated about the receipt of vaginal smear which was collected from the prosecutrix.

15.PW10 to PW12 viz., Biyas, Subbaiah and Thangam are the police officers. They speak about the receipt of the complaint, registration of the case, about the investigation, examination of witnesses and recording of their statements, arrest of the accused and about the filing of final report against the accused.

16.When the above incriminating materials were put to the accused under Section 313 of Criminal Procedure Code, the accused denied the same as false. However, he neither chose to examine any witnesses nor mark any documents on his side. The learned Sessions Judge, after perusing all the above materials and on considering the arguments advanced by either side, convicted the appellant / accused and sentenced to imprisonment as stated supra. Aggrieved over the said conviction and sentence, the appellant is before this Court.

17.I have heard Mr.N.Manokaran, learned Counsel for the

appellant and Mr.S.Karthikeyan, learned Additional Public Prosecutor appearing for the respondent.

18.The learned Counsel for the appellant would contend that during the time of occurrence, the prosecutrix attained majority and only with her voluntary consent, she eloped with the accused and after completing the marriage, she given voluntary consent for sexual intercourse with the accused. Accordingly, the occurrence narrated by the prosecution are all happened within the knowledge of the prosecutrix. Further, he contended that for each and every act of the accused, the prosecutrix gave consent and therefore, it cannot be said that the accused has committed the offence under Sections 366 and 376(2)(n) of Indian Penal Code.

19.Per contra, the learned Additional Public Prosecutor appearing on behalf of the respondent would contend that during the relevant point of time as per the certificate issued by the Head Master of the School in which the prosecutrix was studied, she has not completed the age of 16 and therefore, the consent given by the prosecutrix is not at all a consent and therefore, the findings arrived by the trial Court is well within the four corners of law and prayed for dismissing this appeal.

20.I have considered the rival submissions made on either sides and I have also carefully perused the records.

21.It is seen from the records that PW4 who was the Head Master of the School in which PW2 studied, has issued SSLC certificate under Ex.P.2. In the said certificate, it was stated that the date of birth of the prosecutrix is 15.06.1994. On the other hand, the alleged occurrence had happened on 09.04.2010. Accordingly, in view of the SSLC certificate issued by the School authorities, the prosecutrix has not attained the age of 16 at the time of occurrence. However, it is a settled proposition that information made in school register is not a conclusive proof.

22.In this regard, when at the time of framing charge, it was stated by the trial Court that during the time of occurrence, the victim girl was aged about 19 years. Though the Court below has held that during the time of occurrence, the age of the prosecutrix is below 16, the trial Court, when at the time of framing charges itself, concluded the age of the prosecutrix as 19 years and proceeded the case. In general, as far as the framing of charges is concerned, not only should all materials be set out, but further more, the particulars as to time, place and person and also the provisions of law that are alleged to be proved, must be spelt out in the charge. This is an essential requirement for the reason that in a criminal

trial, where the accused is required to enter upon trial and where the consequence is serious and so far as defect's verdict is a result of loss of liberty.

23. Though, there was a provision available under Section 464 of Criminal Procedure Code to cure the defect found in the charge, here it is the case that during the time of trial, on behalf of the accused, they attempted to mark the certificate issued by the radiologist in which it was stated that the age of the victim girl is 18 to 20 years. In respect of the same, though in the Judgment rendered by the trial Court, it was clearly analyzed by the trial Judge, for not marking the said document, only the Trial Court has not permitted the accused for marking the said document which is nothing but against the proposition laid by our Hon'ble Apex Court in the case of "Bipinshantilal Panchal -vs- State of Gujarat" reported in "2001 3 SCC 1". Therefore, denying the opportunity to the accused for marking relevant documents, will cause prejudice to the accused.

24. In all, considering the fact that the trial Court itself came to the conclusion that the certificate issued by radiologist is in favour of the accused and also the charge has also been framed, this Court is also coming to the same conclusion that at the time of occurrence, the prosecutrix is aged about 18 years. The investigation officer in this case, after seeing the copy of the SSLC certificate pertains to the victim girl, filed final report without ascertaining the correct age of the prosecutrix. It shows that the investigation officer in this case has lethargically handled the life of the victim girl and filed final report which is nothing but abuse of power vested with the police officer.

25. Therefore, in the said circumstances, even after knowing the case of the prosecution that the prosecutrix has completed 18 years at the time of occurrence, the learned Sessions Judge has convicted the accused for the offence under Section 366 of Indian Penal Code which is erroneous in law. As far as the conviction under Section 376(2)(n) of Indian Penal Code is concerned, in respect of the said occurrence, only the prosecutrix (PW2) is the capable person for saying the occurrence, as she is only having the knowledge of the act committed by the accused in respect of sexual intercourse.

26. Here it is a case that while at the time of giving evidence as PW2, the prosecutrix has stated before the trial Court that after the completion of marriage, the accused herein constantly made sexual intercourse with her for a period of one week, till they return to the native. The other relevant factors are, in the meantime, she has not attempted to escape from the place in which both the accused and the victim stayed.

Further, being the matured girl, she has not complained the attitude of the accused to any other person. It is significant to note that before such occurrence, she travelled from Andhiyur to Kochin along with the accused.

27. At this juncture, it is relevant to see the Judgment of our Hon'ble Apex Court in the case of "Kaini Rajan -vs- State of Kerala" reported in "(2013) 9 SCC 113", it has been held as follows:

"12. Section 375, IPC defines the expression "rape", which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression "against her will" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence of probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90, IPC refers to the expression "consent". Section 90 though does not define "consent" but describes what is not consent. "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

28. In this case, as already observed evidence given by prosecutrix is having much significant that the act done by the accused are all supported through the act of prosecutrix. If the alleged offence has been committed by the accused without getting any free consent from the prosecutrix, immediately, after the occurrence, the same should have been intimated to the neighbours of the prosecutrix. Here, it is the case that during the time of occurrence, both the accused and the victim girl jointly went to Kochin and jointly returned to Andhiyur.

29. Further, the prosecutrix already know the status of the accused and the neighbours of the accused. Hence, it is evident that she knows the status of the accused and only thereafter,

she travelled with him without showing any resistance. In this regard, it is relevant to see the Judgment of our Hon'ble Apex Court in the case of "Uday -vs- State of Karnataka" reported in "2003 Supreme Court Cases (Cri) 775" wherein our Hon'ble Apex Court has held as follows:

"There is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. The tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. The court must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."

30. Therefore, following the principles laid down by our Hon'ble Apex Court, herein also facts and circumstances of this case reveals the fact that every occurrence narrated by the prosecution has happened within the knowledge of prosecutrix as well as with her consent. Therefore, it cannot be said that the accused committed offence under Section 376(2)(n) of Indian Penal Code.

31. Accordingly, the appeal is allowed and the conviction and sentence imposed on the appellant/accused by the Trial court are set aside and he is acquitted of all the charges. Fine amount, if any, paid, shall be refunded to the appellant/accused.

Sd/-
सत्यमेव जयते

Assistant Registrar

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Sub Assistant Registrar

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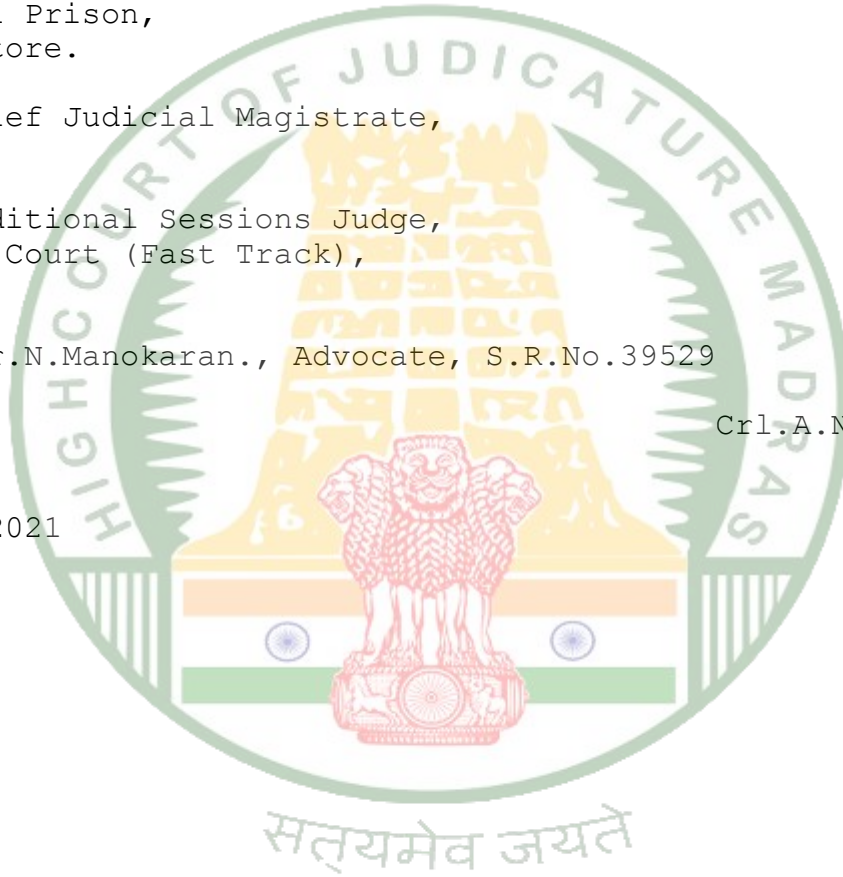
1. The State by Inspector of Police,
Anthiyur Police Station,
Erode District.

2. The Sessions Judge,
Fast Track Mahila Court,
Erode.
3. The Public Prosecutor,
High Court of Madras,
Chennai.
4. The Judicial Magistrate,
Bhavani
5. The Superintendent,
Central Prison,
Coimbatore.
6. The Chief Judicial Magistrate,
Erode.
7. The Additional Sessions Judge,
Mahila Court (Fast Track),
Erode.

+1cc to Mr.N.Manokaran., Advocate, S.R.No.39529

Crl.A.No.6 of 2015

KV(CO)
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