

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.06.2020

Coram

The Hon'ble Mr. Justice **M.M.SUNDRESH**
and
The Hon'ble Mr. Justice **D.KRISHNAKUMAR**

CRL.MP. No.4012 of 2020
in CRL.A.No.140 of 2019

Shakilabanu @ Sumaiyabanu
W/o Mohammed Ali

... Petitioner

-vs-

State rep. by
The Inspector of Police,
Cuddalore N.T., Police Station,
(Crime No.11 of 2017)

... Respondent

Criminal Miscellaneous Petition filed under Section 389(1) of Criminal Procedure Code, to suspend the sentence in Crl.A.No.140 of 2019 imposed upon the petitioner in S.C.No.210 of 2017 by the learned Judge, Mahila Court, Cuddalore, dated 07.07.2018 and enlarge the petitioner on bail, pending disposal of the above criminal appeal.

For Petitioner : Mr.Aditya Varadarajan

For Respondents : Ms.M.Prabhavathi,
Addl. Public Prosecutor

ORDER

[Order of the Court was made by *M.M.SUNDRESH, J.*]

The petitioner has been arrayed as A1 in S.C.No. 210 of 2017 dated 07.07.2018 on the file of Mahila Court, Cuddalore, for the offence punishable under Sections 302 r/w 34, 201 r/w 302 and 497 of IPC. The trial Court, by judgment dated 07.07.2018, convicted the petitioner for the offence punishable under Section 302 r/w 34 IPC and sentenced to undergo life imprisonment and to pay a fine of Rs.5,000/- in default, to undergo one year simple imprisonment for one year and also convicted her under Section 201 r/w 302 IPC and sentenced to undergo rigorous imprisonment for a period of two years and fine of Rs.2000/- in default to under simple imprisonment for a period of six months. Seeking to suspend the sentences, the present petition has been filed.

2. The case of the prosecution is that the petitioner along with A2, who is stated to be her paramour, committed the alleged offence as the victim was the hindrance for the relationship. Needless to state that the petitioner is the step-mother of the victim. The trial Court convicted both the petitioner and A2.

3. A2 filed an appeal in Crl.A.No. 481 of 2018. This Court, allowed the appeal on 01.02.2019 and the following is the relevant passage of the judgment passed:-

"6. Prosecution has examined PW-2, owner of the house, wherein PW-1 and A1 resided, to speak to his witnessing both accused proceeding to the terrace carrying the deceased child and a stool. PW-2 has turned hostile. PW-3 has been examined to speak to his having chanced upon a street immediately adjacent to the occurrence house, having looked up and seeing the appellant throwing a rose coloured object into the water tank. His evidence to such effect, even if accepted, would not carry the prosecution case far as it is not his specific deposition that he saw the body of the child being thrown into the water tank. In any event, PW-3 fails the test of reliability since he has admitted to not knowing appellant/accused earlier and he has not been subjected to a Test Identification Parade which would have lent credibility to his identification of the accused. PW-6 has claimed that both this appellant as also A1 appeared before him at his office on 07.01.2017 at about 09.00 a.m. and tendered confession recorded in Ex.P5. However, Ex.P18, inquest report, prepared on 06.01.2017 at about 05.00 p.m. informs the involvement and commission of offence by appellant and the other accused. Confession is seen to be the making of the prosecution. In any event, the same was post registration of

the case and time and time again has this Court held that such a confession is not admissible. The confession of A2 becomes even more suspect given the evidence of PW-6 that A1 had also signed therein but Ex.P5 does not reflect signature of such accused. One other submission of learned senior counsel which this Court finds most appealing is that A1, even as per the confession recorded from her, continued to dwell in the house post occurrence and that such would hardly be a possibility if one keeps in mind that the inmates including the accused would be using water flowing through the taps from the tank and A1 would have done so in the knowledge that a body was afloat in the tank's wateriest. There absolutely is no material as would justify the finding of conviction arrived at by trial Court.”

4.Learned counsel appearing for the petitioner submitted that on a reading of the aforesaid paragraph, the case of the prosecution cannot be sustained even against the petitioner.

5.Learned Additional Public Prosecutor appearing for the State submitted that Section 106 of the Indian Evidence Act will have to be pressed into service.

6. We have considered the submissions made. We may also note that the earlier application filed by the petitioner was dismissed as withdrawn on 04.12.2019.

7. We have perused the judgment passed by the Division Bench in Crl.A.No. 481 of 2018 dated 01.02.2019. The aforesaid judgment which enures to the benefit of A2 has not been appealed against. It is the specific case of the prosecution that the petitioner being A1 and the paramour being A2, who filed appeal in Crl.A.No.481 of 2018, have committed the offence together. That is the reason why, Section 34 of IPC has been pressed into service. *Prima facie*, for the application of Section 106 of the Indian Evidence Act, the primary facts will have to be proved by the prosecution.

8. The petitioner has been under incarceration from the year 2018 onwards. She is a lady. In fact, she could not even file an appeal earlier. The present appeal itself has been filed by the petitioner, after the order of acquittal passed by this Court in Crl.A.No.481 of 2018 which has become final. We are also of the view that the earlier application filed to suspend the sentence was not pressed cannot stand as a bar for deciding this application on merit.

9.Thus, considering the above, we are inclined to suspend the sentence on furnishing her own bond considering the present situation and the financial condition of the petitioner, who was not eve able to file an appeal. Accordingly, the substantive sentence of imprisonment alone is suspended on condition that the petitioner executes her own bond for a sum of Rs.10,000/- (Rupees Ten Thousand only) to the satisfaction of the Judicial Magistrate No.II, Cuddalore, and on further condition that the petitioner shall report before the concerned Court on the first working day of every month at 10.30 a.m. pending appeal.

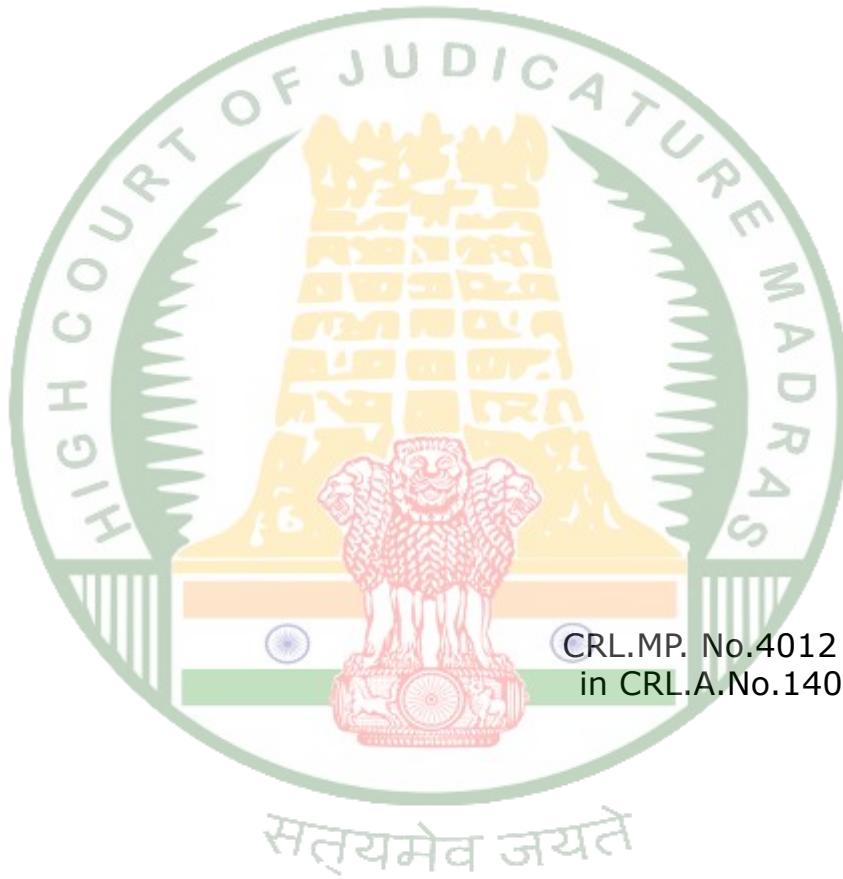
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(M.M.S.,J.) (D.K.K.,J.)
22.06.2020

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M.M.SUNDRESH, J.
and
D.KRISHNAKUMAR, J.

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