

BAIL SLIP

That the appellant herein/ Accused No.1 namely Karthi S/o.Shanmugam was directed to be released on bail dated 20.03.2014 made in Crl.Mp.1/2014 made in Crl.A.No. 88/2014 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:14.12.2020

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Crl.A.No.88 of 2014

Karthi (21) ... Appellant/Accused 1

Vs

State rep. by
Inspector of Police,
Erode Taluk Police Station,
Erode District,
Crime No.133/2010. ... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code praying to set aside the Judgment dated 10.02.2014 in S.C.No.43 of 2013, on the file of the Mahila Court (Fast Track) , Erode.

For Appellant : Mr.D.Selvaraju for
Mr.C.S.Saravanan.

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, Mahila Court (Fast Track), Erode dated 10.02.2014 in S.C.No.43 of 2013.

2.The appellant in this appeal is the first accused in S.C.No.43 of 2013 on the file of the Mahila Court (Fast Track) ,

Erode and the second accused viz., Anandh @ Shanmugam is a juvenile. Being the juvenile accused, the case against him was separated from the charge sheet and the same was tried before Juvenile Justice Board, Erode in J.J.No.102 of 2013.

3. In respect of the appellant herein, the trial Court framed charges for the offence under Sections 376 and 323 of Indian Penal Code. By Judgment dated 10.02.2014, the learned Sessions Judge, Mahila Court (Fast Track), Erode convicted the appellant under Section 376 of Indian Penal Code and sentenced to undergo seven years rigorous imprisonment and to pay a fine of Rs.1,05,000/-, in default to undergo simple imprisonment for a period of one year and further, convicted the appellant under Section 323 of Indian Penal Code and sentenced to pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for a period of six months.

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

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

(i) PW2, Anbazhagan is the father of PW1-Susheela, who is the victim girl in this case. On 08.02.2010 at about 9 P.M., when at the time, PW1 was returning to her home after completing the natural call, one Anandh @ Shanmugam who is the juvenile accused, caught hold the PW1 and closed her mouth. Thereafter, the appellant pulled her down and after removing her dresses, he had sexual intercourse with her. Due to the same, PW1 became unconscious. After sometime, she regained consciousness and at the time when she was returning to her home, one Kalaiselvi and one Ramesh (PW3) made enquiry with PW1. PW1 told to them about the occurrence. Next day morning at about 9 A.M., PW2 arranged panchayat in his village and afterwards due to the decision taken by the Panchayatar, the appellant tied Mangalasutra to the PW1.

(ii) After the marriage, PW1 lived with the appellant in the matrimonial home. However, both of them got misunderstanding and the same was intimated to PW2. In respect of the same, on the same day, when PW2 and some others went to the house of the appellant, wherein without any reason the parents of the appellant assaulted the PW2. At the same time, the appellant has attacked PW1 and thereby, PW1 sustained injuries in her leg. In this regard, she has been taking treatment in the hospital. On 08.03.2010, PW9 Subburathinam, the then Sub Inspector of Police, Erode Taluk Police Station received information from the Hospital wherein PW1 was admitted. In turn, he went to Government Hospital, Erode and recorded the complaint given by PW1 under Ex.P.1. On the strength of the same, he registered

the First Information Report in Crime No.133 of 2010 under Sections 376 and 323 of Indian Penal Code and under Sections 3 and 5 of Child Marriage Restraint Act, 1929. The printed First Information Report has been marked as Ex.P.13. After the registration of the case, the case records were handed over to PW10 for investigation.

(iii)PW10, Sekar, the then Inspector of Police, Erode Taluk Police Station took up the case for investigation and on the same day, he visited the scene of occurrence. In the presence of PW4, Gunasekaran and one Rathinavel, he prepared observation mahazar under Ex.P.2. He drawn rough sketch and the same has been marked as Ex.P.14. He examined PW1 to PW3 and recorded their statements. On 09.03.2010, he arrested the accused and sent him to judicial custody.

(iv)In continuance of investigation, he sent a requisition to the Magistrate for conducting the medical examination to the PW1 and as well as to the accused. Further, he sent requisition to the doctor attached with Government Hospital, Erode for ascertaining the age of PW1. In the meantime, PW5, Dr.Rameshbabu attached with Government Hospital, Erode, on 08.03.2010 examined the victim girl and found the following injuries viz.,

(i)she was suffering from pain in one left knee, difficulty in walking

(ii) unable to lift her foot

He has given a report stating that the nature of injuries sustained by PW1 are simple in nature. The copy of the accident register issued by PW5 has been marked as Ex.P.3. Further, upon the proceedings issued by the Court, PW6, Dr.Latha on 15.03.2010 medically examined the victim girl and collected vaginal smear and sent the same for chemical examination. Thereafter, after the completion of chemical examination, he received report under Ex.P.5 wherein it was stated that there was no sperm deducted in the vaginal smear.

(v)In the meanwhile, PW7, Dr.Sivakumar, radiologist examined PW1 and issued age certificate under Ex.P.8. According to him, the age of the victim girl is between 18 to 20 years. In respect of the accused, upon the request given by the Inspector of Police, PW8, Dr.Karuppusamy medically examined the appellant and issued report under Ex.P.12 stating that there is nothing to show that the appellant is impotent. Further, PW10 examined the doctors and recorded their statements. On completion of investigation, he came to the positive conclusion that both the accused had committed offence under Sections 376 and 323 of Indian Penal Code and filed final report. As already stated, since the other accused is juvenile, the case against him has been split up and sent to the Juvenile Justice Board, Erode.

6. Based on the above materials, the learned Sessions Judge, Mahila Court (Fast Track), Erode, framed charges against the appellant for the offences under Sections 376 and 323 of Indian Penal Code. The accused denied the same and opted for trial. In order to prove their case, on the side of the prosecution, as many as ten witnesses have been examined and 17 documents are marked as Ex.P.1 to Ex.P.17.

7. Out of the said witnesses, PW1, Susheela is the victim girl. She has spoken about the occurrence as during the relevant point of time, both the accused waylaid her and after closing her mouth, the appellant herein forcibly made sexual intercourse with her. Further, she has stated that after getting information from her, PW2, her father and PW3, her uncle arranged the panchayat. In the panchayat, it was decided to marry the victim girl with appellant. Accordingly, the marriage between PW1 and the accused was solemnized. After the marriage, PW1 lead her matrimonial life in the appellant's house, however, the accused developed enmity against PW1 and the same was intimated to PW2 by PW1. When the same was questioned by PW2, the parents of the accused assaulted him and further, during that time the accused attacked PW1 and ultimately, PW1 sustained injuries. In this regard, PW1 lodged complaint before the police.

8. PW2, Anbhazagan is the father of the victim and PW3, Ramesh is her uncle. Both of them gave evidence, similar to the evidence given by PW1. PW4, Gunasekaran, residing in the same locality speaks about the preparation of observation mahazar and rough sketch by the investigation officer. PW5, Dr. Rameshbabu attached with Government Hospital, Erode examined the victim girl and issued a copy of the accident register.

9. PW6, Dr. Latha, medically examined the victim girl and collected vaginal smear and sent the same for chemical examination. Thereafter, she issued report stating that no sperm was found in the vaginal smear. PW7, Dr. Sivakumar medically examined the victim girl and stated that the age of the victim girl is between 18 and 21 years. PW8, Dr. Karuppusamy, one of the doctors working in Government Hospital examined the accused and issued certificate as he is potent. PW9, Subburathinam and PW10, Sekar are the police officers, speaks about the registration of the case, investigation, arrest of the accused and filing of final report.

10. When the above incriminating evidence, were put to the appellant / accused under Section 313 of Criminal Procedure Code, he denied the same as false. In order to prove his case, on the side of the accused, copy of the First Information Report registered in Crime No.134 of 2010 was marked as Ex.D.1, charge

sheet in respect of the First Information Report dated 24.04.2020 has been marked as Ex.D.2 and further, the copy of the accident register report dated 05.03.2010 issued to the accused was marked as Ex.D.3.

11. Having considered all the material placed before him and on considering the arguments put forth by either sides, the learned trial Judge convicted the accused as stated supra. Aggrieved by the said conviction and sentence, the accused is before this Court.

12. I have heard Mr.D.Selvaraju, learned Counsel appearing for the appellant and Mr.S.Karthikeyan, learned Additional Public Prosecutor appearing for the respondent and carefully perused the materials available on record.

13. The appellant / accused in this case stood charged for the offence under Sections 376 and 323 of Indian Penal Code. The consistent evidence of PW1 who is the victim in this case is that during the time of occurrence, the other accused in this case closed her mouth and thereafter, after removing the dresses, the present appellant forcibly made sexual intercourse with her. In this regard panchayat is held and as per the decision made in the panchayat, the marriage between the appellant and PW1 was solemnized and thereafter, the accused developed enmity against the victim girl. Resultantly, the accused assaulted PW1 and the present case has been registered.

14. The learned Counsel appearing for the appellant would contend that after one month from the date of occurrence, PW1 has lodged the present complaint with the false averments. According to PW2, the age of the victim girl, on the time of occurrence is 14 years. On the other hand, as per the evidence given by PW7, radiologist, she has completed the age of 18 at the time of occurrence. More than that, the victim girl itself filed an affidavit stating that only due to the heavy pressure given by her parents, she could not get united with the accused.

15. Further, submission of the learned Counsel for the appellant is that manner of sexual assault alleged to be committed by the accused has not been proved medically. More than that, the panchayatar who are all assembled were not examined. Therefore, the said lapses found in the evidence given by the prosecution witness, creates suspicion over the case of the prosecution and thereby the accused is entitled for acquittal.

16. Per contra, the learned Additional Public Prosecutor appearing for the respondent would contend that since the case has been registered against the accused under Section 376 of Indian Penal Code, solitary testimony of prosecutrix alone is

sufficient to hold that the case narrated by the prosecution is true one. According to him, the prosecution proved his case beyond reasonable doubt. Hence, he prays for dismissal of this appeal.

17. Now on considering the rival submissions made by the learned Counsel on either sides, here it is the case that after filing this appeal, PW1 has filed an affidavit before this Court stating as follows:

"5. I submit that having we both eloped and got married, now I am leading a peaceful family life with a male child, whereas the appellant herein is facing the prolonged legal battle, which seriously affects my conscious, whatever might it happened, it is only due to the contribution of both of us, for which the appellant alone need not be punished."

Though PW1 filed the affidavit as above, the same has not been marked as exhibit by adopting the procedure contemplated in the Code of Criminal Procedure. Therefore, the said affidavit alone cannot be taken into account for considering this appeal fully in favour of the appellant.

18. According to the evidence given by PW1 and PW2, at the time of occurrence, the victim girl is aged about 14 years. On the other hand, PW7, radiologist who medically examined the victim girl, has stated that the victim girl has completed 18 years. In the said circumstances, in order to find out the correct age of the victim girl, the prosecution has not produce the birth certificate of the victim girl. Further, certificates related to the studies, were also not produced. The said lacuna found in the case of the prosecution creates suspicion as to whether at the time of occurrence, PW1 completed the age of 18 years or she is in the age of 14.

19. Secondly, one another important aspect which is necessary to decide in this case is that as per the case of the prosecution, the alleged occurrence had happened on 08.02.2010 at about 8 P.M., for which the case has been registered on 08.03.2010, that too after getting statement from the victim girl from the Government Hospital, Erode. In this regard, the case of the defence is that since the accused herein presented complaint before the police against PW2, PW1 has lodged the present complaint against the accused. In order to prove the same, the copy of the FIR registered upon the complaint given by the accused against PW2 was marked as Ex.D1. In the said FIR, charge sheet has also been filed under Ex.D2. The said documents shows that for the occurrence happened on 05.03.2010, the accused lodged a complaint on 08.03.2010, against PW2.

Accordingly, it is made clear that only after the registration of the above referred case against PW2, the present case has been registered against the accused.

20. Further, it is seen from the averments found in the affidavit filed by the victim girl that the present complaint has been given by her only due to the compulsion made by her parents. More than that, in the evidence given by PW1 and PW2, nothing was stated in respect to the delay in lodging the complaint. It is a settled position that if a case has been registered with delay and if the same has not been properly explained, the same is fatal to the prosecution.

21. Another aspect is that according to the case of the prosecution on the next day, the panchayat was held and in the panchayat, it was decided to perform marriage between the accused and the victim girl. Since the same was denied by the accused, it is for the prosecution to prove the same by examining the persons who have attended the panchayat. But, in this case, to prove the occurrence of the panchayat conducted, no body have been examined by the investigation officer. Though the evidence given by PW1 to PW3 are having some contradictions, the same has not been put before the investigation officer to create contradiction in the evidence deposited by PW1.

22. Though the said aspect is in favour of the prosecution, considering the fact that delay in lodging the complaint and also the non-availability of medical evidence in respect to the forcible intercourse committed by the accused, creates doubt as to whether the alleged occurrence had happened as stated by the prosecution. Accordingly, I am of the considered opinion that prosecution has not proved their case beyond reasonable doubt.

23. In the result, 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/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

- 1.The Sessions Judge,
Mahila Sessions (Fast Track) Court,
Erode.
- 2.The Judicial Magistrate NO.1,
Erode.
- 3.Do thro The Chief Judicial Magistrate,
Erode.
- 4.Inspector of Police,
Erode Taluk Police Station,
Erode District.
- 5.The Superintendent,
Central Prison,
Coimbatore.
- 6.The District Collector,
Erode.
- 7.The Director General of Police,
Mylapore, Chennai 9.
- 8.The Public Prosecutor,
High Court of Madras,
Chennai.



Crl.A.No.88 of 2014

KJ(CO)
GN(18/01/2021)

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