



BAIL SLIP

The Appellant/Accused namely Pappa, W/o.Vellaiyan in Sc.No.206 of 2015 dated 04.01.2019 on the file of the learned Magalir Neethimandram at Salem was released on bail as per the order of this Hon'ble Court dated 27.06.2019 made in Crl.MP.6666 of 2019 in Crl.A.276/2019.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.09.2021

PRONOUNCED ON : 02.11.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.276 of 2019

Pappa  
W/o.Vellaiyan

... Appellant

Vs.

The State represented by  
Inspector of Police  
All Women Police Station  
Suramangalam  
Salem District

...Respondent

prayer: Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure praying to set aside the Judgment passed by the learned Magalir Neethimandram at Salem, in S.C.No.206 of 2015 dated 04.01.2019 and acquit the appellant.

For Appellant : M/s.S.Conscious Ilango

For Respondent : Mr.S.Sugendran  
Government Advocate (Crl.Side)

J U D G M E N T

(The case has been heard through video conference)

This Criminal Appeal has been filed against the Judgement of conviction and sentence passed by the Magalir Neethimandram, Salem, in S.C.No.206 of 2015 dated 04.01.2019 and to set aside the same.



2. The respondent police originally registered the case in Crime No.21 of 2014 against the husband of the appellant for the offence under Section 376 IPC and after investigation, altered the offences into Sections 366, 376(2)(1) IPC read with 109 IPC by impleading the appellant as A2 and subsequently, filed the charge sheet against the husband of the appellant as well as the appellant before the learned Judicial Magistrate, Additional Mahila Court, Salem. In the meantime, since the husband of the appellant/A1 died, the charge against the husband of the appellant/A1 was abated and the learned Magistrate taken the charge sheet on file in PRC No.6 of 2015 and after completing the formalities under Section 207 Cr.P.C., committed the case to the Principal District and Sessions Judge, Salem since, the offences are exclusively triable by the Court of Session. The learned Principal District and Sessions Judge taken the case on file in S.C.No.206 of 2015 and made over the case to the learned Sessions Judge, Mahila Court, Salem and the learned Sessions Judge, after completing the formalities, framed the charges as against the appellant/A2 for the offence under Sections 366, 376 (2) (1) read with 109 IPC.

3. After framing the charges, in order to prove the charges, on the side of the prosecution during trial, as many as 11 witnesses were examined as P.W.1 to P.W.11 and 22 documents were marked as Exs.P.1 to P.22. Besides, 2 Material objects were exhibited as M.O.1 and M.O.2.

4. After completing the examination of the prosecution witnesses incriminating circumstances culled out from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C. However, she denied the same as untrue and pleaded not guilty. On the side of the defence, no oral or documentary evidence were produced.

5. On completion of trial and hearing of the arguments advanced on either side and considering the materials, the Special Court found guilt of the appellant accused for the offence under Sections 366, 376(2)(1) read with 109 IPC and convicted and sentenced her to undergo 10 years rigorous imprisonment and to pay fine of Rs.5,000/- in default to undergo 6 months simple imprisonment for the offence under Section 366 IPC and also sentenced her to undergo 10 years rigorous imprisonment and to pay fine of Rs.5,000/- in default to undergo 6 months simple imprisonment for the offence under Section 376 (2) (1) read with 109 IPC.

6. Challenging the said Judgment of conviction and sentence, the appellant has filed the present appeal before this Court.



7. The learned counsel for the appellant would submit originally the appellant was not arrayed as accused and she was belatedly implicated in this case as accused and the case is only based on presumption, assumption and conjunction and not based on eyewitness or any other material evidence to show that the appellant is also involved in this case. The appellant was incorporated as an accused based on the statement recorded under Section 161 Cr.P.C. and 164 Cr.P.C. which are contradictory to the complaint. Thereafter, there was subsequent improvement and there is no cogent and consistent evidence to connect this appellant in this case. Further, there was a delay in filing the complaint and the prosecution has not explained the inordinate delay of 10 days in lodging the complaint. The unexplained delay is fatal to the case of the prosecution and the trial Court failed to consider the said inordinate delay of 10 days. Since the charge against the husband of the appellant was abated, the appellant was wrongly implicated in this case as if, she abetted her husband to commit rape on the victim. Without any valid reason and material evidence and only based on presumption, surmise and conjunction, the appellant was convicted. Further, at the time of alleged commission of offence, the age of the husband of the appellant was 67 years and the age of the appellant was 62 years and thereby, they could not have committed such a grave offence of rape on the victim who is a mentally retarded. The learned Counsel for the appellant contended that though the victim had stated that the accused forcefully took her to his house and the husband of the appellant bit on her private part, the doctor has clearly stated that there was not bite mark or external injury on the victim girl and in the absence of the same, the trial Court wrongly convicted the appellant and the prosecution has failed to prove its case beyond all reasonable doubt which warrants interference of this Court.

8. The learned Government Advocate (Crl. Side) would submit that P.W.1 is the father of the victim and he was working as a Poojari in a Temple. The victim is a mentally retarded person. Though she can speak well, she could not understand as to what are good things and what are bad things. The appellant and her husband are known to P.W.1 and they used to visit the house of P.W.1, watch T.V. and have snacks and tea along the victim. While so on the date of occurrence, P.W.1 went to temple for sleeping. At that time, the appellant/A2 and her husband/A1 were in the house of P.W.1. Thereafter, at about 1 a.m., when P.W.1 came home, found his daughter missing. Hence, he enquired his sister who is residing in the next house. In turn, she went along with her husband and searched for the victim in and around and they could not find the victim. Thereafter, they went to the house of the appellant and called the appellant. However, there



was no response from the appellant and when they were about to leave the house of the appellant, they heard a sound of bangles. Hence, they again called the appellant and entered into her house. Subsequently, the husband of the appellant came out by holding his Dhoti and when they asked him about the victim, he replied that he did not know anything about the victim. At that time, they again heard the bangles sound. Therefore, they saw inside the house of the appellant by using Torch light and found the victim lying on the cot and the appellant was lying on the floor under the cot. Immediately they took the victim from the house of the appellant and left her in her house. Next day, the father of the victim asked the victim as to why she left the house without any information. At that time, the victim told that the appellant and her husband forcefully took her to their house and with the help of the appellant, the husband of the appellant committed bad things on her. Immediately, the father of the victim beaten the victim and subsequently, lodged a complaint. The delay has been explained under what circumstances, P.W.1 did not file the complaint immediately soon after the incident and the cases of this nature, especially when the victim is a mentally retarded person, the delay in filing the complaint is not fatal to the case of the prosecution. The evidence of P.W.1 to P.W.6 are very clear that the husband of the appellant committed rape on the victim and the appellant has abetted her husband for committing such grave offence. The doctor/P.W.10 in her evidence has clearly stated that there may be a possibility of sexual intercourse and the hymen of the victim was not intact. Though initially the case was registered against the husband of the appellant, during the course of investigation and after recording statements under Section 161 Cr.P.C. and 164 Cr.P.C., the Investigating Officer came to the conclusion that the appellant aided her husband to commit rape on the victim and therefore, they altered the charges by implicating the appellant as A2 and the prosecution proved its case beyond all reasonable doubt through oral and documentary evidence and medical evidence that the victim who is a mentally retarded person was subjected to sexual intercourse. Further, the doctor/P.W.11 who conducted medical examination on the victim has certified that the victim was suffering from Moderate Mental Retardation and he has opined that the victim could able to speak well however, she could not understand what are good things and what are bad things. Therefore, the prosecution proved its case beyond all reasonable doubt. Since, the husband of the appellant died after filing charge sheet and before framing charges, the trial Court dismissed the case against the husband of the appellant/A1 as charges abated and framed charges against the appellant alone and after completion of trial found the guilt of the appellant and convicted and sentenced her as stated above.



10. The case of the prosecution is that the father of the victim/P.W.1 is serving as Poojari in Vana Badhrakali Amman Temple. The mother of the victim died five years before the date of occurrence due to Cancer. The daughter of P.W.1 is a mentally retarded person. Though she could speak well, she could not understand what are good and what are bad. The appellant and her husband had earlier constructed a wall in the house of P.W.1. Thereafter, they used to visit the house of P.W.1 frequently to watch T.V. and to have tea and snacks. Since, P.W.1. used to go to Temple, he believed that the appellant and her husband would take care of her daughter and hence, he allowed them inside his house. While so, on the date of occurrence, P.W.1 went to temple for sleeping. Taking advantage of the aloofness of the victim, the husband of the appellant with the help of the appellant forcefully took the victim to their house and subjected the victim girl to sexual intercourse. Thereafter, at about 1 a.m., when P.W.1 came home found his daughter missing. He enquired his sister who is residing in the next house. In turn, she went along with her husband and searched for the victim in and around and they could not find the victim. Thereafter, they went to the house of the appellant and called the appellant. However, there was no response from the appellant and when they were about to leave the house of the appellant, they heard the sound of bangles. Hence, they again called the appellant and entered into her house. Subsequently, the husband of the appellant came out by hold his Dhoti and when they asked him about the victim, he replied that he did not know anything about the victim. At that time, they again heard the bangle sound. Hence, they saw inside the house of the appellant by using Torch light and they found the victim lying on the cot and the appellant was lying on the floor under the cot. Immediately they took the victim from the house of the appellant and left her in her house. The father of the victim beaten her and on the next day, when he asked the victim as to why she left the house without any information, she told him that the appellant and her husband forcefully took her to their house and removed her dress and with the help of the appellant, the husband of the appellant committed rape on her. Subsequently, P.W.1 lodged a complaint.

<https://hcservices.ecourts.gov.in/hcservices/>



appellant herein. Subsequently, the husband of the appellant/A1 died and therefore, the charge against A1 was abated and the Special Court framed the charges against the appellant alone for the offences under Sections 366, 376(2)(1) read with 109 IPC.

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12. Since the Appellate Court is a final Court of fact finding, it has to necessarily re-appreciate the entire evidence in order give independent findings. Accordingly, this Court re-appreciated the entire evidence and gives its findings independently.

13. In order to substantiate the charges framed against the appellant, on the side of the prosecution, totally 11 witnesses were examined and 22 documents were marked besides, 2 material objects were exhibited.

14. Out of the 11 witnesses, the victim was examined as P.W.2. The father of the victim was examined as P.W.1 and he has spoken about the complaint given against the husband of the appellant.

15. P.W.11 who is a Psychiatrist, working at Chennai Kilpauk, Institute of Mental Health, after conducting medical examination on the victim regarding her mental state, has given certificate that the victim is suffering from Moderate Mental Retardation and the same was marked as Ex.P.22. The doctor who conducted medical examination of the victim in respect of sexual assault was examined as P.W.10 and she has deposed that she examined the victim who was certified as a mentally retarded person (Moderate Mental Retardation) by the Psychiatrist and opined that the hymen of the victim was not intact and there may be a possibility of sexual intercourse. Though the doctor/P.W.10 has stated that there was no external injury on the victim, P.W.2/the victim in her evidence has clearly stated that the appellant and her husband forcefully took her to their house. Thereafter, the appellant tied her hands and the husband of the appellant removed her dress and committed rape on her.

16. P.W.1/ the father of the victim has clearly stated that the appellant and her husband had earlier constructed wall in his house and thereafter, they used to come to his house for watching T.V. and to have tea and snacks. Since, P.W.1. used to go to Temple, he believed that the appellant and her husband would take care of her daughter and hence, he allowed them to visit his house. While so, on the date of occurrence, P.W.1 went to temple for sleeping. Thereafter, at about 1 a.m., when P.W.1 came home, found his daughter missing. Immediately, he enquired his sister and brother-in-law who are residing in the next house and they replied that they did not know about the whereabouts of



the victim. In turn, the sister and brother-in-law of P.W.1 searched for the victim in and around and they could not find the victim. Thereafter, they went to the house of the appellant and called the appellant. However, there was no response from the appellant and when they were about to leave the house of the appellant, they heard the sound of bangles. Hence, they again called the appellant and entered into her house. Subsequently, the husband of the appellant came out by holding his Dhoti and when they asked him about the victim, he replied that he did not know anything about the victim. At that time, they again heard the bangle sound. Hence, they saw inside the house of the appellant by using Torch light and they found the victim lying on the cot and the appellant was lying on the floor under the cot. Immediately, they scolded the husband of the appellant and brought back the victim from the house of the appellant. Thereafter, the father of the victim beaten her and when he asked the victim as to why she left the house without any information, she told him that the appellant and her husband forcefully took her to their house and the husband of the appellant committed rape on her for which, the appellant was facilitating her husband by holding the victim. P.W.3 is mahazar witness.

17. Though in this case there is no eyewitness, the cases of this nature, one cannot expect eyewitness. The accused are known persons and they frequently used to come to the house of P.W.1 and watch TV and used to stay for some time. Since, the mother of the victim died due to Cancer and P.W.1 / the father of the victim was working as Poojari in a Temple and he was taking care of the victim who is a mentally retarded person. Since, the accused were aged persons normally no one could doubt about their contact. Taking advantage of the aloofness of the victim and the circumstances, the appellant and her husband forcefully took the victim to their house and committed the offence. The P.W.1 to P.W.3 were not cross examined by the defence counsel and evidence of P.W.1 to P.W.3 were not challenged. P.W.4 is sister of P.W.1 and P.W.5 is husband of P.W.4 and that they have corroborated the evidence of P.W.1 and P.W.2. Further, the medical report/ Ex.P.20 clearly proves that the victim was subjected to sexual intercourse and the doctor/P.W.11/ Psychiatrist has clearly stated that the victim suffering from Moderate Mental Retardation, however, she could speak well but her I.Q. level is not up to the standard and she is not in a position to understand the good and bad things. Therefore, from the evidence of P.W.1 to P.W.5, P.W.10 and P.W.11 and the medical opinion in Exs.P.20 and 22, the prosecution has proved its case beyond all reasonable doubt that the appellant and her husband with intention to subject the victim to sexual intercourse, took the victim to their house without the consent



of her father who is the natural guardian. Subsequently, A1/the husband of the appellant committed rape on the victim and the appellant/A2 facilitated the same. Therefore, the appellant/A2 has committed the charged offence.

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18. This Court independently re-appreciated the entire evidence and found that the appellant has committed the charged offence and the trial Court has rightly appreciated the evidence and convicted the appellant and this Court does not find any perversity in the Judgment of the trial Court.

19. Though the learned Counsel for the appellant prayed that some leniency may be shown on the appellant considering her age, considering the fact that the victim is a mentally retarded person. The father of the victim, considering the age of the appellant and her husband, believed that they would take care of the victim and allowed them into his house, whereas the appellant and her husband taking advantage of the aloofness and mental retardation of the victim, forcefully took the victim to their house committed such a grave offence. Under these circumstances, this Court does not find any mitigating circumstances except for the fact that the appellant is a lady and aged 65 years. At the same time, the Court cannot ignore the fact that the victim is a mentally retarded person and the father of the victim considering the age of the appellant and her husband allowed them to access into his house and believed that they would take care of the victim. But they failed to keep up his trust and committed such an offence grave in nature. Therefore, this Court is not inclined to show any leniency or mercy on the appellant and there is no mitigating circumstances and the appellant does not deserve for lesser punishment.

20. Accordingly the Criminal Appeal is dismissed. The Judgment dated 04.01.2019 in S.C.No.206 of 2015 passed by the learned Sessions Judge, Magalir Neethimandram, Salem, is hereby confirmed. The trial Court is directed to secure the appellant to undergo the remaining period of sentence if any.

Sd/-  
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The Magalir Neethimandram,  
Salem

WEB COPY

2. Inspector of Police,  
All Women Police Station,  
Suramangalam,  
Salem District.

3. The Public Prosecutor  
High Court, Madras

4. The Section Officer,  
Criminal Section,  
High Court,  
Madras.

Pre-Delivery Judgment in  
Criminal Appeal No.276 of 2019

SR-II (CO)

K.RK. (22.11.2021)