

Bail Slip

The Appellant/1st Accused Thiru.P.Murugaperumal, S/O. Palsamy Nadar is released on bail order dated 26/04/2016 in MP(MD) No.1/15 in Crl.A(MD) No.377 of 2015.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN
Crl.A. (MD) No.377 of 2015

P.Murugaperumal : Appellant/1st Accused

Vs.

The State,
Rep by Inspector of Police,
Thattarmadam Police Station,
Thoothukudi District.
(Crime No.116 of 2011) : Respondent/Complainant

PRAYER: This Criminal Appeal is filed under Section 374 of the Code of Criminal Procedure, to set aside the Judgement and conviction dated 24.11.2015 passed by the learned Sessions Judge, Mahalir Neethi Mandram (fast Track Mahila Court), Thoothukudi in S.C.No.231 of 2014.

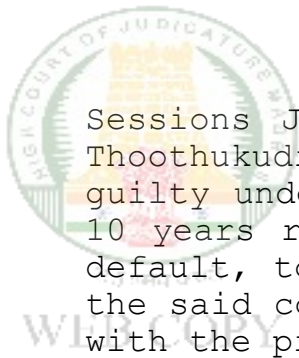
For Appellant : Mr.P.Krishnasamy
for Mr.G.Thalaimutharasu

For Respondent : Mr.M.Muthumanikkam
Counsel for Government of
Tamil Nadu (crl.side)

JUDGMENT

This present criminal appeal is directed against the conviction and sentence dated 24.11.2015 made in S.C.No.231 of 2014 on the file of learned Sessions Judge, Mahalir Neethi Mandram (Fast Track Mahila Court), Thoothukudi.

2.The appellant is arrayed as first accused in the above referred case and the parents of the appellant are arrayed as accused Nos.2 and 3. The trial Court had framed the charge under Section 376 of IPC and Section 4 (C) of Tamil Nadu Prohibition of Harassment of Woman Act. After full-fledged trial, the learned

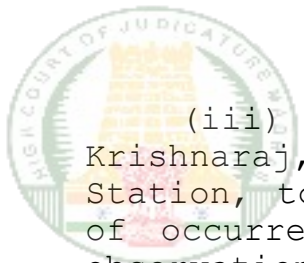


Sessions Judge, Mahalir Neethi Mandram (Fast Track Mahila Court), Thoothukudi, came to the conclusion that the appellant was found guilty under Section 376 of IPC, convicted and sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo three months rigorous imprisonment. Challenging the said conviction and sentence, the appellant is before this Court with the present Criminal Appeal.

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

(i)P.W.1 is the victim in this case and the appellant/accused is her uncle's son. Accused Nos.2 and 3(now acquitted) are her aunt and uncle respectively. P.W.1 is the fatherless lady. Her mother is mentally retarded woman. After seeing the family conditions of P.W.1, the accused Nos. 2 and 3 who are her relatives, brought her to their house, wherein, she attended the domestic work as directed by accused No.2 & 3. The accused is the married man and during the time of occurrence, his wife left away from his family and residing in her parental home along with her child. While at the time of occurrence, the accused, after saying that he intended to marry her, attempted to indulge in sexual activities with P.W.1. At that time, being the reason that the accused is the married man, P.W.1 refused to accept the proposal given by the accused and he had not given any consent for the sexual intercourse. However, after made compulsion, in the month of December, the accused indulged in sexual intercourse with P.W.1 as first time. Thereafter, after made a false promise as he would marry her, the accused regularly had sexual intercourse with the victim. Due to the same, P.W.1 becomes pregnant and at the time when P.W.1 was informed the same to the accused, he refused to marry her. Further, the other accused in this case were proclaimed that they arranged the marriage to the accused with some other girl. Further, in the said occasion, the accused threatened the P.W.1 and compelled to go away from their house. Thereafter, after leaving the accused house, P.W.1 informed the incident to her uncle and afterwards, all of them approached the accused and requested to marry P.W.1. Since the request made by P.W1 and others were refused, P.W.1 lodged the complaint before the police under Ex.P.1.

(ii) After given complaint as against the accused, on 28.08.2012, she had given birth to one male child in Kayalpattinam Government Hospital and thereafter, during the time of investigation, the blood samples were collected from P.W.1, accused and from the minor child, who born to P.W.1 for conducting DNA test. In the meanwhile, on receipt of the complaint from P.W.1, P.W.9-Thangadurai, the then Sub Inspector of Police, Thattarmadam Police Station registered the case against the accused in Crime No.116 of 2011 under Sections 417, 376 and 506(ii) of IPC. The printed FIR was marked as Ex.P.10. After registering the case, he forwarded the original FIR to the Court and forwarded the copy of the FIR to his superior Officer.



(iii) In turn, after receipt of the copy of FIR, P.W.10-Krishnaraj, the then Inspector of Police, Thattarmadam Police Station, took up the same for investigation. He visited the scene of occurrence and in the presence of witnesses, he prepared an observation mahazar under Ex.P.11. He has drawn the rough sketch and the same was marked as Ex.P.12. He examined the witnesses and recorded their statements. On 09.05.2011, around 4.30 am, in Thisayanvilai bus stand, he arrested the accused and sent him to the remand. He submitted the requisition letter before the learned Judicial Magistrate, Sathankulam, for examining the victim girl. In turn, in view of the proceedings issued by the Magistrate, P.W.6-Dr.Mercy Rodrigo, the Assistant Professor, Thoothukudi Government Medical College and Hosptial, examined the victim girl and issued the report under Ex.P6 stating that P.W1 is the pregnant lady and the fetus is about six months. Further P.W.5 -Kanthakumar, who is also a Doctor working in the same hospital conducted the ossification test by taking X-ray to the victim girl and issued the age certificate under Ex.P4, as the age of the victim girl is between 20 to 25.

(iv) In continuation of the investigation, P.W.11-Natarajan, who is also the Inspector of Police, Thattarmadam Police Station on 14.11.2011 submitted an application before the Magistrate for conducting DNA Test to P.W1, the minor child, Jagan and the accused Murguperumal. In turn, in view of the proceedings issued by the Magistrate, blood samples were collected from those persons and same were sent to the Forensic Science Department, Madurai for conducting DNA Test. On receipt of the said samples, P.W7-Mahalakshmi, Assistant Director of Regional Forensic Science Laboratory, Madurai, examined the same and issued a report under Ex.P.8 stating that the accused is the biological father of the minor child.

(v) In the said situation, since P.W11 got transferred from the said post, P.W13, Nagarajan the then Inspector of Police, Thattarmadam Police Station continued the investigation, collected the medical certificate, examined the Doctor and recorded his statement. After concluding the investigation, he came to the positive conclusion that the present appellant/accused is liable to be convicted under Sections 417 and 376 of IPC and the other accused (now acquitted) are liable to be convicted under Section 294(b) and 506(ii) of IPC. He filed the final report accordingly.

4. Based on the above materials available on record, the trial Court framed the charges against the accused for the offence under Section 376 of IPC and Section 4 (C) of Tamil Nadu Prohibition of Harassment of Woman Act. The accused denied the charges and opted for trial. Therefore, the accused were put on trial.

5. During the course of trial proceedings, in order to prove their case, on the side of the prosecution, as many as 13 witnesses were examined as PW1 to PW13 and 13 documents were exhibited as



6.Out of the said witnesses, P.W.1, Jeyakumari is the victim. She spoken about the occurrence as during the relevant point of time, the accused, after giving promise to marry her, had sexual intercourse with her. She has further states before the trial Court as when at the time she became pregnant, the same was reported to the accused and after knowing the same, the accused refused to marry her. The further evidence given by P.W.1 is that after lodging complaint before the police on 28.08.2012, she had given birth to one male child called as Jegan and as of now, the said child is in her custody.

(ii) P.W.2, Velmayil Nadar who is the uncle of P.W.1, has spoken about the occurrence as after knowing the pregnancy of P.W1, he along with P.W.3 and P.W.1 went to the house of accused and requested to marry P.W.1 and in this respect, the first accused made a statement as he is not responsible for the pregnancy of P.W.1.

(iii) P.W.3-Saroja and P.W.4-Natarajan, who are all the neighbours to P.W1, gave the similar evidence as the accused refused to marrying the P.W.1.

(iv) P.W.5-Kanthakumar, who is the Doctor attached with Thoothukudi Government Medical College Hospital, had spoken about the examination of the victim girl and about the determination of the age of the victim girl as the age of the victim girl is between 20 to 25 years.

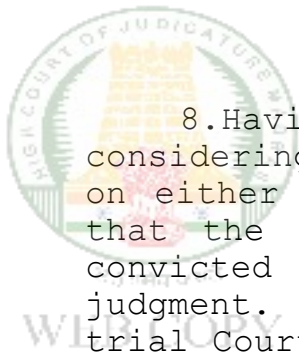
(v) P.W6-Dr.Mercy Rodrigo, who examined the victim girl, had given evidence as while at the time she examined the victim girl, she is pregnant lady and the age of the fetus is about to 6 months.

(vi) P.W.7, Mahalakshmi, who is the Assistant Director of Regional Forensic Science Laboratory, Madurai, had spoken about the examination of blood samples, which were collected from P.W1, accused and minor child and about the result of DNA Test. According to her, the accused is the biological father of the minor child.

(vii) P.W8-C.Manoharan, who is the Doctor working in the Government hospital, Thoothukudi, had spoken about the examination of the accused as in the examination, it was found that there is nothing to suggest that the accused is impotent.

(viii) P.W9-Thangadurai, P.W10-Krishnaraj, P.W11-Natarajan. P.W12-Mathivanan and P.W13-Nagarajan are the police officers. They speaks about the registration of the case, investigation and about the filing of final report.

7.When the above incriminating materials were put to the accused under Section 313 of Cr.P.C., the accused denied the same as false. However, they did not choose to examine any witness, nor marked any document on his side.



8. Having considered all the materials placed before him and on considering the submissions made by the learned counsels appearing on either side, the learned Sessions Judge came to the conclusion that the appellant herein was guilty under Section 376 of IPC, convicted and sentenced as stated in paragraphs No.2 of this judgment. Further, the accused Nos.2 and 3 were acquitted by the trial Court from the charges. Challenging the said conviction and sentence, the appellant is before this Court with this criminal appeal.

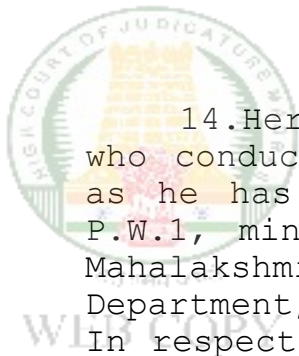
9. I have heard Mr.P.Krishnasamy, learned counsel appearing for the appellant and Mr.M.Muthumanikkam, learned Government Advocate (crl.side) appearing for the State.

10. The learned counsel for the appellant would contend that in respect to the date of occurrence and in respect to the date on which she had given birth to a minor child, P.W1's evidence is having a lot of contradictions. The evidence given by P.W1 appears that the alleged offence committed by the accused is consensual one and therefore, it cannot be held that the accused committed an offence punishable under Section 376 of IPC. He further submitted that in respect to the false promise made by the accused, the evidence given by P.W1 is not corroborated through the evidence of others. Accordingly, he prayed to allow this appeal and to set aside the conviction and sentence.

11. Per contra, the learned Government Advocate (crl.side) would contend that the evidence given by P.W1 is sufficient to accept the case of prosecution that after making false promise as he would marry her, the accused indulged in sexual intercourse with P.W.1. In otherwise, the said evidence given P.W1 did not establish the fact that the same is consensual one. He would further submit that, being the reason that the result of the DNA test is found against the accused, the other minor contradictions, which narrated by the accused cannot be taken into account for deciding the issue raised in this appeal. According to him, the conviction and sentence awarded by the trial Court is found correct and the same does not require any modification in this Court.

12. I have considered the rival submissions made by the learned counsel appearing on either side.

13. It is the case of the prosecution that after the occurrence, the victim girl / prosecutrix has given birth to one male child, further, the result of DNA Test is evident that the accused is the biological father of the said child. Though the admissibility of DNA evidence has always been a very controversial issue as there are subtle discretionary powers with the Court regarding its admissibility.



14. Here it is the case that one of the Investigation Officer, who conducted the investigation, admitted in his cross examination as he has not examined the Doctor, who collected the blood from P.W.1, minor child and the accused in FTA Card. However, P.W.7- Mahalakshmi, working as Assistant Director in Forensic Science Department, Madurai, deposed about the process of DNA examination. In respect to the said evidence, there is no denial on the side of the accused as the said test is not in accordance with the law prescribed. Therefore, I am of the considered opinion that the report given by P.W7 in respect to the paternity of the minor child is found correct and thereby, the result of the DNA test is admissible.

15. The another submission made by the accused counsel is that the alleged occurrence had happened with the consent of the victim child. In this regard, to decide the said issue as whether the alleged occurrence had happened with the consent of victim girl or not, it should be necessary to scrutinise the evidence given by P.W1 with care and caution. Since the alleged offence of rape was committed within the four walls, we do not expect any corroborative piece evidence to the evidence given by the victim. In the said occasion, now on considering the evidence given by P.W.1, she specifically stated before the trial Court as during the relevant point of time, when at the time accused attempted to commit sexual intercourse, being the reason that the accused is a married man, she had not given any permission. The further evidence given by P.W1 is that in the month of December, after made compulsion, he indulged in sexual intercourse with her.

16. Also she gave evidence as due to the reason that the accused made promise to marry her, she continued the said relationship with him, till she becomes pregnant. In otherwise, in her cross examination, she reiterated the same evidence. Now, on going through the said evidence, at no point of time, the victim girl has not given any voluntary consent to the accused for committing the sexual intercourse with her. Even assuming that after the first incident, she consented for the sexual intercourse, the specific evidence given by P.W1 narrates the fact that in the first incident, she has not given any consent to the accused.

17. It is true that the acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of IPC. But here it is the case that during the first incident, the accused, after made compulsion, forcibly committed sexual intercourse with P.W.1. The said act clearly constitutes the offence under Section 376 of IPC. The one another aspect, which is necessary to decide in this case is that after she became pregnant, she approached the accused by herself as well as through her relations and requested to marry her and the accused refused to marry her. Apart from that, after knowing the pregnancy of P.W.1, she was driven away by the accused from his house.



Therefore, the subsequent conduct of the accused is also in support of the case of the prosecution. At this juncture, it would be relevant to see the judgment of **State of Uttar Pradesh Vs Naushad** reported in **2013 (16) SCC 651**, wherein our Hon'ble Apex Court has held as follows:-

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It is apparent from the evidence that the accused only wanted to indulge in sexual intercourse with her and was under no intention of actually marrying the prosecutrix. He made a false promise to her and he never aimed to marry her. He is thus guilty of rape as defined under Section 376 IPC. The trial Court was absolutely correct in appreciating the evidence on record and convicting and sentencing the accused for the offence of rape.

18.The one another submission made by the learned counsel for the appellant is that during the time when the victim girl was produced before the Doctor for medical examination, she has narrated the occurrence as she had sexual intercourse with the known person, for the period of 15 days and therefore, it should be presumed that the alleged occurrence had happened with the consent of the accused. In this regard, the Doctor, who examined the victim girl had given evidence, in support of the submission made by the counsel appearing for the appellant. Therefore, it is necessary to see whether the said evidence given by the Doctor is admissible in evidence or not? In this regard, in a similar situation, our Hon'ble Apex Court in the case of **Pattipati Venkaiah Vs State of Andhra Pradesh** reported in **1985 (4) SCC 18** wherein it was held as follows:-

A doctor is not at all concerned as to who committed the offence or whether the person brought to him is a criminal or an ordinary person, his primary effort is to save the life of the person brought to him and inform the police in medico-legal cases. Doctors before whom dead bodies are produced or injured persons are brought, either themselves take the dying declaration or hold the post-mortem immediately and if they start examining the informants they are likely to become witnesses of the occurrence which is not permissible. In the state of confusion the eyewitnesses in the present case may not have chosen to give details of the murder to the doctor. But that would not render their testimony unreliable.

19.Therefore, in this area also, the submission of the learned counsel appearing for the appellant is not having any much significance and thereby, I am of the considered opinion that the totality of the entire evidence given by the prosecution witnesses would clearly prove that during the time of occurrence, the accused after giving false promise for marrying her in future committed the sexual intercourse with the victim girl and thus, he is liable to be convicted under Section 376 of IPC.



20.In respect to the quantum of sentence, the learned Government Advocate (crl.side) for the respondent would contend after the occurrence, the prosecutrix had given birth to a minor child and the said child was now in the custody of the prosecutrix and therefore, it should be necessary to award some compensation to the minor child along with sentence.

21.Per contra, the learned counsel for the appellant would contend that the accused is the coolie worker in the small scale industries and he is not an affordable person to pay the compensation.

22.In this regard, before deciding the issue in regard to the quantum of sentence, it would necessary to decide the future of the minor child born to P.W.1. Due to the act committed by P.W.1 and the accused, the child born to P.W.1 loses the status of legitimate child. Therefore, the real victim in the alleged occurrence is the child, who born to P.W.1. In otherwise, it cannot be said that P.W.1 is the real victim. Therefore, the victim child has to be compensated by means of awarding a reasonable compensation. Accordingly, this Criminal Appeal is partly allowed on the following terms:-

(i) The accused is found guilty under Section 376 of IPC., convicted and sentence to undergo seven years rigorous imprisonment.

(ii) The accused is directed to deposit a sum of Rs.1,00,000/- to the credit of S.C.No.231 of 2014 on the file of the learned Sessions Judge, Mahalir Neethi Mandram (Fast Track Mahila Court), Thoothukudi, towards the compensation to be paid to the minor child. The learned Sessions Judge, Mahalir Neethi Mandram (Fast Track Mahila Court), Thoothukudi, is directed to deposit the said amount in a fixed deposit in any of the Nationalized Banks in favour of the minor child, for a period of three years and renewable thereafter, till the minor attains majority. The mother of the minor child/P.W.1 is permitted to withdraw the interest accrued thereon once in three months directly from the Bank without filing any formal application before the trial Court and utilize the same for the welfare of the minor child.

(iii) Apart from the above, the victim child is also entitled to receive benefits from the accused under Civil Law.

(iv) Bail bond, if any, executed by the accused shall stand cancelled.



(v) The trial Court is directed to secure the accused and commit him to prison for undergoing remaining period of sentence.

Sd/-

Assistant Registrar (CS II)

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Sub Assistant Registrar(CS)

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To:-

- 1.The Sessions Judge,
Mahalir Neethi Mandram (fast Track Mahila Court),
Thoothukudi.
- 2.The Judicial Magistrate,
Sathankulam, Thoothukudi District.
- 3.Do Through the Chief Judicial Magistrate,
Thoothukudi.
- 4.The Superintendent of Prison,
Palayamkottai.
- 5.The Inspector of Police,
Thattarmadam Police Station,
Thoothukudi District.
- 6.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 7.The Section Officer,
Criminal Section records,
Madurai Bench of Madras High Court,
Madurai.

Crl.A. (MD) No.377 of 2015
28.09.2015

MGJ(17.11.2021) 9P 8C