



BAIL SLIP IN CRL.RC.764/14

The Petitioner/Accused namely 1.Bharathi @ Bharathiyar S/o.Kattavandi @ Govindaraj 2.Veeravel S/o.Appavu were directed to be released on bail in and by the order of this Court dated 25.09.2014 and made in Crl.M.P.No.1/2014 in Crl.RC.No.764/2014, on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved on : 03.02.2022

Order Pronounced on : 15.02.2022

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.R.C.No.764 of 2014

1.Bharathi @ Bharathiyar (Died)
(Amended as per order dated 15/02/2022)

2.Veeravel .. Petitioners

Versus

State Rep. By its
The Inspector of Police,
Thiruvenkadu Police Station.
(Crime No.623 of 2002).

.. Respondent

Prayer : Criminal Revision Case is filed under Section 397 r/w 401 of Cr.P.C., to call for the records of the Fast Track Mahila Court, Nagapattinam in C.A.No.16 of 2011 in the judgment, dated 30.04.2014 confirming the conviction and sentence passed by the Additional Sub Court, Mayiladuthurai in S.C.No.223 of 2008 in the judgment, dated 21.03.2011 and set aside the same.

For Petitioners : Mr.Sarath Chandran

For Respondent : Mr.L.Baskaran
Government Advocate
(Criminal Side)



ORDER

This Criminal Revision Case in Crl.R.C.No.764 of 2014 is filed by the petitioners/accused against the Additional Assistant Sessions Court, Mayiladuthurai in S.C.No.223 of 2008, dated 21.03.2011, thereby, convicting the petitioners for the offence under Sections 376 r/w 511 of Indian Penal Code and imposing a punishment of four years Rigorous Imprisonment and a fine of Rs.2,000/- each and in default of payment of fine, to undergo one month Simple Imprisonment; for the offence under Section 379 of Indian Penal Code and imposing three months Rigorous Imprisonment and for the offence under Section 323 of Indian Penal Code and imposing one year Rigorous Imprisonment and fine of Rs.1,000/- each and in default of payment of fine, one month Simple Imprisonment and the judgment of the Mahila Fast Track Court, Nagapattinam, dated 30.04.2014 in Crl.A.No.16 of 2011, confirming the conviction and sentence imposed by the Trial Court.

2. On 30.11.2002, when P.W.17, Balasubramanian, Sub-Inspector of Police was on duty at Thiruvankadu Police Station, upon receipt of information from the Government Hospital, Sirgazhi., he went there and recorded the statement of P.W.1, the victim/prosecutrix, who is undergoing treatment as inpatient. The prosecutrix stated that on 21.11.2002, at about 7.45 P.M, when she alighted from the bus at Keezha Muvarkarai bus stop and was walking, both the accused were sitting on the parapet wall of a bridge and they enquired whether she was going alone and she replied that her sister would come. After giving reply, she was walking alone. Both the accused followed her and came to her and hugged her. When she attempted to shout, the first accused choked her mouth with dhupatta, the second accused held both her hands on the backside and took her on his shoulder for about 100 meters and laid her under a Karuvelam Tree and when she tried to wriggle out, both of them held her tight by physically attacking her and thereafter, raped her one by one.

3. Upon the statement, a case in Crime No.623 of 2002 was registered under Sections 342, 323, 324 and 376 of Indian Penal Code and P.W.18 took up the case for investigation and filed Final Report proposing the accused guilty for the offences under Section 376, 379 and 323 of Indian Penal Code. The case was taken on file by the learned Judicial Magistrate, Seerkazhi in P.R.C.No.12 of 2006 and after furnishing of copies under Section 207 of Code of Criminal Procedure to the accused, the case was committed as per Section 209(a) of Code of Criminal Procedure to the learned District and Sessions Judge, Nagapattinam. The case was, thereafter, made over to the learned Additional Assistant



Sessions Judge, Mayiladuthurai and was taken on file as S.C.No.223 of 2008.

4. Upon consideration of the Final Report, filed by the respondent Police and the arguments of the learned Counsel on either side, the Trial Court framed the charges under Sections 323, 376 and 379 of Indian Penal Code and upon questioning the accused, denied the charges and stood trial. The prosecution, thereafter, examined P.Ws.1 to 18 and marked Exs.P-1 to P-20 and also produced M.Os.1 to 25. Upon questioning about the evidence and adverse circumstances against the accused on record as per Section 313 of Code of Criminal Procedure, the accused denied the same as false. Thereafter no oral or documentary evidence was let in on behalf of the accused. The Trial Court, thereafter, proceeded to hear the learned Additional Public Prosecutor on behalf of the prosecution and the learned Counsel appearing on behalf of the accused and by a judgment, dated 21.03.2011, after considering the evidence of P.W.1, her complaint, her earlier statement before the Court under Section 164 Cr.P.C., held that P.W.1, victim has consistently spoken about the incident. Further, the Trial Court considered the evidence of P.W.12, Doctor, who treated P.W.1 to whom P.W.1 has stated that by attacking her, two male persons attempted to commit rape on her, while giving a contrary statement in the complaint that she was actually raped by the accused before the Police, coupled with absence of corroborating medical evidence, disbelieved P.W.1 to the extent that the accused actually committed rape, but, held that the accused had only attempted to commit rape and convicted her for the offense of 376 read with 511 of IPC. Further, based on the injuries on the person of the prosecutrix, the Trial Court held that the offence under Section 323 of I.P.C stood proved. Similarly, in view of the recovery of the jewels, which were produced as M.Os.4 to 5, held that the accused were guilty of the offence under Section 379 of Indian Penal Code and sentenced as aforesaid.

5. Aggrieved by the same, the petitioners/accused filed Crl.A.No.16 of 2011 on the file of the Mahila Fast Track Court, Nagapattinam and by a judgment, dated 30.04.2014, after independently appraising the evidence on record, the Appellate Court considered the evidence of P.W.12 and the injuries on the person of P.W.1, victim and P.Ws.17 and 18, Police officers and the recovery of M.Os held that in view of the overwhelming evidence on record, the prosecution has discharged its onus to prove the offence and the Trial Court has rightly convicted the accused and confirmed the conviction and sentence imposed by the Trial Court. Aggrieved by the same, the present Revision is



filed by both the accused. Pending the Revision, the first accused died on 24.09.2016.

6. Heard Mr.Sarath Chandran, learned Counsel originally appearing on behalf of both the petitioners and Mr.L.Baskaran, learned Government Advocate (Criminal Side) on behalf of the respondents.

7. The learned Counsel for the petitioners would submit that the alleged occurrence was about 8.00 P.M on 21.11.2002. Thereafter, at about 11.30 P.M on 29.11.2002, when P.W.12 examined P.W.1/prosecutrix, she had given a statement that two known persons had attacked her with hands and legs and kicked her on neck and face and attempted to rape. However, after short while, she had changed her version by stating that both the accused had raped her one after the other. Therefore, in the absence of any medical evidence, when the Trial Court had thought it fit to disbelieve P.W.1, it should have disbelieved her entirely and acquitted the accused and not restricting to the commission /attempt of rape alone.

8. The learned Counsel for the petitioner would submit that in this case, the victim was subjected to medical examination after 1 ½ years and therefore, the same loses significance. Further, even as per the version of P.W.1/prosecutrix that she was carried on the shoulders by the accused and was put down under Karuvelam tree, in that case, definitely, if the version is true, she would have been injured on her back. But, however, the injuries suggest that it could have happened only by falling down and not by any attempt to rape. The learned Counsel also tried to bring home the contradiction between the prosecution witnesses regarding the recovery and submitted that the Trial Court and the Appellate court erred in convicting the accused. Therefore, when P.W.1, victim was found to be unbelievable in respect of part of her the evidence, the Trial Court ought to have given the benefit of doubt to the petitioners and ought not to have convicted them at all.

9. The learned Counsel would further submit that in her complaint, dated 30.11.2002, there was absolutely no mention about the robbing of jewels and therefore, conviction in respect of the offence under Section 379 of Indian Penal code is totally without any substance. Alternatively, the learned Counsel, by relying upon the judgment of this Court in Easwaran V. State by the Inspector of Police, Kumaralingam Police Station, Coimbatore



District¹ in CrI.A.No.1111 of 2002, dated 19.02.2010, would submit that this Court had held that if the prosecutrix had not sustained any injury on the lower part of her body, at best, the accused can be convicted for the offence under Section 354 of Indian Penal Code and therefore, in the absence of injury on the lower part of the body, the Trial Court and the lower Appellate Court erred in convicting the petitioners under Section 376 read with 511 of Indian Penal code.

10. Per contra, Mr.L.Baskaran, the learned Government Advocate (Criminal Side) would submit that in this case, P.W.1 has consistently spoken about the incident. The incident was reported at the earliest to the Police as P.W.1 was unable to even move from the place of occurrence and only after three hours, she could gather herself and come to the village and thereafter, she was taken to the hospital. At the earliest point of time itself, she had narrated about the incident to P.W.12, Doctor. The discrepancy in her statement, before the Doctor and Inspector, on the day of occurrence, as when she was in grave trauma, should not be taken into account, as thereafter, the matter was taken up for thorough investigation and after gathering all the relevant evidence, chargesheet has been filed. The victim's statement, coupled with the recoveries and the corroboratory evidence of P.W.12, would prove the guilt of the accused and therefore, he would submit that the Trial Court had rightly convicted the petitioners/accused and that there is nothing to interfere by this Court in exercise of the powers in revisional jurisdiction.

11. I have considered the rival submissions made on either side and perused the material evidence on record. At the outset, I am in agreement with the learned Counsel appearing on behalf of the petitioners in respect of the offences under Section 379 of Indian Penal Code. In the earliest point of time, i.e., the statement given to P.W.13, which was reduced into writing First Information Report was filed, absolutely nothing was mentioned about the taking away of jewels. Further, the recovery of the jewels i.e., the accused stating that after committing the offence, they had hidden the jewels under earth near Madhakadi and that they took the respondent Police and the jewels were recovered, absolutely not at all believable especially when P.W.1, in her testimony had stated as follows:-

“இருவரும் நான் செத்து போய் விட்டதாக நினைத்து கொண்டு
வடக்கு பக்கம் ஓடி விட்டனர்”



Therefore, the Trial Court and the lower Appellate Court have based their conviction only on the alleged artificial recovery and therefore, I have no hesitation in interfering with the findings of the guilt of the accused for the offence under Section 379 of Indian Penal code.

12. However, as far as the offence under Sections 379 read with 511 and 323 of Indian Penal Code is concerned, P.W.1, victim's statement, has been considered by the Trial Court in the right perspective because P.W.1 was also physically injured and she stated that after lying down in the same spot for about an hour, she recollected herself and went back home and immediately from home, she was taken to the hospital where P.W.12, Doctor examined her and she had stated that she was injured by both the accused who attempted to commit rape on her. When she improved her version before the Police and before the Court that the accused had actually committed rape on her in this case, since she was not subjected to medical examination by the proper expert immediately, which was done only after a period of one year and six months, in the absence any corroboratory medical or other evidence as to whether penetration atleast to an extent happened or not, the Trial Court and the lower Appellate Court have considered it safe to rely on the prosecutrix evidence only to the extent to conclude that atleast there was a serious attempt by the accused and therefore, convicted both the accused for the lesser offence of attempt to rape. The said findings are based on a proper consideration on the material evidence on record and therefore, there is no ground to interfere.

13. As regards the submission of the learned Counsel for the petitioners that if the victim has not suffered any injuries in her lower part of the body and since in this case, the injuries are found only in the upper part of the body, by relying upon the judgment in *Easwaran V. State* by the Inspector of Police, Kumaralingam Police Station, Coimbatore District², stated above especially by considering paragraph Nos.14 and 15, the learned Counsel submitted that the conviction may be modified into one as under Section 354 of Indian Penal Code. However, I am afraid that I will be able to follow the said judgment. First, by a subsequent ruling in *Radhakrishna Nagesh Vs. State of Andhra Pradesh*³, the Hon'ble Supreme Court of India, even in a case whether Hymen membrane was not ruptured, held in paragraph No.32 as follows:-

"In light of the above judgments, it can safely be concluded that there was limited penetration due to which probably the hymen of

² Refer footnote No.2

³ (2013) 11 SCC 688



the victim girl was not ruptured. The Court should adhere to a comprehensive approach, in order to examine the case of the prosecution. But as regards the facts and circumstances of the present case, the presence of the element of mens rea on part of the accused cannot be denied. He had fully prepared himself. He first lured the girl not only by inciting her, but even by actually purchasing bangles for her. Thereafter, he took the girl to a room where he threatened her of physical assault as a consequence of which the girl did not raise protest. This is why no marks of physical injury could be noticed on her body. Absence of injuries in the context of the present case would not justify drawing of any adverse inference against the prosecution, but on the contrary would support the case of the prosecution."

Therefore, it is the intention of the accused which matters and the type of injury has to be looked into considering the the facts of the case.

14. Further, when the accused has followed the victim and forcibly taken her on his shoulders and dropped her under a Karuvelam tree and kicked her, the accused had all the intentions to commit rape on her and the injuries will occur in the manner in which the offence is committed and injuries on the upper part of the body or lower part of the body will not make any difference. Therefore, I reject the submissions made by the learned Counsel for the petitioners and confirmed the conviction of the accused in respect of the offence under Section 376 read with 511 of Indian Penal Code.

15. Similarly, in respect of the offence under Section 323 of Indian Penal Code, the medical evidence duly corroborates the evidence of P.W.1 and the evidence of P.W.12, Doctor also conclusively establishes the same. Therefore, no fault can be found on the Trial Court and the lower Appellate Court inasmuch as they find accused guilty for the offence under Section 376 read with 511 of Indian Penal code.

16. Now, coming to the sentence, the learned Counsel would plead that the occurrence took place in the year 2002, at that time, the second petitioner/accused was 23 years of age. The first petitioner/accused had since passed away. The accused has been put to ordeal of the proceedings for so long. There is no other antecedent for the accused. Considering all the above, the learned Counsel would pray that the sentence may be reduced and lenient sentence be imposed on the accused. It can be seen that the offence under Section 376 of Indian Penal Code carries a minimum punishment of seven years and therefore, for the offence



under Section 376 read with 511 of Indian Penal Code, the minimum sentence is three years and six months. The Court cannot pass any sentence lesser than the aforesaid sentence for the reasons pleaded by the learned Counsel for the petitioner.

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17. Therefore considering the plea made, I am inclined to reduce the sentence in respect of the offence under Section 376 read with 511 of Indian Penal Code from a period of four years Rigorous Imprisonment to that of Rigorous Imprisonment for a period of three years and six months. The other part of the sentence shall remain unaltered.

18. The Criminal Revision is partly allowed accordingly.

Sd/-

Assistant Registrar(CO)

// True Copy //

Sub Assistant Registrar

grs
To

1.The Judicial Magistrate No.I, Mayiladuthurai.

2.The Chief Judicial Magistrate, Nagapattinam.

3.The Fast Track Mahila Court, Nagapattinam.

4.The Additional Sub Judge, Mayiladuthurai.

5.The The Inspector of Police,
Thiruvenkadu Police Station.

6.The Superintendent,
Central Prison,
Cuddalore.

7.The Public Prosecutor,
High Court of Madras.

+1cc to Mr.K.M.Vijayan Associates, Advocate SR.No.9926

Cr1.R.C.No.764 of 2014

KSM(CO)
CB(16/03/2022)