

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26-04-2016

CORAM:

THE HONOURABLE DR. JUSTICE P.DEVADASS

Crl.M.P.No.3587 of 2016

in

Crl.A.No.231 of 2016

Azhagudurai

.. Petitioner

-VS-

State By:

Inspector of Police,
All Women Police Station,
Ariyalur.
(Crime No.5 of 2015)

.. Respondent

Petition filed under Section 389(1) of Cr.P.C., to suspend the sentence of imprisonment passed in Spl. S.C.No.1 of 2016 dated 16.3.2016 by the learned Additional Sessions Judge, Fast Track Mahila Court, Ariyalur and release the petitioner on bail pending disposal of the Criminal Appeal.

For Petitioner : Mr.B.Ramamoorthy

For Respondent : Mr.P.Govindarajan,
Additional Public Prosecutor.

O R D E R

The sole accused in the Special Sessions Case in Spl. S.C.No.1 of 2016 on the file of the learned Additional Sessions Judge, Fast Track Mahila Court, Ariyalur seeks suspension of his sentence of imprisonment.

2. In the said Court, after trial, while acquitting the accused under Section 450 IPC, the accused was convicted under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter POCSO Act) and sentenced him to undergo RI for 10 years and fine Rs.50,000/-, i/d 2 years SI.

3. The learned Judge also directed the payment of Rs.25,000/- out of the total fine amount as compensation under Section 357 Cr.P.C. He has also directed the District Legal Services Authority to award more compensation.

4. The Trial Court considering the evidence of PW-1, the victim, the child, under Section 2(1)(d) of the POCSO Act and considered it as a case under Section 5(l) of the Act punished him under Section 6 of the Act.

5. According to the learned counsel for the petitioner, in this case the alleged victim is about 20 years old. The evidence of PW-2/mother of PW-1, would show that at the time of admitting her daughter in the school, she did not mention her age and her birth was also not registered. She admits that her daughter's age has been recorded by the School Authorities themselves. Further in her cross-examination, PW-1 herself admitted that while admitting her in the school, 3 years age has been reduced. In her deposition, PW-1 had stated that she was 20 years, in 2016 when the victim girl was examined in the Court, she had stated that she is 20 years old. All

goes to show that at any rate she is above 18 years of age. So the provisions of POCSO Act will not be applicable to this case.

6. The learned counsel for the petitioner referring to statement of the victim girl given before the Court under Section 164 Cr.P.C., submitted that the victim girl had stated that she pressurised the accused and had sex with him. Further, before the Trial Court also, her evidence is on similar line. Thus, it is a case of consensual sex by an adult woman. So no offence has been made out.

7. The learned counsel for the petitioner further submitted that actually the case was registered on the basis of the complaint lodged by P.W.-12, wife of the accused under the provisions of the Child Marriage Restraint Act. After investigation by an alteration report, the Investigation Officer added the provisions of POCSO Act. The investigation is faulty.

8. The learned counsel for the petitioner further submitted that when the main witnesses of the prosecution, namely, P.Ws-1 and 2 have not supported the prosecution version and there is no incriminating aspects in their evidence, convicting the accused is not in accordance with law.

9. The learned counsel for the petitioner further submitted that the accused is victim of circumstances. He is the real sufferer. Thus the petitioner has prima facie case in his favour. He will not escape. In the

circumstances, he may be granted appeal bail.

10. On the other hand, the learned Additional Public Prosecutor submitted that during the relevant time, the victim being a minor girl, below 18 years has been clearly established by the prosecution. It is proved through PW-7 School Headmaster, and Exs.P-11 and P-12 School records. It shows that she was a minor girl. Further, the medical evidence of PW-3 also establishes so. Pws-1 and 2 also initially stated so. However, in order to help the accused to escape from punishment, now they gave oral evidence in support of him. But it is against reality of the situation. Even PW-2 in Ex.C-1 petition, while seeking custody of PW-1 had stated that then girl was a minor.

11. The learned Additional Public Prosecutor further submitted that because of the sexual assault committed upon the minor child, she became pregnant and gave birth to a child on 20.3.1998 (See Ex.P-1 Birth Certificate). He has been named Varun and the child's parents were named as PW-1 and the accused. During his examination under Section 313 Cr.P.C., the accused, a married man of 37 years old had admitted he having had sex with P.W-1, a minor child, and also fathered a child. Even if she consented for sex, it is immaterial and the accusations as against the accused are very grave in nature. He has spoiled the life of a minor girl. He has no prima facie case in his favour. It is not a fit case for grant of appeal bail.

12. I have anxiously considered the rival submissions, perused the averments in the appeal bail petition, counter filed by prosecution, Trial Court's judgment and the piece of evidence referred to by both sides and the relevant materials on record.

13. In the facts and circumstances, now the question is whether the petitioner could be granted appeal bail under Section 389(1) Cr.P.C.

14. Regular bail in a non-bailable offence in fit cases were granted by the Magistrate under Section 437 Cr.P.C. While other Courts and the High Court exercises concurrent jurisdiction to grant bail in non-bailable cases under Section 439 Cr.P.C.

15. The remand prisoners, under-trials could seek bail under the said provisions during pre-conviction stage of a criminal case. During that stage, it is pertinent to note that the presumption of innocence of an accused is intact because everyone is presumed to be innocent till the guilt alleged against the accused is proved beyond all reasonable doubts. However, once conviction is recorded, the said presumption is replaced by a Criminal Court judgment. Thereafter, also the conviction person can seek bail under Section 389 (1) Cr.P.C.

16. Thus, the consideration for the grant of bail to an accused during the pre-conviction stage (before judgment) and post-conviction stage (after judgment) are different.

17. So far as appeal bail under Section 389(1) Cr.P.C. is concerned, the Court has to find out is there any prima facie case in favour of the petitioner. While doing so, the Court should not indulge in meticulous examination of the evidence of the accused because the main appeal is not heard. It is still pending.

18. To find out the prima facie case, the Trial Court has to refer to the findings recorded by the trial Court and the relevant evidence referred to. Further, it must also take into account the nature of the accusation made as against the accused.

19. Now in this case, the accused was already married to PW-12 and through her he is having a son and the accused is stated to have deserted them and he is alleged to have shared his bed with P.W-1, daughter of P.W-2 and through P.W-1 begotten a child (see Ex.P-1 Birth Certificate).

20. Initially, on the basis of the complaint lodged by P.W-12, a case has been registered under the Child Marriage Restraint Act. That is not Bible. That is not the end of a criminal case. It is the beginning (F.I.R., See Section 154 Cr.P.C.) of an end of a criminal case (Final Report, See Section 173(2) Cr.P.C.).

21. A criminal case may start with a small case, but after investigation it may disclose a big and serious offence. A criminal case may

start with a big case, but ultimately after evidence is collected, it may end in a small petty offence. Therefore, the penal provisions of law mentioned at the time of launching the prosecution in the F.I.R. is not an acid test in a criminal case. The acid test is the evidence collected by the Investigation Officer following the provisions of Criminal Procedure Code and the relevant statutory enactments.

22. Now, in a prosecution launched under POCSO Act, age of the victim is very important because only upon the victim being below 18 years that she is a 'child' the stringent provisions of POCSO Act will apply and consent of the victim being immaterial under POCSO Act. POCSO Act is very stringent. It is much more widen in scope in prosecuting an accused than prosecuting accused under Section 376 IPC.

23. In this case, although no specific date of commission of the offence has been stated, but the offence is stated to have been committed during the beginning of 2015. It would be unwise to expect such victim to furnish the exact date of commission of the rape.

24. Generally, such a victim will not record the sad event in any diary or etc. In this case, as per Ex.P-11, School Certificate and Ex.P-12 Record Sheet during the relevant time, PW-1/victim is a minor girl below 18 years. The said document has been marked through PW-7 Headmaster of the school. It is quite natural that during the relevant time entry was made

in the School Register. He would not be the staff of the school. What the Court has to see is the record produced. Further, the evidence of Doctor (PW-3) also corroborated the fact that then the PW-1 was below 18 years and a child.

25. PW-1 is the actual victim. She and her mother PW-2 realising the future of PW-1 as well as the child Varun seems to have attempted to save the accused by stating that then she was 20 years old. But it is too late because in the basic prosecution records they themselves have stated the victim is a minor girl. In Ex.C-1 document, PW-2 accepts that her daughter PW-1 is a minor.

26. P.Ws-1 and 2 were treated as hostile witnesses because they have turned hostile. It is not that once they have so turned their evidence is to be thrown away lock, stock and barrel. The Court can always taken into account, refer to those evidence for factual matrix. Even for corroboration if it is incriminating in nature or even the admitted portion of such evidence to test the testimony of the veracity of the witnesses, including their testimony containing incriminating aspects can be referred to. Evidence, oral, written, medical would show that during the relevant time, the victim/PW-1 is a child within the meaning of Section 2(d) of the POCSO Act.

27. As already stated that the then accused was 37 years old. The evidence of PW-4 would show that the accused has positive potentiality.

28. Child Varun was born to P.W-1. P.Ws-1 and 2 would say that the accused is the putative father of the said child. When the accused was examined under Section 313 Cr.P.C., on the incriminating aspects appearing in the prosecution evidence, he accepted his paternity to the said child. However, he would say that his birth was out of consensual sex between himself and the child's mother/P.W.1.

29. When PW-1 was a minor child, the question of consensual sex becomes immaterial. The accusations against the accused are very grave in nature. There is no prima facie case in his favour. In the facts and circumstances, I am not inclined to grant him appeal bail.

30. Petition dismissed. However, it is made clear that the observations in this order are made only to find out a prima facie case. It has nothing to do with the disposal of the main Criminal Appeal. As the accused is a jail accused, the Registrar (Judicial) is directed to prepare typed set expeditiously as and when the appeal is ripe for disposal, it shall be included in the causelist.

26.04.2016

Svn
Index: Yes/No
Internet: Yes/No

Dr.P.DEVADASS, J.

Svn

To

1. The Additional Sessions Judge,
(Fast Track Mahila Court),
Ariyalur.
2. The Additional Public Prosecutor,
High Court, Madras.
3. The Inspector of Police,
All Women Police Station,
Ariyalur.

Copies to:

1. The Registrar (Judicial),
High Court,
Madras.
2. The Section Officer,
Criminal Section,
High Court,
Madras.

Crl.M.P.No.3587 of 2016
Crl.A.No.231 of 2016

26-04-2016