

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.09.2017

CORAM

THE HONOURABLE MR. JUSTICE N.AUTHINATHAN

Crl.A.No.391 of 2016

& Crl.M.P.No.9192 of 2017

Ragul

... Appellant

versus

State by

Inspector of Police,

Nallipalayam Police Station.

... Respondent

PRAYER: Criminal Appeal filed under Section 374 (2) of the Criminal Procedure Code, to set aside the conviction and sentence imposed against the appellant by the Sessions Judge, Magalir Neethimandram [Fast Track Mahila Court], Namakkal in Special C.C.No.36 of 2015 dated 18.04.2016, allow the appeal.

For Appellant : Mr.S.Kalyanaraman

For Respondent : Mr.K.Mathan,
Government Advocate
(Crl.Side)

J U D G M E N T

The accused is the appellant.

2. This appeal is directed against the conviction and sentence imposed in Special C.C.No.36 of 2015, on the file of the learned Sessions Judge, Magalir Neethimandram [Fast Track Mahila Court], Namakkal, ordering the accused to undergo Rigorous Imprisonment for seven years and also to pay a fine of Rs.2,500/-, in default, to undergo further period of one year Rigorous Imprisonment for the offences under Section 363 IPC and Section 3 r/w 4 of POCSO Act, 2012.

3. The facts necessary for the disposal of the appeal, are as follows:-

[i] Subramani [P.W.1], who is employed as sweeper at Government Head Quarters Hospital, Namakkal, is a resident of Chinna Ayyampalayam, Nallipalayam, Namakkal District and he is living with his wife [P.W.2], two daughters including the victim girl [P.W.3] and one son Manojkumar. At the relevant time, the

victim was a Class XI student of Government Higher Secondary School, Namakkal [North]. She was born on 30.01.1999.

[ii] On 20.05.2015, the victim girl left her home, for attending a camp at Government Higher Secondary School, Nallipalayam. But she did not return home for long. Hence, P.W.1 had lodged a complaint [Ex.P.1] with the Inspector of Police, Nallipalayam Police Station. On receipt of the complaint from P.W.1, the then Sub Inspector of Police [P.W.14], Nallipalayam Police Station, has registered a case in Crime No.127 of 2015 under Section 366(A) IPC. Ex.P.11 is the First Information Report.

[iii] Sivaraman [P.W.15], the then Inspector of Police of Nallipalayam Police Station, took up the case for investigation. He visited the place of occurrence and in the presence of Murugan [P.W.4] and Tamilvanan, prepared an Observation Mahazar [Ex.P.3] and Rough Sketch [Ex.P.12]. He arrested the accused on 02.07.2015 at about 3.00 p.m. near Nallipalayam Bus Stop. On 02.07.2015 at about 12.00 noon, at Buthan Santhai Bus Stop, the victim girl [P.W.3] was rescued by the investigating officer and he sent the victim girl to Government Head Quarters Hospital, Namakkal for medical examination and Saraswathi [P.W.13], Grade-I Woman Police Constable accompanied the victim.

[iv] Dr.Sasireka [P.W.10], Assistant Surgeon, attached to the Government Head Quarters Hospital, Namakkal, examined the victim girl on 03.07.2015 at about 2.30 p.m. and has given Medical Report [Ex.P.10]. She opined : "As hymen is absent and vagina admits 2 fingers, there is a possibility that the victim girl would have had sexual intercourse. There is no injuries or nail marks in the victim girl's body and breast. There is no sperm seen in vaginal smear. No injuries in external genitalia."

[v] The appellant / accused was also subjected to medical examination. Dr.Venkatesh [P.W.8], the then Assistant Surgeon attached to the Government Head Quarters Hospital, Namakkal, examined the accused on 14.07.2015 and on 15.07.2015, he has given a Medical Report (Ex.P.5). He opined : "The person (accused) is not suffering from any major illness and there is nothing to suggest the person is incapable of performing sexual act".

[vi] On 23.07.2015, the Investigation Officer [P.W.15] altered the case into one under Section 366(A) IPC r/w Section 4 of POCSO Act and sent the alteration report [Ex.P.16] to the Court. On 12.08.2015, the victim girl gave statement [Ex.P.15] under Section 164 Cr.P.C. before the learned Judicial Magistrate, Thiruchengodu. After completion of investigation,

P.W.15 has filed a charge sheet against the accused under Section 363, 366[A] IPC and Section 3 & 4 and 17 of POCSO Act.

[vii] In support of the case of the prosecution, 15 witnesses have been examined and 15 documents have been produced. The accused pleaded not guilty. When the incriminating evidences were put to the accused under Section 313 of the Criminal Procedure Code, he has stated that false case has been foisted against him.

4. The Trial Court on a consideration of the materials on record, has acquitted the appellant of the offence under Section 366[A] IPC but convicted him of the offence under Section 363 IPC and under Section 3 read with 4 of POCSO Act, 2012. The Trial Court has also acquitted the second and third accused. Aggrieved by the order of conviction and sentence, this appeal has been preferred by the 1st accused / appellant.

5. The learned counsel appearing for the appellant would submit that in view of the clear evidence of the alleged victim girl [P.W.3], the Trial Court was not justified in convicting the appellant under Section 3 read with 4 of POCSO Act.

6. The learned Government Advocate [Criminal Side] advanced his arguments in support of the Trial Court's judgment. According to him, there is sufficient evidence on record to convict the appellant.

7. It is not in dispute that P.W.1 is the father of the victim girl [P.W.3]. P.W.2 is the wife of P.W.1. P.W.1 was employed as Sweeper at Government Head Quarters Hospital, Namakkal. P.W.1 along with his family members were living at Chinna Ayyambalayam, Nallipalayam. At the relevant time, the alleged victim girl was a class XI student of Government Higher Secondary School, Namakkal [North]. It is seen from the evidence of P.W.1 and P.W.2 that the victim girl [P.W.3] left home at about 11.00am on 20.05.2015 on the pretext of attending a NSS camp. As she did not return home, P.W.1 lodged a complaint [Ex.P.1] with Nallipalayam Police Station on 22.5.2015 at 11.00a.m. P.W.4 to P.W.6 are related to P.W.1 and P.W.2. P.W.12 did not support the case of the prosecution.

8. Ex.P.6 is the Admission Register, maintained by the Government Higher Secondary School, Namakkal [North] for the year 2009-2010. Ex.P.7 is the Register of Admission, pertaining to the year 2014-2015. Ex.P.8 is the Attendance Register, relating to the month of August 2015. As per the School Records, P.W.2 was born on 30.01.1999. The occurrence is said to have been taken place on 20.05.2015. Therefore, it is clear that the victim is a child [she is under 18 years of age], within the meaning of Section 2(d) of POCSO Act, 2012.

9. The prosecution relied on evidence of the victim girl and the medical evidence given by Dr.Sasireka [P.W.10]. The victim girl was subjected to medical examination. She examined the victim girl on 03.07.2015 and she gave Medical Report [Ex.P.10]. She opined that there is a possibility that the victim girl might have had sexual intercourse, "as hymen is absent and vagina admit 2 fingers". The appellant was also examined by Dr.N.Venkatesh [P.W.8] and he gave Medical Report [Ex.P.5]. He opined : "the appellant is not suffering from any major illness and there is nothing to suggest that the person is incapable of performing sexual act." The Trial Court placing reliance on the evidence on P.W.10 and P.W.8 has come to the conclusion that the appellant committed penetrative sexual assault on P.W.3.

10. Section 29 of POCSO Act, 2012 reads thus:

Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

11. In a case of this nature, the provisions of Section 29 of POCSO Act, have to be strictly construed inasmuch as penal consequences are involved. The Section does not say that it is an irrebuttable presumption and in this context it can be safely concluded that the presumption to be drawn under the provision is a rebuttable presumption. The Hon'ble Calcutta High Court in SAHID HOSSAIN BISWAS vs. STATE OF WEST BENGAL had an occasion to deal with this legal aspect and it is worth being extracted and it is thus :

"A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would show that in a prosecution under the POCSO Act an accused is to prove 'the contrary', that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved (see Sait Tarajee Khimchand vs. Yelamarti Satyam, (1972) 4 SCC 562, Para-15). In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence

before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.

Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the court to analyse the evidence on record in the light of the special features of a particular case, eg. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the court to mechanically accept the mere ipse dixit of the prosecution and gave a stamp of judicial approval to every prosecution, howsoever, patently absurd or inherently improbable it may be.

12. It has to be now examined in the facts of the case at hand, whether the prosecution has put forth and established the foundational facts / primary facts in order to draw the presumption under Section 29 of POCSO Act, which is a rebuttable one. It is only thereafter, the question of the accused proving the contrary would arise.

13. In the case at hand, the alleged victim girl herself has come forward to depose that she has not been subjected to sexual assault. In her statement under Section 164 Cr.P.C. [Ex.P.15] also she has not stated that she was subjected to sexual assault. The opinion of the Doctor is that there is possibility of the victim having been subjected to sexual assault. It is also in evidence that the victim stayed with the accused from 20.05.2015 till she was rescued on 02.07.2015. These twin circumstances are in the nature of corroborative evidence and it could not be said to be direct evidence to clinch the issue.

14. As already pointed out that the evidence of the victim girl is that she has not been subjected to sexual assault by the accused. When the direct evidence of the victim herself is available on record, exonerating the accused so far as the offence under Section 3 read with 4 of the POCSO Act is concerned, the aforesaid twin circumstances would be of no avail to the prosecution. The prosecution led evidence but evidence so led would not have the effect of proving the foundational facts of the prosecution case and in such a scenario, the question of rebuttal would hardly arise. In these circumstances, I am of the considered view, that the case of the appellant deserves to be accepted. The Trial Court has not considered the case in its proper perspective and that therefore, the conviction of the appellant under Section 3 read with 4 of the POCSO Act is liable to be set aside and it is accordingly set aside.

15. Coming to the charge that the appellant had kidnapped the victim girl from lawful guardianship of her parents [P.W.1 and P.W.2]. The evidence of the victim girl [P.W.3] is that she left the parental home and stayed with the appellant at Bangalore, Palladam. The evidence of the parents would show that the victim was taken away from their custody without their consent. Admittedly, the victim girl is a minor. Therefore, the consent of the guardians and not of the minor is relevant. It is not the case of the appellant that he obtained the consent of the parents. Therefore, I am of the considered view that this part of the prosecution case has been established beyond reasonable doubt. Hence, the conviction of the appellant under Section 363 IPC is confirmed.

16. Coming to the question of sentence, the learned counsel for the appellant pleaded for leniency on the ground that the appellant is the paternal uncle of the victim girl and there was an attempt to give the victim girl in marriage and that was resisted by the appellant. It is seen from the evidence of P.W.1 and P.W.2 that the appellant is parental uncle of the victim girl. His antecedents are not reported to be bad and he was aged 20 years, as on 15.07.2015, as per Medical Records [Ex.P.5]. He has been in custody for more than 1½ years.

Therefore, taking all these factors into consideration, I am of the view that ends of justice would be met by reducing the sentence to the period already undergone.

17. In the result, this Criminal Appeal is partly allowed. The conviction and sentence passed by the learned Sessions Judge, Magalir Neethimandram [Fast Track Mahila Court], Namakkal in Special C.C.No.36 of 2015 dated 18.04.2016 for the offences under Section 3 r/w 4 of POCSO Act, 2012 are set aside and the fine amount of Rs.2,500/- paid by the appellant is ordered to be refunded to him. The conviction passed by the Trial Judge for the offence under Section 363 of I.P.C. is confirmed. However, the sentence for the offence under Section 363 IPC is reduced to the period, already undergone by the appellant. The sentence of fine in respect of this offence is maintained. The accused is directed to be released forthwith, unless his custody is required in connection with any other case. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

mst / sri

To

- 1.The Sessions Judge,
Magalir Neethimandram
[Fast Track Mahila Court],
Namakkal.
- 2.The Inspector of Police,
Government of Tamil Nadu,
Nallipalayam Police Station.
- 3.The Principal Sessions Judge
Namakkal

4.The District Collector/District Magistrate
namakkal

5.The Superintendent Central Prison
Coimbatore, (for communication to the detenue)

6.The Director General of Police
Mylapore Chennai

7.The Public Prosecutor
High Court Madras

+1 cc to Mr.S.Kalyanaraman Advocate sr 69759

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