

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.01.2017

Coram

The Hon'ble Mr. Justice S.NAGAMUTHU
and
The Hon'ble Mr. Justice N.AUTHINATHAN

Crl.A.No.783 of 2016
and
Crl.M.P.No.12554 of 2016

Hakkim ... Appellant

vs.

State, rep.by
The Inspector of Police,
B-13, Podanur Police Station,
Coimbatore Respondent

Criminal appeal preferred under Section 374(2) Cr.P.C.,
against the judgment, dated 04.06.2016, passed by the Sessions
Judge, Mahalir Neethimandram (Mahila Court), Coimbatore, in
Special C.C.No.4 of 2014.

For Appellant : Mr.S.Kanniah

For Respondent : Mr.P.Govindarajan, Addl.P.P.

JUDGMENT

(Judgement of the Court was delivered by S.Nagamuthu,J.)

The appellant, a man by appearance, but an animal by
behaviour, is alleged to have committed penetrative sexual
assault on his 12 yeras old daughter, to be witnessed by his own
wife. He stands convicted for offence under Section 6 read with
Section 5(n) of the Protection of Children from Sexual Offences
Act, 2012 and sentenced to undergbo imprisonment for life and to
pay a fine of Rs.5000/-, in default, to undergo simple
imprisonment for three months. Challenging the said conviction
and sentence, he is before this Court with this appeal.

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

(a) The accused is a resident of Kurath Layout, Kurichi
Division, Kothanur, at Coimbatore. P.W.1 is his wife. They

have two female children, who were studying 10th standard and 8th standard respectively, in a local school. P.W.2 is their first daughter. During the year 2013, she was doing 8th standard in St.Joseph Middle School, at Kothanur. They were all living together.

(b) On 9.11.2013, P.W.1, P.W.2, the accused and the second daughter of P.W.1 had lunch together in their house. Thereafter, P.W.2 and the second daughter of P.W.1, started having a small nap on the cot inside the house. The accused was sleeping on a mat on the floor. P.W.1 had some domestic work to do. Therefore, she bolted the door outside and was engaged in doing some work outside the house. At around 3.30 to 4.00 p.m., P.W.1, after finishing her work, opened the door and went into the house. There, she noticed a shocking incident being executed by the accused. P.W.2-the elder daughter, who was found sleeping on the cot was the victim. The accused removed her chudidhar pant and panties and finally much against her resistance, inserted his penis into her vagina. P.W.1, shocked over the above incident, questioned the accused as to whether it was proper for him to have sexual intercourse with his own daughter. She scolded P.W.2, the victim also. Then, P.W.1 went to the sister of the accused and informed her about the occurrence. Then, she informed her brother and other Jamadhars about the same. The Jamadhars summoned the accused. Though initially he denied the occurrence, later on, he confessed to his guilt and gave a statement in writing, thereby seeking admonition. Thereafter, the Jamadhars advised P.W.1, to go to the police with a complaint. This had consumed at least five days. Finally, P.W.1 went to the police on 14.11.2013 and made a complaint at 8.00 a.m. (vide Ex.P1). P.W.14, the then Sub-Inspector of Police, Kothanur Police Station, registered a case in Crime No.1282 of 2013, under Sections 4 and 6 of the Protection of Children from Sexual Offence Act, 2012, against the accused. Ex.P1 is the F.I.R. She forwarded both the documents to Court.

(c) The investigation was taken over by P.W.15, the then Inspector of Police. She went to the place of occurrence at 9.00 a.m. on 14.11.2013, prepared an observation mahazar and a rough sketch at the place of occurrence. She examined P.Ws.1 and 2 at their house and recorded their statements. She examined few more witnesses, including the neighbours and the Jamadhars. Then, she forwarded P.W.2 to a Doctor for medical examination.

(d) P.W.9, Dr.Murugalakshmi, examined P.W.2, on 14.11.2013, at 8.00 p.m. P.W.2 informed her that she was sexually exploited by a known person at around 3.30 p.m. on 09.11.2013. P.W.9, on examination, found that the hymen in the vaginal cavity of P.W.2, was ruptured and the vagina allowed one finger to move

into it freely. The pubic hair and vaginal smear were taken and sent for chemical examination. The report revealed that there was no spermatozoa on the same. P.W.9 found that there was no external injuries on P.W.2. P.W.10, Dr.AMS.Seeman, examined P.W.2, in order to ascertain her age. According to him, she had completed 15 years of age and not completed 18 years of age.

(e) P.W.15, during the course of investigation, arrested the accused on 20.11.2013. Then, she forwarded him to the hospital for medical examination. P.W.11, Dr.Jayasingh, examined him and gave opinion that he was sexually potential to perform sexual intercourse with a female. On the request made by P.W.15, P.W.13, the Judicial Magistrate, recorded the statement of P.W.2 under Section 164 Cr.P.C. On completing the investigation, P.W.15, laid charge-sheet against the accused.

3. Based on the above materials, the trial Court framed a lone charge, as detailed in the first paragraph of the judgment. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 15 witnesses were examined, 13 documents were marked and no material object was marked. Out of the said witnesses, P.W.1 is the mother of P.W.2 and the wife of the accused. She has vividly spoken about the entire occurrence. She has also spoken about her complaint to the Jamadhars and finally to the police. P.W.2, the victim girl has stated that when she was sleeping on the cot, the accused laid on her, removed her chudidhar pant and panties and inserted his penis into her vagina, though she resisted. Incidentally her mother also entered into the house and noticed the occurrence. She has further stated that P.W.1 questioned the accused as to how dare he was to have sex with his own daughter. She has further stated about the statement made to the police and the Magistrate. P.W.3 is a relative of P.W.1. He has stated that P.W.1 informed him about the occurrence, immediately after the occurrence. P.Ws.4 and 5 are Jamadhars. They have stated that P.W.1 made a complaint to the Jamadhars about the above occurrence. They have further stated that when they summoned, the accused confessed to his guilt and gave a statement in writing, thereby seeking admonition. Thereafter, according to them, they wanted P.W.1 to go to the police with a complaint. P.Ws.6 and 7 are also Jamadhars, who also spoken to the same facts. P.W.8 has spoken about the preparation of observation mahazar and a rough sketch. P.W.9-Dr.Murugalakshmi, has spoken about the medical examination conducted on P.W.2 and her opinion. P.W.10-Dr.Seeman has stated that on examination, he found that P.W.2 was aged 15 to 18 years. P.W.11, Dr.Jayasingh, has stated that he examined the accused on 22.11.2013 and found that he was sexually potential to have sexual intercourse with a female. P.W.12 is the Headmaster of the school, where P.W.2 was studying. She has stated that according to the school records, the date of birth of P.W.2 is 14.7.2001. Ex.P8 is the School

Record Sheet. P.W.13, the learned Judicial Magistrate has stated that she has recorded the statement of P.W.2 under Section 164 Cr.P.C. P.W.14 has spoken about the registration of the case on the complaint of P.W.1, on 04.01.2013. P.W.15 has spoken about the investigation done and the final report filed.

4. When the above incriminating materials were put to the accused, he denied the same as false. However, he did not choose to examine any witness nor mark any document on his side. His defence was a total denial.

5. Having considered all the above, the trial Court convicted him. That is how he is before this Court with this appeal.

6. We have heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

7. In this case, P.W.2, during the relevant point of time, was doing 8th standard. According to her school records, her date of birth is 14.7.2001. Thus, on the date of occurrence, she was hardly aged about 12 years and thus, she is a child, as defined in the Protection of Children from Sexual Offences Act.

8. On the date of occurrence, P.W.1, P.W.2 and the accused and yet another daughter of P.W.1, were all together in the house. According to the evidences of P.Ws.1 and 2, they had lunch together and thereafter P.W.2 and her sister started sleeping on the cot and the accused was sleeping on a mat on the floor. P.W.1 had gone out of the house after bolting the house outside, on account of some domestic work. She was engaged in domestic work in front of the house. At around 3.30 to 4.00 p.m., when she entered into the house, she found the occurrence. P.W.2 has also sated so. P.W.2 has virtually spoken about the entire occurrence. Thus, the evidences of P.W.1 and 2 would clearly go to prove that this accused, by force, removed the chudidhar pant and the panties of P.W.2 and penetrated his penis into the vagina of P.W.2. This is further fortified by the evidence of the Doctor, who has stated that the hymen was ruptured and vagina of P.W.2 allowed one finger to move into it freely. Thus, the medical evidence also clearly corroborates the eyewitness account of P.Ws.1 and 2. Above all, according to P.W.1, she informed the occurrence to her sister-in-law as well as to her brother and also to the Jamadhars. The Jamadhars have given evidence that on such complaint made by P.W.1, when they summoned the accused, though initially he denied, later on, he confessed to his guilt and gave it in writing seeking admonition. It is only thereafter they advised P.W.1 to go to the police with a complaint. Thus, the evidences of P.Ws.1 and 2 are duly corroborated not only by the medical evidence, but

also the evidences of Jamadhars. From these evidences, in our view, the prosecution has clearly established that the accused had committed penetrative sexual assault on P.W.2. Since P.W.2 happens to be a daughter of the accused, the offence committed by the accused is aggravating penetrative sexual assault, as defined in Section 5(n) of the Protection of Children from Sexual Offences Act, and punishable under Section 6 of the Act.

9. The learned counsel for the appellant would however submit that there was inordinate delay in making the complaint and therefore, the evidences of P.Ws.1 and 2 should be doubted on that score. We are not at all persuaded by the said argument, for P.W.2, who was a young child would not have known the consequences of the act of the accused and therefore, she would not have gone to the police to make a complaint. Of course, P.W.1 would have gone to the police station making a complaint, immediately, but she did not do so. The only perceivable reason for the delayed complaint by P.W.1 must be that she would have had the intention to hide the sexual exploitation caused to P.W.2 with a view to maintain the honour and prestige of the family and also to protect the future of P.W.2. That is the reason why she had gone to her sister-in-law and brother and then to the Jamadhars. Thus, it is not as though P.W.1 did not take any action at all. She had taken action which she had perceived to be the prompt action. Therefore, the delay in preferring the complaint cannot be a ground at all to reject the evidences of P.Ws.1 and 2.

10. The learned counsel for the appellant would next contend that the medical evidence does not corroborate the evidences of P.Ws.1 and 2. In this argument also we do not find any force. P.W.2 has not at all stated that there was ejaculation of semen during the sexual intercourse performed by the accused. She has stated that there was only penetration. Therefore, there would have been no chance for any semen being present in the vaginal smear taken from P.W.2. Assuming that there was ejaculation, since P.W.2 was examined after about 5 days, due to passing of urine or washing, the semen would have been washed off. Thus, the absence of spermatozoa in the vaginal smear taken from P.W.2 would not go to create any doubt in the case.

11. The learned counsel for the appellant would submit that there are some inconsistencies between Ex.P1 and the evidence of P.W.1. But the learned counsel for the appellant, though was called upon by us, was not in a position to point out any such contradiction being brought to the notice of P.W.1 as provided under Section 145 of the Indian Evidence Act. Section 145 of the Act serves a salutary purpose, namely, to afford opportunity to the maker of the statement to explain about the contradiction, in the event, the same is brought to his/her notice. Without bringing the contradiction to the notice of

the maker of the statement and without affording an opportunity to him to explain the said contradiction, the accused cannot invite the Court to compare the two statements and plead that there are contradictions. Doing so will be violative of the principles of natural justice, which is ensured under Section 145 of the Indian Evidence Act. As we have already pointed out, the very purpose of bringing to the notice of the maker of the statement, the earlier contradictory statement is to afford an opportunity by way of following principles of natural justice to explain the said contradiction. In the instant case, since no such contradiction in Ex.P1 was brought to the notice of P.W.1, as required under Section 145 of the Indian Evidence Act, we are unable to appreciate the argument of the learned counsel for the appellant.

12. The learned counsel for the appellant is not able to point out any material on record to rebut the presumption under Section 29 of the Protection of Children from Sexual Offences Act. Section 29 of the Act provides that the Court shall presume that the accused has committed the crime if there is prosecution. Of course, such presumption cannot be raised in vacuum. In the instant case, the evidences of P.Ws.1 and 2, the medical evidence as well as the evidences of the Jamadhars, would provide sufficient foundation for raising such a presumption under Section 29 of the Act to the effect that the accused had committed the crime, for which he had been prosecuted. Of course, the said presumption is rebuttable. Such rebuttal need not always be by means of any direct evidence. It can be established by a simple preponderance of probabilities, either by means of direct or circumstantial evidence. But, in this case, we find no evidence either direct or circumstantial to rebut such presumption raised under Section 29 of the Act. Thus, the un-rebutted presumption raised under Section 29 of the Act, also conclusively goes to prove that this accused had committed the offence punishable under Section 6 read with Section 5(n) of the Protection of Children from Sexual Offences Act.

13. Now turning to the quantum of punishment, the learned counsel would submit that life sentence for the above offence is too harsh a punishment. But we do not think so. The accused is not a stranger party. He is the father of the victim. As we have already mentioned in the first paragraph of this judgment, though he is a man by appearance, by his behaviour towards his own daughter, he has exhibited animal instinct. This kind of domestic violence on his own daughter, cannot be tolerated. But for the fact that P.W.1 had noticed the occurrence, this horror on P.W.2 would have been continued as this accused would have continued to sexually exploit her. P.W.2 would have been forced to keep silence on account of various domestic reasons. Having regard to these aggravating circumstances and the only

mitigating circumstance that he is aged about 35 years, we are of the view that the accused deserves to be punished with the maximum sentence prescribed for the said offence. The trial Court is, thus, right in imposing life sentence and also fine, in which, we do not find any infirmity, warranting interference at all in this appeal.

14. In the result, the criminal appeal fails and the same is dismissed and the conviction and sentences imposed by the trial Court are hereby confirmed. Consequently, connected miscellaneous petition is dismissed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

msk

To

- 1.The Sessions Judge, Mahalir Neethimandram
(Mahila Court), Coimbatore
- 2.The Principal Sessions Judge, Mahila Court, Coimbatore
- 3.The Inspector of Police,
B-13, Podanur Police Station,
Coimbatore
- 4.The Superintendent of Police,Central Prison, Coimbatore.
- 5.The District Collector,Coimbatore District
- 6.The Director General of Police, Mylapore, chennai
- 7.The Section officer, criminal Section, High Court, Madras.
- 8.The Public Prosecutor,
High Court, Madras.

+lcc to Mr.S.Kanniah, Advocate sr.4427

Cr1.A.No.783 of 2016

ss1(co)
ss(15/02/2017)