



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 09.11.2017

CORAM:

THE HONOURABLE MR .JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.A.[MD].No.310 of 2016

A.Poosamalai .. Appellant/ Sole accused

Vs.

State rep. by the
Inspector of Police,
All Women Police Station,
Samayanallur.
(Crime No.27 of 2014)

.. Respondent/ Complaint

PRAYER: Criminal Appeal filed under Section 374(2) of Cr.P.C.
against the judgment, dated 29.03.2016, made in S.S.C.No.18 of
2014, by the learned Sessions cum Mahila Court Judge, Madurai.

For appellant : Mr.Anandha Padmanabhan

For respondent : Mr.C.Mayilvahana Rajendran,
Additional Public Prosecutor

JUDGMENT

[Judgment of the Court was made by R.SUBBIAH, J.]

This appeal has been filed by the appellant / sole accused as
against the conviction and sentence, dated 29.03.2016, made in
S.C.No.18 of 2014 by the learned Sessions cum Mahila Court Judge,
Madurai.

2.The appellant stood convicted and sentenced to undergo
imprisonment as detailed hereunder:

Conviction U/s.	Sentence	Fine amount
377 IPC	To undergo rigorous imprisonment for 10 years.	To pay a fine of Rs.2,000/-, in default to undergo simple imprisonment for one year



4 of the Protection of Children from Sexual Offences Act, 2012	To undergo imprisonment for life.	To pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for one year.
--	-----------------------------------	--

(All the sentences were ordered to run concurrently.)

3.The case of the prosecution is consciously narrated below:

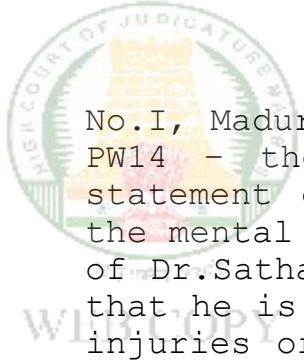
(a) The victim child - PW2 is the daughter of PW1 (father) and PW3 (mother). The accused and PW1 are neighbours. PW2 was aged about 8 years at the time of occurrence. On 08.06.2014, which was a holiday, at about 12.00 noon, PW2 was playing near the house along with her brother and the son of the accused. After half an hour, PW1, who came out of the house, found that PW2 was missing. Hence, he went searing for his daughter (PW2). At that time, he found PW2 inside the sapota grove owned by one Moorthy, where PW2 was made to lie down without any dress and the accused was inserting his penis into the private part of PW2 and performing intercourse and on seeing this, PW1 rushed towards the accused. But, the accused, pushing down PW1, ran away from the spot. Thereafter, PW1 took PW2 to the house. When PW3 enquired PW2 about the occurrence, she had stated that under the guise of showing a puppy dog, the accused took her to the sapota grove and inserted his penis on her mouth and then, inserted the same into her private parts. Then, PW1 and PW3 along with PW2 went to Samayanallur All Women Police Station and lodged a complaint - Ex.P1.

(b) PW13 - the then Sub Inspector of Police, on receipt of complaint - Ex.P1, registered a case in Crime No.27 of 2014 under Sections 377 IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 and forwarded the FIR - Ex.P6 and complaint - Ex.P1 to the Court and a copy of the same to the higher officials.

(c) PW15 - the then Inspector of Police, took up the investigation on the same day ie., on 08.06.2014 and recorded the statements of PW1 and PW2 under Section 161 Cr.P.C. and on 09.06.2014 at 6.30 a.m., PW15 visited the place of occurrence and prepared an observation mahazar (Ex.P8) and rough sketch (Ex.P9) and recorded the statement of PW5 and PW4. Then, he sent PW2 - victim to the hospital for examination.

(d) PW10 - Dr.Thennarasi, attached to the Government Rajaji Hospital, Madurai, conducted examination on PW2 on 09.06.2014 at 1.30 p.m. She opined that there is no scratch / nail marks, bite marks and sexual injury. The opinion of PW10 is marked as Ex.P3.

(e) PW15, during the course of investigation on 09.06.2014 at 8.30 a.m. arrested the accused at Alanganallur Gettu shop and forwarded the accused to the Court for judicial remand. On 10.06.2014, PW15 recorded the statement of PW6, PW7 and PW10. On 09.07.2014, PW15 produced PW2 before the learned Judicial Magistrate



No.I, Madurai, for recording her statement under Section 164 Cr.P.C. PW14 - the then Judicial Magistrate No.I, Madurai recorded the statement of PW2 under Section 164 Cr.P.C., after satisfying with the mental status of PW2. On 11.07.2014, PW15 recorded the statement of Dr.Sathasivam - PW11, who examined the accused and gave a report that he is not an impotent and there is no evidence of any external injuries or foreign bodies noted in and around his private part or anywhere on the body. Ex.P4 is the opinion of PW11. Due to transfer, PW15 handed over the investigation to his successor - PW16.

(f) PW16, during the course of investigation, collected the medical records and examined medical witnesses and few more witnesses, and recorded their statements. After completion of investigation, she laid charge sheet against the accused.

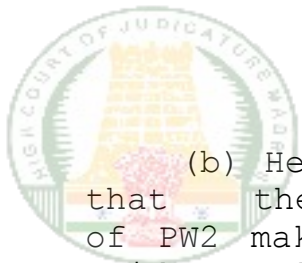
4. Based on the above materials, the trial Court had framed as many as two charges under Section 377 IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012, against the accused. When the accused was questioned in respect of the charges, he pleaded innocence. In order to prove the charges, on the side of the the prosecution, as many as 16 witnesses were examined as PWs.1 to PW16 and Exs.P1 to P8 were exhibited.

5. When the accused was questioned under Section 313 of Cr.P.C. with reference to the incriminating materials adduced by the prosecution, the accused denied his complicity in the crime and pleaded innocence. On the side of the accused, no one was examined and no document was marked.

6.The trial Court, after considering the oral and documentary evidence, has found the accused guilty of both the charges and accordingly, convicted and sentenced the accused, as stated supra. Challenging the said conviction and sentence, the appellant/accused has come up with this appeal.

7. The learned counsel appearing for the appellant mainly contended that there are lot of contradictions in the evidences of the prosecution witnesses and those contradictions are affecting the root of the prosecution case. In this regard, the learned counsel for the appellant took this Court through the evidences and documents and submitted as follows:

(a) The learned counsel for the appellant would submit that in order to prove the case, the prosecution has examined 16 witnesses, out of which PW1 is the eyewitness and PW2 is the victim and child witness. PW3 is only a hearsay witness. PW2 has admitted in her cross examination that she was tutored by her father (PW1) to give evidence against the accused and that on earlier occasion, when she came to the Court, she deposed before the Magistrate as tutored by the police. Therefore, the entire evidence of PW2 - victim girl cannot be believed.



(b) He would further submit that PW1 has stated in his evidence that the accused was penetrating his penis into the private parts of PW2 making her nude, but PW2 has categorically stated in her evidence that at the time of commission of offence by the accused, she was with dress and therefore, the evidence of PW1 also cannot be believed.

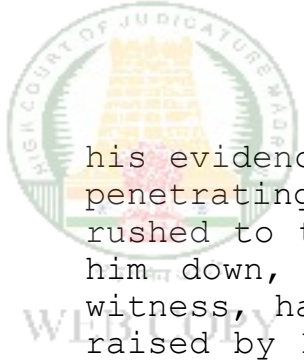
(c) The learned counsel for the appellant would further submit that the doctor - PW10, who examined PW2, has categorically stated that there was no injury or semen found either near the mouth or anywhere on the body of the victim / PW2 and hence, the sexual assault alleged to be committed by accused has not been proved and hence, the accused is entitled for acquittal.

8. Per contra, the learned Additional Public Prosecutor submitted that the prosecution has clearly proved its case by examining PW1 and PW2 - the victim girl and their presence in the place of occurrence is clearly corroborated by PW4. The evidence of PW14 - Judicial Magistrate also clearly support the case of the prosecution. The contradictions alleged by the learned counsel for the appellant cannot be taken serious note of, as PW1 and PW2 have categorically stated that it was this accused who committed the offence and further PW2 - victim girl also categorically stated against the accused. The prosecution has categorically proved the guilt of the accused beyond reasonable doubts. Under such circumstances, no infirmity can be found on the conviction and sentence passed by the trial Court. Thus, he prayed for dismissal of the appeal.

9. We have given our anxious considerations to the rival submissions made on either side and perused the materials available on record.

10. The first contention of the learned counsel for the appellant is that PW2 has admitted in her cross examination that she was tutored by her father (PW1) to give evidence against the accused and that on earlier occasion, when she came to the Court, she deposed before the Magistrate as tutored by the Police. Therefore, the entire evidence of PW2 - victim girl is liable to be rejected.

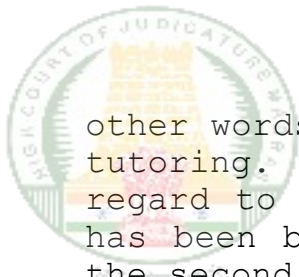
11. Admittedly, the house of the accused is situated opposite to the house of PW1. PW2 has categorically stated in her statement recorded under Section 164 Cr.P.C. before the learned Judicial Magistrate No.I, Madurai as well as before the trial Court in the chief examination that while she was playing, along with her brother and son of the accused, in the coconut grove situate in the backyard of the house, the accused, under the guise of showing a puppy dog, took her to the sapota grove and the accused penetrated his penis in her mouth and then, the accused penetrated his penis into her private parts, after making her lie on the floor. PW1 has stated in



his evidence that while he was searching for PW2, he saw the accused penetrating his penis into the private parts of PW2 and when he rushed to the spot raising hue and cry, the accused, after pushing him down, ran away from the spot. PW4, who is an independent witness, has stated in his evidence that on hearing the hue and cry raised by PW1 and PW2, he rushed to the spot and at that time, the accused escaped and PW2 was found with undergarment (jatti) and that PW1 was removing sand which were sticking in the body of PW2 and then, he heard about the occurrence. PW3, who is the mother of PW2, has clearly corroborated the version of PW1 and PW2. PW6 and PW7 also corroborated the version of PW1 and PW2. PW14 - the Judicial Magistrate No.I, Madurai, who recorded the statement of PW2 under Section 164 Cr.P.C., has also stated that PW2 has clearly and categorically stated that it was this accused, who committed the sexual assault against her. More over, the accused also did not suggest anything against PW1 or produce any material in favour of him. The totality of these evidences would go to show that this accused has committed the sexual assault against PW2.

12. Of-course, it is true that PW2 has admitted in her cross examination that she was tutored by her father (PW1) to give evidence and that on earlier occasion, when she came to Court, she deposed before the Magistrate as tutored by the Police. But, on going through the entire evidences of PW2, it seems that the said admission was made by PW2 without properly understanding the question and meaning of the same. Even after giving such evidence, PW2 has stated that while the accused was performing such act, no one was available near them and PW1 came to the spot only searching her and when PW1 came to the spot shouting at the accused, no one was there near by them. PW2 has further stated that she did not know anything about what a penis was and it was tutored by her father (PW1). Further, PW2 has categorically stated in her 164 statement about the commission of the offence by the accused. PW14 - the Judicial Magistrate, who recorded the said statement, has also supported the case of the prosecution. The evidence of PW2 fully inspires the confidence of the Court. Hence, this Court is of the view that the above admission made by PW2 need not be taken serious note of.

13. The second contention of the learned counsel for the appellant is that though PW1 has stated that at the time of commission of offence by the accused, PW2 was nude, but, on the contrary, PW2 herself has stated that at that time, she was wearing the dress. PW2 has categorically stated in her evidence that immediately after the occurrence, she informed about the occurrence to her mother. PW3, who is the mother of PW2, has clearly stated that PW2 informed her that without removing petticoat, he committed the sexual assault. When that be so, both the version of PW1 and PW2 can go together. As stated earlier, PW2, due to childhood, without understanding the question, has deposed so, which would, in



other words, go to show that PW2 was deposing on her own without any tutoring. More over, the defence has not put any question in this regard to PW1 and though PW1 was cross examined at length, nothing has been brought in favour of the accused. In view of the above, the second contention is rejected.

WEB COPY

14. The third contention of the learned counsel for the appellant is that there was no semen or injury found on PW2 and hence, the sexual assault alleged by the prosecution has not been proved. At this juncture, this Court is of the view that it would be appropriate to refer to the decision of the Hon'ble Supreme Court in State of U.P. v. Babulnath, reported in (1994) 6 SCC 29, wherein it has been held that to constitute the offence of rape, it is not at all necessary that there should be complete penetration with the male organ with the emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ in the labia majora or the vulva or pudenda with or without any emission of semen and even an attempt of penetration into the private parts of the victim would be sufficient enough for the offence of rape. That being so, it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains.

15. From the above dictum, it is clear that even a partial or slightest penetration or an attempt of penetration into the private parts of the victim or mouth is sufficient enough to constitute the offence of rape and sexual assault, for which ejaculation is not a sine qua non. Considering the above legal position, the third contention is also rejected.

16. Now, turning to the quantum of punishment, it is an important task of the Court to measure the gravity of the offences, to have regard to the mitigating circumstances and then, to impose appropriate punishment on the accused. It involves an adjudication and the same cannot be decided in a mechanical fashion. The accused, at the time of occurrence, was 38 years old. The accused has got no bad antecedents. It is stated by the learned counsel for the appellant/accused that he is the sole breadwinner of the family and he has to take care of his family and children. There is likelihood of his reformation. Therefore, we find that this Court has to take a lenient view, while deciding the quantum of punishment so as to afford an opportunity for the accused to reform and to become a responsible citizen of this Country. Having regard to the same, we are inclined to reduce the sentence to 7 years for both the offences and to confirm the fine amount imposed on him by the Trial Court.

17. In the result, this criminal appeal is partly allowed and the conviction passed by the learned trial Court in S.C.No.18 of 2014 under Sections 377 IPC and Section 4 of the Protection of Children from Sexual Offences Act are confirmed, however, the sentences alone are modified as 7 years for both the offences. In



other respect, the judgment of the trial Court is confirmed. The period of sentence already undergone by the appellant / accused shall be given set off under Section 428 of Cr.P.C.

Sd/-

Assistant Registrar(Crl.Side)

/True Copy/

WEB COPY

Sub Assistant Registrar

To

- 1.The Sessions cum Mahila Court Judge, Madurai.
- 2.The Judicial Magistrate (Mahila Court), Madurai.
3. The Chief Judicial magistrate, Madurai.
- 4.The Superintendent, Central Prison, Madurai.
- 5.The District Collector, Madurai.
- 6.The Superintendent of Police, Madurai.
- 7.The Inspector of Police,
All Women Police Station,
Samayanallur.
8. The Director General of Police, Mylapore, Chennai-4.
- 9.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Copy to:

The Record Keeper,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai(2 Copies)

Judgment made in
Crl.A.[MD].No.310 of 2016
Dated: 09.11.2017

gcb

AM/SV MMS/SAR 1/22.02.2018/7P/12C