



BEFORE THE MADURAI BENCH OF THE MADRAS HIGH COURT

Reserved on : 28.11.2017

Pronounced on : 21-12-2017

WEB COPY

CORAM:

**THE HONOURABLE MR. JUSTICE R. SUBBIAH**

**and**

**THE HONOURABLE MR. JUSTICE A.D. JAGADISH CHANDIRA**

Criminal Appeal (MD) No. 325 of 2016

--

Periasamy

.. Appellant/Sole Accused

Versus

State represented by  
The Inspector of Police  
All Women Police Station  
Dindigul

.. Respondent/Complainant

Appeal filed under Section 374 (2) of the Code of Criminal Procedure against the Judgment dated 26.05.2016 passed in Special Sessions Case No. 3 of 2014 on the file of the Mahila Judge, Fast Track Court, Dindigul.

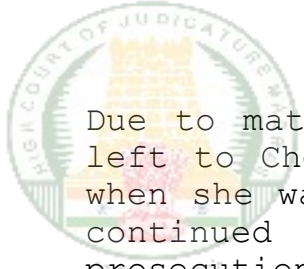
For Appellant : Mr. G. Karuppasamy Pandian  
For Respondents : Mr. C. Ramesh  
Additional Public Prosecutor

JUDGMENT

R. SUBBIAH, J

The appellant was the sole accused in Special C.C. No.3 of 2014 on the file of Mahila Judge, Fast Track Court, Dindigul. He stood charged for the offences punishable under Section 376 (2) (f) (I) and (n) of the Indian Penal Code and Section 6 read with Section 5 (m) and (n) of The Protection of Children from Sexual Offences Act, 2012 (in short POSCO). After conclusion of trial, the accused was convicted for the offence under Section 6 read with Section 5 (m) and (n) of POSCO and sentenced to undergo imprisonment for life, with fine of Rs.1,000/- failing which to undergo imprisonment for a period of six months. However, he was acquitted of the charges under Section 376 (2) (f), (I) and (n) of The Indian Penal Code.

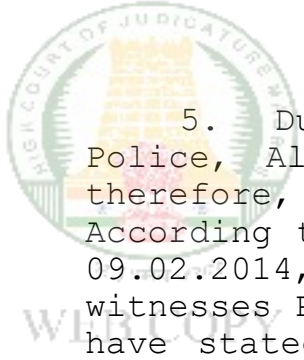
2. The accused/appellant in this case is the father of the minor victim girl/PW1, aged 10 years at the time of occurrence. He is an auto driver by profession. DW1 is the wife of the accused



Due to matrimonial dispute between DW1 and accused/appellant, DW1 left to Chennai by leaving the minor victim girl/PW1 in a hostel, when she was a tender child. PW1/victim girl therefore stayed and continued her studies in the hostel. It is the case of the prosecution that two years prior to the occurrence, the accused/appellant had brought PW1 to his home and from then on PW1 attended her school from the house. It is the case of PW1 that she will be dropped by the accused in the school and after schooling, she will be brought back to school by the accused in his autorickshaw.

3. The prosecution had set the criminal law in motion as against the accused at the instance of the complaint given by Ms. Domitilla Mary, PW12, who is working as a Teacher in the School where PW1 was studying. According to the prosecution, on 13.01.2014, PW1 had complained to PW12 that for the past two years, she was subjected to penetrative sexual assault by none other than her father/accused. Immediately, with the help of the Teacher in the school, PW1 dialled the Telephone Number 1098 and contacted Child Help Line officials at about 3.00 pm. It is stated that through phone, PW1 had narrated the ordeal she had confronted at the hands of her father who was subjecting her to repeated sexual assault. On the basis of such complaint, the Members of Child Help Line namely Mrs. Shyamala (PW3) and Mrs. Amudha (PW4) have reached the School, accompanied PW1 and produced her before PW2, who is the Chair Person of Child Welfare Committee, Dindigul District. On such appearance, PW2 recorded the statement of PW1 and obtained her signature. Ex.P3 is the statement of PW1 recorded by PW2. Thereafter, PW2 has sent a Memo, Ex.P4 to the respondent police for registering a case. PW2 also gave a requisition letter to send the victim girl for medical examination. On completion of medical examination, PW1/victim girl was brought back to the Children Home under the control of Child Welfare Committee.

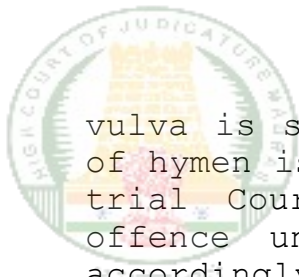
4. On receipt of the Memo, Ex.P4 from PW2 at 06.30 pm on 13.01.2014, PW17, Inspector of Police, All Women Police Station, Dindigul registered a case in Crime No. 3 of 2014 for the offence punishable under Section 376 (2) (b) read with Section 4 of the POSCO against the accused. Ex.P15 is the First Information Report. Immediately on the same day, at about 07.00 pm, she went to the scene of occurrence, being the house where accused and PW1 stayed, prepared a observation mahazar, Ex.P12, in the presence of witnesses Baburaj (PW15) and Siddhar (PW16). She also drew a rough sketch, Ex.P14. Thereafter, she recorded the statement of PW1 to PW17. PW17 went in search of the accused and ultimately, she zeroed in on him near Mettupatti Bus Stand, Dindigul where she arrested him at 08.30 p.m. and brought him to the police station. Thereafter, the accused was sent for remand through Women Head Constable. On 17.01.2014, PW17 recorded the statement of PW8 to PW17. On 27.01.2014, she sent the accused for medical examination.



5. During the course of investigation, PW17, Inspector of Police, All Women Police Station, Dindigul was transferred and therefore, PW19, successor of PW17, continued the investigation. According to PW19, she continued the investigation in this case on 09.02.2014, proceeded to the scene of occurrence and enquired the witnesses PW1 to PW13. Since the witnesses have repeated what they have stated earlier and which was recorded by PW17, she did not record any further statement from them. However, on 10.02.2014, she went to the School where PW1 studied and gave a requisition to the Headmistress of the School to issue the birth certificate of PW1. On receipt of such certificate, PW19 also recorded the statement of the Headmistress of the School under Section 161 (3) of the Code of Criminal Procedure and on the same day enquired and recorded the statement of the Doctor, who examined PW1 and issued a Certificate,. In continuation of her investigation, PW19 submitted a requisition letter dated 13.02.2014 to the learned Sessions Judge, Mahalir Neethimandaram, Fast Track Court, Dindigul seeking to address the Medical Officer to examine the victim child so as to ascertain her age. Accordingly, by a letter dated 14.02.2014, Ex.P17, the learned Sessions Judge, Mahila Court, Dindigul sent a letter addressed to Medical Officer, Radiology Department, Government Head Quarters Hospital, Dindigul. On the basis of such letter, medical examination was conducted for the minor victim child by PW7. PW19 also examined Dr, Ramalatha, PW7, who conducted Radiology test on the minor girl and obtained her statement. Ultimately, on 20.02.2014, PW19 filed the charge sheet in this case as against the accused/appellant for the offences under Section 376 (2) (f) (i) (n) and Section 6 read with Section 5 (m) (n) of POSCO Act.

6. In order to prove the complicity of the offence against the accused, the prosecution has examined PW1 to 19, marked Exs.P1 to P18 and MO1, Radiology report of the victim girl. On behalf of the accused, the wife of the accused was examined as DW1, however, no document was marked on the side of the defence. When the accused was questioned under Section 313 of Criminal Procedure Code as regards the incriminating materials made available against him by the prosecution, he denied having committed the offence complained of.

7. The trial Court, upon analysing the oral and documentary evidence, particularly the oral testimony of the victim girl, PW1, came to the conclusion that the victim girl was subjected to penetrative sexual assault by the accused. It was argued before the trial Court that as per the medical evidence, when the hymen of the victim girl is in tact, it cannot be said that she was subjected to penetrative sexual assault and this would disprove the case of the prosecution. However, the trial Court, by placing reliance on the decision of the Honourable Supreme Court in *Aman Kumar and another vs. State of Haryana* (2004) 4 SCC 379 concluded that the rupture of the hymen is by no means necessary to constitute the offence of rape and even a slight penetration in

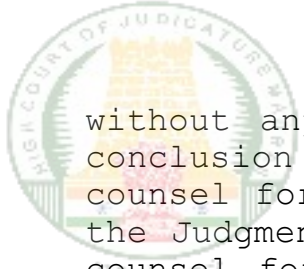


vulva is sufficient to constitute the offence of rape and rupture of hymen is not necessary. By pointing out the above decision, the trial Court held that the accused/appellant is guilty of the offence under Section 5 (m) & (n) of POSCO Act and accordingly awarded the sentence of imprisonment for life.

WEB COPY

8. The learned counsel appearing for the appellant would vehemently contend that the entire case of the prosecution rests on artificial allegations and not on material evidence. It is his contention that even as per the medical evidence, there is no injury caused to the private parts of the victim girl and the hymen was in tact. If really the accused indulged in aggravated penetrative sexual assault, as alleged by the prosecution for two years prior to the complaint, definitely, there is no possibility for the hymen to remain intact. When the medical evidence clearly states that there is no possibility for any penetrative assault, the trial court ought not to have convicted the accused for the offence punishable under Section 6 read with Section 5 (m) and (n) of POSCO Act. In fact, since the medical evidence did not support the case of the prosecution, the trial Court acquitted the accused for the offence punishable under Section 376 of IPC, however, it had erroneously convicted the offence punishable under Section 5 (m) and (n) of POSCO Act.

9. The learned counsel for the appellant would further contend that the prosecution attempted to set the criminal law in motion on the basis of the oral statement made by the victim girl to PW12, a teacher employed in the school. However, PW12 turned hostile and she did not support the case of the prosecution. Similarly, PW17, investigation officer, in the course of her cross-examination stated that she did not examine any of the neighbour as they did not come forward to give statement. PW17 also did not recover any of the personal belongings of the victim girl from the house and subjected those articles to scientific evaluation with respect to any stain or sperm shade in the dresses. The learned counsel for the accused/appellant would further submit that DW1 was examined on the side of the defence, who is none other than the mother of the victim girl. In her deposition, DW1 has deposed that she used to meet the victim girl in the hostel very often. However, the victim girl did not make any complaint to her mother about the so called penetrative assault said to have been committed by the accused. Of course, DW1 would only support the case of the defence to disprove the prosecution theory. The trial Court failed to consider that no prudent mother would have supported her husband, if she comes to know that her husband had indulged in such a shameful assault on her own daughter. In spite of all the above material inconsistencies, the trial court, on assumption, held in para-43 of the Judgment that *"there might have been injuries in the private parts of the victim girl but they would have been healed by passage of time and that the accused might not have indulged in penetrative assault some time prior to the date of complaint given by the victim."* Such a finding rendered by the trial court is



without any basis and it is legally not sustainable when such a conclusion is not supported by any material evidence. The learned counsel for the appellant therefore prayed this Court to set aside the Judgment of conviction passed by the trial court. The learned counsel for the accused/appellant, however, would contend that if this Court comes to a conclusion to confirm the conviction and sentence imposed by the trial Court, leniency may be shown to the accused/appellant for modification of the sentence imposed on him.

10. On the other hand, the learned Additional Public Prosecutor would vehemently contend that the trial court, on the basis of the sole testimony of the victim girl, has rightly convicted the accused. According to the learned Additional Public Prosecutor, at the time when the victim girl was examined by the Court through in-camera proceedings, she has categorically and firmly stated about the sexual assault leashed out against her by none other than her father. The evidence of the victim girl would speak volumes about the conduct of the accused. Even though the medical evidence did not support the case of the prosecution, the learned Additional Public Prosecutor would contend that the sole testimony of the victim girl is sufficient to hold that the accused/appellant is guilty of the offence complained of and therefore, he prayed for dismissal of the Criminal Appeal.

11. We have considered the rival submission of the counsel for both sides and perused the material records placed.

12. At the outset, given the nature of the offence complained of by PW1 against her father, who is the accused in this case, we are conscious of the fact that there cannot be any direct evidence, who would have witnessed the occurrence in this case. Therefore, with the witnesses and evidence adduced on the side of the prosecution, it has to be analysed as to whether the appellant is guilty of the offence complained of or not.

13. PW1 is the victim girl, who is none other than the daughter of the accused/appellant. From her childhood, she was pursuing her studies by staying in the hostel as her mother/DW1 had left her due to a matrimonial dispute with the accused/appellant and was staying at Chennai. Two years prior to the occurrence, the accused had brought the victim girl to the house and from then onwards she started attending the school from her home. On 13.01.2014, the victim girl had complained to PW12, a teacher working in the school where she is studying, as to the ordeal she had underwent at the hands of her own father by which she was sexually assaulted. With the help of PW12, the victim girl contacted the Child Help Line and narrated the incident. On the basis of such oral complaint, PW4 and PW5 came to the school, accompanied her to the office of the Child Help Line and produced her before PW3, Chairperson of Child Welfare Committee. PW3 recorded the statement of the victim girl and gave a written complaint to PW17, the Inspector of Police. On the basis of



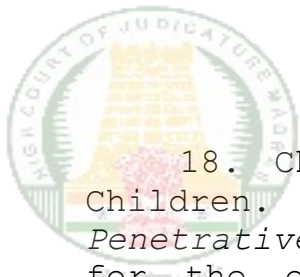
complaint, PW17 registered a case against the accused and during the course of investigation, she apprehended the accused.

14. As regards the evidence of witnesses examined on the side of the prosecution, PW12 is the Teacher to whom PW1 had allegedly narrated the ordeal she had underwent at the hands of her father, for the first time, but, PW12 did not support the case of the prosecution and turned hostile. PW2, Chairperson of Child Welfare Committee, PW3 and 4, Members of the Child Helpline have, however, given cogent and clear evidence as to how they got the information, from whom such information was received, how they came to the school and had interacted with PW1 before recording her statement etc.,

15. DW1 is the wife of the accused and mother of PW1. During her cross-examination, she denied the suggestion that the accused did not treat the minor child/PW1 well. She also went to the extent of stating that the accused was falsely implicated in this case by the police.

16. As regards the medical evidence, admittedly, the Doctor, PW10 has categorically stated that there is nothing to indicate that PW1 was subjected to sexual assault. She also stated that the hymen is intact which would indicate that the possibility of PW1 having been sexually assaulted is very remote. In this context, the trial Court relied on the decision of the Honourable Supreme Court in the case of Aman Kumar and another vs. State of Haryana (2004) 4 SCC 379 to come to the conclusion that merely because the hymen was intact, it cannot be construed that there was no offence of sexual assault by the accused. To fortify this decision, the trial Court strongly relied on the deposition of PW1.

17. In the decision of the Honourable Supreme Court in the case of (State of Uttar Pradesh vs. V. Babulnath) reported in (1994) 6 Supreme Court Cases 629 it was held that even for partial or slightest penetration of the male organ in the labia majora or the vulva or pudenda with or without any emission of semen, an attempt of penetration into the private parts of the victim would be quite enough to commit the offence of rape without causing any injury to the genitals or leaving any seminal stains. The above dictum was subsequently reiterated by the Honourable Supreme Court in the case of Aman Kumar and another vs. State of Haryana (2004) 4 SCC 379 which was relied on by the trial court in the Judgment, which is impugned in this appeal. The above decision of the Honourable Supreme Court would further indicate that even in the absence of any semen in the private parts of the female organ, there is every possibility for committing the offence of rape. In the present case, the trial Court acquitted the accused from the offence of Section 376 of IPC, against which no appeal has been filed by the State. The trial Court only convicted the accused for the offences punishable under Section 5 (m) and (n) read with Section 6 of the POSCO Act.



18. Chapter II of POSCO Act deals with Sexual Offences against Children. Section 5 of the POSCO Act defines *Aggravated Penetrative Sexual Assault* and Section 6 deals with the punishment for the offenders who indulged in such aggravated penetrative sexual assault. Section 5 (m) of the (n) of the POSCO Act makes it a punishable offence if *"whoever commits penetrative sexual assault on the child below twelve years"* or *"whoever being a relative of the child through blood or adoption or marriage or guardianship or foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child,* respectively. Section 6 of the POSCO Act prescribes punishment, for such offences as contained under Section 5 of the Act, for a term which shall not be less than ten years but which may extend to imprisonment for life and shall be liable for fine.

19. Having regard to the above decision of the Honourable Supreme Court mentioned above and applying the ratio laid down therein to the facts of the present case, we proceed to consider the evidence of PW1/victim. Since PW1/victim was a child within the meaning of POSCO Act she was examined by the court below in an in-camera proceedings. We have gone through the deposition of PW1 in entirety. At the time of giving the evidence, PW1 was aged about 10 years. PW1 had narrated the sequence of events in her own childish language befitting her age. PW1 has categorically stated that his father used to strip her naked and indulged in obscene acts and whenever she protested, her father used to slap her and forced her to do such obscene acts. Such deposition of PW1 inspires our confidence that there cannot be any reason to either disbelieve or discard such deposition of PW1. There is no reason for PW1 to implicate her own father. We also notice that at the time when PW1 was examined in the in-camera proceedings, DW1, mother of PW1, was also present. Therefore, the chance of tutoring or for any reason requiring the PW1 to depose against her own father is very remote. Therefore, we hold that the sole testimony of PW1/victim girl is sufficient and adequate to hold that the prosecution had succeeded in proving the guilt of the accused on the basis of the sole testimony of PW1/victim girl.

20. The main contention urged on behalf of the appellant is that even as per the medical evidence, there was no injury caused to the *hymen* of PW1 and in such event, the entire case projected by the prosecution has to be rejected. In this context, we are fortified by A Textbook of Medical Jurisprudence and Toxicology -25<sup>th</sup> Edition authored by Jaising P. Modi and edited by Justice K.Kannan, Judge, Punjab & Haryana High Court. In the said book, in Chapter 31 relating to Virginity, Pregnancy and Delivery, it was stated in page No.737 as follows:-

*"It is said that the hymen may be congenitally absent, but no authentic case has so far been recorded. The hymen is situated more deeply in*

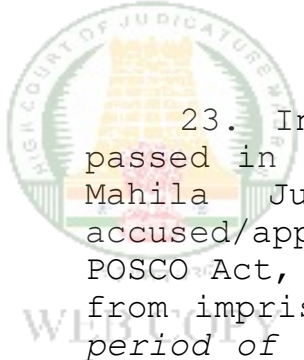


children than in sexually mature girls, and so it more often escapes injury in an attempted rape on children.

Normally, the hymen is ruptured by the first act of coitus, though it may persist even after frequent acts of coitus, if it happens to be loose, folded and elastic; or thick, tough and fleshly. Cases have been reported in which the hymen had to be incised at the time of delivery, while even prostitutes have been known to possess an intact hymen."

21. Therefore, it is evident from the above contents contained in the Textbook mentioned supra that given the nature and magnitude of the presence of hymen, deep in the interior parts of the female children, the rupture to hymen escapes even in an attempted rape on children. In other words, merely because there is no injury caused to hymen or the hymen part is not ruptured, it cannot be said that there was no act of penetrative offence committed on the children. Therefore, the argument advanced by the counsel for the appellant that there is no injuries caused to the hymen of PW1 and therefore, the entire case of the prosecution has to be disbelieved cannot be accepted. The trial Court also, by placing reliance on the book authored by Professor Vedachalam concluded that the hymen of the children will appear very deep than matured adult women and therefore, even during an act of attempt to rape, the possibility of injuries to the hymen of the children is remote. It is well settled that ocular evidence will prevail over the medical evidence and if such principle is applied in this case, the ocular evidence of PW1/victim, in our opinion, would be sufficient to hold that the prosecution has proved the case against the accused/appellant beyond reasonable doubt. Therefore, we are of the view that the trial Court, upon consideration of the entire evidence made available, has rightly come to the conclusion that the accused/appellant is guilty of commission of aggravated penetrative assault and we see no reason to interfere with such a finding. In such view of the matter, we are inclined to confirm the Judgment of the trial court, by which, the accused was found guilty of the offences punishable under Section 5 (m) and (n) of POSCO Act.

22. At this juncture, the learned counsel for the accused/appellant raised a plea with regard to the imposition of sentence and submitted that the offence has been committed by the accused/appellant due to genetic and psychological problems confronted by him and that even according to the victim herself, the accused/appellant had been taking care of her by providing education and thereby prayed for reduction of sentence. Having regard to the above facts and circumstances of the case and taking note of the submission of the learned counsel for the appellant, we are of the view that the sentence imposed on the accused/ appellant can be modified from life imprisonment in to one of *rigorous imprisonment for a period of ten years*, which would meet the ends of justice.



23. In the result, we confirm the Judgment dated 26.05.2016 passed in Special Sessions Case No. 3 of 2014 on the file of the Mahila Judge, Fast Track Court, Dindigul convicting the accused/appellant for the offence punishable under Section 5 of POSCO Act, however, we modify the sentence imposed on the appellant from imprisonment to life into one of *rigorous imprisonment for a period of ten years*. The period of sentence already undergone by the accused/appellant can be given set off as contemplated under Section 428 of Cr.P.C.

Sd/-  
Assistant Registrar(AS)

/True Copy/

Sub-Assistant Registrar

To

- 1.The Mahila Judge  
Mahila Fast Track Court, Dindigul
  - 2.The Principal Sessions Judge, Dindigul
  - 3.The Inspector of Police, All Women Police Station, Dindigul
  - 4.The Superintendent, Central Prison, Madurai
  - 5.The Superintendent of Police, Dindigul
  - 6.The District Collector, Dindigul
  - 7.The Director General of Police, Mylapore
  - 8.The Additional Public Prosecutor,  
Madurai Bench of Madras High Court, Madurai
- +One cc to Mr.G.Karuppasamy Pandiyan, Advocate, SR.No.94133

rsh  
RL/10C/9P/KK/SAR1/16/2/2018

Judgment in

Cr1.A (MD) No. 325 of 2016