

Bail Slip

The Appellant, namely N.Sakthivel(Sole accused in Special Sessions Case No.5/2015, on the file of Special Judge, Pudicherry) was released on bail vide order of this court dated 17/08/2017, and made in CrI.M.P.NO.9131 of 2017 in CrI.A.438/17.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

Criminal Appeal No.438 of 2017

N.Sakthivel ... Appellant/Accused

vs.

The State, rep.by
The Inspector of Police,
Nettapakkam Circle,
Puducherry ... Respondent/Complainant
Crime No.105 of 2013

Criminal Appeal filed under Section 374(2) of Cr.P.C., to set aside the conviction and sentence passed by the Special Judge, Puducherry, in Spl.S.C.No.5 of 2015, dated 14.07.2017.

For appellant : Mr.N.R.Elango, Sr.counsel
for Mr.Ganeshrajan

For Respondent : Mr.V.Balamurugane
Special Government Pleader

JUDGMENT

The appellant herein is the sole accused in Special Sessions Case No.5 of 2015, on the file of the Special Judge, Puducherry. He was charged under Sections 7 & 8 of Protection of Children from Sexual Offences Act, 2012 ('POCSO Act' for brevity). After trial, by judgment dated 14.07.2017, the trial Court convicted him for the above said offence and sentenced him to undergo Rigorous Imprisonment for four years and to pay a fine of Rs.2000/-, in default, to undergo Rigorous Imprisonment for six months for the commission of offence punishable under Section 8 of POCSO Act, 2012. Challenging the said conviction

and sentence, the appellant is before this Court with this appeal.

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

(i)The defacto complainant, D.Sivakumar, residing at 'EP', Puducherry had given a written complaint dated 26.10.2013 to the Sub-Inspector of Police, Nettapakkam Police Station, Puducherry, complaining that on 25.10.2013, staff members of Lakshminarayana Medical College, Villianur, came to their village and informed that they will pick up the persons in their ambulance from the village, who are suffering from illness, for free medical check up and treatment and for that purpose, they requested the villagers to get ready by 26.10.2013 at 9.30 a.m. On 26.10.2013, the complainant had kept ready his daughter 'S' in his house at 9.30 a.m., as she was suffering from some ailment. At that time, the accused/appellant herein, who was working as a Camp Officer in Lakshminarayana Hospital, Villianur, came and asked 'S' to call her parents, for which 'S' told the accused that they were not available in the house. Again the appellant/accused asked 'S' to call her parents and by saying so, when the victim girl 'S' went inside the house, the accused followed her in that house and molested her. The victim girl cried for help and the accused immediately fled from the house.

(ii)Thereafter, a complaint was filed and on the basis of which, an FIR was registered in Crime No.105 of 2013, against the accused under Sections 7 & 8 of POCSO Act, 2012. On completion of investigation, the Inspector of Police, Nettapakkam Circle, had filed the charge-sheet. The Charge-sheet filed by the Inspector of Police would read as follows:

"The accused, on 26.10.2013 at about 9.30 hours, in the residence of the defacto complainant i.e. No.20, Second Cross Street, Earipakkam, New Colony, Kariyamanickam, Puducherry, committed sexual assault on the child Sooriya (14 years), daughter of the defacto complainant, by caught holding her with sexual intent, touched her breast, pinched her lips as enshrined under Section 7 of the and thereby committed an offence punishable under Section 8 of the POCSO Act, 2012."

(iii)The Charge-sheet was taken on file by the Special Judge, Puducherry. The accused denied the charge and therefore, the trial was set in motion.

(iv)On behalf of the prosecution, eight witnesses were examined as P.Ws.1 to 8 and 16 documents were marked as Exs.P1 to P16 and on behalf of the defence three witnesses were

examined as D.Ws.1 to 3 and one document was marked as Ex.D1. Four Material Objects were also filed as M.Os.1 to 4.

(v) P.W.1 is the victim girl, who turned hostile when she was examined by the trial Court. She would completely deny the occurrence which had taken place on 26.10.2013 and she had also denied the fact that she had voluntarily given statement before the police or before the learned Magistrate concerned. She stood the ground when she was declared as hostile and when she was cross-examined by the prosecution. So was P.W.2, who is the father of the victim girl, who also turned completely hostile. According to P.W.2's evidence, he has signed the relevant documents in white papers meaning that he was not aware of the contents of the documents he signed. He would completely disown the statement given by him to the police under Section 161 Cr.P.C. P.W.3, who is a neighbour of the village, had supported the statement of the prosecution and during the course of cross-examination he would submit that he and other persons had come to know about the incident on hearsay from the family of the victim. P.W.4 is the Child Helpline Councilor, who had deposed that the statement was obtained from the victim girl and he had followed the relevant procedure for taking such statement. According to the evidence of P.W.4, the victim girl had given the statement voluntarily without any influence by any other person concerned. P.W.5 is one other witness, who happened to be from the same village. He would depose to the effect that the appellant/accused was beaten up and was dragged to the police station and on an enquiry he was informed of the incident. In the cross-examination he would submit that he had signed the document after the police had filled the same.

(vi) P.W.6 is the learned Magistrate of Small Causes Court, Chennai and he stood by the 164 statement recorded by him, as given by the victim girl. P.W.7 is the Sub-Inspector of Police, Puducherry, who, at the relevant time, was working in the Nettapakkam Police Station. He would depose to the fact that on the basis of the complaint given by the father of the victim girl, an FIR was registered and 161 statement has also been obtained. But he would admit that the statement was obtained in the police station. When P.W.7 was cross-examined by the defence, he would admit that P.W.3 had not stated that he had seen the incident directly and he had given statement only on the basis of hearsay. He would also admit that the statements had been obtained only in the police station. He would further admit that P.W.3 was banned from entering the village on the basis of 144 proceedings initiated against some villagers, including P.W.3. P.W.8 is the Inspector of Police, Nettapakkam Police station. He would also admit in his cross-examination that P.W.3 was banned from entering the village and also in respect of other witnesses, such ban was imposed on 24.09.2013. According to P.W.8, he did not obtain Birth

Certificate or Medical Report regarding the proof of age of the victim girl, as according to him, the victim girl appeared to be a young girl.

(vii) On behalf of the defence, the Superintendent of Police, Puducherry was examined as D.W.1. He would also admit that on 24.09.2013, P.W.3 and others were banned from entering the subject village. D.W.2 is an employee of Lakshminarayana Medical College, Villianur and he would depose that the entire case was foisted against the appellant/accused, since he was part of the team, which went to the village and according to him, no such occurrence took place. D.W.3 is other employee of Lakshminarayana Medical College and he also would support the case of the defence.

(viii) On the basis of oral evidence and also on the basis of Exs.P1 to P15, since Ex.P16, viz., 161 statement of the victim child came to be eschewed, as per the order of this Court in Crl.R.C.No.815 of 2016, dated 25.10.2016, the trial Court convicted the appellant/accused and sentenced him to undergo Rigorous Imprisonment for four years and also imposed a fine of Rs.2000/-, in default, to undergo Rigorous Imprisonment for six months for the commission of offence punishable under Section 8 of POCSO Act, 2012. The trial Court has found the appellant/accused guilty of the offence principally on the basis of corroborative evidence, since admittedly, the prime witnesses, namely, P.Ws.1 and 2 have turned completely hostile and they disown their initial statements given to the police and the Magistrate. According to the trial Court, although the principal witnesses have turned hostile, there were enough materials and evidence to show that the appellant/accused was guilty of the offence punishable under the provisions of the POCSO Act, 2012.

(ix) The trial Court has held that the entire case of the prosecution cannot be thrown away just because P.Ws.1 and 2 have turned hostile, since the evidence given by other witnesses and the investigation report would prove the guilt of the appellant/accused. The trial Court has come to the conclusion that it was probably both P.W.1 and P.W.2 would have felt little shameful in coming out with the truth, since it was a sensitive issue of a young girl being sexually exploited.

(x) The trial Court has also concluded the guilt of the appellant/accused holding that P.W.3 did not turn hostile, but has spoken about the occurrence and so are P.Ws.5 and 6, who are also independent witnesses, who corroborated the factum of the accused being taken to the police station. Therefore, the trial Court concluded that there was corroborative and circumstantial evidence and the quantum of their evidence was very much inspiring the confidence of the Court, notwithstanding the

evidence of P.W.1 and P.W.2. The trial Court discarded the evidence of D.Ws.2 and 3 as they were interested witnesses, being co-employees of the appellant/accused. In fact, the trial Court has given reasons as to why their evidence should not be accepted. It was observed by the trial Court that the employees have not reported about the incident to the management and the fact of they being beaten up or taken to the police station etc. Taking into consideration the over all circumstances of the case, the trial Court has come to the conclusion that there are sufficient materials to hold the petitioner guilty of the offence punishable under the provisions of the POCSO Act.

3.Mr.N.R.Elango, the learned Senior counsel appearing for the appellant would submit that the entire prosecution case was premised on the statements given by P.Ws.1 and 2, before the Police under section 161 Cr.P.C., and the learned Magistrate under Section 164 Cr.P.C. Once the statements given by P.Ws.1 and 2 have been retracted in the trial and nothing contra could be elicited from the crucial witnesses, viz., P.Ws.1 and 2, the entire edifice of the prosecution crumbled. He would further submit that P.W.3 could not have entered the village in the first place, as admittedly he was banned from entering the village under Section 144 proceedings. Therefore, his evidence cannot be relied upon at all. Even otherwise, his evidence was admittedly only an hearsay and cannot be relied upon.

4.The learned Senior Counsel would submit that the other witnesses examined during trial can speak about the incident, only on the basis of the statements recorded in the Police Station given by P.W.1 and P.W.2. Once those statements have been disowned by the witnesses themselves, their evidence can hardly be counted for the purpose of holding the appellant/accused guilty of the offence. He would submit that P.W.1 herself had stated that her statement before either the learned Magistrate or before the Child Helpline Councilor was not voluntary. According to the learned Senior counsel, P.W.2's statement that he had put his signatures only in white papers, would only reflect the fact that the complaint was not prepared on the basis of statement by the complainant. But it was admittedly prepared in the Police Station by the Police. He would further submit that the evidence of other witnesses cannot independently stand without the support of the crucial witnesses, viz., P.Ws.1 to 3. He would therefore submit that the conclusion by the trial Court that there exist corroborative and circumstantial evidence, which was sufficient enough to convict the appellant/accused, cannot be countenanced both in law and on facts. Therefore there are grave lacuna and infirmities in the prosecution theory and it is a clear case of no evidence against the appellant and therefore, he would pray that the appeal may be allowed and the conviction be set aside.

5.This Court has considered the submissions of the learned Senior counsel for the appellant and perused the oral evidence and also the exhibits marked in the trial Court.

6.As rightly contended by the learned Senior counsel, the entire prosecution case was built and premised on the statements given by P.Ws.1 and 2. Since the initial statements given by the two witnesses, viz., the victim girl and her father had been retracted and disowned subsequently in the trial Court, how far the trial Court can proceed to hold the appellant/accused guilty of the offence is the question to be decided, on the basis of the evidence of other witnesses.

7.The evidence of P.W.3 cannot be safely relied on since admittedly his evidence was on the basis of hearsay and moreover, he was admittedly banned from entering the village and therefore, his evidence cannot be counted as a safe evidence to be relied on. The evidence of P.W.4, viz., Child Helpline Councilor, cannot also be relied on in view of the fact that the statement given to the Councilor had been disowned by the victim girl herself. The evidence of P.W.5 admittedly is an hearsay evidence and it cannot stand independently to support the case of the prosecution. The evidence of P.W.6, viz., the learned Magistrate, also cannot be relied upon in view of the retraction of the same by the prosecution witness viz., P.W.1. As regards the evidence of P.Ws.7 and 8 is concerned, their evidence is only on the basis of the so called statements given by the father of the victim girl P.W.2 and also the statement obtained from the victim girl herself. Since those statements have been denied and retracted, the evidence of P.Ws.7 and 8 cannot be of any worth to be relied upon.

8.As rightly contended by the learned Senior counsel for the appellant, this is a case of no evidence in the face of the crucial witnesses P.Ws.1 and 2 turning completely hostile. Although the trial Court has come to a conclusion that there were enough materials even otherwise corroborating the fact of the offence committed by the appellant/accused, this Court is unable to appreciate as to the validity of such conclusion in the absence of crucial evidence by PW.1 and P.W.2. The substratum of prosecution evidence stood completely removed once the prosecution witnesses, viz., P.Ws.1 and 2 turned hostile and therefore, the evidence of all other prosecution witnesses cannot independently stand to scrutiny for coming to the conclusion against the appellant/accused. The entire prosecution case has been built on the statements given by P.Ws.1 and 2 and when such statements have been retracted, the case of the prosecution has to fall apart inevitably.

9. For the above reasons, this Court is of the considered view that the trial Court has erred in holding the appellant/accused as guilty of the charge framed against him. This is a case of no evidence and therefore, the conclusion reached by the trial Court, brushing aside the crucial evidence of P.Ws.1 and 2, cannot be countenanced either in law or on facts. In view of all the above, this Court holds that the prosecution has failed to prove the case beyond reasonable doubts and therefore, the appellant is entitled for acquittal.

10. In the result, this criminal appeal is allowed; the conviction and sentence imposed on the appellant by the trial Court are set aside and the appellant/accused is acquitted. Bail bond, if any, executed by him shall stand cancelled. Fine amount, if any, paid by him is ordered to be refunded forthwith.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

msk

To :

1. The Special Judge, Puducherry.

2. The Chief Judicial Magistrate,
Pondicherry.

3. The Superintendent,
Central Prison,
Kalapet,
Puducherry.

4. The Inspector of Police,
Nettapakkam Circle,
Puducherry.

5. The Public Prosecutor,
High Court, Madras (Pondicherry)

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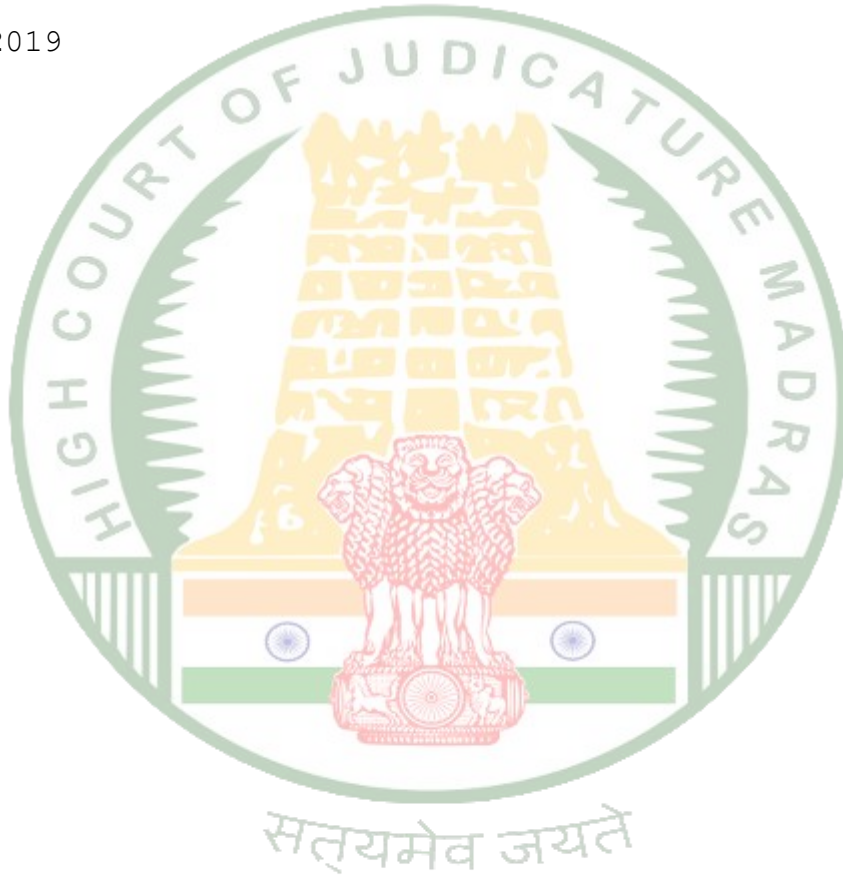
copy to:

The Section Officer,
Criminal Section,
High Court, Madras.

+2cc to Mr.Ganeshrajan, Advocate sr.no.78688

Crl.A.No.438 of 2017

gj (co)
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