

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 20.11.2018

Delivered on: 19.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

Criminal Appeal No.596 of 2018
and
Crl.M.P.No.13197 of 2018

Seetharaman@ Mani ... Appellant

vs.

State, rep.by
The inspector of Police
N-4 Harbour police Station,
Chennai-600 081 ... Respondent

Criminal Appeal filed under Section 374(2) of Cr.P.C., to call for the records in respect of the judgment dated 11.07.2018 in S.C.No.278 of 2017, passed by the Special Court for cases under POCSO Act 2012/Mahila Court, Chennai.

For appellant : Mr.Sunder Mohan

For Respondent : Mrs.V.Saradha Devi
Government Advocate (Crl.Side)

JUDGMENT

The appellant herein is the sole accused in Sessions Case No.278 of 2017, on the file of the Special Judge, Mahalir Neethimandram, Chennai. He stood charged for the offence under Section 366 of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act' for short). After trial, by judgment dated 11.07.2018, the trial Court convicted him for the offence under Section 366 IPC and Section 6 of POCSO Act and sentenced to undergo Rigorous Imprisonment for ten years and to pay a fine of Rs.10,000/-, in default, to undergo Rigorous Imprisonment for six months for offence under Section 6 of POCSO Act and sentenced to undergo Rigorous Imprisonment for seven years and to pay a fine of Rs.10,000/-, in default, to undergo Rigorous Imprisonment for six months for offence under Section 366 of the IPC. 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:

On 06.08.2015, appellant/accused took the victim girl, who was at that time aged 17 years, in a two wheeler, promising to take her to a nearby temple, but took her to a far away temple, viz., Tirupathi temple, against her will. On 07.08.2015, according to the prosecution, the accused forcibly tied 'thali' on the victim girl and after the so called marriage, they started from Tirupathi and reached Kalasthri on 08.08.2015. On that day they stayed in the temple itself. On 09.08.2015, the accused took the victim girl to Ondikuppam at Tiruvotriyur, where they stayed in a hut. At that time, the accused had sexual intercourse with the victim girl several times on compulsion stating that they had become husband and wife. A case was filed and investigation was conducted and it was found that the accused had committed offence punishable under the provisions of the POCSO Act and also under the provisions of the Indian Penal Code. On finding the victim girl absconding, after lodging a complaint with the police concerned, the mother of the victim girl had committed suicide.

3.During trail, seven Prosecution witnesses were examined as P.Ws.1 to 7 and 20 documents were marked as Exs.P1 to P20. No one was examined on the defence side nor marked any documents. Materials Objects M.Os.1 to 10 were marked.

4.P.W.1 is the victim girl and the evidence of P.W.1 reveals that on 07.08.2015, when she went to college, the accused called her and took her to Tirupathi and at about 6.00 to 7.00 p.m., the accused tied 'Thali' and married her. According to the evidence of P.W.1-the victim girl, she did not give consent for the marriage. Thereafter, they stayed in upper Tirupathi in a room and there, they had sexual relationship. When they were about to return from the place, P.W.1 was informed about her mother's suicide and thereafter she reached back home. In the meanwhile, her mother had already given a complaint that the victim girl was missing and on the basis of investigation, the accused was arrested when they came to Chennai. Thereafter, P.W.1 was sent for medical examination and thereafter, she was sent to Children Home. Subsequently, a statement was also obtained under Section 164 of the Code of Criminal Procedure, before the Judicial Magistrate. P.W.1 has also produced her 10th Standard Mark sheet as proof of her date of birth and the same was marked as Ex.P2. As per the said mark-sheet, her date of birth is 28.11.1997.

5.P.W.2 is the father of the victim girl and he deposed that on 06.08.2015, he had gone for his work and his wife also had gone to bank for some work. P.W.1-the victim girl was staying alone in the home and after his wife's return from the bank, she found the victim girl missing. Therefore, his wife immediately informed him and later police complaint was lodged. P.W.2 also spoke about the suicide committed by his wife and he corroborated the events as stated above.

6.P.W.3 is a mahazar witness, who signed Ex.P4. P.W.4 is a Professor, Department of Forensic Medicine, Government Stanley Hospital, who deposed that the accused was brought for medical examination and on the basis of examination of the accused, he opined that there was nothing to suggest that the accused was impotent and he also issued a certificate under Ex.P6. P.W.5 is the neighbour of the accused and he deposed that he came to know about the incident of P.W.1 being kidnapped and a complaint was lodged in that regard. The seizure of Material Objects and the confession of the accused had been witnessed by the said witness. P.W.6 is the Assistant Professor, Department of Forensic Medicine and she deposed that the victim girl of 17 years was brought by the police for medical examination and on enquiry, she was told that for the past six months, P.W.1 was in love with the accused and told her that she and the accused had gone out on 06.08.2015 and married and they were together for four days till 10.08.2015. During medical examination, no external injuries were found on her and reports were also submitted, which are marked as Exs.P11 to P.13. P.W.7 is the Inspector of Police, who investigated the case and he narrated the events, on the basis of the complaint and the subsequent investigation done by him.

7.On the basis of the oral evidence and also on the basis of the other materials placed on record, the trial Court had come to a definite conclusion that the appellant/accused was guilty of the offences charged against him and convicted him as afore mentioned.

8.The trial Court had given a detailed reasoning, particularly in regard to the evidence given by P.W.1-the victim girl, since her evidence was cogent and acceptable and there was no evidence available on the side of the accused to disprove the initial presumption that has been drawn against him. According to the trial Court, on the basis of the consistent evidence of the witnesses along with the medical evidence and other facts and circumstances of the case, initial presumption was drawn against the accused and ultimately, the same has culminated into a conclusive

proof against the accused. This was more so when the accused did not produce any contra evidence or material to disprove the case of the prosecution. The trial Court has held in its entirety of the judgment that it was almost an open and shut for the prosecution, since the affair is admitted and the consent of the victim girl is immaterial under the provisions of the POCSO Act. Therefore, the trial Court has convicted the appellant, as aforementioned.

9. When the appeal is taken up for hearing, initially the learned counsel appearing for the appellant would submit that the age of the victim girl is questionable, as according to him, no proper investigation has been done in order to ascertain the actual date of birth of the victim girl. According to the learned counsel Mr. Sundar Mohan, the 10th Standard Mark-sheet, which is marked as Ex.P2, is not a conclusive proof indicating the correct age of the victim. The learned counsel would particularly draw the attention of this Court to the deposition of P.W.2, the father of the victim girl, who, in his cross-examination had stated that he did not remember the actual date of birth of his daughter P.W.1, the victim girl. According to the learned counsel, in order to attract the provisions of the POCSO Act, the proof of age of the victim girl is very important and in the absence of proof, the trial Court ought to have ordered proper investigation so as to ascertain the true age of the victim girl. In this Connection, the learned counsel would draw the attention of this Court to the decision of the Hon'ble Supreme Court of India in BIRAD MAL SINGHVI VS. ANAND PUROHIT [1998 (Supp) Supreme Court Cases 604]. He would draw particularly the attention of this Court to the observation of the Supreme Court of India as found in a portion of Paragraph No.14, which is extracted hereunder:-

"14. No evidence was produced by the respondent to prove that the aforesaid documents related to Hukmi Chand and Suraj Prakash Joshi who had filed nomination nation papers. Neither the admission form nor the examination form on the basis of which the aforesaid entries relating to the date of birth of Hukmi Chand and Suraj Prakash Joshi were recorded was produced before the High Court. No doubt, Exs. 8, 9. 10. 11 and 12 are relevant and admissible but these documents have no evidentiary value for purpose of proof of date of birth of Hukmi Chand and Suraj Prakash Joshi as the vital piece of evidence is missing, because no

evidence was placed before the Court to show on whose information the date of birth of Hukmi Chand and the date of birth of Suraj Prakash Joshi were recorded in the aforesaid document. As already stated neither of the parents of the two candidates nor any other person having special knowledge about their date of birth was examined by the respondent to prove the date of birth as mentioned in the aforesaid documents. Parents or near relations having special knowledge are the best person to depose about the date of birth of a person. If entry regarding date of birth in the scholars register is made on the information given by parents or some one having special knowledge of the fact, the same would have probative value. The testimony of Anantram Sharma and Kailash Chandra Taparua merely prove the documents but the contents of those documents were not proved. The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made in the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi

was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouch safe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts. namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted."

10.The learned counsel would further submit that the school authority was not examined to establish the factum of contents as contained in the mark-sheet Ex.P2. Unless the age of the victim girl is conclusively established, it cannot be gainsaid that the allegation against the appellant could be brought within the mischief of the POCSO Act.

11.During the course of arguments, the learned counsel for the appellant would submit that the prosecution evidence had been largely unchallenged and untested, since the evidence of P.Ws.1 and P.Ws.4 to 7 have not been put to cross-examination at all, except P.W.2 and P.W.3, viz., the father of the victim girl (P.W.2) and one Jayaraman, who is a neighbour. All other testimony of the other prosecution witnesses had remained untested. According to the learned counsel, unfortunately, the advocate, who represented the accused in the trial Court, for strange reasons, had chosen not to cross-examine those witnesses. If only the Prosecution Witnesses had been cross-examined, the defence of the appellant/accused would have been clinchingly established, particularly with regard to the age of the victim girl. According to the learned counsel for the appellant, immediately, after conclusion of the trial, without any delay, a petition dated 16.5.2018, under Section 311 of the Code of Criminal Procedure, was filed, for recalling the Prosecution Witnesses. According to him, he had stated the reason that due to the poverty of the accused, he could not engage an effective counsel and he may be given an opportunity to cross-examine the Prosecution

Witnesses. However, the trial Court, vide its order dated 07.06.2018, rejected the petition stating that no particulars were mentioned by the appellant for recalling the Prosecution Witnesses.

12. In these circumstances, the learned counsel for the appellant would submit that he would confine his arguments in respect of the present appeal only to the point that the matter may be remanded back to the trial Court for the purpose of providing fair opportunity to the appellant to cross-examine the Prosecution Witnesses. In the absence of fair opportunity being afforded to the appellant in the matter of cross-examination of the Prosecution Witnesses, the appellant has suffered conviction under the provisions of the POCSO Act as well as under the provisions of the Indian Penal Code. According to the learned counsel for the appellant, the right to fair trial is embodied in the fundamental rights, as enshrined under Article 21 of the Constitution of India and denial of such right will only result in miscarriage of justice. In support of his above contention, the learned counsel would rely on the decision of this Court in *M. Kannan vs. State*, rep. by the Inspector of Police, All Women Police station, [2017 SCC Online Mad 10874]. The learned Judge of this Court begins the judgment in regard to the entitlement of fair trial as follows:

"Every person has a right to a fair trial by a competent Court is the spirit of the right to life and personal liberty guaranteed under Article 21 of the Constitution of India. 'Denial of fair trial is as much injustice to the accused as it is to the victim and the society'. The Hon'ble Supreme Court in *Zahira Habibullah Sheikh v. State of Gujarat* reported in (2006) 3 SCC 374 has explained the concept of fair trial and said that it is central to the administration of justice and the cardinal principal of protection of human rights. In the instant case, the principal ground raised by the appellant is that there was denial of fair trial to him before the trial Court. Let us go into the circumstances under which such a plea is raised by the accused/appellant."

After commenting on the human rights protection, the learned Judge proceeds to hold in paragraph No.37, as under:

"37. The Court shall carefully strike a balance between the fair trial to the accused as well as the victim. In other words, the right of the accused

to cross examine the victim and the right of the victim to privacy should be measured meticulously and without causing any harm to any of these rights, the court should draw the line. When we do the said exercise, we are convinced that the right of the accused for fair trial which, in the instant case, has been denied on account of the gross dereliction of professional duty by the learned counsel needs to be provided once again, however with sufficient safeguard to the victim's privacy. Thus, we are inclined to remand the case back to the trial Court to allow the accused to cross examine the witnesses on the same day and to examine witnesses in defence and with a further direction to the trial Court to dispose of the case within three months. While the victim/child is under examination, the trial Court shall scrupulously follow the provisions of the POCSO Act."

13. The learned counsel would therefore submit that in order to uphold fairness in trial, a balance has to be maintained both on the side of the prosecution as well on the side of the defence. Therefore, he would implore this Court to send back the matter for fresh consideration by the trial Court, by affording an opportunity of cross-examining the witnesses, who were not cross-examined originally. While making this plea, the learned counsel would also submit that in order to protect the interest of the victim girl, who has now become major, the appellant can be ordered to be incarcerated and need not be set at liberty and some time limit may be fixed for the trial Court to complete the trial and pronounce the judgment afresh. According to the learned counsel this Court has inherent power for such a course of action.

14. Per contra, the learned Government Advocate, appearing for the prosecution, strongly objects to the grant of relief as asked for by the learned counsel for the appellant. She would submit that for the mere asking of the appellant, recalling of witnesses cannot be ordered. According to her, the Hon'ble Supreme Court of India in AG vs. Shiv Kumar Yadav and Others (Crl.A.No.1187-1188 of 2015 dated 10.09.2015) has held that the fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim or the society. She would particularly draw the attention of this Court to

the observations made in the following Paragraphs:

"10. It can hardly be gainsaid that fair trial is a part of guarantee under Article 21 of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for. It is also true that principle of fair trial has to be kept in mind for interpreting the statutory provisions.

11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.

15.. . . . While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.

27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 Cr.P.C. is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of

harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.

15. Therefore, the learned Government Advocate would vehemently oppose for the retrial, particularly when the appellant is convicted for the offence under the provisions of the POCSO Act. She would submit that the victim girl need not be recalled and harassed as that would only result in further mental agony and anguish to the victim girl. She would therefore strongly oppose for remanding the matter back to the trial Court for cross-examining the Prosecution Witnesses, including the victim girl.

16. This Court has bestowed upon its anxious consideration to the submissions made on behalf of the appellant/accused and respondent/prosecution.

17. From the seven Prosecution Witnesses, who were examined before the trial Court, only two witnesses, viz., P.Ws.2 and 3 were cross-examined and all other witnesses, including P.W.1-the victim girl have not been cross-examined

at all. Although it was very unfortunate that the lawyer, who represented the appellant/accused in the trial Court, for some strange reasons, had chosen not to cross-examine the Prosecution Witnesses, at the same time, this Court cannot allow the justice delivery system to falter, by denying fair trial to the appellant/accused, particularly, when the accused stood convicted for 10 years under the provisions of the POCSO Act. Moreover, the age of the victim girl is being bona fide questioned, since there was no conclusive evidence to establish that she was below 18 years. P.W.2, the father of the victim girl himself, in his evidence, was not sure of the age of the victim girl, as deposed by him. As rightly contended by the learned counsel for the appellant, the contents of the mark-sheet, without being supported by oral evidence, cannot be taken as a conclusive proof of evidence nor bring the offence within the mischief of the provisions of the POCSO Act. Therefore, it is all the more reason that the appellant herein ought to have been given an opportunity to cross-examine the Prosecution Witnesses, including P.W.1, not only in regard to the age, but also in regard to the charge as framed against him.

18. From the materials placed on record, this Court is of the considered view that the appellant/accused should be given an opportunity to cross-examine five of the seven Prosecution Witnesses, as only in the cross-examination certain truth could be culled out from the witnesses, in support of the defence. This is more so when Section 29 of the POCSO Act provides for presumption in favour of the prosecution and cast burden on the accused to disprove the case of the prosecution. In the said circumstances, non cross-examination of the crucial witnesses for whatever reasons, led to injustice to the accused and the conclusion ultimately reached by the trial Court, on the basis of unchallenged testimony of the Prosecution Witnesses, cannot be the basis for convicting the appellant/accused, as such conclusion can be construed as lopsided and not balanced.

19. No doubt, the appellant/accused herein was represented by a lawyer, but unfortunately, the lawyer, who represented him in the trial Court, has not abdicated his professional responsibility and undermined the cause of defence of his client. Ultimately, the appellant/accused is punished for serious offence, without having a fair trial and the lawyer, who was responsible for such a predicament, goes unpunished. In any event, from the entirety of the circumstances, this Court is of the considered view that in the interest of justice, the appellant/accused needs to be given one more opportunity to cross-examine the witnesses, after recalling them, in order to establish his defence as

that would satisfy the constitutional demand of fairness, good conscience and justice.

20.As rightly held by the learned single Judge of this Court in paragraph No.37 of the judgment, as extracted above, a careful balance has to be struck for providing fair trial to the accused on one side and protection of the victim on the other. During the course of argument, the learned counsel appearing for the appellant/accused himself has submitted that the appellant/accused shall remain incarcerated, in the interest of providing protection to the victim girl, till the trial Court pronounces its judgment afresh. This Court feels that such a course will not prejudice any party, particularly, when the victim girl has become major by passage of time.

21.This Court further is of the view that ultimately the majesty of justice delivery system lies in securing the ends of justice between the parties. The right to fair trial, being the fundamental right as embodied in the Constitution of India under Article 21 and such fair trial cannot be denied to the appellant/accused, particularly, when he charged with a serious offence under the provisions of POCSO Act, for which minimum conviction period is 10 years imprisonment. More serious the punishment, the more safe-guards to be in place not only to provide justice, but also to prevent miscarriage of justice. In this case, eventually, the trial Court has come to a conclusion only on the basis of untested evidence of most of the Prosecution witnesses, including the victim girl, medical evidence, the investigating officer etc. Further, the appellant/accused has moved the trial Court immediately after the conclusion of the trial for recalling of the witnesses. But unfortunately, the trial Court had dismissed the petition on the basis of certain incorrect facts represented in the petition for recalling. The act of being prudent and wise is in the judicial conduct of overlooking minor discrepancies in order to accommodate justice oriented approach. The trial Court ought to have overlooked such minor discrepancies in the details furnished in the petition for recalling, in the larger interest of justice, but unfortunately, the trial Court dealt with the petition with a pedantic approach and dismissed the same, dutifully.

22.For the above said reasons, this Court is of the considered view that the appellant has made out a case for remand. Accordingly, the judgment dated 11.07.2018, passed by the trial Court in Sessions Case No.278 of 2017, is set aside and the matter is remanded back to the trial Court with the following directions:

(i)The Prosecution Witnesses, who were not cross-

examined, are directed to be recalled for the purpose of cross-examination by the defence.

(ii) The trial Court shall complete the process of cross-examination within a period of six weeks from the date the matter is remanded back to its file.

(iii) In case, on the defence side, it requires any evidence to be let in, on the basis of the out come of the cross-examination, the same shall be permitted and such evidence shall also be completed within a period of four weeks thereafter.

(iv) The trial Court shall pronounce its judgment within four weeks after completion of re-trial to the extent indicated above.

(v) The trial Court shall follow necessary procedure as provided under the POCSO Act for protecting P.W.1, the victim girl, while under examination.

By invoking the inherent powers of this Court, it is directed that the appellant/accused shall be kept in judicial custody during the period of re-trial and the pronouncement of judgment by the trial Court, afresh. Connected miscellaneous is closed.

Sd/-

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

msk

To :

1. The Judge Special Court for cases
under POCSO Act 2012/Mahila Court, Chennai.

2. The Superintendent of Central Prison,
Puzhal Chennai.

3. The inspector of Police
N-4 Harbour police Station, Chennai-600 081

4. The Public Prosecutor,
High Court, Madras

+2ccs to Mr. Sunder Mohan , Advocate SR.No. 88108

CrI.A.No.596 of 2018

A.SK (27/02/2019)