

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.08.2019

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

Crl A.No.709 of 2015

Vellaiyan @ Marimuthu

... Appellant

Vs.

State, represented by
The Inspector of Police,
Thoppur Police Station,
Dharmapuri District,
Cr.No.177/2013.

... Respondent

Prayer : Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code, to set aside the order of the Mahila Court, Fast Track Judge, Dharmapuri in Special S.C.No.9 of 2014, dated 07.10.2015.

For Appellant : Mr.R.Vijayaraghaven

For Respondent : Mr.T.Shanmugarajeswaran
Government Advocate (Crl.Side)

JUDGMENT

The appellant was convicted for the offences under Section 448, 506(2) and Section 5(1) r/w Section 6 of Protection of Children from Sexual Offences (POCSO) Act, 2012 and sentenced to one year Rigorous Imprisonment for the offence under Section 448 IPC; to undergo 10 years RI for the offences under Section 5 (1) r/w Section 6 of the POCSO Act; to undergo one year RI under Section 506(2) IPC vide judgment dated 07.10.2015 in Special S.C.No.9 of 2014 on the file of the Mahila Court, Fast Track Judge, Dharmapuri.

2. The prosecution case, in brief, is as under :-

The victim girl was aged about 15 years at the time of occurrence and she was living at Easalpatty in Dharmapuri District along with her paternal grandparents. The grandfather was running a tea shop in the front portion of their house. The accused viz., Vellaiyan @ Marimuthu was a friend of the grandfather of the victim girl and was also assisting him in his

tea shop business. On 30.08.2013, at about 3.00 a.m., when the grandfather of the victim girl was away for a short while to answer the call of nature, the accused entered into the house and committed forcible penetrative sexual assault on the victim. He threatened the victim that if she revealed the same to her grandparents, he would kill her. He again committed penetrative sexual assault on the victim later when she went to gather wood in the fields. On account of the acts committed by the accused, the victim got pregnant. On noticing the symptoms associated with pregnancy, information was passed on to the local childline. The members of the childline team visited the victim and took her along with her grandmother for medical examination. After confirming the pregnancy of the victim, information was lodged vide Ex.P1/complaint dated 30.08.2013 before Thoppur Police Station. Ex.P6/F.I.R. in Crime No.177 of 2013 was registered for the offences under Section 376 IPC and Sections 3 and 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. Investigation was undertaken. The accused was arrested on the same day. The victim was sent for medical examination. After carrying out the usual formalities, final report was filed against the appellant/accused before the Special Court.

3.Cognizance of the offences was taken and the case was taken up for trial in Special S.C.No.9 of 2014. The accused was served with the copies of the final report along with the documents. Charges were framed against the accused for the offences under Sections 448, 506(2) IPC and 5(1) r/w Section 6 of the "POCSO" Act, 2012. The accused denied the charges and claimed to be tried. The prosecution examined PW1 to 18 and marked Exs.P1 to 15. On the side of the accused, DW1-Dr.Anita Thamarai Selvi was examined. The learned Trial Judge after a detailed consideration of the evidence on record, found the appellant/accused guilty of the offences and sentenced him as mentioned above. Challenging the same, this appeal has been filed.

4.Heard Mr.R.Vijayaraghavan, learned counsel for the appellant who reiterated the contentions set out in the appeal memorandum. According to the prosecution, the victim conceived as a result of the crime committed by the accused and that the conception was aborted. It is claimed by the prosecution that the product of the conception was sent for forensic analysis. But then, PW16-Lakshmi Balasubramanian-Assistant Chemical Examiner to Government & Deputy Director of Tamil Nadu clearly deposed that the product of conception was not received by them and as a result, the comparison with the DNA profile of the accused could not be carried out. This is the categorical testimony of PW16 and it is evident from the report dated 24.02.2014 which forms part of Ex.P7. The appellant's counsel

would therefore, argue that the best evidence that could have established the culpability of the accused was the DNA report of the product of the conception. In this case, the prosecution had completely botched it up. Therefore, the innocence of the accused cannot be established. If only the prosecution had sent not only the tissue sample of the accused but also the product of the conception, the truth would have been established. He therefore, wanted this Court to grant the benefit of doubt to the accused due to the fatal failure on the part of the prosecution in this regard.

5.The learned counsel appearing for the appellant also submitted that there are several other discrepancies featuring in the prosecution case. He pointed out that the victim hailed from Mel Easalpatti Village while the accused hailed from Poorikal. The distance between the two villages is about 2 Kms. The childline team which took the victim for medical examination initially lodged a complaint only before the Adhiyaman Kottai Police Station and not Poorikal Police Station. The learned counsel took me to the evidence of PW2 in this regard. PW2 had admitted in her cross examination that the occurrence took place in Poorikal. On the other hand, the victim would claim that the occurrence took place in Mel Easalpatty.

6.The suggestion of the learned counsel appearing for the appellant is that the victim must have had physical intimacy with some other person and in order to screen the true identity of the accused, she conveniently put the blame on the accused herein. The learned counsel also pointed out that even according to the prosecution, it was not a solitary occurrence. The first occurrence is said to have taken place sometime in May 2013 three months prior to 30.08.2013 at about 3 a.m. But then the complaint came to be lodged only on 30.08.2013. Even according to the victim, the accused had physical relationship with her on quite a few occasions. The learned counsel would point out that the victim had completed her X Standard and she had crossed the age of 15. The fact that she did not reveal the occurrence to anybody would indicate that she was having an affair with some other person and that when the symptoms of pregnancy became evident, she chose to fasten the blame on the accused who was a friend of her grandfather. He took me through the impugned judgment and wanted me to reverse it and acquit the appellant.

7.Per contra, the learned Additional Public Prosecutor submitted that even though there is a serious lacuna on the part of the prosecution in not sending the sample of the product of the conception, the benefit thereof should not go to accused. He submitted that the evidence of the victim is clear and direct and that therefore, the impugned judgment can very well rest on

the testimony of the victim and that the appeal should be dismissed.

8.I carefully considered the rival contentions and perused the evidence on record.

9.I must at the very outset concur with the submission of the appellant's counsel that there is a very serious lapse on the part of the prosecution in not ensuring that the product of the conception was sent to the Forensic Department. If only the said sample had been sent for forensic analysis, the culpability of the appellant could have been conclusively established. But, the question that arises for consideration is whether on this ground the appellant should be allowed to go scot free.

10.The victim was born on 20.05.1998 as is evident from Ex.P2 - the school record issued by the Headmistress of Government Higher Secondary School, Maniyadhahalli, Dharmapuri District. The said Ex.P2 was marked through PW5/Amudhavalli. Thus, the prosecution has clearly established that on the occurrence date, the victim was very much a child within the meaning of Section 2(d) of the POCSO Act, 2012. A child has been defined as "any person below the age of eighteen years". In this case, there is no doubt whatsoever that the victim was below the said age and she was just above 15 years of age. It is true that the victim did not lodge any complaint immediately after the occurrence. The complaint came to be lodged only following the intervention of the local childline. PW2 is the local childline activist. She stated that the childline of Dharmapuri received a call on 30.08.2013 at about 11.30 a.m. that the victim was subjected to sexual assault and that she was vomiting and thereupon the team members went to the place of the victim. Of course, PW2 had described the place of the victim as Poorikal. This is factually incorrect. The victim hails from Mel Easalpatty and not Poorikal. PW3 was a team member who actually took the victim along with her grandmother to the hospital. PW3 had clearly deposed that when she enquired the victim, she named the accused as the person who committed the charged acts.

11.The victim herself was examined as PW1 and in her examination, she stated that her parents had got separated and that they were leading their independent lives. Her father remarried and was staying at Kadaiyampatti, while her mother was away at Bangalore and that she was being brought up by her grandparents. The victim's grandfather was running the tea shop in the front portion of the house. She further stated that the accused would come to the tea shop daily for having tea. In fact, the victim described the accused as "Vellaiyan Thatha" (grandfather Vellaiyan). The victim's grandfather would keep

the tea shop open from 3 to 6.30 A.M. On the occurrence date, the victim's grandfather had opened the tea shop at 3.00 a.m. and he went to answer the nature's call. Vellaiyan alone was present in the tea shop. He entered the house and committed penetrative sexual assault on the victim. The victim also claimed that the accused pinched her on the chest. Since the victim felt ashamed, she did not reveal what had happened to her grandfather when he returned after a short while. She further deposed that when she went to the forest for gathering wood, the accused saw her and threatened her that if she did not accept or act according to his desire, he would reveal the fact to others and shame her. The victim stated that unable to resist the same, she submitted herself to the accused. According to the victim, the accused had such relationship with her on quite a few occasions. As a result, she got conceived. Later she informed her friend, who in turn complained to the childline.

12. The learned counsel appearing for the appellant would contend that the friend of the victim was not examined as a witness. I am of the view that non examination of the person who informed the childline will not really weaken the prosecution case. The testimony of PW1 is corroborated as far as genesis is concerned by the evidence of PW4 - grandfather of the victim, who clearly deposed that the accused would come to his house on a daily basis. He also stated that on at least one occasion, he left the accused in the tea shop and went to answer the call of nature and that during the relevant time, his grand daughter was alone in the house. It has been further elicited from the grandmother of the victim (PW7) that on the occurrence date, she had gone to attend a temple function.

13. It is true that the testimony of PW7 - grandmother appears to be exaggerated but then the core question is whether culpability of the accused has been established. PW12- S.Girija is the Doctor who examined the victim on 31.08.2013. She had clearly stated that there was a laceration measuring 1x1 cm on the left portion of the chest of the victim. she confirmed that the victim had conceived and that it was eventually aborted. These facts are beyond dispute.

14.Ex.P7 which was marked through PW.12 conclusively establishes that the victim had conceived and that it had to be aborted. Now the question that arises for consideration is whether the testimony of DW1 - Dr.Anitha Thamarai Selvi will come to the rescue of the accused. DW1 merely stated that apart from admitting the victim in the hospital, she did not play any other role. She however, confirmed that on 03.09.2013, the victim was sent for abortion and it was DW1 - Dr.Anita Thamarai Selvi, who actually admitted her. Therefore, the evidence of DW1 will not in any way come to the rescue of the accused.

15.It has been held in C. Muniappan and Others vs. State of Tamil Nadu, (2010) 9 SCC 567 that the defect in the investigation by itself cannot be a ground for acquittal and that the conclusion of the trial in the case cannot be allowed to depend solely on the probity of the investigation. The case on hand is one such. Whether the I.O is to be blamed or the doctor concerned is to be blamed is not for this Court to decide. I am of the view that the responsibility will have to be fixed on the erring official. The learned trial Judge had already analyzed this lapse in detail in paras 29-31 of his judgment and copies were marked to the District Collector, Superintendent of Police and Dean, Government Hospital, Dharmapuri. The Superintendent of Police, Dharmapuri District is directed to coordinate in the matter and ensure that appropriate disciplinary action is taken against the concerned official.

16.The learned Government Advocate (crl.side) drew my attention to Section 29 of the POCSO Act, 2012 and contended that applying the presumption set out in the said provision, the accused must be presumed to be guilty and the presumption should be made absolute since he had not rebutted the same.

17.It is true that Section 29 incorporates a mandatory presumption. It directs that the court shall presume that the person prosecuted for committing or abetting or attempting to commit any offence under Section 3, 5, 7 and 9 of the Act has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. While the court is obliged to raise such a presumption, the question arises at what stage the presumption will kick in. Of course, a literal application of Section 29 may lead the court to raise such presumption the moment the charge is framed against the accused. I am afraid that the section cannot be viewed in that fashion. Presumption of innocence and right to fair trial are the essence of our jurisprudence and are accepted as rights of the accused (Rampal Singh vs State Of U.P, (2012) 8 SCC 289). They cannot be given a go-bye. In fact, one Special Judge entertained a doubt and even made a reference under Section 395 of Cr.Pc for declaring Section 29 of the POCSO Act, 2012 as unconstitutional. But then, the Hon'ble Division Bench of the Gauhati High Court answered the reference in negative and directed the Special Judge to pronounce judgment in accordance with the existing provisions of the Act of 2012 in the judgment reported in 2017 CrL LJ 1615 (In Re: Secretary to the Government of India and Ors). The Hon'ble Division Bench also observed that the constitutional validity of Section 29 of the POCSO Act was not challenged by the accused before the High Court.

18.In the case on hand also, the appellant/accused, had

not challenged the constitutional validity of Section 29 of the Act. But then, a constitutional court has an interpretative obligation to read and construe all statutory provisions in a manner that is consistent with the Constitution of India. And if that is not possible, the offending provision will have to be struck down, of course, after complying with all procedural requirements.

19. Discharging the aforesaid obligation, I have to necessarily hold that Section 29 of the Act which of course is a rebuttable presumption cannot be pressed into service at the inception. The burden cast under Section 29 can be discharged by a preponderance or balance of probabilities. Of course, the legislative policy is clear and specific. It does cast a legal and not evidential burden on the accused. That is clear from the expression "unless the contrary is proved". Raising a legal burden is a serious thing. After taking evidence for the prosecution, examining the accused and hearing both sides, if the judge considers that there is no evidence that the accused committed the offence the judge shall record an order of acquittal. This is the mandate set out in Section 232 of Cr.PC. Where the accused is not acquitted under Section 232 of Cr.Pc, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof. The moment the stage set out in Section 232 of Cr.Pc is crossed and the trial judge is of the view that it is not a case of no evidence that the accused committed the offence, the presumption under Section 29 of the Act will kick in and the trial judge will have to presume that the accused is guilty of the offence. The presumption of guilt cannot be invoked till that stage. The accused would thereafter be under a legal burden to rebut the presumption that he has committed, abetted or attempted to commit the offence in question. Of course, as already pointed out, the standard of proof will be on a balance of probabilities.

20. In this case, the accused was prosecuted for having committed the offence under Section 5 of the POCSO Act, 2012. The prosecutrix tendered her evidence. The prosecution had examined quite a few witnesses in support of their case. They were also cross examined by the counsel for the accused. Incriminating circumstances were put to the accused under Section 313 of Cr.PC. Thereafter, the court had clearly been of the view that it is not a case for acquittal under Section 232 of Cr.PC. The accused was called upon to enter his defence. Therefore, the legal burden to rebut the presumption effectively shifted to the accused. In this case, the accused apart from examining DW1 and cross examining the prosecution witnesses has not done anything else. As already pointed out, the testimony of DW1 will not come to the rescue of the accused. Except putting a suggestion that the victim was in love with

some other person and that to screen the actual offender, the accused has been implicated, nothing else has been brought on record. Mel Easalpatty is after all a small village. If the victim had been having an affair with some other person, the same would have been very easily known. The case of the victim has been consistent right from the beginning. In this case, the victim did not go to the Police Station immediately. It was the childline officials, who came to the house of the victim on getting information about her condition. PW3 - Ambika, was the person who enquired the victim initially. PW3 clearly stated that the victim named and implicated only the accused. The testimony of PW3 inspires the confidence of this Court. The learned trial judge has given cogent and convincing reasons as to why this suggestion of the accused deserves to be rejected and as to why the testimony of the victim deserves to be accepted. I concur with the reasons given by the learned trial judge in this regard. In the complaint also the victim has named only the accused. In the Court also she had clearly and categorically stated that it was the accused who was responsible for her condition. The testimony of the grandfather also clearly indicates that on the occurrence date, he left the tea shop in charge of the accused and that during the relevant point of time, the victim alone was present in the house. All these circumstances cumulatively taken led the Court below to come to the conclusion that the prosecution established the case against the accused beyond reasonable doubt. I do not find any reason to interfere.

21. The learned counsel for the appellant submitted that this Court can reduce the sentence by taking into account the age of the accused. I am afraid that I cannot accept the request of the learned counsel for the appellant. This is because, Section 6 of the POCSO Act clearly states that 10 years R.I. will have to be the minimum sentence. In this case, the victim had deposed that the accused committed sexual assault on her on more than one occasion. It was a penetrative sexual assault leading to her pregnancy. Therefore, the sentence imposed by the Court below cannot be modified. I see no ground to interfere and the appeal stands dismissed.

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Assistant Registrar

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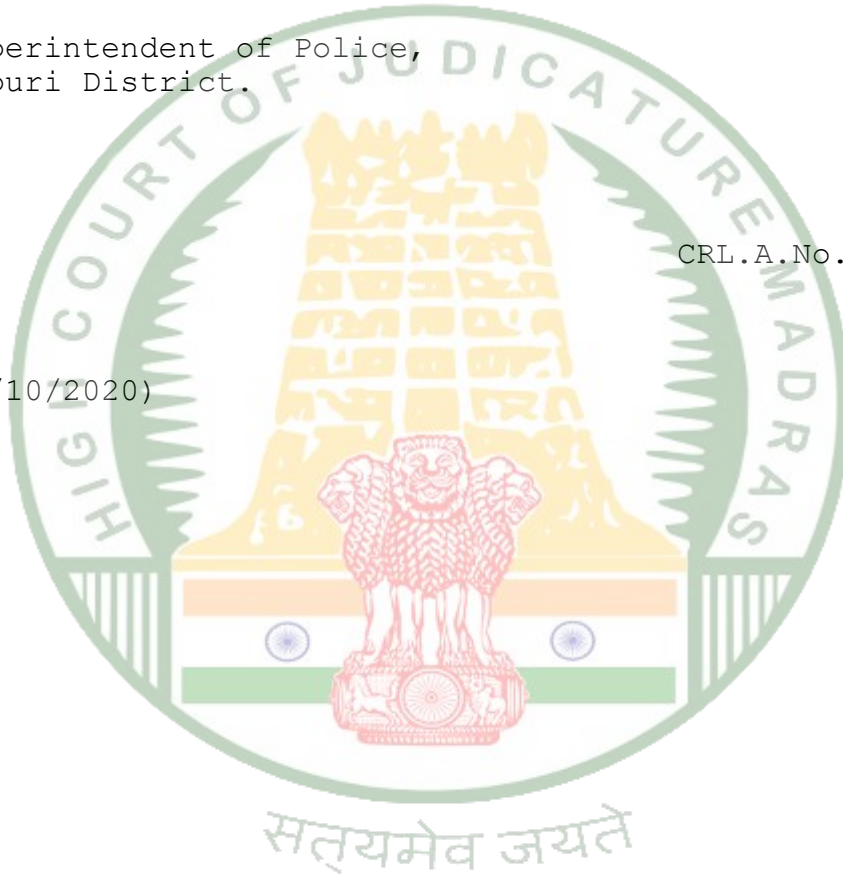
Sub Assistant Registrar

To

1. The Mahila Fast Track Judge,
Mahila Court, Dharmapuri.
2. The Public Prosecutor, High Court,
Madras
3. The Inspector of Police,
Thoppur Police Station,
Dharmapuri District.
4. The Superintendent of Police,
Dharmapuri District.

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