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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 10.07.2019

DELIVERED ON: 23.07.2019

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl.A. No.859 of 2016

Dharmalingam

..Appellant/Accused

vs.

The State represented by
the Inspector of Police
A.W.P.S. Kondalampatty
Salem District
(Cr. No.7 of 2013)

..Respondent/Complainant

Criminal Appeal filed under Section 374(2) Cr.P.C. seeking to set aside the judgment and order of conviction and sentence dated 20.10.2016 passed in S.C. No.34 of 2014 on the file of the Court of Sessions Judge, (Mahila Court), Salem.

For appellant : Mr. R. Baskaradoss

For respondent : Mrs. Kritika Kamal P.
Government Advocate (Crl. Side)

JUDGMENT

This criminal appeal has been filed seeking to set aside the judgment and order of conviction and sentence dated 20.10.2016 passed in S.C. No.34 of 2014 on the file of the Court of Session (Mahila Court), Salem.

2 Shorn of unnecessary details, a precis of facts leading to the institution of this criminal appeal are as under:

2.1 That the father has sexually abused his own daughter is the prosecution case.

2.2 Kamala (P.W.1) lodged a written complaint on 21.07.2013 to the Inspector of Police, Amani Kondalampatty A.W.P.S., Salem District, based on which, a case in Cr. No.7 of 2013 under Section 8 read with Section 7 of the Protection of Children from



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Sexual Offences Act, 2012 (for short "the POCSO Act") was registered on 21.07.2013 and the printed FIR (Ex.P.5) was prepared, which reached the jurisdictional Magistrate on the same day at 7.00 p.m., as could be seen from the endorsement thereon.

2.3 In the written complaint (Ex.P.1), Kamala (P.W.1) has stated that she is living with her family comprising her husband (Dharmalingam - appellant), victim girl "X" (name not disclosed for the sake of anonymity) aged 14 years, son "Y" aged 11 years and another daughter "Z" aged 10 years in Amani Kondalampatti in Salem; her husband would consume liquor daily and not give any money for family expenses and would also beat her and their daughter "X"; on 16.07.2013, while they were sleeping in their house, her husband asked her to put off the night lamp and she also obliged; after she slept, around 12 o' clock in the midnight, her husband went and slept next to their daughter "X" and fondled her breasts besides pressing her private parts; fearing his temper, "X" did not raise any alarm; after the day dawned, when her husband went for work, "X" narrated the incident to her; she (Kamala-P.W.1) did not know how to react and was in a state of confusion and shock; again on 20.07.2013, he repeated the same act on "X"; "X" tearfully narrated the incident to her; since there is no point in remaining patient any longer, the complaint is lodged; action may please be taken.

2.4 Jageera (P.W.6), Inspector of Police, took up the investigation of the case and went to the place of occurrence and prepared the observation mahazar (Ex.P.2) and rough sketch (Ex.P.6). She recorded "X's" statement and the statement of other witnesses. "X" was sent for medical examination.

2.5 After completing the investigation, final report was filed in P.R.C. No.24 of 2013 before the Additional Mahila Court (Magisterial level), Salem and the case was committed to the Court of Session in S.C. No.34 of 2014 and was made over to the Mahila Court, Salem, for trial. The Trial Court framed charge against the appellant under Section 9(n) read with Section 10 of the POCSO Act and when questioned, the appellant pleaded not guilty.

2.6 To prove its case, the prosecution examined 6 witnesses and marked 7 documents.

2.7 When the appellant was questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against him, he simply denied the same and did not offer any further explanation. On his side, no witness was examined nor was any document marked.



2.8 After considering the evidence on record and on hearing either side, the Trial Court convicted and sentenced the appellant as under:

Provision under which convicted	Sentence
Section 9(n) read with Section 10 of the POCSO Act	Seven years rigorous imprisonment and fine of Rs.2,000/- in default to undergo three months simple imprisonment.

2.9 Challenging the aforesaid conviction and sentence, the accused is before this Court.

3 Heard Mr.R. Baskaradoss, learned counsel for the appellant and Mrs. P. Kritika Kamal, learned Government Advocate (Crl. Side) appearing for the respondent State.

4 The learned counsel for the appellant formulated the following submissions:

a) the appellant has been framed by Kamala (P.W.1) and X (P.W.2) since he used to be very strict with them;

b) for the incident that had taken place on 16.07.2013, the complaint was lodged only on 21.07.2013;

c) the delay has not been explained;

d) Kamala (P.W.1) being the mother of "X", did not take any step to protect "X" after 16.07.2013 itself by sending her to any of her relatives house or keeping her away from the appellant;

e) "X" did not shout or make any noise when the alleged incident had taken place, which only shows that no such an incident had ever taken place;

f) "X" was not subjected to medical examination.

g) Kamala (P.W.1), in her evidence, has stated that her girl children will sleep with her on one side and on her other side, her husband and son will sleep. If that is so, the possibility of the appellant sexually abusing "X" stands ruled out.



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h) After the incident, Kamala (P.W.1) did not inform anyone including the relatives of her husband who were also in the same village, but had informed her sister Sathyavani (P.W.3) only on 21.07.2013, whereas, Sathyavani (P.W.3) has stated that she was informed on 17.03.2013 and therefore, there is a contradiction in the evidence of these two witnesses;

i) "X" (P.W.2) has been tutored by Kamala (P.W.1) to speak against the appellant;

5 The learned Government Advocate (Crl. Side) refuted the contentions put forth by the learned counsel for the appellant.

6 In a case of this nature, it is absolutely necessary to punctiliously and meticulously examine the evidence on record. Admittedly, the one and only witness who spoke and who was competent to speak was "X" (P.W.2) herself. The prosecution has proved beyond cavil that "X" (P.W.2) was born on 30.01.2000 by examining Banumathy (P.W.5), Headmistress of the school in which "X" (P.W.2) was studying. In the cross-examination of Kamala (P.W.1), mother of "X" (P.W.2), the dates of birth of her three children were asked, for which, she has stated that "X" (P.W.2) was born on 30.01.2000, "Y" was born on 02.06.2002 and "Z" was born on 26.01.2003. Thus, as on the date of the incident, viz., 20.07.2013, "X" (P.W.2) was 14 years old.

7 "X" (P.W.2), in her examination-in-chief, has stated that she is living with her parents and two siblings in Amani Kondalampatti village and is studying 10th standard. The free English translation of the examination-in-chief of "X" (P.W.2) is as under:

"I am living with my parents, my brother "Y" and sister "Z" in Amani Kondalampatti village. I am studying in the 10th standard. My father is working as Gas Cutter. Two years ago, I was studying in IX standard in Maniyanoor Higher Secondary School. We have a bathroom, kitchen and bedroom only. My father would come home drunk daily and beat my mother. If we go to her rescue, we will also be beaten. On 16.07.2013, I was sleeping in the front room. We used to keep the night lamp burning. While I was sleeping, I felt that someone was holding my hips. Initially, I thought that it was my brother. Soon, I realised that it was my father and he kept his hand on my breasts and hugged me. When I wanted to shout, he closed my mouth. Thereafter, he pressed my urinal part with his finger. He did so four or five times. He took my right hand and shored it into his underwear. Thereafter, he



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got up and went to the bathroom and then, slept next to my mother. Normally, the night lamp will be burning in our house. On that day, he asked my mother to put off the night lamp. On the next day, I narrated the incident to my mother. My mother wept and lamented as to whom this can be given vent to. Three days later, on 20.07.2013, he repeated the same thing on me. When I told my mother on the next day about the incident, she said that we cannot leave it like that and so, she went and told her elder sister Sathyavani (P.W.3) and Malar (not examined). Afterwards, my mother, my senior maternal aunt and Malar (not examined) went to Amani Kondalampatti Police Station and my mother gave a complaint. My mother took me to the hospital. The police examined me."

8 "X" (P.W.2) was subjected to a grilling cross-examination and some answers given by her are worth referring to.

"I did not tell my younger siblings because if I tell them, they will get scared of my father. That is why, I told this only to my mother."

9 The learned counsel for the appellant contended that "X" (P.W.2) had not told the police that the appellant made her put her hand into his underwear and that is an improvement which only shows that her testimony deserves to be rejected. He further contended that Kamala (P.W.1) has stated that a person outside the police station had helped her to write the complaint (Ex.P.1), but, "X" (P.W.2) has stated that the complaint was written inside the police station. It is his further contention that "X" (P.W.2) did not state to the police that after fondling her, the appellant went to the bathroom and came back, repeated the act and thereafter, went and slept beside her mother (Kamala-P.W.1).

10 The question is, could these alleged discrepancies be sufficient to completely disbelieve the testimony of "X" (P.W.2). In the cross-examination of "X" (P.W.2) nor of her mother (Kamala-P.W.1), motive was nowhere suggested by the defence for foisting a case on the appellant. On the contrary, it was suggested to "X" (P.W.2) that the appellant was not her father at all and that the appellant was not residing with them. Likewise, in the cross-examination of Kamala (P.W.1), it has been suggested by the defence that the appellant was not related to her at all, which she has denied. However, in the Section 313 Cr.P.C. statement, the appellant has not taken the stand that he is not the husband of Kamala (P.W.1) and the father of "X" (P.W.2). In fact, the school records (Ex.P.3) bears the name of the appellant as the father of "X" (P.W.2).

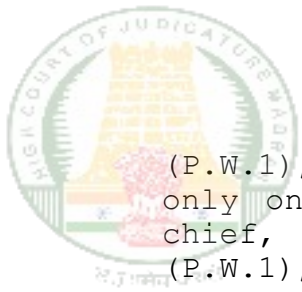


11 Kamala (P.W.1), in her evidence, has stated that the accused (appellant) is her husband and she has three children, viz., "X", "Y" and "Z"; the appellant would come home drunk and pick up quarrel with her and beat her; if the children intervene, he would beat them as well; they live in a house measuring 10 x 10 ft. and all of them would sleep together in one room; on 16.07.2013, her husband asked her to put off the night lamp and she obliged; on the next day, her daughter "X" (P.W.2) told her that the appellant pressed her breasts and hip and touched her private parts; since she was scared of him (appellant), she did not protest; he did these acts intermittently in four hours; she (Kamala-P.W.1) did not know what to do and was in a state of confusion and shock for two or three days; again, on 20.07.2013, the appellant did the same thing on "X" (P.W.2) which she ("X") told her (Kamala-P.W.1) on the next day; when she asked "X" (P.W.2) as to why she did not raise alarm, she ("X") told her (Kamala-P.W.1) that the appellant closed her mouth. The chief-examination was recorded on 14.07.2014 and on that day, this witness was not cross-examined. Before the Trial Court, the learned counsel for the accused sought time for cross-examining Kamala (P.W.1) on the ground that some compromise talks were going on. The Trial Judge asked the counsel and the accused to remain outside the Court hall and asked the witness, viz., Kamala (P.W.1) as to whether there is any truth in the representation of the counsel, for which, the witness (Kamala-P.W.1) answered in the negative. The Trial Judge called the counsel and the accused inside the Court Hall and told them what the witness (Kamala-P.W.1) had stated, for which, the counsel stated that he had not read the papers and refused to cross-examine the witness. All these have been meticulously recorded by Mr.K.Rajasekar, I Additional District and Sessions Judge, Salem, in-charge of the Mahila Court, Salem, on 14.07.2014, in the deposition itself, for which, this Court places its commendation. It has become a tactics for the defence counsel to seek adjournments on such specious pleas for gaining time, which should not be permitted by the Trial Courts, especially in the light of the judgment of the Supreme Court in Vinod Kumar vs. State of Punjab¹ The Trial Judges should record such happenings in the deposition itself and in the adjudication sheet as well. Only when they record in the deposition, will the superior Courts get a correct picture as to what had transpired during the trial. For such antics, the Trial Court can remand the accused to custody as laid down by the Supreme Court in State of Uttar Pradesh v. Shambhu Nath Singh².

12 Before, the Trial Court, the defence has filed C.M.P. No.512 of 2015 under Section 311 Cr.P.C. for recalling Kamala

1 (2015) 3 SCC 220

2 JT 2001 (4) SC 319



(P.W.1), pursuant to which, Kamala (P.W.1) was cross-examined only on 10.02.2016, nearly two years after her examination-in-chief, which is deprecated. In the cross-examination of Kamala (P.W.1), the defence was not able to make any serious dent.

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13 The learned counsel for the appellant contended that from the evidence of Kamala (P.W.1), it can be seen that the girl children of the appellant and Kamala (P.W.1) used to sleep on one side of Kamala (P.W.1) and her husband and son would sleep on her other side and therefore, there is no possibility for the appellant to misbehave with "X". A careful reading of the evidence of Kamala (P.W.1) shows that she has not stated that everyday, they would sleep in that order, but has only stated that normally they would sleep like that. This evidence does not, in any way, contradict the evidence of "X" (P.W.2), because, "X" (P.W.2), in her evidence, has stated that while she was sleeping, she felt that someone put his hand around her hip and initially, she thought that it was her brother; however, later, she realised that it was her father when he started pressing her breasts. Therefore, it is indeed possible that the appellant would have got up and lay down beside "X" to satiate his lust. "X" (P.W.2) has clearly stated that after fondling, the appellant got up and went quietly and slept next to her mother-Kamala (P.W.1). (emphasis supplied)

14 Sathyavani (P.W.3), elder sister of Kamala (P.W.1), in her evidence, has stated that she is also a resident of the same village; on 17.07.2013, her niece "X" (P.W.2) wept to her saying that on the previous night, her father sucked and fondled her breasts and pressed her private parts; her sister Kamala (P.W.1) also wept to her complaining about her husband; she did not know what to do and so, advised her sister Kamala (P.W.1) to take care of "X" (P.W.2); again on 20.07.2013, the incident recurred and so, on 21.07.2013, they all went to the police station and lodged the complaint.

15 In the cross-examination, Kamala (P.W.1) was asked as to who had written the complaint, for which, she stated that they went to the police and orally told the police as to what had happened and when the police asked them to give it in writing, they requested a lady to be the scribe and that she does not remember the name of that lady. It was suggested to her that the appellant belongs to a different caste and that he is not the husband of Kamala (P.W.1), which suggestion, she denied. Thus, the consistent stand of the appellant has been that he is not the husband of Kamala (P.W.1) and the father of "X" (P.W.2). After merely putting such suggestions to P.Ws.1 to 3, the appellant did nothing else even to probabalise that he is not the father of "X" (P.W.2). Further, he did not even suggest to the witnesses the name of the actual father of "X" (P.W.2).



16 The learned counsel for the appellant contended that Kamala (P.W.1), "X" (P.W.2) and Sathyavani (P.W.3) have admitted that after the incident, they did not either confront the appellant or complain about him to his parents and sisters and had instead gone to the police station and complained straightaway, which is an unusual conduct. Sathyavani (P.W.3), in the cross-examination, has stated that they did not choose to complain to the appellant's relatives because the appellant was none other than her own aunt's son. This explanation by Sathyavani (P.W.3) has taken the wind out of the sails of this argument. That apart, Kamala (P.W.1) and Sathyavani (P.W.3) have stated that when they heard about this from "X" (P.W.2), they were in a state of shock and did not know how to react. Further, the evidence on record shows that the appellant would frequently beat and terrorise his wife and children. In a perilous situation, it is common knowledge that all persons will not react in the same manner. Some will fight back and some will sulk. Therefore, this Court does not find anything wrong in Kamala (P.W.1) and Sathyavani (P.W.3) in not complaining of the appellant's behaviour to his relatives and going to the police instead. At this juncture, it may not be out of place to extract the following sapient passage from Rana Partap & Others vs. State of Haryana³ wherein, different reactions of witnesses on seeing a particular incident have been set out:

"6. . . . Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

In the case at hand, in fact, Kamala (P.W.1) and party did not go to the police after the first incident on 16.07.2013. Only after the incident on 20.07.2013, had they gone to the police on the next day.

17 The learned counsel for the appellant contended that the case has been foisted on the appellant because he used to beat Kamala (P.W.1) and "X" (P.W.2). Had Kamala (P.W.1) and "X"

3 (1983) 3 SCC 327



(P.W.2) wanted to wreak vengeance against the appellant for beating them, they would not have credulously disclosed in the complaint itself that the appellant used to come home drunk daily and beat them. Any hidden agenda will always remain in the secret cavity of one's heart and would get spilled either during police interrogation or during cross-examination. The appellant appears to have been as cruel as Edward Marston, the step father character in Charles Dickens' novel David Copperfield. That is why, the family felt terrorised and there was a radio silence till they garnered courage to spill the beans to the police on the 21st after the incident on the 20th. Had the appellant taken a defence that the case was foisted because he was a strict husband and parent, then, there would have been some scope for this Court to delve deep into this aspect. Contrarily, he has taken a defence that he is not the husband of Kamala (P.W.1) and the father of "X" (P.W.2) and had denied his fatherhood itself.

18 Next, it may be useful to refer to Sections 29 and 30 of the POCSO Act which read as under:

"29. Presumption as to certain offences:

Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5 and 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

30. Presumption of culpable mental state:

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in the prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."



19 The two presumptions aforesaid have not been dislodged by the appellant even by preponderance of probability much less by proof beyond reasonable doubt, as envisaged by Section 30(2), *ibid.*

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20 The learned counsel for the appellant placed reliance upon Section 27 of the POCSO Act and submitted that "X" was not medically examined. Refuting the said contention, the learned Government Advocate (Crl. Side) brought to the notice of this Court the evidence of "X" (P.W.2) and the Investigating Officer (P.W.6), who have stated that "X" was sent to the hospital for examination. However, neither the doctor was examined nor the copy of the accident register marked. That there was penetrative sexual assault for her to suffer injuries in her private parts is not the case of "X". Nor is it the case of "X" that she suffered any injury when her father misbehaved with her. Therefore, non-examination of the doctor who medically examined "X" will not be fatal to the prosecution case.

21 The learned counsel for the appellant placed reliance on the unreported judgment in *Sham Singh vs. State of Haryana*⁴ and submitted that the Supreme Court has rejected the evidence of the prosecutrix in that case and has acquitted the accused and hence, the same yardstick should be applied to the case at hand. In *Sham Singh (supra)*, the Trial Court had acquitted the accused and the High Court had reversed the acquittal. Further, in that case, there was material on record to show that there was animosity between the two families and the case was foisted on account of that. In this case, the allegation of sexual abuse is not against the neighbour, but, against the victim's father.

22 The learned counsel for the appellant placed further reliance on the unreported judgment of the Delhi High Court in *Atender Yadav vs. State, Government of NCT of Delhi*⁵, wherein, the father was implicated for sexually assaulting his daughter and was acquitted by the High Court holding that the mother had foisted the case to wreak vengeance. The reason for disbelieving the evidence of the prosecutrix has been catalogued in paragraph no.73 (a) to (g) of the said judgment. On the evidence in that case, the Delhi High Court had come to the said conclusion, whereas, on a careful scrutiny of the evidence in this case, this Court is unable to persuade itself to come to a different conclusion to the one what has been arrived at by the Trial Court.

4 Crl. A. No.544 of 2018 decided on 21.08.2018

5 Crl.A. No.1340 of 2010 decided on 29.10.2013



In the result, this criminal appeal stands dismissed as being devoid of merits.

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cad

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Inspector of Police
A.W.P.S. Kondalampatty
Salem District
2. The Sessions Judge
Mahila Court, Salem
3. The Public Prosecutor
High Court of Madras
Chennai 600 104
4. The Superintendent,
Central Prison,
Salem.
5. The Superintendent,
Central Prison, Coimbatore.

Copy to:-

The Section Officer,
Criminal Section,
High Court, Madras - 104.

+1cc to Mr.R.Baskaradoss, Advocate, SR.No.63670/19

Cr1.A. No.859 of 2016

Kak(16/09/2019)