

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.04.2019

Delivered on : 30.04.2019

CORAM

THE HON'BLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HON'BLE MR.JUSTICE M.NIRMAL KUMAR

Criminal Appeal No.716 of 2017
Crl.M.P.No.3364 of 2018

Selvam .. Appellant/Sole Accused

vs

State : Inspector of Police,
Velagoundanpatti Police Station,
Namakkal District.
(Cr.No.122 of 2014)

.. Respondent/Complainant

Prayer: Criminal Appeal preferred under Section 374(2) CrPC
against the Judgment dated 11.10.2017 made in Spl.C.C.No.11 of
2015 on the file of the Fast Track Mahila Court, Namakkal.

For Appellant : Mr.V.Karthick, Senior Counsel
for Mr.A.E.Ravichandran.

For Respondent : Mr.R.Prathapkumar,
Additional Public Prosecutor.

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M.SATHYANARAYANAN, J.

The sole accused in S.C.No.11 of 2015 on the file of the
Fast Track Mahila Court, Namakkal is the appellant herein and he
stood charged, tried and convicted, vide impugned judgment dated
11.10.2017, as under:

Accused Rank	Conviction Under Sections	Sentence of Imprisonment
Sole Accused	354 I.P.C.	1 year Rigorous Imprisonment
	506(i) I.P.C.	1 year Rigorous Imprisonment
	376(2)(f) I.P.C.	Life Imprisonment with a fine of Rs.10,000/- in default to undergo 6 months rigorous imprisonment.
	4 r/w. 2(a) of the Tamil Nadu (Prohibition of Harassment) of Women Act, 1988	2 years Rigorous Imprisonment with a fine of Rs.10,000/- in default to undergo 6 months rigorous imprisonment
	6 r/w. 5(n) of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act]	Life Imprisonment with a fine of Rs.10,000/- in default to undergo 6 months rigorous imprisonment
	10 r/w. 9(n) of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act]	6 years Rigorous imprisonment with a fine of Rs.5,000/- in default to undergo 3 months rigorous imprisonment.

The sentences were ordered to run consecutively. The sole accused/appellant, aggrieved by the conviction and sentence awarded by the Trial Court, vide impugned judgment dated 11.10.2017, has filed this Criminal Appeal.

2. Facts leading to the filing of this appeal, briefly narrated, are as follows:

2.1. The appellant is the husband of PW1 and father of the victim girl and DW4. The deceased / female child born to the appellant/accused and PW1 was aged about 14 years. After marriage, PW1 and her brother-in-law, namely Dr.Boopathy along with the appellant/accused were residing in the same premises. Dr.Boopathy/brother of the appellant/accused started misbehaving with PW1 and a panchayat was also convened in the presence of one Sadasivam and thereafter, PW1 and her husband/appellant/accused had set up a separate residence. The appellant/accused was running a medical store near the nursing home run by his brother / Dr.Boopathy. The deceased / female child was born out of the wedlock between the appellant/accused

and PW1 on 29.10.1999 and DW4 was born during 2006.

2.2. In the year 2009, the appellant/accused got job as a teacher and therefore, PW1 started looking after the affairs relating to the medical shop and as and when PW1 takes the prescription to the brother of the accused/Dr.Boopathy, he misbehaved indecently and though the said fact was told by PW1 to her husband/appellant/accused, he replied it by saying that his brother won't misbehave in that manner.

2.3. On 17.04.2014 at about 18.30 hours, PW1 was weeping, thinking about the act of misbehaviour on the part of her brother-in-law, namely Dr.Boopathy and the victim girl asked about the same and she also narrated the incident to her daughter. At that time, victim girl told that the appellant, who happens to be her father, also misbehaved with her in the same way and also narrated the said happenings and according to the victim girl, those kind of illegal acts by the accused were going on for the past 5 years and the appellant also threatened her that he would kill her and her mother, if she reveals the same to somebody and that is why, she kept quiet.

2.4. PW1 contacted the accused over phone and he threatened her with dire consequences. PW1 also informed the same to her brother-in-law Dr.Boopathy, who told that there was nothing wrong in it. On the next day on 18.04.2014, PW1 along with her father / PW2 went to see Dr.Boopathy and he abused PW2. The said fact was informed by PW1 to her brother and sister and at about 7.00 p.m. on the same day, the brother and sister of PW1 as well as PW2 went to the house of the appellant/accused and when PW2 asked about the illegal and indecent acts, the appellant/accused admitted his guilt and prayed for pardon / leniency. At about 7.30 p.m. on the same day, Dr.Boopathy came there and he told that, only at his instance, his brother/accused was doing like that and there was some wordy altercation and as a result, PW2 slapped Dr.Boopathy. Immediately, Dr.Boopathy lodged a complaint in that regard to the Velagoundampatti Police Station and when police came, it was informed that since it was a family dispute, it will be resolved amicably.

2.5. The victim girl was admitted in the hostel and within a month, she came back on the pretext that hostel studies are not suitable. Once again, the appellant/accused started misbehaving with the victim girl and when PW1 resisted the same, the appellant/accused threatened that he would initiate divorce proceedings. PW1 left the matrimonial home on 08.07.2014 and went to her parental home and on the same day, she received a notice for divorce issued on behalf of the appellant/accused.

2.6. On 09.07.2014, PW1 lodged a complaint with regard to the indecent/illegal act done by the appellant on his own daughter/victim girl on the file of Velagoundampatti Police Station, but it was refused to be received. Thereafter, she went to the Deputy Superintendent of Police, Vellore and lodged a complaint, who in-turn asked her to lodge the complaint to Velagoundampatti Police Station. On 10.07.2014, based on the complaint given by PW1 under Ex.P1, an F.I.R was registered on the file of Velagoundampatti Police Station. The relatives of PW1, who were examined as witnesses, also became aware of the said acts on the part of the appellant/accused. After obtaining the Birth Certificate of the victim girl, she was produced before PW13 / Doctor for medical examination. The appellant/accused was produced before PW13 on 22.07.2014 and he has given a certificate, marked as Ex.P5, stating that the accused is not impotent.

2.7. On 19.07.2014, the victim girl was produced before PW14-Doctor for medical examination and she has given a certificate under Ex.P6 opining that the victim is not virgin, as the hymen is absent and she was found not pregnant after medical examination. The victim girl was produced before PW15 - Judicial Magistrate, Namakkal for recording of statement under Section 164 CrPC and accordingly, her statement was recorded, which was marked as Ex.P8.

2.8. PW16- Sub Inspector of Police, on 10.07.2014 at about 10.30 a.m., received the complaint from PW1 and registered a case in Crime No.122 of 2014 for the commission of offences under Sections 4 r/w. 3, 8 r/w.7 and 12 r/w.11 of POCSO Act, 2012 as well as Section 506(ii) I.P.C. The printed F.I.R. was marked as Ex.P9.

2.9. PW17 was the Inspector of Police, All Women Police Station, Vellore and as per the proceedings of the Deputy Superintendent of Police, Vellore, she took up the investigation in Crime No.122 of 2014 and proceeded to the scene of occurrence and recorded the statements of PWs.2 and 3 and prepared the Observation Mahazar, marked as Ex.P10 and also made a request under Ex.P11 for medical examination of the victim girl.

2.10. On 11.07.2014, PW17 took steps to record statement under Section 164 CrPC from the victim girl and on 12.07.2014 at 17.30 hours, effected arrest of the appellant/accused and he was sent for judicial custody. PW17, after obtaining necessary permission, took steps for medical examination of the appellant/accused and also recorded the statement of PW13/Doctor. On 07.08.2014, PW17 had examined PWs.4 and 5 and on 11.08.2014, recorded the statement of PWs.6 and 7 and on 19.08.2014, she had examined the Executive Officer of the

Kodumudi Town Panchayat and got the medical certificate of the victim girl, marked as Ex.D4 and also recorded his statement. On 06.09.2014, near the medical shop of the appellant/accused, PW17 had examined PWs.8 and 9 and the neighbours of PW1, namely PWs.10 and 11 and recorded their statements. On completion of investigation, PW17 filed the first final report on 17.09.2014, charge sheeting the accused for the commission of offences under Sections 4 r/w.3, 8 r/w.7, 12 r/w.11 of the Tamil Nadu (Prohibition of Harassment) of Women Act, 1988 and Section 354 I.P.C. and Section 4 r/w. 2(a) of Tamil Nadu (Prohibition of Harassment) of Women Act, 1988 and 506(i) I.P.C. and subsequently altered the Sections to 376(2)(f) of the I.P.C. and Section 10 r/w. 9 and Section 6 r/w. 5 of POCSO Act and the Alteration Report was marked as Ex.P12.

2.11. The Final Report was taken on file by the Trial Court in Special C.C.No.11 of 2015 and after summoning the accused and furnishing him copies of documents under Section 207 CrPC, framed charges under Sections 354 and 506(ii) I.P.C., Section 4 r/w. 2(a) of the Tamil Nadu (Prohibition of Harassment) of Women Act, 1988, Section 376(2)(f) I.P.C., Section 6 r/w. 5(n) and Section 10 r/w. 9(n) of POCSO Act, 2012 and questioned the accused. The appellant/accused pleaded guilty to the charges framed against him.

2.12. The prosecution, in order to support of it's case, examined PWs.1 to 17, marked Exs.P1 to P12. On behalf of the accused, Dws.1 to 4 were examined and marked Exs.D1 to D10. When the accused was questioned under Section 313(1)(b) CrPC with regard to the incriminating circumstances made out against him, he denied it as false.

2.13. The Trial Court, on consideration of oral and documentary evidences, convicted and sentenced the appellant/accused as stated above and challenging the legality of the same, the present appeal is filed.

3. Mr.V.Karthick, learned Senior Counsel assisted by Mr.A.E.Ravichandran, learned counsel appearing for the appellant made the following submissions:

(i) PW1 had made very many improvements in the statement recorded under Section 161(3) CrPC from that of Ex.P1 and therefore, the origin and genesis of the occurrence is highly doubtful.

(ii) The victim girl died on 15.07.2016 and therefore, the statement recorded from her under Section 164 CrPC, marked as Ex.P8, was of no use to the prosecution.

(iii) A separate complaint was also lodged for the alleged harassment given by Dr.Boopathy - brother of the accused to PW1 and the said case, after investigation, has culminated into a Charge Sheet, which came to be renumbered in C.C.No.8 of 2018, on the file of the Mahila Court No.II, Namakkal and Crl.O.P.No.15201 of 2018 has been filed for stay of further proceedings and an order of interim stay was granted by this Court on 11.06.2018.

(iv) The Trial Court has not properly appreciated the testimonies of defence witnesses as well as defence documents including that of DW4/daughter of PW1 and the appellant/accused and recorded a finding of guilt on mere surmises and conjectures, overlooking the fact that the prosecution has failed to produce any tenable evidence connecting the appellant with the commission of crime.

(v) The only evidence available is that of PW1 and she had made very many improvements during the course of her testimony, contrary to her complaint.

(vi) The people of the locality also agitated opposing the arrest of the appellant/accused and DW3 has also spoken about the said fact certifying the character and conduct of the appellant/accused and at the earliest point of time, PW1 has failed to lodge any complaint as to the alleged indecent/inappropriate behaviour on the part of her brother-in-law and only after filing of the petition for divorce by the appellant/accused under Ex.D5, the present complaint under Ex.P1 came to be lodged.

In sum and substance, it is the submission of the learned Senior Counsel appearing for the appellant that in the light of very many inconsistencies in the case projected by the prosecution, which goes into the root of the prosecution case, the Trial Court ought to have awarded benefit of doubt and acquitted the accused and therefore, prays for allowing of this Criminal Appeal.

4. Per contra, Mr.R.Prathapkumar, learned Additional Public Prosecutor appearing for the State would submit that the testimony of PW1 has been amply corroborated by the statement of the victim girl recorded under Section 164 CrPC, marked as Ex.P8 coupled with the medical report of the victim girl, marked as Ex.P6. It is the further submission of the learned Additional Public Prosecutor that insofar as the evidence rendered by the

defence is concerned, in the light of the fact that DW4 was under the care and custody of the appellant/accused, she was tutored to give evidence and also drawn the attention of this Court to the cross examination of DW4. It is also brought to the knowledge of this Court by the learned Additional Public Prosecutor that as regards inappropriate and indecent behaviour on the part of Dr.Boopathy / brother of the appellant, a separate case is pending in C.C.No.8 of 2018 and the victim girl died on 15.07.2016, for which also a case has been registered and Dr.Boopathy as well as the appellant are facing trial in S.C.No.150/2018 on the file of the Mahila Court, Namakkal.

5. The learned Additional Public Prosecutor would also submit that the statement recorded under Section 164 CrPC from the victim girl was obtained on 15.07.2014 and she died within two years and as such, the said statement can also be taken as one of the important circumstance to connect the appellant with the heinous crime and would further add that the Trial Court, on a thorough and careful consideration of the entire evidence made available before it, had rightly convicted the appellant and sentenced him accordingly and hence, prays for dismissal of this Criminal Appeal. The learned Additional Public Prosecutor, in support of his submissions, has placed reliance upon the decision in State of Karnataka v. Mahabaleshwar Gourya Naik [AIR 1992 SC 2043 : 1991 CrLJ 3786] and an order of the learned Single Judge of the High Court of Jammu and Kashmir at Srinagar dated 11.12.2015 made in Cr.Rev.No.07 of 2013 [Ms.T.Sakeena v. Mohammad Hussain Sheikh and another].

6. This Court paid its best attention and anxious consideration to the rival submissions and also perused the entire materials placed before it.

7. The sole question arises for consideration is whether the prosecution, with the evidence made available before the Trial Court, has proved it's case beyond any reasonable doubt and whether the impugned judgment warrants interference?

8. Ex.P1 / complaint was given by PW1 to the Deputy Superintendent of Police, Vellore Sub-Division, Namakkal District and the contents of the same would disclose among other things as to the fact of the victim girl complaining about the behaviour of her father/appellant and the disclose made by the victim girl as to the physical abuse at the hands of the appellant/accused has been disclosed. PW1- wife of the appellant/accused and mother of the victim girl was examined and her evidence in the chief examination is in consonance with Ex.P1/complaint. In the cross examination, PW1 would depose that divorce proceedings initiated against her by the appellant/accused is still pending and she received summons on

08.07.2014 indicating the date of first hearing on 04.08.2014 and on 09.07.2014, she lodged a complaint under Ex.P1.

9. It is also to be noted at this juncture that as per Ex.D2 dated 26.08.2014, PW1 gave a representation to the Child Welfare Committee, Namakkal as to the sexual harassment given by her husband/appellant to his own daughter and his incarceration in connection with the said case and she wants the custody of her younger daughter/DW4. Under Ex.D4 dated 12.08.2014, the Child Welfare Committee, Namakkal has forwarded the PW1's representation to its President stating among other things as to the statement given by DW4/younger daughter of the appellant and PW1 as to the affair of her mother with somebody else and her disinclination to go with her mother.

10. PW1 in her cross examination would further depose that she had filed a petition in M.C.No.3 of 2015 against the appellant/husband and also G.W.O.P.No.144 of 2015 on the file of the Principal Sessions Court, Namakkal for getting the custody of her younger daughter/DW4 and denied the suggestion that the alleged incidents said to have taken place on 17.04.2014 and 18.04.2014 are false and concocted.

11. It is very pertinent to point out at this juncture that under Ex.D6 dated 10.07.2014, only after receipt of summons in the divorce proceedings, marked as Ex.D5, Ex.P1/complaint came to be lodged by PW1. A perusal of Ex.D5 would disclose about the alleged illicit behaviour between PW1 and one Karthikeyan and alleged love affair between the victim girl and one auto driver Vijayakumar. As already noted, PW1 has received summons in the said case on 08.07.2014 and on the next day, she lodged the complaint on 09.07.2014.

12. Ex.D6 is the complaint given by PW1 to the All Women Police Station, Paramathi as to the harassment meted out to her and it is dated 06.06.2014 and if really the victim girl narrated about the indecent behaviour and physical abuse on the part of her father, which was disclosed by her to PW1 on 17.04.2014, Ex.D6 would have contained the same and admittedly, the said fact has not been stated in the complaint.

13. PW1 is the wife of the appellant/accused and mother of the victim girl and DW4, being minor Sri Varshini and in the chief examination, she has spoken about the arranged marriage between her and the appellant and the physical harassment meted out by her from her brother-in-law, Dr.Boopathy. PW1 has also spoken about the said indecent act on the part of Dr.Boopathy at 6.30 p.m. on 17.04.2014 and told the same to her elder daughter / victim girl, who in-turn informed PW1 as to the

physical abuse meted out by her at the hands of his own father / appellant on 17.04.2014 as well as similar acts of physical abuse for the past 5 years prior to 2014. PW1 further deposed that she has questioned the appellant/accused as to the said act and he threatened that he would kill her as well as the victim girl and the said fact was also informed by PW1 to her parents. PW2/father of PW1 also came and he was verbally abused by her brother-in-law and sometime thereafter, her husband came and tendered apology as to the said act and promised that he will not do the said fact. Dr.Boopathy once again abused her father and also slapped him and neighbours intervened and sorted out the issue and as per the arrangement, the victim girl was admitted in hostel and within one month, she came back on the pretext that hostel studies is not suitable for her and once again, the appellant/accused disturbed her physically on 07.07.2014.

14. In the cross examination, PW1 would depose that she is a B.Com. Graduate and in the year 2018, her husband got job as a Teacher in Government High School and would admit that her husband/appellant/accused has instituted divorce proceedings on the file of the Sub-Court, Namakkal and he acknowledged the receipt of summons of 08.07.2014, fixing the first date of hearing on 04.08.2014 and on 09.07.2014, she went to Velagoundampatti Police Station and lodged the complaint. PW1 would further depose that she has also instituted maintenance proceedings in M.C.No.3/2015 on the file of the Court of Judicial Magistrate, Namakkal and also filed GWOP.No.144/2015 on the file of the Principal District Court, Namakkal seeking custody of her younger daughter/DW4 and the same is pending and the Child Welfare Committee, Namakkal District also caused enquiry on 24.07.2014. PW1 denied the suggestion that she did not state anything about the misbehaviour on the part of her brother-in-law upon her in Ex.P1/complaint and she further denied the suggestion that the alleged incidents on 17.04.2014 and 18.04.2014 are false and concocted and she would further depose that she has lodged a complaint against her brother-in-law Dr.Boopathy, her husband/appellant, Vennila, Parvathi, Dravidamani and Munivel, who are cousin brothers of the appellant/accused.

15. PW2 is the father of PW1 and maternal grandfather of the victim girl and DW4 and she has spoken about the physical abused meted out by her from her brother-in-law and as to the physical abuse made by him upon his own daughter and as to the act of slapping PW2 by Dr.Boopathy. In the cross-examination, PW2 denied the suggestion as to the happenings on 18.04.2014.

16. PW3 is the elder brother of PW1 and son of PW2 and he was examined to corroborate the version of PW2 and he denied the

suggestion that since his brother-in-law has initiated divorce proceedings in order to wreck vengeance, he is deposing falsely.

17. PW4 is the younger brother of PW1 and PW3 and son of PW2 and he deposed on similar lines as that of PW3.

18. PW5 is the younger sister of PW1 and she was examined to corroborate the version of PW2 and also physical abuse meted out by her sister from her brother-in-law Dr.Boopathy and in the cross-examination, she would depose that her uncle/appellant, after coming out of incarceration for three months in connection with this case, had murdered the victim girl.

19. PW6 is the neighbour of PW1 and she was examined as an independent witness to corroborate the version of PWs.2 to 5 and she had turned hostile and so also PWs.7 to 11.

20. PW12 was the Executive Officer of Kodumudi Town Panchayat and he issued the Birth Extract of the deceased victim girl, which was marked as Ex.P4.

21. PW13 was the Doctor, who examined the appellant/accused and he certified under Ex.P5 that the appellant/accused was potent.

22. PW14 was the Doctor attached to the Government Headquarters Hospital, Namakkal who had examined the victim girl and she would depose that vaginal orifice of the victim girl admits two fingers and there is evidence regarding sexual abuse and she is not pregnant. In the cross examination, PW14 would depose that the victim girl was examined 85 days after sexual assault and she was accompanied by her mother/PW1 and the victim girl informed that there was attempts made to rape her and on examination found that her hymen was absent and her vaginal orifice admits two fingers on account of physical abuse on the part of accused.

23. PW15 was the Judicial Magistrate, Namakkal, who recorded the 164 CrPC statement of the victim girl, which was marked as Ex.P8 and in the cross examination, he would depose that the victim girl did not state that on compulsion of her mother, she gave the statement.

24. PW16 was the Sub-Inspector of Police attached to Velagoundampatti Police Station and she registered the F.I.R. on the basis of the complaint/Ex.P1 given by PW1 and the said F.I.R. was marked as Ex.P9. In the cross examination, she would depose that when the complaint/Ex.P1 was given, the victim girl was also present and she did not record her statement and she did not mention in the F.I.R. that the victim girl accompanied

with her mother.

25. PW17 was the Investigating Officer and in the cross examination, she would depose that PW1 was further examined and her 161(3) CrPC statement was recorded and it was not written in her own handwriting and it was received by the Court on 13.11.2014 and the first statement of PW1 had reached the Court on 14.07.2014. PW17 was also questioned as to whether she seized the cellphone of PW1 and she replied it by stating that she did not conduct investigation as to the call details of the cellphone possessed by PW1 and she did not aware that PW1 was possessing two cellphones and she did not conduct investigation as to the call details in respect of the cellphone possessed by the appellant/accused. PW17 would further depose that the fact of the appellant/accused instituting divorce proceedings against PW1 did not come out in the investigation and as to the arrest of the appellant/accused, there were public agitations and she would further depose that in the investigation, the alleged relationship between the victim girl and one auto driver Vijayakumar did not come to light.

26. On behalf of the appellant/accused, four witnesses were examined including DW4, who is the younger daughter of PW1 and the appellant/accused. DW1 was the President of the Child Welfare Committee, Namakkal District and based on the petition submitted, she had examined the victim girl on 19.08.2014 and also examined the close relatives of the victim girl and DW4. she had examined DW4 also and at that time, DW4 had expressed her willingness to go with her father and it was marked as Ex.D1. DW4 also stated that the behaviour of her mother was not to her liking and she used to beat her and as such, she is not willing to go with her and also identified the photo of DW4 in Ex.D3/photograph. In the cross examination, DW1 deposed that DW4, in her statement, did not state anything about the bad conduct of her mother/PW1 and in the last page of Ex.D4, the signature of the person who has written was not found and in the statement recorded on 30.04.2014, DW4 did not sign.

27. DW2 was the Sub-Inspector of Police attached to All Women Police Station, Vellore, Namakkal District and she has spoken about the earlier complaint given by PW1 on 08.06.2014 and also the subsequent compromise and the complaint given by PW1 under Ex.D6 and the receipt Ex.D7 and the result of the enquiry, marked as Ex.D8. In the cross examination, DW2 would state that in the complaint given by PW1, marked as Ex.D6, it was stated that the victim girl was in the custody of PW1 and the younger/daughter DW4 was in the custody of the appellant and access to see her has been denied.

28. DW3 was one of the persons who participated in the agitation, aggrieved by the arrest of the appellant in connection with the present case and in the cross examination, he would depose that the appellant/accused is a good teacher and denied the suggestion that on account of his acquaintance, he is deposing falsely.

29. DW4 is the daughter of PW1 and the appellant and the Court had put questions as to the understanding and mental capability to get through the oral examination and after ascertaining the same, examined her in chief. In the chief examination, DW4 would state that only for the past 3 years, she is in the custody of her father/appellant and there used to be frequent quarrel between the appellant/father and PW1/mother and the same had happened on account of the illicit relationship of her mother with one Karthikeyan and would further add that Karthikeyan used to take her and PW1 to various places and even on one occasion, he brought wine to home and she videographed the same, but it was deleted by her sister.

30. DW4 would further depose that her elder sister was in love with one Vijay Kumar and she has also seen her sister in the company of Vijay Kumar and he used to contact her sister frequently over phone and PW1 became aware of the same and questioned her sister, who replied that she is in love with Vijay Kumar and the appellant also questioned the same and he advised that now she is in the age of studying and her sister promised that she will not do so. In the cross examination, DW4 would depose that since she is in the care and custody of her father for the past 3 years, she used to listen to her father's advise and denied the suggestion that she was tutored to give evidence in the Court. DW4 further admitted that she did not state to her father about the fact of her sister loving Vijay Kumar and after problem arose, she has informed the same to her father and denied the suggestion that she is deposing falsely. DW4 further denied the suggestion that her elder sister was having a cellphone and did not inform the conversion of her sister and the alleged enquiry pertains to the dispute between her father and mother.

31. This Court has already recorded a finding that Ex.P1/complaint was given by PW1 only after receipt of summons in respect of divorce proceedings initiated by her husband and on the very next day, he lodged the complaint on 09.07.2014. The Trial Court has recorded a finding that belated filing of complaint on the part of PW1 and in the light of the conduct exhibited by the appellant against her own father can be condoned and it cannot be said that Ex.P1/complaint came to be given with a motive to wreak vengeance for initiation of divorce proceedings by her husband. The Trial Court has taken into

consideration the oral evidence of the father, brothers and sister of PW1, who are examined as PWs.2 to 5 and despite the fact that neighbours/independent witnesses, namely PWs.6 to 9 had turned hostile, it did not affect the credibility of the prosecution case.

32. The Trial Court has also taken into consideration the testimony of PW14/Doctor who examined the victim girl and placed heavy reliance upon the statement of the victim girl recorded under Section 164 CrPC, marked as Ex.P8 to give the finding of guilt on the part of the appellant/accused. The Trial Court has also taken into consideration the fact that with regard to the alleged murder of the victim girl, the Death Certificate certifying her death on 15.07.2016 was also produced on 03.10.2016, but did not go into the question whether she was murdered or not and further taken into consideration of the fact the complaint given by PW1 as to the physical abuse given by her brother-in-law/Dr.Boopathy and subsequent registration of a separate case. The Trial Court has also rejected the testimony of DW4 and found the appellant/guilty and convicted and sentenced him.

33. This Court, while dealing with Ex.P1/complaint given by PW1, has noted that the divorce proceedings initiated by her husband under D5 coupled with the admission on the part of PW1 that she has received summons in connection with the divorce proceedings on 08.07.2014, fixing the first date of hearing on 04.08.2014 and on the next day she lodged a complaint under Ex.P1, which resulted in registration of the present case.

34. It is very pertinent to point of at this juncture that on 17.04.2014, PW1 was in-charge of the medical shop run by the appellant and when she took the prescription slip to her brother-in-law seeking certain clarification, he misbehaved with her and the said fact was also told by PW1 to her elder daughter/victim girl, who has also informed about the physical abuse meted out by her from her own father / appellant on the same day on 17.04.2014 and commission of similar acts all along 5 years prior to the said date.

35. Ex.D2 is the petition given by PW1 to the Child Welfare Committee, Namakkal, seeking custody of her younger daughter/DW4 and the said petition is dated 26.08.2014 and it came into existence after the alleged incident on 17.04.2014 and in the said petition, nothing has been stated about the alleged physical abuse by the appellant/accused against her own daughter. The Child Welfare Committee, Namakkal, in the proceedings marked as Ex.D4 series, has recorded the statement

of DW4 as to her willingness to stay with her father for the reason that her mother has relationship with one stranger.

36. The very crucial document is Ex.D5 dated 24.06.2014, namely the divorce proceedings initiated by the appellant/accused against PW1 in H.M.O.P.No.141 of 2014 on the file of the Sub-Court, Namakkal and the contents of the same would disclose the allegations made by the appellant/accused against his wife and with regard to her relationship with one Karthikeyan and also spoiling the career of her elder daughter and by permitting her to have relationship with one auto driver Vijay Kumar and the warnings given by him to her elder daughter. The said fact was also corroborated by DW4 in her oral testimony.

37. As already pointed out, summons relating to divorce proceedings was received by PW1 on 08.07.2014 and on the next day, she lodged the complaint under Ex.P1 on 09.07.2014. Ex.D9 dated 10.07.2014 is with regard to arrest of the appellant in connection with the present case and there was road roco and agitations and in the regard, an F.I.R. in Crime No.141/2014 dated 13.08.2014 under Ex.D9 was registered for the alleged commission of offences under Sections 147, 341, 185, 149 I.P.C. r/w/ Section 7(1) of the Criminal Law Amendment Act, 1932 and the charge sheet filed in the said case and DW3, who was one of the accused in the said case, has spoken about the said fact.

38. The Trial Court has placed heavy reliance upon the testimony of PW14/Doctor, who examined the victim girl and Ex.P6 given by her and the statement recorded under Section 164 CrPC from the victim girl by PW15/Judicial Magistrate, Namakkal, marked as Ex.P8. It is also the version of PWs.4 and 5 that the victim girl was murdered by her own father/appellant/accused. In the light of the said development, the victim girl could not be examined.

39. This Court is also incidentally called upon to decide what is the veracity of the 164 CrPC statement of the victim girl given to PW15/Judicial Magistrate No.II, Namakkal.

40. In Ram Kishan Singh v. Harmit Kaur and Another [(1972) 3 SCC 280], uses of the statement recorded under Section 164 CrPC came up for consideration and it was held in Paragraph No.8 of the said decision that "A statement under Section 164 of the Code of Criminal Procedure is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness."

41. In State of Karnataka v. Mahabaleshwar Gourya Naik [AIR 1992 SC 2043], the issue arose for consideration is as to

the non-availability of the victim of rape for examination and in paragraph No.15 it was observed that "merely because a victim is dead and consequently could not be examined can never be a ground to acquit an accused, if there is evidence otherwise available proving the criminal act of the accused concerned."

42. In Cr.Rev.No.07 of 2013 dated 11.12.2015, rendered by a Single Bench of the High Court of Jammu and Kashmir at Srinagar, the scope of the statement recorded under Section 164 CrPC from the witnesses came up for consideration and so also the dying declaration given by the victim girl, who survived the attack. In paragraph No.22 of the said decision, it was held that "... statements under Section 164 or 164-A Cr.P.C. would fall within purview of Section 157, Evidence Act. The statement of witness recorded under Section 164/164-A Cr.P.C. can, therefore, be proved under Section 157, Evidence Act, to corroborate testimony of witness and proceeded to hold that the statement of 164 CrPC can be proved by examining the concerned Judicial Magistrate and further held that merely because a victim is dead and consequently could not be examined can never be a ground to acquit an accused if there is evidence otherwise available proving the criminal act of the accused concerned."

43. In Arjun Biswas v. State of Assam [2005 CRI.L.J. 554], a Division Bench of Gauhati High Court has considered the scope of the statement of the witnesses recorded under Section 164 CrPC and held as follows:

"A witness's statement made under S.164 Cr.P.C. cannot be treated as relevant and admissible under S.33 of the Evidence Act if the witness, whose statement has been so recorded, does not appear or whose presence cannot be procured by the Court and/or kept out of the Court by adverse party. One of the prime requisites for making a statement admissible in evidence by taking recourse to S.33 of the Evidence Act is that the adversary must have had a right and opportunity to cross-examine the witness, whose statement is sought to be admitted into evidence. During the course of investigation, when the statement of a witness is recorded under S.164 Cr.P.C. the accused neither has any right nor is he given opportunity to cross-examine such a witness. For non-fulfillment of the condition precedent alone, it is sufficient to hold that a statement of a witness recorded under S.164 Cr.P.C. is not a statement which can be admitted into evidence at the trial under S.33 of the Evidence Act."

44. In R.Shaji v. State of Kerala [AIR 2013 SC 651], the Hon'ble Supreme Court has considered the object behind recording the statement under Section 164 CrPC and in paragraph No.16, it

was observed as follows:

"16. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C., can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or event to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC., such statements cannot be treated as substantive evidence."

In the case on hand, the victim girl died before the commencement of the trial, for which a separate case has been registered and it is pending trial.

45. It is an admitted fact that in the divorce proceedings instituted by her husband in H.M.O.P.No.141 of 2014 on the file of the Sub-Court, Namakkal, marked as Ex.D5 24.06.2014 wherein a specific allegation has been made as to the alleged illicit relationship between PW1 and one Karthikeyan and the love affair between the victim girl and one auto driver Vijay Kumar and the same was also corroborated by the testimony of DW4-younger daughter of PW1 and the appellant. PW1 also admitted the receipt of summons in divorce proceedings instituted by her husband dated 08.07.2014 and on the next day on 09.07.2014, she lodged the complaint under Ex.P1, which resulted in registration of the case. The testimonies of PWs.2 to 5 at best supported the case of the prosecution and the alleged physical abuse by the brother-in-law of PW1 on PW1 and her father and her testimony, no way advance the case as to the alleged physical abuse by the appellant/accused.

46. The testimonies of defence witness coupled with the proceedings of the Child Welfare Committee, Namakkal, marked as Ex.D6 and the earlier case registered by the All Women Police Station, Vellore, Namakkal District, marked as Exs.D7 and D8 would disclose the said fact and the complaint came into being after the alleged happenings on 17.04.2014 which include the physical abuse upon her own daughter, have not been stated at all. The Child Welfare Committee after recording the statement of DW4, had passed the order entrusting the custody of DW4 to the appellant/accused.

47. The testimony of the Doctor/PW14 coupled with the certificate given by her under Ex.P6 would disclose that the victim girl is not virgin, as the hymen is absent and she might have had penetrable sequences. A perusal of Ex.P8/ statement given by the victim girl under Section 164 CrPC to PW15 would also disclose about the physical abuse upon her by her father and unfortunately she is no more. It is brought to the knowledge of this Court that with regard to the alleged death of

the victim girl, a separate case has been registered and the same is pending trial and however, this Court is not inclined to go into the merits or otherwise of the said case for the reason that the Trial Court also did not want to go in the same.

48. In the light of the settled position of law that the statement recorded under Section 164 CrPC is not a substantive evidence and therefore, it cannot be treated as relevant especially for the reason that it is open to the accused to confront the said witness by putting questions in cross examination.

49. The Division Bench of Gauhati High Court, in the decision in Arjun Biswas v. State of Assam [2005 CRI.L.J. 554], after considering the earlier decisions, has also laid down the proposition that if the accused is not given opportunity to cross-examine the said witness, then the statement of witnesses recorded under Section 164 CrPC is not a related statement, which can be admitted into evidence at the trial under Section 33 of the Evidence Act.

50. It is an unfortunate case where the victim girl, who said to have suffered physical abuse at the hands of her own father, was not alive and not told the ordeal of sufferings undergone by her as a witness; but the fact remains that the appellant/accused has been denied opportunity to test the veracity of the said statement in the form of cross-examination. The other witnesses let in by the prosecution did not lend support for the purpose of proving the criminal acts on the part of the appellant/accused and as a consequence, the appellant/accused is entitled to the benefit of doubt.

51. In the result, this Criminal Appeal is allowed and the conviction awarded and sentence imposed on the appellant, vide impugned judgment dated 11.10.2017 made in Spl.C.C.No.11 of 2015 passed by the Fast Track Mahila Judge, Namakkal., is set aside and the appellant/accused is acquitted of the charges and he is set at liberty forthwith, unless his presence/custody is required in connection with any other case/proceedings. Fine amount, if any, paid by the appellant/accused shall be refunded to him. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-VI)

//True copy//

Sub Assistant Registrar

jvm

To

1.The Session Judge,
Fast Track Mahila Judge,
Namakkal.

2. -do-Principal Sessions Judge, Namakkal.

3. The Superintendent,
Central Prison,
Tiruchirappalli

4.The Inspector of Police,
Velagoundanpatti Police Station,
Namakkal District.

5. The District Collector,
Namakkal District.

6. The Director General of Police,
Mylapore, Chennai.

7.The Public Prosecutor,
Madras High Court, Chennai.

Copy To:

The Section Officer, Criminal Section, High Court, Madras

+2cc to Mr.AE.Ravichandran, Advocate SR.No.42808

Criminal Appeal No.716 of 2017

GI (CO)
GMY (18/06/2019)

सत्यमेव जयते

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