

**Bail Slip**

Appellant/Sole Accused, namely, Pathamuthu S/o, Nanthavana Nadar was directed to be released on bail in and by the order of this court dated 17.08.2017 made in CrI M.P(MD).No.6509/2017 in CrI A(MD).No.274/2017.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 12.07.2019

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

AND

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Criminal Appeal (MD)No.274 of 2017

Pathamuthu

... Appellant/Sole Accused

Vs.

The State,
represented by
The Inspector of Police,
Mamsapuram Police Station,
Virudhunagar District.
[Cr.No.364 of 2006]

... Respondent/Complainant

Prayer : Appeal filed under Section 374(2) of the Code of Criminal Procedure, against the judgment and conviction dated 17.12.2015, by the learned Sessions Judge, Fast Track Mahalir Neethimandram, Virudhunagar District at Srivilliputhur in S.C.No.10 of 2008.

For Appellant : Mr.M.Karunanithi
for Mr.D.Rameshkumar

For Respondent : Mr.S.Chandrasekar
Additional Public Prosecutor

* * * * *

JUDGMENT

(Judgment of the Court was delivered by **M. SATHYANARAYANAN, J.**)

The sole accused in S.C.No.10 of 2008, on the file of the Court of Sessions Judge, Fast Track Mahalir Court, Virudhunagar District at Srivilliputhur, is the appellant. The appellant/accused stood charged and tried for the commission of the offences under Sections 376 r/w 511 I.P.C. and Section 4 of the Protection of Child from Sexual Offences Act, 2012 (POCSO



2. The trial Court, vide impugned judgment dated 17.12.2015, has found him guilty for the commission of offences under Sections 376 r/w 511 I.P.C., and imposed him with the sentence to undergo life imprisonment and to pay a fine of Rs.25,000/-, in default to undergo one year simple imprisonment. The trial Court acquitted the appellant/accused for the commission of offence under Section 4 of the Protection of Child from Sexual Offences Act, 2012 and the appellant/accused, aggrieved by the said conviction and sentence awarded by the trial Court, has filed this Criminal Appeal. The State did not prefer any Criminal Appeal for acquittal of the appellant/accused under Section 4 of the Protection of Child from Sexual Offences Act, 2012.

3. The facts leading to the present appeal, relevant for the purpose of disposal, briefly narrated, are as follows:

3.1. The victim girl - P.W.2 was aged about 9 years and the appellant/accused is the neighbour and the family of the victim girl and the appellant are in inimical terms. The victim girl-P.W.2 was studying 4th standard. On 08.10.2006 at about 01.00 p.m., the parents of P.W.2, went for a job and she along with other children were played and at that juncture, the appellant/accused called her inside the house and when she went into house, he locked the door from inside and thereafter, removed the garments and asked her to lay down and thereafter, committed the sexual assault, including the oral sex. P.W.2, came out of the house and vomiting and left and also informed the said fact to her sister - P.W.3. P.W.2 also identified the appellant/accused to her sister viz., P.W.3 and on seeing both of them, he ran away. P.W.3 washed the inner garments of P.W.2 and their parents returned to home at about 06.00 p.m. on that day and found P.W.2 and P.W.3 were weeping and they asked about the details and they narrated the incident. After thinking for some time, they have decided to lodge a complaint and accordingly proceeded to the Mamsapuram Police Station and lodged a complaint under Ex.P.1, to P.W.12, at about 11.00a.m..

3.2. P.W.12, upon receipt of the complaint given by P.W.1, under Ex.P.1, has registered a case in Cr.No.364 of 2006, under Sections 376 and 511 I.P.C. The printed F.I.R., is marked as Ex.P.1. P.W.12 proceeded to the house of the accused at about 11.45 a.m. on 09.10.2006 and in the presence of P.W.6, prepared observation mahazar, marked as Ex.P.2 and also rough sketch, marked as Ex.P.10. P.W.12 had examined the father of the victim girl - P.W.1, P.W. 3 - sister of P.W.2 and the daughter of P.W.1 and P.W.4 - mother of P.W.2 and P.W.3 and the wife of P.W.1 and recorded their statements under Section 161(3) Cr.P.C. On 09.06.2006, at about 11.00 a.m., in the presence of P.W.6 and <https://hse.mca.gov.in/hse/mca> examined the clothes worn by P.W.2 under the cover of mahazar Ex.P.3. At about 15.00 hours on 09.10.2006, the accused was arrested near Mamsapuram bus stand and he was examined in the

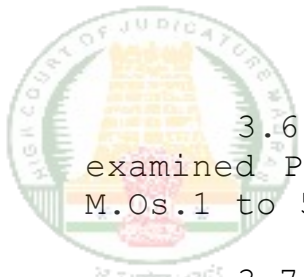


presence of P.W.7 and another, who voluntarily came forward to give confession statement and as per the admissible portion of the confession statement, marked as Ex.P.4, the clothes worn by the accused viz., M.Os 3 to 5 were recovered, under the cover of mahazar Ex.P.5. P.W.12, made necessary arrangements to medically examine the victim girl - P.W.2 as well as the accused.

3.3. P.W.8 was the Assistant Surgeon, attached to Virudhunagr Government Hospital and at about 09.30 a.m., on 11.10.2006, she examined the victim girl and she narrated the events took place on 08.10.2006. P.W.8, during the course of examination, found that there was no external injuries and however, perineum was found to be swollen and hymen was intact and smear taken from the anterior surface of the hymen was sent for chemical analysis. P.W.8, after examination of P.W.2, has given Ex.P.6 - accident register.

3.4. Subsequently, P.W.12 sent the appellant for remand and handed over the investigation to the Inspector of Police. P.W.13- was the Station House Officer of Mamsapuram Police Station and after going through the rough case diary, found that P.W.12 had examined five witnesses and continued the investigation and once again, re-examined the five witnesses and since they repeated the same, he did not separately record their statements. P.W.13 recorded the statements of P.W.7, Govindaraj, P.W.10, P.W.6, Arumugavel, Mathavan and also sent the clothes worn by P.W.2 as well as spermatozoa of the appellant/accused, for chemical analysis and received the same under Exs.P.7 and P.8. On 15.05.2007, P.W.13 examined Elizabeth Rani, Raju and Mahalakshmi and recorded their statements and after completion of investigation and after obtaining opinion, also recorded the statement of P.W.8, who examined the victim girl. P.W.13, after completion of the investigation and obtaining the legal opinion, on 29.07.2007, has filed the final report charging the accused for commission of offences under Sections 376 and 511 I.P.C.

3.5. The Trial Court, upon filing of the final report, issued summons to the appellant/accused and on his appearance, furnished to them the copies of the documents under Section 207 of the Code of Criminal Procedure, 1973 and having been the case is exclusively tried by the Sessions Court, the same has been committed to the Principle Sessions Court, Virudhunagar District at Srivilliputhur. The said Court, in turn, has taken the case on file as S.C.No.10 of 2008 and forwarded the same to the Fast Track Mahalir Court for trial. The appellant/accused was summoned to the charges under Sections 376 and 511 I.P.C. and Section 4 of the Protection of Child from Sexual Offences Act, 2012, were filed and he was questioned. The appellant/ accused pleaded not guilty and was committed to the Sessions Court for trial. The charges framed against him and prayed for trial of the case.



3.6. The prosecution in order to sustain their case, examined P.W.1 to P.W.13, marked Exs.P.1 to P.10 and also marked M.Os.1 to 5.

3.7. The appellant/accused was questioned under Section 313 (1) (b) of the Code of Criminal Procedure, 1973, with regard to the incriminating circumstances made out against him in the evidence tendered by the prosecution and he denied it as false.

3.8. On behalf of the appellant/accused, neither oral nor documentary evidence was let in.

3.9. The trial Court, on consideration of the oral and documentary evidences and other materials, found the accused guilty and convicted and sentenced the appellant/accused as stated above vide the impugned judgment and challenging the legality of the same, the present Criminal Appeal has been filed.

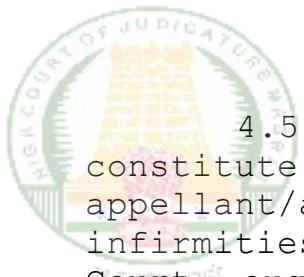
4. Mr.M.Karunanithi, learned Counsel appearing for the appellant/accused made the following submissions:

4.1. Even as per the testimony of P.W.1 to P.W.4, the family of the victim girl as well as the appellant/accused are not in talking terms and in order to rectify the vengeance against the appellant/accused, a false case has been lodged using the services of P.W.2-minor girl.

4.2. The scientific evidence, in the form of Exs.P.7 and P.8, did not support the case of the prosecution, for the reason that no spermatozoa was noted over in the clothes worn by the victim girl as well as the appellant/accused and in the absence of the said vital evidence, it cannot be stated that P.W.2 - victim girl was subjected to sexual assault.

4.3. It is also the evidence of P.W.2 that she was playing with other children and the appellant/accused has called her inside the house and admittedly, the children with whom P.W.2 had played, did not examine at all and except the interested testimonies of the family members, no independent witnesses have been examined to sustain the case of the prosecution. The arrest and recovery, per se, is false, for the reason that P.W.3, the sister of the victim girl - P.W.2 would state that the accused/appellant was very much present and was taken to the police station.

4.4. The trial Court, having found that the appellant/accused was not found guilty for the offence under Section 4 of the Protection of Child from Sexual Offences Act, 2012, ought to have acquitted him for the commission of offences under Sections 376 and 511 I.P.C.



4.5. The materials placed by the prosecution did not constitute the ingredients to the offence, for which, the appellant/accused was charged and in the light of the very many infirmities and inconsistencies in the prosecution case, the trial Court, ought to have awarded the benefit of doubt and acquitted him and hence, prays for allowing the Criminal Appeal and thereby setting aside the conviction and sentence imposed by the trial Court.

5. Per contra, Mr.S.Chandrasekar, learned Additional Public Prosecutor, appearing for the State would submit that the testimony of P.W.2 - victim girl, coupled with the evidence of P.W.8 and Exp.6, has clinched the case of the prosecution that the victim girl, who was aged about 9 years had been physically, forcibly, sexually assaulted by the appellant/accused, who was aged about 35 years and her testimony is amply corroborated the testimony of P.W.3.

6. It is the further submission of the learned Additional Public Prosecutor that as to the non-trace of spermatozoa in the clothes worn by P.W.2 as well as the accused, P.W.3 has offered explanation that immediately the clothes worn by P.W.2 were washed and P.W.9 - Scientific Assistance- Gr.II, would depose that if the spermatozoa was collected immediately after the incident, it would reveal the said fact and when the clothes are washed, the same can be vanished. He would further submit that in the absence of non-tracing of spermatozoa in the clothes worn by P.W.2-victim girl as well as the appellant/accused, it could not be stated that he did not commit the offence. In sum and substance, it is the submission of the learned Counsel appearing for the Additional Public Prosecutor that the testimony of the victim girl corroborated by the testimony of P.W.3 has inspired confidence and also found trustworthy. The trial Court, rightly, reached the verdict of convicting the appellant/accused for the offences, under Sections 376 and 511 I.P.C. and imposed the appropriate sentence and hence, prays for dismissal of this Criminal Appeal.

7. This Court paid its anxious consideration on the rival submissions and also considered the oral and documentary evidences and other materials and also perused the original records.

8. The question arises for determination in this Criminal Appeal is "Whether the prosecution through oral and documentary evidences and other materials had proved the charge framed against the appellant/accused for the commission of offences under Sections 376 and 511 I.P.C. beyond any reasonable doubt?"

9. P.W.2 is the victim girl and after physically abused and <https://hcservices.civildataservices.com> part of the appellant/accused, she informed the same to her sister viz., P.W.3, who was aged about 14 years and was studying 9th standard. P.W.3, in her chief examination, would



state about the events narrated by her sister - victim girl - P.W.2 and also the identification of the accused, who on seeing P.W.2 and P.W.3, went away and the fact of washing the clothes worn by P.W.2 on the same day of occurrence and passing the information to her parents. P.W.3, in her cross-examination, would state that the appellant/accused and their family are not in talking terms and she has written the contents of Ex.P.1 and her sister, did not conceal anything and told everything to her and necessary advise was also given by the police, as to how the complaint should be drafted. P.W.3 denied the fact that on account of the enmity between their family and the family of the appellant/accused, a false complaint has been given.

10. The trial Court considered the crucial evidence of P.W.2 - victim girl and after obtaining the mental capacity of the victim girl, to understand the question and answering it, has found that she has the capacity to understand and giving answers accordingly examined her. P.W.2, in chief examination, has narrated in total as to the sexual assault done by the appellant/accused and in the cross-examination, she reiterated the same. P.W.2 denied the suggestion that on account of the enmity between her family and the appellant/accused, she has stated it as falsely.

11. P.W.8 is the Assistant Surgeon, attached to the Government Hospital, Virudhunagar and she examined the victim girl - P.W.2, at about 09.30 a.m., on 11.10.2006 and during the course of examination, she would state the sexual assault done by the appellant/accused upon her and also issued Ex.P.6 - the accident register.

12. It is relevant to extract hereunder the contentions of Ex.P.6:

"O/E:-

Conscious oriented, PR-90/mt(NC)

CVS NAD

RS

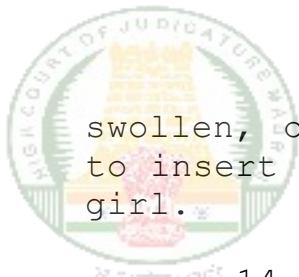
Breast not developed. No axillary or public hair. No external injury over the chest or abdomen or anywhere in the body.

L/E:-

Perineum (NC) swollen. Hymen intact. Labia Majora not well developed. Smear taken from the anterior surface of the hymen and preserved for HPE. H/O. Washed the perineum several times after the (NC) the incident.

Blood group and RH typing - O +ve Saliva preserved."

<https://hcservices.ecourts.gov.in/hcservices/> to be noted that in Ex.P.6, it is stated that perineum was "swollen" and it was further indicated that the perineum was washed several times after the incident. Perineum was



swollen, on account of the fact that the appellant/accused tried to insert his private part into the private part of P.W.2 - victim girl.

14. The primordial submission made by the learned Counsel appearing for the appellant/accused would submit that Exs.P.7 and P.8 did not reveal anything of spermatozoa on the clothes worn by the victim girl - P.W.2 and the appellant/accused.

15. It is to be pointed out at this juncture that according to P.W.3, the sister of P.W.2, the clothes worn by P.W.2 were washed on the same day and Ex.P.6 report given by P.W.8 would also indicate the said fact.

16. The scientific assistance Gr.II, who was also examined as P.W.9 would also depose that immediately after the incident, in the clothes worn by the victim girl - P.W.2 and the appellant/accused, if the spermatozoa or saliva were collected, it would reveal the fact and if the clothes were tainted with spermatozoa after a wash, then it could not be traced. However, the prosecution has let in sufficient explanation as to the non-tracing of spermatozoa in the clothes worn by P.W.2 - victim girl as well as the appellant/accused.

17. It is also the submission of the learned Counsel appearing for the appellant/accused that despite P.W.2 would state that when the appellant/accused called her inside, she was playing with other children and admittedly none of them were examined and the conviction and sentence came to be passed based on the uncorroborated testimony of the prosecution and hence, prays for interference.

18. The legal position as to the reliability of the testimony of prosecutrix is no longer *res integra* and it is useful to refer the decision rendered by the Honourable Supreme Court of India in **Hem Raj Vs. State of Haryana reported in (2014)2 Supreme Court Cases, 395**, wherein it is stated that it is well settled position of law that if the testimony of the prosecutrix is found to be credible and if it inspires total confidence, it can be relied upon even sans corroboration.

19. In the case on hand, as already pointed out, the testimony of P.W.2 is natural and trustworthy and it is also found ample corroboration through the testimony of P.W.3, with whom she has shared the said incident. It is also supported by the scientific evidence in the form of Ex.P.6 and also the testimonies of P.Ws.8, 9 and 11.



20. It is also the submission of the learned Counsel appearing for the appellant/accused that the arrest and recovery of incriminating articles from the accused cannot be believed and this Court finds some force in the said submission.

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21. According to P.W.3, when they were summoning to the police station, the appellant/accused also came to the police station, eschewing the arrest and recovery, in the considered opinion of this Court that the prosecution is still able to prove the commission of the offence on the part of the appellant/accused.

22. The prosecution through the testimonies of witnesses had proved the case projected against the appellant/accused beyond any reasonable doubt and the trial Court, on proper appreciation of oral and documentary evidences and other materials, had rightly reached the conclusion and found him guilty and awarded life sentence, taking into consideration the fact that the victim girl was aged about only 9 years and she was subjected to brutal sexual assault.

23. In the result, the Criminal Appeal is dismissed, confirming the conviction and sentence awarded by the trial Court, vide impugned judgment dated 17.12.2015, made in S.C.No.10 of 2008.

24. It is represented that pendency of the Criminal Appeal, the suspension sentence of imprisonment imposed upon the appellant/accused has been suspended and in the light of the dismissal of the appeal and thereby confirmed the conviction and sentence awarded by the trial Court, the bail bonds executed by him, stand cancelled and the immediate necessary steps to be taken by the respondent to secure the custody of the accused, so as to enable him to undergo the sentence of imprisonment.

25. The victim girl, who was aged about 9 years, has faced the brutal sexual assault at the hands of the appellant/accused and therefore, it is a fit case wherein, she should be provided the succour /relief under Section 357(A) of the Criminal Procedure Code and therefore, this Court, recommends that proper and adequate compensation shall be paid to the victim girl.

Sd/-

Assistant Registrar (Crl.Side)

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To

1. The Sessions Judge,
Mahilar Neethimandram (Fast Track Mahila Court),
Virudhunagar District at Srivilliputhur.
2. The Judicial Magistrate No.II,
Srivilliputhur, Virudhunagar District.
3. -do-Thro' The Chief Judicial Magistrate,
Virudhunagar District at Srivilliputhur
4. The Officer-in-charge,
Tamil Nadu Legal Services Authority
Chennai.
5. The Officer-in-charge,
District Legal Services Authority
Virudhunagar District.
6. The Superintendent,
Central Prison,
Madurai.
7. The Inspector of Police,
Mamsapuram Police Station,
Virudhunagar District.
8. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
9. The Section Officer,
Criminal Section (Records),
Madurai Bench of Madras High Court,
Madurai. (2 copies)

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