

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.11.2020

PRONOUNCED ON : 09.12.2020

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.M.P.No.4177 of 2020

in Crl.A.No.277 of 2019

K.Venkatesan

... Petitioner

Versus

State rep by:

... Respondent

The Inspector of Police,
W-25, All Women Police Station,
T.Nagar, Chennai-17.
(Cr.No.9 of 2015)

PRAYER: Criminal Miscellaneous Petition filed under Section 389(1) of the Code of Criminal Procedure, to suspend the sentence of imprisonment imposed in the judgment dated 05.03.2019 in S.C.No.212 of 2016 on the file of the learned Sessions Judge Mahila cum Children's Court Chennai and enlarge the petitioner on bail pending disposal of the above Criminal Appeal No.277 of 2019 before this Court.

For Petitioner : Mr.A.Thiyagarajan

For Respondent : Mr.C.Raghavan
Government Advocate [Crl. Side]

For Defacto Complainant : Mr.Saravanavel

ORDER

This Criminal Miscellaneous Petition has been filed to suspend the sentence imposed on the petitioner in S.C.No.212 of 2016, dated 05.03.2019 passed by the learned Sessions Judge, Mahila Court (Mahalir Neethimandram), Chennai.

2.The petitioner was convicted for offence under Section 10 of the Protection of Children from Sexual Offence Act, 2012 and sentenced to undergo five years Simple Imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo six months Simple Imprisonment.

3.The gist of the case is that PW2 is the victim girl, aged about 11 years at the time of occurrence. PW1/defacto complainant is her father and PW3 is her mother. PW1, PW3 and their two daughters are residing in a Flat Apartment at Kodambakkam. On 11.11.2015, PW1 along with his wife/PW3 and their younger daughter had gone to Big Bazaar Market, Vadapalani. The elder daughter/PW2/victim, who was aged 11 years was alone at home. Taking advantage of the absence of PW2's family members, the petitioner, who is a neighbour, at 11.00 a.m., rang the calling bell. PW2 viewed the petitioner through door lens and opened the door with the lead chain. The petitioner viewing through the door, found PW2 making a toy house and enquired about the same. Continuing the conversation, the petitioner asked PW2 to open the door. Since the petitioner being a neighbour and known person, PW2 opened the door and allowed the petitioner inside the house. After viewing the toy house, the petitioner moved into the bed room and found new bunker cot and enquired about the same. At that time, PW2 was playing in the cot, the petitioner sat besides her and molested her, PW2 got relived and went to her father's/PW1 room and playing some games. The petitioner followed PW2 again and molested her. Thereafter, PW2 took up the phone and informed the petitioner that she had to call her grand mother to recite Mathematical tables. At that time, the petitioner left the house. PW2 called her parents in mobile phone and informed about the petitioner barging into the house and his molestation act and she was in fear and called them immediately to come back home.

4.PW1 along with his wife/PW3 and their younger daughter returned back home at about 12.00 p.m. PW2 informed her mother/PW3 about the happenings. PW1 went to attend other works. Thereafter, PW3 informed PW1 about the molestation act of the petitioner. PW1 called his Advocate friend Arul Mozhi and informed about the happenings, who instructed PW1 to call Police Emergency Service 100. After deliberation with his wife/PW3 and his mother on the next day, PW1 lodged a complaint [Ex.P1] to the respondent Police, who registered an FIR in Crime No.9 of 2015 [Ex.P10], came to the scene of occurrence, enquired PW2 and her mother, arrested the petitioner near Liberty Bus Stop, recorded the confession of the petitioner, sent PW2 for medical examination, the statement of PW2 under Section 164 Cr.P.C., was recorded, examined the other witnesses, collected the documents and filed charge sheet before the trial Court.

5.During trial, the prosecution examined PW1 to PW9 and marked Exs.P1 to P11. On the side of the defence, DW1 was examined and marked Exs.D1 and D2 and DMO1 to DMO3. The trial Court on conclusion of trial, had convicted and sentenced the petitioner as stated above.

the petitioner's family and PW2's family were residing in the same floor in an Apartment at Kodambakkam, Chennai. He further submitted that PW1, who is the father of the victim girl/PW2 was the President of the Apartment Welfare Association and the petitioner was the Assistant Secretary. In handling the association funds, there was some animosity between them. Further, the petitioner was residing with his family in opposite portion of PW1's family. The petitioner's son is suffering from Spinal Muscular and he is 90% disabled person and her daughter attended puberty recently. The petitioner did not indulge in any molestation as alleged by the prosecution.

7. The learned counsel for the petitioner further submitted that in this case, the occurrence is said to have taken place on 11.11.2015 and the complaint was lodged only on 12.11.2014 at about 08.00 p.m. There is no reason given for the delay in lodging the complaint. PW2 informed her parents/PW1 and PW3 through mobile phone about the incident, but the call details particulars were not produced. PW4, who is the friend of PW1, stated that he had gone along with PW1 to the police station while lodging the complaint [Ex.P1]. According to PW4, the complaint [Ex.P1] was given earlier to the time when the case was registered. Earlier, PW4 had gone to the house of PW1, at that time, itself some police personnel were present, thereafter, only PW4 had gone along with PW1 and PW3 to lodge the complaint [Ex.P1]. He further submitted that at that time and even before registration of case, the petitioner was in custody of the police. Hence, the arrest, in this case, is highly doubtful. PW4 stated that the petitioner was arrested and he gave confession to the police in the Police Station. PW8, the Investigating Officer stated that the petitioner was arrested near Liberty Bus Stand. PW4 further stated that he was informed about the incident immediately by PW1 on 11.11.2015, but he came to the house of PW1 only on 12.11.2015. Thereafter, PW4, PW1 and PW3 went to the police station and lodged a complaint.

8. PW1 admitted that he informed his Advocate friend Arul Mozhi about the incident and on her advice, PW1 called the police, who had come to the house of the petitioner and conducted enquiry. PW5, the witness for Observation Mahazar [Ex.P5] stated that the Observation Mahazar was prepared on 12.11.2015. PW5 admitted that the other witness to the Observation Mahazar [Ex.P5] Thamarai, below her signature, the date 08.04.2016 is written. PW8, the Investigating Officer admitted the same and could not give any no reason why the date 08.04.2016 has been inscribed there. Hence, it would obviously shows that the Observation Mahazar [Ex.P5] has been prepared much later after the occurrence.

9. PW6 is the XVII Metropolitan Magistrate, who recorded the statement of PW2 [Ex.P3] on 06.01.2016 with much delay. The delay in recording the statement of PW2 has been made to tutor PW2 to give a version as desired by PW1. In this case, PW1 is a political

activist, which is an admitted fact. PW4 and PW5 are the friends of PW1, who are also political activist. No independent witnesses from the flat were examined in this case. The petitioner had marked Exs.D1 and D2 to show the animosity between the petitioner and PW1. PW1 admitted there was some animosity between them. Though Ex.D2 is a letter dated 04.04.2016 after the occurrence, the prevalence of animosity between them is not disputed. PW1 and PW3 stated that there is no grill gate to the main entrance to their house and the petitioner barged into the house. The Defence Material Objects DMO1 to DMO3 were marked to prove the falsity of the claim of PW1 and PW3. The evidence of PW1 and PW3 are with exaggeration and contradiction.

10.It is further submitted by the learned counsel for the petitioner that PW7, who is the Doctor attached to the Children Government Hospital, Egmore stated that on 14.11.2015, PW2 was produced for medical examination and through her Exs.P7 to P9 were marked. From the Medical Evidence, it is seen that there is no injury marks or presence of reddishness in the private parts of PW2 and her hymen found intact. PW8, the Investigating Officer stated that on 12.11.2015, at about 08.00 p.m., Ex.P1 was lodged by PW1 and FIR [Ex.P10] was registered, visited the scene of occurrence at about 11.00 p.m. The evidence of PW4 and PW8 are contradictory with regard to arrest and recording of confession. The preparation of Observation Mahazar [Ex.P5] is highly doubtful.

11.The entire case rest on the evidence of PW2/victim. PW1 and PW3 admitted that they knew the occurrence from their elder child PW2/victim. PW2 in her evidence stated that she was tickled and made to lie on the bed and the petitioner has committed molestation, she moved from the bed room to her father's room, the petitioner continuing his conversation followed her, she informed the petitioner that she is to call her grand mother and sent out the petitioner from the house and locked the door. PW2 further stated that 10 days prior to the occurrence, she, her sister along with her friend were playing in the terrace during rain, the petitioner came there and played with them, her friend informed her that the petitioner is making intentional touch. These facts are not found in her statement recorded under Section 164 Cr.P.C [Ex.P3]. The evidence of PW2 is an improved version and contradictory to the statement recorded under Section 164 Cr.P.C., in vital aspects. Further submitted that PW2 did not raise any alarm or show any defiance. On the other hand stated that the petitioner had left the house on his own and she locked the door.

12.PW1 being a political activist, had tutored his daughter/PW2/victim to given exaggerated version against the petitioner. During investigation, the petitioner was granted bail. PW1 filed a petition for modification, making wild allegation as though the petitioner was moving in front of PW2 wantonly and also

looking into the house of PW2 and thereby, creating fear over her. This Court modified the condition, restricting the movement of the petitioner. The petitioner is in confinement from 05.03.2019 and now his family vacated the flat and living separately. The petitioner is the only bread winner for his family and he has to take care of his handicapped son and daughter, who recently attended puberty and his family members are suffering due to incarceration of the petitioner. Hence, he prayed to suspend the sentence of the petitioner till the disposal of the appeal.

13.The learned Government Advocate [Crl. Side] appearing on behalf of the respondent Police submitted that in this case, PW2 is the victim, who is aged about 11 years, a school going child. The petitioner's family and PW2/victim's family were residing in the same floor of Apartment at Kodambakkam, Chennai opposite to each other. On 11.11.2015, PW1 and PW3, the parents of PW2, went to Big Bazaar, Vadapalani along with their younger daughter and PW2 was alone. At that time, the petitioner in a deceitful manner entered the house of PW2 in the guise of viewing the toy house built by PW2. The petitioner picked up conversation with PW2 and in the bed room, he molested her. PW2 moved away from there and went to her father's room. The petitioner followed her and again molested her and PW2 picked up the phone to call her grand mother and parents. Sensing fear, the petitioner slipped away from there.

14.PW1 and PW3, who were in Big Bazaar, Vadapalani along with their younger daughter were informed about the happenings. They came back home and PW2 informed her mother/PW3 about the happenings. PW3 informed her husband/PW1 and after some deliberation with the family, PW1 informed his friend PW4 and Advocate friend Arul Mozhi. On her advice, PW1 called the Police Emergency Service 100. On 12.11.2015, a complaint [Ex.P1] was lodged to the respondent Police. PW8, the Investigating Officer received the complaint, registered an FIR [Ex.P10], visited the scene of occurrence, prepared Observation Mahazar [Ex.P5], enquired PW2 and PW3, recorded their statement, arrested the petitioner on the same day near Liberty Bus Stand, recorded the confession of petitioner in presence of PW4, prepared Observation Mahazar [Ex.P5] in presence of PW5, sent PW2 for Medical Examination. PW7, the Doctor examined PW2 on 14.11.2015. Thereafter, the statement under Section 164 Cr.P.C., was recorded on 06.01.2016 by PW6. On transfer of PW8, PW9 took up the further investigation, examined the witnesses, received the report and filed charge sheet.

15.It is further submitted that the petitioner made attempt to create alibi, by examining DW1, which only exposed the conduct of the petitioner. There could have been some minor discrepancies in the prosecution, the lower Court had given reason

for the same and finding that there is no reason to discard the evidence of PW2, had convicted the petitioner. In this case, PW2 narrated the incident, which corroborates the statement recorded under Section 164 Cr.P.C. PW2 was chased from one room to another and molested by the petitioner. The statement of PW2 alone is sufficient to convict the petitioner. Hence, the learned Government Advocate prayed to dismiss the suspension of sentence petition.

16.Mr.Saravanel, learned counsel, who has been assisting the defacto complainant/PW1 and following the case right from investigation, appeared and made his submissions that PW1 is the father of PW2/victim, who lodged the complaint [Ex.P1]. PW1 had given reason for delay in lodging the complaint. The future of minor girl had to be considered and after deliberation with the family members, the complaint [Ex.P1] came to be lodged in this case. The discrepancies pointed out by the learned counsel for the petitioner were raised during the trial and the trial Court considered the same. The evidence of PW2 is natural and PW2 is a minor girl is not in dispute. He further submitted that the evidence of PW1 and PW3 are in conformity to the evidence of PW2. During the occurrence, the petitioner followed PW2 from one room to another and molested her. The petitioner during investigation was granted bail. While residing in the opposite house of PW2, the petitioner wantonly to create fear on PW2 was moving in front of her, due to which, she was physiologically affected. Thereafter, PW1 had moved a petition for modification before this court. This Court modified the condition of the bail to the petitioner that the petitioner should not no away come across PW2. The defence raised by the petitioner, by examining DW1 proved to be hallow, which would only expose the conduct of the petitioner. He further submitted that in this case, PW2 was not cross examined and the other witnesses were cross examined belatedly, despite sufficient opportunity given. Further, the petitioner had produced no material to dislodge the statutory presumption against him. Hence, he opposed to grant suspension of sentence to the petitioner.

17.This Court considered the submissions made by the learned counsel for the petitioner and the learned Government Advocate [Crl. Side] appearing for the 1st respondent Police and Mr.Saravanel, learned counsel for the defacto complainant and also perused the materials available on records.

18.It is seen that the petitioner's family and PW2's family are neighbours. There is some animosity existing between the petitioner and PW1, who is the father of PW2, which is not in dispute. In this case, the occurrence had taken place on 11.11.2015 at about 11.30

a.m. and the complaint came to be lodged only on 12.11.2015 at about 08.00 p.m. PW8, the Investigating Officer stated that on receipt of the complaint, registered an FIR [Ex.P10] at about 11.00 p.m, visited the scene of occurrence, enquired PW2 and PW3, prepared Observation Mahazar [Ex.P5] in presence of PW5 and one Thamarai. From Ex.P5, it is seen that below signature of Thamarai date 08.04.2016 is written and the said Thamarai was not examined as witness. PW8, the Investigating Officer is unable to given any explanation for the same. PW5 stated that he had gone to the house of PW2 on 12.11.2015 between 10.30 a.m. and 11.00 a.m. At that time, the police personnel were present. PW8 is categorical that she had gone to the scene of occurrence only at about 11.00 p.m. Added to it, PW1 admitted that on the advice of his Advocate friend Arul Mozhi, he called Police Emergency Service 100 and thereafter, Police came there. PW4, who is the friend of PW1 stated that on 12.11.2015, at about 02.30 p.m., he went to the house of PW1. At about 05.30 p.m to 06.00 p.m., he had gone to the Police Station along with PW1 and PW3. At that time, the petitioner was present in the Police Station, where he was arrested and confession recorded.

19.PW4 and PW5 are political activists and friends of PW1. PW1 is also a political activist and they are not ordinary persons. The evidence of PW2 is with improvements and her earlier statement recorded under Section 164 Cr.P.C on 06.01.2016 is more than 50 days after the occurrence. During the occurrence, PW2 not raised any alarm, showed defiance and she moved freely from one room to another and thereafter, sent out the petitioner, which defies normal conduct. Added to it, PW7, the Doctor, who examined PW2 on 14.11.2015, found no injury or any marks on her. PW3, the mother of PW2 has not stated that she gave any medication or native treatment for reddishness and pain suffered by PW2.

20.In view of the above, this Court finds there are arguable points involved in the appeal and taking into consideration, the period of incarceration and the appeal is not likely to be taken up for final hearing in the near future and also considering the petitioner's family having vacated the flat and are living elsewhere, this Court is of the considered view that the petitioner herein is entitled to the relief of grant of suspension of sentence.

21.Accordingly, the substantive sentence of imprisonment alone is suspended and the petitioner is directed to be enlarged on bail on condition that the petitioner shall execute a bond for a sum of Rs.10,000/-(rupees Ten Thousand only) with two sureties each for a like sum to the satisfaction of the learned Sessions Judge Mahila cum Children's Court Chennai, within a period of 15 days from the date of receipt of a copy of this order and on further condition that the petitioner shall appear before the said Court on first working day of every English Calender Month at 10.30 a.m., till the

disposal of the appeal. The petition is ordered.

-sd/-
09/12/2020

This order, on being produced, be punctually observed and carried into execution by all concerned

TRUE COPY

Sub-Assistant Registrar (Statistics/C.S.)
High Court, Madras - 600 104.

TO

1 THE SESSIONS JUDGE MAHILA CUM CHILDRENS
COURT, CHENNAI.

2 THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS.

3 THE INSPECTOR OF POLICE,
W-25, ALL WOMEN POLICE STATION,
T.NAGAR, CHENNAI-17.

5 THE SUPERINTENDENT,
CENTRAL PRISON, PUZHAI, CHENNAI.

+1 C.C. to M/S.A.THIIYAGARAJAN Advocate on payment of necessary
charges SR.NO.8058

Order

in
CRL MP.4177/2020

in
CRL A.277/2019

Date :09/12/2020

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