

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 18.11.2020
Pronounced On : 30.11.2020

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.M.P.No.6142 of 2020

in Crl.A.No.401 of 2020

Ram @ Ramlal

... Petitioner

Versus

The State rep. by
The Inspector of Police,
G-7, Chetpet Police Station
Chetpet
Chennai 600 031.
G-37(Crime No.637 of 2014)

... Respondent

Prayer: Criminal Miscellaneous Petition filed under Section 389(1) of the Code of Criminal Procedure, to suspend the sentence and conviction imposed against the petitioner in the judgment dated 08.03.2019, passed in S.C.No.229 of 2015 by the Magalir Sessions Judge, Chennai and enlarge the petitioner on bail.

For Petitioner : Mr.C.H.Vinoba Gandhi

For Respondent : Mr.C.Raghavan
Government Advocate (Crl.Side)

ORDER

The petitioner herein is accused in S.C.No.229 of 2015, on the file of the Sessions Judge, Mahila Court, Chennai, was convicted by the judgment dated 08.03.2019 for the offence under Section 10 of the Protection of Children from Sexual Offence Act, 2012 and sentenced to undergo 5 years Simple Imprisonment and imposed with a fine of Rs.5,000/- in default six months Simple Imprisonment and the period of remand if any is ordered to be set off against the sentence imposed. Aggrieved over the same, the present Criminal Appeal filed along with a petition for suspension of sentence.

2.The gist of the case is that the petitioner, P.W.1 and P.W.2/parents of the victim, residing in a same building as co-tenants. P.W.1 and P.W.2 residing at second floor and the petitioner residing at third floor. P.W.1 and P.W.2 having a female child aged

about 3 ½ years. There are totally 16 tenants in the said building. All the tenants are Hindi speaking people other states employed as construction workers. P.W.2 is the carpenter. P.W.3 is the owner of the building residing at Guduvancherry. On 05.08.2013, at about 6 p.m, the victim child went to third floor and thereafter came back and slept. At about 2.00 a.m., the victim girl complained about the pain in her private part and wanted to urinate. When the mother of the victim enquired about the pain, the victim girl informed that the petitioner who is residing in the third floor pressed her private part. On examination, P.W.1 found that the victim's private part was reddish in colour. Immediately P.W.1 contacted her husband P.W.2, who was in Madurai and took the child to the Children Hospital, Egmore on 06.08.2013. P.W.6/Doctor in Casualty examined the victim and P.W.1 stated about the incident and thereafter it was informed to P.W.8/Investigation Officer, who came to the Hospital received a complaint from P.W.1 and registered the case. On receipt of the complaint, P.W.8 visited the scene of occurrence, prepared observation mahazar and rough sketch, examined the witnesses present in the scene of occurrence and arrested the accused. Thereafter, swab were taken from the victim and sent to forensic examination. After getting the forensic report, copy of the accident register and medical report, charge sheet came to be filed in this case.

3. During trial, the prosecution examined P.W.1 to P.W.8 as witnesses and marked Exs.P1 to P8 and no material object was marked. On the defence side no witnesses were examined and no document was marked. On the completion of the trial, the Court below convicted the petitioner as stated above.

4.The contention of the petitioner is that the petitioner was living in the third floor along with his wife, children and mother. The petitioner house is a single room portion in the third floor of the said building where there are totally four tenants in that floor and there are totally 16 families residing in that building, no neighbours spoke about the occurrence. There was dispute between the petitioner and P.W.3/House owner, the petitioner was forced to vacate the house. On the date of occurrence, the petitioner was in his work spot. The petitioner was never alone in the house thereby he would not have committed any offence as alleged. Further, in this case P.W.2/Father of the victim admits that he was in Madurai on the date of occurrence and reached Chennai the next day. One Raja Mandal, cousin of P.W.2 was residing along with P.W.1 and P.W.2. Raja Mandal Family was residing at Kolkata. After the alleged occurrence, the said Raja Mandal was sent out of their house. If the occurrence is said to have been true, it might have been committed by the said Raja Mandal.

5. The learned counsel for the petitioner further contended that the entire case hinges on the evidence of P.W.1, who stated that the victim girl gone to the third floor, she was there for sometime and the victim girl informed that the petitioner pressed her private part. Though the victim girl was studying in school and was able to answer the question of Judicial Magistrate why P.W.1 was examined and no statement had been recorded from the victim girl. It

is an admitted case that there are totally 16 tenants residing in the building apart from that there are three tenants living in the third floor. The petitioner was staying in one room portion along with his mother, wife and two daughters and they are all together and there is no possibility of the petitioner being alone with the victim. Further, none of the tenants in the building were examined as witness in this case. P.W.8/Investigation Officer though states that during investigation he had examined some of the tenants and recorded their statement they have not been examined as witnesses. The evidence of P.W.2 and P.W.3 is in the nature of hearsay. The evidence of P.W.1 is contrary to the evidence of P.W.6 and P.W.7/the Doctors and Deputy Director of Forensic Department/P.W.4 From Ex.P5, it is seen that there is no external and internal injury or any reddishness present in the private part of the victim. Ex.P6/Medical report as well as Ex.P3/Forensic report are contrary to the oral evidence of P.W.1. Except the admission of signature there is no evidence, who had written the complaint/Ex.P1 since P.W.1 does not know to read or write Tamil.

6. The further contention of the learned counsel for the petitioner is that the Trial Court failed to look into all these aspects. On the contrary held that the statutory presumption under Section 20 of the POCSO Act, is against the petitioner. There was some dispute between the petitioner and P.W.3/House owner. Therefore P.W.1 lodged a complaint against the petitioner in collusion with P.W.3. The evidence of Investigating Officer/P.W.8 feigns ignorance for most of the questions and no proper investigation has been conducted in this case. The Trial Court was carried away for the reason that except P.W.2, P.W.5 and P.W.8 none of the prosecution witnesses was cross examined and convicted the petitioner. During investigation the petitioner was in prison for a period of six months and after that he is confined from 08.03.2019 and he is in the prison for more than two years. The petitioner's elder daughter marriage held on 14.09.2020 in his absence. The petitioner is residing in Chennai for more than 20 years and he has been carrying his job as painter and he is the sole bread winner of the family. Hence sought for bail.

7. The learned Additional Public Prosecutor filed his counter and made his submission, that on 05.08.2014 at about 6.00 p.m., the petitioner had sexually abused the victim girl who is 3 years old by removing her panties and by pressing over her private part. Hence the case came to be registered in Crime No.637 of 2014 under Section 10 of POCSO Act, 2012. On 06.08.2014, P.W.1/Mother of the victim taken the victim girl to the Childrens Hospital, Egmore, where P.W.6/Doctor examined the victim and gave accident register/Ex.P5. Thereafter, P.W.7/Doctor examined the victim and gave Ex.P6/certificate of examination for sexual offences. Swab was taken from the victim and sent to P.W.4/Scientific Officer and he had given a report/Ex.P3. P.W.5 is the witness to the observation mahazar and rough sketch. P.W.3 is the house owner who corroborate the statement of P.W.1. On investigation charge sheet came to be filed in this case. The petitioner failed to cross examine the witnesses, the statement of the victim girl was not recorded due to

her tender age. Added to it, the witnesses were recalled made to wait and ultimately the Advocate of the petitioner did not turn up to conduct cross examination. The Trial Court considering all these aspect had convicted the petitioner as stated above. The petitioner is not a native of Tamil Nadu and if bail granted to the petitioner he would not be available for the final hearing. Hence opposed for granting bail.

8. Considering the rival submissions and perusal of the materials and the evidence, it is seen that P.W.1/Mother of the victim has stated that on 05.08.2014, the victim girl complained to her that she was feeling pain in her private part. When P.W.1 questioned about the same, the victim girl stated that the petitioner misbehaved with her and therefore P.W.1 lodged a complaint/Ex.P1 and gave statement before the Judicial Magistrate which is marked as Ex.P2. P.W.1 was recalled for cross examination and the counsel for the petitioner failed to cross examine her. P.W.2 is the husband of P.W.1 and father of the victim admits that one Raja Mandal, his cousin was residing at his house and doing carpentry work and there was some dispute in their family and later he left the house. He further submits that there are 16 tenants in the building and all are Hindi speaking people from other states. It is noted that the petitioner was asked to vacate the house several times and there was some dispute with P.W.3/House owner in this regard. Hence there is a possibility of implication of the petitioner by the P.W.1 in collusion with P.W.3. The evidence of P.W.3 is in the nature of hearsay.

9. P.W.4 is the Scientific Officer from the Forensic Department. He submits that he had received a swab in a glass slide and during examination he found the white worms present in the glass slide and he had given Ex.P3. This might be a reason for frequent and irritable urination by the victim girl added to that P.W.6/Doctor has given Ex.P5/Accident Register, in which there is no injuries recorded and reddishness found. P.W.7, the another Doctor who examined the victim has given a report/Ex.P6, in which it is stated that there is no injury or reddishness found in the private part. P.W.8 is the Investigating Officer, from his evidence it is seen that he had examined seven persons from the scene of occurrence viz., Sakunthala Halthar, Hemalatha, Selvamathi, Munusamy, Kanchana, Neelavathi and Soba Rani, prepared observation mahazar and rough sketch but except two persons i.e P.W.1 and P.W.3 others are not examined as witnesses. P.W.5 is the witness to the observation mahazar. P.W.8 admits that P.W.1 does not know to read and write Tamil, he is not aware who had written the complaint and there is no explanation for the same. Thus, it is seen that P.W.1 is the only witness for the entire case. P.W.1 admits that she does not know to write and read Tamil. Ex.P1/complaint is written in Tamil and no reason is given for the same. Added to it, her evidence is also recorded in Tamil. The Trial had not certified whether the witness spoke in Tamil or any other person translated her evidence and whether evidence recorded was read over, admitted to be correct. Admittedly, in this case there are 16 tenants in the building. None were examined as witness. The petitioner was residing in a single

room portion along with his mother, wife and two daughter. The evidence of P.W.1 is contra to the evidence of P.W.4, P.W.6 and P.W.7. P.W.6 and P.W.7 had examined the victim given a report Ex.P5 and Ex.P6 stating that there is no injury or reddishness in the private part of the victim. Ex.P3/Swab test report reveals that white worm was present in the swab leading to the inference that the victim might have had urinary infection and it might be the reason for the continuous urination and irritation. Further the learned counsel for the petitioner failed to cross examine the witnesses. For the fault of the Advocate, the petitioner cannot be punished. In view of the same and the evidence of P.W.1 cast serious doubt, vital contradiction is with the medical report. The petitioner is in confinement for more than two years.

10. Further, in view of the fact that there are several infirmities in the prosecution case and there are arguable points involved in the appeal, as contended by learned counsel for petitioner and further, the appeal is not likely to be taken up for final hearing in the near future, this Court is of the considered view that the petitioner herein is entitled to the relief of grant of suspension of sentence.

11. 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) each with two sureties each for a like sum to the satisfaction of the Mahila Court / Special Court for cases under POCSO Act, 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 the first working day of once in three month of English Calender Month at 10.30 a.m. till the disposal of the appeal.

-sd/-
30/11/2020

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 COURT,
CHENNAI.

2 THE MAHILA COURT/SPECIAL COURT FOR CASES
UNDER POCSO ACT, CHENNAI,

3 THE XIV METROPOLITAN MAGISTRATE COURT,
EGMORE, CHENNAI.

4 THE CHIEF METROPOLITAN MAGISTRATE,
EGMORE, CHENNAI. [FOR INFORMATION]

5 THE INSPECTOR OF POLICE,
G-7, CHETPET POLICE STATION,
CHETPET, CHENNAI - 600 031.

6 THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS.

7 THE SUPERINTENDENT, CENTRAL PRISON,
PUZHAI, CHENNAI.

+1 C.C. to M/S. C. H.VINOBA GANDHI Advocate on payment of
necessary charges SR.NO.7823

Order

in
CRL MP.6142/2020

in
CRL A.401/2020

Date :30/11/2020

From 7.2.2001 the Registry is issuing certified
copies of the BAIL/Anti.BAIL Orders in this format

TA-02/12/2020

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