

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.11.2020

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.M.P.No.15615 of 2019

in

Crl.A.No.742 of 2019

Ebi @ Ebinesar

... Petitioner

Versus

The State rep by,
Inspector of Police,
Neravy Police Station,
Karaikal.

... Respondent

PRAYER: Criminal Miscellaneous Petition filed under Section 389(1) of the Code of Criminal Procedure, to suspend the sentence imposed on the petitioner in Special Sessions Case 2/2018, on the file of Special Judge [District and Sessions Judge], Karaikal by judgment dated 23.08.2019 and enlarge the petitioner on bail pending disposal of above Criminal Appeal.

For Petitioner : Mr.S.Sounthar

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

ORDER

This Criminal Miscellaneous Petition has been filed to suspend the sentence imposed on the petitioner in Special Sessions Case No.2 of 2018, in judgment dated 23.08.2019 by the learned Special Judge, Karaikal and enlarge the petitioner on bail pending disposal of above Criminal Appeal.

2.The petitioner was convicted for offence under Section 7 of the Protection of Children from Sexual Offence Act, 2012 and sentenced to undergo seven years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo six months Rigorous Imprisonment.

3.The case of the prosecution is that on 21.07.2017, PW1/defacto complainant, the mother of the victim/PW2, has lodged a complaint to PW10/Sub Inspector of Police stating that on 05.05.2017, she was taking treatment as inpatient in Vinayaka Mission Medical College Hospital for diabetics. At that time, her daughter PW2 and her husband PW3 came to meet her, PW3 her husband had to stay there and the petitioner who is the neighbour, had visited PW1. PW1 requested

the petitioner to take his daughter PW2 back home. PW2 was taken in the bike of the petitioner. At about 08.00 p.m., in a thorny bush near Eden Garden Nagar, near Railway Flyover, Akkaraivattam, Neravy, the petitioner had sexual intercourse with PW1's daughter [PW2], knowing well that PW2 is a minor and below the age of 18 years. PW1 has found that her daughter PW2 missed the menstrual cycle and enquired her. PW2 informed about the penetrative sexual assault committed by the petitioner on her.

4. PW10, the Sub Inspector of Police, recorded the said complaint [Ex.P1], registered an FIR [Ex.P12] in Crime No.54 of 2017, for offence under Section 4 of the Protection of Children from Sexual Offence Act, 2012. Thereafter PW11, the Inspector of Police, took up the investigation, visited the scene of occurrence, prepared Observation Mahazar in the presence of witnesses, examined the witnesses namely PW1, PW3 and PW4, sent PW2 for medical examination on 22.07.2017. The statement under Section 164 Cr.P.C., of PW2 was recorded with the assistance of PW5, the Women Sub Inspector and PW6, the Child Line Member. On the same day, at about 10.15 hours, the petitioner was examined in the presence of PW7, VAO. On the confession of the petitioner, MO1 to MO5 were recovered. The clothes of the victim/PW2 [Ex.P14] were marked through PW11. The birth certificate of the victim/PW2 was marked as Ex.P15.

5. During trial, the prosecution examined 11 witnesses and marked 16 documents and 5 material objects. On the side of the defence, no witnesses were examined and no documents were marked. On completion of investigation, charge sheet came to be filed before the learned Special Judge, Karaikal. On conclusion of trial, the learned Special Judge convicted the petitioner as stated above.

6. The learned counsel for the petitioner submitted that according to PW1, the alleged occurrence is said to have taken place on 05.05.2017, but the complaint is lodged after two months delay on 21.07.2017. The reason given for the delay is that PW2 did not inform about the incident to PW1, on suspicion that her daughter/PW2 had missed the menstrual cycle, during enquiry, PW2 informed that the petitioner had penetrative sexual assault with her, turned to be false on the evidence of PW8/Doctor, who examined the victim/PW2 and issued the report Ex.P10]. From Ex.P10, it is seen that the victim/PW2 was not pregnant at the time of medical examination and she was bleeding and the hymen was intact. PW2 admitted that she is a sports person and used to do physical exercise, which might be reason for hymen not being intact and the petitioner is not the cause. The learned counsel further submitted that in the statement recorded under Section 164 Cr.P.C [Ex.P16], PW2 has not stated with regard to penetrative sexual assault made by the petitioner. Further, Ex.P3 is the signature of PW2/victim in the statement recorded under Section 161 Cr.P.C and Ex.P4 is the signature of the victim in the statement recorded under Section 164 Cr.P.C. By marking the signature alone, it cannot be construed that the statements and the contents are proved.

7. Admittedly, in this case, the learned Magistrate, who recorded the statement of the victim/PW2 under Section 164 Cr.P.C was not examined as witness. The statement of the victim/PW2 recorded under Section 164 Cr.P.C was marked as Ex.P16 through PW11, the Investigating Officer. The trial Court had no material for corroboration on the statement of the victim/PW2. The evidence of PW1 and PW2 are contradictory to each other. The reason given for delay of 2 ½ months in lodging the complaint turned to be false. During recording the statement, PW2 did not make any complaint against the petitioner. There was some enmity between the petitioner and PW2's family. Admittedly, they are neighbours. Due to the enmity, the petitioner has been falsely implicated in this case. The Child Line Member/PW5 evidence is exaggerated, blown out of proportion, which leads to filing a case against the petitioner. PW1 goes to the extent that PW2 was admitted in the hospital, where she underwent medical termination of pregnancy. PW2 has not stated so. There is no evidence to show that PW2 undergone medical termination of pregnancy. Thus, PW1 had given exaggerated version and also forced the victim/PW2 to give such statement against the petitioner. The Birth Certificate [Ex.P15] of the victim/PW2 has been marked through Investigating Officer/PW11, which cannot be looked into and acted upon. The trial Court failed to consider all these aspects, convicted the petitioner. Further, there are lot of inconsistencies and contradictions in the statement of the witnesses, which the lower Court failed to consider.

8. The learned counsel for the petitioner further submitted that there was love affair between the petitioner and the victim/PW2, which was objected by the family members and parents and they had concocted a story against the petitioner. The petitioner is even today willing to marry the victim/PW2. Had the victim given free mind without any coercion, she would express her willingness to join the petitioner. Hence, he prayed to suspend the sentence of imprisonment till the disposal of the appeal.

9. The Public Prosecutor, Puducherry appearing for the respondent submitted that PW1 was taking treatment in the hospital for diabetics and requested the petitioner to drop his daughter/PW2 at home. Deliberately, the petitioner had taken the victim/PW2 to a forest area and committed penetrative sexual assault on her, further threatened her not to disclose the same. Fearing for life, the victim/PW2 kept quiet till 21.07.2017. The mother of the victim/PW2 found the menstrual cycle of the victim/PW2 skipped and on enquiry, PW2 disclosed the happenings. Immediately, PW1 lodged a complaint [Ex.P1] to PW10, who registered FIR and forwarded the same to higher officials. PW11 contacted PW5/Child Line Member, visited the scene of occurrence, recorded the statement of PW1, PW3 and others, who were in the scene of occurrence, prepared Observation Mahazar, Rough Sketch, recorded the statement of PW2 with the assistance of PW6, Women Sub Inspector and sent the victim/PW2 for medical examination. PW8, the Doctor examined the victim, gave a report [Ex.P8]. From the

medical report [Ex.P8], it is seen that the hymen was not intact. PW2 had given a statement under Section 164 Cr.P.C and deposed before the Court that the petitioner had committed the penetrative sexual assault on her. The evidence of PW1, PW2 and PW8 corroborated and confirmed the case of prosecution. Considering the evidence and materials produced, the trial Court convicted the petitioner. Taking into consideration of the age of the petitioner, minimum sentence has been imposed on the petitioner. The petitioner was arrested on 21.07.2017 and he was in jail for 90 days as per trial prisoners and after conviction, he inside the prison from 23.08.2019.

10. On considering the rival submissions and on perusal of the materials, it is seen that PW2 is the victim in this case. The Birth Certificate [Ex.P15] of victim/PW2 was marked through the Investigation Officer/PW11. The contention of the petitioner does not prove that whether the victim is a minor or not is not proved in the manner known to law cannot be brushed aside. Further marking of Ex.P3 the signature of PW2 in the statement of PW2 recorded under Section 161 Cr.P.C., and Ex.P6 the signature of PW5 in the statement of PW2 recorded under Section 161 Cr.P.C statement and Ex.P7 the entire statement of PW2 recorded under Section 161 Cr.P.C., is against the procedure and law. The victim/PW2 had not stated against the petitioner in her statement under Section 161 Cr.P.C. The statement under Section 164 Cr.P.C [Ex.P16] is marked through Investigating Officer/PW11. The lower Court placed reliance on the evidence on the materials, which are doubtful in nature and had given a finding against the petitioner. The evidence of PW1 is that PW2 had missed the menstrual cycle is the reason for the complaint. The occurrence had taken place on 05.05.2017 and the complaint [Ex.P1] came to be lodged on 21.07.2017. The stopping of menstrual period proved to be false on the evidence of PW8 and the medical report Ex.P8.

11. Further, PW1 stated that PW2 got admitted and undergone termination of pregnancy is also proved to be false. The evidence of PW1, PW2 and PW8 are contradictory to each other, which causes doubt on the genuineness and truthfulness of the evidence and materials. The petitioner is aged about 22 years at the time of occurrence. The petitioner and the victim/PW2 were in love affair with each other, which were opposed by the parents of the victim/PW2. Due to their adolescence and not knowing the consequences, there might have been some excess in their love affair.

12. Further, there are infirmities in the prosecution case and arguable points involved in the appeal, considering the period of incarceration and the appeal is not likely to be taken up for final hearing in the near future, hence, this Court is of the considered view that the petitioner herein is entitled to the relief of grant of suspension of sentence.

13. 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 Special Judge, Karaikal 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 once in three months on first working day of English Calendar Month i.e., from December 2012 at 10.30 a.m., till the disposal of the appeal. The petition is ordered.

-sd/-

20/11/2020

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 SPECIAL JUDGE, KARAİKAL.

2 THE SPECIAL JUDGE, (DISTRICT AND SESSIONS JUDGE),
KARAİKAL

3 THE PUBLIC PROSECUTOR, PUDUCHERRY

4 INSPECTOR OF POLICE,
NERAVY POLICE STATION, KARAİKAL.

5 THE SUPERINTENDENT,
CENTRAL PRISON, PUDUCHERRY

C.C. to M/S.S.SOUNTCHAR Advocate on payment of necessary charges
Sr.7707

Order

in

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in

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Date :20/11/2020

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RVR 30/11/2020