

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reservation	06.02.2020
Date of Judgment	19.06.2020

CORAM

THE HONOURABLE MRS. JUSTICE **T.KRISHNAVALLI****Crl.A(MD)No.220 of 2015****and****Crl.A(MD)No.47 of 2017****Crl.A(MD)No.220 of 2015:**

1.Paulraj
2.Sakkarai : Appellants/A2 and A3

Crl.A(MD)No.47 of 2017:

Mookaiah : Appellant/A1

Vs.

State Represented by
The Inspector of Police,
All Women Police Station,
Thoothukudi.
(Crime No.20 of 2013)

: Respondent/Complainant
in both cases

Common Prayer: Criminal Appeals filed under section 374(2) of the Criminal Procedure Code, against the judgment of the Sessions Judge/Fast Track Mahila Court, Thoothukudi, in Spl. SC No.4 of 2014, dated 06.07.2015.

For Appellants in
Crl.A(MD)No.220 of 2015 : 1.Mr.Ka.Ramakrishnan for A2
2.Mr.A.Joseph Jawahar for A3

For Appellant in
Crl.A(MD)No.47 of 2017 : Mr.A.Joseph Jawahar

For Respondent : Mr.V.Neelakandan
(in both cases) Additional Public Prosecutor

COMMON JUDGMENT

These Criminal Appeals are directed against the judgment of the Sessions Judge/Fast Track Court (Mahila Court), Thoothukudi, in Spl. SC No.4 of 2014, dated 06.07.2015.



2.The case of the prosecution is that on 30.08.2013, A1 to A3 on different occasions, had individually called the victim to their houses, made her lie down on the floor undressed her full skirt and inserted the penis into her vagina and committed penetrative sexual assault and further more, A1 enticed the victim by showing obscene pictures through CD and forced her to act of such. The Inspector of Police attached to All Women Police Station has filed a final report against the accused persons examining the witnesses.

3.The trial court, after careful perusal of the entire materials available on record found A1 to A3 guilty under section 5(1) r/w 6 of Protection of Children from Sexual Offences Act, 2012 and each are convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.2,000/-, in default each to undergo rigorous imprisonment for 1 month. Aggrieved over the same, the appellants/A1 to A3 are before this court.

4.Heard both sides and perused the materials available on record.

5.The first contention raised on the side of the appellants/A1 to A3 is that PW2/victim girl stated that the alleged place of occurrence is the shop of A2, but in her 164 Cr.P.C statement stated that Mariselvi took her to the house of A2 and further, the Investigating Officer stated during his evidence that he mentioned the house of A2, is the place of occurrence and hence, the prosecution has not clearly proved with PW2 or other witnesses that where the occurrence took place and the prosecution witnesses stated different place of the alleged incident and so far as the incident is concerned, the prosecution failed to prove the exact place where the alleged occurrence took place and thus, it is doubtful whether such incident had taken place or not and prays that the appellants/A1 to A3 are entitled to acquittal. For the above submission, the learned counsel for the appellants/A1 to A3 submitted a ruling reported in **CDJ 2018 BHC 1619 (Vanita Vasant Patil & others Vs. S.S.Shinde & Maharashtra & others)**. In that case, it has been held in para 31 as follows:-

''31.Thus, it is clear from the perusal of the evidence of the prosecution witnessed that, they have stated different spot of the alleged incident. Thus, so far as the alleged incident is concerned, the prosecution has failed to prove the exact spot where the alleged incident took place. Thus, it is doubtful whether such incident had taken place or not.''



6. In this case, PW2 is the victim and PW1 is the mother of the victim. In respect of the occurrence, PW1 gave Ex.P1 complaint and PW1 and PW2 gave 164 Cr.P.C statements before the learned Judicial Magistrate and the above 164 statements of PW1 and PW2 were marked as Ex.P20. In respect of the occurrence, Exs.P1 and Ex.P20 are the earliest documents. In Ex.P1, PW1 categorically stated that A1 to A3 several times took her daughter to their residence and sexually abused her daughter by way of pressing his private part on the private part of her daughter. In this case, in respect of the place of occurrence, Exs.P14 and Ex.P16 (Rough Sketches) were marked. On perusal of Exs.P14 and Ex.P16, it reveals that the place of occurrence is shown as the house of A1 to A3. PW2 during her Chief examination stated that A2 took her to his cement shop and subjected her to sexual intercourse. But during her cross examination by A1 and A3's counsel, PW2 stated that she went to the residence of A1 to A3 and identified them. Further, PW2 stated that A2 took her to his cement shop for several times for doing sexual activities. But in Exs.P1 and Ex.P20, it was stated that on the date of the alleged occurrence, A2 took PW2 to his residence. Hence, Exs.P1 and P20 reveal that the place of occurrence is the residence of A1 to A3. Further, it is stated on the prosecution side that A2's cement factory is situated adjacent to the house of A2. It is not stated on the accused side that the cement shop of A2 is far away from his house. Hence, the argument of the learned counsel for the appellants/A1 to A3 stating that the prosecution failed to prove the occurrence place is not at all acceptable. Hence, it is held that the place of occurrence is the residence of A1 to A3.

7. The next contention put forth on the side of the appellants/A1 to A3 is that as per the prosecution version, the sexual offence said to have taken in a plastic chair is highly impossible and the medical evidence is not corroborated with the oral evidence and prays that the appellants/A1 to A3 are entitled to acquittal.

8. The learned counsel appearing for the appellants/A1 and A3 argued that PW1 stated the averments in Ex.P1 complaint as stated by PW2, but while cross examined by A2, PW1 deposed that PW5 got signature in the complaint and she did not know the contents of the complaint and PW5 and the police only tutored her and her daughter what to state before the court and in the same way, PW2 also stated that she was tutored by PW5 and the police, which would go to show that the evidence of PW1 and PW2 cannot be accepted and vitiated by tutoring done by PW5 and the police and hence, the evidence of PW1 and PW2 cannot be relied upon and further, the learned counsel for the appellants/A1 and A3 submitted that the evidence of PW10/Doctor assumes importance in which reflects truthful rendition of what happened

to the victim girl, who is aged 11 at the time of occurrence and according to PW10, she found no external injuries, but the hymen was absent, which is possible by engaged in sports activities and further, PW2 stated to her that she was assaulted by one unknown person and no penetrative act was committed and such unknown person misbehaved with her only, so the evidence of PW1, PW2 and PW5 taken together, it is clear that the police manipulated the whole story and the prosecution case is ridden with exaggeration and imagination and at this juncture, the judgment rendered in 2017-1-LW (Cr1) 251 may be accepted as from the expert evidence PW10, it can be construed that the acts of the appellants if admitted, it will be only attempt under section 18 of POCSO Act and the appellants already incarcerated for 4-1/2 years and the said period may be set off.

9. In this case, on the side of A1 and A3, cross examination was done. But the learned counsel for A2 represented before the trial court that he has not received the notice and hence, it was not possible for him to cross examine and only on the representation by A2's counsel, it was endorsed that no cross examination by A2, But the second accused filed petition under section 311 and it was allowed and A2 cross examined PW1 and PW2 on 07.11.2014. But the chief examination was done on 26.08.2014. After a lapse of three months, PW1 and PW2 were cross examined. But PW1 and PW2 stated during her cross examination as follows:-

PW1 while cross examining on behalf of A2 stated as follows:-

“வழக்கறிஞர் தனக்கு நோட்டீஸ் எதுவும் வராததால் தன்னால் குறுக்கு விசாரணை செய்ய இயலாது என்று கூறி 2வது எதிர்ப்பீடம் குறுக்கு விசாரணை செய்ய தயாரா என்று கேட்ட போது அவர் தயாராக இல்லை என்று கூறியதால் 2வது எதிரி தரப்பில் குறுக்கு விசாரணை இல்லை என்று முடிக்கப்பட்டது.

PW2 while cross examining on behalf of A2 stated as follows:-

“அ.சா.1 என் அம்மா அவரை பியூலா டீச்சரும் போலீசும் சம்பவம் நடந்ததாக தவறாக சொல்லச் சொன்னார்கள். நான் மாரிச்செல்வியுடன் பால்ராசு கடைக்கு போகவில்லை. முதல் விசாரணையில் போலீசார் சொல்லிக்கொடுத்ததை வைத்து சொன்னேன் என்றால் சரிதான்.”

But they were not treated as hostile. When a witness cross examined, after a long interval of time and deposed contrary to their chief examination, their evidence in the cross examination can be eschewed since they were won over by the accused.



10. In this regard, it is relevant to refer the judgment reported in the case of **Akil alias Javed Vs. State (NCT of Delhi) 2013 (3) SCC (Cr1.) 63**, wherein, it is held as follows:-

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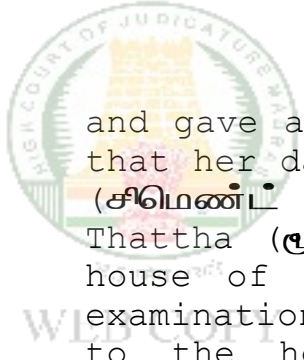
''...If a witness has been cross-examined after a long interval from the date of chief examination and circumstances are available for the purpose of believing that he or she might have been won over by other side, such evidence can be disregarded / eschewed...''

11. In this case also, PW1 and PW2 were cross examined after a lapse of three months. Hence, there is a chance for won over by the accused. Therefore, it is held that the cross examination of PW1 and PW2 by A2's counsel on 07.11.2014 was eschewed.

12. In this case, PW2 is the victim and she is only the competent person to speak about the occurrence. PW2 during her evidence stated that A2 made her sit on the chair, then removed her jatti and inserted his penis into her vagina and embraced her and kissed her and licked her private part and white oozed out, he left her and then gave her Rs.20/-. Similarly, A1 accused took her to his house, made her lie on the cot stripped of her jatti, inserted his penis and as she felt pain, he had applied oil and something white oozed out and further stated that he gave her money. Similarly, A3 took her along with Mari Selvi to his house stripped of her jatti and inserted his penis into her vagina and gave her money. It is the version of PW2 that each of the accused had done the sexual act twice and PW2 had further stated that her mother was informed about the occurrence through one akka and later, she had informed her about the incident. PW2/child victim has also stated that earlier also, she narrated the incident before the Court.

13. In this case, PW2 identified A1 to A3. Further, PW2 during her cross examination stated that she was not tutored. On careful perusal of the evidence of PW2, it is natural, cogent and trust-worthy.

14. The mother of PW2 was examined as PW1. PW1 deposed that prior to six months, she found that her daughter had money and when she enquired about the same, for that her daughter told that A1/Mookaiah, A2/Balraj and A3/Sakkarai gave the amount and she went to the house of Beulah teacher and Beulah teacher told her that she found money in the hands of PW2 and she enquired PW2, for that PW2 replied that the grand-fathers gave money to her for doing wrongful act by them and then, she went to police station



and gave a complaint. But PW1 during her cross examination stated that her daughter stated that the grand-fathers are Cement Thattha (சீமெண்ட் தாத்தா), Thoppi Thattha (தொப்பி தாத்தா) and Mookaiya Thattha (மூக்கையா தாத்தா). It is admitted that adjacent to the house of A2, there was a cement shop. PW2 during her cross examination identified A3 as "Thoppi Thattha." Further, PW2 went to the house of A1 to A3 and identified them before the Investigating Officer. From the evidence of PW1, it reveals that for doing wrongful act, A1 to A3 gave money to the victim. PW2 also deposed that for doing wrongful act, A1 to A3 gave money to her. Hence the evidence of PW1 is corroborated with the evidence of PW2.

15. PW4 is the neighbourhood of PW1. But, he turned hostile and did not support the case of the prosecution.

16. PW5 is working as Teacher in National Special School and the victim Malarkodi is studying in the above school and one day during the lunch interval, she saw the victims Mariselvi, Malarkodi and Kanmani were quarrelling and when she enquired, for that she replied that the grand-fathers gave her the money for doing wrongful act and quarrel arose between the three victims by dividing the money given by A1 to A3. Then, she went to the house of the victim/PW2 and informed the above incident to her parents and then in next day, PW1 went to the police station and gave a complaint.

17. The learned counsel for the appellants/A1 to A3 submitted that PW5 is the Head of Women Self-Helping Group (மகளிர் சுய உதவி குழு) and in that Group, she arranged loan for others and in that loan arrangement, she misappropriated some amount and further, she encroached the property for her school and it was opposed by the public and hence, at her instigation, the mother of the victim gave the complaint as against A1 to A3 and hence, her evidence cannot be relied upon. While cross examining PW5, she has stated that after she came to understand the sexual activities by A1 to A3, she narrated the occurrence to the mother of the victim and the parents of the victim did not know how to write the complaint and then, she wrote the complaint what was stated by the mother of the victim. The learned counsel for the accused put a question to PW5 stating that she misappropriated the amount, hence, she induced the mother of the victim to give the complaint. No contra evidence was let in on the side of the accused to prove that PW5 misappropriated the amount and it was opposed by A1 to A3. Further, while cross examining PW5, the learned counsel for the accused put a question that she encroached property for her school and when it was questioned by the public, she instigated the mother of the victim to give the complaint



opposed the encroachment done by PW5. The learned counsel appearing for the accused specifically put a question that only the public opposed for the encroachment done by PW5. Hence, the argument put forth on the side of the accused stating that at the instigation of PW5, the mother of the victim gave complaint against A1 to A3 is not at all acceptable.

18. In this case, it is necessary to decide whether the ocular evidence is corroborated with the evidence of the Doctor. The Doctor, who examined the victim was examined as PW10. PW10 in his evidence stated that after examination of the victim, he found that the hymen of PW2 was not intact and her private part admitted with a little finger tip and no evidence of any external injuries.

19. In this case, PW2 categorically stated that the above performance of sexual intercourse by all the accused and her statement was not challenged during her cross examination. PW2 deposed that A2 made her sit on the chair and removed her inner garments and inserted his private part in her private part and she has not left her until the white oozed out. Further, the Doctor also stated that the hymen of PW2 was not intact and her private part is admitted with a little finger. Hence it reveals that due to sexual intercourse, the hymen of PW2 was not intact. The learned counsel for the accused submitted that as per the prosecution version, A2 put PW2 on a chair and subjected her to sexual intercourse. But it was not possible to have sexual intercourse, when the victim sat on the chair and hence, there was no such commission of sexual intercourse by A2. PW2 has not stated that A2 was in standing position, subjected her to sexual intercourse. She has stated that A2 put her on the chair and removed the inner garments and pressed the private part of A2 on the private part of her. Hence, the argument put forth on the side of the appellants/A1 to A3 stating that the alleged sexual assault by A2 is not possible is not at all acceptable. Further, the hymen was not intact and the private part is admitted with a little finger tip. PW2 categorically stated that A1 to A3, after removing her inner garments, pressed their private part into her private part and did some obscene activities and they left her only when the white oozed out. Hence, it reveals that A1 to A3 subjected her to intercourse until the white oozed out. PW2 stated that sever times, A1 to A3 subjected her to sexual intercourse. Further, PW2 categorically stated that only A1 to A3 subjected her to sexual intercourse. Hence, it is held that the evidence of PW2 is corroborated with the evidence of PW10.

20. The next contention raised on the side of the appellants/A1 to A3 is that the victim was misused by PW5, since she had enmity with the accused and only on her instigation, PW1 gave the complaint as against the accused when there was no



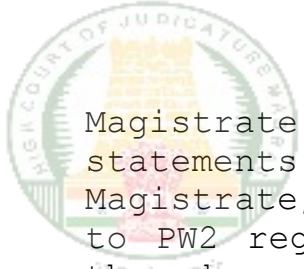
commission of offence by the accused and prays that the appellants/A1 to A3 are entitled to acquittal.

21. The learned counsel for the accused while cross examining PW5 put a suggestion in respect of the enmity between her and the accused, for that PW5 denied. In this case, to prove that A3 has not committed that offence and the enmity between PW5 and their family, the son of A3 was examined as DW1. DW1 deposed that PW5 is residing nearer to his house and she was running a school and in the school, dispute arose in respect of taking water and due to it, this false case was filed against his father at the instigation of PW1.

22. It is admitted that the victim is the grand daughter of A3. To prove that the dispute between PW5 and the family of DW1, no document was filed on the side of the accused. Further, PW5 categorically denied the suggestion put forth by the learned counsel for the accused in respect of the enmity between her and the accused on the ground that she had misappropriated the amount belonging to the Self Group, on account of which, he take revenge on PW5 and used PW1 and PW2 as an instrument and he filed a false case. But while cross examining PW5, the learned counsel for the accused has not put a question that due to taking water in the school belonged to PW5, she instigated the mother of the victim to give the complaint as against A1 to A3. But the learned counsel while cross examining PW5 put a question that she misappropriated amount from the Self Group and further, she encroached the property for her school and it was opposed by the public, she instigated the mother of the victim to give a complaint as against A1 to A3. There are lot of contradictions in the defence taken by the accused in respect of the motive. Hence the argument put forth on the appellants/A1 to A3 stating that only at the instigation of PW5, PW1 gave this complaint is not at all acceptable.

23. The further contention raised on the side of the appellants/A1 to A3 is that the 164 Cr.P.C statement of PW1 and PW2 were not marked through PW1 and PW2, but it was marked through the Magistrate only and hence, it is not good in the eye of law as the defence did not have the opportunity to cross examine the witnesses, whose statements are recorded under 164 Cr.P.C and such statements could not be treated as substantial evidence. For that, the learned counsel for the appellants/A1 to A3 submitted the rulings reported in **2014(2) MWN (Cr1) 290 (DB) (R.Murugesan Vs. State) and 2009-2-LW (Cr1.) 92 (Selvam Vs. State:Inspector of Police, Namakkal District).**

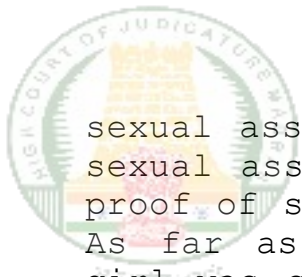
24. PW2 during her evidence stated that already, she gave statement before the Magistrate and it was recorded by the



Magistrate. It is fault on the prosecution side to mark the 164 statements through PW1 and PW2. But it was marked through learned Magistrate, who recorded the statement. But no question was put to PW2 regarding the 164 statement of PW2. Already the copy of the above statements were given to the accused. Hence, it was given reasonable opportunity to the accused to cross examine in respect of all the records. Already, the learned counsel for the accused cross examined in respect of all the records. The learned counsel for the accused has not taken any steps to recall PW1 and PW2 and further cross examination in respect of 164 Cr.P.C statement of PW1 and PW2. Hence, the non-marking of 164 statements of PW1 and PW2 through PW1 and PW2 will not affect the case of the prosecution.

25. In this case, the Doctor, who examined A1 to A3 in respect of their potentiality was examined as PW6. PW6 categorically stated that A1 to A3 are potent. In this case, at the time of occurrence, the age of victim is 11 years. At this stage, the victim has no knowledge of physical relationship and the victim at this young age has no reason to falsely implicate all the accused since there was no enmity between the accused and the family of the victim. It is admitted on the accused side that there was no dispute between the accused and the family of the victim. In this case, the victim clearly deposed about the sexual assault committed by A1 to A3 and hence, there is no reason to doubt the same. Further, the victim stated that she gave statement in respect of the occurrence before the learned Judicial Magistrate by way of 164 Cr.P.C. On careful perusal of the evidence of PW2, her testimony is cogent and trustworthy. Further, the evidence of PW2 is corroborated with the evidence of PW1, PW5 and PW10/Doctor. The victim deposed about the sexual intercourse by all the accused and the rupture of hymen proved that the victim was subject to sexual assault. Further, PW2 during cross examination put a question that she was tutored either by the police or Advocate. But it was denied by PW2. In this case, PW2 clearly explained the act of A1 to A3 and the medical opinion confirmed the sexual assault. PW2 deposed in detail the incident on two occasions by A1 to A3 during her evidence as well as the 164 statement. The oral evidence of PW2 is corroborated with the medical evidence. Hence, the argument put forth on the side of the appellants/A1 and A3 stating that only the accused attempted to commit the offence under section 18 of the POCSO Act is not at all acceptable.

26. Considering the whole aspects of the matter and the evidence of the prosecution in the proper perspective, it is clear that all the three accused persons had committed sexual assault on victim twice each. All the accused very much ravished one after another. It is proved that there was repeated penetrative



sexual assault. Each of the accused had the intention to commit sexual assault on the victim. The prosecution adduced clinching proof of sexual assault by each one of the accused on the victim. As far as the aggravating circumstances are concerned, a minor girl was sexually exploited. The aggravating circumstances are so grave in nature. All the proven circumstances if taken together and cumulatively go a long way to establish all the accused had committed an offence of aggravated penetrative sexual assault.

27. For all the reasons stated above, this court is of the considered view that the trial court on proper appreciation of the entire materials on record, both oral and documentary, had given a correct finding, which requires no interference of this court.

28. In the result, these criminal appeals fail and the same are **dismissed**.

Sd/-

Assistant Registrar(CS-II)

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Sub Assistant Registrar(CS)

vsd/er

To,

1. The Sessions Judge,
Fast Track Court/Mahila Court,
Thoothukudi.
2. The Judicial Magistrate No.I, Tuticorin.
3. The Chief Judicial Magistrate, Tuticorin.
4. The Inspector of Police,
All Women Police Station,
Thoothukudi.
5. The Superintendent, Central Prison,
Palayankottai.
6. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



COPY TO

The Section Officer, Criminal Section,
Madurai Bench of Madras High Court, Madurai.(2 copies)

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and
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19.06.2020

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