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IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 22.07.2021
JUDGMENT DELIVERED ON : 29.07.2021

CORAM

THE HONOURABLE MR. JUSTICE P.N.PRAKASH
and
THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

Criminal Appeal No.558 of 2019

Vijayakumar
S/o.Nataraj

.. Appellant

Vs.

State represented by
Inspector of Police,
All Women Police Station,
Gobichettipalayam,
Erode District.
Crime No.6 of 2016

.. Respondent

Criminal Appeal filed u/s.374(2) of the Code of Criminal Procedure against the judgment and order dated 23.06.2017 passed in Spl.S.C.No.10 of 2017 on the file of Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode.

For Appellant : Mr.N.Manoharan
For Respondent : Mr.M.Babu Muthu Meeran
Additional Public Prosecutor

JUDGMENT

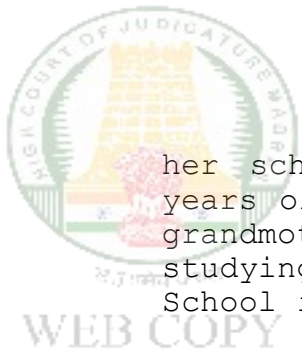
P.N.PRAKASH, J

This criminal appeal is directed against the judgment and order of conviction and sentence dated 23.06.2017 passed by the Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, in Spl.S.C.No.10 of 2017.

2. This being a case under the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POCSO Act"), we deem it necessary not to refer to the name of the victim and instead, refer to her as "X".

3. The prosecution case is as follows:

3.1. "X" is the daughter of Shanthi-Ravi couple. Shanthi is said to be mentally retarded. The date of birth of "X" as per



her school records is 05.06.2003 and accordingly, she was 14 years old during the alleged occurrence. "X" was living with her grandmother Backiyalakshmi in Periyapuliur village and was studying in 8th standard in the Government Higher Secondary School in Periyapuliur.

3.2. In September 2016, after the quarterly examination, "X" had holidays and so, her aunt Meenakshi (PW-1) took her to her village, Kaalingarayanpalayam, which is about 10 kms. from Periyapuliur. After reaching the house of Meenakshi (PW-1), "X" complained of body pain and when Meenakshi (PW-1) enquired her, she stated that she wanted to confide in her certain things and said that she was sexually abused on various occasions by four persons, of whom, she named three persons, Sembulingam, Murugesan @ Murugan and Sivakumar @ Ramesh of Periyapuliur village. As regards the fourth person, she stated that he is from Kaalingarayanpalayam and that she can identify him. Immediately, Meenakshi (PW-1) brought these revelations by "X" to the notice of the elders in the house and on 25.09.2016, Meenakshi (PW-1) gave a written complaint vide Ex.P1 narrating what "X" had told her.

3.3. On the said complaint, Nagamani (PW-21), Sub-Inspector of Police, All Women Police Station, Gobichettipalayam, registered a case in Crime No.6 of 2016 on 25.09.2016 for the offences under Sections 366 IPC, 5 r/w 6 of the POCSO Act and 506(II) IPC against Sembulingam, Murugesan @ Murugan, Sivakumar @ Ramesh, all residents of Periyapuliur and one, not named, but an identifiable person being a resident of Kaalingarayanpalayam and prepared the printed First Information Report (Ex.P24), which reached the jurisdictional Magistrate on the same day at 10.30 p.m.

3.4. Investigation of the case was taken over by Gayathri (PW-22), Inspector of Police, who arrested Sembulingam, Murugesan @ Murugan, Sivakumar @ Ramesh and Vijayakumar (appellant) on 25.09.2016 at 15.15 hours in Gobichettipalayam Bus Stand.

3.5. All the arrested accused were medically examined by Dr.Sivasankar (PW-3), Assistant Medical Officer, Government Hospital, Gobichettipalayam, on 25.09.2016 at 07.15 p.m. and certificates were issued, of which we are concerned with the one relating to the appellant herein, viz., Ex.P5, wherein the following final opinion has been given:

'FINAL OPINION:-

Mr.Vijaya Kumar 34/M

Based on clinical examination, there is nothing to suggest that the male examined is not capable of performing sexual act.'



3.6. The appellant was further examined, his semen collected and it was sent to Tamil Nadu Forensic Sciences Department for examination. The final opinion (Ex.P8) given by Dr.S.Vijayakumar (PW-4) reads as under:

'FINAL OPINION:-

The result for grouping test is inconclusive. There is no evidence to suggest he is impotent.'

3.7. Dr.Kalyani (PW-5), Senior Assistant Medical Officer, examined "X" on 26.09.2016 for determining her age and after conducting necessary radiological tests, she gave a report (Ex.P9) opining that "X" has completed 14 years of age and is less than 15 years of age.

3.8. Dr.Kalapriya (PW-6) medically examined "X" on 25.09.2016 and took her vaginal smears, which were sent to the Tamil Nadu Forensic Sciences Department for chemical examination. The chemical examination report showed absence of spermatozoa in the vaginal smears. Thereafter, Dr.Kalapriya (PW-6) gave her final opinion (Ex.P13), wherein she stated that the hymen was torn; no spermatozoa was detected in the vaginal smears; and that it is possible for "X" to have been subjected to coitus.

3.9. "X" was admitted as an inpatient on 31.12.2016 in the Government Head Quarters Hospital, Erode, for psychological assessment. Dr.Jayaprakash (PW-13), Psychiatrist, conducted several psychological screening and administered the following tests:

1. Vineland social maturity scale
2. Woodern Form Board Test
3. Binet Kamat Test of Intelligence
4. Mental Status Examination
5. Psychopathological Screening Test

and submitted a detailed report which has been marked as Ex.P23.

3.10. After examining various witnesses and collecting the reports of the experts, Gayathri (PW-22), Inspector of Police, completed the investigation and filed a single final report against four accused viz., Sembulingam (A1), Murugesan @ Murugan (A2), Sivakumar @ Ramesh (A3) and Vijayakumar (A4) for the offences under the POCSO Act and IPC in the Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, which is designated as the Special Court under the POCSO Act.

4. The learned Special Judge carefully analysed the final report and found that the offences allegedly committed by the four accused were not committed in the course of the same transaction and therefore, he split up the case qua each accused and assigned separate case numbers to conduct the trials



simultaneously and not jointly. The details of the case numbers are as under:

Sembulingam	-	Special S.C.No.5 of 2017
Murugesan @ Murugan	-	Special S.C.No.8 of 2017
Sivakumar @ Ramesh	-	Special S.C.No.9 of 2017
Vijayakumar (Appellant herein)-		Special S.C.No.10 of 2017

4.1. The trial Court framed charges u/s.366 IPC (2 counts) in respect of the alleged incident on 29.05.2016 and 30.05.2016; Section 6 of the POCSO Act and Section 506(II) IPC for intimidating "X". When questioned, the appellant pleaded "not guilty".

4.2. To prove the case, the prosecution examined 22 witnesses and marked 27 exhibits. When the appellant was questioned u/s.313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same. No witness was examined from the side of the appellant nor any document marked.

4.3. After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 23.06.2017, acquitted the appellant of the offence u/s.366 IPC, but convicted him of the offence u/s.4 of the POCSO Act and section 506(II) IPC and sentenced him as under :

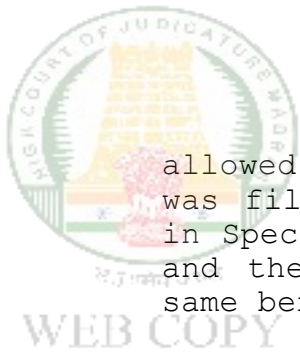
Provision under which convicted	Sentence
Section 4 of POCSO Act	Life imprisonment and fine of Rs.5,000/-, in default, to undergo two years simple imprisonment.
Section 506 (ii) IPC	Seven years rigorous imprisonment and fine of Rs.5,000/-, in default, to undergo two years simple imprisonment.

Challenging the aforesaid conviction and sentences, the appellant has preferred the present appeal.

5. It is pertinent to state here that the other three accused viz., Sembulingam, Murugesan @ Murugan and Sivakumar @ Ramesh were also convicted and sentenced on the same day by three separate judgments.

6. Heard Mr.N.Manoharan, learned counsel for the appellant and Mr.M.Babu Muthu Meeran, learned Additional Public Prosecutor appearing for the respondent State.

7. At the outset, Mr.N.Manoharan, learned counsel for the appellant, contended that a Division Bench of this Court has



allowed the appeal in Crl.A.No.424 of 2017 on 30.01.2018 that was filed by Sivakumar @ Ramesh against the judgment and order in Special S.C.No.9 of 2017, by disbelieving the evidence of "X" and therefore, the present appellant should also be given the same benefit.

8. It appears that after all the four accused were convicted and sentenced, only Sivakumar @ Ramesh filed an appeal in Crl.A.No.424 of 2017 and the others resigned to their fate. After the appeal of Sivakumar @ Ramesh was allowed by this Court on 30.01.2018, the present appellant filed this appeal with a delay of 727 days, which was condoned by this Court and the appeal was taken up for hearing. We understand that the other accused viz., Sembulingam and Murugesan @ Murugan have not preferred any appeal so far.

9. We find that the chief-examination of all the prosecution witnesses is common to the four cases but only the cross-examination differs. The trial Court cannot be faulted for adopting such a procedure in the peculiar facts and circumstances of the present case. The defence has not disputed the age of "X" nor other facts like the potency of the appellant. They have also not disputed the inter se relationship of "X" with Meenakshi (PW-1) and Vasuki (PW-15). The medical evidence does not, in any manner, implicate the accused.

10. The whole prosecution case is posited on the testimony of "X". According to the complaint (Ex.P1), "X" spilled the beans to Meenakshi (PW-1) on 23.09.2016 when PW-1 brought her to her house during the post quarterly examination holidays. "X" told Meenakshi (PW-1) that one month after she attained puberty, Sembulingam pulled her to his house saying that he would give her chocolates, closed the door, removed her chudithar and sexually abused her; he further threatened her saying that she should not disclose this to anyone; he also repeated this act four times later; four months ago, while she was going to the fields for attending to the nature's call, Murugesan @ Murugan sexually abused her; he did this three times later while she was on her way to ease herself; in the mean while, one day, when she was playing with Aswathi in her house, when Aswathi went to the rest room, her father Sivakumar @ Ramesh sexually abused her.

10.1. Coming to the allegations against the appellant, the First Information Report (Ex.P24) states as follows:

That, three months ago, "X" went with her grandmother to the house of her aunt Vauski (PW-15) in Kaalingarayanpalayam; her grandmother and Vasuki (PW-15) went to consult an astrologer with her horoscope; at that time, she was playing with the local children in front of her aunt Vasuki's (PW-15's) house; after sometime, the children, who were playing with her, went to play



elsewhere; at that time, a person, whom she can identify, pulled her hand to his house, made her lie on her back and sexually abused her; on the next day, while she ("X") was in the terrace of her aunt Vasuki's house (PW-15), the same person called her down, took her to the house of an old lady and sexually abused her; thereafter, he threatened her saying that she should not disclose this to anyone; while she and that person came out of the house, her aunt Vasuki (PW-15) saw them.

10.2. "X" was examined as PW-2 and she identified the sole accused standing in the dock as the person who sexually abused her when she had gone to her aunt Vasuki's (PW-15's) house in Kaalingarayanpalayam. Of course, in her examination in chief, she has also spoken to about the allegations against the other three accused, which we are not dwelling into, as those accused are not before us in this appeal.

10.3. Admittedly, "X" did not reveal the name of the appellant to her aunt Meenakshi (PW-1) on 23.09.2016. Had the name of the appellant been revealed, it would have found a place in Column No.7 of the First Information Report. As stated above, in Column No.7 of the First Information Report, the names of Sembulingam, Murugesan @ Murugan and Sivakumar @ Ramesh find place and as regards the fourth person, it is recorded as 'identifiable person, Kaalingarayanpalayam'. The moot question is how did the police fix the appellant as the unnamed person.

10.4. Gayathri (PW-22), Inspector of Police, in her evidence, has stated that after registering the First Information Report, she went along with her team in search of the accused; on intelligence, she went to Gobichettipalayam bus stand and near a flower shop, she found Sembulingam, Murugesan @ Murugan, Sivakumar @ Ramesh and Vijayakumar, who were identified by "X" and she arrested them on 15.15 hours on 25.09.2016. This sounds unbelievable and incredible for the following reasons:

- Sembulingam, Murugesan @ Murugan and Sivakumar @ Ramesh were from Periyapuliyur, whereas, the appellant was from Kaalingarayanpalayam. There is no shred of material to show that the appellant was known to the other three. Kaalingarayanpalayam is 8 kms. away from Periyapuliyur and Gobichettipalayam bus stand from where all the four were said to have been arrested, is 28 kms. away. There is no reason for the appellant to go along with the other three accused of Periyapuliyur Village to Gobichettipalayam bus stand.
- The easiest way to identify the fourth person, unnamed in the First Information Report, was to have taken "X" to Kaalingarayanpalayam and asked her to show the house where she was allegedly abused. Based on the showing of the place of occurrence by "X", it would have been easier for the police to zero in on the perpetrator of the offence. The police could



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have sent "X" along with Meenakshi (PW-1) and Vasuki (PW-15) or with the members of the local Child Welfare Committee or with any other respectable persons to go around Kaalingarayanpalayam for identifying the perpetrator. Instead, saying that, on intelligence, they went to Gobichettipalayam bus stand, found all the four accused near a flower shop and arrested them on the identification of "X", defies credulity.

10.5. Meenakshi (PW-1), in her evidence, has stated that she is a resident of Kaalingarayanpalayam and a distant relative of Backiyalakshmi/ grandmother of "X"; that on 23.09.2016, she went to Backiyalakshmi's house at Periyapuliyur and brought "X" to her house as "X" was having holidays after her quarterly examination; in her house, "X" confided to her that she was subjected to sexual abuse by Sembulingam, Murugesan @ Murugan, Sivakumar @ Ramesh in Periyapuliyur and by an identifiable person in Kaalingarayanpalayam; after "X" revealed all this, she (PW-1) shared this information with her brother Vijayakumar (PW-17), Backiyalakshmi (not examined) and other relatives; then, she went to Gobichettipalayam Police Station and lodged the complaint (Ex.P1).

10.6. Thus, it is crystal clear from her evidence that even at the time of lodging the complaint, the name of the fourth person was not known. Admittedly, Meenakshi (PW-1) and Vasuki (PW-15), the aunt of "X", were from Kaalingarayanpalayam. They did not take any steps to identify the fourth person of Kaalingarayanpalayam with the help of "X". Of course, we cannot blame them for this, because they themselves would have been in a state of bewilderment and that they would not have known as to how they should go about after "X" complained to Meenakshi (PW-1) on 23.09.2016.

10.7. Had the prosecution remained content with the story that only on 23.09.2016 "X" spilled the beans for the first time, then, we would have had little hesitation in disbelieving their version albeit the incongruity in the identification and arrest of the appellant by the police on 25.09.2016 at Gobichettipalayam bus stand. What spoiled the prosecution case was the evidence of Vasuki (PW-15) and Vijayakumar (PW-17). The evidence on record shows that "X" attained puberty on 04.09.2016, for which, a function was held in a marriage hall in Kaalingarayanpalayam.

10.8. Vasuki (PW-15) has stated that she is a resident of Kaalingarayanpalayam and is related to the family of "X"; on 29.05.2016, Backiyalakshmi came with "X" to their house in Kaalingarayanpalayam for consulting an astrologer; so, they both left "X" to play with other children and went at 10'0 clock to meet the astrologer with "X's" horoscope; they returned to



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Kaalingarayanpalayam around 1.30 p.m.; while they were all sitting to have their lunch, she found that "X" was not there; when they called out for her, she came from near the house of Vijayakumar (appellant); after having her lunch, "X" blinked bizarrely and when questioned, she refused to say anything; thereafter, she told her (PW-15's) granddaughter Ruchika that Vijayakumar (appellant) had sexually abused her; Ruchika, in turn, informed this to Vasuki (PW-15) and when she (PW-15) questioned "X", who confirmed the same; when she confronted Vijayakumar (appellant), the latter denied; she told this to Backiyalakshmi, grandmother of "X", who counseled that the matter may not be blown out of proportion as it will affect the marriage prospects of "X"; therefore, she did not make an issue of it; when she heard that similar incidents had taken place in Periyapuliyur also, she went to the police station and complained about Vijayakumar (appellant).

10.9. Thus, from the evidence of Vasuki (PW-15), it appears that on 29.05.2016 itself the family came to know about the alleged sexual abuse of "X" by the appellant. Of course, the explanation given by Vasuki (PW-15) for not making an issue out of it does appear plausible. However, Meenakshi (PW-1), in her evidence, has stated that, after "X" disclosed about all the incidents to her on 23.09.2016, she informed this to all the relatives, including Backiyalakshmi/grandmother of "X" and her brother Vijayakumar (PW-17) and only thereafter, they went to the police station on 25.09.2016 and lodged the complaint. If the version of Vasuki (PW-15) that on 29.05.2016 itself, she and Backiyalakshmi knew about the involvement of the appellant, is true, then the name of the appellant, who hails from Kaalingarayanpalayam would have found place in the complaint (Ex.P1) that was lodged by Meenakshi (PW-1) on 25.09.2016.

10.10. Superadded to this confusion is the evidence of Vijayakumar (PW-17), the brother of Meenakshi (PW-1). Vijayakumar (PW-17) has stated that "X's" puberty function was held on 04.09.2016 in Saraswathi Marriage Hall, Kaalingarayanpalayam, for which, his son Santhosh was the photographer; after some days, in the same marriage hall, the puberty function of one Darshini, daughter of Murugan of Kaalingarayanpalayam, was held; "X" attended that function and told his uncle Santhanam's wife Maheswari that Sembulingam, Sivakumar @ Ramesh, Murugesan @ Murugan and Vijayakumar had sexually abused her; Maheswari, in turn, informed this to her husband Santhanam and in turn, Santhanam contacted him (PW-17) on 20.09.2016 and shared with him the disclosures that were made by "X" to Maheswari; in turn, Vijayakumar (PW-17) shared the information with his sister Meenakshi (PW-1) and asked her to enquire; accordingly, Meenakshi (PW-1) brought "X" to her house in Kaalingarayanpalayam on 23.09.2016 and enquired with "X"; "X"



disclosed everything to Meenakshi (PW-1) and thereafter, the police complaint was given.

10.11. Thus, going by the evidence of Vijayakumar (PW-17), the name and the alleged involvement of the appellant was known to Vijayakumar (PW-17) and Meenakshi (PW-1) on 20.09.2016 itself. Strangely, the name of the appellant has not been given in the complaint (Ex.P1).

10.12. Further, on gleaning the evidence of Vasuki (PW-15) and Vijayakumar (PW-17), it appears that the name and involvement of the appellant was known to Ruchika (not examined), Vasuki (PW-15), Backiyalakshmi (not examined/grandmother of "X"), Maheswari (not examined), Santhanam (not examined), Vijayakumar (PW-17) and Meenakshi (PW-1) much before 25.09.2016. Strangely, Meenakshi (PW-1) has not stated that her brother Vijayakumar (PW-17) apprised her of everything on 23.09.2016 and that is why she fetched "X" from Periyapuliur for the purpose of enquiring her. In her evidence, she has stated that she brought "X" to her village on 23.09.2016 as "X" was having school holidays and after coming to her house, "X" disclosed that she was sexually abused by Sembulingam, Murugesan @ Murugan, Sivakumar @ Ramesh and an identifiable person. "X" herself, in her evidence, has not stated that she disclosed these facts to Ruchika, Vasuki (PW-15), Backiyalakshmi and Maheswari.

10.13. Finally, Dr.Jayaprakash (PW-13), Psychiatrist, under whose observation and treatment "X" was in the Government Head Quarters Hospital, Erode, in his evidence as well in his report (Ex.P23), has stated that "X" was suffering from mild mental retardation and low intellectual functioning. He has further stated that "X" cannot properly recount incidents that happened six months ago and that she would give incoherent answers. He has also stated that she is capable of repeating whatever has been told by others to tell and that her understanding of 'what is right and what is wrong' is low.

10.14. In the teeth of the evidence of the expert with regard to the mental condition and poor intellectual capability of "X" coupled with the patently conflicting versions proffered by Meenakshi (PW-1), Vasuki (PW-15) and Vijayakumar (PW-17) concerning the kernel of the prosecution case, it would be unsafe to sustain the conviction of the appellant, albeit, the presumptions under sections 29 and 30 of the POCSO Act. These presumptions will come into operation only when the prosecution places a reasonably probable story before the Court and not otherwise. That apart, in the appeal (Crl.A.No.424 of 2017), that was filed by Sivakumar @ Ramesh, this Court has appraised the evidence of "X" and has given sound reasons for rejecting



her testimony. We also concur with them, of course, for our own reasons. In our view "X" has either been tutored to implicate a whole lot of persons or "X" has allowed her flight of imagination to weave stories and venture on an implicating spree.

In the result, this Criminal Appeal is allowed and the appellant is acquitted of all the charges. The conviction and sentence passed in Spl.S.C.No.10 of 2017 on the file of the Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, vide judgment and order dated 23.06.2017, are set aside. The appellant is directed to be released forthwith unless his presence is required in connection with any other case.

Sd/-

Assistant Registrar(CS VII)

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Sub Assistant Registrar

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To

1.The Additional Sessions Court,
Magalir Neethi Mandram
(Fast Track Mahila Court),
Erode.

2.The Inspector of Police,
All Women Police Station,
Gobichettipalayam,
Erode District.

3.The Superintendent,
Central Prison,
Coimbatore.

4.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.N.Manoharan, Advocate SR.No. 36605

Criminal Appeal No.558 of 2019

RSV (CO)
B.VC(12.08.2021)