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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.01.2021

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THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.723 of 2019
and Crl.M.P.Nos.15097 of 2019 and 19040 of 2019

Munusamy

... Appellant

Versus

State represented by
The Inspector of Police,
Kadathur Police Station,
Dharmapuri District.
Crime No.286 of 2014

... Respondent

PRAYER: Criminal Appeal is filed under Section 374(2) Cr.P.C seeking to call for the records of the learned Sessions Judge, Fast Track Mahalir Neethimandram, Dharmapuri, Dharmapuri District made in S.C.No.39 of 2017 and set aside the judgment dated 31.10.2018.

For Appellant : Mr.M.Purushothaman

For Respondent : Mr.R.Surya Prakash
Government Advocate.

J U D G M E N T

This Appeal has been filed seeking to call for the records of the learned Sessions Judge, Fast Track Mahalir Neethimandram, Dharmapuri, Dharmapuri District made in S.C.No.39 of 2017 and set aside the judgment dated 31.10.2018.

2. The case of the prosecution is that P.W.1 is the victim girl, who was 15 years at the time of the occurrence and she was working in the private mill. On 26.10.2014, since it was a Sunday, the mill was not working and it is a holiday, she did not go to the mill. She went along with her father at 10 a.m for grazing the cattle and at about 4 p.m, her father asked victim to take the cattles to the house and he will gather the goats. So the victim was proceeding to her house. The accused intercepted and misbehaved with her. She raised her voice. On hearing the voice, P.W.2 came there. Immediately, the accused



fled away from the occurrence place. P.W.1 and P.W.2 approached the village elders, but they have not given any solution. Therefore they approached the respondent police with the help of P.W.4.

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3. The respondent police registered the case against the appellant in Crime No.286 of 2014 for the offence u/s.354 IPC and Section 7 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter called as POCSO Act). After investigation, charge sheet was laid before the Fast Track Mahila Court, Dharmapuri. Since the offences against the children, the respondent police laid the charge sheet before the learned Sessions Judge, Fast Track Mahila Neethimandram, Dharmapuri, Dharmapuri District. The learned Special Judge taken the case on file in Spl. S.C.No.39 of 2017. After completing the formalities, the learned Sessions Judge framed the charges for offence under section 354 IPC and Section 7 of the POSCO Act and the accused has denied the charges and claimed to be tried.

4. After framing charges, in order to prove the case, on the side of the Prosecution, P.Ws.1 to 10 have been examined, Ex.P1 to P5 have been marked. No material object was marked.

5. When the accused was questioned under Section 313 of the Code of Criminal Procedure, 1973 and the incriminating materials available in evidence against them were put to him, he denied his complicity in the crime and pleaded not guilty.

6. After closing of the prosecution witnesses, on the side of defence, no oral and documentary evidence was produced. After completing the trial and hearing the arguments advanced on either side, the learned Sessions Judge acquitted the appellant for the offence under section 354 of IPC and convicted the appellant for the offence punishable under section 8 of the POSCO Act and sentenced him to undergo three years Rigorous Imprisonment and pay fine of Rs.5,000/- in default to undergo 6 months Simple Imprisonment.

7. Challenging the said judgment of conviction, the accused has filed the present appeal before this Court.

8. The learned counsel for the appellant would submit that the appellant has filed a petition under Section 391(1) Cr.P.C., and the same shall be heard along with this appeal. Further he would submit that there is inordinate delay in lodging the complaint before the police and there is no acceptable explanation given by the prosecution and even in the complaint.



There is no date mentioned regarding the date of the occurrence and date of complaint. Though P.W.2 father of the victim has stated that they approached the villagers, after five days only, they approached the respondent police, P.W.1 has stated that three days after the occurrence they approached the Police. Therefore, there is material contradiction in the date of occurrence and the date of complaint. Further the complaint is alleged to have been lodged on 01.11.2014. However, no date has been mentioned in the complaint, but it reached the Court only on 05.11.2014. In the case involving serious nature like this, the FIR should be reached within 24 hours. But prosecution has not explained the reason for delay in filing the complaint and delay in sending the FIR to the Court. Further statement recorded under Section 164 Cr.P.C of the victim also reached the Court belatedly. Even the statements of other witnesses have also not reached to the Court soon after recording from the witnesses. Therefore, the prosecution has not explained the inordinate delay and therefore it is fatal to the case of the prosecution.

9. The learned counsel would further submit that the place of occurrence is a open space and it is a public place and there is a public movement in the place of occurrence, but none of the persons have noted the same. Even the person who is residing nearer to the place of occurrence, have not been examined. Further, taking into account the place of occurrence is the open space, the alleged occurrence would not have happened and it is not possible for the accused to escape from the place of occurrence. P.W.2 father of the victim after hearing the voice of his daughter, rushed to the place which is very nearest. Therefore it is highly unbelievable and further P.W.2 is the interested witness. Further he would submit that due to enmity with the appellant, the complainant has foisted the false case. Therefore, they are not in a position to say the date of occurrence and date of the complaint. Even in the complaint itself, it is not mentioned the date of giving complaint to the respondent police. The Investigating officer has stated that after lodging the complaint by P.W.2, he was keeping the complaint for some time and registered only after five days. That itself shows that the Investigating officer, after deliberation from the witnesses, foisted false case against the appellant. P.W.4 only taken the victim and her father to the police station. P.W.4 is a person, who used to go to Police Station very frequently and doing Katta Panchayat. Further, a criminal case registered against P.W.4 and the same was also pending in the same police station. In this case also, he conducted Katta Panchayat and he induced P.W.1 and 2 to give false complaint. P.W.4 is not a genuine person and the evidence of P.W.4 is not trustworthy. Prosecution witnesses P.W.1, 2 and 3 are only interested witnesses and they have filed false case



against the appellant. P.W.4 is also having enmity with the appellant and the villagers. Therefore evidence of P.W.4 cannot be considered and the evidence of P.W.4 is not trustworthy. There are two mahazar witnesses. Only one of the witnesses viz., P.W.5 was examined but other witnesses have not been examined by the prosecution. No proper explanation was given by the prosecution as to why they have sent the FIR belatedly to the Court. Therefore, under these circumstances, the learned Sessions Judge failed to consider the materials and however convicted the accused/appellant on the ground of sympathy over victim and on assumption. The settled proposition of law is that unless the prosecution has proved its case beyond all reasonable doubt, the court cannot convict the accused on the basis of assumption and the accused who is unable to take effective defence to disprove the case of the prosecution. However, he would submit that the appellant filed a petition under Section 391(1) Cr.P.C. and also filed documents praying to take additional evidence and documents on file. In such circumstances, the appellant has to be given opportunity to establish his defence and disprove the case of the prosecution. But the learned Trial Judge failed to consider the materials and therefore the petition filed by the appellant under section 391 (1) Cr.P.C., may be allowed and the judgment of the trial Court may be set aside, and after going through the additional evidence, the Court can either directly take the additional evidence or can remit the matter back to the Trial Judge to record the evidence afresh and passing of the judgment.

10. The learned Government Advocate(Criminal Side) would submit that P.W.1 is the victim. P.W.2 is the father of the victim, P.W.3 is mother of the victim. They have categorically stated about the occurrence. The evidence of P.W.2 corroborated the evidence of P.W.1 father who has stated that since the matter was informed to the village elders immediately, they did not approach the police. But the elders of the villager have not properly responded. Therefore, father of the victim approached the police with the help of P.W.4 and thereafter complaint was registered. After the complaint, the investigating officer recorded the statement of witness who has clearly stated that on 01.11.2014, the occurrence took place. After investigation, the police laid charge sheet. Before the trial Judge, the prosecution examined victim as P.W.1 and who has clearly narrated the incident happened on the date of occurrence. Therefore, the document relied on by the learned counsel for the appellant sought to be received as additional evidence in the petition filed under Section 391(1) Cr.P.C is not relevant to the present case and the same is only relevant to some other case and no suggestion was either put before P.W.4 or P.W.2 regarding the documents sought to be received as additional evidence, which were very much available on the date of



examination of the said witnesses during the trial. Therefore, the petition filed under Section 391(1) Cr.P.C., is liable to be dismissed. Further, the trial Court after considering the entire material and after fullfledged trial, found that there is no merit in the petition and the appeal is liable to be dismissed.

11. Heard and perused the records.

12. Admittedly on the side of the prosecution, totally 10 witnesses were examined out of which, P.W.1 is the victim. She has clearly deposed that she is working in the private textile mill; on 26.10.2014 since it was Sunday she did not go to the mill, she went along with her father for grazing cattles. At about 4 p.m., father told the victim to go to the house with the cow. While going to home along with the cow, the appellant intercepted and misbehaved with her. Immediately she raised her voice. After hearing the voice of his daughter, P.W.2 father rushed there. Subsequently, the appellant left from the scene of occurrence. The same was immediately informed to the father and father also informed to his wife i.e., mother of P.W.1. It is the usual practice in the villages, if anything happened to a girl child, parents may not immediately go to the police station for their grievances because they would think about the future of the child. Therefore, first they would think that where should go and to whom they should approach. Normally if any incident like this happens, they used to approach village elders in panchayat and this practice is prevailing in the villages in our country since ancient times and even till today also, the same practice is prevailing in many of the villages. In a situation like this, parents of the victim would normally think about the future of their girl children and reputation of the family. Therefore in the present case also, parents of the victim went to the elders of the village and they have also not decided the matter immediately. In the cases like this, immediately the village elders would call the persons involved and they advice them. If any of the party not accepting their advise, then the aggrieved party use to approach the police. In the case on hand, P.W.2 approached P.W.4 Tirupathy. Admittedly he is worldly-wise man, who used to go to police station frequently in order to help the innocent villagers. As stated by the learned counsel for the appellant, he is doing some katta panchayat and it is very clear that the villagers wont directly go to the police station to report the incident like this. They search for some person who is well-versed and well-acquainted with police station and Government offices. With the help of such persons only, villagers would approach Police due to their illiteracy. Likewise in this case also, P.W.2 went to the police station along with P.W.4 to give complaint. Though the investigation done belatedly and the FIR was sent to the Court belatedly, for such defects, grievance of the victim should not



be simply thrown away. It is settled proposition of law that lapse on the part of the prosecution should not lead unmerited acquittal, subjected to rider that in such a situation, evidence on record should be clinching so that lapses of prosecution can be condoned. In a case like this, the Court has to consider the suffering of the victim and testify the veracity of evidence of the prosecution witnesses. The aspect regarding whether the complainant has given the complaint immediately, registered the FIR immediately, and whether the Police sent the FIR to the Court immediately or not are all beyond the control of the victim, for which defects on the part of the investigating officer, which purely arose due to the lethargic attitude of the investigating officer, for which, the victim would not be made to suffer. This Court cannot take any hypothetical view in this case since there is no serious infirmity in the prosecution case. Mere technicalities should not be allowed to stand in way of administration of Justice.

13. In all cases delay in transmitting FIR and reaching the Magistrate with delay will not be fatal unless the genesis of the complaint is in doubt. Further when the delay is not inordinate and version of the victim's father is honest and straight forward, the delay will not be fatal. The purpose behind sending FIR immediately to Magistrate has got dual purpose. Firstly, to avoid possibility of distorted version by consultation and deliberations and secondly, enabling the Magistrate to watch progress of investigation. In this case, in the complaint itself, the defacto complainant has stated the reason as already explained above. The delay in filing FIR itself is not a ground to doubt the case of a prosecution. The delay in lodging the FIR would put the Court on its ground to search if any plausible explanation has been offered if so, whether it is satisfactory. In this case, this Court is satisfied with the explanation. Further lapse on the part of prosecution should not lead unmerited acquittal, subject to rider that in such a situation evidence on record should be clinching, so lapses of prosecution can be condoned.

14. A reading of the evidence of victim clearly shows that the offence under section 7 of POCSO Act is committed by the appellant. This Court carefully seeing the evidence of the victim girl, which is cogent and trustworthy. Her evidence was corroborated by her father who was examined as P.W.2. If the evidence of sole witness is cogent, incredible and trustworthy conviction is permissible. The evidence of interested witnesses, if found to have creditworthiness, conviction could be based on uncorroborated testimony.

15. Though the learned counsel for the appellant would submit that victim is not subjected to medical examination, the



allegation is not that the appellant committed penetrative sexual assault, but only intercepted and closed the mouth and tried to touch her and since in the inception stage itself, the victim girl raised voice, the father was also nearer to the calling distance, soon after hearing the voice, he rushed to the place of occurrence, the appellant left the occurrence place. Therefore, non sending of the victim to medical examination is not fatal to the case of the prosecution. In the facts and circumstances of the case, sending the appellant and the victim girl for medical examination does not arise.

16. A careful reading of the evidence of the victim girl and her father P.W.2, this Court does not find any reason to discard the same. The prosecution has established its case beyond all reasonable doubt. The trial Court has given the reasons for conviction and therefore, petition under Section 391 (1) Cr.P.C., is concerned, those documents were very much available even at the time of trial and examination of the witnesses. None of the documents have been either suggested before P.W.4 or P.W.2 when they were examined as witness before trial Court, and the motive has not been established. If at all, the respondent police is said to have foisted false case against the appellant due to motive, at the time of trial, the appellant would have handed over the documents now sought to be received as additional evidence to his counsel and gave instructions and the counsel at that time would have put suggestion; or at least at the time of Section 313 Cr.P.C., questioning, the appellant would have given the written statement and those documents would have been produced before the trial Court. Since the documents are not related to the occurrence, the filing of the petition under Section 391(1) Cr.P.C., are related to P.W.4, noway helpful to the defence case. In this case, invoking Section 391 (1) of Cr.P.C. is nothing but brainchild of the counsel for the appellant and it is not actual defence of the appellant / accused.

17. During the course of argument, the learned counsel for the appellant placed reliance on the following judgments in support of his submissions:-

- (1) (2019) 5 SCC 628 [Prakash Chand Vs. State of Himachal Pradesh]
- (2) (2013) 3 SCC 791 [Rajesh Patel Vs. State of Jharkhand]
- (3) (2019) 16 SCC 712 [Brigadier Sukhjeet Singh (Retired) MVC Vs. State of Uttar Pradesh and others]

18. This court gone through the above decisions. As far as the case on hand is concerned, it comes under POSCO Act and the minor girl clearly had stated that she undergone sexual harassment and in such situation, the parents of the minor girl will not boldly come out immediately and lodge complaint but



used to think about the future of the girl and also approach the village elders; if they are not able to get any solution, then they will approach the police station. In this case also, they have done the same. Therefore, the judgments above cited are not applicable to the present case on hand. Further, it is settled proposition of law that every criminal case has to be decided on the basis of facts and evidence available and not on precedence.

19. As far as the documents are concerned, they are very much available even at the time of trial and at the time of examination of the witnesses, the documents were not suggested before the witnesses especially P.W.4 and P.W.2 and the appellant not filed the documents at the earliest point of time. Therefore, this court is of the view that the application is filed only afterthought and therefore, not inclined to entertain the petition u/s.391 Cr.P.C., and the citations are not applicable to the present case. Therefore, under these circumstances, this Court finds that in order to protract the appeal and fill up lacunae, the appellant has invoked Section 391 Cr.P.C. and it cannot be invoked in any extraneous circumstances. If any material is available on the side of defence and not produced or suppose subsequently came to knowledge about the material, in the interest of justice the Court can exercise power under Section 391 Cr.P.C., and allow the additional evidence. But a careful perusal of the entire records, this Court finds that the appellant is not entitled to the relief sought for under Section 391 Cr.P.C., and filing petition under section 391 Cr.P.C., will not helpful to the defence case. Even if the said documents received as evidence and taken into consideration, the decision of the trial Court will not be changed. The evidence of the victim child is clear that the appellant has committed the charged offence. Therefore, under these circumstances, the petition under Section 391 Cr.P.C., filed by the appellant is liable to be dismissed.

20. The appellate Court is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give independent finding. Accordingly, this Court also finds that the appellant has committed offence under section 7 which is punishable under Section 8 of POCSO Act 2012 and the trial Court rightly appreciated the evidence and convicted the appellant and sentenced him to undergo three years rigorous imprisonment and to pay fine of Rs.5,000/- in default to undergo six months simple imprisonment. Therefore this Court does not find any merit in the appeal and the Criminal Appeal is dismissed.

21. Accordingly, this Criminal Appeal and Crl.M.P.No.15097 of 2019 are dismissed. Consequently, connected miscellaneous petition is closed.



22. It is seen from the records that the appellant/accused is at large and therefore, the trial court is directed to take appropriate steps so as to immure him in prison to serve out the remaining period of sentence.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

mpa

To

1. The Sessions Judge, Fast Track Mahila Neethimandram,
Dharmapuri, Dharmapuri District.
2. The Inspector of Police,
Kadathur Police Station,
Dharmapuri District.
3. The Director General of Police,
Chennai-4
4. The District Collector,
Chennai -1
5. The Honourable POSCO Committee,
High Court, Madras
6. The Superintendent, Central Prison, Salem
7. The Public Prosecutor Office, High Court, Madras.

Copy to:

The Section Officer,
Criminal Section,
High Court, Madras

+2CC to Mr.M.Purushothaman, Advocate, Sr.No.3271

Crl.A.No.723 of 2019
and

Crl.M.P.Nos.15097 of 2019 and 19040 of 2019

LN (CO)
K.RK. (22.07.2021)