

Bail Slip

The Appellant namely P. Ganesan, S/o. Paramasivam was ordered to be released on bail vide order dated 20.12.2019 made in order dated 20.12.2019 made in CrI.M.P. No. 16152/2019 in CrI.A.No.757/2019 passed by this Hon'ble High Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.03.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CrI.A.No.757 of 2019

P.Ganesan

... Appellant

-Vs-

State represented by,
The Inspector of Police,
W-27 All Women Police Station,
Vadapalani,
Chennai-600 093.
(Crime No.10/2018)

... Respondent

PRAYER: Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure, to call for the records and to set aside the order of conviction passed in judgment in S.C.No.343/2018, dated 05.11.2019, by the Sessions Judge, Mahila Court, Chennai.

For Appellant : Mr.R.Shivakumar
Legal Aid Counsel

For Respondent : Mr.R.Suryaprakash,
Government Advocate [CrI. Side]

JUDGMENT

This Criminal Appeal has been filed against the conviction and sentence imposed by the learned Sessions Judge, Mahila Court, (Mahalir Neethimandram), Chennai in S.C.No.343 of 2018, dated 05.11.2019.

2.The respondent Police have registered a case in Crime No.10 of 2018, for offence punishable under Section 12 of Protection of Children from Sexual Offence Act, 2012 against the appellant on the complaint (Ex.P3) given by PW2. After completing investigation, the respondent police laid a charge sheet before the learned Sessions Judge, Mahila Court, (Mahalir Neethimandram), Chennai and the same was taken on file in S.C.No.343 of 2018.

3.After completing the formalities under Section 207 Cr.P.C., since there was a prima facie material to frame charges against the appellant, the learned Sessions Judge, framed charges under Sections 10 and 12 of Protection of Children from Sexual Offence Act, 2012 (hereinafter referred to as 'POCSO Act').

4.After completing the trial and hearing the arguments advanced on either side and also considering the oral and documentary evidence, the trial Judge found the appellant guilty for offence punishable under Sections 10 and 12 of POCSO Act and convicted and sentenced to undergo 5 years Rigorous Imprisonment and to pay a fine of Rs.3,000/-, in default to undergo 6 months Simple Imprisonment for offence under Section 10 of POCSO Act and also sentenced to undergo one year Simple Imprisonment and to pay a fine of Rs.1,000/-, in default to undergo one month Simple Imprisonment for offence under Section 12 of POCSO Act.

5.Challenging the above said Judgment of conviction and sentence, the appellant has filed the present appeal before this Court.

6.The learned counsel for the appellant would submit that a false case has been foisted against the appellant by the prosecution. Though the place of occurrence was surrounded by flats about 1000 apartments and always public movements were available, the prosecution failed to examine any of the independent witness who resides at the place of occurrence. It is the case of the prosecution that when the victim girl was standing in balcony and seeing whether her friends are coming to play, the appellant, who was in the car parking, removed his pant zip and shown his private parts towards the victim girl and subsequently, the victim girl came to downstairs and playing ball and the ball was moved under the car. When the victim girl tried to take the ball, the appellant touched backside of the victim girl. The occurrence is said to have taken place in the open yard that is car parking, but none of the other car drivers or watchmen or iron man were examined in this case and even the father of the victim girl was also not examined in this case. The learned counsel would further submit that the witness (PW.3) for the Observation Mahazar (Ex.P4) is a close relative to the father of the victim girl. The learned counsel would further submit that there are material contradictions between the evidence of the victim girl and her mother (PW.1) and also improvement from stage to stage. Though the victim girl during recording the statement under Section 164 Cr.P.C., (Ex.P1) has stated that when she tried to take the ball under the car along with her friends, the appellant touched her backside, but the prosecution has not examined the friends of the victim girl.

Even in the surroundings where the occurrence is said to have taken place, the prosecution has not verified as to whether there was any CCTV camera has been installed. At the time of occurrence, the watchmen, iron man and also other Drivers were available, but none of the persons have been examined as witnesses in this case.

7.The learned counsel for the appellant would further submit that it is not the case of the prosecution that the accused had trespassed into the house and committed the offence within the 4 walls and no eye witness could be expected. As per the prosecution, the occurrence had taken place in the open yard. The victim girl has stated that she was standing in balcony and the appellant was in the car parking, at that time, he shown his private parts towards her. In the statement recorded under Section 164 Cr.P.C., (Ex.P1), the victim girl has stated that the appellant shown his private parts towards her and immediately she went and informed her mother at about 05.00 p.m., whereas the mother of the victim girl (Ex.P1) during chief examination has stated that her daughter informed about the act of the appellant during night hours. Hence, in every stage, there is further improvement and material contradictions.

8.The learned counsel for the appellant would further submit that the trial Court erred in considering the fact of inordinate and unreasonable delay in lodging the complaint (Ex.P3). The alleged occurrence took place on 23.05.2018 and the complaint (Ex.P3) was lodged only on 28.05.2018 after a delay of 5 days and the reason for the delay has not been properly explained by the prosecution. Further, the contradiction pointed out by the learned counsel for the appellant would cut the root of the case of the prosecution and the alleged occurrence said to have taken place in the open place and not in the covered area. No person would commit an offence in the apartment premises and also in public. The trial Court failed to consider these aspects and also failed to consider the evidence of the prosecution in its proper perspective. The respondent Police also not conducted the investigation in fair and proper manner on the complaint (Ex.P3) given by the mother of the victim girl (PW.1). Even in the complaint (Ex.P3) itself, there is a material contradiction with regard to the person one who has written the complaint.

9.The victim girl has stated that at the time of occurrence, she came back to home from the school, whereas her mother (PW.2) has stated that the alleged occurrence had taken place during the month of May, which is a vacation time. Therefore, it is a contradiction that as to how the victim girl had gone to school and come back there at the time of occurrence. In each and every stage, there are improvements and contradictions, which adds bundle of suspicion as to the occurrence. The respondent

Police in this case have not examined any of the neighbours or any resident in the apartment or iron man or watchmen or other drives and the friends of the victim girl, who were playing with her at the time occurrence. Thus, the non examination of these witnesses, would fatal to the case of the prosecution and leads to interference of this Court. The trial Court failed to appreciate the evidence and erroneously convicted the appellant without any substantive material. Thus, the appeal is to be allowed and the conviction and sentence were awarded against the appellant by the trial Court is liable to be set aside.

10.Mr.R.Suryaprakash, learned Government Advocate (Crl. Side) appearing for the respondent Police would submit that at the time of occurrence, the victim girl was only 11 years old. When the victim girl was standing in the balcony, the appellant was standing in the car parking and shown his private parts towards her and subsequently, she came to downstairs and playing with her friends. At that time, the ball went under the car and when she tried to take the ball, the appellant touched the victim girl backside. The victim girl informed her mother about the act of the appellant during night hours and thereafter, she gave a complaint (Ex.P3) on 28.05.2018. After that, the victim girl was produced before the learned Magistrate for recording the statement under Section 164 Cr.P.C., and the same was recorded and during trial, marked as Ex.P1. During trial, the victim girl was examined as PW.1 and her mother was examined as PW.2. The evidence of the victim girl and her statement recorded under Section 164 Cr.P.C., (Ex.P1) are corroborated the evidence of the mother of the victim girl. The offence committed by the accused are heinous offence. Therefore, the prosecution has proved its case beyond all reasonable doubt and the trial Court rightly appreciated same and convicted the appellant and there is no merits in the appeal and the appeal is to be dismissed.

11.Heard the learned counsel appearing for the appellant and the learned Government Advocate [Crl. Side] appearing for the respondent and also perused the materials available on record.

12.The case of the prosecution is that at the time of occurrence, the victim girl was studying 7th standard and aged about 11 years. On 23.05.2018, at about 05.00 p.m., the victim girl was standing in the balcony after returning from the school and seeing whether her friends are coming out to play. The appellant was standing down in the opposite corridor and he exhibited his private parts by opening his pant zip and rolled his tongue and shown signs of asking her to come down. After sometime, the victim girl came down to play with her friends and she was playing. At that time, the ball went under the car and when she was attempting to take the ball, the appellant came

there and stood behind her and stroked her at the back from neck and offered that he would take the ball. She snatched herself away by removing his hands and informed her mother (PW.2), who lodged the complaint (Ex.P3) to the respondent Police.

13. Based on the complaint (Ex.P3) given by the mother of the victim, an FIR in Crime No.10 of 2018 was registered for offence punishable under Section 12 of POCSO Act. After completing investigation, the respondent police laid a charge sheet before the learned Sessions Judge, Mahila Court (Mahalir Neethimandram), Chennai and the same was taken on file in S.C.No.343 of 2018.

14. During the trial, on the side of the prosecution, as many as 4 witnesses were examined, 7 documents were marked and no material object was marked. After completing the evidence of prosecution witnesses, when incriminating circumstances were culled out from the prosecution witnesses put before the accused, he denied the same as false. On the side of the defence, no oral and documentary evidence was produced.

15. After completing trial and hearing arguments advanced on either side, the learned Sessions Judge, by judgment dated 05.11.2019 in S.C.No.353 of 2018, convicted and sentenced the appellant as stated above.

16. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.

17. A reading of the complaint (Ex.P3) dated 28.05.2018, two incidents said to have alleged. The first incident is said to have taken place between the car parking and balcony and the second incident is in the car parking. The victim girl in the statement recorded under Section 164 Cr.P.C., (Ex.P1), has stated that soon after the first occurrence, she intimated the act of the appellant to her mother at about 05.00 p.m., itself and with regard to the second incident, she has stated that after ½ hour from the first occurrence, she was playing ball along with her friends and when the ball went under the car, she tried to take the ball, at that time, the appellant came there and touched backside of the victim girl. Though the victim girl stated in the statement recorded under Section 164 Cr.P.C., (Ex.P1) that she tried to take the ball along with the friends, but none of the friends have been cited as witness and examined them, which creates a reasonable doubt.

18. The victim girl has stated that she immediately informed the act of the appellant to her mother at 5'o clock itself and the appellant would have been very much available at that time,

but the mother of the victim girl did not go and question the same with the appellant and simply allowed her daughter to play freely, which is also unbelievable. Even the mother of the victim girl not intimated the same to any one of the neighbours. Normally, if the servants or Drivers or any others are committed the offence like this in the apartment premises, immediately the aggrieved person would alert the other persons and also inform the neighbours and other residents and also ask the concerned person to remove the accused from the job. In this case, the mother of the victim girl has not taken any steps as stated above. Further, there are contradictions between the statement of the victim girl recorded under Section 164 Cr.P.C., (Ex.P1) and the complaint (Ex.P3).

19.A perusal of the materials, it is seen that the father of the victim girl was not examined by the prosecution in this case. The another contradiction is with regard to who has preferred the complaint and who has written the complaint. During trial, only four witnesses were examined in this case, out of the four witnesses, the victim girl was examined as PW1; the mother of the victim girl was examined as PW2; the witness for Observation Mahazar was examined as PW3 who is none other than the friend of the father of the victim and not a resident of the said apartment and the Investigating Officer was examined as PW4. None of the independent witnesses were examined in this case. A reading of the materials placed, this Court finds that a false case has been put up against the appellant, but unfortunately, the Investigating Officer (PW4) has also not properly investigated the matter and trial Court has also failed to appreciate the evidence and also failed to consider the material contradictions and improvement in the prosecution witnesses and mechanically recorded the conviction and sentence on the ground of presumption and assumption and also on the ground of sympathy.

20.Even in the complaint itself, it is mentioned that the occurrence had taken place on 23.05.2018, whereas the complaint was given only on 28.05.2018 and the delay for five days has not been properly explained. A bare perusal of the complaint (Ex.P3), it is seen that the date has been altered and overwritten, which creates a suspicion on which date, the complaint was given and who has written the complaint. During cross examination, the mother of the victim girl (PW2) stated that she gave a complaint to the respondent Police on the next day of the occurrence, but whereas the FIR (Ex.P6) was registered only on 28.05.2018. If at all the occurrence had taken place on 23.05.2018 at about 05.00 p.m., the complaint would have been given on the next day on 24.05.2018 itself and the case would have been registered on 24.05.2018 or 25.05.2018 itself. But the complaint was given only on 28.05.2018 and the

FIR (Ex.P6) was registered on the same day, which also creates a doubt. Hence, after discussion and deliberation, the mother of the victim had foisted a false case against the appellant.

21.The mother of the victim girl (PW2) admitted that there was watchmen and iron man were available in the scene of occurrence, but none of the persons have been cited as Witnesses as to whether on the day such incident was happened. PW3 admitted that he is not residing in the said apartment and watchmen and iron man were available in the place of occurrence, but none of them and none of the residents have been examined as witness in this case at any point of time and for any reason.

22.As already stated, the occurrence is said to have taken place in the open yard. Normally in the balcony of apartments, one or other person would be there and even in the downstairs or parking area as even admitted by the prosecution witnesses, iron man, watchmen and other car drivers would be available. It is highly improbable that except the victim girl no one was noticed the alleged occurrence said to have taken place and particularly, when the victim girl was taking ball along with the friends, the appellant touched her backside, but none of the friends have been examined as witnesses, unfortunately the Investigating Officer (PW4) also not clarified the same and during trial, the defence counsel also not put any question with regard to the same and the trial Court also failed to look into the surroundings circumstances which create suspicious. This is a case, which is example to all the stakeholders, who have not actively participated and played their role effectively in responsible manner. Therefore, this Court finds that in this case, unfortunately an innocent person has been victimized as accused.

23.On the above facts and circumstances and available evidence, this Court finds that the prosecution has failed to establish the guilt of accused/appellants beyond all reasonable doubt and therefore, the accused/appellants are liable to be acquitted by giving them benefit of doubt.

24.In the light of the above, it would be unsafe to place reliance upon all the evidence and materials produced by the prosecution as against the appellant to convict him. Hence, the charges framed against the appellant have not been proved. The conviction and sentence imposed on the appellant in S.C.No.343 of 2018 by the learned Sessions Judge, Mahila Court, (Magalir Neethimandram), Chennai are set-aside and this Criminal Appeal is, accordingly, allowed. The appellant is acquitted of all the charges levelled against him and the fine amount, if any paid, shall be refunded to him and the bail bond, if any executed, shall stand cancelled. The appellant is directed to be released

forthwith, if he is inside, unless his custody is required in connection with any other case.

25.The counsel who argued the appeal for the appellant was appointed by the Legal Services Authority from the legal aid panel, hence he is entitled for fees as per rule.

-s/d-
Assistant Registrar(CS-VI)

True Copy

Sub-Assistant Registrar

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To

1.The Sessions Judge, Mahila Court,
(Mahalir Neethimandram),
Chennai.

2.The Inspector of Police,
W-27 All Women Police Station,
Vadapalani,
Chennai-600 093.

3.The Public Prosecutor,
High Court, Madras.

4.The Superintendent
Central Prison
Puzhal, Chennai

5.The Section Officer
Criminal Section
High Court, Madras 104.

6.The Director General of Police
Dr. Radhakrishnan Salai
Mylapore, Chennai 4.

7.The Hon'ble POCSO Committee
High Court, Madras 104.

+1 CC to Mr.K. Shivakumar, Advocate sr 1450

Cr1.A.No.757 of 2019

CP(CO)
SP(02/07/2021)