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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.12.2021

DELIVERED ON : 21.12.2021

CORAM :

THE HONOURABLE MR. JUSTICE P.N.PRAKASH
and
THE HONOURABLE MRS. JUSTICE R.HEMALATHA

CrI.A.No.826 of 2018

Balasubramani

...Appellant

vs.

State rep by,
The Inspector of Police,
Komarapalayam Police Station,
Namakkal District
Crime No.591 of 2013)

...Respondent

PRAYER: Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code, 1973 praying to set aside the judgment passed in Spl.C.C.No.3/2016 dated 16.06.2017 on the file of Sessions (Fast Track Mahila) Judge, Namakkal.

For Appellant : Mr. T. Muruganantham
For Respondent : Mr.M.Babu Muthumeeran
Additional Public Prosecutor.

J U D G M E N T

(Delivered by R.HEMALATHA, J.)

The Present appeal is filed against the conviction and sentence passed by the learned Sessions Judge, Mahila Court, Namakkal, against the appellant in Spl. C.C. No.3 of 2016 as detailed hereunder.

S.No.	Conviction	Sentence
1.	U/s. 5(n) r/w 6 of POCSO Act 2012	Life Imprisonment and pay a fine of Rs.1,000/- in default, to undergo Rigorous Imprisonment for 3 months.
2.	U/s. 506(ii) IPC	3 years Rigorous Imprisonment .



The learned Sessions Judge also ordered that both the sentences shall run concurrently.

2. The case of the prosecution in nutshell is as follows:

- i. The victim child (P.W.1) was 16 years of age and was studying XI standard at Mallasamuthiram Government Higher Secondary school. The appellant, father of the victim child, was residing at Devanankuruchi with his family consisting of his wife Kasthuri (P.W.2), his daughter, the victim (P.W.1) and his son Gokulhari.
- ii. The victim attained puberty when she was studying 6th standard and according to the victim (P.W.1), her father, the appellant, forced himself upon her and when this was objected by her, he cajoled her by saying that this is not uncommon and is happening in every house and continued to have penetrative sex with his daughter. The further deposition of the victim child was that her father used to enquire her as to whether she had her menstrual cycle every month and whenever she missed her cycle, her father used to get her tablets to make it regular. When the victim was studying VIII standard, P.W.1's mother (P.W.2) underwent hysterectomy operation in Government Hospital, Erode, and after discharge, stayed with her mother Ponnuthayee (P.W.6) at Thattankuttai for 4 months. Therefore, the appellant shifted his family to Periyanaickenpalayam, Coimbatore, and got the victim admitted in IX standard in a school over there. Even during that time, the appellant abused her daughter sexually and when the mother of the victim came back home, the appellant made his wife drink beer in order to make her sleep so that she might not know what he was doing with his daughter. After 4 or 5 years, P.W.1, realising the wrongful act of her father, threatened him that she would inform her mother about what is happening to her. In turn, the appellant threatened her with dire consequences of killing her and her mother.
- iii. P.W.1 narrated the ordeal undergone by her to her relatives Tmt. Meenakshi (P.W.5) and Poovathi (P.W.4), who in turn informed Tmt. Kasthuri (P.W.2), the mother of the victim, after which, P.W.1 and P.W.2 left the house of the appellant and started living with the mother of P.W.2.
- iv. P.W.1 thereafter called the childline on 17.09.2013 by dialing 1098. Tmt. Mailambigai (P.W.7), working in District child Protection Unit, Namakkal, attended the call and enquired the child victim (P.W.1). The victim narrated all the incidents to her and sought for help. P.W.7 informed the same to Child Welfare Committee and met P.W.1 in person. Tmt. M. Vijayalakshmi (P.W.10), a team member of Childline, Namakkal, accompanied P.W.7. Both of them took P.W.1 with them and on the same day Tmt. P. Vijayalakshmi (P.W.9), Counsellor, Child Protection Unit, Namakkal, counselled P.W.1 and on the next day,



i.e., 18.09.2013, P.W.7 and P.W.10 took P.W.1 to Komarapalayam Police Station, where P.W.1 lodged a written complaint (Ex.P.1) with the police against her father.

- v. Thiru. Manickam (P.W.17), Special Sub Inspector of Police, Komarapalayam Police Station, received Ex.P1 from P.W.1 and registered FIR (Ex.P7) in Komarapalayam Police Station Crime No.591 of 2013 for the offences under Sections 354, 376 (2) (f) (i) (n), 506(ii) IPC and 5(1) (m) (n) r/w 6 POCSO Act 2012.
- vi. Thiru. Santhamurthy (P.W.20), Inspector of Police, Komarapalayam Police Station, took up investigation in Crime No.591/13 and went to the scene of occurrence, prepared an Observation Mahazar (Ex.P2) and a rough sketch (Ex.P9) in the presence of the witnesses Sundararajan (P.W.8) and Muniraj (not examined).
- vii. On 20.09.2013, P.W.20 proceeded to Observation Home for girl children at Namakkal, as per the directions of the Deputy Superintendent of Police, along with Tmt.Sivakami, Sub Inspector of Police, All Women Police Station, Thiruchengode, and enquired the victim (P.W.1) in the presence of the counsellor Tmt.Vijayalakhmi (P.W9). He sent the victim to Government Hospital, Namakkal, with the counsellor for medical examination.
- viii. Dr. Sathya (P.W.19) examined P.W.1 on 20.09.2013 at about 1 p.m. and found that her hymen was not intact and her vagina easily admitted one finger. However P.W.1 was not found to be pregnant in the scan test. The report was marked as Ex.P.8.
- ix. On 11.10.2013, the child victim was produced before the Judicial Magistrate II, Namakkal where her statement (Ex.P10) under Section 164 of the Code of Criminal Procedure was recorded.
- x. Thiru.Veluthevan (P.W.21), Inspector of Police, Komarapalayam Police Station, took up further investigation in Crime No.591 of 2013, arrested the appellant on 15.10.2015 at about 7.30 a.m. near Katheri Junction and recorded his police confessional statement in the presence of the witnesses Thiru.Vijayabaskar (P.W.11), Village Administrative Officer, Amani Village, and his assistant Kamaraj (not examined) and produced the appellant before the concerned court for judicial custody.
- xi. On 30.10.2015, P.W.21 took the appellant for medical examination to Mohan Kumaramangalam Government Hospital, Salem. Dr.Gokularamanan (P.W.15) and Dr. Ramasamy (P.W.12) examined the appellant. While Dr. Ramaswamy certified (Ex.P4) that there was nothing to suggest that the appellant was not capable of performing sexual act, Dr. Gokularaman certified (Ex.P6) that the age of the appellant was about 38 years.
- xii. Tmt. Sivagamavalli (P.W.13), Chairman, Child Welfare Committee, Namakkal, enquired the child victim and also



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gave counselling whenever required.

xiii. P.W.21 after completing the investigation, altered Sections of law to 5(1) r/w Section 6 of POCSO Act and Section 506(ii) IPC on 21.11.2015. The alteration report was marked as Ex.P12. After completing investigation, P.W.21 laid a charge sheet against the appellant for the aforesaid offences before the Sessions Judge, Mahila Court. The learned Sessions Judge, Mahila Court, furnished the appellant the copies of the documents under Section 207 of the Code of Criminal Procedure and framed charges under Sections 5(1) r/w Section 6 of POCSO Act and 506(ii) IPC. The appellant denied of having committed any offence.

xiv. In order to bring home the guilt of the accused, the prosecution examined 21 Witnesses and marked 12 Exhibits.

xv. When the accused was questioned with regard to the circumstances appearing in evidence against him under Section 313 of Cr.PC, his answers were a simple denial. He did not examine any witness on his side.

3. Mr. T. Muruganantham, learned counsel for the appellant contended that there was an inordinate delay in lodging the complaint by the victim and that the entire theory of the prosecution is not true. He would further contend that the appellant was not given opportunity to cross examine the prosecution witnesses.

4. Per contra, Mr. M. Babu Muthu Meeran, learned Additional Public Prosecutor, contended that the prosecution proved all the charges against the accused beyond reasonable doubts and that though the petition filed by the appellant to recall all the witnesses under Section 311 Cr.PC was allowed by the learned Sessions Judge on payment of Rs.250/- for each witnesses towards batta, the appellant did not pay batta and allowed the petition to be dismissed. Thus the appellant did not take any efforts to cross examine the witnesses and the evidence adduced on the side of the prosecution remains unrebutted. He therefore, prayed for dismissal of the present appeal.

5. This is an unfortunate case in which the very essence of father-daughter relationship has been mauled beyond recognition. An old saying goes like this "The smile of a daughter is the secret purpose of every father". On the contrary, here is the appellant who brought only miseries to her daughter and disgrace to himself. The victim girl was first sexually abused by her own father, the appellant, when she was studying VI standard and just after she attained puberty. As the victim P.W.1 deposed, it all started in a very mild manner when she was fondled and made to believe that it was common. Subsequently, the appellant forced himself on her and when resisted he convinced her by mentioning that it happens in every family. The victim girl was in an age at which she was neither a kid nor a teenager. The absence of



her mother who was away from home either in the night shift or due to her profession made things easier for the appellant. The appellant also did not have any sort of guilt feeling and continued with his activities forcibly. It is also learnt from the evidence that at one point of time, he went to the extent of threatening his daughter with dire consequences. He also threatened that he would murder her mother too if things were leaked out. The victim child had a trauma filled childhood and with no one to confide, she had tolerated her father's sexual assaults till she gathered courage to inform her relatives P.W.4 and P.W.5 and later called up the child helpline 1098.

6. As per P.W.1's deposition, her father, the appellant, used to make his wife drink beer and get her intoxicated to facilitate privacy during his act. It is also shocking to know that he used to buy pills and make his daughter consume them to prevent conception. It appears that the appellant was single mindedly obsessed with his dirty mission ruining the life of his own daughter and bringing disrepute to his family.

7. The phone call made by the victim child to the child helpline unfolded the chain of events which took place as narrated in the earlier paragraphs. The cogent evidence of P.W.1 is adequate. In such cases, the evidence of other witnesses serve only the purpose of adding credibility to the victim's statement.

8. The contention of the learned counsel for the appellant that fair opportunity was not afforded to the appellant to cross examine the witnesses has no iota of truth in it. In fact, the trial court, in its judgment, had mentioned that there were atleast three counsels for the appellant at the trial stage and all of them did not avail the opportunity to cross examine any of the witnesses except the Investigating Officers P.W.20 and P.W.21. It is also seen from the records and the judgment of the trial court that the petition under Section 311 Cr.PC filed by the appellant was allowed on payment of Rs.250/- for each witness towards batta. The appellant did not pay batta and allowed the petition to be dismissed. The suggestion of the defence in the trial court that there was dispute between the appellant and his wife also fell flat for the simple reason that no evidence on that aspect was ever let in by the defence. Actually, the act of the appellant was nothing short of a bitter betrayal of the faith reposed in him by his wife and the daughter. In the instant case, the protector himself became the hunter and it is a shameful act for which the maximum punishment ought to be given and was given by the trial court. P.W.2, the victim's mother, and P.W.6, her grandmother, have also corroborated, P.W.1's version. In fact, P.W.2's deposition reflect her emotional motherly instinct and the anguish as she was not informed at the initial stages of her husband's misbehaviour.



The chairman, Child Welfare Committee (P.W.13), the Child helpline Personnel (P.W.7 & P.W.10) and the counsellor (P.W.9) had supported the traumatised victim and their versions in their depositions are also corroborative in nature. There is no valid ground to discard the evidence of any of prosecution witnesses.

9. Finally, we would like to say a few words in response to the submission of the learned counsel for the appellant that no opportunity was given to the appellant to cross-examine the prosecution witnesses. We carefully pored over the trial Court records in order to see if the trial Judge had denied opportunity to the appellant to cross-examine the prosecution witnesses. The records show otherwise. The trial Judge himself has made the following observations in paragraph 9 of the judgment:

"9. In this matter, except the both Inspector P.W.20, 21 none of the other witnesses cross-examined by the defence side. Even though there are three different counsels were appeared separately during the trial period, the P.W.1 to P.W.19 were not cross-examined by the defence side. During the almost end of the trial, the defence side filed an application to recall the P.W.1 to 19 in CrI.M.P. No.179/2017 in which a conditional order was passed for depositing of Rs.250/- for each witness. But, the defence side failed to deposit the above said amount and hence, the above petition was dismissed on 19.04.2017. The defence side failed to cross-examine the above prosecution side witnesses even though they had opportunity for cross examination during their chief examination and through petition u/s 311 Cr.P.C. When the above said witnesses were not cross-examined by the defence side, it can be taken up as the evidences of P.W.1 to 19 were unimpeached....."

10. Of late, we frequently come across cases, especially under the POCSO Act, in which witnesses are not cross-examined on the same day after the recording of their examination-in-chief. The witnesses are recalled under Section 311 Cr.P.C. for the purpose of cross-examination and at that time, they are made to resile from their earlier statements in the chief-examination. Sometimes, as in this case, they are not even subjected to cross-examination and at the appellate stage, the accused cry foul and seek remand of the matter to the trial Court for the purpose of cross-examination of the witnesses. The appellate Court cannot remand the case to the trial Court without first setting aside the judgment and order of conviction. Therefore, the appellate Court would have to first set aside the judgment and order of conviction and only then, remand the case to the trial Court to recall the witnesses and give an opportunity to the accused to cross-examine them. Once the judgment and order of the trial Court is set aside, the



accused cannot remain in prison and he has to be perforce released from the prison. If the matter is so remanded, the prosecution witnesses may not even be available or even if available, they may not remember the minute facts or may even turn hostile. Criminal justice system cannot be subverted in this manner.

11. The Supreme Court took note of all these dilatory tactics adopted by the accused in the trial Courts and in *Vinod Kumar vs. State of Punjab* (2015) 3 SCC 220, issued a direction to all the trial Courts that they should ensure that cross-examination of a witness is done immediately without delay after he is examined in chief. Following the directions issued by the Supreme Court, the Registrar General of this Court has issued a circular dated 18.12.2015 to all the trial Courts to strictly adhere to the directions of the Supreme Court in *Vinod Kumar* (supra). Further, the Supreme Court, in *Rajaram Prasad Yadav vs. State of Bihar* [(2013) 14 SCC 461] and *State (NCT of Delhi) vs. Shiv Kumar Yadav* [(2016) 2 SCC 402], has clearly held that the petition to recall a witness under Section 311 Cr.P.C. should not be mechanically allowed unless there are sound and convincing reasons to justify the same. To nip such dilatory tactics in the bud, the Parliament, in its wisdom, has laid down as under in Section 33(5) of the POCSO Act.

“33. Procedure and powers of Special Court:

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the Court.”

Coming to the present case, as observed by the trial Court, the appellant changed his lawyers thrice. The trial Court had even allowed the petition in CrI. M.P. No.179 of 2017 filed under Section 311 Cr.P.C. for recalling P.W.1 to P.W.19 and had directed the accused to deposit Rs.250/- per witness which also he did not avail. Therefore, the appellant cannot be heard to say that opportunity to cross-examine the prosecution witnesses was denied.

12. In the result,

- (i) This Criminal Appeal is dismissed.
- (ii) The conviction and sentence passed by the Sessions (Fast Track Mahila) Judge, Namakkal, in Spl. C.C. No.3 of 2016, dated 16.06.2017, is confirmed.

Sd/-

Assistant Registrar(co)

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Sub Assistant Registrar



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1. The Sessions Judge, Fast Track, Mahila Court, Namakkal.
2. The Inspector of Police,
Komarapalayam Police Station,
Namakkal District.
3. The Superintendent, Central Prison, Coimbatore.
4. The Public Prosecutor, High Court, Madras.

Copy to:

The Section Officer, Criminal Section,
High Court, Madras

2. The POSCO Committee, High Court, Madras.

+1 cc to Mr. T. Muruganantham, Advocate Sr. NO. 69138 (24/05/2022)
CrI.A.No.826 of 2018

sv(CO)
A.SK(30.12.2021)