



Bail Slip

The Appellant / Sole Accused, Balusamy S/o.Chinnathambi was directed to be released on bail by the order of this Court Dated 14.03.2019 and made in CrI.MP.9537/2018 in CrI.A.96/2016.

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.08.2021

Pronounced on : 17.08.2021

C O R A M

THE HON'BLE MR.JUSTICE R. PONGIAPPAN

Criminal Appeal (MD) No.96 of 2016

Balusamy
S/o.Chinnathambi

... Appellant/Sole Accused

versus

State Represented by
The Inspector of Police,
Pasupathipalayam Police Station,
Karur.
(Crime No.591 of 2014)

... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, against the judgment dated 04.12.2015 passed in Spl.S.C.No.10 of 2015, by the learned Sessions Judge, Fast Track Mahila Court, Karur.

For Appellant	: Mr.S.Deenadhayalan
For Respondent	: Mr.E.Antony Sahaya Prabahar Government Advocate (CrI. Side)

J U D G M E N T

This appeal is directed against the conviction and sentence dated 04.12.2015, made in Spl.S.C.No.10 of 2015, on the file of the learned Sessions Judge, Mahila Court, Karur.

2.The appellant is the sole accused. He stood charged for the offence under Section 5(1)(m) read with Section 6 (2 counts) of the Protection of Children from Sexual Offences Act, 2012 [hereinafter referred to as 'the POCSO Act'] and Section 506(i) I.P.C. The accused opted for trial. After full-fledged trial, the learned Sessions Judge came to the conclusion that the appellant/sole accused is guilty under Section 5(1)(m) read with Section 6 (2 counts) of the POCSO Act and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,000/-, in default, to undergo simple imprisonment for three months. The accused was further convicted under Section 506(i) I.P.C. and sentenced to undergo simple imprisonment for one year and to pay a fine of Rs.500/-, in default, to undergo simple imprisonment for one



month.

3.Challenging the same, the accused is before this Court with this criminal appeal.

4.The case of the prosecution is as follows:-

(i) P.W.15 is the victim in this case. P.W.1 - Janaki is his mother and P.W.2 - Ranjith Kumar is his father. During the relevant point of time, P.W.15 was a Student of 1st Standard, studying in Melapalayam Government Adi-Dravidar Welfare Primary School. P.W.15 is having the habit of taking care of his sister, thereby, he is not regularly attending the School. On 18.09.2014 when P.W.1 and P.W.2 went for attending regular work, P.W.15 and his daughter, aged about 3 years, were called by the accused and brought them to the house belongs to one Kaathayee, wherein he committed aggravated penetrative sexual assault on P.W.15 and his sister. Further, the accused threatened to kill them if they would disclose the same to others. In the evening hours, when P.W.1 and P.W.2 called the victims for taking dinner, they found there was a contusion in the mouth of the victims. On enquiry, P.W.15 reported the occurrence to his parents and thereafter, on the next day morning, around 11.30 a.m., P.W.1 lodged a complaint under Ex.P.1 in Pasupathipalayam Police Station.

(ii) On 19.09.2014 around 11.30 a.m. on receipt of the complaint given by P.W.1, P.W.19 - Arulmozhi Arasu, the then Inspector of Police, Pasupathipalayam Police Station registered a case against the accused in Crime No.591 of 2014 under Section 6 of the POCSO Act, 2012 and Section 506(i) I.P.C. The printed F.I.R. has been marked as Ex.P.12. P.W.19 took up investigation and on the same day, around 03.00 p.m. he went to the scene of occurrence and in the presence of P.W.7 - Arivazhagan and one Veerappan, he prepared an Observation Mahazar under Ex.P.2. He drew the Rough Sketch and the same has been marked as Ex.P.13. He brought P.W.18 - Lakshmi, a Women Inspector of Police and requested to record the statement from the victim children. On the same day around 05.30 p.m., near Sanapiratti Railway Gate, Melapalayam Road, he arrested the accused and thereafter, in the presence of P.W.8 - Sindhu, the then Village Administrative Officer and one Veerappan, he recorded the disclosure statement from the accused. In the disclosure statement, the accused admitted the commission of offence and willing to identify the rope, which was used for tying P.W.15. Pursuant to the disclosure statement, the accused brought the investigation team to his house and identify the rope (M.O.1) and thereafter, the same was recovered by P.W.19 under the cover of Mahazar [Ex.P.4]. The admitted portion of the disclosure statement was marked as Ex.P.3.

(iii) In continuation of investigation, through P.W.16 - Ambika P.W.15 and his sister, who are the victims in this case, had been

<https://hcservices.mca.gov.in/services/>

P.W.12 - Dr.Praveen Kumar, for medical examination.



He examined the victims and opined as follows:-

'Victim boy:-

Paediatrician Opinion:-

Oral Cavity - Normal.

No scratch marks (or) nail marking.

External Genitalia - Normal.

Psychiatrist opinion:- Stress reaction due to sexual abuse.

Victim girl:-

Paediatrician Opinion:-

Oral Cavity - Normal.

Multiple old linear abrasions with scale formation over anterior wall of chest and back.

No injuries over external genitalia and around anal canal.

Gynaecologist opinion :- Oral cavity - Normal.

No injuries over external genitalia.

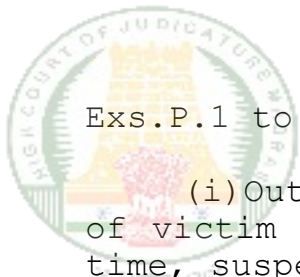
Hymen - intact.'

In this regard, he issued an Accident Register Copy under Exs.P.8 and P.9.

(iv) On 24.09.2014 in view of the request made by the Investigation Officer, P.W.13 - Revathy, the then Judicial Magistrate No.II, Karur, recorded statement from the victim under Section 164(5) Cr.P.C. and the same has been marked as Ex.P.10. Further, the said proceedings have been recorded by P.W.9 - Prabhu, Videographer and the recorded Video and C.D. were marked as M.O.2 and M.O.3, respectively.

(v) In continuation of investigation, P.W.19 submitted an application for conducting medical examination to the accused and in view of the same, P.W.11 - Dr.Nagarajan and P.W.12 - Dr.Praveen Kumar examined the accused and issued discharge summary under Ex.P.5, further, they issued an Accident Register Copy under Ex.P.7. Ultimately, after concluding the investigation, P.W.19 came to the positive conclusion that the accused had committed the offence under Section 5(1)(m) read with Section 6 (2 counts) of the POCSO Act, 2012 and Section 506 (i) I.P.C. He filed alteration report, dated 14.11.2014 and final report before the Judicial Magistrate Court No.I, Karur, accordingly.

5. From the above materials, the learned Sessions Judge, Mahila Court, Karur, framed charges under Section 5(1)(m) read with Section 6 (2 counts) of the POCSO Act and Section 506 (i) I.P.C. The accused denied the same and opted for trial. Hence, in order to prove their case, on the side of the prosecution 19 witnesses have been examined as P.W.1 to P.W.19 and 17 documents were marked as



Exs.P.1 to P.17, besides three Material Objects [M.O.1 to M.O.3].

(i) Out of the said witnesses, P.W.1 and P.W.2 are the parents of victim children. They claim that during the relevant point of time, suspecting the attitude of P.W.15 and his sister, they made an enquiry and thereafter, came to know that the accused had committed penetrative sexual assault on P.W.15 and his sister.

(ii) P.W.3 - Kurumani claims that on the date of occurrence, while she was in her house, which is situated near to the occurrence place, the accused herein brought P.W.15 and his sister from Kaathayee's house.

(iii) P.W.4 - Devika, who is the daughter-in-law of Kaathayee, states that prior to the occurrence, the house belongs to Kaathayee was closed for a period of 1 ½ years.

(iv) P.W.5 - Annakodi, P.W.6 - Lakshmi and P.W.14 - Packiyam, who are the occurrence witnesses, gave evidence in support of the defence as the hut, which belongs to the said Kaathayee, was always closed and therefore, they were treated as hostile witnesses.

(v) P.W.7 - Arivazhagan claims that the Investigation Officer in this case has prepared Observation Mahazar in his presence.

(vi) P.W.8 - Sindhu, the then Village Administrative Officer, speaks about the arrest of the accused and about the recovery of M.O.1.

(vii) P.W.9 - Prabhu, who is the Videographer, speaks about the statement recorded by P.W.13 under Section 164(5) Cr.P.C.

(viii) P.W.10 - Dr.K.Padma and P.W.11 - Dr.R.Nagaraj, who attached with Government Headquarters Hospital, speak about the issuance of Potency Certificate. According to them, the accused is capable of doing sexual assault.

(ix) P.W.12 - Dr.Praveen Kumar gave evidence in respect of the medical examination of the victims.

(x) P.W.13, the then Judicial Magistrate claims that on 24.09.2014 in view of the request given by the Investigation Officer, a statement has been recorded from P.W.15 under Section 164 (5) Cr.P.C.

(xi) P.W.15 being the victim speaks about the occurrence as alleged by the prosecution.

(xii) P.W.16 - Ambika and P.W.17 - Kumar, who are the Police persons, speak about the production of victims and the accused for medical examination.



(xiii) P.W.18 - Lakshmi claims that in view of the request given by P.W.19, she recorded the statement from the victims.

(xiv) P.W.19 - Arivumathi Arasu speaks about the receipt of complaint, registration of the case, arrest of the accused, recovery of material objects and filing of final report.

6. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., the accused denied the same as false. On the side of the accused, two witnesses have been examined as D.W.1 and D.W.2.

(i) In their evidence, D.W.1 - Maheswari, who is the Headmistress of the School, in which, P.W.15 was studying, has stated in her evidence as during the relevant point of time, P.W.15 was studying in 2nd Standard and he had attended the Classes regularly without taking any leave.

(ii) D.W.2 - P.Subha Ananthi, who is the Teacher in the same School, has also spoken about the presence of P.W.15 in the School. Through the said witnesses, a copy of the Attendance Register pertains to the year 2014 was marked as Ex.D.1.

7. Having considered the above materials and also on considering the arguments advanced by either side, the learned Sessions Judge, Mahila Court, Karur, came to the conclusion that the accused is guilty under Section 5(1)(m) read with Section 6 (2 counts) of the POCSO Act and Section 506(i) I.P.C. After concluding as above, the accused was sentenced as stated in Paragraph 2 of this judgment.

8. I have heard Mr.S.Deenadhayalan, learned counsel appearing for the appellant and Mr.E.Antony Sahaya Prabahar, learned Government Advocate (Criminal side) appearing for the State and perused the materials available on record.

9. The learned counsel appearing for the appellant contended that while at the time of framing the charges, it was stated that the alleged occurrence had happened on three days. But, in order to substantiate the same, no evidence is available from the prosecution witnesses. Further, P.W.1 has not lodged any complaint immediately after getting information from her children. The evidence given by P.W.1 and P.W.2 in respect of the injury sustained by the victims is not in terms of the Certificate issued by the Doctor, who treated the victims. As per the evidence of Investigation Officer, the distance between the School and the occurrence place is about 1 ½ Kilometers, being the 2nd Standard Student, it is impossible for P.W.15 to attend his house regularly in lunch hours. More than that, Ex.D.1 - Attendance Register is a written document establish the fact that P.W.15 has regularly attended the School and therefore, the accused had not committed any offence as alleged by



the conviction and sentence.

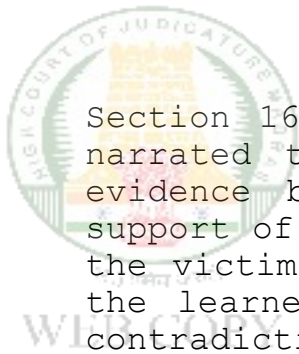
10. Per contra, the learned Government Advocate (Criminal side) appearing for the State contended that minor contradictions found in the evidence given by P.W.1 and P.W.2 and P.W.15 are not at all helpful to disbelieve the entire prosecution case. Being the child, immediately after the occurrence, P.W.15 narrated the incident to P.W.1 and P.W.2 and before the learned Judicial Magistrate, who recorded the statement under Section 164(5) Cr.P.C. On that score, the evidence given by the victim is sufficient to attract the confidence of this Court and therefore, the question of setting aside the conviction does not arise.

11. I have considered the rival submissions made by the learned counsel appearing on either side.

12. Initially, on going through the charge framed against the accused, it seems that the alleged occurrence had happened on 16.09.2014, 17.09.2014 and 18.09.2014. On the other hand, the evidence given by P.W.1 and P.W.2 and P.W.15 reveal the fact that the alleged occurrence had happened only on 18.09.2014. In otherwise, in respect of the alleged occurrence, on 16.09.2014 and 17.09.2014, the witnesses examined on the side of the prosecution did not say anything and therefore, I am of the opinion that during the time of framing the charges, the learned trial Judge without appreciating the materials available on record, framed the charges. However, since the alleged occurrence had happened on 18.09.2014 also, the lapses found in the charge cannot be a reason for disbelieving the entire case of prosecution.

13. Secondly, on 18.09.2014 around 08.00 p.m. onwards, P.W.15 victim reported the occurrence to his parents. Thereafter, only on 19.09.2014 around 11.00 a.m., P.W.1, the mother of the victim, has lodged a complaint before the Police. In this occasion, it is necessary to see that being the Labourers, if these types of offence had happened, naturally, they would inform about the occurrence to her neighbours. But, in this case, P.W.1 after hearing the news from her son, kept quiet and only on the next day, she informed the occurrence to the others. In the said situation, it is necessary to see whether the attitude committed by P.W.1 is natural or not. On a whole reading of the evidence given by the prosecution witnesses, it appears that during the relevant point of time, the accused is aged unmarried man. On the other hand, P.W.1 lives with her husband and children. Hence, there may be a chance to be afraid against the accused, as if the same is disclosed, he may act in otherwise. Therefore, non-reporting of the occurrence immediately before the Police is also not fatal to the prosecution case.

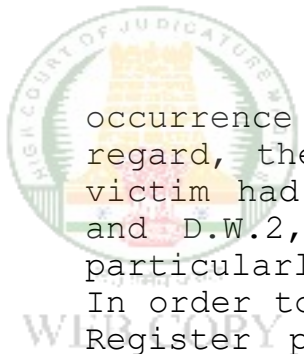
14. The next crucial area in this case is, from the evidence given by the victims, it is not in dispute, during the time of



Section 164(5) Cr.P.C. In the said statement, P.W.15 has clearly narrated the occurrence. Thereafter, during the time of giving evidence before the trial Court, he narrated the occurrence in support of the prosecution. Accordingly, the oral evidence given by the victim is fully in favour of the prosecution. In this regard, the learned counsel for the appellant contended that there was a contradiction between the ocular evidence and medical evidence. In this connection, P.W.1, the mother of the victims, has stated in her chief-examination as on the date of occurrence, the victims have sustained a contusion in their mouth, on the other hand, the Doctor, who examined the victims, has specifically stated that there was no such contusion found in the mouth of P.W.15. Further, the Doctor, who gave such evidence, examined the victim girl immediately on the next day of occurrence. Therefore, in this area, I am of the opinion that P.W.1 had given evidence in an exaggerated manner, however, since the Doctor, who treated P.W.15 gave evidence as the victim boy is under the pressure, the same cannot be thrown out easily. Accordingly, the said reason projected by the defence counsel is also not in the aid of the accused.

15.The next aspect, which is necessary to find out the truth in this case is that, the neighbours of P.W.1, viz., P.W.4, P.W.5 and P.W.6 claim that the hut, which belongs to Kaathayee was closed for a period of 1 ½ years before the occurrence. Though they were treated as hostile witnesses, before treating them as hostile witnesses, they narrated as above. It is well settled law that the evidence given by the hostile witness cannot be discarded with entirety for the reason that the learned Prosecutor treated them as hostile witness. Further, on going through the Rough Sketch prepared by the Investigation Officer reveals the fact that the hut belong to Kaathayee is having a single room. Therefore, the whole circumstances appears if the said hut is locked, there is no chance for the accused to bring the victims to the said hut. Hence, in this aspect, the evidence given by the prosecution witnesses in respect of the occurrence place creates a doubt whether the alleged occurrence had happened as stated by the prosecution, particularly, in the alleged occurrence place.

16.One another aspect in this case is that, while at the time of giving evidence, P.W.19 Investigating Officer says that the School, in which, the victim had studied, is situated 1 ½ Kilometers away from P.W.1's house. In the said situation, it is the case of the prosecution that even in the school days at the lunch hours, P.W.15 returned to his house for providing lunch to his sister, who is aged about three years. The said story put forth by the prosecution, is nothing but artificial one. Being the Labourers, P.W.1 and P.W.2 cannot leave the three years old child in their house regularly without any Assistant. Further, being the seven years school boy, it is not easy for P.W.15 to reach his house regularly at lunch hours. Therefore, the circumstances now narrated by the prosecution witnesses create a doubt whether the alleged



occurrence had happened as stated by the prosecution or not. In this regard, the Teachers, who are working in the School, in which, the victim had studied, while at the time of giving evidence as D.W.1 and D.W.2, have stated that during the relevant point of time, particularly, on the date of occurrence, P.W.15 attended the School. In order to substantiate the same, they have produced the Attendance Register pertains to P.W.15. The learned trial Judge without considering the said evidence, believing the evidence given by P.W.15 alone, came to the conclusion that the accused is guilty. In this occasion, it is necessary to see the judgment of our Hon'ble Apex Court in the case of **State of Haryana Vs. Ram Singh**, wherein it has been held as follows:-

'Incidentally be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one - the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution.'

17. Further, in the case of **Anil Sharma Vs. State of Jharkhand** reported in **2004 (5) SCC 679**, our Hon'ble Apex Court in Paragraph 15, has held as follows:-

'15. So far as the question as to whether equal treatment was being given to the evidence of prosecution and defence witnesses, is concerned, there can be no quarrel with the proposition in law. In the present case it is not that the courts below glossed over the evidence of defence witnesses. In fact detailed analysis has been made to conclude as to why no importance can be attached to their evidence. After carefully analysing the prosecution evidence and that tendered by the accused, the trial court recorded the conviction. The High Court in appeal made further detailed analysis of the evidence and came to hold that there was no infirmity in the conclusions of the trial court. The conclusions are not shown to suffer from any infirmity whatsoever to warrant interference.'

Accordingly, herein also, it is necessary to give an equal importance to the evidence given by the defence witnesses. But, in this case, the trial Court did not give importance to the defence witnesses. Being the Teachers, viz., D.W.1 and D.W.2, there is no necessity for them to give such evidence as against the prosecution case. Therefore, in this aspect, the story put forth by the prosecution, does not inspire the confidence of this Court. Accordingly, I am of the opinion that the story put forth by the prosecution is not rest on the truth and therefore, the contradictions found in the evidence given by the prosecution



witnesses create a doubt whether the alleged occurrence had happened as stated by the prosecution. Hence, the accused is entitled to avail the benefit of doubt.

18. In the result, this Criminal Appeal is allowed and the conviction and sentence dated 04.12.2015, imposed in Spl.S.C.No.10 of 2015, by the learned Sessions Judge, Fast Track Mahila Court, Karur, is set aside and the appellant is acquitted from the charges. The fine amount, if any, paid by him shall be refunded to him. Bail bond, if any, executed by the appellant shall stand cancelled.

Sd/-

Assistant Registrar (CS I)

// True Copy //

/ /2021

Sub Assistant Registrar (CS)

To

1. The Sessions Judge,
Fast Track Mahila Court,
Karur.
2. The Judicial Magistrate No.I,
Karur.
3. -do- through The Chief Judicial Magistrate,
Karur.
4. The Inspector of Police,
Pasupathipalayam Police Station,
Karur.
5. The Superintendent, Central Prison,
Tiruchirappalli.
6. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
7. The Section Officer,
Criminal Section (Records),
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

Pre-delivery judgment in
Criminal Appeal (MD) No.96 of 2016
17.08.2021