

Bail Slip

Karthick S/o. Muthuramalingam, released on Bail Vide order of this Court dated 13.04.2017 made in Crl.MP(MD).1393 of 2017 in Crl.A.(MD) No.51 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED ON : 19.07.2021

JUDGMENT PRONOUNCED ON : 29.10.2021

CORAM:

THE HONOURABLE MR.JUSTICE **SATHI KUMAR SUKUMARA KURUP**

Crl.A.(MD) No.51 of 2017

Karthick

S/o.Muthuramalingam

: Appellant/Accused

-vs-

State through

The Inspector of Police,
All Women Police Station,
Manamadurai,
Sivagangai District.

(In Crime No.13 of 2015)

: Respondent/Complainant

PRAYER:- Criminal Appeal filed under Section 374 of the Code of Criminal Procedure, to call for the records and set aside the order passed by the learned Sessions Judge, Fast Track Mahila Court, Sivagangai District in S.S.C.No.14 of 2015 vide order dated 01.12.2016 and set aside the order of conviction and sentence.

For Appellant : Mr.N.Anantha Padmanabhan

For Respondent : Mr.T.Senthil Kumar

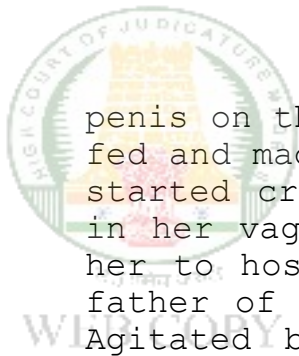
Government Advocate (Crl.Side)

JUDGMENT

This Criminal Appeal has been filed against the Judgment and Conviction dated 01.12.2016 by the learned Sessions Judge, Fast Track Mahila Court, Sivagangai in S.S.C.No.14 of 2015.

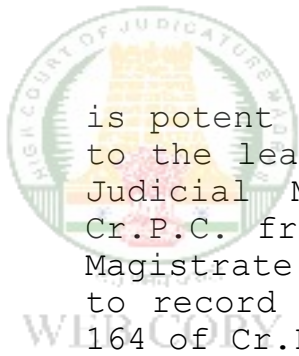
2. The facts, which are relevant for consideration in this appeal, as per the Prosecution case, are briefly as follows:

2.1.The victim in this case is a child studying in LKG in Velammal School. On the date of occurrence, i.e., on 10.04.2015, the child did not attend school and was at home. The Accused in this case is the neighbour residing just opposite to the house of the child. The Accused is aged between 18 and 20 on the date of occurrence. On the date of occurrence i.e., on 10.04.2015 by around 11.00 a.m. the child, who was playing outside the house was taken by the Accused to his house and he had indulged in sexual assault on the genital of the child. The child did not inform immediately. On coming home, the child experienced pain in her vagina and cried. On enquiry by the mother of the child P.W-1, the child informed the mother that the Accused herein, who is a neighbour, pressed his



penis on the vagina of the child. The mother gave her bath and then fed and made her sleep. By around 3 O' clock, the child woke up and started crying and complained her mother that she experienced pain in her vagina. Therefore, the mother and father of the child took her to hospital. P.W-1 is the mother of the child. P.W-3 is the father of the child. P.W-2 is the victim/child witness of crime. Agitated by the said expression of the child, P.W-1 immediately called her husband P.W-3. On reaching home P.W-3 and P.W-1 went to Poovanthi Police Station, Sivagangai District where the Police Officer on duty directed them to go to All Women Police Station, Manamadurai. Therefore, P.W-1 and P.W-3 along with their child/P.W-2 went to All Women Police Station, Manamadurai and lodged complaint under Ex.P-1. P.W-13, Inspector of Police, All Women Police Station, Manamadurai, had received the complaint from P.W-1 and P.W-3 and registered the case in All Women Police Station Crime No.13 of 2015 under Section 5(m) and 6 of the Protection of Children from Sexual Offences Act, 2012. She had sent the copy of the original FIR under Ex.P-9 and the original complaint under Ex.P-1 to the learned Sessions Judge, Fast Track Mahila Court, Sivagangai and placed the copies to the higher officials of the Police Department. Thereafter, she had sent a memo under Ex.P-3 to the Duty Medical Officer at Sivagangai Medical College Hospital to examine the child along with the constable on duty. P.W-9-Malathi, Woman Constable of All Women Police Station accompanied P.W-1 and P.W-3 along with the child victim to Government Medical College Hospital, Sivagangai where P.W-5 Dr.Valarmathi, examined the child and issued Ex.P-4-Medical Examination Report. Also, the child was subjected to medical examination to determine her age. Accordingly, P.W-6-Dr.Anandhavalli, Duty Medical Officer at Sivagangai Government Medical College Hospital had taken x-ray of the hand of the child and arrived at a conclusion that the age of the child was between 4 and 5. She had issued the age certificate under Ex.P-5. P.W-13 had also sent a requisition to the learned Chief Judicial Magistrate, Sivagangai, to nominate a Judicial Magistrate to record statements under Section 164 of Cr.P.C. from the victim under Ex.P-12. She had also obtained age certificate from P.W-6-Medical Officer, Government Hospital, Sivagangai under Ex.P-5. She had visited the place of occurrence and prepared Rough Sketch under Ex.P-11 and Observation Mahazar under Ex.P-10.

2.2.She had examined P.W-1 mother of the victim, P.W-3 father of the victim and P.W-2 victim and on the same day, arrested the Accused and she had sent a request to the learned Judicial Magistrate to subject the Accused to medical examination. She had forwarded the Accused along with P.W-10-Selva Kumar, Constable of Poovanthi Police Station for remand along with remand request to the learned Judicial Magistrate, Sivagangai. On the requisition of the learned Judicial Magistrate under Ex.P-7 the Accused was also subjected to medical examination with P.W-11 Dr.Senthil Kumar, Duty Medical Officer at Sivagangai Medical College Hospital who had examined the Accused and issued Ex.P-8 which states that the Accused



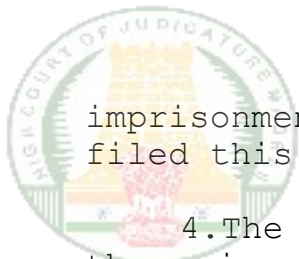
is potent and had normal health. P.W-13 had also sent a requisition to the learned Chief Judicial Magistrate, Sivagangai, to nominate a Judicial Magistrate to record statements under Section 164 of Cr.P.C. from the victim under Ex.P-12. The learned Chief Judicial Magistrate had nominated the learned Judicial Magistrate, Ilayangudi to record the statement of the victim as the witness under Section 164 of Cr.P.C.

2.3.The learned Judicial Magistrate, Ilayangudi had recorded the statement of the child witness and sent the same to the file of the learned Chief Judicial Magistrate and the copy of the same was sent to the Investigation Officer P.W-13. Thereafter, as P.W-13 was transferred, P.W-14-Amirtham, Inspector of Police, All Women Police Station, Manamadurai, took up the investigation. Since all the witnesses had stated the same set of facts as was narrated before P.W-13, she had not recorded the statements of the individual witnesses. She had obtained the age certificate from the school where the child witness had studied under Ex.P-14 and on obtaining the certificate from the Doctors who had examined the witness as well as the Accused and recording their statement based on the materials gathered by her, the offence alleged in the FIR under Ex.P-9 had been confirmed. Therefore, P.W-14 had laid the final report under Section 173 of Cr.P.C. before the Court of the learned Sessions Judge, Fast Track Mahila Court, Sivagangai.

2.4.The learned Sessions Judge, Fast Track Mahila Court, Sivagangai, had sent summons to the Accused. On appearance of the Accused, copies were furnished under Section 207 of Cr.P.C. to the Accused and charges under Section 5(m) and 6 of the Protection of Children from Sexual Offences Act, 2012, were framed after hearing the Prosecution and the defence. The Accused pleaded not guilty and claimed to be tried. Therefore, trial was ordered. During trial, the Prosecution had examined witnesses P.W-1 to P.W-14 and marked documents Ex.P-1 to P-14.

2.5.On closing of Prosecution, the learned Sessions Judge, Fast Track Mahila Court, had examined the Accused under Section 313 of Cr.P.C. against the incriminating evidence appearing against him. The Accused denied the incriminating evidence and stated that he has evidence to prove his case. The Accused had not examined any witness as defence witness. Therefore, the Prosecution and the Defence arguments were heard and on proper appreciation of the evidence through P.W-1 to P.W-14 and Ex.P-1 to P-14, the learned Sessions Judge, Fast Track Mahila Court, had convicted the Accused for the offence under Section 5(m) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012, and sentenced him to undergo Rigorous Imprisonment for 10 years and to pay fine of Rs.5,000/-, in default, to undergo one year Simple Imprisonment.

<https://hcservices.equityindia.org/> by the judgment of conviction and sentence of



imprisonment of ten years and fine of Rs.5,000/-, the Accused had filed this Criminal Appeal.

4.The learned Counsel for the appellant/Accused submitted that there is no evidence regarding the alleged occurrence. P.W-1 and P.W-3 are hearsay witnesses. P.W-5-Dr.Valarmathi, who had examined the child and issued Ex.P-4 medical examination report, had clearly stated that the hymen is intact. The child was not allowed the Doctor to take swab from the vagina of the child. Therefore, there is no proof that the Accused had caused the alleged sexual assault on the child. In the absence of the medical evidence and in the absence of direct witness, the judgment of the learned Sessions Judge, Fast Track Mahila Court, convicting the Accused merely relying on the evidence of P.W-1 and P.W-3 is perverse and is to be set aside.

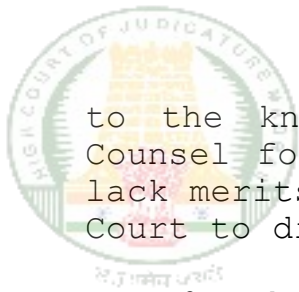
5.Further, the learned Counsel for the appellant/Accused stated that the child had been tutored by P.W-1 and P.W-3, the parents of the child. P.W-1 and P.W-3 are friends to Dr.Rajendran against whom the family of the Accused had given a complaint for dereliction of duty as a Doctor and for medical negligence for the death of the grandmother of the Accused. Since the said Dr.Rajendran suffered social stigma due to the complaint given by the family of the Accused, he had arranged P.W-1 and P.W-3 to lodge a false case against the family of the complainant/Accused herein and thereby causing social stigma on the family of the Accused. He also submitted that the evidence of the child witness cannot be accepted.

6. As per the submission of the learned Counsel for the Appellant/Accused, the Prosecution has not proved the case against the Accused. In such circumstances, the judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Sivagangai District in S.S.C.No.14 of 2015 vide Judgment dated 01.12.2016 convicting the Accused for offence under Section 5(m) r/w. Section 6 of Protection of Children from Sexual Offences Act, 2012 is found to be perverse and has to be set aside. The Accused be discharged from the said charges.

7.In support of his contention, the learned Counsel for the Appellant/Accused relied on the following rulings:-

1. ***State of Himachal Pradesh -vs- Sham Lal*** reported in ***2017 STPL 12802 HP.***
2. ***Shivasharanappa and others -vs- State of Karnataka*** reported in ***2013 STPL 14230 SC.***

8.The learned Government Advocate (Crl. Side) by way of reply submitted that no parent of a girl child will take the risk of endangering the future of the child by using the child as a weapon to institute a false case against any person. The family of the child suffers social stigma if the same had occurred and had come



to the knowledge of the society. The argument of the learned Counsel for the Appellant/Accused had to be rejected as the Appeal lack merits. The learned Government Advocate (Crl. Side) prays this Court to dismiss the appeal as there is no merit.

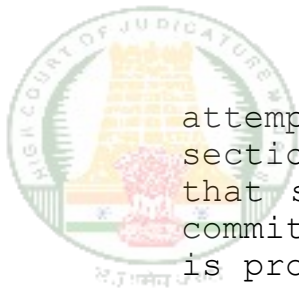
9.Point For Consideration:

Whether the judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Sivagangai, in Spl.S.C.No.14 of 2015, dated 01.12.20216 is perverse warranting interference by this Court as Appellate Court?

10.A perusal of the judgment relied upon by the learned Counsel for the Appellant/Accused in the case of **State of Himachal Pradesh -vs- Sham Lal** reported in **2017 STPL 12802 HP**, the victim herself had contradicted from the earlier statement made to the police officers in the cross examination. Further, the victim in that case was 15 years old girl. She had accompanied the Accused from the School to the place where the Accused alleged to have kidnapped her and alleged to have assaulted her. But she did not raise those issues when she had preferred complaint to the police. Therefore, based on the contradictions regarding the alleged offence, the trial Court disbelieved the evidence of 15 years old girl and acquitted the Accused. In the present case before this Court, the victim is a child studying LKG and she herself is unable to explain things but narrated it in the statements under Section 164 Cr.P.C. before the learned Judicial Magistrate and to the Doctor who examined her and also in the deposition before the learned Sessions Judge, Fast Track Mahila Court, Sivagangai. The learned Trial Judge believed the evidence of the victim who is aged less than five years. If the evidence of the victim who is an innocent child of less than five years old inspires confidence in the Trial Judge, the High Court as an Appellate Court cannot dislodge the same in the appeal as the High Court as Appellate Court does not have the benefit of observing the demeanour of the witness as the trial Judge had. Therefore, the ruling cited by the learned Counsel for the Appellant/Accused is not applicable to the facts in the present case.

11.With regard to the rulings of the Hon'ble Supreme Court of India relied upon by the leaned Counsel for the Appellant/Accused in the case of **Shivasharanappa and others -vs- State of Karnataka** reported in **2013 STPL 14230 SC**, the said ruling is with regard to the facts related to murder case where the evidence of the child witness was not believed by the Court concerned but the facts regarding offence under the provisions of the Protection of Children from Sexual Offences Act, 2012 stands on a different footing. It is pertinent to extract here Section 29 of the Protection of Children from Sexual Offences Act, 2012 which reads as under:-

"29. Presumption as to certain offences - Where a person is prosecuted for committing or abetting or



attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

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12.As per section 29 of the Protection of Children from Sexual Offences Act, 2012, the duty is cast upon the Court that the Court shall presume that the offence had occurred as stated by the victim of crime invariably children. Therefore, the ruling of the Hon'ble Supreme Court disbelieving the evidence of the child witness in a murder case by the Court will not help the Appellant/Accused herein.

13.Further, as per Section 29 of the Protection of Children from Sexual Offences Act, 2012, there is a presumption that when there is a complaint against the Accused, the Court shall presume that the child speaks the truth and therefore, it is the duty of the Accused to disprove the case of the Prosecution. Here the Accused had not let in any evidence to disprove the case of the Prosecution. When there is absence of evidence from the Accused/Defence witness, then what had been stated by the Prosecution is to be believed as per the provisions of POCSO Act.

14.If the Appellant herein as Accused before the learned Sessions Judge, Fast Track Mahila Court wanted the Court to disbelieve the evidence of the child witness, he ought to have let in evidence to disprove the case of the Prosecution. The general principle of criminal law that the Accused is presumed to be innocent unless and until the Prosecution proves the charge through cogent evidence before the Court concerned will not apply to the cases under the Protection of Children from Sexual Offences Act, 2012. Therefore, invariably when there is no evidence from the Accused, as defence witness, then the Court on the basis of the evidence let in by the Prosecution can convict the Accused. In the light of the above, the rulings cited by the Appellant/Accused will not help the Appellant/Accused.

15.The offences triable under the Protection of Children from Sexual Offences Act, 2012, stands on a different footing from the offences under the Indian Penal Code for which the general theory that the Accused is presumed innocent until the charge is proved through cogent evidence is applicable. Whereas in the case of the Protection of Children from Sexual Offences Act, 2012, the presumption of innocence of the Accused is not taken for granted. The innocence of the child is taken for granted. When the child complains of sexual offence, the Court presumes it to be true. Therefore, the arguments put forth by the learned Counsel for the Appellant/Accused and reliance placed on the reported ruling of the Hon'ble High Court of Himachal Pradesh that the evidence of the child witness cannot be taken for granted, is rejected. Here in the case of the child had clearly stated before the learned Judicial



Magistrate, Ilayangudi, the actual occurrence. Recording the statement of the child witness under Section 164 of Cr.P.C. by the learned Judicial Magistrate is a mandatory provision to inspire confidence in the Investigation Officer that the Investigation is on the right path. The child had in her statement before the learned Judicial Magistrate stated that the Accused had thrust his penis on the vagina of the child repeatedly three or four times. Therefore, what had been stated before the learned Judicial Magistrate at the earliest point of time and the evidence of child victim before the learned Sessions Judge, Fast Track Mahila Court is found natural and cogent. Apart from the above, the Accused did not take the risk of letting in evidence as a Defence witness. Therefore, the presumption is available under the Protection of Children from Sexual Offences Act, 2012, in favour of the Prosecution cannot be dislodged based on the defence theory of victimising the Accused by a Doctor against whom the family of the Accused had preferred a complaint. From the normal human conduct, no parents will take the risk of risking the future of their own daughter and using the daughter as a weapon to institute a criminal case against another person. The child suffers social stigma, the father of the child is affected when the same is available in the public domain. Therefore, the defence of the Accused before the learned Sessions Judge was rejected. For the same reasoning, this Court also rejects the grounds of appeal and the arguments by the learned Counsel for the Appellant/Accused.

16. Further, on a perusal of the judgment of the learned Sessions Judge, Fast Track Mahila Court and on perusal of the evidence of P.W-1 to P.W-14, it is found that the evidence as pointed out by the learned Counsel for the Appellant by the time P.W-5 Doctor had examined the child, there is no proof of sexual assault. As per the evidence of P.W-1, she had given a bath to the child and that whatever the evidence available that might have been lost by the time the Doctor had examined her. Naturally, the child has stated the facts under Section 164 of Cr.P.C. to the learned Judicial Magistrate, Ilayangudi which had inspired confidence in the Investigation Officer that the investigation is on the right path. P.W-2 the child witness had herself deposed before the learned Sessions Judge, Fast Track Mahila Court, regarding the sexual assault committed by the Accused on her. In this type of cases, there will not be and may not be evidence available for corroboration. The child had naturally spoken about the act to her mother P.W-1 which had resulted in registering of FIR under Ex.P-9. The arguments of the learned Counsel for the Appellant/Accused is rejected since the Appellant himself has the duty to disprove the case of the Prosecution. He had not entered the witness box. Therefore, the presumption available under Section 29 of the Protection of Children from Sexual Offences Act, 2012, cannot be dislodged lightly by the Appellate Court. Apart from these things, the Hon'ble Supreme Court had laid down rulings to appreciate criminal trials by the Appellate Judge, the Appellate



Judge can re-assess the entire materials before the learned Trial Judge. At the same time, the Appellate Judge does not have the advantage of appreciating the demeanour of the witness and Accused as the learned Trial Judge has. In such circumstances, even if the Appellate Judge arrives at an opposite conclusion on the same materials available before the learned Trial Judge, still the Appellate Judge shall not disturb the findings of the learned Trial Judge as the Appellate Judge does not have the benefit of appreciating the demeanour of the witness and the Accused. If the materials available before the learned Trial Judge had been properly assessed as per the Indian Evidence Act and the learned Trial Judge had arrived at a just conclusion based on the evidence then the Appellate Judge shall not interfere with the same.

17.If this Court accepts the argument of the learned Counsel for the Appellant/Accused and set aside the judgment of the learned Sessions Judge, Fast Track Mahila Court, it amounts to ignoring the provisions of the POCSO Act wherein it had insists on its conditions on the learned Trial Judge that there is presumption that the offence complained of by the child witness had to be treated as *bona fide* truth. Therefore, the contention of the learned Counsel for the Appellant/Accused is rejected. The argument of the learned Government Advocate (Crl. Side) is accepted.

18.Point for consideration is answered in favour of the Respondent/Prosecution and against the Appellant/Accused. The finding of guilt recorded by the learned Sessions Judge, Fast Track Mahila Court, Sivagangai in S.C.No.14 of 2015, dated 01.12.2016 is found not perverse.

In the result, this Criminal Appeal is dismissed as having no merit.

19.The judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Sivagangai in Spl.S.C.No.14 of 2015, dated 01.12.2016 is confirmed. The learned Sessions Judge, Fast Track Mahila Court, Sivagangai, is directed to issue warrant to secure the Accused so as to forward him to prison to undergo the remaining period of sentence imposed on the Accused by judgment dated 01.12.2016 in Spl.S.C.No.14 of 2015. The period of detention already undergone by the appellant/Accused is set off under Section 428 of Cr.P.C

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)



- 1.The Sessions Judge,
Fast Track Mahila Court,
Sivagangai.
- 2.The Inspector of Police,
All Women Police Station,
Manamadurai,
Sivagangai District.
- 3.The Officer In charge,
Bostal School, cum District Prison at Pudukkottai.
- 4.The Additional Public Prosecutore,
Madurai Bench of Madras High Court, Madurai.

Copy to:

The Section Officer,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

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29.10.2021

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