

BAIL SLIP

The Petitioner/Accused namely Parthiban, Male, Age 30 Years, S/o.Murugan was directed to be released on Bail vide order dated 01/11/2021 made in Crl.M.P.No.11050 of 2021 in Crl.A.No.208 of 2019 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 09.02.2022

PRONOUNCED ON: 01.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH
AND
THE HONOURABLE MR.JUSTICE A.A.NAKKIRAN

CRL.A.NO.208 OF 2019

Parthiban

... Appellant

.Vs.

The State by
the Inspector of Police,
All Women Police Station (North),
Tiruppur,
Tiruppur District.
(Cr. No.44 of 2014)

... Respondent

PRAYER:-

Criminal Appeal filed under Section 374(2) Cr.P.C. seeking to set aside the judgment and order dated 26.02.2019 passed in Spl. S.C. No.2 of 2017 on the file of the Sessions Court (Fast Track Mailha Court), Tiruppur.

For appellant : Mr.Philip Ravindran Jesudoss

For respondent : Mr.M.Babu Muthu Meeran
Additional Public Prosecutor

JUDGMENT

P.N.PRAKASH, J

This criminal appeal is directed against the judgment and order dated 26.02.2019 passed in Spl. S.C. No.2 of 2017 on the file of the Sessions Court (Fast Track Mahila Court), Tiruppur, in and by which, the appellant herein was convicted of the offence under Section 5(m) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for brevity "the POCSO Act") and sentenced to undergo imprisonment for life with fine of Rs.20,000/-, in default to undergo rigorous imprisonment for two years.

2. The prosecution story runs thus:

2.1 It is common knowledge that Tiruppur is a garment manufacturing hub and so, it attracts many a migrant labourer from other States, especially north and north eastern States. Nagendra Kumar (P.W.1) is one such a migrant labourer from Bihar, who came with his family consisting of his wife Meena Kumari and four children (2 sons and two daughters), including the victim child in this case, viz., "X" (P.W.2 - name not divulged for the sake of anonymity), who was 3 years and 10 months old at the time of occurrence.

2.2 Nagendra Kumar (P.W.1) was residing in a portion for rent in a row of houses in Mumoorthy Nagar in Tiruppur and was working as a tailor in Akshara Banian Company where Rahman (P.W.5) was the Supervisor.

2.3 On 24.11.2014, while Nagendra Kumar (P.W.1) was on work, around 12 noon, his wife Meena Kumari called him over phone and sobbingly told him that while their children were playing with their neighbour Parthiban (appellant), he had sexually abused their daughter "X" (P.W.2) by taking her near a washing stone, removing his jeans pants and thrusting his penis into her mouth, which was seen by their son Ankit Kumar (not examined), who was chased away by the appellant. Upon being told so by Ankit Kumar, when Meena Kumari rushed to the place, the appellant quickly pulled up his jeans pants and let her ("X") free. He further warned Meena Kumari saying that he would subject her too to that treatment and left the place.

2.4 On hearing this shocking information, Nagendra Kumar (P.W.1) took permission from his office and rushed to his house and found his house sobbing. In the evening, when Nagendra Kumar

(P.W.1) confronted the appellant and questioned him, the latter told him that he did not do anything of that sort and warned Nagendra Kumar (P.W.1) haughtily saying "Whatever you northerners can do, do" and left the place.

2.5 The next day, i.e., on 25.11.2014, at 8.30 a.m., the statement of Nagendra Kumar (P.W.1) that was given by him in Hindi and translated by Rahman (P.W.5) into Tamil, was recorded by Ramadevi (not examined), Sub Inspector of Police, as a complaint (Ex.P.1) and a case in A.W.P.S., Tiruppur (North) Cr.No.44 of 2014 was registered on 25.11.2014 at 8.30 a.m. and the printed FIR (Ex.P.4) was prepared, which reached the jurisdictional Magistrate on the same day, as could be seen from the endorsement thereon.

2.6 Investigation of the case was taken over by Bathrunissa Begum (P.W.6), Inspector of Police, (for brevity "the first I.O."), who was in charge of the A.W.P.S., Tiruppur (North). She went to the place of occurrence and prepared the observation mahazar (Ex.P.5) and rough sketch (Ex.P.6). She recorded the statements of Nagendra Kumar (P.W.1), Meena Kumari, "X" (P.W.2), Ankit Kumar, Priya (not examined), Rahman (P.W.5) and other witnesses. She arrested the appellant at 16.30 hrs. on 25.11.2014. She sent "X" (P.W.2) to the Government Hospital, Tiruppur, where "X" (P.W.2) was examined by Dr. Hemalatha (P.W.3) who issued the medical certificate (Ex.P.3), who did not find any external injuries on the person of "X" (P.W.2). However, she recorded in the medical certificate (Ex.P.3) as "history of insertion of male organ of a young 22 year old male inside the baby's mouth". The first I.O. (P.W.6) took "X" (P.W.2) to the Court of the Judicial Magistrate, Kangayam and also requisitioned the services of a Hindi knowing teacher from St. Joseph School, Tiruppur, for translating the statement of "X" (P.W.2) to the Court. Accordingly, one Vidya (P.W.4) appeared before the Judicial Magistrate, Kangayam and the statements of "X" and her younger brother were recorded.

2.7 On Hema (P.W.7), regular Inspector of Police, A.W.P.S. Tiruppur (North) ("the second I.O.") joining duty, the investigation was continued by her and she completed the investigation and filed a final report in the Special Court for POCSO Act Cases, Tiruppur, for the offence under Section 5(m) read with Section 6 of the POCSO Act against the appellant, which was taken on file as Special S.C. No.2 of 2017.

2.8 On appearance of the appellant, the provisions of Section 207 Cr.P.C. were complied with and a charge under Section 5(m) read with Section 6 of the POCSO Act was framed against him. When questioned, he pleaded not guilty.

2.9 To prove the case, the prosecution examined 7 witnesses and marked 7 exhibits.

2.10 When the appellant was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same and did not offer any explanation nor did he examine any witness from his side.

2.11 After considering the evidence on record and on hearing either side, the trial Court, by judgment and order dated 26.02.2019 in Spl. S.C.No.2 of 2017, convicted and sentenced the appellant, as stated in the opening paragraph of this judgment and did not award compensation.

2.12 Challenging the aforesaid conviction and sentence, the accused Parthiban has preferred this criminal appeal.

3. Heard Mr.Philip Ravindran Jesudoss, learned counsel for the appellant and Mr.M.Babu Muthu Meeran, learned Additional Public Prosecutor appearing for the respondent.

4. Mr.Philip Ravindran Jesudoss made the following submissions:

- (a) There were two complaints in this case and the first complaint which was given in the Anupparpalayam Police Station was suppressed by the prosecution;
- (b) Neither Meenakumari, the mother of "X" nor Ankit Kumar, the brother of "X", who is said to have seen the incident, was examined; and
- (c) Even according to the witnesses, the appellant was found in the police station on the date of the incident itself, i.e., on 24.11.2014 and therefore, his arrest on 25.11.2014 is false.

5. Per contra, the learned Additional Public Prosecutor refuted the aforesaid submissions.

6. One fact deserves to be noted at the outset itself. The occurrence had taken place on 24.11.2014, the final report had been filed by the police only in 2017 and the trial had been begun with the examination of Nagendra Kumar as P.W.1 only on

04.10.2018, by which time, Nagendra Kumar (P.W.1) had relocated his family to Bihar, perhaps, unable to withstand the trauma suffered by his family.

7. Nagendra Kumar (P.W.1), in his evidence, has stated the preliminary facts upto the lodging of complaint to the police. He has deposed in Hindi and his evidence has been translated into Tamil with the help of one Yakub, a school teacher from a nearby school. In his evidence, Nagendra Kumar (P.W.1) has stated that when he was at work on 24.11.2014, around 12 noon, his wife called him and told him that their neighbour Parthiban had sexually abused their daughter "X" (P.W.2) by inserting his penis into her (X's) mouth near the washing stone which was seen by their son Ankit Kumar, who informed this to her (Meena Kumari). He has further stated that Rahman (P.W.5), Supervisor, also came with him to the nearby police station where he gave a statement.

8. Rahman (P.W.5) has corroborated the evidence of Nagendra Kumar (P.W.1) on these ancillary facts, because, neither Nagendra Kumar (P.W.1) nor Rahman (P.W.5) had witnessed the actual occurrence. From the evidence of Nagendra Kumar (P.W.1) and Rahman (P.W.5), it appears that Nagendra Kumar (P.W.1) and his team had gone to the Anuppapalayam Police Station and given a statement. As is their wont, our police had ping ponged them and ultimately, the case was registered only on the next day, i.e., 25.11.2014, by the A.W.P.S., Tiruppur (North) and the investigation was conducted by Bathrunnisa Begam (P.W.6). To cover up this mess created by them, the police have written in the complaint-statement (Ex.P.1) as if Nagendra Kumar (P.W.1) told them that being night hours, he did not want to come to the police station and give a complaint and therefore, he had come the next morning to give the complaint. In our opinion, this supine misadventure by the police should not be allowed to deflect the truth in the testimony of Nagendra Kumar (P.W.1) and Rahman (P.W.5).

9. As regards the kernel of the incident, we have the testimony of "X" (P.W.2), the victim child herself, who was aged 7 years when she was examined on 04.10.2018, who has stated that while she was playing in the compound, the appellant called her out and took her with him, removed his pants and thrust his penis into her mouth, which was seen by her brother Ankit Kumar, who informed this to her mother. The defence was not able to cause any dent whatsoever in her testimony. In the cross-examination of "X" (P.W.2), the defence has asked her the meaning of "Zuji Koo Mukh May dala" and "Zuzoo may hath Lagaya".

For these two questions, "X" (P.W.2) has just stood still in the witness box and had not answered. Her demeanour has been recorded by the trial Judge in the deposition.

10. Much argument was advanced by the learned counsel for the appellant on this, contending that in the absence of "X" (P.W.2) explaining these two lines, it cannot be stated that the offence has been proved. We were wondering as to where from these two Hindi expressions have been lifted and posed to "X" (P.W.2) by the defence in the trial Court and therefore, we pored over the records. We found the answer in the Section 164 Cr.P.C. statement of "X" (P.W.2). The Section 164 Cr.P.C. statement of "X" has been recorded by the Judicial Magistrate, Kangeyam on 26.11.2014. A perusal of the proceedings of the Judicial Magistrate, Kangeyam, shows that the services of Vidya (P.W.4) were requisitioned for assisting the Court for translation. "X" (P.W.2) was 3 ½ years old on 26.11.2014 when her Section 164 Cr.P.C. statement was recorded, as could be seen from her birth certificate (Ex.P.2), wherein, her date of birth has been shown as 16.03.2010. The incident had taken place on 24.11.2014 and the Section 164 Cr.P.C. statement of "X" has been recorded on 26.11.2014. To the preliminary questions posed by the Judicial Magistrate, Kangeyam, "X" (P.W.2) appears to have had stood still without answering, but, when questions as to the actual occurrence were posed, she has stated in Hindi Zujuji ko muhmein rakha (the victim girl showing her private part and says) "hath rakha" which has been translated by Vidya into Tamil as under:

“அவர் தனது ஆண் உறுப்பை என் வாயில் வைத்தார். அவர் கையை எனது பெண் உறுப்பில் வைத்தார்.”

11. We are conscious of the fact that a statement recorded under Section 164 Cr.P.C. is not a substantive piece of evidence, but, at the most could be used for corroborating or contradicting the deponent in the witness box. Therefore, we are not using the aforesaid answers as substantive piece of evidence against the appellant, because, in the chief examination itself, "X" (P.W.2) has stated that the appellant has kept his penis in her mouth. Just because in the cross-examination, she did not give the translation for the two Hindi expressions, it does not mean that "X" (P.W.2) was speaking falsity. What motive can a child of 7 years have against the appellant? Admittedly, the appellant is a local and "X" (P.W.2) is a child of a migrant labourer from Bihar, who had come to this State for eking out his livelihood. Even to Nagendra Kumar (P.W.1), "X" (P.W.2) and Rahman (P.W.5), the defence has not suggested any motive for foisting this case on the appellant.

12. Likewise, the non-examination of Meena Kumari and Ankit Kumar is not fatal to the prosecution case, because, we have the substantive evidence of "X" (P.W.2) herself, who had undergone the sexual abuse at the hands of the appellant.

13. As regards the arrest of the appellant, though Nagendra Kumar (P.W.1) and Rahman (P.W.5) have stated that the appellant was brought to the Aarapalayam Police Station on 24.11.2014 itself, whereas, according to the first I.O. the appellant was arrested by the police only on 25.11.2014, much credence need not be placed on this contradiction, inasmuch as, it falls within the realm of remissness in investigation by the police, which would have least bearing on the credibility of the evidence of "X" (P.W.2). Therefore, we have no hesitation in holding that the prosecution has proved the charge beyond a peradventure.

14. Coming to the substantive sentence of imprisonment, the learned counsel for the appellant pleaded that at least, the period of imprisonment, may be reduced on sympathetic grounds.

15. Be it noted, reducing the sentence is tantamount to showing misplaced sympathy to a person, who has sought to satiate his sexual appetite by inserting his penis into the mouth of a 3 year and 10 month old child, which is a horrendous act. Every child comes with the message that God is not yet disgusted with man. The trauma with which "X" (P.W.2), should have to live for the rest of her life, cannot be put in words. Therefore, we are not inclined to reduce the sentence even a wee bit.

16. Since no compensation has been awarded by the trial Court, we award a compensation of Rs.5 lakhs, under G.O. (Ms.) No.33, Social Welfare & Nutritious Meal Department Programme (SW.5(2)) Department dated 03.10.2020, to be deposited in the name of "X" by the State Government in any nationalised bank with her mother Meena Kumari as her guardian till she attains the age of majority. The District Child Protection Officer, Tiruppur, the Secretary, Legal Services Authority, Tiruppur, the trial Court and the respondent police shall ensure that the compensation is disbursed to "X" as directed by us within a period of three months from the date of receipt of a copy of this judgment. The Director, Social Defence Department, Chennai, shall file a compliance report in the Registry of this Court within a period of three months from the date of receipt of a copy of this judgment and the Registry shall place the

compliance report as part of the appeal records.

In the result, this criminal appeal stands dismissed on the aforesaid terms.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

cad

To

1. The Secretary,
Home Department,
Government of Tamil Nadu,
Fort St. George,
Chennai - 600 009.
2. The Secretary,
Finance Department,
The Government of Tamil Nadu,
Fort St. George,
Chennai - 600 009.
3. The Director,
Social Defence Department,
300, Kellys High Road,
Kilpauk, Chennai - 600 010.
4. The Inspector of Police,
All Women Police Station (North),
Tiruppur, Tiruppur District.
5. The Sessions Judge,
(Fast Track Mailha Court),
Tiruppur.
6. The District Child Protection Officer,
Tiruppur.
7. The Secretary,
Legal Services Authority,
Tiruppur.

8. The Superintendent of Central Prison,
Coimbatore.
9. The Public Prosecutor,
High Court of Madras,
Chennai - 600 104.

Copy To:-

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

+1cc to Mr.Philip Ravindran Jesudoss, Advocate, S.R.No.13530

CRL.A.NO.208 OF 2019

MT(CO)
PBS/24/03/2022