



WEB COPY



Crl.A.No.819 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 12.12.2023

CORAM :

THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP

Crl.A.No.819 of 2016

Rajarajan

... Appellant/Accused

Vs.

State Rep by
The Inspector of Police,
Mayiladuthurai Police Station,
Nagappattinam District.
(Crime No.475/2015)

... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 of Cr.P.C., to set aside the conviction and sentence imposed in Special Sessions Case No.4/2015 dated 17.06.2016 on the file of the learned Sessions Judge (Fast Track Mahila Court), Nagapattinam.

For Appellant : Mr.M.G.Udhaya Shankar
for Mrs.S.Shantha Kumari

For Respondent : Ms.G.V.Kasthuri
Additional Public Prosecutor



Crl.A.No.819 of 2016

JUDGMENT

WEB COPY

This Criminal Appeal has been filed to set aside the Judgment of the learned Sessions Judge (Fast Track Mahila Court), Nagapattinam in Special Sessions Case No.4/2015 dated 17.06.2016.

2. The learned Counsel for the Appellant submitted that the Appellant is convicted for the offences under Section 6 r/w. 5 (i) (m) of Protection of Children from Sexual Offences Act. He was sentenced to undergo 10 years of Rigorous Imprisonment and to pay a fine of Rs.10,000/-, in default, to undergo one year of Simple Imprisonment as per the Judgment of the learned Sessions Judge, Fast Track Mahila Court, Nagapattinam in Spl.S.C.No.4/2015 dated 17.06.2016.

3. It is the submission of the learned Counsel for the Appellant that while admitting this Appeal no bail was granted and till date the Appellant/Accused has been in Prison continuously.

4. The learned Counsel for the Appellant invited the attention of this Court to the charge framed by the learned Sessions Judge, Fast Track



Crl.A.No.819 of 2016

WEB COPY

Mahila Court, Nagapattinam in Spl.S.C.No.4/2015. As per the charge, only Section 6 r/w. 5 (i)(m)(n) of the Act had been framed by the Court. The Accused denied the charges. Therefore, the trial was ordered. As per the submission of the learned Counsel for the Appellant, the alleged occurrence took place on 18.07.2015 by around 9 a.m.

5. The facts of the case as stated by the Prosecution are as follows:

The Accused is a cousin (elder brother through her elder paternal uncle). The defacto Complainant is the mother of the victim who was examined as P.W-1. She is residing in a thatched house belonging to the father of the Accused who is none other than her father's elder brother. As per the Prosecution case, the Accused is alleged to be studied in College. On the date of occurrence, he is at home. The Accused is known to the family of the victim. He had taken the child to play with the child. When P.W-1 was in her house and attending to her daily chores, she heard the cries of her child. She proceeded to the shed put up for the benefit of the Accused for his study where he had taken the child. When she entered the hut, she found the Accused lie in bare body and the child aged two also bare body. She was taken aback by shock and immediately



Crl.A.No.819 of 2016

WEB COPY

took her child and rushed out. On seeing her, the Accused immediately left the place putting on his lungi.

6. She took the child to her house, examined the child, she found the genital of the child in reddishness and on touch, she found some fleshy fluid on the vagina of the child. She attempted to calm down the child. She disclosed the facts to one Valli, a neighbour. The said Valli advised her to wash genital with warm water and apply coconut oil. She had accordingly done so. In the evening, her husband, who is working in Coimbatore, contacted the father of the Accused to talk to P.W-1-mother of the child. At that time, she had disclosed what had happened in the day time. The husband of P.W-1 scolded her for being careless and also informed her that he will call his mother to come to her and take the child to Hospital. The next day her mother-in-law who is residing in the nearby Village came in the morning. She along with her mother-in-law and her husband's sister-in-law took the child to the Government Hospital at Mayiladuthurai. The child was examined by a Doctor at the causality Centre and since it was a case of alleged sexual assault, he had referred to a woman Doctor who had examined the child and she had opined that the



Crl.A.No.819 of 2016

WEB COPY

child was subjected to attempt of rape and she had accordingly given a medical certificate. Also, advised the mother of the child to lodge a complaint. From the Hospital Police Outpost, the Officials were summoned by the Doctor to whom the mother of the child lodged a Complaint. Based on the oral statement of the mother of the victim/P.W-1, Complaint was written down by the Head Constable at the Police Outpost, Myladuthurai which was forwarded to the jurisdictional Police Station. The original complaint and the original FIR were sent to the Court of the learned Judicial Magistrate and copy of the same was handed over to the Inspector of Police, Mayiladuthurai. The Inspector of Police, Mayiladuthurai took up the investigation and laid the final report before the Court of the learned Sessions Judge, Fast Track Mahila Court, Nagapattinam. When the Inspector of Police took up the investigation, he had visited the alleged place of occurrence and prepared Observation Mahazar and Rough Sketch in the presence of the witnesses and arrested the Accused in the presence of witnesses and recorded the confession of the Accused. He had forwarded the Accused and the child to the Doctor and after getting Doctor opinion, recorded statement of the Doctor who had examined the victim and the Accused. The mother-in-law (paternal



Crl.A.No.819 of 2016

grandmother of the victim) who had accompanied the mother of the victim was examined by the Investigation Officer and recorded the statement. He had recorded the statement of other witnesses and laid the final report.

7. As per the submission of the learned Counsel for the Appellant, the ingredients of offence under Section 5 or 6 are not at all attracted in this case. The conviction by the learned Sessions Judge, Fast Track Mahila Court is perverse as there was no evidence regarding penetration to attract the offence under the definition to Section 5(a) to (u) or Section 6. Therefore, the conviction recorded by the learned Sessions Judge is perverse and is to be set aside.

8. The learned Counsel for the Appellant submitted that P.W-1 has enmity with her paternal uncle, the father of the Accused as there was tenancy dispute between them. She was residing in a thatched shed and not paying rent. During rainy season as it had been leaking, she requested her paternal uncle to put up thatch to avoid leakage. He directed her to vacate and hand over the possession. Only to settle score,



Crl.A.No.819 of 2016

WEB COPY

she had foisted the case and her evidence is unbelievable and not trustworthy. If what had been stated by her in the complaint had been true, she would have immediately taken the child to the Hospital which is hardly $\frac{3}{4}$ KM which is available in the cross-examination of P.W-1 before the trial Court. She had not done so. She claims that she had disclosed the fact of sexual assault to neighbour by name Valli. The said Valli had not been examined by the Investigation Officer.

9. It is the submission of the learned Counsel for the Appellant that P.W-1 is only the direct witness as per the Prosecution case. P.W-2 is the mother-in-law and P.W-3 is the Mahazar witness. P.W-4 is the Doctor who had examined the Accused and issued Ex.P-4-Potency Certificate. P.W-5 is the woman Doctor who had examined the child and issued Ex.P-6. P.W-6- Special Sub Inspector of Police who accompanied the Accused to the Government Hospital for medical examination. P.W-7-Woman Head Constable who accompanied the child along with her mother to the Government Hospital for medical examination. P.W-8 is the witness to the arrest and confession of the Accused. P.W-9 is the learned Judicial Magistrate – I, Nagapattinam who had recorded the statement under



Crl.A.No.819 of 2016

Section 164 Cr.P.C., of the mother of victim, as the victim was aged two years at the relevant point of time, which was marked as Ex.P-8, during trial. P.W-10 is the sister-in-law of husband of P.W-1 who was alleged to have accompanied the victim and the mother of the victim to the Government Hospital. P.W-11 is the Investigation Officer.

10. It is the submission of the learned Counsel for the Appellant that except P.W-1, others are hearsay witnesses. Therefore, no weightage shall be given to their evidence. P.W-11 is the Investigation Officer who had in his cross-examination admitted that the evidence of P.W-1 before the Court was full of improvements from her earlier version of Ex.P-1. Therefore, it is the submission of the learned Counsel for the Appellant that the learned Sessions Judge, Fast Track Mahila Court believing the version of P.W-1 convicted the Accused for the offence under Section 5 (i) (n) r/w. 6 of the Act is perverse. Therefore, the same is to be set aside.

11. The learned Additional Public Prosecutor vehemently objected to the submission of the learned Counsel for the Appellant stating that even though there may be improvements, it has not affected the case of



Crl.A.No.819 of 2016

WEB COPY

the Prosecution. The learned Additional Public Prosecutor invited the attention of this Court to the contents of Ex.P-1 which had been repeated by her in her evidence in examination-in-chief before the trial Court. Also, the learned Additional Public Prosecutor submitted that Ex.P-8 is the statement under Section 164 Cr.P.C., recorded by P.W-9-learned Judicial Magistrate which reflects what had been narrated by P.W-1 at the earliest point of time under Ex.P-1 complaint. Even for argument sake, if the submission of the learned Counsel for the Appellant is true, she had spoken about the facts resulting in the examination of the child by the Doctor who had given opinion under Ex.P-6 that the child was subjected to attempt of rape. The learned Additional Public Prosecutor also invited the attention of this Court to the evidence of P.W-5, Doctor who examined the victim aged two years and the Doctor evidence itself will be sufficient to corroborate the evidence of P.W-1, P.W-1 withstood cross-examination. Therefore, the learned Additional Public Prosecutor submitted that Ex.P-6 issued by P.W-5/Doctor corroborates what had been narrated by P.W-1 in her evidence. The so-called improvements/exaggeration which were alleged to have been made by the learned Counsel for the Defence before the trial Court was put in cross-examination to P.W-11. Even if those



Crl.A.No.819 of 2016

WEB COPY

facts are rejected, the evidence of P.W-1 corroborated by P.W-5 under Ex.P-6. Therefore, the fact of sexual assault had been proved by the Prosecution through P.W-1 and P.W-5 and Ex.P-6. The learned Sessions Judge, Fast Track Mahila Court had on appreciation of evidence arrived at a logical conclusion that charge framed by the trial Court had been proved by the Prosecution through the Prosecution Witnesses/P.W-1 to P.W-11 and Ex.P-1 to Ex.P-10. Also, the learned Additional Public Prosecutor submitted that even if the case of the submission of the learned Counsel for the Appellant is considered, it cannot shake the foundation of the Prosecution case and there are reported rulings of the Hon'ble Supreme Court for the proposition that if the Prosecution Witnesses had withstood cross-examination, the evidence of the Prosecution witness inspires confidence of the learned trial Judge, the learned Appellate Judge shall not disturb the finding. Therefore, the learned Additional Public Prosecutor submitted that the Appeal lacks merits and is to be dismissed.

12. By way of rejoinder, the learned Counsel for the Appellant invited the attention of this Court to the Provision of Section 5, 6, 8, 18 of



Crl.A.No.819 of 2016

WEB COPY

the Act and the following reported ruling cited by the learned Counsel for the Appellant are as follows:

(i) **(2007) 1 SCC (Cri) 161** in the case of **Sadashiv Ramrao**

Hadbe Vs. State of Maharashtra and another. The relevant portion is extracted hereunder:

“Penal Code, 1860 – S.376 – Rape – Proof and corroboration of- Appellant doctor alleged to have raped prosecutrix, a patient visiting his clinic – Sessions Court as well as the High Court convicting the appellant relying on the testimony of prosecutrix – Held, though in rape cases conviction on the sole testimony of prosecutrix is sustainable (provided it inspires confidence), but in the instant case version given by the prosecutrix is unsupported by medical evidence and the surrounding circumstances belie the case set up by her – There were many persons in the clinic and it is highly improbable that the appellant would have sexually assaulted her when they were present in the near vicinity – It is also highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able-bodied person of 20 years of age with ordinary physique – Absence of injuries on the body improbablise the prosecution version – Moreover, there was absence of spermatozoa in the vaginal swab of the prosecutrix – Presence of semen on the undergarments of the appellant as also on her petticoat and sari not sufficient by itself to prove the offence though may cause some suspicion on the conduct of the appellant – Further, the doctor who examined the appellant on the same day negated sexual intercourse on the basis of scientific evidence – No injury found on the body or the private parts of the prosecutrix – Doctor who examined her unable to give any opinion about the alleged sexual intercourse – Held, appellant entitled to benefit of doubt – Conviction and sentence set aside – Crimes against women and children – Rape by persons in position of authority.”



Crl.A.No.819 of 2016

WEB COPY

(ii) The Judgment of the High Court of Delhi in ***Crl.L.P.No.303/2019 dated 16.07.2019*** in the case of ***The State, Govt. of NCT of Delhi Vs. Tufail***. The relevant portion is extracted hereunder:

“9. In the opinion of this Court, the trial Court in the impugned Order has correctly concluded as under:-

“10.....The mother of victim in rukka stated that accused moved his hand all over the body of victim but in Court stated that accused touched private part of victim. Considering these material variations and contradictions in the testimony of the victim, her mother and the eye witness, the prosecution failed to prove beyond reasonable doubt that accused sexually assaulted or penetratively sexually assaulted the victim. There is no independent corroboration to the testimony of the victim which varied on material points as far as sexual assault is concerned. The other girl K who was with victim at the time of incident was not inquired nor cited as a witness in this case. The prosecution failed to prove the offence punishable u/s. 6 read with Section 5 (m) of POCSO Act and accused is acquitted from these charges.”

(iii) The Judgment of this Court in Crl.A.No.710/2005, dated 19.07.2007 in the case of John Vs. State by, The Inspector of Police, F-1, Chintadripet Police Station, Chennai.

13. In the light of the reported decision, the Appellant seeks to set aside the Judgment recorded by the learned Sessions Judge, Fast Track



Crl.A.No.819 of 2016

Mahila Court as the fact before the trial Court is not regarding penetration. Only penetration is attracting Sections 5 and 6 of the Act. Therefore, the conviction is perverse and is to be set aside.

Point for Consideration

Whether the Judgment recorded by the learned Sessions Judge, Fast Track Mahila Court, Nagapattinam in Spl.S.C.No.4/2015 dated 17.06.2016 is to be set aside as perverse?

14. Heard the learned Counsel for the Petitioner, the learned Additional Public Prosecutor and perused the deposition of evidence of P.W-1 to P.W-11 and Ex.P-1 to Ex.P-10 and the Judgment of the learned Sessions Judge.

15. On perusal of the evidence of P.W-1 to P.W-11, it is found that P.W-11-Investigation Officer had admitted that there had been improvements in the evidence of P.W-1. As rightly pointed out by the learned Additional Public Prosecutor, the version of P.W-1 in Ex.P-1 is proved before the Court during the evidence of P.W-1 through evidence of



Crl.A.No.819 of 2016

WEB COPY

P.W-5/Doctor under Ex.P-6. In the cross-examination of P.W-5/Doctor, the suggestion was put to the Doctor by the learned Counsel for the Accused stating that there is a possibility of chilli powder will cause the similar symptoms which was also admitted by P.W-5/Doctor. It is the further suggestion that even without any rashes, patient come and claim absolutely that there is pain and reddishness in the genitals which was also admitted by her. This cannot help the Accused. In this case as rightly pointed out by the learned Additional Public Prosecutor, the child/victim was aged only two years. As per Indian Evidence Act, the child will not subject to lies. The child is always treated as innocent. Therefore, the learned Counsel for the Accused before the trial Court is to be considered as a fertile imagination which in the light of the right of the Accused can be considered by the Court, but cannot be given due weightage as it is a harsh and cruel on the child/victim who was aged 2 years. If the suggestion is given due weightage, the mother will not throw the chilli powder on her to create such symptom. Therefore, the arguments of the learned Counsel for the Appellant on that score, in cross-examination of P.W-5 admitted the suggestion put to her will not help the Accused to wriggle out from the Charge of sexual assault. Also, as a trial Judge for



Crl.A.No.819 of 2016

WEB COPY

more than 26 years I had come across, how the Advocates harassing the witnesses in the witness box to ill-treat the witnesses particularly Official witnesses viz., Police Officer, Motor Vehicle Inspector and Doctor. The Hon'ble Supreme Court had deprecated the trial Judges watching the trial from outside just like in the cricket stadium as umpire and the Hon'ble Supreme Court directed the learned trial Judges to be indulgent. When the Advocates as Court Officer exceed their professional ethics by attempting to harass the witnesses, the Judge has to come to the rescue of the witnesses particularly from highly qualified people on the introduction of Court summons as per Code of Criminal Procedure, to help the Court to arrive at a just conclusion. After the cross-examination, the last suggestion is put by the Court, “you are a liar or you are a stock witness” . Therefore, even highly qualified people are not ready to help the Court or to attend the Court or to assist the Court, particularly, in criminal trial, this is the attitude of the Bar Members wherever I served in 26 years. As an assertive trial Judges, the Judges have a duty to curtail the Counsel who exceed their professional ethics to harass the witnesses. Similarly P.W-5/Doctor in her regular duty, she answered everything as suggested. That will not help the Accused to wriggle out from the case. As a woman



Crl.A.No.819 of 2016

WEB COPY

Doctor who has the experience of examining the gynecological problems, health issues, they come across from several cases based on their textbook knowledge as well as based on their professional practice of medicine, her opinion has more weightage to the Court of law. Therefore, the submission of the learned Counsel for the Appellant/Accused that the Doctor in the cross-examination admitted the suggestion of the defence Counsel before the trial Court cannot be considered by this Court. Hence the same is rejected. As rightly pointed out by the learned Additional Public Prosecutor, the evidence of P.W-1 in the light of Ex.P-1 had been proved she had withstood the cross-examination.

16. As rightly pointed out by the learned Additional Public Prosecutor, even if the admission made by the Investigation Officer/P.W-11 in his cross-examination stated at the earliest point of time or in 161 statement, P.W-1 had not stated in detail can be ignored by the Court, it will not shake the foundation of the prosecution case. In short, the evidence of P.W-1 had not been contradicted in the cross-examination. On the contrary, it has been corroborated by the evidence of P.W-5/Doctor under Ex.P-6. As rightly pointed out by the learned Counsel for the



Crl.A.No.819 of 2016

WEB COPY

Appellant, P.W-2 is the paternal grandmother of the victim and the mother-in-law of P.W-1, she was only a hearsay witness and P.W-10 is the wife of brother-in-law of P.W-1 is also hearsay. The Court did not give due weightage. The other attack of the learned Counsel for the Appellant is that P.W-1 had in her deposition stated that she had disclosed occurrence to the neighbour Valli. The said Valli was not examined by the Investigation Officer. Therefore, the Prosecution is weakened. Also pointed out by the learned Counsel for the Appellant, the father of the victim is not examined. As far as investigation is concerned, the Investigation Officer cannot be directed either by higher Officials of the Police Department or by any Court of law, right from the learned Judicial Magistrate to the Hon'ble Supreme Court to collect evidence in a particular way. The Investigation Officer collects materials based on his/her rational mind and involvement in the case. He/she has so many reason either to examine the witness or to ignore the said witness. In present day's social condition, the people are not willing to assist the investigation in criminal cases for fair Court proceedings. Whether the Counsel or Accused put suggestion to the witnesses' they are scared by the appearing Counsels before the Court. Also, there is no witness



Crl.A.No.819 of 2016

WEB COPY

protection scheme as available in USA and in other Western Countries which had changed their criminal justice system. We are still in our system followed in England when we were ruled by British. Therefore, the witness scared of assisting either the Investigation Officer or appearing before the trial Court. Therefore, lack of the same invariably in all criminal cases had end up in acquittal. As the Counsel for the Accused, the learned Counsel can put any number of suggestions to the witness and find out any number of suggestion to the Investigation Officer before the learned trial Judges. All the materials available before the learned trial Judges, whether to believe the victim, whether to believe the deposition of witnesses and arrive at a logical conclusion. The learned Sessions Judge, on perusal of the entire materials and on proper appreciation of the evidence, arrived at a conclusion that there had been an attempt of sexual assault on the minor child aged 2 years by the Accused.

17. As pointed out by the learned Counsel for the Appellant, the Charge framed itself is not proper. Instead of Section 5 (i) (n) r/w. 6 of



Crl.A.No.819 of 2016

WEB COPY

the Act, the learned Judge ought to have framed penetrate charges as it is a clear case of attempt of sexual assault and not the sexual assault defined under Section 5 of the Act to attract 10 years of Imprisonment. Therefore, as pointed out by the learned Counsel for the Appellant, Section 18 of the Act regarding punishment for an attempt to commit the offence under Section 5 or 6 of the Act, it is for 10 years. For the attempt, the punishment is half of the same. Therefore, **this Criminal Appeal is partly allowed.** On that score, under Section 18 of the Act, the sentence of 10 years Rigorous Imprisonment is reduced to 7 years. The Appellant/Accused is ordered to be released after completion of the same.

In the result, **this Criminal Appeal is partly allowed.** The bail bond, if any executed by the Accused, shall stand cancelled.

12.12.2023

dh

Index: Yes/No

Internet: Yes/No

SATHI KUMAR SUKUMARA KURUP, J.

dh

To

19/20



Crl.A.No.819 of 2016

WEB COPY

1. The Sessions Judge,
Fast Track Mahila Court,
Nagapattinam.
2. The Inspector of Police,
Mayiladuthurai Police Station,
Nagappattinam District.
3. The Public Prosecutor,
High Court, Madras.

Crl.A.No.819 of 2016

12.12.2023