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*Crl.M.P.No.478 of 2024
in Crl.A.No.67 of 2024*

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.02.2024

CORAM:

THE HON'BLE MR.JUSTICE **M. NIRMAL KUMAR**

Crl.M.P.No.478 of 2024
in
Crl.A.No.67 of 2024

Akilan @ Kabilan

... Petitioner

Vs.

The Inspector of Police,
W-20, All Women Police Station,
Saidapet, Chennai-600 015.
[Crime No.04 of 2017]

... Respondent

PRAYER: Criminal Miscellaneous Petition has been filed under Section 389 of Cr.P.C to suspend the sentence imposed in Special Sessions Case in S.C.No.551 of 2018 dated 29.12.2023 on the file of the Sessions Judge, Special Court for Exclusive Trial under POCSO Cases at Chennai and enlarge the petitioner on bail pending disposal of the criminal appeal.



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For Petitioner : Mr.R.Rajarathinam
Senior Counsel
for Mr.D.Bennington

For Respondent : Mr.R.Kishore Kumar
Government Advocate (Crl. Side)

ORDER

This Criminal Miscellaneous Petition has been filed by the petitioner, seeking suspension of sentence of imprisonment imposed by the learned Sessions Judge, Special Court for Exclusive Trial under POCSO Cases at Chennai by judgment dated 29.12.2023 made in Special S.C.No.551 of 2018 and enlarge the petitioner on bail pending disposal of the above appeal.

2.The petitioner/accused was convicted by the Trial Court in Special S.C.No.551 of 2018 and sentenced to undergo seven years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo three months simple imprisonment for the offences under 6 of POCSO Act r/w. 376D of IPC @ 4 r/w. 376 IPC. Against which, the present appeal is filed along with suspension of sentence.



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3.The learned senior counsel appearing for the petitioner submitted that in this case totally there are four accused in the case, A2 and A3 were acquitted by the Trial Court, A4 was tried by Juvenile Justice Court and he was acquitted. P.W.1/victim girl is aged about 17½ years. He would submit that the victim girl gives varied version at each stage. The alleged occurrence is said to have taken place on 09.12.2017 but the complaint/Ex.P2 was given on 21.12.2017 and FIR/Ex.P17 registered. He would further submit that P.W.1 gives a version that A1 called P.W.1 to Kovalam Beach where they played in the beach and since P.W.1's dress got wet, they went to a private guest house for changing the clothes, at that time, the petitioner/A1 is said to have committed penetrative sexual assault. The other version is that one Kamal took the victim girl in the car where the petitioner/A1 is also present, they took her to a lodge in Adyar where the petitioner is said to have committed penetrative sexual assault and thereafter called the other accused in turns and A2 to A4 committed penetrative sexual assault. He further submitted that P.W.9/Doctor who examined the victim girl issued the Accident Register/Ex.P14, wherein it is recorded that on 09.12.2017 when she was returning home after attending the tuition, one



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Kamal who is working in a canteen and residing in the same area, took her to a lodge at Adyar along with friends, namely, the petitioner/A1 and other accused and committed penetrative sexual assault. He would further submit that the counsel for A1 in the Trial Court could not cross examine the victim girl since he was sick due to Covid attack. A2 and A3 cross examined the victim girl. A petition to recall P.W.1 filed and the same was dismissed. Thereafter, the petitioner approached this Court in Crl.O.P.No.25782 of 2021 and this Court by a detailed order dated 24.02.2023, considering the contradiction in the statement of P.W.1 and also finding that P.W.1 was improving her statement at each stage and further, her evidence found contradictory with the medical records and the evidence of P.W.9/Doctor allowed the petition, permitting recall of P.W.1. Since P.W.1 got married and settled in USA, the petition was allowed with condition of payment of travel expenses of P.W.1 and other incidental expenses by the petitioner or meeting the expenses for cross examination of P.W.1 through video conferencing subject to Madras High Court Video Conferencing Rules. The petitioner was ready to comply with the order of this Court. P.W.1 was unable to be contacted immediately and the respondent police took steps to



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establish contact with P.W.1 and enquired her father. At that time, P.W.1's father filed a petition in Crl.O.P.No.16961 of 2023 and this Court by order dated 28.07.2023 passed a short and crisp order that the father of the victim girl is receiving calls from the Police for enquiry which causes harassment and in view of the same, the father of P.W.1 to appear before the Trial Court and file a memo giving reasons. Thereafter, a memo was filed on 11.08.2023 by the father of P.W.1 stating that P.W.1 got married, staying in USA and she is having her own life with her husband and if she is called for re-examination, her marriage life will be in peril. Considering the same, the Trial Court passed an order on 15.11.2023 that the evidence of P.W.1 is closed and the case was posted for arguments and thereafter, rendered the judgment convicting the petitioner.

4.The learned senior counsel submitted that the reasoning given by the Trial Court in acquitting A2 and A3 is applicable to the case of the petitioner. The Trial Court in its judgment had compartmentalized the case into two, one case against A1 and another against A2 and A3 in appreciation of the evidence which is not proper. The case has to considered as a whole



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and not by compartmentalizing the facts of the case. He further submitted that the Trial Court in paragraph 9.23 had given a finding that though it is found that hymen is intact as could be seen from the evidence of P.W.9 and Ex.P14, the oral evidence of P.W.1 is that A1 penetrated his penis and convicted A1, if that is the appreciation of evidence, the same rationale applicable to other accused but A2 and A3 acquitted. He further submitted that the explanation given by P.W.9 when confronted with Ex.P14 that Kabilan name not found, gave explanation that it was wrongly written as Kamal cannot be a proper explanation since in the said Accident Register not only the name of Kamal, the name of Kabilan is also recorded. In such circumstances, it cannot be considered as wrongly written. The Trial Court not considered vital contradictions in the case. He further submitted that after P.W.1 was permitted to be recalled for cross examination, but denied on filing of a memo. Hence, the evidence of P.W.1 cannot be considered. In support of his contention, the learned senior counsel relied upon the decision of the Hon'ble Apex Court in the case of ***State of Orissa vs. Prasanna Kumar Mohanty*** reported in ***(2009) 3 SCC (Cri) 428***.



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5.The learned Government Advocate [Crl. Side] filed a counter and submitted that at the time of occurrence, P.W.1 is aged about 17 years, studying 11th Standard. At that time, the petitioner/A1 started to talk to her, while she return from her tuition. When she refused to talk with him, he threatened her that he would kill her parents and brother. On 09.12.2017, the petitioner along with A2 to A4 kidnapped the victim girl and took her to Kovalam Beach on compulsion. Since the victim girl's dress became wet, A1 took her to one AP Veera Guest House, confined her in a room and committed penetrative sexual assault. Thereafter, the remaining accused A2 to A4 committed penetrative sexual assault one after and another. The victim girl returned home but she could not be normal in her day-to-day like. On seeing the same, her mother/P.W.2 insisted P.W.4/uncle of P.W.1 to enquire her and on enquiry, P.W.1 narrated about what had happened. Hence, complaint/Ex.P1 lodged. Based on the complaint, FIR/Ex.P17 in Crime No.4 of 2017 for the offence under Sections 363, 343, 506(ii) IPC and Section 4 of POCSO Act, 2012. P.W.11/Investigating Officer visited the scene of occurrence, prepared observation mahazar/Ex.P.5 and rough sketch/Ex.P.18, examined the witnesses and recorded their statements.



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During the course of investigation, the petitioner/A1 and other accused/A2 and A3 were arrested. Thereafter, the victim girl/P.W.1 was sent for medical examination. P.W.9/Doctor examined the victim girl and issued Accident Register/Ex.P14 and medical report/Ex.P15. P.W.8/Doctor examined the accused persons/A1 to A3 and issued potency certificates/Ex.P11 to Ex.P13. P.W.7/Head Master was examined and he issued the School Attendance Register/Ex.P9 and details of the victim girl/Ex.P10. On completion of investigation, charge sheet filed before the Trial Court. Before the Trial Court, on the side of the prosecution, P.W.1 to P.W.12 marked and Ex.P1 to Ex.P20 marked. On the side of the accused, no witnesses examined, Ex.D1 and M.O.1 marked. On conclusion of trial, the Trial Court had rightly convicted the petitioner as stated above.

6.Considering the submissions made and on perusal of the materials, it is seen that on the same set of facts the Trial Court acquitted A2 and A3 who are also said to have been committed penetrative sexual assault on the victim girl but for the reason that the petitioner's name is found in the complaint, he was convicted is not proper for the reason that P.W.1's evidence becomes



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doubtful, at each stage her statement seems to be improving and contradictory to each other. Added to it, the medical evidence does not support the case of the prosecution. P.W.9 on examination of the victim girl recorded that hymen is intact. Further, P.W.1 stated in her evidence that forcible penetrative sexual assault was committed confirming the falsity of P.W.1. Since the Doctor evidence and medical report/Ex.P14 prove hymen is intact. This vital contradiction between the evidence of P.W.1 and P.W.9 not considered. Further, this Court permitted the petitioner to recall P.W.1 for further cross examination by a detailed order which had been closed by way of a memo which is not proper, hence the judgment of the Trial Court to be re-considered. Hence, this Court is inclined to suspend the Substantive Sentence of Imprisonment alone till the disposal of the appeal.

7. Accordingly, the Substantive Sentence of Imprisonment imposed on the petitioner is suspended till the disposal of the appeal and the petitioner is ordered to be enlarged on bail, on condition that he shall execute a bond for a sum of Rs.10,000/- (Rupees Ten Thousand only) with two sureties each for a like sum to the satisfaction of the learned Sessions Judge, Special Court



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8.Further, the petitioner shall appear before the Trial Court on the first working day once in three months at 10.30 a.m. until the disposal of the appeal and if he is not able to appear before the Trial Court on that day, he shall make arrangements to file an application under Section 317 Cr.P.C. and shall appear before the Trial Court on any other day in lieu of the date of his absence as directed by the Trial Court.

9.Accordingly, this Miscellaneous Petition is ordered.

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To

- 1.The Inspector of Police,
W-20, All Women Police Station,
Saidapet, Chennai-600 015.
- 2.The Sessions Judge,
Special Court for Exclusive Trial
under POCSO Cases at Chennai.
- 3.The Superintendent,
Central Prison-I,
Puzhal, Chennai.
- 4.The Public Prosecutor,
High Court, Madras.



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M. NIRMAL KUMAR, J.

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