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Court : Chennai

Decided On : Apr-27-2016

Judge : The Honourable Dr. Justice P. Devadass

Appeal No. : Crl.M.P.No. 3669 of 2016 in Crl.A.No. 235 of 2016

Appellant : Suresh

Respondent : State represented by The Inspector of Police, II Women Police Station, Nilgiris

Judgement :

(Prayer: Petition filed under Section 389(1) of Cr.P.C., to suspend the sentence of imprisonment passed in Spl. S.C.No.4 of 2015 dated 27.11.2015 by the learned Additional Sessions Judge, Fast Track Mahila Court, Udhagamandalam, Nilgiris District and release the petitioner on bail pending disposal of the Criminal Appeal.)

1. The sole accused in the Special Sessions Case in Spl. S.C.No.4 of 2015 on the file of the learned Additional Sessions Judge, Fast Track Mahila Court, Nilgiris District at Udhagamandalam seeks suspension of his sentence of imprisonment.

2. In the said Court, after trial, the trial Court convicted the accused under Section 7 read with Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter POCSO Act) and sentenced him 3 years R.I. and fined him Rs.5,000/-

and directed him to pay a compensation of Rs.1,00,000/-, i/d 2 years RI. The learned Judge also directed him payment of further compensation of Rs.2,00,000/- out of Victim Assistance Fund.

3. PW-2 is the daughter of PW-1. The accused has been prosecuted for he having sexually abused her. The Trial Court believed her and construed his act as a sexual assault and thus convicted and sentenced him as stated above.

4. The learned counsel for the petitioner/appellant would contend that the petitioner as well as the accused fancied each other. They fell in love. To distance him from her daughter, PW-1 had engineered this case. The prosecution version is the concocted brainchild of PW-1 in an unholistic alliance with the obliging police.

5. The learned counsel for the petitioner further contended that in this case the two instances of occurrence have been projected. However, on this aspect, there is material contradictions as between the mother (P.W.1) and the daughter/P.W.2. It is PW-1 vs. PW-2.

6 The learned counsel for the petitioner would also contend that top of it, there is material variation in the testimony of PW-2 before and during trial. Before trial before a Magistrate under Section 164 Cr.P.C. So also in her police statement.

7. P.Ws.-2 and 1 were inconsistent as to the alleged date of occurrence, more particularly, PW-1 introduces a date, namely, 5.3.2015 which is nobody's case. 5.3.2015 was not uttered either by PW-2 nor prosecution. Thus, PW-1's version is a coloured version. In such circumstances, placing implicit reliance on the testimony of PWs-1 and 2 and inflict punishment upon the accused is too dangerous. Thus, there is prima facie case in favour of the petitioner. He will not run away. He has no bad history/antecedents. In the circumstances, he may be granted appeal bail.

8. On the other hand, the learned Additional Public Prosecutor would submit that the Court can keep aside PW-1 because she is not the victim and focus its attention mainly on the victim/PW-2. Her evidence is crystal clear that the accused prayed on PW-2 like a vulture. He committed the inhuman act upon a minor child.

Her solemn statement as to the sexual violence committed upon her. There is no significant reason for PW-1 as against the accused to implicate the accused risking the life and future of unmarried school going minor daughter. Very grave allegations are made as against the accused. There is no prima facie case in favour of the petitioner. This case is not a fit case for the grant of appeal bail.

9. I have anxiously considered the rival submissions, perused the Trial Court's judgment and the piece of evidence referred to by both sides.

10. In the facts and circumstances, now the question is whether the petitioner could be granted appeal bail under Section 389(1) Cr.P.C.

11. Regular bail in a non-bailable offence in fit cases are being granted by the Magistrates under Section 437 Cr.P.C. While other Courts and the High Court exercises concurrent jurisdiction to grant bail in non-bailable cases under Section 439 Cr.P.C.

12. The remand prisoners, under-trials could seek bail under the said provisions during pre-conviction stage of a criminal case. During that stage, it is pertinent to note that the presumption of innocence of an accused is intact because everyone is presumed to be innocent till the guilt alleged against the accused is proved beyond all reasonable doubts. However, once conviction is recorded, the said presumption is replaced by a Criminal Court judgment. Thereafter, also the conviction person can seek bail under Section 389 (1) Cr.P.C.

13. Thus, the consideration for the grant of bail to an accused during the pre-conviction stage (before judgment) and post-conviction stage (after judgment) are different.

14. So far as appeal bail under Section 389(1) Cr.P.C. is concerned, the Court has to find out is there any prima facie case in favour of the petitioner. While doing so, the Court should not indulge in meticulous examination of the evidence of the accused because the main appeal is not heard. It is still pending.

15. To find out the prima facie case, the Trial Court has to refer to the findings recorded by the trial Court and the relevant evidence referred to. Further, it must

also take into account the nature of the accusation made as against the accused.

16. In view of the large scale violence committed upon the children, in 2012, the Protection of Children from Sexual Offences Act, 2012 (Act No.32 of 2012) has been enacted. It is a Central Act. It contains provisions ensuring confidentiality of the victim of the offence, her family details and also conducting of the trial in a child friendly atmosphere and it had also introduced a legal fiction as to the criminal propensity, mental faculty of the accused, through Sections 29 and 30(1) of the Act. However, under Section 30(2), the Act one's right of presumption of innocence until he is otherwise held guilty by legal evidence has been preserved.

17. Thus, it is Indianised version of admixture of English Criminal Law (Common System of Law) and French Criminal Law (Continental System of Law).

18. Now, in a prosecution launched under POCSO Act, age of the victim is very important because only upon the victim being below 18 years that she is a 'child' the stringent provisions of POCSO Act will apply and consent of the victim being immaterial under POCSO Act. POCSO Act is much more wider in scope in prosecuting an accused than prosecuting accused under Section 376 IPC.

19. In this case, start of the offence was stated to be on 21.2.2015 in the house of PW-1, when her mother was away. During that time, PW-2 was studying VIII Standard in a school.

20. It is stated that then she was 13 years old. Ex.P-3 School Certificate, Ex.P-8 Medical Certificate, Ex.P-9 age Certificate and the evidence of PW-7 School Headmaster and PW-5 Doctor beyond pale of any controversy establishes that at the time when the alleged occurrence took place, she was below 18 years. So she is a child within the meaning of Section 2(d) of POCSO Act. So the provisions of POCSO Act became applicable to this case.

21. PW-2 is stated to be the victim of a sexual violence. Her evidence shall be treated as the evidence of an injured witness. If her evidence is consistent, cogent, unimpeachable unless there is acceptable reasons to implicate the accused, her evidence can be acted upon. The question of looking for corroboration for her

evidence arises when her evidence appears to be murky. This is a rule of prudence and not a rule of law. Thus, corroboration cannot be insisted upon as a condition precedent to act on the testimony of a victim in a sexual violence case. But while appreciating their evidence, the Court must fathom out the reality of the situation and the truth of the allegations. While doing so, the Court cannot mistake every difference in evidence as a material contradiction. It cannot go blow out a contradiction beyond proportion. It cannot mistook a mole a mountain. In a sexual violence case, honour of two persons, namely, the victim as well as the accused is involved. When the allegations are very serious, the Court must be very serious of proving those allegations.

22. Even to impute culpable mental state to the accused, there must be some material for the Court to have reason to believe the existence of such a fact (See Sections 29 and 30(2) of POCSO Act, 2012).

23. Now, in this case, PW-2 the minor child had the countenance of the accused, a Book-Seller for the first time when he came to their house to market his books. PW-1 forewarned him not to visit again since there are ladies in her house. According to PW-2, on the fateful day, namely, on 21.2.2015, at about 2 p.m., while she was alone in her house, the accused came, pressed her breasts, pushed her to the bed, sexually abused her private parts by placing his private part. Subsequently, on 28.3.2015 around 2 p.m., when again the accused came to her house with similar motive, PW-2 raised alarm, the accused took to his heels, PW-1 came, PW-2 recounted the whole incident and also the earlier incident that took place on 21.2.2015. Thereafter, police complaint was lodged. Thereafter, medical examination was conducted and there was no presence of external injuries on her private part.

24. It is pertinent to note that the actual physical violence was not on 28.3.2015. Even as per the version of PW-2, it was on 21.2.2015 and thus, by the time the medical examination was conducted more than a month had passed away, the evidence on her person had fade away.

25. PW-2, being a child was under extreme trauma, normally a child like her, when placed in such grim situation, will not be forthcoming and will try to hide the

shame. But, in this case, as per PW-2 when again the accused attempted to make her sexual assault on her, unable to put up with the shame, she cried and the accused was caught. Reading the evidence of PWs-2 and 1 and other witnesses and the complaint, the substratum of the case that the accused on the first occasion had sexually assaulted the victim has been brought out by the prosecution.

26. The attempt of the defence to dilute the effect of the said evidence by clinging to some difference in the evidence of PWs-1 and 2 and in the statement of the victim girl recorded under Section 164 Cr.P.C. which are not so material and are not significant enough to shake the veracity of the testimony of the victim girl has not been shattered by this adventure of the defence which has become a misadventure. Further, there is no convincing reason or motive supported by any material or acceptable reason to view the evidence of PW-2 with a jaundiced eye. The nature of the allegations made as against the accused is very serious. Thus, the fallout is that there is no prima facie case in favour of the petitioner. Thus, I am not inclined to grant him appeal bail.

27. In view of the foregoings, this petition is dismissed.

28. However, it is made clear that the observations made in this order are only for the purpose of finding out a prima facie case to take a decision in this petition and it has nothing to do with the disposal of the main Criminal Appeal. The Registrar (Judicial) is directed to make ready the booklet expeditiously as and when the appeal is ripe for disposal, it shall be included in the causelist under the caption 'Accused in Jail cases'.

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