BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Judgment Reserved on : 27..10..2015
Judgment Pronounced on : 16..12..2015

CORAM

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Criminal Appeal (MD) No.163 of 2007

Kathiresan

... Appellant

-Versus-

The State Rep. by
Inspector of Police,
Kadayanallur Police Station,
Tirunelveli District.
[Crime No.542 of 2005]

... Respondent

Appeal filed under Section 374 of the Code of Criminal Procedure against the conviction and sentence passed by the Sessions Judge, Magalir Neethimandram, Tirunelveli, in S.C.No.85 of 2006 dated 26.02.2007.

For Appellant : Mr.M.Ajmalkhan
SC assisted by Mr.A.Velan
for M/s.Ajmal Associates

For Respondent : Mr.C.Mayilvahana Rajendran, Addl. Public Prosecutor for Respondent

JUDGMENT

This is a case of child rape. The appellant/accused is the sole accused in S.C.No.85 of 2006 on the file of the learned Sessions Judge, Magalir Neethimandram, Tirunelveli. The trial court framed two charges against the accused. He stood charged for offences under Sections 366 and 376(1) of IPC. By judgment dated 26.02.2007, the learned Sessions Judge, convicted the appellant/accused under Sections 366 and 376(1) of IPC and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.1000/- in default to undergo rigorous imprisonment for three months for offence under Section 366 of IPC and to undergo rigorous imprisonment for seven years and to pay a fine of Rs.1000/- in default to undergo rigorous imprisonment for three months for offence under Section 376(1) of IPC. Challenging the said conviction and sentence, the accused is now before this court with this criminal appeal.

2. The case of the prosecution in brief is as follows:- The victim of the alleged rape in this case is one 'X' [The name of the victim is consciously avoided]. At the time of occurrence, X was studying VI standard in a local school.

Thus, she was hardly aged 11 years. P.W.1 is the father and P.W.3 is the mother of X. They were residing in a village in Tenkasi Taluk. X used to go to her school everyday on walk. The accused is also a resident of the same village. He was running a two-wheeler mechanic shop.

3. According to the case of the prosecution, on 25.07.2005, in the usual course, X was proceeding to her school. The accused, who came in a motor cycle, intercepted her and told her that he would take her in his motor cycle and drop her in the school. As the accused was already known to her and on few occasions in the past the accused had taken her in his motor cycle to the school, she believed his words and agreed to travel with him in the motor cycle. He took her in the motor cycle, not to the school, but to his workshop. X enquired him as to why he had brought her to his workshop. He told her that after meeting a friend who was on his way to his workshop he would take her again in his motor cycle and drove her in the school.

4. It is the further case of the prosecution that thereafter, the accused took her to Tenkasi in a bus from

where he took her to Madurai by another bus and from Madurai to Coimbatore and finally, to Tiruppur. It is further alleged that at Tiruppur, he fixed a rented house where he forced her to reside along with him. With the help of a friend of him by name Mr.Ganesan, he secured a job in a local workshop. As and when he used to go for his workshop, he locked the house from outside thereby confining X in the house. While in the said house, when X insisted him to take her back to her parental home, the accused threatened her of dire consequences. While in the house, on one occasion, he made sexual overtures and removed her dress by force. When she resisted, with a knife he made a scratch injury on her leg and kept her under fear. Then, he had forcible sexual intercourse with her. Thereafter, he repeatedly had sexual intercourse with her in a span of about 50 days.

5. Meanwhile, P.W.1 and P.W.3 were shocked that X did not return from the school on 25.07.2005 in the evening. They went in search of X. They heard from the fellow students of X that she was taken in the motor cycle by the accused and she did not attend the class on that day. They found the accused also missing. Thereafter, P.W.1 made a

complaint to the police on 29.07.2005. P.W.9, the then Sub Inspector of Police, Kadayanallur Police Station, received the complaint under Ex.P.1 and registered a case in Crime No.542 of 2005 for offence under Section 366A of IPC. Ex.P.8 is the printed FIR. He forwarded both the complaint and the FIR to the court and handed over the case diary to the Inspector of Police for investigation.

6. P.W.12, the Inspector of Police, took up the case for investigation on 29.07.2005, proceeded to the place of occurrence, prepared an observation mahazar and a rough sketch in the presence of P.W.6 and another witness. Until 08.09.2005, though a number of witnesses were examined, according to P.W.12, there was no clue regarding the whereabouts of X and the accused. On 08.09.2005, the accused surrendered before the learned Judicial Magistrate No.I, Tiruppur, in connection with this case and he was remanded to judicial custody. An intimation was received by P.W.12 about the same through the Special Branch Police. He also received information that X was staying in a service home in Tiruppur. Therefore, P.W.12 along with P.W.3 and others rushed to Tiruppur and rescued X from the service

home on 11.09.2005. During interrogation of X, it came to light that X had been sexually exploited by the accused. P.W.12 forwarded X to the hospital for medical examination. He altered the case on 12.09.2005 into one under Section 366A and 376 of IPC.

7. P.W.7-Dr.Anitha Paline-examined X on 13.09.2005 at 12.45 p.m. She estimated the age of X as 11 years. She found that there was no pubic hair on her private part. There was also no injury to the vagina. But, the vaginal cavity freely allowed one finger to enter thereby indicating that she had been subjected to sexual intercourse. Smear was taken from vagina and the same was sent for chemical examination which revealed that there was no spermatozoa found. It also came to light that X had not attained puberty. From these findings, she gave opinion that within forty-eight hours before the examination, X would not have been subjected to sexual intercourse. Ex.P.4 is the certificate issued by her. P.W.12 made a request to the learned Judicial Magistrate to record her statement under Section 164 of Cr.P.C. Accordingly, P.W.10 recorded her statement under Section 164 of Cr.P.C. on 15.09.2005 at 12.00 noon. Ex.P.10 is her statement. In the

said statement also she reiterated that she was sexually exploited by the accused.

8. P.W.12 then forwarded X for medical examination to ascertain her age. P.W.11 Dr.Kuzhanthaivelu examined her on 16.09.2005. He took X-Rays and conducted other examinations. He finally opined that she had completed 12 years of age and not completed 13 years of age. Ex.P.12 is the certificate issued by him. On 26.09.2005, on a request made by P.W.12, the jurisdictional Magistrate passed an order for medical examination of the accused. P.W.8 Dr.Rebaikhan examined the accused on 03.10.2005. He found that all the sexual organs of the accused had fully developed. After examination, he gave opinion that the accused was not an impotent and he was capable of performing penile sex with a woman. P.W.12 examined Doctors, collected medical records and on completing the investigation, he laid final report against the accused under Sections 366 and 376 of IPC before the learned Judicial Magistrate, Tenkasi.

9. Based on the above materials, the trial court framed charges as detailed in the first paragraph of this judgment.

The accused denied the same. In order to prove the same, on the side of the prosecution, as many as 12 witnesses were examined, 15 documents were marked. X-Ray films taken to ascertain the age of X were marked as M.O.1 (series).

10. Out of the said witness, P.W.1 and P.W.3 who are the parents of X, have stated that X went to school on 25.07.2005 but did not return. They have further stated that during their enquiry they came to know that X was taken in a motor cycle by the accused. They have also spoken about the complaint made to the police on 29.07.2005 and the fact that X was rescued from a service home in Tiruppur on 08.09.2005. X, examined as P.W.2, has vividly spoken about the entire occurrence. P.W.4 is the paternal uncle of X and P.W.5 is the brother-in-law of P.W.1. They have also spoken about the missing of X from 25.07.2005 onwards. They have further stated that they also went in search of X and they could not find her any where. They have further stated that X was rescued from the service home in Tiruppur on 08.09.2005. P.W.6 has spoken about the preparation of the observation mahazar and rough sketch by the Inspector of Police. P.W.7 has spoken about the medical examination

conducted by her on X and her final opinion to the effect that hymen in the vaginal cavity of X was found ruptured and that her vaginal cavity allowed one finger to move freely. P.W.8 has spoken about the fact that the accused was not impotent and he was capable of performing penile sexual intercourse with a woman. P.W.9 has spoken about the registration of the case. P.W.10, the then Judicial Magistrate, Shengottah has spoken about the statement recorded by him under Section 164 of Cr.P.C. from X. P.W.11 - the Doctor - has spoken about the fact that he opined that X had completed 12 years of age and not completed 13 years of age. P.W.12 has spoken about the investigation done by him.

11. When the above incriminating materials were put to the accused under Section 313 of the Code of Criminal Procedure, he denied the same as false. However, he did not choose to examine any witness on his side nor did he mark any document. His defence was a total denial.

12. Having considered all the above, the trial court convicted the appellant/accused under Sections 366 and 376(1) of IPC and accordingly punished him. That is how, he is now before this court with the present criminal appeal.

13. I have heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor for the State and also perused the records carefully.

14. The learned counsel appearing for the appellant/accused would submit that absolutely there is no truth in these allegations and according to him, the evidence of X (P.W.2) is highly contradictory and the same cannot be believed. He would further submit that the evidence of X is contradicted by medical evidence. He would also submit that due to previous enmity the accused has been falsely implicated.

15. The learned Additional Public Prosecutor would vehemently oppose the appeal. According to him, the evidence of X is very cogent and convincing and the same is duly corroborated by medical evidence. So far as the age of X is concerned, she had not completed 13 years of age as per the medical opinion. He would further submit that there is no question of consent on the part of X. The oral evidence of X coupled with the evidence of P.W.1, P.W.3 to P.W.5, according

to the learned Additional Public Prosecutor, have proved the case against the appellant/accused beyond reasonable doubts.

16. I have considered the above submissions carefully.

17. There is no dispute that X was residing along with her parents namely, P.W.1 and P.W.3 in her village. Admittedly, she was studying in the local school. She used to go to school everyday on walk. P.W.1 and P.W.3 have categorically stated that in the usual course, X left for her school from her house on 25.07.2005. They have further stated that X did not return in the evening. They went in search of her and since they could not find her anywhere, they made a complaint in the morning on 29.07.2005. They have further stated that the fellow students of X had informed them that X was taken in the motor cycle. P.W.4 and P.W.5 have also stated that they joined P.W.1 and P.W.3 to search for X and they also could not succeed. From these evidences, it has been clearly established that X was missing from 25.07.2005.

18. The 'X' has stated that when she was proceeding towards her school, the accused intercepted her in a motor cycle and offered to take her to the school in his motor cycle. Since on previous occasions, the accused had so taken her to the school, this time also, innocently, she agreed to travel with him in the motor cycle. He took her to his workshop, from there to Tenkasi in a bus and from Tenkasi to Madurai by another bus and from Madurai to Coimbatore and then from Coimbatore to Tiruppur. To prove these facts, the prosecution has got only the evidence of X. It is unfortunate that the investigating officer has not collected any other material from any other source to corroborate the evidence of X from the time when she was taken from her native place until she reached Tiruppur. X has stated that in Coimbatore, they went to the house of a friend of the accused and from that house one Mr.Ganesh took them to his house where the accused introduced to his parents and a sister X as his sister's daughter and had come there to secure a job. It is her further evidence that it was only Mr.Ganesh who arranged for a rented house and he only made arrangement for the accused to get a small time job in a private company. To prove these facts, the prosecution again relies only on the evidence of X.

The investigating officer had not examined Mr.Ganesh, his parents, his sister and the other friend in whose house they stayed for some time. The person who rented the house to the accused and the person who gave employment to the accused at Tiruppur also have not been examined. Absolutely, there is no explanation on the part of the investigating officer as to why he did not examine these persons during the course of investigation. At Tiruppur, according to X, she and the accused were staying together and so, certainly, their stay in that house would have been noticed by the neighbours. But, no such neighbour has been examined by the prosecuting agency for which also absolutely, there is no explanation. Had they been examined during investigation and had they been subsequently examined at the trial, their evidence would have duly corroborated the evidence of X. This, in my considered view, is a very serious flaw on the part of the investigating officer in having failed to examine these witnesses. But, on that score, the evidence of X cannot be rejected because X's evidence is so cogent and convincing.

19. It is the further evidence of X that when she was forced to stay with the accused at Tiruppur, the accused had

forcible sexual intercourse with X despite her resistance. According to X, the accused caused a scratch injury on her leg and forced her to allow him to have sex. This continued for 50 days, according to her. To prove this fact also the prosecution relies only on the evidence of X.

20. The contention of the learned counsel for the appellant is that had it been true that she was subjected to sexual intercourse repeatedly in a span of 50 days, she would have certainly informed the same to her neighbours or she would have made an attempt to escape from that place. But she did not do so. From this fact, according to the learned counsel, it could be inferred that there is no truth in her version that she was detained there for 50 days and subjected to repeated sexual intercourse. This argument does not at all persuade me for, X has categorically stated that she was detained under threat and that the accused used to lock her in the house as and when he used to go out. In such a situation, in my view, it is difficult to expect her to either escape or to inform the neighbours. Looking it from another angle, at the most, the conduct of X in keeping silence may only indicate that she had consensual sex with the accused.

Assuming that she had so consented, in law, it is no consent as she was only 13 years old at the time of occurrence.

21. The next question is whether it would be safe to rely on the solitary evidence of X alone to hold that the accused had forcible sexual intercourse with X. In my considered view, in a case of rape, the quality of the evidence of the prosecutrix that matters much. If the evidence of the prosecutrix inspires the confidence of the court, then, even in the absence of any corroboration from any other source, the accused can be convicted for rape relying on the evidence of the prosecutrix alone. Expecting corroboration from independent sources is only a rule of caution based on prudence. In the instant case, in my considered view, the evidence of X is trustworthy which can be the foundation for conviction.

22. Further, the medical evidence clearly states that there was rupture of hymen. The Doctor has further stated that the vaginal cavity of X allowed one finger to move freely. But, the learned counsel would submit that the Doctor during cross examination has admitted that tearing of hymen would

have happened while X was riding a bicycle. It is true that rupture of hymen may occur due to various reasons including while riding a bicycle. But, in the instant case, it is not even suggested to X by the accused that she ever rode bicycle. It was not elicited so from any other witness also. In the absence of any evidence to this effect, it cannot be held that the rupture of hymen of X had occurred due to riding of bicycle. There is yet another reason to reject this argument of the learned counsel for the appellant/accused i.e if the hymen had ruptured due to riding of a bicycle, there is no chance for vaginal passage to become broader so as to allow one finger to move freely into the same. If the vaginal cavity allows one finger or two fingers freely into the same, forensically, it is a definite indication that she had sexual intercourse. There would have been penile sexual intercourse, or there would have been some other object, like finger, used and inserted into the vaginal cavity thereby rupturing the hymen. Here, according to X, the accused had penile sexual intercourse with her. Though the learned Additional Public Prosecutor, who conducted the trial before the court below was not obviously vigilant to elicit from the Doctor as to whether the vaginal cavity of the X which allowed one finger to move

freely would indicate that she would have had penile sexual intercourse with a man, on that score, I cannot reject the evidence of X. The clear evidence of X is that the accused had penile sexual intercourse with her. The very fact that the vaginal cavity of X allowed one finger to enter freely would duly corroborate the evidence of X that she has sexual intercourse. Thus, I find that the evidence of X is convincing, cogent and the same draws due corroboration from the medical evidence. From these evidences, I hold that the accused had sexual intercourse by force with X.

23. The learned counsel for the appellant, pointing out the fact that there was no injury found anywhere in the private part of either X or the accused, would submit that there would have been no forcible intercourse. This argument also does not persuade me because it is not necessary that in every case of forcible intercourse there should have occurred injuries to the private parts of the woman or the man. It all depends upon the force used and also the physical condition of the individuals. Here in the instant case, since medical examination was conducted nearly after two months of the first act of sexual intercourse, there would have been no

injury noticed on the private part of either the girl or the boy, or the individuals might not have sustained injuries. Therefore, this argument is rejected.

24. The learned counsel would submit that, X being a child, is prone to tutoring and so her evidence should not be accepted as she had been in fact tutored by her relatives due to some previous motive. The learned counsel has placed reliance on a number of judgments of the Hon'ble Supreme Court relating to the appreciation of evidence of child witnesses.

25. I do not want to refer to those judgments because there is no quarrel over the fact that a child is a dangerous witness who is prone to tutoring. But, on that score the evidence of a child cannot be simply brushed aside and instead, the evidence of such child requires only a close scrutiny. In other words, tutoring cannot be readily inferred without there being some evidence, either direct or circumstantial giving rise to such an inference. Here in the instant case absolutely there is no evidence even to remotely infer that X would have been tutored and it will only be a

surmise to hold that she had been tutored. In my considered view, since the evidence of X passes the test of close scrutiny, there is no difficulty for this court to accept the evidence of X.

26. The learned counsel for the appellant would submit that the evidence of X is highly self contradictory and therefore, her evidence cannot be accepted. In order to substantiate this contention, the learned counsel pointed out that X, during the course of her cross examination, has stated that the accused took her to Tenkasi from her village and at Tenkasi Bus Stand she raised a hue and cry and therefore, the conductor and the driver of the bus took her to Tenkasi Police Station. During inquiry by police, she told about the whereabouts of her parents and also she told that she was being kidnapped by the accused and she has further stated that thereafter on intimation from the police, her parents came to the police station and took her to their village. Relying heavily on this part of evidence of X, the learned counsel for the appellant would submit that therefore the evidence of X that from Tenkasi she was taken to Madurai, then to Coimbatore and finally to Tiruppur, where she was subjected to sexual intercourse for about 50 days cannot be

true. Of course, this is a major contradiction in the evidence of X and if the same is given weightage of, then, the evidence of X may be doubtful. Under Section 155 of the Evidence Act, proving the former contradictory statement of a witness is one of the modes to impeach the credit of the said witness. But, in this case, I am not prepared to give any weightage for this contradiction. The reason follow.

27. It is well known that sexual abuse can cause intense feelings of embarrassment, fear and humiliation. The victim of sexual abuse is terrified that she will not be believed and ashamed that she does not know how to stop the abuse. The victim often feels trapped between wanting the abuse to stop and being terrified of other people learning what has been done to her. That fear can keep her silent while the abuse is going on, and for years after it has come to an end. It is important to remember that child victims often feel very confused about the abuse while it is ongoing. Out of such fear and confusion, the poor victim may continue to have a relationship with her abuser. The victim who suffers from trauma on account of sexual assault would react in different ways. Some victim may maintain contact with their abusers

because they may still feel affection for them even though they hate the abuse. It is also possible for some victims to maintain contact with an attempt to regain control over their assault. Some others may maintain contact in an attempt to regain a feeling of normalcy. Due to the said confusion state , during investigation, initially, a victim may say that nothing had happened to her. It is also reported that in many cases the victim deny the occurrence and deny that she was abused. Such suppression of occurrence would continue even for months. This is mainly because of fear of the stigma associated with the abuse, embarrassment and retaliation.

28. Therefore, going by the age of the victim in the instant case and going by the fact that she was examined in court after a long time, I find it difficult to attach any importance to the above contradiction. The contention of the learned counsel that had it been true that she was repeatedly harassed sexually by the accused , she would have told the neighbours about the same also deserves to be rejected because X was alone as a captive in the hands of the accused and, therefore, for various reasons, like threat, fear, shame and humiliation, she would not have informed about the

occurrence to any of her neighbours. Further, there was no occasion for her to meet the neighbours also.

29. Had it been true that the accused and X were caught hold at Tenkasi Bus Stand itself and X had been handed over to her parents, there would have been no necessity for P.W.1 to make a complaint on 25.07.2005. Further, the accused surrendered before the learned Judicial Magistrate at Tiruppur on 08.09.2005. According to X, the accused took her to an Advocate, made her to wait outside the court and with the help of the Advocate, he surrendered before the Court. After that, the Advocate took her to a service home and entrusted her custody to the person in-charge of the Home. It is not explained to the court as to why the prosecution has not examined that Advocate as a witness in the case. The investigating officer had not made any attempt to examine him at all.

30. Further, had the records and registers from the service home been seized during investigation, they would have revealed the fact as to who brought X to the service home and who entrusted her custody to the person in-charge

of the home and with what statement. Similarly, the person who admitted her in the service home also has not been examined. Had they been examined, there would have been better evidence on record as to who brought X to the home on 08.09.2005. There is no explanation for this also on the side of the prosecution. The entire evidence available on record would go to show that there is not even any mention as to where that service home is situated; whether it is a private service home or government organization; and as to how P.W.12 came to know that X was confined in the said service home. Absolutely, there is no material collected during investigation in respect of these facts. These are all, of course, very serious flaws in the case of the prosecution. But, there is no denial by the accused that X was secured only on 11.09.2005 from the service home. X has stated that she was entrusted to the service home only by an Advocate as requested by the accused. Therefore, it is crystal clear that X was in the custody of the accused during the interregnum period and only at his behest, she was taken to the service home. For these reasons, I hold that the contradiction pointed out by the learned counsel for the appellant does not in any manner impeach the credit of P.W.1.

31. From the evidence of X coupled with the other evidences, which I have discussed herein above, I hold that the accused took X from the lawful guardianship of P.W.1 and P.W.3, detained her at Tiruppur and had sexual intercourse with her. The said act of the accused would amount to offence of kidnapping and rape. Thus, the trial court was right in convicting the appellant/accused under both the charges.

32. Now turning to the quantum of sentence, the Trial Court, taking into consideration all the available aggravating and mitigating circumstance, has imposed the just sentence upon the accused which does not require any interference at the hands of this Court.

33. Before concluding, I wish to highlight the following:- A child is, undoubtedly, a national asset. It is the duty of the society to protect the children of this country, more particularly, the Courts of law, should take every precaution to protect the modesty of the children, when they appear before a court of law. When it is alleged that an young girl was sexually exploited, the trial court is expected to

follow the guidelines issued by the Hon'ble Supreme Court as to how such a victim of sexual abuse should be treated in court and as to how she should be examined and as to how her evidence should be appreciated.

34. A child is undoubtedly a competent witness. But, as per the Evidence Act, her competence is to be tested by the court before administering oath and if the court finds that the witness is capable of understanding the questions put to her or giving a rational answers to those questions, then, the court may hold that the witness is competent to testify. Here in the instant case, admittedly, X is a child witness. While examining her, the trial court committed, I regret to say, a lot of errors in gross violation of the guidelines issued by the Hon'ble Supreme Court.

35. Before examining X, the trial court asked few questions purportedly to test her competence. The first question was, what is her father's name; the second question was, what was her age; the third question was, what was her educational qualification; and the fourth question was, where was she at the time of examination in court - she answered all

the questions correctly. From these answers, the court has recorded that the witness had understood the questions. In my considered view, this is not sufficient. The court had not recorded whether the answers given to the questions were rational and sufficient to hold that she is competent. Asking few questions as though it is an empty formality will not satisfy the legal requirements. It should not be done in a mechanical fashion. At the same time, such questions should not be ticklish making it impossible to answer rationally. Neither should it be like a cross examination. The questions should be in the nature of testing her competence to depose. While framing the questions, the age, her social background, whether literate or illiterate are all to be taken into consideration. The questions should be put to her in such a way understandable to her. In this regard, we may look into the judgment of the Hon'ble Supreme Court in ***Rameshwar Vs. State of Rajasthan*** reported in ***1952 AIR 54***, wherein the Hon'ble Supreme Court has held as follows:

> *"It is desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth."*

36. In ***Ratansinh Dalsukhbhai Nayak Vs. State of Gujarat*** reported in ***(2004) 1 SCC 64***, the Hon'ble Supreme Court has prescribed the following requirements:

> *"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath....."*

37. As held by the Hon'ble Supreme Court in the above judgments, if only the court finds that the answers are rational and on considering the same, if the court records that the witnesses is competent to testify, the court could further proceed to examine the child witness. In the instant case, the learned Sessions Judge had not followed these guidelines meticulously. But, on that score, I am not rejecting the evidence of X inasmuch as the accused had not disputed the competency of X to depose.

38. Next, in the instant case, the examination of X was evidently not done in camera. In **State of Punjab v. Gurmit**

Singh, [1996] 2 SCC 384 the Hon'ble Supreme Court has held as follows :-

> *"The expression that the inquiry into and trial of rape "shall be conducted in camera" as occurring in sub- section (2) of Section 327 Cr. P.C. is not only significant but very important. It casts a duty on the Court to conduct the trial of rape cases etc. invariably "in camera". The Courts are obliged to act in furtherance of the intention expressed by the Legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327 (2) and (3) Cr. P.C. and hold the trial of rape cases in camera. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. The High Courts would therefore be well advised to draw the attention of the trial courts to the amended provisions of Section 327 Cr. P.C. When trials are held in camera, it*

would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the Court as envisaged by Section 327 (3) Cr. P.C. This would save any further embarrassment being caused to the victim of sex crime. Wherever possible it may also be worth considering whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the Courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The Courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial Courts would take recourse to the provisions of Sections 327 (2) and (3) Cr. P.C. liberally. Trial of rape cases in camera should be the rule and an open trial in such cases an exception."

39. Subsequently, in **Sakshi v. Union of India, AIR**

2004 SC 3566, the Hon'ble Supreme Court has in addition to the above directions, issued the following directions:-

> (1) The provisions of sub-section (2) of Section 327 of Cr.P.C. shall in addition to the offences mentioned in the sub-section would also apply in inquiry or trial offences under Section 354 and 377 of IPC.
>
> (2) In holding trial of child sex abuse or rape :
>
> (a) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
>
> (ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the President Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
>
> (iii) the victim of child abuse or rape,

while giving testimony in court, should be allowed sufficient breaks as and when required.

40. Though in **State of Punjab v. Gurmit Singh** and **Sakshi v. Union of India cases,** cited supra, the Hon'ble Supreme Court has held that in order to make it comfortable for the victim of a child abuse, who is vulnerable, a screen or some such arrangements may be made where the victim or the witness normally do not see the body or face of the accused and though similar provision has been made in The Protection of Children from Sexual Offenses (POCSO) Act, 2012 in the State of Tamil Nadu, I regret, that sufficient infrastructure in the subordinate courts making such arrangements for the examination of vulnerable witnesses are yet to be made. I am hopeful that the State Government will pay adequate attention on the above issues and create sufficient infrastructure for the subordinate courts so that the subordinate courts could follow the directions of the Hon'ble Supreme Court in **Sakshi v. Union of India,** AIR 2004 SC 3566 and **State of Punjab v. Gurmit Singh**, [1996] 2 SCC 384 and the provisions of POCSO Act meticulously.

41. In the result, the criminal appeal fails and the same is accordingly dismissed. The conviction and sentence imposed on the appellant/accused by judgment dated 26.02.2007 in S.C.No.85 of 2006 by the learned Sessions Judge, Magalir Neethimandram, Tirunelveli, is confirmed. The trial Court shall take steps to secure the accused and commit him to prison to undergo the unexpired portion of the sentence.

Index : yes 16..12..2015

kmk/kk

S.NAGAMUTHU.J.,

kmk/kk

Judgment
in
Crl.A.(MD) No.163 of 2007

Reserved on : 27..10..2015
Pronounced on : 16..12..2015