

IN THE HIGH COURT JUDICATURE AT MATRAS

MADURAI BENCH

CrI.M.P.(MD).No. of 2023

In

CrI.M.P.(MD).No.2427 of 2023

In

CrI.A.(MD).No.111 of 2023

M.Jesuraj

S/o. Maria Sebastian

... Petitioner

-Vs-

State through Inspector of Police,

A W.P.S, Virudhunagar,

In Cr.No.11 of 2020.

... Respondent

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This is certify that the above documents are the true copies of the originals.

Dated at Madurai on the 17th day of July, 2023.

COUNSEL FOR PETITIONER

MEMORANDUM OF CRIMINAL MISCELLANEOUS PETITION

(Under Section 389 (1) of Cr.P.C.)

IN THE HIGH COURT OF JUDICATURE OF MADRAS

MADURAI BENCH AT MADURAI

(Criminal Appellate Side)

Crl. M.P. (MD) No. of 2023

In

Crl. M.P. (MD) No. 2427 of 2023

In
Crl. A. (MD) No. 111 of 2023
Against
Spl. S.C. No. 9 of 2021
(On the file of the Learned Special Judge for Trial of offences under
POCSO Act, Virudhunagar District at Srivilliputhur)

M. Jesuraj, Aged 61 years

Son of Maria Sebastian

56, Sixty Feed Road, Fathima Nagar

Virudhunagar-626 001

Virudhunagar District

Petitioner/Appellant/Accused

Vs.

State through Inspector of Police

A.W.P.S, Virudhunagar

In Cr. No. 11 of 2020

Respondent/Respondent/Complaint

PETITION FOR SUSPENSION OF SENTENCE AND BAIL

1 The address for service of process of this Hon'ble Court on the Petitioner/Appellant is that of his counsel M/s. M. Michael Bharathi (Ms. 683/1984), V. Sasi Kumar (Ms. 1212/1998), S. Murugapandi (Ms. 919/2018), M. Surya Kala (Ms. 623/2021) and C. Carmel Jency (Ms. 5505/2022) 8, Law Chamber, High Court Bench, Madurai, Cell Ph. No. 9443150562, Email ID. mmbadvocate@yahoo.com.

2 The address for service of the process of this Hon'ble Court on the Respondent/Respondent is as stated above.

For the reasons stated in the accompanying affidavit, it is prayed That this Hon'ble Court may graciously be pleased to suspend the execution of the substantial sentence to undergo 6 months Rigorous Imprisonment for the offence Punishable under section 342 of IPC and to undergo twenty years Rigorous Imprisonment for the offence punishable under section 376-AB of IPC passed against The Petitioner/Appellant in Spl. S.C. No. 9 of 2021 dated 24-1-2023 on the file of the Learned Special Judge for Trial of offences under POCSO Act, Virudhunagar District at Srivilliputhur till the disposal of the pending appeal in CrI.A.(MD) No. 111 Of 2023 and release the Petitioner/Appellant/Accused on bail and thus render justice.

Dated at Madurai on this day of July, 2023

Counsel for the petitioner

M. Michael Bharathi (Ms. 683 of 1984)
Government Law of College, Madurai-1980 to 1984
8, Law Chamber, High Court Bench, Madurai
Res. 13, Munisif Court South Street, Sathur - 626 203
Cell No. 9443150562

Note

1. This is the second for suspension of sentence and bail
2. The Petitioner is at Central Prison in Madurai
3. Total fine of Rs. 11,000/- already paid
4. Surely satisfaction: The special Judge for Trial of offences under POCSO Act, Virudhunagar District at Srivilliputhur

IN THE HIGH COURT OF JUDICATURE OF MADRAS
MADURAI BENCH AT MADRAS
(Criminal Appellate Side)

Crl. M.P. (MD) No. of 2023

In

Crl. M.P. (MD) No. 2427 of 2023

In

Crl. A, (MD) No. 111 of 2023

Against
Spl. S.C. No. 9 of 2021
(On the file of the Learned Special Judge for Trial of offences under
POCSO Act, Virudhunagar District at Srivilliputhur)

M.jesuraj, Aged 61 years

Son of Maria Sebastian

56, Sixty Feed Road, Fathima Nagar

Virudhunagar - 626 001 Virudhunagar District

Petitioner/Appellant/Accused

Vs.

State through Inspector of Police

A.W.P.S, Virudhunagar

In Cr. No. 11 of 2020

Complaint

Respondent/Respondent/

AFFIDAVIT OF M. JESURAJ

I, M. Jesuraj son of Maria Sebastian, aged 61 years, Christian and having permanent residence at 56, Sixty Feed Road, Fathima Nagar, Virudhunagar in Virudhunagar District now at Central Prison in Madurai as a convict do hereby solemnly affirm and sincerely state as follows

1 I submit that I am the petitioner herein and appellant in Crl. A. (MD). No. 111 of 2023 and as such I am well acquainted with the facts of the case.

2 I submit that I was tried for the offences punishable under section 342 of IPC and section 6 of the Protection of Children from Sexual Offences Act, here in after the will be referred to POCSO Act for brevity sake read with section 376-AB of the IPC and convicted and sentenced to undergo 6 months Rigorous Imprisonment and to pay a fine of Rs. 1,000/- and in default to undergo 1 month Simple Imprisonment for the offence punishable under section 342 of IPC and to undergo twenty two years Rigorous Imprisonment and to pay a fine of Rs. 10,000/- and in default to undergo 1 year Simple Imprisonment for the offence punishable under section 376-AB of IPC with a direction to suffer concurrently and to set off the period of detention already undergone in Spl. S.C. No. 9 of 2021 on the file of the Learned Special Judge for Trial of offences under POCSO Act, Virudhunagar District at Srivilliputhur on 24-1-2023 and now I am undergoing the sentence in Central Prison in Madurai for more than 5 months since 24-1-2023. The total fine of Rs. 11,000/- imposed on we was paid in the trial court of the next day of the judgement on 25-1-2023.

3 I submit that as against the said conviction I have preferred an appeal before this Hon'ble Court and I swear this affidavit in support of my petition which is filed for suspension of substantial sentence and for bail. I submit that I am an innocent and I have not committed any offence what so ever much less the offences punishable under sections 342 and 276 AB of IPC. I have been erroneously convicted and sentenced by the Learned Trial Judge without considering the grave

suspicious, infirmities and improbabilities found in the evidence and the prosecution case. I crave leave of this Hon'ble Court to read my Grounds of Appeal as part and parcel of this affidavit for better appreciation and understanding the facts of the case. I beg this Hon'ble court to suspend the substantial sentence imposed on me and release me on bail on the following amongst other grounds.

GROUND

1. The impugned judgement dated 24-1-2023 passed by the Learned Special Judge for POCSO Act convicting and sentencing the Appellant for the offences punishable under Sections 342 and 376-AB of the Indian Penal Code to undergo 6 months Rigorous Imprisonment and to pay a fine Rs. 1000/- and in default to undergo 1 month Simple Imprisonment and to undergo up to twenty years Rigorous Imprisonment and to pay a fine Rs. 10,000/- and in default to undergo 1 year Simple Imprisonment respectively with a direction to suffer concurrently and to set off the period of detention already undergone is devoid of any merits, against Criminal jurisprudence, total misconception of facts and law, weight of evidence, perverse and liable to be set aside.

2. The impugned judgement is in complete perversity as the Learned Trial Judge has miserably failed to consider the following material discrepancies casting reasonable and serious doubts and inherent improbabilities over the prosecution case

brought on record in the cross examination of P.W. 1, the mother of the Victim; P.W. 2, the Victim; P.W.7, Observation Mahazat Witness; P.W. 9, Doctor who examined the Victim; P.W. 10, Officer who registered FIR and P.W. 12, Investigating Officer.

3.The Learnd Special Judge gas held in Paras 23 and 26 of the impugned judgement in a summary fashion without having any discussion on the material discrepancies surfaced in the cross examination of the star witnesses, P. Ws. 1,2,7,9,10 and 12 as afore tabulated and erroneously held that the prosecution has proved its case.

4. The conspicuous absence of any discussion and non- consideration of the following material discrepancies and grave suspicious circumstances surrounded in theevidence of the P.W.1, the mother of the Victim, P.W.2, Victim in lodging of Ex. P-1, complaint and as to the suppression of the First Investigation done by the Virudhunagar East P.S. before registration of the FIR would tend to prove the total non-application of mind by the Learned Trial Judge.

- a) The suppression of lodging of written complaint before Virudhunagar East before registration of FIR and the enquiry by Virudhunagar East P.S. on accused and his employees as deposed by P.W. 1 and 2
- b) The suppression of medical examination done on Victim by a Private Medical

practitioner, Dr. Suguna on reference by Virudhunagar East P.S. even prior to registration of the FIR as deposed by P.W. 1 and 2.

c) The suppression of arrest of accused even prior to registration of the FIR and his detention at AWPS, Virudhunagar throughout night as deposed by P.W.1

d) The suppression of the fact that the FIR was registered on Ex.P-1 complaint which was followed by Virudhunagar East P.S. as deposed by P.W.1

The aforesaid material discrepancies create a reasonable suspicion over the prosecution case which the Learned Trial Judge deplorably failed to note and discuss in the impugned judgement.

5. The maternal grandmother who only reported to her daughter, P.W.1 above the slumberous of the Victim P.W.2 without taking any food and only on her information the Victim was enquired and sexual assault alleged to have been inflicted on the Victim by the accused was come to be known material witness.

6. Absolutely no evidence to attract the offence punishable under section 342 of IPC is available in the evidence of the Victim, P.W.2 which the Learned Trial Judgemiserably failed to note and erroneously convicted the accused.

7. As per the prosecution case, the accused was arrested on 25-12-2020 at 6 a.m. whereas the evidence of P.W. 1 and 2 proves that the accused was brought to

Virudhunagar East P.S. by the police on 24-12-2020 at 5 p.m. and he was sent to AWPS, Virudhunagar and detained thereon throughout night. As such the arrest of the Accused as projected by the prosecution has been falsified and creates a grave suspicion over the prosecution case which the Learned Trial Judge conveniently failed to consider and discuss the same in the impugned judgement.

8. When the accused was alleged to have been arrested by the police only on 25-12-2020 at 6 a.m., the evidence of P.W.7, the witness for preparation of Observation Mahazar (Ex.P-6) and Rough Sketch (Ex. P-12) is in contra that when the Observation Mahazar and Rough Sketch was prepared at 11 p.m. on 24-12-2020, the accused opened the hotel and showed the same to Police and also signed in the Observation Mahazar. The prosecution also did not all clarify the material and significance inconsistency by way of re-examination. Such a material inconsistency cuts root of the prosecution case which the Learned Trial Judge failed to consider.

9. Admittedly it's a case of solitary evidence hinges wholly on evidence of the Victim, P.W.2 without any corroboration even from any circumstances and in such a case the Learned Trial Judge ought to have applied the dictum and principles laid down by the Hon'ble Apex Court in appreciation of the evidence of the child witnesses which were relied on by the defense. Permanently, even though the Learned Trial Judge listed the judgements relied on by the defense in para 10 of the impugned judgement, the Learned Trail Judge did not at all

whisper anything about the relevancy or irrelevancy of those Judgements in the impugned judgement.

10. The Learned Trial Judge failed to consider the inherent improbabilities and unbelievable Ness in the evidence of the Victim, P.W.2 that she was subjected to penetrative sexual assault as defined under section 3 (a) of the POCSO Act when she was admittedly not attained puberty without any suffering or pain or injury over her vagina.

11. The Learned Trial Judge failed to note that no penetration taken place into private part of the victim as per Medical evidence and oral testimony of the Victim, P.W.2 and such evidence in the absence of evidence for penetrative sex, at the most the charge and could be only for the aggravated sexual punishable under section 10 of the POCSO Act.

12. The Learned Trial Judge has miserably failed to note and consider the material discrepancies found in the evidence of the Victim, P.W.2 and the same is very much evident in para 15 of the impugned judgement wherein the material discrepancies were not at all referred to.

13. The Learned Trial Judge landed his judgment on misconception of the facts which is evident in Paras 21 to 23 and he has focused his judgment only on the issue whether medical evidence will supersede ocular evidence which is not at all a defense of the accused.

14. The Learned Trial Judge without considering the material suspicious brought on record over the prosecution case and has summarily held in Para 23 of the impugned judgment that the evidence of the Victim, P.W.2 was sufficient to bring home the accused for gravamen of the charge.

15. The Learned Trial Judge has accepted that to prove the charge of the penetrative sexual assault, the penetration of male organ into the female organ is necessary and it is sufficient that the penetration may be to slightest extent. But the Learned Trial Judge failed to note that the Victim, P.W.2 has not at all whispered anything about the penetration or insertion of male organ of the accused into her female organ and what she has deposed is that the accused placed and pressed his male organ over her female organ which would not amount to penetration as defined under section 3 (a) of the POCSO Act. The Judgment of the Hon'ble Division bench of this Hon'ble court referred to was not at all considered by the Learned Trial Judge.

16. The Learned Judge ought to have considered and appreciated the evidence of the Child Victim, P.W.2 in the light of the dictum of the Hon'ble Apex Court consistently held time and again in plethora of cases that the rule of prudence is that the evidence of child witness requires corroboration when the same does not inspire the confidence of the court. In the case under appeal, in view of the afore indicated suspicious circumstances, the solitary evidence of the Child Victim require corroboration which the Learned Trial Judge failed

to consider.

17. The Learned Trial Judge failed to consider that the Doctor, P.W.9 failed to follow and comply with the Guidelines and Examination Proforma for Medico Legal Cases of victims of Sexual Violence drawn up by the Ministry of Health and Family Welfare which was adopted by the Government of Tamil Nadu by G.O.(MS) No. 201 dated 11-7-2014 for examination of the Victim and the medical opinion was given in a very casual manner in Accident Register Form.

18. The Learned Trial Judge failed to consider the following grave suspicious, defects and illegalities found in the investigation which were brought on record in the cross examination of the P.W.12, the Investigating Officer

a) The answer 'Don't remember' to crucial questions tells upon her irresponsibility and creates suspicion.

b) Material witness, employees of accused Hotel were not examined.

c) No scientific investigation as to possibility of penetrative sexual assault in the absence of pain or suffering or injury on the child victim who did not attain puberty.

d) No request to follow the Government guidelines for Medical examination of Victim.

e) Material witness, Mother of P.W.1 was not examined.

f) Examination of Victim under section 161 (3) not video graphed.

19. The investigation is perfunctory, defective, trained, partisan and not above the board is very much reflected in the evidence of the P.W.12, the Investigating Officer which the Learned Trial Judge miserably flunked to note that the investigation of the case is not only the case is not only perfunctory but also defective and illegal and vitiated the prosecution case to such an extent as to warrant acquittal of the accused.

20. Which due respect, it is submitted that the impugned order of conviction is in perfunctory manner without even noticing much less, considering and discussing the evidence led by the prosecution and the arguments raised by the defense. The Learned Trial Judge has not at all considered the facts elucidated in the cross examination of P.Ws. 1,2,7,9 and 12 which cut root of the prosecution case. As such the Impugned judgment of conviction does not comply with the requirement of the statutory provisions as laid down in Section 354 (1) (b) of Cr.P.C. The impugned judgment of conviction is unreasonable and has resulted in miscarriage of justice and so liable to be set aside.

21. The impugned judgement of conviction lacks any discussion and reasoning on overall evidence of the witness and exhibits and on the other hand, the same is based only on the basis of final report submitted by the investigating agency

and the evidence stated by the witnesses in examination in chief and as such the impugned judgment is perverse and liable to be set aside.

22. The Learned Trial Judge ought to have rejected the prosecution case and acquitted the accused extending the benefit of reasonable doubts.

23. The Learned Trial Judge totally prejudicated over the prosecution case and failed to marshal the evidence in proper perspective and has very much the evidence in proper perspective and has very much relied on the evidence of the Victim, P.W.2 on the sole ground that no motive between the Victim and the accused has been proved for false implication of the accused.

24. Pertinently none of the 12 judgments referred to and relied on by the defense to disprove the prosecution case was not as all considered by the Learned Trial Judge even though those 12 judgments were referred to in Para 10 of the Impugned Judgment and nowhere in the impugned judgment the Learned Trial Judge has observed whether those judgments are relevant or irrelevant or applicable or inapplicable,

25. The Learned Trial Judge has convicted the appellant only on assumption and presumption and not on evidence.

26. The petitioner has no bad antecedent and previous conviction for any offence.

4 I submit that I have been in incarceration for more than 5 months since 24-1-2023. Since I have a fair chance to succeed in an appeal, my further incarceration till the disposal of the appeal would cause irreparable injury and prejudice to me. Further I submit that I had been in bail throughout the trial.

5 I submit that I am having permanent abode at the above said address and so I will not abscond or flee from the court proceedings. Anyhow I am prepared to offer substantial sureties for my due recognition.

Therefore it is prayed that this Hon'ble Court may graciously be pleased to suspend the execution of the substantial sentence to undergo 6 months Rigorous Imprisonment for the offence punishable under section 342 of IPC and to undergo twenty years Rigorous Imprisonment for the offence punishable under section 376-AB of IPC passed against the Petitioner/Appellant in Spl. S.C. No. 9 of 2021 dated 24-1-2023 on the file of the Learned Special Judge for Trial of offences under POCSO Act, Virudhunagar District at Srivilliputhur till the disposal of the pending appeal in Crl. A. (MD) No. 111 of 2023 and release the petitioner/Appellant/Accused on bail and thus render justice.

Solemnly affirmed and the contents of

this affidavit have been read out and

Petitioner

explained in Tamil to the deponent on

this day of July, 2023 at Central

Before me

Prison in Madurai

and signed in my presence.

Jailor, Central Prison

Madurai