IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22.09.2022

CORAM

THE HONOURABLE MR. JUSTICE **SUNDER MOHAN**

Crl.A.No.65 of 2020
and Crl.M.P.No.1327 of 2020

Ravichandran .. Appellant

Vs.

State Represented by,
The Inspector of police,
AWPS, Tiruppur,
Tiruppur District.

.. Respondent

Prayer: Criminal Appeal filed under Section 374 (2) Cr.P.C. to set aside the judgement order passed by the Magalir Neethimandram (Fast Track Mahila Court) Tiruppur in S.C.No.158 of 2016 vide his order dated 21.01.2020.

For Appellant : Mr.R.Sukumaran
for Mr.S.Patrick
For Respondent :Mr.S.Balaji
Govt. Advocate (Crl. Side)

JUDGMENT

The appeal has been filed against the judgement of the learned Sessions Judge, Tiruppur, passed in S.C.No.158 of 2016 dated 21.01.2020. The appellant along with his wife was tried for the offence under Section 307 and 502(ii) of IPC.

2.The Trial Court acquitted the appellant's wife for the offences charged against her. The appellant was found guilty for the offences under Section 307 and 506(ii) IPC. The appellant was sentenced to 10 years R.I and directed to pay a fine of Rs.2000/- for the offence under Section 307 IPC and sentence to undergo 5 years R.I for the offence under Section 506(ii) IPC.

3.The case of the prosecution is that P.W.1, victim is deaf and dumb and when she was five years old, her parents took her to the appellant for treating her by adopting meditation techniques and to cure her illness; that the appellant and his wife took a sum of Rs.1,89,000/- for the purpose of the

treatment and demanded further sum without giving proper treatment; that they caused harm to P.W.1, victim by attacking her with weapons and had poked her all over the body with needles and caused injuries on the head; that the appellant and his wife also attacked the private parts of the P.W.1, victim.

4.The case was registered in Crime No.132 of 2005 for the offences under Section 384 and 307 of IPC on the file of the respondent police, on the complaint given by the P.W.2, father of the victim. P.W.5, the Sub Inspector of Police, registered the FIR and P.W.6, Investigation Officer, took up the investigation. The charge sheet was filed before the learned Judicial Magistrate No.1, Tiruppur in P.R.C.No.1 of 2008. Thereafter, on committal by the learned Judicial Magistrate No.1, Tiruppur, the case was tried by the learned Sessions Judge, Tiruppur, in S.C.No.158 of 2016. The prosecution examined P.W.1, victim, P.W.2, the father of the victim, P.W.3, Mahazer witness, P.W.4, Dr.Kesavamoorthy, who treated the victim, P.W.5, the Sub Inspector of Police who registered the FIR and P.W.6, Investigation Officer

and marked Exs.P.1 to P.6, to establish its case. The learned Sessions Judge found that the prosecution had established its case beyond reasonable doubt and convicted the appellant for the offences under Section 307 and 506(ii) I.P.C.

5.Heard, Mr.K.Sukumaran, learned counsel for the appellant and Mr.S.Balaji, learned Government Advocate (Crl. Side) for the respondent.

6.The learned counsel for the appellant submitted that the prosecution has not established its case and admittedly, P.W.1, victim suffered from speech and hearing impairment. Her deposition does not disclose as to how and in what manner her evidence was recorded by the trial Court. The Trial Court had not followed the procedure prescribed under Section 119 of the Indian Evidence Act. The learned counsel further submitted that in any event, the complaint by P.W.2, the father of the victim, is hearsay and could not have been the basis for initiating the prosecution. The Investigating Officer, P.W.6 has admitted in his evidence that he recorded the 161 statement of the victim only by the gestures shown by her and further,

admitted that he had not recorded the said fact in the 161 statement. The Investigation Officer has further admitted that none of the allegations made by P.W.2, father of the victim in the FIR was confirmed by P.W.1, victim when she was examined by her. The learned counsel further submitted that the evidence of P.W.2, father of the victim, confirm that the victim is deaf and dumb. P.W.4, the Doctor, did not treat P.W.1, the victim for the alleged injuries suffered by her. The Doctor would admit in the cross examination that P.W.1, the victim was brought to him only for the treatment of puss oozing out from the ear of the victim and not for the injuries suffered by her. P.W.4, the Doctor would also admit that he did not ask the victim as to how the injuries was caused to her because she could not hear. Therefore, the learned counsel submitted that for all the above infirmities, the trial Court ought not to have convicted the appellant for the offences alleged against him.

7. Mr.Balaji, the learned Government Advocate (Crl. Side) submitted that the victim was aged about 5 years at the time of the occurrence and she

had suffered injuries as could be seen from the evidence of P.W.4, the Doctor. The victim's father, P.W.2 had given the complaint immediately, after the occurrence. The victim was residing only with the appellant and his wife and therefore, the appellant and his wife were responsible for causing injuries on the victim. The appellant also did not treat the victim, P.W.1 in a professional manner. The evidence of P.W.1, P.W.2 and P.W.4 are cogent and establishes the fact that the appellant is guilty of the offences charged against him. The Trial Court has rightly convicted the appellant for the offences charged against him.

8.I have given my anxious consideration to the submissions and evidences on record. The charge as against the appellant is that he along with his wife caused injury on the head and other parts of the body including the private parts of the victim who suffered from speech and hearing impairment by using weapons and also poked the victim with needles besides causing harm to her by using a cat to attack her.

9.The charge and the evidence reveals that the vicim suffered from speech and hearing impairment. In such circumstances, the record of evidence of the deposition PW.1, does not reveal as to how and in what manner her evidence was recorded by the Court. Section 119 of the Indian Evidence Act has not been complied by the trial Court. However, even assuming that the deposition of P.W.1 was recorded as mandated under the Indian Evidence Act, I find that the allegations made by the P.W.1 in her deposition is completely contrary to the charge. We may note here, that when P.W.1 was examined in Court, she was 19. P.W.1 has not stated about the alleged attack on her private parts and attack by using of dangerous weapons and poking by needles. On the other hand, she had stated that she was slapped, beaten by wooden logs and was not given proper food and proper place to sleep. Further, the appellant harmed her by using a cat. The reading of the evidence discloses that the evidence is more of a perception of a five year old girl. The deposition besides being different from the charge and the original complaint also appears to be improbable and opposed to common-sense. P.W.2 who is the father of the victim has

admitted in his evidence that he had never visited P.W.1 when she was living with the appellant and his wife. Therefore, it is not his case that he was a witness to the alleged occurrences relating to the harm caused by the victim. The relevant portion of the deposition of P.W.2 which reveals that P.W.1 could not speak and P.W.2 gathered information from her only on the basis of gestures made by her:

" என் மகள் காவ்யாவிற்கு பிறவியிலிருந்து காதும் கேட்காது, வாயும் பேச இயலாது. அதனால் அவள் 2–1/2 வயது குழந்தையாக இருந்தபோது கோவை, விக்ரம் உறாஸ்பிட்டலில் வைத்து என் மகளுக்கு அறுவை சிகிச்சை செய்தோம். சிகிச்சைக்கு பின்னிட்டு என் மகள் ஓரளவிற்கு பேச ஆரம்பித்தாள்"

" என் மகளுக்கு ஜாடை மூலமாக கேட்டு அவள் சொன்ன விவரங்களை தெரிந்து கொண்டேன். இந்த விவரத்தை போலீஸ் விசாரணையில் நான் சொல்லவில்லை என்றால் சரியல்ல"

10.P.W.4, the Doctor also would admit that he did not enquire from P.W.1, victim as to how the injury was caused to her because, the victim could not hear. He would further admit in the cross examination that P.W.2 brought the victim, P.W.1 for treatment of puss in her ear and he did not treat her for the injuries allegedly suffered by her. Further, P.W.6 would admit in the cross-examination that the victim did not support most of the allegation made in the complaint of P.W.2, during his interrogation. That apart, he had recorded the 161 statement with the assistance of an interpreter who was not examined in Court.

11. Besides the above infirmities in the deposition of the witness, which makes them unreliable, we may note that the trial Court has not complied with the mandatory provision of Section 119 of the Indian Evidence Act. Admittedly, P.W.1, victim was unable to speak. The relevant portion of the charge which confirms that reads as follows:

> " இவ்வழக்கில் பாதிக்கப்பட்ட சிறுமி காவியா வாதி மல்லிகார் ஜீனின் மகள் என்றும், அந்த சிறுமி வாய் பேச முடியாதவர் என்றும், ..."

The relevant portion of P.W.6 also confirms the fact that P.W.1 suffered from speech and hearing impairment:

" 13.12.2005–ம் தேதி பாதிக்கப்பட்ட சிறுமி காது கேளாத மற்றும் வாய் பேசமுடியாத சிறுமி என்பதால் திருப்பூர் காது கேளாதோர் பள்ளி முதல்வர் அவர்களுக்கு விண்ணப்பம் கொடுத்து மேற்படி பள்ளி ஆசிரியர் சித்ரா மூலம் பாதிக்கப்பட்ட சிறுமியை விசாரித்து வாக்குமூலம் பதிவு செய்தேன்"

"காது கேட்காத மற்றும் வாய் சரியாக பேச முடியாத ஒரு சிறுமியை நான் எவ்வாறு 11.12.2005–ம் தேதி விசாரித்தேன் என்றால் அவர் சைகை மூலமாக சொன்ன விவரங்களை நான் வாக்குமூலமாக பதிவு செய்தேன். இந்த விவரத்தை நான் பதிவு செய்த 161 வாக்குமூலத்தில் குறிப்பிட்டு சொல்லவில்லை

" 13.12.2005–ம் தேதி காது கேளாதவர் மற்றும் வாய் பேச முடியாதவர்கள் பயிலும் பள்ளி ஆசிரியரை நான் விசாரித்துள்ளேன் என்றால் சரிதான். நான் இந்த வழக்கில் மேற்படி பள்ளி ஆசிரியரை எதுவும் விசாரிக்கவில்லை என்றும், விசாரித்ததாக வாக்குமூலம் பதிவு செய்துள்ளேன் என்றால் சரியல்ல".

Thus, the trial Court ought to have followed the mandate under Section 119 of the Indian Evidence Act.

12. As per Section 119 of the Indian Evidence Act, if the victim cannot speak he/she can may give evidence in any manner which can make it intelligible, as by writing or by signs made in open Court. The Trial Court has not recorded as to whether her evidence was made in writing or by signs. The proviso to Section 119 of Indian Evidence Act stipulates that if the witness is unable to communicate verbally, the Court shall take the assistance of the interpreter or a special educator in recording the statement and such statement shall be video-graphed.

13.The Hon'ble Supreme Court in ***State of Rajasthan vs. Darshan Singh alias Darshan lal*** reported in ***(2012) 5 SCC 789*** while considering Section 119 of the Indian Evidence Act prior to the insertion of the proviso in the year 2013 held as follows:

"26. .....When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law requires that there must be a record of signs and not the interpretation of signs.

29. *To sum up, a deaf and dumb person is a competent witness. If in the opinion of the court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have*

any interest in the case and he should be administered oath."

14. This Court in ***Mariyadoss vs. State by Inspector of Police*** reported in ***2014 (2) MWN Cr. (321): 2014 SCC Online Mad 1862*** considered Section 119 of the Indian Evidence Act with the proviso and held as follows:

> ***12.*** *Section 119 of the Evidence Act as amended by the Parliament with effect from 15.3.2013 reads as under:*
>
> *"119. A witness, who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, evidence so given shall be deemed to be oral evidence:*
>
> *Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed."*
>
> ***13.*** *The Madras High Court has issued a circular in R.O.C. No. 1729/2010/RR, dated 2.6.2010 to all the Subordinate Courts, containing a list of*

Advocates, who are trained to provide assistance to the Court for recording the evidence of deaf and dumb witnesses. This list has been prepared for all the Districts in the State and the mobile numbers of the Advocates are also given. This R.O.C. was issued pursuant to the direction by this Court on 30.11.2009 in W.P.(MD) No. 5802 of 2006. Apart from the names of the Advocates, the list also contains the addresses of Special Schools for deaf and dumb in Tamil Nadu from where the Courts can requisition the service of teachers for this purpose. As regards the expenses for videographing the evidence of a dumb witness, it should be defrayed from the contingent fund. The Judicial Officer, who is vested with contingent fund in a district, shall make available necessary funds for videographing when a request is made by a Presiding Officer of a Court under his administrative control.

14. *During my informal discussions with some Trial Court Judges about the viability of videographing the evidence of dumb witnesses and videographing the confession statements under*

Section 164, Cr.P.C., they expressed a very genuine apprehension that the videographer, who would have it in his system, may knowingly or unknowingly share it with third parties, in which event, it may even get uploaded in online platforms and portals like You-tube and will be a great injustice and embarrassment to the witness. I gave my anxious consideration to these possibilities and I felt that if an Affidavit of Undertaking is obtained from the videographer to the effect that he will not disclose the proceedings to anybody, will maintain secrecy and will also not retain a copy of the proceedings in any form or transmit or publish the recordings, it can to some extent be a deterrent. Therefore, Trial Courts should obtain an Undertaking Affidavit from the videographer as aforesaid and make it part and parcel of the Court records so that action can be taken against the videographer, if he violates the undertaking.

15. One may note that though the main part of Section 119 of the Indian Evidence Act speaks about witness who is unable to speak, the

proviso that was incorporated in the year 2013 states about a witness who is unable to communicate verbally. As per section 119, if the witness is unable to speak, he may give evidence by writing or by signs. But, such writing must be written and the signs made in open Court and the evidence so given shall be deemed to be oral evidence. Since the language employed in the main part of the Section and in the proviso are different, they do not obviously convey the same meaning. A person can verbally communicate even if he is unable to speak. *The Black's Law dictionary defines* " **Verbal**, adj.(15c) **1**. Of, relating to, or expressed in words". Thus verbal communication in the context of Section 119 is by words in writing. Therefore, the proviso is applicable only to such category of persons who are unable to speak and unable to verbally communicate through writing. Therefore, it follows that it applies only to persons who give evidence by signs.

16. From the above discussion and the decisions cited above, we can sum up the principles relating to examination of witnesses who are unable to speak under Section 119 of the Indian Evidence Act, as follows:

a. The endeavour of the Court must be to record the evidence, by giving questions in writing and seeking answers in writing, if the witness is able to read and write. Only if the witness is unable to read and write, the courts should record the evidence by signs.

b. If the evidence is recorded by signs, the view of the Courts, (prior to amendment) was that the signs must be recorded as such and they should not be any interpretation of the signs. The Hon'ble Apex court, in ***Darshan Singh*** case cited supra held that the interpreter is necessary while recording the evidence of witnesses who give evidence by signs. The legislature thought it fit to make it mandatory for the Courts to take the assistance of an interpreter and videograph such evidence, in line with the pronouncements of the Hon'ble Apex court.

c. The meaning of word "unable to communicate verbally" in the proviso to Section 119 of the Indian Evidence Act means unable to communicate in writing and can communicate only through signs. It is for

those category of persons who are unable to speak and can't communicate in writing that the proviso would apply. As per the proviso the Courts shall take the assistance of the interpreter and such recording of such statement shall be videographed. This is a mandate that the Courts have to strictly comply that. This Court in ***Mariyadoss*** cited supra held that the trial Courts should get an undertaking affidavit from the videographer that he will not disclose the proceedings to anybody and that he will not retain a copy of the proceedings. The relevant portion has been extracted above.

17.In the Instant case the mandatory provisions under Section 119 of the Indian Evidence Act has not been complied by the trial Court. Since the mandatory procedure to record the deposition of P.W.1, victim has not been complied with, it is highly unsafe to rely upon the deposition as recorded by the trial Court. It is needless to mention that the safeguards have been incorporated in the act only to ensure the authenticity of the recording of the statement of such witnesses. The trial Court in its judgement at Paragraph 24 has stated that the injuries were shown by the victim by

gestures. That being so, this Court is unable to appreciate as to how the trial Court could have interpreted the gestures, in the absence of an interpreter or a special educator. P.W.6, the Investigating Officer has stated in her evidence that she took the help of an interpreter namely the Principal of Tiruppur Deaf and Dumb School, to record the statement of the victim. However, for reasons best known to the prosecution that interpreter was not examined by the prosecution.

18. I am of the opinion that, in view of the violation of the mandatory procedure under Section 119 of the Indian Evidence Act and in the absence of any record in the deposition to show as to how and in what manner, the evidence of P.W.1 was recorded P.W.1's deposition cannot be relied upon. That apart, even assuming that the evidence of P.W.1, victim was recorded in a proper manner her evidence does not inspire confidence for the reasons stated earlier. The evidence discloses that P.W.2 had a grudge against the appellant for charging exorbitant fees for the treatment and not giving proper treatment. It is highly unsafe to render finding of guilt on the basis of the evidence on record.

19.For the above said reasons, the judgement of the trial Court deserves to be set aside and the appellant is acquitted and is set at liberty. The bail bond if any executed by the appellant/accused shall stands cancelled.

In the result, this Criminal Appeal is allowed. Consequently, connected miscellaneous petition is closed.

22.09.2022

Index: Yes/No
vsn

To

1.The Magalir Neethimandram (Fast Track Mahila Court) Tiruppur
2.The Sessions Judge, Tiruppur
3.The Public Prosecutor, High Court, Madras.

SUNDER MOHAN.J,

vsn

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