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Crl.A.No.433 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.09.2023

CORAM:

The Honourable MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Crl.A.No.433 of 2018

P.Pathap Kumar Nayak

...Appellant / Single Accused

-Vs-

State represented by Inspector of Police
W-12, All Women Police Station,
Harbour Range, Chennai - 1.
(Crime No.51 of 2014)

...Respondent / Complainant

Prayer:- Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code, 1973, against the judgment of the learned Sessions Judge, Special Court for cases under POCSO Act 2012/Mahila Court, Chennai, in S.C.No.428 of 2014 dated 27.02.2018.

For Appellant : Mr.P.Srinivasan for
Mr.A.Michael Jacob Dennyson

For Respondent : Ms.G.V.Kasthuri
Additional Public Prosecutor



Crl.A.No.433 of 2018

JUDGMENT

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The Appellant is the sole Accused in S.C.No.428 of 2014 dated 27.02.2018 on the file of the learned Sessions Judge, Special Court for cases under POCSO Act 2012/Mahila Court, Chennai.

2. The Trial Court, vide impugned judgment in S.C.No.428 of 2014 dated 27.02.2018, has convicted the Sole Appellant/Accused as follows:-

Conviction under section	Sentence Awarded
6 of Protection of Children from Sexual Offences Act, 2012	To undergo ten years of simple imprisonment and to pay a fine of Rs.10,000/- and in default, to undergo six months simple imprisonment.

The Trial Court ordered the sentences to run concurrently and has also granted set-off under Section 428 Cr.P.C. for the period of incarceration undergone by the Accused during investigation/trial.

3. The challenge in this Appeal is to the above said judgment of the learned Sessions Judge, Special Court for cases under POCSO Act 2012/Mahila Court, Chennai.



WEB COPY 4. Brief facts which are necessary for the disposal of this Criminal

Appeal, are as follows:-

- a) P.W.1 is the wife of a serving Army Jawan who was away in Goa and undergoing training. The Accused is a colleague of the husband of P.W.1, also serving in the Army Signal Corps. Both families are residing in adjoining flats of J.M.R. Raju Enclave near R.B.I. Campus Chennai.
- b) On 28.08.2014 by around 4 p.m., P.W.1, the mother of the victim went for shopping to purchase pooja materials for the Vinayagar Chathurthi celebration. P.W.1, the mother of the victim, accompanied by the wife of the Accused left for shopping. At that time, P.W.2, the victim and her younger brother were allowed to remain in the house of the Accused to play with the daughter of the Accused. After shopping, P.W.1, the mother of P.W.2, along with the wife of the Accused returned home by 6 p.m. After lighting the lamp, the victim, P.W.2 and her younger brother came home and started reading. When P.W.1, the mother of P.W.2 observed her daughter, she was dull and tired. On enquiry by P.W.1 with her daughter, P.W.2, P.W.1, the mother was informed by her daughter



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P.W.2 that the next-door uncle, the Accused is a bad man. He had misbehaved with her. He removed her clothes, dragged her inside his bedroom, and had sexual intercourse with her. Also, he warned her not to inform anyone. If she did, he would lose his job. Therefore, she went inside the bathroom, washed herself, came back, worn her dress, and slept. By the time the mother came to the house, she had informed the mother about the same.

- c) The next day, the mother, P.W.1, went to the Police Station and gave a complaint. Since she did not know any other language than Odiya, she had written down the complaint in Odiya under Ex.P.1. It was translated into Hindi by P.W.3, which was written down in Hindi by P.W.4 under Ex.P.5. P.W.5 had translated the Hindi version of the complaint into Tamil under Ex.P.6. Based on the complaint under Ex.P.6, P.W.13 had registered the complaint and issued copy of the FIR under Ex.P.18 to the Complainant.
- d) P.W.14 proceeded with the investigation. He had examined the victim's mother and recorded her statement. He also recorded the statements of the persons who assisted the Police in translating the complaint under Ex.P.1 into Hindi under Ex.P.5 by P.W.3 and P.W.4, who were also examined. P.W.5 translated the complaint



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from Hindi under Ex.P.5 to Tamil under Ex.P.6. She had arrested the Accused and sent him to medical examination. P.W.7, the Doctor had subjected the victim to medical examination. P.W.12 had examined the victim and issued accident register under Ex.P.17 and forwarded her to P.W.7. P.W.7 had examined the victim and issued Ex.P.11. The Accused was sent to medical examination to P.W.10, who had examined the Accused and issued Ex.P.15.

- e) After recording the statements of the witnesses including Doctor, the P.W.14 laid the final report before the learned VII Metropolitan Magistrate, George Town. The learned VII Metropolitan Magistrate on receiving the final report taking cognizance of the offences, issued copies to the Accused under Section 207 of Cr.P.C and committed the case to the Court of Sessions as the same is triable.
- f) On appearance of the Accused before the learned Sessions Judge, exclusively by Court of Sessions, Special Court for exclusive trial of POCSO Cases, Chennai (learned Sessions Judge, Mahila Court, Chennai), after hearing the argument of the learned Public Prosecutor and the learned Counsel for the Defence framed charges under Section 376 of IPC and Sections 4 and 6 of Protection of Children from Sexual Offences Act, 2012. Subsequently, altered to



Crl.A.No.433 of 2018

offence under Section 6 of Protection of Children from Sexual
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- g) The Accused denied charges.
- h) Therefore, trial was ordered by the learned Sessions Judge, Mahila Court, Chennai.
- i) To prove the charges, the prosecution had examined witnesses P.W.1 to P.W.14 and marked Ex.P.1 to Ex.P.20 and M.O-1 to M.O-5. On the defence side, the Accused himself was examined as D.W.1.
- j) On appreciation of evidence, the learned Sessions Judge, Special Court for Cases under POCSO Act 2012, Chennai (learned Sessions Judge, Mahila Court, Chennai) by judgment dated 27.02.2018, convicted the Accused to undergo sentence of 10 years of simple imprisonment with a fine of Rs.10,000/-. Aggrieved by the same, the Appeal is filed.

5. Learned Counsel for the Appellant submitted that the Appellant had been convicted by the learned Sessions Judge, Special Court for cases under POCSO Act 2012/Mahila Court, Chennai, in S.C.No.428 of 2014 dated 27.02.2018 for the offence under Section 6 of the Protection of



Crl.A.No.433 of 2018

Children from Sexual Offences Act, 2012, thereby sentencing him to

undergo sentence of 10 years of simple imprisonment with a fine of Rs.10,000/- in default to undergo six months of simple imprisonment.

6. Learned Counsel for the Appellant further submitted that the Appellant had not been granted bail in the Appeal. He is still in prison. He has already served five years in prison.

7. Therefore, this Appeal has been filed seeking to set aside the judgment of conviction recorded by the learned Sessions Judge, Special Court for cases under POCSO Act 2012/Mahila Court, Chennai, in S.C.No.428 of 2014 dated 27.02.2018.

8. Learned Counsel for the Appellant submitted that the victim and the Appellant are residents of the Army Flat of J.M.R. Raju Enclave near R.B.I. campus, Chennai.

9. As per the prosecution case, on 28.08.2014, P.W.1, the mother of the victim, had accompanied the wife of the Accused to purchase pooja items regarding the celebration of Vinayagar Chathurthi. She left the house



Crl.A.No.433 of 2018

by 4 p.m. The victim, P.W.2, along with her younger brother, who had been instructed by their mother, P.W.1, to play in the park near their flat in the army quarters behind the R.B.I. While so, the mother of the victim, P.W.1, and the wife of the Accused both returned home after purchase by 6 p.m.

10. P.W.1 is the mother of P.W.2, the victim. The victim's family and the family of the Accused arrived from Odisha State. P.W.1, the mother of the victim, is not familiar to speak in Hindi. She knows her mother tongue, Odiya only. She can convey it in English with little effort. The complaint under Ex.P.1 was written by her in Odiya. She had explained it to P.W.3-Laxman Munda. P.W.3 had translated it in Hindi. P.W.4-K.K.Sharma had written down the same in Hindi. P.W.5-Jeyaseelan had translated from Hindi to Tamil. Ex.P.5 is the translation of the complaint under Ex.P1 in Hindi. Ex.P.6 is the complaint translated in Tamil based on which the FIR was registered under Ex.P.18 for the offence under Section 376 of IPC and Section 4 of Protection of Children from Sexual Offences Act. Subsequently, altered to offence under Section 6 of Protection of Children from Sexual Offences Act.



11. It is the submission of the learned Counsel for the Appellant that the Accused in this case is not familiar in English. Due to the language problem, he was arrayed as Accused. The alleged occurrence had not at all taken place. Only to wreck vengeance the mother of the victim had given a complaint under Ex.P.1, which had resulted in the Accused suffering conviction.

12. Learned Counsel for the Appellant submitted that the version as depicted by P.W.1 has contradictions as depicted by the victim, P.W.2 also. Further, as per the case of the prosecution, the version as stated by P.W.2, victim and her mother, P.W.1, is not supported with medical evidence through P.W.7, Doctor, who had examined the victim on the day when FIR was registered under Ex.P.18.

13. Learned Counsel for the Appellant invited the attention of this Court to Ex.P.11, the certificate of examination for sexual offences in respect of P.W.2 issued by P.W.7, Doctor, on the next date of the alleged occurrence. The version of the victim, P.W.2, is not corroborated by the medical evidence. It clearly states that there is no injury on the body of the P.W.2, the victim, particularly around her genital area.



14. Also, the learned Counsel for the Appellant invited the attention of this Court to the version of P.W.1, who claimed that the Police Officers had visited them on the next day after registration of the complaint. The FIR was registered under Ex.P18. The Investigation Officer had requested the dress worn by the victim at the time of the alleged occurrence, which was handed over by her to the Police Officers, whereas the Investigation Officer, P.W.14, claims that he had not seized any dress worn by the victim at the time of the occurrence.

15. Further, the learned Counsel for the Appellant invited the attention of this Court to the forensic report regarding the swab collected by the P.W.7, Doctor at the time of examination of the child victim the next day after the alleged occurrence. In Ex.P12, which clearly states as follows:

“Item 1 : A test tube containing a cotton swab.
Item 2 : A microscope slide with a poor whitish smear.
REPORT: Did not detect semen on item 1.
Did not detect spermatozoa or Gonococci on the smear of the slide in item 2.
Note : The above items were used up during examination.”



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16. It is the contention of the learned Counsel for the Appellant that the Accused himself had let in evidence as D.W.1 in which he had narrated the motive for the registration of the case. On the alleged date of occurrence, the uncle of the Accused visited his house with regard to the celebration of Vinayagar Chathurthi. On his return, P.W.1, the mother of the victim, was standing outside her flat. She invited the Accused inside her house and she requested for an obligation, which was refused by the Accused, which was considered as immoral act by him. Therefore, she shouted at him in Odiya. The nearby residents in the flat objected to the Accused and P.W.1 shouting at each other in Odiya, and thereby spoiling the common peaceful atmosphere in the army flats. They advised both parties to resolve the dispute in the Police Station. The Accused had gone to the Police Station the next day morning. He was unable to communicate in English. At that time, the P.W.1 had also gone to the Police Station. Her complaint was translated by those accompanying her. The very same persons did not come to the rescue of the Accused. The Accused requested the Police Officers to find someone else to translate for him in Hindi. He is able to communicate in Hindi, which was refused by the Inspector of Police. Also, the mobile phone of the Accused was snatched by the Inspector of Police. Therefore, he could not seek help from his colleagues



Crl.A.No.433 of 2018

who are familiar with the local language and who are familiar with English and who communicate with the Police Officers. On the same date after receipt of the complaint under Ex.P.1 by the Inspector of Police, he was arrested. He had let in evidence as D.W.1 narrating the entire sequence of events.

17. Learned Counsel for the Appellant invited the attention of this Court to the discussion of the materials available before the Court by the learned Sessions Judge, Special Court for cases under POCSO Act 2012/Mahila Court, Chennai, wherein the learned Trial Judge had discussed the evidence available before the Court through P.W.1 to P.W.14 and Ex.P.1 to Ex.P.20, M.O-1 to M.O-5 and had rejected D.W.1's evidence, stating if what had been stated by the Accused as D.W.1 had been true what prevented him from putting such suggestions to P.W.1 during her evidence as witness before the Court. Therefore, the learned Trial Judge rejected the evidence of the Accused as D.W.1 and on the basis of the evidence of the victim, P.W.2 had convicted the Accused for the offence under Section 6 of the the Protection of Children from Sexual Offences Act. Therefore, the learned Counsel for the Appellant seeks to set aside the judgment of conviction and sentence of imprisonment and fine



imposed by the learned Sessions Judge, Special Court for cases under POC SO Act 2012/Mahila Court, Chennai, in S.C.No.428 of 2014 dated 27.02.2018.

18. The learned Counsel for the Appellant relied on the ruling of the Hon'ble High Court of Madras in the case of ***Chellappan Vs. State represented by the Inspector of Police, Gandarvakottai Police Station, Pudukottai District***, wherein this Court held as follows:

“18. It is useful to refer the the decision cited by the learned counsel for the appellant, in [Radhu V. State of M.P.](#)(cited supra), wherein at paragraph 6 it is held as follows:-

?6. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse of rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, wrist, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The Courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get ride of financial liability. Whether there was rape or not would depend ultimately on the fact and circumstances of each case.?”



Crl.A.No.433 of 2018

19. Learned Additional Public Prosecutor by way of reply, vehemently objected to the line of argument to the learned Counsel for the Appellant. The learned Additional Public Prosecutor submitted that the evidence of the victim alone is sufficient to convict the Accused. The evidence of P.W.2 is corroborated by the evidence of her mother, P.W.1. Even if there is lack of corroborative materials as per the provisions of the Protection of Children from Sexual Offences Act, it casts a burden on the Court to believe or presume the version of the victim, P.W.2.

20. The learned Additional Public Prosecutor submitted that the theory of language problem is not true. P.W.1 had given the complaint in Odiya, which was translated by P.W.3 and written down by P.W.4, and P.W.5 translated from Hindi to Tamil. The same had been corroborated through the evidence of the witnesses P.W.1 to P.W.14 and the materials placed by the prosecution under Exs.P.1 to P.20 and M.O-1 to M.O-5, which are as follows:

M.O-1	-	Blue colour half pant
M.O-2	-	Red & blue colour jatti-1
M.O-3	-	White colour frock
M.O-4	-	Green colour Baniyan
M.O-5	-	Panties-1



Crl.A.No.433 of 2018

21. Further, the learned Additional Public Prosecutor submitted that even though Ex.P.12-Chemical Analysis Report from the Forensic Department is corroborative, it is to be noted that the victim herself had stated that after the occurrence, she washed her private part. Therefore, nothing is available. At the same time, the victim, aged about 12 years from the date of occurrence, had narrated the sexual conduct of the Accused.

22. Further, the learned Additional Public Prosecutor invited the attention of this Court to Ex.P.2, the birth certificate of P.W.2 furnished by her mother, P.W.1, in which her date of birth is given as on the date of the alleged occurrence, she was 11 years old.

23. Also, the learned Additional Public Prosecutor invited the attention of this Court to the statement recorded from the victim at the initial stage of the investigation. Therefore, the Court of the learned Metropolitan Magistrate, which is a mandatory provision in which the statement is recorded under Section 164 of Cr.P.C. finds that the evidence of P.W.2 itself is sufficient to convict the Accused. Therefore, the judgment of the learned Sessions Judge, Special Court for cases under the



Crl.A.No.433 of 2018

Protection of Children from Sexual Offences Act 2012/Mahila Court, Chennai, in S.C.No.428 of 2014 dated 27.02.2018, is a well-reasoned judgment that does not need any interference by this Court. The Appeal is to be dismissed as having no merits and the judgment of the learned Trial Judge is to be confirmed.

24. Point for consideration:

Whether the judgment of the learned Sessions Judge, Special Court for cases under POCSO Act 2012/Mahila Court, Chennai, in S.C.No.428 of 2014 dated 27.02.2018 is to be set aside as perverse?

25. Heard the learned Counsel for the Appellant and the learned Additional Public Prosecutor for the State.

26. Perused the evidence of witnesses P.W.1 to P.W.14, Ex.P.1 to Ex.P.20, M.O-1 to M.O-5 and the evidence of the defence witness, the Accused as defence witness as D.W.1.

27. On perusal of the evidence of P.W.1 and P.W.2 and Ex.P.6, Ex.P.18 and Ex.P.11 issued by P.W.7, the alleged occurrence claimed by the victim is not corroborated with the medical evidence of Doctor, P.W.7.



Regarding the presumption, when there is lack of materials, the presumption will not come to the rescue of the prosecution. Therefore, the argument of the learned Additional Public Prosecutor is rejected and the argument of the learned Counsel for the Appellant is accepted in the light of Ex.P.11.

28. The point for consideration is answered in favour of the Appellant and against the prosecution case.

29. (i) Section 3 of Protection of Children from Sexual Offences

Act, 2012 reads as follows:

“3. Penetrative sexual assault

A person is said to commit "penetrative sexual assault" if--

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”



(ii)Section 4 of Protection of Children from Sexual Offences Act,

2012 reads as follows:

“4.Punishment for penetrative sexual assault.

1[(1)] Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than 2[ten years] but which may extend to imprisonment for life, and shall also be liable to fine.

3[(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.]”

(ii)Section 5 of Protection of Children from Sexual Offences Act,

2012 reads as follows:

“5.Aggravated penetrative sexual assault.

(b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child--

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the forces or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where the said person is known or identified as a member of the security or armed forces; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or”

(iii)Section 6 of Protection of Children from Sexual Offences



Act, 2012 reads as follows:

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“6. Punishment for aggravated penetrative sexual assault

1/6. Punishment for aggravated penetrative sexual assault.-- (1) *Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.*

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.]”

30. As per the contents of the complaint under Ex.P.6 (translation of Ex.P.1) the mother of the victim, P.W.1, along with the wife of the Accused had left the children in the house of the Accused. The mother of the victim returned home after shopping by 6 p.m. P.W.2, victim, informed her mother, P.W.1, that the Accused is not a good person. On enquiry by P.W.1, she came to know that the Accused had removed the clothes of P.W.2 when she was in the house of the Accused when the wife of the Accused and the mother of P.W.2, both had left the children in the care of the Accused. The father of the victim was away in Goa for training in the Army. The incident is alleged to have taken place in the absence of the father of P.W.2. P.W.1 had informed her father on the phone that he had contacted his Superior Officer in Chennai the next day morning. As per the



Crl.A.No.433 of 2018

evidence of P.W.1, the mother of the victim, the children of P.W.1, P.W.2, victim, as well as her younger brother, were playing along with the daughter of the Accused, aged about 4 years, in the park nearby their residential complex behind the R.B.I. compound. On 28.08.2014, she had left the children by 4 p.m. She left for shopping along with the wife of the Accused. She returned after shopping by 6 p.m. in the evening hours. After lighting the lamp, the children came back to study. At that time, the victim, P.W.2, was tired. On enquiry by P.W.1, mother, P.W.2 narrated the incident, weeping that the Accused had took her inside his house and switched on the TV. The daughter of the Accused, aged 4 years, slept while watching TV. The Accused had given a mobile to the son of P.W.1 and asked him to play outside. He dragged the victim, P.W.2, into his bedroom removed her clothes and embraced her. He forcefully removed her dress. Even though she protested he had intercourse with her. She kicked him, she protested and she cried. The Accused also prayed to the victim not to disclose the incident to anyone. If she did, he may lose his job.

31. It is the contention of the learned Counsel for the Appellant that the version as stated by P.W.1 in the complaint under Ex.P.1 has been



translated under Ex.P.6. It is different from the version stated by her in her deposition, as stated before the Court as P.W.1.

32. Learned Counsel for the Appellant invited the attention of this Court to the evidence of the victim, P.W.2, which reads as follows:

“I am residing in K.M.R. Raju Enclave, Near R.B.I., (Quarters No.86, Chennai. I am residing with my parents and my brother. My father is working as Clerk in Signal Company, Chennai Port Army. P.W.1 is my mother. I know the person Prathap Kumar Naik for 8 months. Today he is present in this Court. He is also residing in the K.M.R. Raju Enclave, in our place. On 28.08.2014 at about 4.00 p.m. myself, my brother and Accused daughter, 4 years old, were playing opposite to our Quarters. My mother and wife of the Accused/auntly went for shopping to market. Thereafter, the Accused called all three of us to watch T.V. at his house and we all went there. When we were watching T.V., 4 years child, i.e. the uncle's daughter slept. Immediately, Accused switched off the T.V. He gave a Mobile phone to my brother and sent him out to play with the mobile. I also went behind him and that time, the Accused locked the door. The Accused has spoken vulgar words and abusive language. He has taken me to the bed and kept me on the bed. When I was shouting, he closed my mouth and he removed my pant and panties. He laid himself on me and he inserted his urine part in my urine part. I kicked him and escaped from him. I went to the bathroom and at that time I found blood in my private part and it was bleeding. At that time, the Accused said that I should not inform this to my parents, otherwise, he will loose his job and will put in prison. After that, auntly came there. I went to my house. When I was studying in my



house, I felt chest pain. The chest pain is because of the Accused pressed my breast. When I informed this to my mother, after that my mother and one aunty went to Police Station. Two women Police enquired me at my house. Then the Police took me to the Hospital for check-up and I was in the hospital for three days. Thereafter, my mother and father took me to the Magistrate. The Magistrate enquired me about the occurrence. I gave the statement in Hindi. One aunty asked me in Hindi and Magistrate recorded statement. In the presence of Magistrate, I gave the statement. The signature found in the statement was signed by me. The statement given before the Magistrate is Ex.P3. The statement was recorded in English.

Deposition of witness for P.W.2:

I have stated in the chief examination that my pants were removed by the Accused. Police recovered the said pants from my mother. I do not remember how many Doctors examined me. I do not remember whether any Doctor gave counselling to me along with my mother. The Doctor did not ask me to come for check-up or review.”

33.(a)Evidence of P.W.3-Laxman Munda:

P.W.3 was examined regarding the translation of the complaint under Ex.P.1 in Odiya into Hindi. In the course of his evidence, he had stated that he was directed by his Superior Officer to assist the Police in translating the complaint in Odiya into Hindi. Accordingly, he had translated the contents of Ex.P.1 into Hindi as Ex.P4, which was written by P.W.4 under Ex.P.5.



(b)Evidence of P.W.4-K.K.Sharma:

P.W.4 had deposed in his evidence that he was not aware of any incident relating to the case. But he had translated the complaint under Ex.P.1 into Hindi and written it down in Hindi as Ex.P.5 on the basis of the translation by P.W.3 under Ex.P.1 into Hindi from Odiya. What was translated by P.W.3 from Odiya to Hindi was written down into Hindi by P.W.4.

(c)Evidence of P.W.5-Jeyaseelan:

P.W.5 stated had in his deposition that he had translated the Hindi version as written down by P.W.4 into Tamil under Ex.P.6. In his cross-examination, he had stated that, based on his Superior Officer's direction, he had only gone to the police station to assist the police officials in interpreting the complaint.

34. P.W.3, P.W.4 and P.W.5 are Personnel serving in the Indian Army who are staying in the very same unit where the Accused is also serving Army Personnel. The husband of P.W.1 and father of P.W.2 is also Army serving personnel. The Accused is not the father of the victim. He is an acquaintance of the family of P.W.1, who is residing in the adjacent Army flat in the J.M.R. Raju Enclave behind the R.B.I.



Crl.A.No.433 of 2018

35. On perusal of the deposition of P.W.2 under Ex.P11, which reads

as follows:

*“On examination patient conscious oriented
No external injuries noted on the body
Examination of breast does not show any abrasion or
contusion or bite marks
Examination of lips does not show abrasion or bite
marks
Abdomen soft, not tender
Public hair only few. Not matted
Examination of external genitalia – no contusion or
abrasion or laceration noted at the time of
examination. Hymen intact and admits tip of finger.
No abrasion or contusion seen. Fluid whit discharge
present
(1)swab/perineal
(2)slide taken and sent for forensic science
department, Government of Tamil Nadu
Reported as did not detect semen on swab(1)
Did not detect spermatozoa or gonococci on the
smear of the slide in item(2)”*

36. The evidence of P.W.7, Doctor, who had issued Ex.P.11, in which he stated that there is no mark of sexual assault on the body of the victim, P.W.2, which reads as follows:

“அப்போது ஜோதிர்மய்நாய்க ஆண்டி என்னிடம் அவர்கள் வீட்டில் ஒரு சிண்ண பெண் குழந்தை இருக்கிறது என்றும் அதனுடன் அவர்கள் வீட்டில் இருக்குமாறு என்னை கேட்டுக்கொண்டார்கள். அவர்கள் கடைக்கு சென்ற பிறகு அந்த குழந்தையை அந்த பிரதிப்துமார் அங்கிள் குழந்தையை துங்க வைத்துவிட்டார். அதன்பிறகு என்னுடைய தம்பியிடம் அவருடைய மொபைல் போனை கொடுத்து வெளியே சென்று



CrI.A.No.433 of 2018

வினையாடுமாறு கூறி அனுப்பிவிட்டார். அதன்பிறகு வெளியே போகிறேன் என்று கூறினேன் அதற்கு அந்த அங்கிள் நீ வெளியே போகக்கூடாது இங்கே தான் இருக்கவேண்டும் என்று கூறிவிட்டார். பின் அந்த அங்கிள் அந்தகுழந்தையுடன் தூங்குமாறு சொன்னார் அம்மா வந்தவுடன் போகலாம் என்று கூறினார். அதன்பிறகு என் அருகில் வந்து படுத்தக்கொண்டார். நான் எழுந்து அந்த குழந்தைக்கு அந்த பக்கம் போய் படுத்துக்கொண்டேன். மறுபடியும் அந்த அங்கிள் அங்கும் வந்து என் அருகில் படுத்துக்கொண்டு என்னை கட்டிப்பிடித்துக்கொண்டார். பின் கழுத்து மற்றும் மார்பு பகுதியில் கையை வைத்தார். என்னுடைய ஸ்கர்டை(skirt) கழட்டிவிட்டு என் மேல் படுத்துக்கொண்டார் பின் டியூப்(tube) மாதிரி இருந்ததை எடுத்து பிறப்பு உறுப்பில் வைத்தார் அது எனக்கு வலி எடுத்தது அதை நான் தள்ளிவிட்டு விட்டேன். பின் நான் பாத்ரூம் சென்று வாசிபண்ணிவிட்டு டிரஸ் சேஞ்ஜ் செய்துவிட்டு மீண்டும் அந்த குழந்தையின் பக்கத்தில் சென்று படுத்துக்கொண்டேன் சிறிதுநேரம் கழித்து கதவு தட்டும் சத்தம் கேட்டது அந்த அங்கிள் சென்று கதவை திறந்தார். அப்போது எனது தம்பி வந்தான் எனது தம்பியை உள்ளே அழைத்துக்கொண்டு மீண்டும் பூட்டிவிட்டார். எனதுதம்பியையும் குழந்தையின் அருகே படுக்க வைத்தார் மீண்டும் அந்த அங்கிள் என் அருகே வந்து படுத்துக்கொண்டார் சிறிதுநேரம் கழித்து ஜோதிமயி ஆண்டி கதவை தட்டினார் அப்போது நான் வெளியே சென்றுவிட்டேன். பின் அன்று இரவு என் அம்மாவிடம் நடந்ததை கூறினேன்.”

37. As per the submission of the learned Additional Public Prosecutor, the statement of the victim recorded under Section 164 of Cr.P.C. before the learned Judicial Magistrate or learned Metropolitan Magistrate inspires confidence of the Investigation Officer to proceed with the investigation. Further, the evidence of the victim before the Court is



Crl.A.No.433 of 2018

presumed to be true under Section 29 of the Protection of Children from Sexual Offences Act.

38. Section 29 of the Protection of Children from Sexual Offences Act, 2012, reads as follows:

“Presumption as to certain offences:

Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

39. If the argument of the learned Additional Public Prosecutor is to be accepted, this is a case where the Court has to mechanically convict the Accused based on the evidence of P.W.1 and P.W.2. The child witness, P.W.2, states that she had been assaulted sexually by her neighbour, who is a colleague of her father, who is an acquaintance of the family. If the version of the child witness, P.W.2, is to be believed, when her mother went shopping and the children left at home, the Accused had invited the children to remain in his house to play with his daughter, aged four years. While so, he had switched on the TV and all were watching the TV, the daughter of the Accused slept, and the brother of P.W.2 was given a mobile belonging to the Accused and sent out. He had dragged the victim



into his bedroom removed her dress and had sexual intercourse, whereupon there was blood in her vagina and also a liquid on her. Therefore, she washed it in the bathroom of the attached bedroom of the Accused, put on her clothes, and slept on the cot where the daughter of the Accused was sleeping.

40. This is pointed out by the learned Counsel for the Appellant as not a normal behaviour of a child who feels ashamed of the conduct of the Accused, feels insecure and attempts to move away from the place where such occurrence took place. The child victim says that she slept on the cot. The version of P.W.2 in her evidence cannot be believed in the light of P.W.1's evidence, the evidence of the mother that by the time she returned the children where at home they went to study, the appearance of the victim was found dull. Therefore, she enquired her. On her enquiry, P.W.2 started weeping, stating that the neighbour uncle is not a good man. On her further enquiry, she had narrated the entire incident.

41. Learned Counsel for the Appellant pointed out that if the version of P.W.2, victim is to be believed, there was insertion of penis in her vagina where the victim bled. She had washed her vagina of the liquid that



was found on her and also blood.

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42. If that part of the evidence of the victim is to be considered by the Court, there is no proof of the same. If there had been blood in her vagina, then her hymen would have been torn. P.W.7, Doctor who had examined the victim and issued Ex.P11 certificate of sexual offence examination in respect of the victim clearly stated in her evidence that no injuries were found either on the breast or any part of the body and no teeth marks were also found. The hymen is intact. Therefore, the allegation of aggravated sexual assault as per Section 4 of the Protection of Children from Sexual Offences Act is not at all attracted. Under those circumstances, the evidence of the Accused as D.W.1, gives preponderance that language problem resulted in registration of a complaint under the Protection of Children from Sexual Offences Act by the wife of his colleague, P.W.1, which is found justified.

43. It is not the case of the victim that the Accused misbehaved with her. It is a clear case of P.W.1 that blood was coming out of the vagina. She washed it. If that version is taken, it is to be supported with medical evidence. The child victim, P.W.2, was examined by the Doctor on the



Crl.A.No.433 of 2018

next day of the actual occurrence. Therefore, symptoms of the aggravated sexual assault will be visible when examined by the Doctor. The evidence of P.W.7, Doctor, regarding Ex.P11 makes it clear that there is no injury mark on the body of the victim. Therefore, the version of P.W.2 cannot be taken for granted. The burden shifts on the Accused. The Accused had rebutted the evidence and narrated the facts, which resulted in filing a complaint against him.

44. In the light of the ruling cited by the learned Counsel for the Appellant in the case of ***Chellappan Vs. State Represented by the Inspector of Police, Gandarvakottai Police Station, Pudukottai District***, which is also a case of sexual assault on a victim aged about 11 years, the learned Judge of this Court had acquitted the Accused on the ground that the aggravated sexual assault had not been corroborated with medical evidence.

45. Therefore, it is a clear case that the prosecution had not proved the charges through medical evidence. Therefore, the presumption under Section 29 of the Protection of Children from Sexual Offences Act, if mechanically applied in these circumstances will result in miscarriage of



Crl.A.No.433 of 2018

justice. The Accused is an Army Jawan. Due to this conviction, he was sentenced to 10 years of simple imprisonment. He is also likely to lose his job. The evidence before the Court is not proved. The evidence does not prove aggravated sex, insertion by the Accused, whereas the victim and her mother state that there was insertion resulting in bleeding from the vagina. That allegation/charge is not supported with medical evidence through P.W.7 in which it is stated that hymen is intact. Therefore, in the light of the above circumstances, the judgment of conviction recorded by the learned Sessions Judge, Mahila Court, Chennai, has to be set aside. The judgment of the learned Sessions Judge, Special Court for cases under POCSO Act 2012/Mahila Court, Chennai, in S.C.No.428 of 2014 dated 27.02.2018 is to be set aside as perverse.

46. In view of the above discussion, the point for consideration is answered in favour of the Accused/Appellant and against the prosecution.

47. In the result, the Criminal Appeal stands allowed. The judgment of conviction recorded by the learned Sessions Judge, Special Court for cases under POCSO Act 2012/Mahila Court, Chennai, in S.C.No.428 of 2014 dated 27.02.2018 is set aside. The



Crl.A.No.433 of 2018

Accused/Appellant is acquitted of the charge under Section 6 of the Protection of Children from Sexual Offences Act, 2012. The Accused is to be released from prison unless he is required in connection with any other case, the fine already paid deposited by the Accused/Appellant shall be refunded to him.

26.09.2023

cda

Index : Yes/No

Speaking/Non-speaking order

To

- 1.The Sessions Judge,
Special Court for cases under POCSO Act 2012/
Mahila Court, Chennai
- 2.The Inspector of Police
W-12, All Women Police Station,
Harbour Range, Chennai – 1.
- 3.The Superintendent,
Central Prison,
Puzhal, Chennai.
- 4.The Public Prosecutor,
High Court, Madras.
- 5.The Section Officer, VR Records,
High Court, Chennai.



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CrI.A.No.433 of 2018

SATHI KUMAR SUKUMARA KURUP, J.,

cda

CrI.A.No.433 of 2018

26.09.2023