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CRL.A.NO.355 OF 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 14 / 06 / 2023

JUDGMENT PRONOUNCED ON: 03 / 07 / 2023

CORAM:

**THE HON'BLE MR.JUSTICE M.SUNDAR
AND
THE HON'BLE MR.JUSTICE R.SAKTHIVEL**

**CRL.A.NO.355 OF 2020
AND
CRL.M.P.NO.5497 OF 2023
IN
CRL.A.NO.355 OF 2020**

Manickam

... Appellant

Versus

The State
Rep. By The Inspector of Police
Anthiyur Circle,
Erode District.
(Crime No.249/2014)

... Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, against the judgment dated 13.03.2015 passed in Special S.C.No.7 of 2014 on the file of Magalir Neethi Mandram (Fast Track Mahila Court) Erode and acquit the appellant / accused from the offence charged.



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For Appellant : Mr.S.Pushpakaran
For Respondent : Mr.R.Muniyapparaj
Additional Public Prosecutor
Assisted by Mr.M.Sylvester John

JUDGMENT

R.SAKTHIVEL, J.

The appellant is the sole accused in Spl.S.C.No.7 of 2014 on the file of the learned District Judge, Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode. He stood charged for offences under Section 370 (4) of the Indian Penal Code (45 of 1860) [hereinafter referred to as “IPC” for the sake of brevity]. and Section 4 read with 18 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “POCSO Act” for the sake of brevity). By judgment dated 13.03.2015, the trial Court convicted him under all the charges and sentenced him to undergo Imprisonment for Life with a fine of Rs.100/-, in default of payment of fine, further undergo six months simple imprisonment under Section 370(4) of IPC; and to undergo seven years rigorous imprisonment with a fine of Rs.100/-, in default of payment of fine, further undergo six months simple



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imprisonment under Section 4 read with 18 of POCSO Act. Challenging the said conviction and sentence, the appellant has preferred this Appeal before this Court.

2. The case of the prosecution in brief is as follows:

2.1. P.W.2 is the victim in this case. At the time of occurrence, she was studying 8th Standard. PW1 is the mother of the victim. The accused/appellant and PW1 along with her family are residing in the same street. The case of the prosecution is that on 09.09.2014 at about 08.30 pm, the victim was returning by walk from the house of her maternal aunt (Mother's sister) which is in the same locality. The accused/appellant had encountered and offered her that he will drop her at her house and asked her to get on his bicycle and took her along with him to the house of one XX (Identity hidden). Then the accused asked the victim to come inside the house (Aasaram) of XX. Then, with an intention to have sexual intercourse with her, the accused tried to disrobe the victim and thereby, committed the offences under Section 370 (4) of IPC and Section 4 read with 18 of POCSO Act. Thereafter, PW1 -

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mother of the victim went to Anthiyur Police Station and preferred a complaint on 10.09.2014 at 07.00 a.m. PW12 the then Inspector of Police on receipt of the said complaint, registered a case in Crime No.249 of 2014 initially under Section 7 read with 8 of POCSO Act and after investigation, it was altered into Section 370 (4) of IPC and Section 4 read with 18 of POCSO Act and filed charge sheet accordingly on 19.09.2014.

2.2. The trial court framed charges under section 370 (4) of IPC and section 4 read with 18 of the POCSO Act. Since the appellant accused denied the charges framed against him, trial was ordered. With a view to prove the charges, the Prosecution has examined PW1 to PW12 and Ex.P1 to Ex.P9 were marked. No material objects were marked on either side. No defense witnesses and documents were adduced on the side of the accused. After hearing both sides, the trial court found that the accused is guilty under section 370 (4) of IPC and Section 4 read with 18 of POCSO Act and sentenced him to undergo imprisonment for life with a fine of Rs.100/-, in default of payment of fine, further undergo six months simple imprisonment under Section 370 (4) IPC; and to undergo seven years rigorous imprisonment



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with a fine of Rs.100/-, in default of payment of fine, further undergo six months simple imprisonment under Section 4 read with 18 of POCSO Act.

3. Aggrieved by the conviction and sentence awarded by the trial court, the accused has filed this criminal appeal.

4. The learned counsel for the appellant / accused argued that the trial court has not properly appreciated the evidences available on record, that the accused sustained head injury, that the alleged bicycle was not recovered, that as per the prosecution the alleged occurrence took place in XX's house but the said XX was not examined and cited as a witness in this case and that the trial court failed to appreciate the fact that appellant accused was doing some service to the age-old people like XX; that the appellant accused did not take the child to a remote or secluded or isolated place and that there is no evidence or material for the alleged offence under Section 370 (4) of IPC. He further argued that the trial court failed to appreciate the evidence of PW5 - Doctor and the fact that the appellant / accused is languishing behind the bars for more than 8 years. Accordingly, he prays to set aside the conviction and

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sentence awarded by the trial court and acquit the appellant / accused from all the charges.

5. Per contra, the learned Additional Public Prosecutor has argued that there is no reason to disbelieve the evidence of the victim (PW2), victim's mother (PW1) and the evidence of PW6 and PW7 since their testimonies are quite natural. Hence there is no reason to interfere with the trial court's judgment. Accordingly he prays to dismiss the Criminal appeal.

6. This Court considered the submissions made on either side and perused the evidences and records.

7. The date of alleged occurrence is 09.09.2014. At the time of alleged occurrence, the victim was studying 8th standard and her date of birth is 22.05.2002. Hence, it is clear that on the date of the alleged occurrence, the victim girl had completed 12 years of age. The deposition of the Headmaster (PW3), Age Certificate (Ex.P2) and Birth Certificate (Ex.P4) prove the same. The victim was examined as PW2. She deposed that she knew the appellant /



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accused, that on 09.09.2014 (Thursday) in the evening after school hours, she went to her aunt's house (victim's mother's sister's house) situated near 'fish shop bridge', that while she was returning from her aunt house to her house at 08.00 pm, the appellant / accused came in a bicycle and offered to drop her at her home as he was going in the same route, that she got on the bicycle, that the appellant / accused stopped the bicycle in front of XX's house (age old deaf and dumb person), that she went inside the house as the appellant / accused called her to the Hall, that at that time the appellant / accused attempted to disrobe her, that she managed to escape and run outside the house during which the accused got a head injury, that she screamed and called the villagers for help, that PW6 and PW7 came there and enquired about what happened, that she narrated the incident of the accused disrobing her, that then she went to her house and narrated the incident to her mother and that the next morning the victim went to police station and preferred a complaint in this regard.

8. PW1 in her cross examination, deposed that the accused

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usually goes to XX's house and buy him necessary food items. On the date of alleged occurrence, the accused as usual bought food for XX. Further she deposed that the appellant / accused house comes only after XX's house.

9. PW1 who is the mother of the victim deposed along the same line of the victim. In addition, PW1 deposed that she knows the appellant accused for the past 5 years and that they reside 1 km apart and through her Ex.P1 complaint was marked. Through the evidence of PW2, it can be seen that the PW1 and the accused are residing in the same locality for the past 5 years, that XX is an age old and bed ridden person and that the accused is helping XX by buying him food and medicines.

10. PW3 is a Headmaster in the school where victim girl was studying. She deposed about the date of birth of the victim. PW4 recorded the victim statement under Section 164 of the Code of Criminal Procedure, 1973 [hereinafterwards referred to as Cr.P.C. for the sake of brevity] .

11. PW6 is a person residing in the same locality who is known



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to both the victim and the accused. She deposed that on 09.09.2014 at about 8.30 pm, herself along with PW7 and others were fetching water from the public tap when the accused came along with the victim girl and entered into the XX's house, that after a while, the victim came crying out of XX's house that when herself and PW7 asked the victim what happened, the victim told that the accused tried to remove her clothes and tried to push her down, that she managed to escape and that then the victim proceeded to her house weeping. They further deposed that, in the meantime, the accused came out of the house as if he is highly drunk and went away in his bicycle. PW7 deposed along the same line of PW6.

12. PW8 is the aunt of the victim girl (sister of PW2). She deposed that on 09.09.2014 in the evening at 05.30 pm the victim came to her house for playing after which she returned to her house at 08.30 pm. To this extent alone her evidence is believable and admissible as she did not witness the incident.

13. PW10 is residing in the same locality. He is working as a



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Headmaster in a Primary School. He was cleaning his bike in his house at the time of the alleged occurrence. He further deposed along the same line of PW6 and PW7.

14. PW11 who is the Sub-Inspector of Police deposed that on 10.09.2014, PW1 appeared in person at the police station and preferred a complaint based on which he registered a case in Crime No.249 of 2014 under Section 7 read with 8 of POCSO Act. He marked the FIR as Ex.P7.

15. PW12 is the Investigation Officer deposed that after receiving the case file, he rushed to the place of alleged occurrence on 10.09.2014 at 08.00 am and prepared a rough sketch (Ex.P8) and observation mahazar (Ex.P6) and examined the witnesses. On perusal of the rough sketch (Ex.P8), it is seen that PW6's house is situated behind XX's house, that the PW7's house is situated 50 feet away from the place of occurrence and that the public tap is situated within 50 feet of the scene of occurrence. Hence, there is no reason to reject the presence of PW6 and PW7 at the time of alleged occurrence near the place of alleged occurrence. Further, their evidences are

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natural and probable one. Further, Investigation Officer (PW12) deposed that on 10.09.2014 at 11.30 am he arrested the accused. After examining the Doctor and other witnesses he filed a charge sheet u/s 370 (4) of IPC and Section 4 read with 18 of POCSO Act. This Court does not find any irregularity or lapse on the part of the investigation.

16. PW5, the Doctor who examined the victim girl medically deposed that on 10.09.2014 at 02.26 pm she examined the victim girl. At the time of examination, the victim was conscious, blood pressure level and pulses were normal. On local examination, she found no injuries on breast area, no external and internal injuries on genitalia and that hymen was intact. Through her, Accident Register (Ex.P5) was marked.

17. This Court has considered the above evidences and the exhibits marked by the prosecution. The victim's testimony has been corroborated by the testimony of PW1, PW6 and PW7. This Court is of the opinion that their evidences are believable and there is no reason to reject the same.

18. From the evidence of PW1, it is seen that the accused tried to



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disrobe the victim. This Court is of the view that the prosecution has established the foundational facts by examining PW1, PW2, PW6, PW7 and PW8. Hence, keeping in mind Sections 29 and 30 of POCSO Act, this Court is of the opinion that the appellant / accused has committed sexual assault of the victim. It's apposite to mention here that to attract Section 7, skin to skin contact is not necessary and the act of disrobing a child is sufficient to attract Section 7 of the POCSO Act [*Vide Attorney General for India Vs. Satish and Another (2022 (5) SCC 545 : 2021 SCC Online 1076)*].

19. Section 7 of the POCSO Act reads as follows:

“7. Sexual assault

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

20. Sections 29 and 30 of POCSO Act read thus:



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“29.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.

30.Presumption of culpable mental state

(1)In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2)For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.”

21. The trial court convicted and sentenced the accused under



Section 370 (4) of IPC and Section 4 read with 18 of POCSO Act. Section 4 of POCSO Act reads thus:

“4.Punishment for penetrative sexual assault

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

[(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.”

22. In view of the above, there is no evidence available on record



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to attract Section 4 of POCSO Act. The trial court without properly appreciating the evidences and documents, particularly the evidence of the victim and the Doctor has convicted and sentenced the accused under Section 4 read with 18 of POCSO Act. Hence, the said sentence is liable to be set aside.

22.1. Section 370 of IPC which reads thus:

“370. Trafficking of person.—(1) Whoever, for the purpose of exploitation, (a)recruits, (b)transports, (c)harbours, (d)transfers, or (e)receives, a person or persons, by —

First.—using threats, or

Secondly.—using force, or any other form of coercion, or

Thirdly.—by abduction, or

Fourthly.—by practising fraud, or deception, or

Fifthly.—by abuse of power, or

Sixthly.— by inducement, including the giving or receiving of payments or benefits, in order to achieve the



consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 1.—The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation 2.—The consent of the victim is immaterial in determination of the offence of trafficking.

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which



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may extend to imprisonment for life, and shall also be liable to fine.

(5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. ”

22.2. The trial court in paragraph 12 of its judgment has stated



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that to attract Section 370 of IPC, mere deception is sufficient. However, this

Court is of the view that mere deception is not sufficient to attract Section 370

IPC. PW2 in her evidence has stated as follows:

“...நான்திரும்ப என் சித்தி வீட்டிலிருந்து எங்கள் வீட்டிற்கு இரவு 8 மணியளவில் சென்ற போது மாணிக்கம் தாத்தா சைக்கிளில் வந்தார். எங்க பாப்பா நீ போற என்று கேட்டார். நான்வீட்டிற்குப் போறேன்னு சொன்னேன். நான்கொண்டுபோய் விடுகிறேன் என்று அவர் சொன்னார். நான்வல்லை தாத்தா நான் நடந்தே போகிறேன் என்று சொன்னேன். மறுபடியும் அந்த தாத்தா நான்அந்த வழியாகத்தான் போகிறேன், கொண்டு போய் விடுகிறேன் என்று சொன்னார். நானும் சைக்கிளில் ஏறிப்போனேன். சைக்கிளில் ஏறிப் போனபோது XX தாத்தா வீட்டில் சைக்கிளை நிப்பாட்டினார். மாணிக்கம் தாத்தா உள்ள ஆசாரத்திற்கு போய் XX தாத்தாவிடம் சாப்பிட்டாயா என்று கேட்டார். மாணிக்கம் தாத்தா என்னை ஆசாரத்திற்கு கூப்பிட்டார். நானும் போனேன். அப்போது மாணிக்கம் தாத்தா என் மேல் சட்டையையும், கீழ் சட்டையையும் கழற்ற முயற்சி செய்தார். நான்தப்பித்து ஓடி வந்தேன். ஓடிவந்த போது அந்த தாத்தாவுக்கு தலையில் அடிபட்டு இரத்தம் வந்தது. நான்கத்தி ஊரை கூப்பிட்டேன்...”

23. This Court is of the view, that, whether an act amounts to



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trafficking or not, should be decided on case to case basis. In the above deposition, there is no sufficient evidence is available on record to satisfy the ingredients of Section 370(4) of IPC. Hence, the trial court's conclusion in this regard deserves to be set aside. Accordingly, this Court set aside the conviction and sentence imposed by the trial court under Section 370(4) of IPC.

24. As narrated supra, the evidence of the prosecution has established that the appellant / accused committed the offense of sexual assault against the victim girl under Section 7 which is punishable under Section 8 of the POCSO Act. It is apposite to mention here that on the date of occurrence, the victim had completed the age of twelve years. Hence, Section 9(m) of the POCSO Act would not be attracted.

25. Resultantly, the Criminal Appeal is partly allowed and the conviction and sentence awarded to the appellant / accused under 370(4) of IPC and Section 4 read with 18 of POCSO Act is hereby set aside. Since this Court finds the appellant / accused guilty under Sections 7 which is



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punishable under Section 8 of the POCSO Act, this Court imposes a punishment of five years rigorous imprisonment along with a fine of Rs.200/-, in default of payment of fine, imposes a further period of one month of simple imprisonment. The Trial Court, namely, Sessions Court, Mahalir Needhimandram (Fast Track Mahila Court) Erode is directed to send a modified / amended conviction warrant to the prison authorities immediately after receipt of the copy of this judgment. The period of incarceration already undergone by the appellant / accused is ordered to be set off under section 428 Cr.P.C. The fine amount if any paid by the appellant / accused shall be adjusted for the fine amount imposed by this Court under Section 8 of the POCSO Act in this Criminal Appeal. Considering the cumulative facts and circumstances, no compensation to the victim is ordered. Consequently, connected miscellaneous petition is closed.

(M.S., J.)

(R.S.V., J.)

03 / 07 / 2023

Speaking
Neutral Citation : Yes
TK

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To

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- 1.The Sessions Judge
Sessions Court
Mahalir Needhimandram (Fast Track Mahila Court)
Erode.
- 2.The Inspector of Police
Anthiyur Circle, Erode District.
- 3.The Superintendent of Prison
Central Prison
Coimbatore.
- 4.The Public Prosecutor
High Court of Madras.



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M.SUNDAR, J.

AND

R.SAKTHIVEL, J.

TK

PRE-DELIVERY JUDGMENT MADE IN
CRL.A.NO.355 OF 2020
AND CRL.M.P.NO.5497 OF 2023
IN CRL.A.NO.355 OF 2020

03 / 07 / 2023