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CrI.A.No.640 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 16.03.2023

PRONOUNCED ON: 29.03.2023

CORAM

THE HONOURABLE MR. JUSTICE V.SIVAGNANAM

CrI.A.No.640 of 2022

V.Saravanan

... Appellant

Vs.

State by : Inspector of Police,
AWPS Tiruppur North Police Station,
Tiruppur District.
[Crime No.3 of 2020]

... Respondent

PRAYER: Criminal Appeal filed under Section 374 of Cr.P.C. to set-aside the judgment/conviction order passed by the Sessions Judge of Magalir Neethimandram, [FTMC], Tiruppur made in Spl.C.C.No.23 of 2020 dated 07.06.2022 under section 9[m] read with 10 of POCSO Act and sentencing him to undergo 5 years rigorous imprisonment and imposed a fine of Rs.5000/- in default to undergo further period of 6 months simple imprisonment.



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For Appellant : Mr.T.Shanmuga Boopathi

For Respondent : Mr.A.Gokulakrishnan

JUDGMENT

Challenging the judgment of conviction, passed by the learned Sessions Judge of Mgalir Neethimandram, [FTMC], Tirupur in Spl. C.C.No.23 of 2020, dated 07.06.2022, the present Criminal Appeal has been filed.

2. The prosecution case is that on 26.01.2020, the victim girl went to the house of the accused Saravanan. The daughter of the accused, viz., Pavithra is taking Dance class to the victim girl. At that time Pavithra was not in the house. The accused was alone in the house. When the victim girl entered into the house, the accused closed the door of the house. The accused hugged her and kissed her on her back and lifted her gown and touched her private part and laid her over his body. Immediately, the victim girl shouted. Thereafter, the accused contacted her father through his phone



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and informed him to come to his house and take the victim girl to his house.

Thereafter, the father of the victim came to the house of the accused and found his daughter weeping and took her to his house. On the way to his house, the victim informed the incident to her father and thereafter, he gave Ex.P.2 complaint before the respondent police which was registered in Crime No.3 of 2020 for the offences under sections 7 read with 8 of POCSO Act and Section 506[i] of IPC. After investigation, final report has been filed.

3. Based on the above materials, the Trial Court framed charges as against the accused and the accused denied the same as false. In order to prove the case of prosecution, 6 witnesses were examined, 9 documents were filed. Besides one material object was marked.

4. When the incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false, he did not choose to examine any witness nor mark any documents.



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5. Having considered all the materials, the Trial Court convicted the accused under Section 9[m] read with 10 of POCSO Act and sentenced him to undergo 5 years of rigorous imprisonment and imposed a fine of Rs.5000/- in default to undergo six months Simple Imprisonment for the offence under section 9[m] read with 10 of POCSO Act and the detention period already undergone by the accused is ordered to be set off under section 428 of Cr.P.C. Challenging the above conviction and sentence, the accused is before this Court with this appeal.

6. The learned counsel for the appellant/accused submitted that the trial Court has not properly appreciated the prosecution evidence and the contradictions in the evidence of the victim and her father. Only two witnesses, the victim and her father have spoken about the incident and no independent witness was examined by the prosecution. He further submitted that no colegal evidence is produced in support of the prosecution case. Under these circumstances, without any evidence, the trial Court



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found the accused guilty and convicted him, which is unsustainable in law and is liable to be set aside. Hence, prayed to acquit the accused and to allow this appeal.

7. The learned Additional Public Prosecutor, supported the judgment of the trial Court and contended that the victim girl is examined as P.W.1 and her father has been examined as P.W.2 and both of them supported the prosecution case and the victim clearly deposed about the bad touch committed by the accused and there is no reason to disbelieve the evidence of P.W.1 and P.W.2 and the trial Court rightly found the accused guilty and convicted the accused. Hence, submitted that there is no reason to interfere in the finding of the trial Court and there is no merit in the Criminal Appeal and pleaded to dismiss this appeal.

8. I have considered the submissions made by the learned counsel for the parties and also perused the materials available on records carefully.



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9. It is a case of sexual assault made by the accused upon the victim girl aged about 8 years. The victim girl was going to dance class taken by one Pavithra and the accused is the father of the said Pavithra. On 26.01.2020 morning, the victim girl went to the house of the said Pavithra for dance class. At that time, the said Pavithra was not in the house. The accused was alone in the house. When the victim girl entered the house, the accused locked the door and made the alleged sexual assault. Hence, he has been prosecuted by the respondent police.

10. I have gone through the prosecution evidence and the entire documents. The prosecution has examined 6 witnesses. Among 6 witnesses, P.W.1 is the victim girl and P.W.2 is the father of the victim girl. P.W.3 is Dr.Karthikeyan, working as Assistant Professor, Surgery Department, Tiruppur Government Medical College Hospital. He examined the accused and gave accident register and certificate Ex.P.3 and Ex.P.4 with regard to the potentiality of the accused. P.W.4 Arokiadhas, is a witness to the Observation Mahazar Ex.P.6. P.W.5, Sub Inspector of Police,



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Tirupur, All Women Police Station on receipt of complaint Ex.P.2 from P.W.2, Kumar, registered the First Information Report Ex.P.7 in Crime No.3 of 2020 in Ex.P.7. P.W.6 Inspector of Police conducted investigation in this case and filed final report. Therefore, with regard to the alleged incident, only two witnesses, P.W.1 victim and P.W.2 Kumar alone are available. It is to be noted that no medical evidence is produced by the prosecution for examination of the victim girl.

11. I have considered the evidence of P.W.1 and P.W.2. P.W.1 in her evidence had stated that on 26.01.2020, one Manickam took her to the dance class in a two wheeler and left her in the accused house. P.W.2 Kumar also deposed that on the date of the alleged occurrence, Manickam took the victim girl to the dance class and left her in the dance class. But the prosecution had not examined the said Manickam to show that on the particular date, i.e., on 26.01.2020, the victim girl went to the house of the accused. It is very important in the background of the case. It is not disputed that the dance teacher Pavithra previously informed to the father of



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the victim that there will be no dance class on 26.01.2020. It is evidenced by the victim. Her evidence runs as follows :

"அம்மாவிடம் பட்டன் போன் தான் இருக்கிறது, அப்பாவிடம் தான் டச் போன் இருக்கிறது, அதனால் கிளாசிக்கல் டேன்ஸ் லீவு என்ற மெசேஜை மிஸ் என் அப்பாவிற்கு அனுப்பியிருந்தார். என் அப்பா நேரத்தில் வேலைக்கு போக வேண்டுமென்பதால் மெசேஜை பார்க்கவில்லை. மாணிக்க மாமா என்னை 26.01.2020ம் தேதி டேன்ஸ் கிளாசுக்கு ரூவீலரில் அழைத்துக்கொண்டு போய்விட்டார்."

Therefore, it is clear that the dance teacher Pavithra had already sent a message to the father of the victim that on 26.01.2020, there is no dance class. In such circumstances, the prosecution ought to have examined the said Manickam, who took the victim girl to the dance class to prove that on that date, the victim girl went to the house of the accused. Further, the victim girl in her evidence has stated that the accused pinched on her cheek and kissed her on her back. In this regard, her evidence runs as follows :



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"நான் டான்ஸ் கிளாசுக்கு உள்ளே போய்விட்டேன்.

அப்போது பவித்ரா அக்காவின் அப்பா எதிரி சரவணன் மட்டும் இருந்தார். நான் உள்ளே போனவுடன் எதிரி சரவணன் கதவை லாக் பண்ணிவிட்டார். நான் அங்கிருந்த ஜேபாவில் போய் உட்கார்ந்தேன். அப்போது சரவணன் uncle என் பக்கத்தில் வந்து உட்கார்ந்தார். அதுக்கப்பறம் நான் ரெஸ்ட் ரூம் போற இடத்தில் தொட்டார், பின்பு கன்னத்தில் கிள்ளினார், முதுகிலும் கிள்ளி முத்தம் கொடுத்தார், எதிரி சரவணன் படுத்துவிட்டு அவர் மேலே என்னை படுக்கவைத்தார்."

However, the victim in her 164 Cr.P.C. statement she had stated that the accused pinched her thigh and back and kissed her and the relevant portion of the statement reads as follows :

"நான் பிவத்ரா அக்கா வீட்டில் இருக்காங்கனு சொல்லிவிட்டு நானும் உள்ளே போய்விட்டேன். உள்ளே போனதற்கப்பறம் பவித்ரா அப்பா கதவை தாழ்



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போட்டுவிட்டார். நான் பவித்ரா அக்கா எங்கே என்று
கேட்டதற்கு வீட்டுக்குள் தூங்குவதாக
பொய்செர்லிவிட்டார். அவர் என்னை ரெஸ்ட் ரூம்
போகும் இடத்தில் தொட்டார். என் தொடையில்
கிள்ளி வைத்தார். முதுகில் கிள்ளி வைத்தார்.
முதுகில் முத்தம் கொடுத்தார். கன்னத்தில் முத்தம்
கொடுத்தார். அவர் படுத்திருந்தார். அவர் மேல்
என்னை படுக்க வைத்தார்."

12. The compliant Ex.P.2 was given immediately after the alleged occurrence. In such circumstances, to support the allegation, the victim must be examined by the doctor to appraise any pinching marks in her thigh. If it is true, there may be some bruises or pain over that part. But the prosecution failed to examine the victim girl and not produced any medical evidence in support of the allegations.



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13. I have examined the evidence of P.W.2, father of the victim girl.

He had deposed that after hearing about the incident from the victim girl, he immediately went to the house of the accused and questioned about the incident and at that time nearby people gathered. His evidence, in this regard, runs as follows :

"உடனே நான் 10.55 மணிக்கு மகளின் டேன்ஸ் கிளாகுக்கு போனேன். என் மகள் என்னை பார்த்தவுடன் பயமாக இருக்கிறது வாப்பா போகலாம் என்று சொன்னாள். உடனே நான் என் மகளை ரூவீலரில் அழைத்துக்கொண்டு போகும்போது பாதியில் நிறுத்தி ஏன் பாப்பா அழுகிறாய், நீ தைரியமான பெண்தானே என்று கேட்டேன். அப்போது என் மகள் டேன்ஸ் கிளாசில் இருக்கும் அங்கிள் சரவணன் (டேன்ஸ் மிஸ்ஸின் அப்பா) என் மகள் டேன்ஸ் கிளாகுக்கு போனவுடன் அவர் கதவை சாத்திவிட்டதாகவும், என் மகள் டேனஸ் மிஸ் எங்கே



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என்று கேட்ட போது மிஸ் உள்ளே
தூங்கிக்கொண்டிருப்பதாக சொன்னதாகவும், பிறகு
சரவணன் என் மகளை கட்டிப்பிடித்து யூரின் போகும்
இடத்தில் கையை வைத்து கிள்ளியதாகவும், மேலே
படுக்க வைத்து என்னமோ செய்ததாகவும், இந்த
விஷயத்ததை யாரிடமாவது சொன்னால் உன்னை
கொன்றுவிடுவேன் அந்த அங்கிள் என்னை
மிரட்டியதாகவும், அதனால் தான் நான் உடனே
சொல்லவில்லை, இங்கு வந்து சொன்னேன் என்று என்
மகள் என்னிடம் சொன்னாள். மேலும் என் மகள்
சரவணன் அங்கிள் போனை எடுத்து தான் உங்களை
கூப்பிட்டேன் என்றும், உடனே நான் கோபம் வந்து என்
மகளை அழைத்துக்கொண்டு டேன்ஸ் கிளாசுக்கு போய்
எதிரி சரவணனை பார்த்து கேட்டேன். உடனே அக்கம்
பக்கத்தில் இருப்பவர்கள் கூடிவிட்டார்கள். உடனே
நான் என் மனைவிக்கு போன் செய்து தகவல்
சொன்னேன், அதன் பிறகு வடக்கு அனைத்து மகளிர்
காவல் நிலையத்திற்கு சென்று எதிரி மீது புகார்



கொடுத்தேன். அந்த புகார் அ.சா.ஆ.2. போலீசார்
என்னை விசாரித்தார்கள்."

14. The evidence of P.W.2 clearly shows that immediately after the alleged occurrence, nearby people have gathered before the house of the accused and enquired about the incident. Further, in the complaint, Ex.P.2 also it is mentioned by the complainant that immediately after receiving phone from the accused, he went to the house of the accused and questioned him. On hearing sound, nearby people gathered there and they assaulted the accused. The relevant portion of the complaint runs as follows :

"நான் மீண்டும் வண்டியை திருப்பிக்கொண்டு
பவித்ரா மிஸ் வீட்டிற்கு போனேன். வெளியே போய்
நின்று சத்தம் போட்டேன். என் சத்தத்தை கேட்டு
அக்கம் பக்கம் உள்ளவர்களும் அந்த வழியாக
சென்றவர்களும் கூடிவிட்டார்கள், அனைவரும்
என்னவென்று கேட்க நான் குழந்தை காவியாவிடம்
தவறான முறையில் நடக்க முயற்சிசெய்ததை பற்றி



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கூறினேன். அதை கேட்டு அனைவரும் சரவணனை
அடித்துவிட்டார்கள்".

If it is true, the police would have examined any of the independent witness to support the case of the prosecution. But the prosecution failed.

15. In this case, the evidence adduced by the prosecution did not conclusively lead to the guilt of the accused and only pointed the needle of suspicion towards the accused and nothing more. Further, in the instant case, the victim is aged about 8 years. The law recognizes the child as a competent witness. But a child, particularly at such a tender age of 8 years at the time of complaint, will not be able to depose clearly. Therefore, when a child witness is examined for the alleged sexual assault, the Court shall proceed the proceedings with a considerable endeavour and ensure that the trial is fairly conducted. In this case, to support the allegation of the victim, that the accused pinched her on her thigh and on her back, no medical evidence was produced. Further, immediately after the alleged occurrence, the father of the victim, P.W.2, shouted before the house of the accused and



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nearby people gathered there and assaulted the accused. It had happened before the complaint lodged by P.W.2. In Ex.P.2 complaint also these facts have been stated. In these circumstances, the prosecution has not assigned any valid reason for non examination of any independent witness. Hence, it is unsafe to convict the accused based upon the evidence of the victim and the father of the victim alone, which is unsupported by medical evidence and independent witness.

16. The Order of conviction can be based only on legal evidence and not on hypothetical preposition or unwarranted inference. Surmises and suppositions cannot take the place of legal proof in a criminal appeal and the suspicion, however grave, cannot sustain a criminal charge in the absence of legal proof. When there is an element of genuine doubt, then there must be acquittal. In this case, the accused is entitled for acquittal. Hence, the judgment of the trial Court is liable to be set aside.



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17. In the result, the Criminal Appeal is allowed and the conviction and sentence imposed on the appellant/accused by the learned Sessions Judge, Magalir Neethimandram,[FTMC], Tiruppur in Spl.C.C.No.23 of 2020 by the judgment dated 07.06.2022 is hereby set aside. The appellant/accused is acquitted of the charges levelled against him. Fine amount, if any, paid by the appellant/accused to be refunded to him. Bail bond, if any, executed by him shall stand cancelled.

29.03.2022

vrc

To

The Sessions Judge of Magalir Neethimandram,
[FTMC], Tiruppur



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V.SIVAGNANAM, J.

VRC

Judgment in
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