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Crl.A.No.71 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.12.2024

CORAM :

THE HON'BLE MR. JUSTICE SUNDER MOHAN

Crl.A.No.71 of 2023

Karthick

...Appellant/Sole Accused

VS.

The State represented by
Inspector of Police,
Erode, All Women Police Station,
Erode District.

(Crime No.13 of 2020

...Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, 1973, to set aside the Judgement passed in Spl.S.C.No.19 of 2021 dated 27.12.2022 on the file of the Sessions Judge, Magalir Neethi Mandram, (Fast Track Mahila Court), Erode.

For Appellant : Mr.M.Rajkumar
for Mr.T.Murugnantham

For Respondent : Dr.C.E.Pratap
Government Advocate (Crl.Side)



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JUDGMENT

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This Criminal Appeal has been filed by the accused, challenging the conviction and sentence imposed upon him, vide judgment dated 27.12.2022 in Spl.S.C.No.19 of 2021, on the file of the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court), Erode.

2(a). The case of the prosecution is that the appellant/sole accused had befriended the victim girl through an App called “Hello App” and became intimate with the victim; that thereafter, induced the victim to send her nude pictures by threat; that the appellant had forced the victim to send inappropriate pictures and videos of the victim either nude or the victim touching her private part inappropriately by a further threat that he would upload her nude pictures in the internet if she did not do so; that since the behaviour of the victim was unusual, the uncle of the victim learnt that the victim had shared obscene pictures and videos on the threats made by the appellant and lodged a complaint which was registered for the offences under Sections 11(2), 11(4), 11(5) and 12 of the Protection of Children from Sexual Offences Act, 2012 [for the sake of convenience, hereinafter referred to as POCSO Act, 2012] and 67B(a) of the Information Technology



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(Amendment) Act 2008 [for the sake of convenience, hereinafter referred to as IT Act] against the appellant/accused.

(b) P.W.7/Sub-Inspector of Police registered the complaint and thereafter handed over the investigation to P.W.9/Inspector of Police. After examination of witnesses and collecting other evidence, P.W.9 who conducted a portion of the investigation handed over the investigation to P.W.10/Inspector of Police completed the investigation and filed the final report for the offences under Sections 11(ii)(iv)(v) r/w 12 of the POCSO Act, 2012 and 67(B)(a) of the IT Act.

(c). On the appearance of the appellant, the provisions of Section 207 Cr.P.C. were complied with and the trial Court framed charges against the appellant under Sections 11(ii), (iv) and (v) punishable under Section 12 of the POCSO Act, 2012 and 67B (a) of the IT Act and when questioned, the appellant pleaded 'not guilty.'



(d). To prove the case, the prosecution examined ten witnesses as P.W.1 to P.W.10, marked sixteen exhibits as Exs.P1 to P16 and produced two Material Objects as P.M.O.1 and P.M.O.2. When the appellant was questioned under Section 313 of the Cr.P.C. on the incriminating circumstances appearing against him, he denied the same. The appellant did not examine any witnesses or mark any documents.

(e). On appreciation of oral and documentary evidence, the trial Court found that the prosecution had established its case beyond reasonable doubt and held the appellant guilty of the offence under Section 11(ii) (iv) (v) punishable under Section 12 of the POCSO Act, 2012 and acquitted the appellant for the offence 67B(a) of the IT Act. The appellant was sentenced as follows:

<u>Offence under</u>	<u>Sentence imposed</u>
11(ii) (iv) (v) punishable under Section 12 of the POCSO Act, 2012	To undergo rigorous imprisonment for three years and to pay a fine of Rs.1,000/-, in default to undergo simple imprisonment for one month.

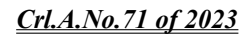
Hence, the accused has preferred the appeal challenging the said conviction and sentence.



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3. Heard, Mr.M.Rajkumar, learned counsel appearing for the appellant and Dr.C.E.Pratap, learned Government Advocate (Crl.Side), appearing for the respondent/State.

4. Mr.M.Rajkumar, the learned counsel for the appellant, would submit that the victim had given an exaggerated version in her deposition and most of the statements made by her were improvements and not stated during the investigation and pointed out the evidence of the Investigating Officer in this regard; that no obscene picture or video was found either in the phone of the victim or that of the appellant/accused or retrieved from the App; and that in the light of such evidence, the trial Court ought not to have convicted the appellant based on the sole testimony of the victim and relied upon the Judgment of the Hon'ble Supreme Court *Nirmal Premkumar and another vs. State rep. by Inspector of Police*, reported in *2024 SCC OnLine SC 260*, in support of the submission that since the victim is neither wholly reliable nor wholly unreliable, the Trial Court ought to have sought for corroboration and in the absence of same, the Judgment is liable to be set aside.



5. Dr. C.E. Pratap, the learned Government Advocate (Crl.Side) for

6. This Court carefully considered the submissions made on either

7. As stated earlier, the prosecution had examined ten witnesses.



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8. It is the case of the prosecution that the appellant befriended the victim through an App called the “Hello App.” and thereafter, the appellant had forced the victim to send obscene pictures and videos by stating that he loved the victim and also by threats that he would upload the pictures in the Internet if she did not send the videos or the pictures.

9. P.W.1 and P.W.2, the uncle and aunt of the victim, had deposed that they lodged the complaint on the information given by the victim. It is not the case of P.W.1 and P.W.2 that they had seen the WhatsApp messages. In fact, this was clarified in the cross-examination of the Investigating Officer/P.W.9. The relevant portion reads as follows:

“புகாரில் முதல் தகவல் அறிக்கையிலும் என்னுடைய
விசாரணையிலும் புகார்தாரர் பாதிக்கப்பட்ட சிறுமியின்
செல்போனில் பாதிக்கப்பட்ட சிறுமியின் ஆபசமான
புகைப்படங்களை அவருடைய செல்போனில் பார்த்தாக
குறிப்பிட்டு கூறவில்லை என்றால் சரிதான், புகார்தாரர்
பார்த்தாக சொல்லவில்லை.”



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10. During the course of the investigation, the mobile phones of both the appellant and the victim were seized and sent for forensic examination.

The expert had found that there were four messages exchanged between the appellant and the victim and all the messages read as “*I love you.*” The expert, however, found that some pictures were exchanged between the appellant and one Archana, who has not been examined and she had nothing to do with the instant case.

11. The investigating officer/P.W.10 in his cross-examination had admitted that during the investigation, no material was collected to prove the exchange of obscene videos and pictures between the appellant and the victim. The relevant portion reads as follows:

“வட்டார தடய அறிவியல் ஆய்வகத்தில் இருந்து பெறப்பட்ட அறிக்கையை நான் பார்வையிட்டேனா என்றால் பார்வையிட்டேன். எதிரியிடம் இருந்து கைப்பற்றப்பட்டதாக சொல்லப்படும் செல்போன், பாதிக்கப்பட்ட சிறுமியின் செல்போன்னில் இருந்து எதிரியின் போனுக்கு போன் காலோ வீடியோ காலோ சென்றதாக பதிவுகள் இல்லை என்றால் சரிதான். எதிரியின் போனில் இருந்து பாதிக்கப்பட்ட



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சிறுமிக்கு ஆபசமான போட்டோ பெற்றதாகவும் சிறுமியின் போனில் இருந்து எதிரியின் போனிற்கு அனுப்பப்பட்டதாகவும் ஆய்வகறிக்கையில் குறிப்பு எதுவும் இல்லை என்றால் சரிதான். எதிரியின் போனில் Hello App இருந்ததாக எந்த ஒரு குறிப்பும் இல்லை என்றால் சரிதான். பாதிக்கப்பட்ட சிறுமியின் செல்போன் OnModeக்கு வரவில்லை எனவே அதில் இருந்து எந்த தரவும் சேகரிக்கமுடியவில்லை என்று அறிக்கையில் குறிப்பிடப்பட்டுள்ளது என்றால் சரிதான். ஆய்வகத்தில் உள்ள உபகரணங்களை கொண்டு மீட்டெடுக்கப்படமுடியவில்லை என்று குறிப்பிடப்பட்டுள்ளார்கள் என்றால் சரிதான்”

12. In the light of the above evidence, we are now left with the evidence of the victim/P.W.3 alone. The victim was aged 17 years and eight months at the time of occurrence, and the appellant was aged 20 years at the time of the occurrence.

13. The evidence of the victim/P.W.3 suggests that both the victim and the appellant had shared an intimate relationship. In light of such



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evidence, the version of the victim that she was threatened to send some obscene pictures appears to be an afterthought. In fact, the investigating officer in his evidence had stated that the victim had not stated about any threat by the appellant in her statement made to him during the investigation. The relevant portion of the investigating officer's evidence reads as follows:

“அசா.3 பாதிக்கப்பட்ட சிறுமி என்னுடைய விசாரணையில் ஒவ்வொரு முறையும் எதிரி தன்னை மிரட்டி தான் கேட்டார் என்று கூறி உள்ளாரா என்றால் மிரட்டி கேட்டதாக குறிப்பிட்டு சொல்லவில்லை. 06.08.2020ம் தேதி வரை தன்னுடைய வீட்டில் இருப்பவருக்கு தெரியபடுத்தவில்லை என்று கூறி உள்ளார் என்றால் சரிதான். வாட்ஸ்ஆப் code no வரும் எனக்கு கொடு என்று எதிரி கேட்டதாக என்னுடைய விசாரணையில் கூறி உள்ளாரா என்றால் இல்லை. கணவன் மனைவி உறவு, First night போன்றவற்றை பற்றி பேசியதாக குறிப்பிட்டு கூறவில்லை என்றால் சரிதான்.”

Hence, this part of the version of P.W.3 is crucial and has not been stated during the investigation.



14. This Court is of the view that it is highly unsafe to rely upon only the statement of the victim to hold that the appellant made the victim to share her obscene pictures and videos. In this regard, it would be usual to refer to the observations of the Hon'ble Supreme Court in ***Nirmal Premkumar and another vs. State rep. by Inspector of Police***, reported in ***2024 SCC OnLine SC 260***, which read as follows:

“11. Law is well settled that generally speaking, oral testimony may be classified into three categories, viz. : (i) wholly reliable; (ii) wholly unreliable; (iii) neither wholly reliable nor wholly unreliable. The first two category of cases may not pose serious difficulty for the Court in arriving at its conclusion(s). However, in the third category of cases, the Court has to be circumspect and look for corroboration of any material particulars by reliable testimony, direct or circumstantial, as a requirement of the rule of prudence.

*12. In **Ganesan v. State**⁴, this Court held that the sole testimony of the victim, if found reliable and trustworthy, requires no corroboration and may be sufficient to invite conviction of the accused.*

...

*14. In **Krishan Kumar Malik v. State of Haryana**⁶, this Court laid down that although the victim's solitary*



evidence in matters related to sexual offences is generally deemed sufficient to hold an accused guilty, the conviction cannot be sustained if the prosecutrix's testimony is found unreliable and insufficient due to identified flaws and lacunae. It was held thus:

“31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.

32. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (CrPC), FIR and deposition in court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant.”

15. What flows from the aforesaid decisions is that in cases where witnesses are neither wholly reliable nor wholly unreliable, the Court should strive to find out the true genesis of the incident. The Court can rely on the victim



as a “sterling witness” without further corroboration, but the quality and credibility must be exceptionally high. The statement of the prosecutrix ought to be consistent from the beginning to the end (minor inconsistencies excepted), from the initial statement to the oral testimony, without creating any doubt qua the prosecution's case. While a victim's testimony is usually enough for sexual offence cases, an unreliable or insufficient account from the prosecutrix, marked by identified flaws and gaps, could make it difficult for a conviction to be recorded.”

15. The reading of the evidence of the victim would make it clear that she would fall under the third category of witnesses who would require corroboration. Considering the fact that no obscene pictures or videos could be recovered from either the phone of the victim or the appellant; that neither P.W.1 nor P.W.2 have stated that they saw the pictures during the course of the investigation; that there are substantial improvements in the evidence of the victim; and considering the nature of the relationship between the appellant and the victim and their age, this Court is of the view that it is highly unsafe to convict the appellant only on the sole testimony of the victim. The appellant would therefore be entitled to the benefit of the



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doubt and hence the Judgment of conviction and sentence imposed on the appellant by the trial court is liable to be set aside.

16. As a result, this Criminal Appeal is allowed and the appellant is acquitted of all the charges levelled against him. The conviction and sentence passed in Spl.S.C.No.19 of 2021 dated 27.12.2022 on the file of the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, are set aside. The fine amount, if any, paid by the appellant shall be refunded. Bail bond, if any, executed shall stand discharged.

17. This Court records its appreciation for Mr.M.Raj Kumar, the learned counsel for the petitioner, for his meticulous preparation and valuable assistance.

09.12.2024

Speaking /Non-speaking order
Neutral citation : yes/no
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To

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1. The Sessions Judge, Magalir Neethi Mandram,
(Fast Track Mahila Court), Erode.

2. The Inspector of Police,
Erode, All Women Police Station,
Erode.

3. The Public Prosecutor,
High Court, Madras.



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SUNDER MOHAN,J.

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