IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.09.2015

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM

Criminal Appeal No.614 of 2014
& M.P.No.1 of 2014

Sundaramahalingam ... Appellant/Sole Accused

vs.

The State by
Inspector of Police,
Karungalpalayam Police Station
Erode District ... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Cr.P.C., to set aside the conviction and sentence imposed on the appellant by the judgment dated 27.11.2014 passed in Special S.C.No.3 of 2014 by the Sessions Court, Mahalir Court, Mahalir Fast Track Court, Erode.

For appellant : Mr.I.C.Vasudevan

For Respondent : Mr.P.Govindarajan,
Additional Public Prosecutor.

JUDGMENT

The conviction and sentence dated 27.11.2014 passed in Special Sessions Case No.3 of 2014 by the District and Sessions Court, Mahalir Court (Mahalir Fast Track Court), Erode are being challenged in the present Criminal Appeal.

2. The contraction of the case of the prosecution is that the accused is residing in Door No.77, Kamala Nagar 3rd Street, Karungalpalayam, Erode. The accused and defacto complainant are neighbours. On 15.11.2013 at about 11 a.m., while the prosecutrix (P.W.3) has been playing near the house of the accused, under the guise of seeing Television, accused has taken her inside his house and all of a sudden, the accused has inserted his fingers into the private part of the prosecutrix. After occurrence, the mother of the prosecutrix by name Sathya, as defacto complainant, has given the complaint in question and the same has been registered by the Sub Inspector of Police (P.W.13) in Crime No.581 of 2013. The complaint given by the defacto complainant has been marked as Ex.P.1.

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3. On receipt of Ex.P.1, Investigating Officer, viz., P.W.16, has taken up investigation, examined the connected witnesses and also made arrangements for conducting medical examination to the prosecutrix and accordingly, the Doctor by name Sivakami (P.W.12) has examined the prosecutrix and issued Ex.P.6, Final Opinion. The Investigating Officer has also made arrangements to record statement from the prosecutrix under section 164 of Code of Criminal Procedure, 1973 and accordingly, the concerned Judicial Magistrate (P.W.15) has recorded a statement from the prosecutrix under the said section and the same has been marked as Ex.P.11. On completing investigation, P.W.16, Investigating Officer has laid a final report on the file of the trial court and the same has been taken on file in Special Sessions Case No.3 of 2014.

4. The trial court, after hearing arguments of both sides and upon perusing relevant documents, has framed a charge under section 10 of the Protection of Children from Sexual Offences Act, 2012 and the same has been read over and explained to him. The accused has denied the charge and claimed to be tried.

5. On the side of the prosecution, P.Ws.1 to 16 have been examined and Exhibits 1 to 11 have been marked.

6. When the accused has been questioned under Section 313 of the Criminal Procedure Code, as respects the incriminating materials available in evidence against him, he denied his complicity in the crime. No oral and documentary evidence have been let in on the side of the accused.

7. The trial court, after hearing arguments of both sides and also perusing the available evidence on record, has found the accused guilty under Section 10 of the Protection of Children from Sexual Offences Act, 2012 and sentenced him to undergo 7 years Rigorous Imprisonment and also imposed a fine of Rs.1,00,000/- with usual default clause. Further, the trial court has directed the State Government to give compensation of Rs.1,00,000/- to the prosecutrix. Against the conviction and sentence passed by the trial court, the present Criminal Appeal has been filed at the instance of the accused as appellant.

8. The learned counsel appearing for the appellant has raised the following points so as to supplant the conviction and sentence passed against the appellant/accused.

(i) Both the accused and P.Ws.1 and 2 are neighbours and P.W.2, father of the prosecutrix is a street vendor and he received a sum of Rs.25 thousand from the accused by way of debt and the same has not been discharged and due to that, a strong motive has been in existence in between the families of accused and P.Ws.1 and 2.

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(ii) The specific evidence given by the prosecutrix (P.W.3) is that before occurrence, she played with one Deva, who is none other than the son of Mutharasi (P.W.4) and no person is in existence by name Deva and further P.W.4 has stated that she is not having any son by name Deva.

(iii) The Doctor (P.W.12), who examined the prosecutrix has not found any external and internal injuries in the private part of the prosecutrix.

(iv) The defacto complainant, viz., P.W.1 has stated in her evidence that she has not known the name of grandfather of one Charu, whereas, in Ex.P.1, complaint, the name of the accused has been mentioned. Further, she deposed that she has not known the person, who has written Ex.P.1.

(v) In Ex.P.1, it has been clearly stated that near the house of the accused, while playing, the accused has committed the alleged offence, whereas in the charge as well as in Ex.P.9, Plan, the house of the accused has been shown as place of occurrence.

9. In order to sustain the conviction and sentence passed by the trial court, learned Additional Public Prosecutor has contended that in the instant case, prosecutrix has been examined as P.W.3 and her specific evidence is that at the time of playing, the accused has called her to come inside his house under the guise of seeing Television and accordingly, the prosecutrix has gone into the house of the accused and he inserted some fingers into the private part of the prosecutrix. Further, the prosecutrix has given statement under section 164 of Code of Criminal Procedure, 1973 to P.W.15 and the same has been marked as Ex.P.11, wherein it has been stated about the alleged occurrence and further as per Section 7 of the Protection of Children from Sexual Offences Act, 2012, mere touching on private part would be sufficient so as to constitute the concerned offence and further as per section 29 of the said Act, a presumption can also be drawn and the trial court, after considering the credible evidence available on record, has rightly found the appellant/ accused guilty under section 10 of the said Act and therefore, the conviction and sentence passed by the trial court are not liable to be interfered with.

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10. Before contemplating the rival submissions made on either side, the Court has to look into Sections 7 and 29 of the said Act. It is an admitted fact that as per Section 7 of the said Act, a mere touching on the private part of the prosecutrix would be sufficient to constitute an offence mentioned in the Act. Further, it is also equally an admitted fact that necessary presumption can be drawn. With these legal backdrops, the Court has to carefully and dispassionately analyze the case of the prosecution as well as the defence taken on the side of the appellant/accused.

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11. In the charge framed against the accused, it has been specifically stated that on 15.11.2013, at about 1 a.m., while the prosecutrix has been playing, the accused has taken her to his house under the guise of seeing Television and subsequently inserted his fingers into her private part.

12. The main defence taken on the side of the appellant/accused is that the prosecution has not proved the place of occurrence.

13. The entire case of the prosecution is based upon Ex.P.1, Complaint, wherein, it has been clearly stated that the occurrence has taken place at the time of playing. No mention has been made in Ex.P.1 that the occurrence has taken place inside the house of the accused. Further, on the side of the prosecution, for the purpose of knowing the juxtaposition of the place of occurrence, Ex.P.8, Plan has been marked, wherein it has been clinchingly stated that the occurrence has taken place inside the house of the accused. As adverted to earlier, in Ex.P.1, it has been specifically stated that the occurrence has taken place, while prosecutrix has been playing, whereas in Ex.P.8 as well as in the charge, it has been stated to the effect that the entire occurrence has taken place inside the house of the accused. Therefore, it is needless to state that the prosecution is not certain enough with regard to place of occurrence. Even on the side of the prosecution, two places have been shown as place of occurrence and therefore, the genesis of the case of the prosecution is highly doubtful.

14. Now the Court has to look into the available evidence on record. The prosecutrix has been examined as P.W.3 and her specific evidence is that she and one Deva have played together on the date of occurrence. At that time, the accused has called her to come inside his house under the guise of seeing Television and subsequently inserted his fingers into her private part. Further, she has deposed that the said Deva is the son of one Mutharasi. The said Mutharasi has been examined as P.W.4 and her specific evidence is that she is not having any son by name Deva. Therefore, it is quite clear that the prosecution has failed to establish the fact that the accused has called the prosecutrix to come inside his house at the time of playing with the said Deva. Since the prosecution has not proved that aspect, the Court can easily disbelieve the case of the prosecution.

15. The defacto complainant, viz., P.W.1 has deposed in her evidence that she does not know the name of grandfather of one Charu, but in Ex.P.1, the name of the accused has been clearly mentioned. Further, she deposed that she has not known the person by whom Ex.P.1 has been written. With regard to name of the accused also, the prosecution has not given any concrete evidence.

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16. The motive attributed on the side of the accused is that P.W.2, father of the prosecutrix is nothing but a street vendor and for running his business, he received a sum of Rs.25,000/- by way of debt from the accused, but he failed to discharge the same. Under the said circumstances, the accused has been falsely roped in the present case.

17. For the purpose of proving lending of money by the accused, no document has been filed on his side. Even though no document has been filed on his side, as marshaled earlier, the entire case of the prosecution bristles with lacunae and also infirmities. Even for the sake of convenience, this Court would like to assort the following infirmities found in the case of the prosecution:

(A) The prosecution has failed to establish the place of occurrence.

(B) The prosecution has failed to prove that prior to occurrence, both prosecutrix and one Deva have played together and at that time, the accused has called her to come inside his house.

(C) The prosecution has failed to establish by whom, Ex.P.1 has been written.

(D) P.W.1, defacto complainant, has failed to corroborate the averments made in Ex.P.1, since she has clearly deposed that she does not know the name of grandfather of one Charu.

18. By way of eschewing both infirmities and also lacunae found on the side of the prosecution, it is also highly impossible and improbable to come to a conclusion that the occurrence has taken place as alleged on the side of the prosecution. Even at the risk of jarring motive, the Court would like to point out that the prosecution has miserably failed to establish the guilt of the accused under section 10 of the said Act.

20. The trial court, without considering the vital infirmities as well as lacunae, has erroneously found the appellant/accused guilty under the said Section. In view of the foregoing enunciation of both factual and legal aspects, this Court has found enormous force in the contentions put forth on the side of the appellant/accused. Further, simply on the basis of presumption available under section 29 of the said Act, without having acceptable/trustworthy evidence, the Court cannot draw by such kind of presumption. Therefore, viewing from any angle, the conviction and sentence passed by the trial court are liable to be set aside.

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In fine, this Criminal Appeal is allowed. The conviction and sentence passed against the appellant/accused in Special S.C.No.3 of 2014 by the trial court are set aside. The appellant/accused is acquitted. M.P.No.1 of 2014 is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To :
1. Sessions Judge,, Mahalir Court
(Mahalir Fast Track Court), Erode.

2. The Inspector of Police,
Karunkalpalayam Police Station
Erode District

3. The Superintendent
Central Jail Coimbatore

4. Judicial Magistrate, Court NO.1
Erode

5. The Public Prosecutor, High Court, Chennai

+1 cc to Mr.I.C.Vasudevan Advocate sr.49388

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