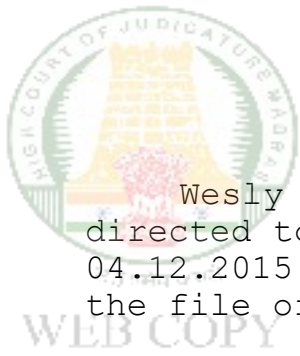




BAIL SLIP

Wesly Lazar, Male, S/o.Krishnan, the Appellant/Accused was directed to be released on bail as per the order of this Court dated 04.12.2015 made in MP(MD)No.1 of 2015 in CRL.A(MD)No.321 of 2015 on the file of the Madurai Bench of Madras High Court, Madurai.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 27.07.2020

CORAM:

THE HONOURABLE MR.JUSTICE **B.PUGALENDHI**
Crl.A. (MD)No.321 of 2015

Wesly Lazar : Appellant
Vs.

State rep. by
The Inspector of Police,
All Women Police Station,
Thoothukudi.
Cr.No.5 of 2014 : Respondent

PRAYER: Appeal filed under Section 374(2) of the Criminal Procedure Code to call for the records in connection with the judgment of conviction and sentence passed by the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi, in Spl.S.C.No.10 of 2014, dated 14.10.2015 and quash the same.

For Appellant : Mr.Antony S.Prabhakar

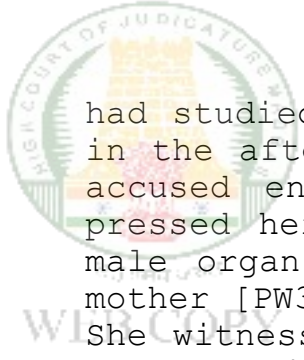
For Respondent : Mr.A.Robinson,
Government Advocate (Crl. Side)

JUDGMENT

The appellant is the sole accused in Spl.S.C.No.10 of 2014, on the file of the Sessions Court, Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi. The appellant was charged for the offence under Section 451 IPC and Sections 7 r/w 8 of the Prevention of Children from Sexual Offences [POCSO] Act, 2012. The trial Court, by its judgment dated 14.10.2015, though found this appellant not guilty for the offence under Section 451 IPC, has found him guilty for the offence under Sections 7 r/w 8 of the POCSO Act, 2012, convicted and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.1000/-, failing which, to undergo simple imprisonment for three months. Aggrieved over the same, the appellant has filed the instant appeal.

2. The brief facts of the case, in a nutshell, are as follows:

2.1. PW1, namely, Mari Aruna and the accused are relatives. PW1



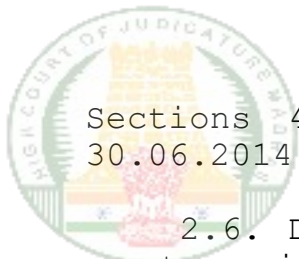
had studied upto 12th Standard and on 28.03.2014, at about 01.15 pm in the afternoon, she was sleeping in her house. At that time, the accused entered into the house, gagged her mouth with a cloth, pressed her breast, lifted her nighty and attempted to insert his male organ into her female organ. PW1 raised hue and cry and her mother [PW3], at that time, returned home after completing her work. She witnessed the accused coming out of her house and attempted to prevent him, but the accused intimidated her and also run away. Their neighbors, viz., PWs.4 & 5 have also witnessed the accused came out of the house and flee away.

2.2. PW2 is the father of the victim [PW1] and he returned only in the evening. When the incident was informed to him, he thought of taking this issue to the elders, since the accused happened to be his relative. But no one was willing to mediate the issue and therefore, he took his daughter [PW1] to lodge the complaint before the All Women Police Station, Thoothukudi, on 11.04.2014.

2.3. Tmt.Jeyanthi [PW9], the Sub-Inspector of Police, All Women Police Station, Thoothukudi, on receipt of the complaint [Ex.P1] from PW1 on 11.04.2014 at about 04.00 pm, registered the case as against the appellant / accused in Crime No.5 of 2014 under Sections 448, 506(ii) IPC and Section 8 of the POCSO Act. The printed FIR was marked as Ex.P4. She also forwarded the copies of the FIR to the concerned Court as well as to the Inspector of Police [PW10].

2.4. The Inspector of Police [PW10], All Women Police Station, Thoothukudi, took up the investigation in Crime No.5 of 2014, went to the place of occurrence on 12.04.2014 at about 08.30 am, prepared an observation mahazar [Ex.P2] and a rough sketch [Ex.P5] in the presence of PW4 and another. She also examined the witnesses, PWs.1 to 3 and one Murugesan and thereafter, referred the victim [PW1] to the Government Hospital for medical examination through the Constable [PW7]. Dr.Shobana [PW8] examined the victim [PW1] on 16.04.2014 and recorded her observations in the Accident Register [Ex.P3] that the victim was abused by a known person on 28.03.2014 at 01.14 pm, but, there is no external injury and the hymen was not intact. The Doctor further observed that the cervical smear and the vaginal smear were sent for chemical examination and the pregnancy test was also conducted, but it was negative. The Doctor, in the Accident Register [Ex.P3], has also mentioned the age of the victim as 17 years.

2.5. The Inspector of Police [PW10] examined the Doctor [PW8] and the other witnesses and also collected the Secondary School Leaving Certificate [Ex.P6] of the victim from Victoria Girls Higher Secondary School. As per the Secondary School Leaving Certificate, the Date of Birth of the victim [PW1] is 06.05.1996 and the victim was short off 35 days to attain the age 18 years, during the relevant point of time. In conclusion of the investigation, PW10



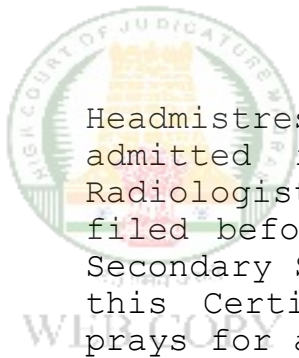
Sections 451, 506(ii) IPC and Section 8 of the POCSO Act, on 30.06.2014.

2.6. During the trial, on the side of the prosecution, as many as ten witnesses were examined and eight documents were marked. After the prosecution evidence was closed, the incriminating materials were put to the accused under Section 313 Cr.P.C., and the accused denied the same. Neither any witness nor any document was marked on behalf of the appellant / accused. The trial Court, in conclusion of the trial, found this appellant guilty, convicted and sentenced him as stated supra.

3. Heard Mr.Antony Prabakar, learned Counsel for the appellant and Mr.A.Robinson, learned Government Advocate (CrI. Side) for the respondent / State.

4. Mr.Antony Prabakar, learned Counsel for the appellant submits that the occurrence was taken place on 28.03.2014, but the complaint has been lodged only on 11.04.2014, with a delay of 14 days and even this date, ie., 11.04.2014, cannot be the correct date, since the FIR registered on 11.04.2014 has reached the concerned Judicial Magistrate Court only on 15.04.2014, with a further delay of 4 days. Moreover, though this is a case registered for sexual assault on 11.04.2014, the victim [PW1] was sent for medical examination only on 16.04.2014. This delay in the FIR reaching the Court, coupled with the delay in referring the victim for medical examination would prove beyond any doubt that this complaint was not registered on 11.04.2014. He further submits that the Sub-Inspector of Police [PW9], who registered the FIR, admitted in her evidence that the case was originally registered on 15.04.2014. PW2, the father of the victim, has also admitted in his evidence that within ten days, they have lodged a complaint and the victim was in their custody in a Home and therefore, there are numerous doubts on the genesis of the complaint itself.

5. The learned Counsel for the appellant further submits that the trial Court has already extended the benefit of doubt in favour of this appellant for the offence under Section 451 IPC, but convicted him for the offence under Sections 7 r/w 8 of the POCSO Act, based on the Secondary School Leaving Certificate [Ex.P6] of the victim. Through this document [Ex.P6], the prosecution attempted to establish the date of birth of the victim as 06.05.1996 and the victim was short off 35 days in attaining the age 18 years. According to the learned Counsel, this Certificate [Ex.P6] has been marked through the investigation officer and not by the Headmistress of the Victoria Girls Higher Secondary School, Thoothukudi, the Attestor, who attested the same. Moreover, this certificate cannot be a genuine one for the reason that the Doctor [PW8], who examined the victim, has admitted in her evidence that this certificate was shown to her by the victim on 16.04.2014 itself at the time of examination. Therefore, the certificate [Ex.P6] was attested by the



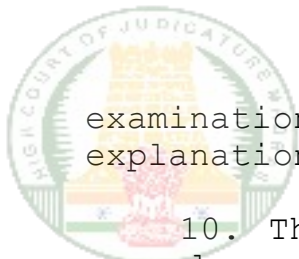
Headmistress only on 25.07.2014. That apart, the Doctor [PW8] admitted in her evidence that the victim was referred to a Radiologist to ascertain her age, but the Radiology Report was not filed before the Court, since the victim was accompanied with the Secondary School Leaving Certificate [Ex.P6], but the genuineness of this Certificate [Ex.P6] is also highly doubtful. Therefore, he prays for allowing this appeal.

6. Per contra, Mr.A.Robinson, learned Government Advocate (Crl. Side) submits that the delay of 14 days in lodging the complaint is not a material defect in a case of this nature. The accused is a relative of the victim's family and therefore, they were hesitant to lodge the complaint immediately after the occurrence. They attempted to solve the issue amicably by way of negotiation, for which, nobody has come forward and thereafter, they have lodged the complaint on 11.04.2014. The reference of the victim for medical examination on 16.04.2014 cannot be a ground to conclude that the case itself was registered on 15.04.2014. He further submits that PW1 has specifically stated about the offence committed by the accused and the presence of the accused was also witnessed by PWs.3 to 5. Therefore, the prosecution has established the case beyond reasonable doubt and there is no reason to interfere with the orders of the trial Court.

7. This Court paid it's anxious consideration to the rival submissions and also to the available materials.

8. Admittedly, the appellant is a relative of the victim [PW1]. The pith and substance of the prosecution case is that on 28.03.2014, this accused entered into the house of the victim and attempted to rape her. On the date of occurrence, the victim did not complete the age of 18 years and therefore, the respondent Police filed the final report as against the appellant / accused under the POCSO Act, besides Indian Penal Code. The trial Court, though acquitted the appellant for the offence under Section 451 IPC, has found him guilty for the offence under Sections 7 r/w 8 of the POCSO Act.

9. For the occurrence took place on 28.03.2014, a complaint was lodged on 11.04.2014 and this complaint also reached the Court only on 15.04.2014 at 02.15 pm. No doubt, there is a delay in reporting the incident as well as in FIR reaching the Court. As rightly pointed out by the learned Government Advocate (Crl. Side), delay do occur in these type of cases and the parents of the victim may usually refrain from lodging the complaint, taking into consideration of the future of their daughter. This is the reason for the delay in reporting the incident. But, apart from this delay in reporting the incident and the delay in FIR reaching the Court, there is a delay in producing the victim [PW1] before the Doctor [PW8] for examination, as well. Though the incident was reported to the Police on 11.04.2014, the victim was subjected for medical



examination only on 16.04.2014, for which, there was no proper explanation.

10. The Doctor [PW8] admitted in her evidence that the victim was also referred to a Radiologist and a report from the Radiologist was also obtained. However, it was not placed before the Court, since a copy of the Secondary School Leaving Certificate [Ex.P6] of the victim was produced before her. This Secondary School Leaving Certificate [Ex.P6] is a xerox copy, attested by the Headmistress of the Victoria Girls Higher Secondary School. Though the investigation officer [PW10] admitted in her evidence that she has also examined the Headmistress, who attested the certificate [Ex.P6], she was not examined by the prosecution during the trial.

11. As per the document [Ex.P6], the victim was short off 35 days in attaining the age 18 years. As per the definition under Section 2(D) of the POCSO Act, a child means any person till the age of 18 years. The charges have been framed against this appellant under the POCSO Act, besides the Indian Penal Code, only based on this Secondary School Leaving Certificate [Ex.P6]. This certificate [Ex.P6] was attested by the Headmistress on 25.07.2014. But, according to the Doctor [PW8], this certificate was shown to her even when she examined the victim on 16.04.2014. Only based on this certificate [Ex.P6], the Doctor [PW8] has not enclosed the Radiologist report, though the victim was subjected for Radiology test to ascertain her age. Admittedly, the victim was subjected for Radiology test and a report was also obtained from the Radiologist, but the same was not placed before the Court. On the other hand, the prosecution has relied upon the Secondary School Leaving Certificate [Ex.P6] to establish the Date of Birth of the victim.

12. The emanation of this certificate [Ex.P6] is highly doubtful, in view of the attestation of the Headmistress on 25.07.2014 and the admission of the Doctor [PW8] that it was produced before her even on 16.04.2014. This Secondary School Leaving Certificate [Ex.P6] was issued by the Secretary, State Board of School Examination, Tamil Nadu. A xerox copy of the Secondary School Leaving Certificate was attested by the Headmistress of the Victoria Girls Higher Secondary School, Thoothukudi and the certified copy has been marked as Ex.P6. Neither the Secondary, State Board of School Examination, Tamil Nadu, nor the Headmistress, Victoria Girls Higher Secondary School, Thoothukudi, was examined by the prosecution to establish the genuineness of this document [Ex.P6]. That apart, the appellant / accused has been denied the opportunity of cross examining this witness to dispute the certificate [Ex.P6] relied upon by the prosecution. Moreover, even as per the prosecution case, the victim was short off 35 days in attaining the age 18 years at the time of occurrence. In the absence of a valid document for the age proof, it is not safe to sustain the conviction under the POCSO Act, based on the certified copy of the Secondary School Leaving Certificate [Ex.P6] alone.



13. As rightly pointed out by the learned Counsel for the appellant, the genesis of the complaint [Ex.P1] is also doubtful. The occurrence was taken place in a day time at about 01.15 pm. At that time, the accused is said to have entered into the victim's house and attempted to rape her. The Doctor [PW8], who examined the victim has not noted down any injury on the victim. Apart from the evidence of the victim [PW1], the other available evidences are the evidence of PWs.3 to 5. These witnesses have also stated that this accused came out of the house and at that time, they have witnessed him. According to PWs.2 & 3, the accused is a close relative and he often visited their house. It is, in fact, based on this evidence of PWs.2 & 3, the trial Court acquitted the appellant for the offence under Section 451 IPC.

14. The occurrence was also informed to PW2 on the same day, ie., on 28.03.2014, but, they have decided to lodge the complaint only on 11.04.2014. The First Information Report [Ex.P4] was also registered on 11.04.2014, but, it reached the Court only on 15.04.2014. The Sub-Inspector of Police [PW9] has admitted in her cross examination that the reason for sending the FIR belatedly to the Court is that the FIR was registered only on 15.04.2014, but ante-dated as 11.04.2014. This evidence of PW9 demolishes the entire case of the prosecution. PW2, the father of the victim [PW1], in his evidence, has stated that they have lodged a complaint within ten days and the victim [PW1] was in the custody of the Police at Muthukuviyal. This evidence of the father of the victim is also raising certain doubt over the manner in which the case was registered.

15. As per the evidence of the Doctor [PW8], she has not noted down any injury. Excepting the evidence of PW1, there is no other evidence for the allegation of rape. This evidence of PW1 is also an exaggerated one to her complaint [Ex.P1]. In the complaint [Ex.P1], the victim has stated that the accused entered into her house on the date of occurrence, gagged her mouth and attempted to rape her. But, in her evidence, she also added that the accused has lifted her nighty and also inserted his male organ into her female organ. No doubt, in a case of this nature, it cannot be expected that the complaint must contain all the details. Moreover, an FIR is also not an encyclopedia, where each and every minute details have to be recorded. But, since the genesis of the prosecution case itself is doubtful, coupled with the delay in referring the victim for medical examination and the Certificate [Ex.P6] for age proof is also doubtful, as discussed supra, this Court is of the view that the prosecution has not established the case beyond any reasonable doubt and the appellant / accused is entitled to the benefit of doubt.

16. Accordingly, the benefit of doubt is extended to the appellant / accused and the conviction and sentence imposed by the



Court), Thoothukudi, in Spl.S.C.No.10 of 2014, dated 14.10.2015 are set aside. The appellant / accused is acquitted from the charges levelled against him. Bail bonds, if any executed, shall stand terminated and fine amount, if any paid, shall be refunded.

In the result, this Criminal Appeal is allowed.

Sd/-

Deputy Registrar (LA&M)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

- 1.The Sessions Judge,
Mahalir Neethimandram,
Fast Track Mahila Court,
Thoothukudi.
2. The Judicial Magistrate No.I, Thoothukudi.
- 3.The Inspector of Police,
All Women Police Station,
Thoothukudi.
- 4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 5.The Section Officer, (2 copies)
Criminal Section,
Madurai Bench of Madras High Court,
Madurai.

Cr1.A. (MD) No.321 of 2015
27.07.2020