

**BAIL SLIP**

The Appellant herein/Accused Viz., K.Thangaraj, S/o.Kalusulingam, was released on bail vide order of this Court dated 16.11.2015 made in MP(MD)No.1 of 2015 in CRL A(MD).No.337 of 2015 on the file of this Court.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on 01.10.2020	Delivered on 23.12.2020
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CORAM

The Honourable **Mr. JUSTICE B.PUGALENDHI****CRL.A.(MD)No.337 of 2015**

K.Thangaraj

... Appellant/Sole Accused

Vs.

The State rep. By
The Inspector of Police,
Aandipatti Police Station,
Theni District.
[Crime No.333/2014]

...Respondent/Complainant

Prayer : This Criminal Appeal is filed under Section 374 (2) Cr.P.C., praying to call for records in Special S.C.No.10 of 2014, dated 10.10.2015, on the file of the Mahalir Neethimandram (Fast Track Mahila Court), Theni, and set aside the same.

For Appellant : Mr.Lenin Sekar
for M/s.M.Mohan Gandhi.

For Respondent : Mr.A.Robinson
Government Advocate (Criminal side)

JUDGMENT

This Criminal Appeal is filed by the sole accused in Special S.C.No.10 of 2014 on the file of the Mahalir Neethi Mandram/Fast Track Mahila Court, Theni, as against the conviction and sentence imposed by the trial Court by its judgment dated 10.10.2015. The appellant was tried for the offence under Section 12 of the Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act") and the trial Court found him guilty and convicted him for the offence under Section 12 of the POCSO Act and sentenced him to undergo two years rigorous imprisonment and fined Rs.2000/- (Rupees Two Thousand only) in default undergo a further imprisonment



2. The brief fact of the prosecution is that the child witness - P.W.3 Palani Selvi is the daughter of P.W.1- Murugan and P.W.2 - Muneeshwari. She was playing with her friends near a Vinayagar Temple on 16.06.2014, around 04.30 p.m. and at that time, this appellant accused, who used to distribute *Pongal* to the devotees of the Temple called her in the cause of distributing *Pongal* and taken her to his mother-in-law's house and showed his private part to the child victim - P.W.3. The child got frightened over the act of the appellant/accused and went to her house and informed her mother P.W.2 about the incident. P.W.2 in turn, informed the same to her husband P.W.1. The child could not identify the person exactly and on 21.06.2014, when the accused was passing through the street, the victim child identified that the appellant/accused is the person, who misbehaved with her on 16.06.2014.

2.1. Thereafter, P.W.1 Murugan went to the Aandipatti Police Station and lodged a complaint before P.W.8 - Sub-Inspector of Police, Pandiammal, in Ex.P1 on 21.06.2014 at about 09.30 p.m. P.W.8 on receipt of the complaint - Ex.P1, registered a case in Aandipatti Police Station Crime No.333 of 2014 as against this appellant for the offence under Section 12 of the POCSO Act and also placed the FIR for further investigation to P.W.10, Thiru.Nallu, Inspector of Police.

2.2. P.W.10 took up the investigation, went to the place of occurrence, prepared mahazar - Ex.P2 and rough sketch - Ex.P5 in the presence of P.W.6, one Elango and P.W.4 - Subhuraman. He also recorded the statement of the victim child through the woman Sub-Inspector of Police P.W.8. He also arrested the accused on the next day on 22.06.2014 at about 05.30 a.m. from his house and remanded him to judicial custody. He made a request for recording the statement of the victim girl before the Judicial Magistrate on 23.06.2014 and the statement of the victim child was recorded by the Judicial Magistrate - P.W.9 on 27.06.2014. The victim girl has narrated the occurrence before the learned Judicial Magistrate and her statement recorded under Section 164 Cr.P.C is marked as Ex.P4. After examination of other witnesses, the Investigation Officer filed his final report before the trial Court on 10.07.2014.

3. During the trial, 10 witnesses were examined on the side of the prosecution and 5 documents were marked. P.Ws.1 and 2 are the father and mother of the victim child. P.Ws.4 and 6 are witnesses for mahazar. P.Ws.5 and 7 are the neighbours to the occurrence place and they did not support the case of the prosecution and P.W.8 is the Sub-Inspector of Police, who registered the FIR in Ex.P3. P.W.9 is the Judicial Magistrate, Theni, who recorded the statement of the victim child as Ex.P4 on 27.06.2014 in Ex.P4 and P.W.10 is the Inspector of Police, who investigated the



case and filed the final report.

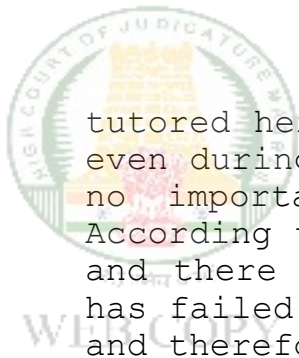
4. In conclusion of the trial, the incriminating materials were put to the appellant/accused under Section 313 Cr.P.C. and the appellant/accused denied the same. Though the appellant/accused stated that there are witnesses on his side, he has neither examined any witness nor produced any document on his behalf. The Trial Court viz., Magalir Neethimandram [Fast Track Mahila Court], Theni, found the appellant/accused guilty for the offence, convicted and sentenced him as stated supra.

5. As against the conviction and sentence imposed on the appellant/accused, the present criminal appeal is filed.

6. Heard Mr.Lenin Sekar, learned Counsel, for Mr.M.Mohan Gandhi. learned counsel for the appellant and Mr.A.Robinson, learned Government Advocate [Criminal side] appearing for the respondent/complainant.

7. The learned Counsel appearing for the appellant would submit that there is an inordinate delay in reporting the incident and the same has not been considered by the trial Court. The occurrence had taken place on 16.06.2014, but the complaint was lodged only on 21.06.2014 at 09.30 p.m, after the delay of five days and the reasons assigned by the prosecution for the delay is not satisfactory. By referring to the evidence of P.Ws 1 to 3, the learned Counsel for the appellant submits that the witnesses admitted that the appellant used to clean the Vinayagar Temple and used to distribute *prasadam* to the devotees and the victim child as well as P.Ws.1 and 2 knows the accused very well. Even though the reason assigned by the prosecution for the delay that the accused was identified by the victim girl only on 21.06.2014 cannot be true. He would further submit that the place of occurrence has not been proved by the prosecution and there are two versions on the place of occurrence by the prosecution witnesses. One is that, the occurrence was taken place in the house of the appellant, another is in the house of his mother-in-law. No independent witness was examined to substantiate the case of the prosecution. The prosecution has also failed to examine the children, who were playing with the victim child at the time of occurrence.

8. By relying on the evidence of P.W.1, the learned Counsel for the appellant further submits that P.W.1 admits in his evidence that on the date of occurrence itself a complaint was lodged, but the same was suppressed and the complaint, which was lodged after five days i.e., on 21.06.2014, is projected as the complaint Ex.P1 and therefore, on the suppression of the earlier complaint, the benefit of doubt has to be extended to the appellant/accused. The victim child in her evidence has admitted that when she was examined by Judicial Magistrate under Section 161 Cr.P.C, the Police had



tutored her in the manner in which she has to depose and similarly, even during the trial, she was tutored by her parents and therefore, no importance can be given to the evidence of victim child. According to P.W.1, the appellant was residing adjacent to his house and there was a motive between them. But the Investigation Officer has failed to verify the motive aspect between the appellant and PW1 and therefore, he prays for acquittal of the appellant/accused.

9. Per contra, Mr.A.Robinson, learned Government Advocate (Criminal Side) appearing for the respondent submitted that the victim child was aged about 5 years at the time of occurrence and she was studying first standard in a School and after returning from the School, she was playing with her friends and at that time, the accused had taken the child saying that he would provide *Pongal* to her and showed his private part with sexual intention to abuse the victim girl and the evidence before the Judicial Magistrate would establish the same and the evidence of P.Ws.1 and 2 also strengthens the case of the prosecution that on the date of occurrence on 16.06.2014, the child returned to her house with tears and informed the incident to her mother P.W.2, who in turn, informed her husband P.W.1 and since, they could not identify the accused exactly, they have not preferred any complaint on the date of occurrence and on 21.06.2014, the victim child rightly identified the accused and thereafter, a complaint was lodged and statement before the Judicial Magistrate under Section 164 Cr.P.C was recorded immediately without any lapse of time and therefore, according to him, the prosecution has established the case beyond any reasonable doubt and the presumption is against the appellant/accused and the accused did not discharge his reverse burden and therefore, there is no reason to interfere with the finding of the trial Court.

10. This Court paid its anxious consideration to the rival submissions made by the learned counsel on either side and also perused the materials available on record.

11. The victim girl [P.W.3] Palani Selvi was aged about five years at the time of occurrence and she was studying first standard in a School. P.Ws.1 and 2 are the weavers and they were engaged in their work and P.W.3 after returning from her School was playing with her friends near the Vinayagar Temple, where the accused used to serve the Temple by cleaning the temple and also distributing *prasadam/pongal* to the devotees, who visit the Temple. On 16.06.2014, around 4.30 p.m. when the child PW3 was playing with her friends, the appellant/accused taken the child to his mother-in-law's house in another street stating that he would provide *Pongal* and with the sexual intent showed his private part to the victim child. The victim child having suffered a shock returned to her house with tears and informed her mother P.W.2 about the incident. She was weeping while informing the incident to her mother P.W.2, who in turn, informed her husband P.W.1 and they were not able to



identify the accused exactly on the date of occurrence. On 21.06.2014, when the accused passed through their house, the victim child - P.W.3 informed the same to her mother that he is the concerned person who behaved in such a manner on 16.06.2014 and thereafter, P.W.1 set the law in motion by lodging the complaint Ex.P1. The case was registered on the same day in Ex.P3 and the printed FIR has also reached the concerned Magistrate on the next day. A request was also made for recording the statement of the victim child on 23.06.2014 and after permission, her statement was recorded by the learned Judicial Magistrate - P.W.9 on 27.06.2014. When she was examined under Section 164 Cr.P.C, the victim child has narrated the incident in the same lines as stated in the complaint in Ex-P1 and in the evidence of P.Ws.1 to 3.

12.Though the learned Counsel for the accused highlighted the delay of five days in reporting the incident, it is on the date of occurrence the victim child was in a shock and was weeping, has said about the incident. But, she is not in a position to identify the accused by telling his name. Subsequently, on seeing the accused again on 21.06.2014, the victim child identified the accused as the person who involved in such an act on 16.06.2014. Thereafter, P.W.1 lodged the complaint Ex-P1.

13.Though the learned Counsel for the appellant attempted to elicit that the appellant/accused is known to the victim child as well as to P.Ws.1 and 2 and the reason assigned by the prosecution for the delay is not acceptable, the victim child is five years old at the time of occurrence. She was under shock due to the behaviour of the appellant/accused on the date of occurrence. She returned to the house and was weeping with tears and she did not know the name of the accused on the date of the occurrence.

14.It is the case of the appellant/accused that he used to clean the Vinayagar Temple and used to distribute *prasadam* to the devotees daily and the *prasadam* will be distributed only in the morning, while so, knowing that the appellant/accused, is the person, who is distributing *prasadam* and if the child had informed her parents that the person had taken her for providing *pongal*, the parents of the victim child could have identified the accused on the date of occurrence itself and P.W.1 has also admitted in his evidence that on the same day, he lodged the complaint and therefore, the delay in lodging the complaint has to be taken against the prosecution.

15.The Hon'ble Apex Court has reiterated in umpteen number of cases that any delay in this type of cases cannot be viewed seriously as against the prosecution. Considering the age of the victim at the time of occurrence and how she disclosed the identity of the accused to the police on the date of occurrence are all factors to be decided in this case and therefore, the delay of 5



days in reporting the incident is not fatal to the prosecution in this case.

16.The victim was placed before the learned Judicial Magistrate immediately on 27.06.2014 and the child has narrated the said incident before the learned Judicial Magistrate - P.W.9. and she was examined under Section 164 Cr.P.C. and also before the trial Court. The chief examination of P.W.3 was recorded on 17.12.2014. The cross examination was deferred on that day and the cross examination was conducted only on 26.03.2015. Even after completing the cross examination, the victim child was again called on 05.08.2015 and further cross-examination was conducted and in the further examination only this contradictory statements were obtained as if the appellant/accused is well known to the victim child and therefore, this Court is not inclined to take it as a material defect affecting the case of the prosecution.

17.Though the learned counsel for the appellant/accused raised a plea that there is enmity between the appellant/accused and P.W.1, the appellant/accused has not elicited the same with acceptable evidence. Under Section 30 of POCSO Act, a presumption can be drawn on the culpable mental state, which includes intention, motive, knowledge of the fact and the belief in, or reason to believe, a fact. In this case, the prosecution has sufficiently discharged its onus by proving the basic fact constituting an incident and Section 30 of the POCSO Act is in *pari meteria* with Section 35 of NDPS Act, Section 138A of Customs Act, Section 278E of Income Tax Act, Section 9C of Central Excise Act, 1944, Section 10C of the Essential Commodities Act and Section 135 of CGST Act, 2017. The appellant has not rebutted the presumption. The prosecution has established the case beyond any reasonable doubt and the defence has not demolished the prosecution theory and there is no reason for this Court to interfere with the order of the trial Court.

18.Accordingly, this appeal is dismissed and the conviction and sentence imposed on the appellant by the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court), Theni, in Special S.C.No.10 of 2014, dated 10.10.2015, is confirmed. The bail bonds executed by the appellant shall stand cancelled. The period of imprisonment already undergone by the appellant/accused shall be given set off. The respondent is directed to take steps to procure the accused for undergoing the remaining period of sentence.

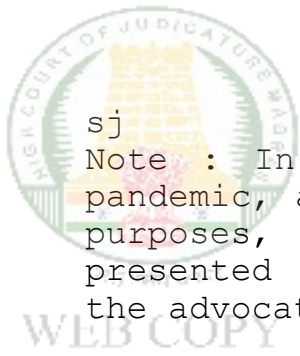
Sd/-

Assistant Registrar(CS-I)

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/ /2021

Sub Assistant Registrar(CS)



sj

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,
Magalir Neethimandram (Fast Track Mahila Court),
Theni.
- 2.The Inspector of Police,
Aandipatti Police Station,
Theni District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
4. The Section Officer,Criminal Section,
Madurai Bench of Madras High Court, Madurai.(2 copies)

Judgment in

CRL.A.(MD)No.337 of 2015

Delivered on : 23.12.2020

ss (CO)

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