



BAIL SLIP

The Appellant/Accused Namely, Aravind @ Aravindsamy S/o.Chinnaraj was directed to be released on bail by the order of this court dated 03.01.2018 and made in CrI.MP.No.14932/2017 in CrI.A.No.293 of 2016.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.10.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN
CRL.A.No.293 of 2016

Aravind @ Aravindsamy

... Appellant/Accused

Versus

State Rep.by
The Inspector of Police,
Thudialur All Women Police Station,
Coimbatore.
Crime No.68 of 2013.

... Respondent/ Respondent

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure, against the Judgment of conviction and sentence imposed on the appellant dated 29.03.2016 in Spl.C.C.No.25 of 2014 by the learned Sessions Judge, Magalir Neethimandram, (Mahila Court) Coimbatore.

For Appellant : Mr.R.Vinayaga Vishnu
for Mr.V.Purushothaman

For Respondent : Mr.S.Sugendran,
Government Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal has been filed against the conviction and sentence imposed on the appellant vide Judgment dated 29.03.2016 made in Special C.C. No.25 of 2014, by the learned Sessions Judge, Magalir Neethimandram, (Mahila Court), Coimbatore.

2.The respondent/police registered a case in Crime No.68 of 2013, for the offence under Section 3 (a), 4 & 5 (m) of the Protection of Children from Sexual Offences Act, 2012, (for brevity 'the POCSO Act' against the appellant. The respondent/police, after investigation laid a charge sheet before the Special Court, since the offence is against the woman particularly child. After completing the formalities, the Special Court framed the charges. In



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order to substantiate the charges framed against the appellant, on the side of the prosecution, as many as 13 witnesses were examined as P.W.1 to P.W.13 and 9 documents were marked as Ex.P.1 to Ex.P.9 and no material object was produced.

3. After completing the examination of the prosecution side witnesses, when incriminating materials culled out from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C., he denied the same as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

4. On completion of trial and after considering the arguments advanced on either side and also considering the materials, the learned Special Judge found the appellant guilty and convicted him for the offence under Section 7 r/w Section 9 (m) r/w 10 of the POCSO Act, and sentenced him to undergo 5 years rigorous imprisonment and to pay a fine of Rs.2,000/-, in default to undergo 3 months simple imprisonment. However, the Trial Court ordered to set off the period already undergone by the accused as per Section 428 of Cr.P.C.,

5. Challenging the said Judgment of conviction and sentence, the appellant/accused has filed the present appeal before this Court.

6. The learned counsel for the appellant/accused would submit that occurrence had taken place on 24.12.2013, the complaint was given only on 25.12.2013, therefore, there was an inordinate delay in filing the complaint. Further, the investigation itself commenced belatedly which led to lapses in the investigation. There are some material contradictions between the evidence and the statements recorded under Section 161 of Cr.P.C., The victim's father and the appellant are friends and they are fans of actor Ajithkumar. There seems to be some dispute between them in respect of the Ajithkumar Fans Association Club, hence, the father of the victim girl foisted a false case against the appellant, for the above said offences.

6.1. Further, he submitted that there are some material contradictions in the evidence of P.W.1/the victim, PW.2/ mother of the victim and PW.3/father of the victim. The inordinate delay in filing the complaint and unexplained delay of sending the documents to the Court are fatal to the case of the prosecution, but the learned Trial Judge has failed to consider the same. Further he would submit that victim was not produced before the learned Judicial Magistrate for recording the statement under Section 164 Cr.P.C. When the victim girl was produced before the Doctor by her grand mother, she stated that a known person



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committed sexual assault on her. But there was no external or internal injury in the private part of the victim girl or any other parts of the body of the victim girl, therefore, there is no material medical evidence with regard to the sexual assault. The doctor/PW.12 who examined the victim girl has stated that the hymen was intact. Further, there are material contradictions in sending the hospital memo and obtaining statements for registering the case. The age of the victim has also not been proved in the manner known to law. The witnesses examined on the side of the prosecution did not prove the commission of penetrative sexual assault. Therefore, the Trial Court failed to appreciate the evidence and wrongly convicted appellant for the alleged offence.

6.2.Though P.W.1 has stated that the appellant has committed sexual assault, it was not corroborated by any eye witness in this case. Even the evidence and documents produced by the prosecution were not genuine. There is doubt in filing of the complaint and a false case has been foisted against the appellant. The appellant was convicted for the offence under Section 7 r/w and Section 9 (m) r/w 10 of the POCSO Act without any materials, and it is unwarranted. The Trial Court failed to appreciate the oral and documentary evidence and erroneously held that the motive was clearly established by the prosecution without considering the defence evidence.

6.3.The evidence of the victim girl is suspicious, it is not cogent, consistent and natural. The victim girl is four year child, she was tutored by her parents to victimise the appellant and to wreck vengeance due to the previous enmity between the appellant and de-facto complainant, the father of the victim. The father tutored the 4 year old daughter and foisted a false case, which warrants interference of this Court.

7.The learned Government Advocate (crl.side) appearing for the respondent would submit that at the time of occurrence, the age of the victim girl was only 5 years. On the date of occurrence, the appellant took the victim girl to his house, removed her dress and his dress and he inserted his penis on the vaginal part of the victim girl. At that time, the victim girl shouted due to pain and thereafter, he left the victim girl. The victim girl informed the same to her mother, who in turn, informed it to the father of the victim girl. The father of the victim girl had taken his daughter to the hospital. Since the victim was admitted in the hospital, there was a delay in lodging the complaint. Subsequently, the next day, the case was registered and investigation commenced. After investigation, charge sheet has been filed. In order to prove the case of the prosecution as many as 13 witnesses were examined, out of which, the victim was examined as



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Ex.P6. PW.13/Inspector of Police, who prepared observation mahazar. On a combined reading of the evidence of PW.2, PW.10, PW.11, PW.12 and PW.13 and documents Ex's.P6, P7 and P3, it could be seen that the age of the victim was four years and there is no dispute in the age of the victim, therefore, she is a child under the definition of 2(1)(d) of the POCSO Act, 2012. Before the doctor/PW.12, the grandmother of the victim girl/PW.10 had informed that the child was subjected to the sexual assault, however, the medical evidence shows that there is no external or internal injury and the hymen was intact and there is no marks on the victim body.

12.As far as the penetrative sexual assault is concerned, the victim has not suffered any internal or external injury in any other part. On a reading of Section 3 of the POCSO Act, it is very clear that injury on the private part of the child is not condition precedent for an offence falling under this Section. As per the ingredients of Section 3(c) of the POCSO Act, even he manipulates any part of the body of the child as to cause penetration into vagina is an offence of penetrative sexual assault which is punishable under Section 4 of the POCSO Act. If the offence falls under anyone of the ingredients of the section 3 of the POCSO Act and if the victim was under the age of 12 years then the offence would fall under Section 5 of POCSO Act. Therefore, the commission of the offence falls under Section 5(m) of the POCSO Act which is punishable under Section 6 of POCSO Act. However, the Trial Court finds the appellant guilty for the offence under Section 7 r/w 9 (m) r/w 10 of the POCSO Act. Since there was no external injury and other significant injury, the Trial Court came to a conclusion that the act committed by the appellant was not an aggravated penetrative sexual assault, but found that there was some sexual assault committed on the victim girl, who is below the age of 12 years, and therefore, the Trial Court framed the charges against the appellant for the offence under Section 7 of POCSO Act, since the victim is below 12 years which falls under Section 9(m) of the POCSO Act and also which is punishable under Section 10 of the POCSO Act.

13.The Trial Court recorded the acquittal for the offence under Section 5(m) which is punishable under Section 6 of the POCSO Act, 2012 and this was not challenged by the prosecution. However, the Trial Court recorded the conviction of the appellant for the offence under Section 9 punishable under Section 10 of the POCSO Act. In this case, the victim was four years old, soon after the occurrence, the victim girl informed the same to her mother. Since the father of the victim girl was out of station, the victim girl was informed to the grandmother of the victim girl. Though the learned defence counsel has taken the



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stand that there was enmity between the appellant and the victim's father and they were members of the Association of actor Ajithkumar Fans Club, it was not proved by any substantial evidence. However, no parent will sacrifice the life of their children and make false allegation, especially a mother cannot do so, for the four year old daughter, by projecting false case against the appellant to take vengeance or to ventilate the enmity relating to any association / club. The victim has very clearly stated that a known person committed the offence, who is none other than the relative and neighbour of the victim, who took the victim to a secluded place and committed sexual assault on her by removing her dress and touched the private part and pressed his penis on her vaginal part. Though the doctor has stated that there is no external injury and the hymen of the victim was intact and there was no penetrative sexual assault on the victim, the victim has clearly narrated that the appellant touched her private part and kept his penis on her vagina. Therefore, the appellant committed the offence under Section 5(m) of the POCSO Act. Even though, the charge framed against the appellant is for the offence under Section 5(m) in this case, however, the Trial Court acquitted the appellant from the charge of Section 5(m) of the POCSO Act, found that the prosecution has not proved from the evidence that the appellant committed penetrative sexual assault. Whereas PW.1 clearly narrated that the appellant touched her private part and pressed his penises into her vagina, further, from the evidence of the doctor/PW.12, who had clearly stated in the Accident Register/Ex.P7, that victim was examined by the doctor, she informed about the sexual assault committed by the appellant, therefore, the appellant is liable to be punished for the offence under Section 5(m) which is punishable under Section 6 of the POCSO Act.

14.As regards, the delay in lodging the complaint and filing the First Information Report, in a case of this nature, the delay is not fatal to the case of the prosecution. Further, considering the age of the victim girl, who does not know what is good touch and bad touch, since she is not in the age to explain what happened to her. Further, the victim girl informed the said incident to her mother, who in turn informed the same to her husband and after his arrival they preferred the complaint and hence, the delay has been properly explained by the prosecution. Though PW.2 & PW.3, are parents, they would not take a hasty decision immediately to take a risk on their own daughter's life. Therefore, the delay in filing the complaint is not fatal to the case of the prosecution and hence, the contention raised by the learned counsel for the appellant is not acceptable.



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15.The medical evidence revealed that no external or internal injury was found at the time of admitting the victim girl into the hospital. The grandmother of the victim girl accompanied her, she has informed that a known person had committed the sexual assault. The evidence of the victim was cogent and consistent and further, she was only four years old, therefore, she cannot be tutored. Unless, the victim girl directly suffered with such an act, she could not say so. Therefore, this Court does not find any reason to discard the evidence of the victim. The victim was only four years old and there is no reason to tutor the victim. If anybody tutored, undoubtedly she would have also revealed the same. The victim has stated simply that she was taken by the appellant in a secluded place and offence was committed on her. Therefore, the evidence of the victim was very clear and there was no motive that could be attributed towards the victim to register a false case against the appellant.

16.Considering the facts and circumstances of the case, this Court finds that the appellant committed aggravated penetrative sexual assault on the victim. However, neither prosecution nor victim filed any appeal for acquittal for the offence of 5(m) of the POCSO Act, there is no reason to interfere with the Judgment of the Trial Court and there is no merit in the appeal. Accordingly, the Criminal Appeal is liable to be dismissed.

17.The learned counsel for the appellant would submit that the appellant/accused is aged about 19 years and prayed to send him to the Borstal School, as per the Tamil Nadu Borstal Schools Act, 1925 and his incarceration cannot extend more than three years and he cannot be retained in the general prison. Since the offence falls under POCSO Act, it is special enactment, which prevails over all other Acts.

18.Especially, the victim girl is four years old and the appellant is 19 years at the time of occurrence. The contention raised by the learned counsel for the appellant is not acceptable and the same is not applicable to the present case and it is rejected as per the decision rendered by the larger bench of this Court in the case of N.Gowthaman @ Babu Vs. The Government of Tamil Nadu and another reported in 2016 (5) CTC 225 and 2016 (4) MLJ (Cr1) 129.

19.In the result, the Criminal Appeal is dismissed by confirming the Judgment of conviction and sentence dated 29.03.2016 passed in Spl.C.C.No.25 of 2014 by the learned Sessions Judge, Magalir Neethimandram, (Mahila Court),



20. Since the accused was released on suspension of sentence passed by this Court in Crl.M.P.No.14932 of 2017, dated 03.01.2018, and now the appeal is dismissed, the trial Court is directed to take steps to secure his custody, to undergo the remaining period of sentence, if any.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

pbl/klt
To

- 1.The Sessions Judge, Magalir Neethimandram,
(Mahila Court), Coimbatore.
- 2.The Inspector of Police,
Thudialur All Women Police Station,
Coimbatore.
- 3.The Superintendent,Central Prison,Coimbatore.
- 4.The Public Prosecutor,
High Court, Madras.

Copy to:
The Section Officer,
Criminal Section,
High Court,Madras.

+1 cc to Mr.R.Vinayaga Vishnu, Advocate Sr.NO. 51771
CRL.A.No.293 of 2016

kv(CO)
A.SK(17/03/2022)