

Bail Slip

The Appellant/Accused, namely Golam Mortoja S/o. Nizamudin was released on bail as per order dated 24.11.2020 in CRL MP.NO.13428/19 IN CRL A.NO.625/2019.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 03.03.2021

CORAM

THE HONOURABLE MR. JUSTICE P. VELMURUGAN
CRL.A.No.625 of 2019 and
Crl.M.P.No.13428 of 2019

Golam Mortoja ... Appellant/ Accused

.Vs.

State by Inspector of Police
Railway Police Station
Podhanur
Coimbatore
(in Crime No.218/2016) ... Respondent

Criminal Appeal filed under Section 374 (2) of the Code of Criminal Procedure to set aside the Judgment of the learned Sessions Judge, Mahila Court (Magalir Neethi Mandram, Coimbatore in S.C.C.No.12 of 2017 dated 28.08.2019.

For Appellant : Mr.D.Murugan
Legal Aid counsel

For Respondent : Mr.R.Suryaprakash
Government Advocate (Crl.side)

J U D G M E N T

This Criminal Appeal has been filed challenging the conviction and sentence passed by the learned Sessions Judge, Mahila Court (Magalir Neethi Mandram, Coimbatore in S.C.C.No.12 of 2017 dated 28.08.2019.

2. The respondent police registered a case in Crime No.192 of 2016 against the appellant for the offence under Section 7 r/w 8 of Protection of Children from Sexual Offences (in short 'POCSO') Act, 2012. After investigation, charge sheet was laid and taken on file by the learned Sessions Judge, Mahila Court, Mahalir Neethimandram, Coimbatore in S.C.No.12 of 2017 for the offence under Section 7 r/w 8 of the POCSO Act 2012.

3. After completing the formalities, the learned Special Judge framed the charge against the accused and after trial found the appellant guilty of the offence punishable under Section 7 r/w 8 of POCSO Act 2012, and convicted and sentenced the appellant to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.1,000/- in default to undergo six months Rigorous imprisonment. Aggrieved against the same, the appellant is before this Court by filing this appeal.

4. The learned counsel for the appellant would submit that the prosecution has failed to prove its case beyond reasonable doubt. He would further submit at the time of examination of P.W.1, she has deposed that one person touched her body and she did not point out the accused/appellant, but according to the prosecution, two persons travelled in the said berth No.62 and, hence, there is contradiction in the version of P.W.1 and the trial Court failed to consider the same and wrongly convicted the accused. He would further submit that there was a portion of wooden plate between berth Nos. 62 and 67 and, therefore, it is not possible to project the hand in the middle and hence, the allegation against the accused that he put his hand on the chest of the victim girl is false. He would further submit that the T.T.R was examined as P.W.8 and he has clearly stated during cross examination that in between berth No.62 and 67, there is a partition by way of plywood covered with iron grill and through the iron grill, there is no possibility to touch the person who was sleeping in the berth which is other side and only the finger will enter and hence the contention of the victim girl is false. He would further submit that at the time of investigation, the investigating officer has not gone to the scene of occurrence., i.e, the train and he had not chosen to draw the sketch of the place of the occurrence. He would further submit that even Ex.P12- chart marked by the prosecution does not contain the name of the appellant and, therefore, the appellant had not committed the alleged offence. He would further submit that though the victim girl has stated that the cousin of the appellant also accompanied him in the train and both were sleeping in the same berth, the prosecution has not examined the person who accompanied the appellant in train. He would further submit that there is no sexual assault in this case, since there is no space in between the two berths and there is no chance for causing the alleged occurrence and the prosecution has not established its case beyond reasonable doubt. He would further submit that there are material contradictions, but the trial Court has failed to appreciate the evidence and wrongly convicted the accused as stated supra and therefore the Judgment of the trial Court warrants interference.

5. The learned Government Advocate (Crl.side) would submit that the appellant has not denied that he was travelling in

the train which the alleged occurrence is said to have taken place. He would further submit that though the learned counsel for the appellant stated that there is no possibility to insert the hand from berth No. 62 to 67, the victim girl has clearly stated that there was a space in between the neck portion and through which, the appellant brought his hand and kept it on her chest and the appellant has not stated the said fact before police and during the cross examination it is for the counsel for the appellant to prove the same but he failed to prove the same. He would further submit that normally there may not be a any gap between two berths for keeping hands of one person on the another and there would be a wooden plate in between the two berths, which was deposed by the T.T.R at the time of examination, however, in this case, the victim girl has clearly stated that there was a damage in the net through the said hole he inserted his hand. He would further submit that the victim girl identified the appellant more than once i.e., at the time of occurrence before the passengers and parents and before the Court and therefore it is clear that the appellant has committed the alleged offence. He would further submit that the prosecution has proved its case beyond reasonable doubt and there is no perversity in the order passed by the Court below.

6. Heard both sides. Perused the records.

7. The case of the prosecution is that on 11.07.2016, victim while travelling with her parents and relatives in Train No.12601 (Chennai Central-Mangalore Central Express) and when the train went near Tirupur to Podanur railway station, the victim girl was travelling in S-9 coach in Berth No.67 and the accused was travelling in the same coach in berth No.62 and that the appellant had put his hands through the iron grill in between the two upper berths and touched the breast of the victim child and thereby sexually assaulted her and hence the charge.

8. In order to prove the case of the prosecution before the trial Court, examined as many as 9 witnesses as P.W.1 to P.W.9 and 12 documents were marked as Exs.P1 to P12 and no material object was marked.

9. After completing the prosecution evidence, the incriminating circumstances culled out from the prosecution witnesses were put before the appellant and the appellant denied it as false. On the side of the appellant, no witness was examined and no documentary evidence was produced.

10. After considering the evidence on record and after hearing the learned counsel on either side, the learned Sessions Judge, Mahila Court, Mahalir Neethimandram, Coimbatore vide judgment dated 28.08.2019 in SPL.C.C.No.12 of 2017, convicted and sentenced the appellant as stated supra.

11. Challenging the judgment of conviction and sentence, the present appeal has been preferred by the appellant.

12. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.

13. It is stated that the victim is 16 years at the time of occurrence and in order to prove the same, Ex.P2- copy of the birth certificate was marked, which clearly shows that the victim girl is below 18 years and she is a child under Section 2(d)(1) of POCSO Act and even the School leaving certificate was marked as Ex.P3, which also clearly shows that the victim girl not completed 18 years. Further, a perusal of complaint-Ex.P1 clearly shows that the occurrence is alleged to have taken place in the running train. In order to substantiate the case of the victim, the father of the victim girl was examined as P.W.2 and her mother was examined as P.W.3 and they have clearly deposed the alleged occurrence, which corroborates the evidence of P.W.1. Since there is no injury or penetrative sexual assault the victim girl was not subjected to medical examination. Further, she was produced before the learned Judicial Magistrate for recording statement under Section 164 of Cr.P.C. and accordingly statement was recorded from the victim child and it was marked as Ex.P4. A careful reading of the evidence of P.W.1 before this Court and also the statement recorded by the learned Magistrate under Section 164 Cr.P.C, show that victim child has clearly stated before the Court as well as before the learned Magistrate that the appellant had committed the offence. In order to confirm the fact that both the appellant as well the victim travelled in the same train, TTR in the said coach was examined as P.W.8 and he has clearly identified the victim and appellant and deposed the alleged occurrence. Therefore a reading of the evidence of P.W.1 to 3 and P.W.8 and a perusal of Exs.P1 to P4 and Ex.P9, clearly show that the prosecution has proved its case beyond reasonable doubt. Even though the appellant counsel vehemently contended that there is no possibility for the appellant to keep his hand on the victim girl as there is no space in between two berths 67 and 62, the appellant should have informed the said fact to the passengers when they questioned him, but he kept silent and even during the cross examination of the witnesses, the defence counsel has not put any of such suggestion which clearly shows that there was gap in the iron wire put between the berths.

14. The act of the investigating officer in not visiting the place of occurrence and drawing a rough sketch to show the actual place of occurrence is a flaw, but the said flaw cannot be said to undermine the evidence of the witnesses. Further, the occurrence said to have taken place in the running train the investigating officer would have visited the train and drew the sketch as to whether there is a gap between the two berths, but he has not taken any steps for the same, but the

investigating officer with a lethargic attitude has conducted the investigation, even though the offence falls under POCSO Act. In the light of the corroborating nature of the evidence of the witnesses coupled with the non-examination of the witnesses by the accused relating to the impossibility to put the hand on the victim, the stand of the accused before this Court that it would be an impossibility for the accused to have assaulted the victim sexually in view of the dividing wooden plank between the two berths cannot be a ground to set at naught the well considered finding recorded by the trial court. However the defective investigation cannot be the sole ground to discredit the veracity of the statement of the witnesses, which corroborates on all material particulars. Section 29 of the Act clearly states that when the prosecution has stated that the accused has committed any offence by examining the victim girl, it is for the appellant to rebut the presumption in the manner known to law. In the case on hand, though there is failure on the part of the prosecution to prove its case by the investigating officer visiting the place of occurrence and noting down the physical features by drawing rough sketch, the appellant has got the opportunity during cross examination of the witnesses to bring out the fallacy in the prosecution story, which would bolster his case and in the absence of the accused to bring out the material deposition from the witnesses, the appellant cannot seek refuge that the prosecution has not proved its case beyond reasonable doubt which necessitates acquittal of the accused. The victim girl when produced before the learned Magistrate for recording statement under Section 164 Cr.P.C. has clearly stated that the appellant kept his hand on her chest and there was gap between two berths. Even during the examination before the Court, she has clearly deposed that the appellant had committed sexual assault on her by keeping his hand on her chest during night hour, while travelling in the train. The contention of the appellant that the occurrence had taken place only in the running train that too in the late night, when all the passengers were asleep and, therefore, the identification of the accused is not possible cannot be accepted. The accused is an unknown person to the victim girl and hence there may be no motive to implicate the accused in this case. It is for the appellant to rebut the presumption, in the manner known to law. In this case, the appellant had not rebutted the presumption in the manner known to law. This Court, being an Appellate Court, is a fact finding Court and on re-appreciating the entire evidence finds that the appellant had committed the alleged occurrence. This Court condemns the act of the investigating officer in not conducting the investigation in a proper manner. This Court, therefore, directs the Director General of Police to take necessary action for imparting proper training to the investigating officers, as otherwise such faulty investigation would lead to the accused being let out on technicalities.

15. In view of the aforesaid reasoning, the Appeal is dismissed by confirming the Judgment of the trial Court. The suspension of sentence already granted by this Court dated 24.11.2020 in Crl.M.P.No.13428 of 2019 in Crl.A.No.625 of 2019 stands cancelled. The trial Court is directed to secure the appellant for sufferance of the above sentence. The legal aid counsel is entitled for fees as per rules.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Sessions Judge, Mahila Court,
(Magalir Neethi Mandram), Coimbatore.
2. The Superintendent,Central prison, Coimbatore.
- 3.The Inspector of Police
Railway Police Station
Podhanur,Coimbatore.
- 4.The Director General Of Police,(Railways),Chennai.
5. The Secretary,
Legal Services Authority,
High Court, Madras.
6. The Public Prosecutor
Madras High Court.
7. The Section Officer (Crl.side)
Madras High Court.

Copy to:

The Presiding Officer,
POCSO COMMITTEE,
High Court,Madras

+3ccs to Mr.D.Murugan, Advocate SR.No. 13448

CRL.A.No.625 of 2019

A.SK(05.07.2021)