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Bail Slip

Appellant namely Mahendiran was released on bail as per order of this Court dated 20-04-2016 made in Crl Mp(MD) No.3289 of 2016 in Crl A(MD) No.126 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 25.08.2021
CORAM:
THE HONOURABLE MR.JUSTICE R.PONGIAPPAN
Crl.A.(MD) No. 126 of 2016

Mahendiran : Appellant/Sole Accused

Vs.

State rep by
The Inspector of Police,
All Women Police Station,
Kulithalai,
Karur District.
(Crime No.6 of 2013). : Respondent/Complainant

PRAYER: The Criminal Appeal is filed under Section 374 of the Code of Criminal Procedure, to set aside the order of conviction and sentence, dated 19.01.2015 made in Special S.C.No.01 of 2014, on the file of the learned Session Judge, Mahalir Neethimandram (Fast Track Mahila Court), Karur and allow this appeal and acquit the appellant/accused from the charge levelled against him.

For Appellant : Mr.C.Christopher
for Mr.P.Krishnasamy

For Respondent : Mr.E.Antony Sakaya Prabahar
Government Advocate (Crl.side)

JUDGMENT

The present Criminal Appeal is directed against the conviction and sentence, dated 19.01.2015, made in Special S.C.No.01 of 2014, on the file of the Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Karur.

2. The appellant is the sole accused. He stood charged for the offences punishable under Sections 5(m) r/w 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred as "POCSO Act"). The accused denied the charges as false and opted for trial. Therefore, he was put on trial on the charges.

3. After full-fledged trial, the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Karur, came to the conclusion that the appellant was found guilty for the offence

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punishable under Section 5(m) r/w 6 of POCSO Act and accordingly, he was convicted and sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs.5,000/-, in default, to undergo Simple Imprisonment for 6 months. Challenging the said conviction and sentence, the appellant is before this Court, by way of filing the present Criminal Appeal.

4. The relevant facts of the case, which gave rise to filing of this appeal are necessary to be recapitulated for the disposal of this appeal:-

(i) P.W.-3-X- is the victim child. P.W.1-Thavamani and P.W.2-Paulraj are her parents. On 23.10.2013 around 10.15 a.m., when P.W.1 was in her house, the victim child came from the area, in which, the accused was residing and when P.W.1-Thavamani questioned the victim child, she wanted to go for attending the natural call. At the time, P.W.1 removed the skirt which owned by victim child, she found that there was a white fluid in the thigh of the victim child. Further, the while fluid was found in the skirt also.

(ii) After attending the natural calls, when the victim child was questioned by P.W.1, the victim child told to P.W.1 that the accused Mahendiran after giving chocolate, brought her to his house and committed a bad activities. Immediately, after hearing the same, P.W.1 and one P.W.4-Tamilselvi @ Selvi went to the accused house and questioned about the complaint made against him by the victim child. In this regard, the accused after denying the allegation replied to P.W.1 as he brought the minor child only for seeing the Cinema. Further, he has told to P.W.1 that since the victim child is wanted to attend the natural call, after pinching her instructed to send out from his house. Thereafter, P.W.1 brought the victim child to one Visalakshi Hospital which is situated in Somarasampettai, wherein, due to the reasons that the Doctor is not available, again returned to her house along with victim child. Later, she brought the victim child to the Government Hospital, Trichy for giving treatment.

(iii)In the Government Hospital, Trichy, P.W.10-Dr.Thiruselvi, on the same day, in noon, examined the victim child and admitted her as inpatient. On examination, she found that there was no external injuries. She collected the vaginal smear and sent the same for chemical examination. After completing the process of chemical examination, she received a report that there was no semen found in the vaginal smear. The said report was marked as Ex.P7.

(iv) In the mean time, on receipt of information from the Government Hospital, Trichy, P.W.18-V.R.Selvi, the then Inspector of Police, All Women Police Station, Kulithalai, rushed to the hospital and recorded the statement from P.W.1 (Ex.P1). In turn, based on the statement given by P.W.1, she registered a case against the accused in Crime No. 6/2013 for the offences punishable under

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Section 8 of POCSO Act. The printed FIR was marked as Ex.P16. After registration of the case, P.W.18 took the same for investigation. She examined the witnesses and recorded their statements.

(v) In the presence of P.W.5-Jeyavel and one Vasudevan, she recovered the dresses (M.O.1 & M.O.2) owned by the victim child at the relevant point of time. Recovery Mahazar prepared for the recovery of those M.O.1 and M.O.2 were marked as Ex.P.4. On the next day ie, on 24.10.2013 she has visited the occurrence place and in the presence of P.W.9-Manikandan and Vellaichamy, she prepared an Observation Mahazar under Ex.P5. She drawn the Rough Sketch and the same has been marked as Ex.P17.

(vi) In continuous of investigation, on 24.10.2013 around 10.00 a.m., she arrested the accused and in the presence of P.W.9, she recorded the disclosure statement from the accused. In the disclosure statement, the accused admitted the commission of offence and willing to produce the dresses which owned at the time of occurrence.

(vii) Pursuant to the confession statement, P.W.18 brought the accused to his house, wherein, the accused produced the dresses (M.Os. 3 to 5). The said material objects were recovered in the presence of same witnesses under the cover of mahazar Ex.P6. After recovering the material objects as above, P.W.18 made arrangements for sending the accused to remand. On 31.10.2013 she submitted an application before the Fast Track Mahila Court for recording the statement under section 164 Cr.P.C., from P.W.1 as well as from the victim child. In turn, in view of the orders passed by the Fast Track Mahila Court, P.W.17-Mohana Ramya, on 31.10.2013 recorded the statement from P.W.1 and the victim child and the said statements have been marked before the trial Court as Ex.P2 and Ex.P3 respectively. Further, the said statements have been recorded through M.O.6-CD.

(viii) In continuous of investigation, P.W.18 vide Ex.P18 submitted a letter before the Judicial Magistrate, Kulithalai, praying for medical examination of the accused. Thereafter, in view of the reference issued by the Judicial Magistrate No.I, Kulithalai, P.W.13-Dr.Gowtham examined the accused and issued a certificate as there was no resemblance to show that the accused committed intercourse recently, further, he referred the accused to the Radiologist for fixing the age scientifically.

(ix) In turn, P.W.14-Dr.Ravi, radiologically examined the accused and issued the certificate stating that the age of the accused is around 30 years. The age certificate issued by P.W.14 was marked as Ex.P12. The letter sent by the Court and the Accident Register copy issued by P.W.13 were marked as Ex.P8 and Ex.P.9 respectively. Further, the opinion given by P.W.13 was marked as Ex.P.10.

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(x) After the completion of above formalities, P.W.18 submitted a one another letter before the Court with request to send the material objects, which were collected during the time of investigation, for chemical examination. In turn, in view of the reference issued by the Court, P.W.16-C.Jeya, Scientific Assistant examined the following Material Objects:-

"Item 1 : A silken light brownish tops with black designs, ligh brownish embroidery designs, black chumky designs and yellow stones.
Item 2 : A torn silken pink skirt
Item 3 : A silken blue underwear
Item 4 : A silken maroon half sleeve shirt
Item 5 : A torn light yellowish cotton dhoti with yellowish fancy border stripes, on which were dark brown stains."

In the examination, she detected that there was a semen found in a torn silken pink skirt (MO-2). In this regard, she issued a report under Ex.P.15.

(vii) After receipt of the said report, P.W.18 examined P.W.16 and recorded her statement. Further, she examined the doctor, who examined the accused and the victim child, and recorded their statement. Ultimately, after concluding the investigation, she came to the positive conclusion that the accused herein had committed penetrative sexual assault on a child, who is below the age of 12 years. In this regard, he altered the section of law from 8 of POCSO Act to 5(m) r/w 6 of POCSO Act. The alteration report was marked as Ex.P.21. Further, he filed a final report against the accused, accordingly.

5. Based on the materials available, the trial Court framed the charges for an offence punishable under Section 5(m) r/w 6 of POCSO Act. The accused denied the charge and opted for trial. Therefore, the accused was put on trial.

6. During the course of trial proceedings, in order to prove the case of prosecution, as many as 19 witnesses i.e., P.W.1 to P.W.19 were examined on the side of the prosecution and 22 documents were exhibited as Ex.P1 to Ex.P22.

7. Out of the above said witnesses, P.W.1-Thavamani, who is the mother of the victim child, speaks about the information given by the victim child in respect of the sexual assault committed by the accused. She has also claims that at the time, when the victim child was admitted in the hospital for taking treatment, P.W.18 came there and obtained a complaint from her.

(ii) P.W.2-Paulraj, who is the father of the victim child, deposed that during the relevant point of time, he was informed by

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P.W.1 and thereafter, he made arrangements for giving treatment to the victim child.

(iii) P.W.3 is the victim child. She did not give any evidence in support of the case of the prosecution. However, before the trial Court, she identified accused without any hesitation.

(iv) P.W.4-Tamilselvi @ Selvi and P.W.7-Kalarani, they were neighbours to P.W.1 gave similar evidence given by P.W.1 as while at the time of seeing the child, there is a white semen in the thigh of the victim child.

(v) P.W.5-Jayavel is the resident of Neithaloor. He claims that the Investigating Officer in this case had prepared an Observation Mahazar in his presence. He has further stated before the trial Court that M.Os.1 & 2 were recovered in his presence.

(vi) P.W.6-Mohamed Ali is the resident of Neithaloor. He claims that during the relevant point of time around 10.00 a.m., there was a crowd, wherein, somebody told that the accused herein committed an offence as alleged by the prosecution.

(vii) P.W.8-Gobalakrishnan @ Pandiyan is the resident of same locality. He did not say anything about the occurrence in support of the prosecution.

(viii) P.W.9-Manikandan gave evidence as P.W.18 prepared an Observation Mahazar in his presence. He has further stated that after the arrest of the accused in their presence, P.W.18 recorded the confession statement from the accused and recovered the material objects M.Os.3 to 5.

(ix) P.W.10-Dr.Thiruselvi attached with Government Hospital, Trichy, speaks about the details of treatment given to the victim child.

(x) P.Ws.11 & 12 are Grade-1 Constables speaks about the details in respect to the production of accused for medical examination.

(xi) P.W.13-Dr.Gowthaman attached with the Government Hospital, Karur, gave evidence as during the time of examining the accused, he has not found any symptoms for recent sexual intercourse. However, he issued a certificate that the accused is a capable person to perform sexual intercourse.

(xii) P.W.14-Dr.Ravi, who is another Doctor/Radiologist, examined the accused and issued a age certificate stating that the age of the accused is around 30 years.

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(xiii) P.W.15-Thiyagu Grade-I Constable speaks about the

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details about the production of victim child before the Magistrate for recording 164 Cr.P.C., statement.

(xiv) P.W.16-C.Jaya is a Scientific Assistant. She claims that on 31.03.2013 she received the Material Objects 1 to 5 for examination and on examination she detected a semen in M.O.2.

(xv) P.W.17-S.Mohana Ramya, the then Magistrate, speaks about the details in respect of recording 164 Cr.P.C., Statement from P.Ws.1 & 3.

(xvi) P.W.18-V.R.Selvi, the then Inspector of Police, gave evidence in respect of the registration of the case, examination of the witnesses, arrest of the accused and about filing of final report.

8. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C., he denied the same as false. However, he did not chose to examine any witness or mark any document on his side.

9. The learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Karur, after perusing all the above materials and on considering the arguments advanced by the learned counsels on either side, convicted and sentenced the appellant as stated supra. Aggrieved by the said conviction and sentence, the appellant is before this Court with this appeal.

10. I have heard Mr.C.Christopher, learned counsel appearing for the appellant/accused and Mr.E.Antony Sahaya Prabakar, learned Government Advocate (Crl.side) appearing for the State. I have also perused the records carefully.

11. The learned counsel appearing for the appellant would contend that before the trial Court, the victim child is the competent person to say the occurrence, had not been given any evidence in support of the prosecution. Even assuming that the evidence given by P.W.1 is in favour of the prosecution. The evidence given by the doctor, who examined the victim child as a first instant, is not in support of the evidence given by P.Ws.1 & 7. According to him, absolutely, there is no evidence available from the prosecution witness to convict the accused, the learned trial Judge without appreciating the same in a perspective manner mainly relying on Presumption Clause found in Section 29 of POCSO Act, came to the conclusion that the appellant is found guilty under Section 5(m) r/w Section 6 of POCSO Act, and these fact, the conviction and sentence rendered by the trial Court is liable to be set aside.

12. Per contra, the learned Government Advocate (Crl.side) appearing for the respondent would contend that being the reason

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that the victim child is aged about 3 years, she is not in a position to gave evidence in support of the prosecution. Though, she has not given any evidence verbally before the trial Court, but the identification made by the victim child is sufficient to hold that the accused committed an offence as alleged by the prosecution. He would further contend that the semen found in the skirt (M.O.2) is a substantial evidence to accept the story put forth by the prosecution. According to him, the interference of this Court in the findings given in the impugned judgment does not require.

13. I have considered the rival submissions made by the learned counsel appearing on either side.

14. Initially, on going through the impugned judgment rendered by the trial Court, it is true that the learned Sessions Judge, Fast Track Mahila Court mainly relied on the evidence given by P.W.1 by applying the presumption clause found in Section 29 of POCSO Act, came to the conclusion that the accused is found guilty.

15. Now, on go through the definition Clause of 5(m) of POCSO Act, it is necessary for the prosecution to raise a prima facie evidence as during the time of occurrence, the accused committed penetrative sexual assault on a child below 12 years. Applying the ingredients of the said Section with the case in hand, absolutely, there is no evidence found on the side of the prosecution that during the time of occurrence, the accused commits penetrative sexual assault. The only evidence available in respect of the allegation levelled against the accused is that, the evidence given by P.W.1 and P.W.7, according to them, during the relevant point of time, they saw a white fluid in the dresses of the victim child. Further, the evidence given by P.W.1 is quite clear that on the same day, after removing the dresses owned by the victim child, she washes the symptoms and then, she brought the child to the hospital for giving treatment. In this regard, the evidence given by the doctor, who examined the victim child as a first time, is a very narrow one that there is no injury found in the body of the victim child. Therefore, in the said circumstances, it cannot be conclude that during the time of occurrence, the accused committed penetrative sexual assault. Therefore, I am of the view that the conviction and sentence awarded by the trial Court under Section 5 (m) r/w Section 6 POCSO Act is liable to be set aside.

16. However, on go through the whole story projected by the prosecution, it is not in dispute that P.W.18 Investigating Officer during the time of investigation recovered the skirt owned by the child at the time of occurrence and sent the same for chemical examination. The evidence given by P.W.16, who is the scientific officer, stated that during time of chemical examination, she detected a semen in the skirt of the victim child. In respect of the said evidence, there was no denial on the side of the accused as no semen was detected. Further, in respect of the recovery of the

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skirt, the evidence given by P.W.9, who attested in the seizure mahazar and the evidence given by the investigating officer, were not disputed on the side of the accused. Mere putting the suggestion, as the evidence given by the investigating officer in respect of the recovery of the skirt, is false and it is not sufficient to hold that the accused has shown a prima facie materials for disbelieving the said evidence. Therefore, the detection of semen by the Scientific Assistant is in support of the evidence given by P.Ws.1 & 7, who are the persons to saw the victim child, immediately after the occurrence. Therefore, in the said circumstances, though the evidence given by the doctor, who examined the victim child is not in correspondence with the evidence given by P.Ws.1 & 7, I am of the opinion that the detection of semen is in support of the evidence given by P.Ws.1 & 7. When at the time of giving evidence as P.W.1, the mother of the victim child has clearly narrated the occurrence as the child was came from the area, in which, the accused was residing. Further, in respect of the enquiry made by P.Ws.1 & 7, the accused had admitted that he pinched the victim child. Therefore, the reply given by the accused is quite clear that the child was together with accused just before the occurrence. In the said circumstances, it is necessary to presume that the semen detected is belongs to the accused. Therefore, the said circumstances made clear that the accused with sexual intend, touches the vagina of the victim child and involves physical contact without penetration.

17. Accordingly, in the light of the above discussions stated supra, the appellant/accused is convicted under Section 9(m) r/w 10 of POCSO Act and sentenced to undergo Rigorous Imprisonment for 5 years and to pay a fine of Rs.5,000/- in default to undergo Simple Imprisonment for 6 months.

18. In the result, this Criminal Appeal is partly allowed.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

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To:-

1.The Session Judge, Mahalir Neethimandram
(Fast Track Mahila Court), Karur.

2.The Superintendent,
Central Prison, Trichy.

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3.The Inspector of Police,
All Women Police Station,
Kulithalai,
Karur District.

4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

5.The Section Officer,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai.

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