



Bail Slip

Appellant/Accused viz., Karthikeyan, S/o. Jeya Murugaiya Nadar, was already released on bail vide this court order dated 11/01/2017 in Crl.MP(MD)No.3355 of 2016 in Crl.A(MD)No.129 of 2016.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE **R.PONGIAPPAN**
Crl.A.(MD)No.129 of 2016

Karthikeyan

: Appellant/Sole Accused

Vs.

State rep by
The Inspector of Police,
Kulasekarapattinam Police Station,
Thoothukudi District.
(Crime No.262 of 2013)

: Respondent/Complainant

PRAYER: This Criminal Appeal is filed under Section 374 of the Code of Criminal Procedure, to call for the entire records pertaining to the judgment rendered by the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi, Thoothukudi District, in Special S.C.No.1 of 2015, vide judgment dated 28.03.2016, by convicting the appellant under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo three months simple imprisonment.

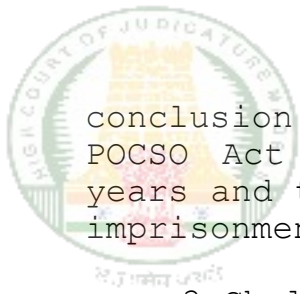
For Appellant : Mr.J.C.Rathnavel Pandian

For Respondent : Mr.M.Muthumanikkam
Government Advocate (Crl. side)

JUDGMENT

This appeal is directed against the conviction and sentence dated 28.03.2016, made in Spl.S.C.No.1 of 2015, on the file of the learned Sessions Judge, Fast Track Mahila Court, Thoothukudi.

2.The appellant is the sole accused. He stood charged for the offence punishable under Section 5(m) read with 6 of the Protection of Children from Sexual Offences Act, 2012 [hereinafter referred to as 'the POCSO Act']. After full-fledged trial, the learned Sessions Judge, Fast Track Mahila Court, Thoothukudi, came to the



conclusion that the accused is found guilty under Section 6 of the POCSO Act 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 three months.

3.Challenging the said conviction and sentence, the appellant/accused is before this Court with this Criminal Appeal.

4.The case of the prosecution is as follows:-

(i) P.W.2 - 'X' is the victim child in this case. During the relevant point of time, she was aged about 8 years and was studying IV Standard in Sri Parvathy Middle School. P.W.1 - Muthulakshmi is the mother of the victim child and P.W.3 - Pitchai Pazham is her father. The accused is her uncle. He is residing in the same street near to the residence of P.W.1. On the day of occurrence, around 07.30 p.m., when P.W.2 was playing in Santhaiadi Amman Temple, the accused Karthikeyan brought her to the dark area and after putting a cloth in her mouth and after removing the skirt worn by the victim child, penetrated his penis into her vagina. Afterwards, he threatened the victim child as if she discloses the same to anyone, he would kill her. On the next day also, he committed the same offence and thereby, P.W.2 sustained pain and due to the same, she informed the occurrence to her mother [P.W.1]. In turn, P.W.1 after seeing the contusion found on the vagina of the minor child, informed the same to one Raja Poobathi, Muruganantham, Amutha and Parameswari. Subsequent to that, she lodged a complaint before the respondent Police under Ex.P.1. In the complaint lodged before the respondent Police, P.W.3 signed as a witness.

(ii) After receipt of the complaint given by P.W.1, P.W.12- Muthuraman, the then Sub-Inspector of Police, Kulasekarapattinam Police Station, registered a case against the accused in Crime No.262 of 2013 under Section 376 I.P.C. and Sections 3 and 4 of the POCSO Act. The printed F.I.R. has been marked as Ex.P.7. After registration of the F.I.R., he forwarded the original to the learned Judicial Magistrate, Thiruchendur and forwarded a copy of the F.I.R. to the Inspector of Police for investigation.

(iii) Upon receipt of a copy of the F.I.R., P.W.13 - Pradhaban, the then Inspector of Police, Kulasekarapattinam Police Station, took up the same for investigation. On the same day, i.e., on 15.09.2013 around 09.00 a.m., he visited the scene of occurrence and in the presence of the witnesses, he prepared an Observation Mahazar under Ex.P.2. He drew the Rough Sketch and the same has been marked as Ex.P.8. He examined the witnesses and recorded their statements. He submitted an application before the learned Judicial Magistrate, Thiruchendur, for sending the victim child for medical examination. In turn, in view of the proceedings issued by the learned Magistrate, P.W.11 - Dr.Mareeswari examined the victim child and found the following symptoms:-



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*'A female, not pale, Breast - Tanner Stage &
No axillary hair seen.
No external injuries found all over the body.
PR - 90 / mins
CVS - S1 S2 present / No (NC)
RS - NVBS present / No added sounds.
P/A - Soft
L/E - No Public hair seen
P/V - Hymen not intact
Vagina admits 1 finger
No blood on examining finger.'*

She collected vaginal smear and sent the same for chemical examination, wherein no semen is detected. Ultimately, she issued a report under Ex.P.6 stating that due to reason that the hymen was ruptured, there may be a possibility that the victim child was subjected to rape.

(iv) In continuation of investigation, P.W.13 on 15.09.2013, arrested the accused and on the same day, he recorded the confession statement from him. He has submitted an application before the Court for conducting medical examination to the accused. In turn, in view of the proceedings issued by the Court, P.W.10 - Dr.Ganapathy examined the accused and issued a report under Ex.P.5 stating as there is nothing to suggest that the accused is impotent. Thereafter, since P.W.13 got transfer from the said post, he handed over the case records to P.W.14 for further investigation.

(v) P.W.14 - Thiru.Esakki, the then Inspector of Police, Kulasekarapattinam Police Station, on receipt of the case records, on 17.09.2013, examined the witnesses. Since the witnesses had given a similar statement, which had already been recorded by P.W.13, he has not recorded the said statement. He examined the Headmistress, who is working in the School, in which, the victim child was studying, and obtained the Age Certificate [Ex.P.3]. Ultimately, after concluding the investigation, P.W.14 came to the positive conclusion that the accused herein is liable to be convicted under Section 4 of the POCSO Act. He filed a final report accordingly.

5.From the above materials, the trial Court framed charges for the offence punishable under Section 5(m) read with 6 of the POCSO Act. The accused denied the same as false. He opted for trial. Hence, in order to prove their case, on the side of the prosecution, 14 witnesses have been examined as P.W.1 to P.W.14 and 8 documents were marked as Ex.P.1 to Ex.P.8.

(i) Out of the said witnesses, P.W.1 - Muthulakshmi, who is the mother of the victim child, speaks about the occurrence as, on 14.09.2013 her daughter 'X' complains about the pain on her Vagina. On enquiry, the victim child has stated that prior to three



days, the accused had committed a wrong on her. On examination, she found a contusion on the Vagina of the victim child, further, after informing the same to her neighbours, in view of the instruction given by her husband, she went to the Police Station and lodged a complaint against the accused.

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(ii) P.W. 2 - 'X', who is the victim child, had given evidence before the trial Court as during the relevant point of time, the accused took her to the dark area, situated near to the Temple and after removing her skirt, penetrated his penis into her vagina. She has further stated since the accused threatened her, the said act committed by the accused has not been disclosed to anybody immediately. However, as the accused had committed the same offence for second time, she got pain and thereby, without any alternative, she informed the same to her mother / P.W.1.

(iii) P.W.3 - Pitchai Pazham, who is the father of the victim child, deposed before the trial Court as on 16.09.2013 around 09.00 p.m., P.W.1 had informed the occurrence and in turn, he immediately returned to his home and lodged a complaint before the respondent Police.

(iv) P.W.4 - Amutha, who is relative of P.W.1, gave evidence before the trial Court as after she got information about the alleged occurrence, along with P.W.1, she went to the Police Station and lodged the complaint.

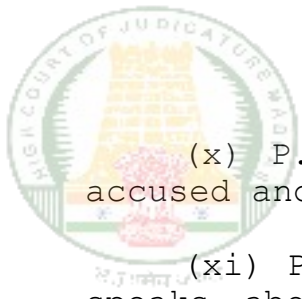
(v) P.W.5 - Siva Ganesan, who is a resident of the same Village, deposed before the trial Court as the Observation Mahazar, which was marked as Ex.P.2, was prepared by the Investigation Officer in his presence.

(vi) P.W.6 - Sundar speaks about the arrest of the accused as on 15.09.2013 around 01.00 p.m., the Inspector of Police, Kulasekarapattinam Police Station, arrested the accused and on enquiry, the accused gave a confession statement, wherein, he has signed as a witness.

(vii) P.W.7 - Tmt.Indumathi, the then Headmistress of the School gave evidence in respect of the issuance of certificate that as per the documents maintained in the School, the date of birth of the victim child is 12.09.2005.

(viii) P.W.8 - Esakkimuthu, the then Police Constable, has stated in his evidence as on 18.09.2013 in view of the direction given by the Inspector of Police, he produced the accused before the Hospital for medical examination.

(ix) P.W.9 - Prabhadevi, the then Police Constable has stated about the production of victim child before the Doctor for medical



(x) P.W.10 - Dr.Ganapathy speaks about the examination of the accused and about the issuance of Potency Certificate.

(xi) P.W.11 - Dr.Mareeswari attached to the Government Hospital speaks about the examination of the victim child and about the issuance of Medical Certificate with respect to body component of the victim child.

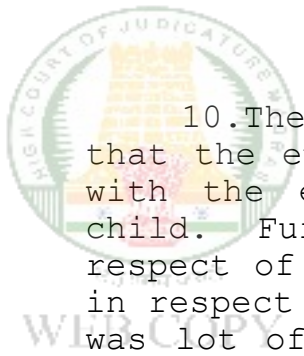
(xii) P.W.12 - Muthuraman, P.W.13 - Pradhaban and P.W.14 - Esakki, are all the Police Officials, speak about the receipt of complaint from P.W.1, registration of the case, investigation and filing of final report.

6.When the above incriminating materials were put to the accused under Section 313 Cr.P.C., the accused denied the same as false. He filed a statement under Section 313 Cr.P.C., wherein he has stated that one Karthikeyan, who is the brother of P.W.3, passed away leaving behind his wife Veilukantha Eswari as his legal heir. Further, at the time of his death, he left certain immovable properties worth about multi-crores. After the death of the said Karthikeyan, his wife adopted one Velkumar, who is the son of her brother, as her son. In due course, the said Veilukantha Eswari made arrangements for the marriage of the said Velkumar along with one Kausalya, who is the daughter of the accused and the same was objected by P.W.1, P.W.3 and P.W.4. They believed that if the said marriage was performed, the properties left out by the deceased Karthikeyan were all goes to the hands of the said Kausalya and therefore, they have falsely implicated the accused in this case. Further, it was stated in the said statement as in the Amman Temple, every day there was a Pooja between 06.00 p.m. to 09.00 p.m. In the said Pooja, 100 persons were participated. Therefore, in the said circumstances, it is impossible for the accused to take the victim child from the temple and committed the offence. Except filing the said statement, the accused has not examined any witness nor mark any document on his side.

7.Having considered the materials placed before her and after considering the arguments advanced by the learned counsel on either side, the learned Sessions Judge, Fast Track Mahila Court, Thoothukudi, came to the conclusion that the accused is found guilty under Section 5(m) read with 6 of the POCSO Act, convicted and sentenced him as stated in Paragraph 2 of this judgment.

8.Aggrieved over the said conviction and sentence, the accused is before this Court with the present Criminal Appeal.

9.I have heard Mr.J.C.Rathnavel Pandian, learned counsel appearing for the appellant and Mr.M.Muthumanikkam, learned Government Advocate (Criminal side) appearing for the respondent.



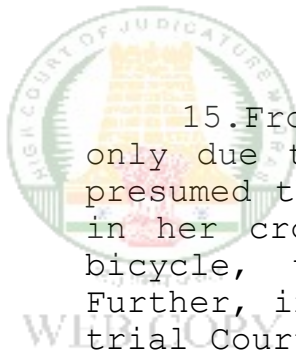
10.The learned counsel appearing for the appellant contended that the evidence given by P.W.1 to P.W.3 is entirely contradicted with the evidence given by the Doctor, who examined the victim child. Further, the evidence given by the Investigation Officer in respect of the arrest of the accused is false one. More than that, in respect of presence of stone bench in the occurrence place, there was lot of contradiction found available in the evidence given by P.W.1 and the Investigation Officer. He further contended that the said contradictions now indicated by the accused are sufficient to hold that the prosecution has not shown any *prima facie* case and therefore, Section 29 of the POCSO Act did not come into play and thereby, the accused is entitled to the relief of acquittal.

11.Per contra, the learned Government Advocate (Criminal side) appearing for the respondent Police contended that the evidence given by the prosecution witnesses is sufficient to hold that the accused alone had committed the offence of penetrative sexual assault on P.W.2 and therefore, interfering with the findings arrived at by the learned Sessions Judge does not require.

12.I have considered the rival submissions made by the learned counsel appearing on either side and perused the materials available on record.

13.Primarily, in view of Section 29 of POCSO Act, it should be necessary for the accused to show probability that under what circumstance, a false case has been foisted against him. Now, on weighing the evidence given by the prosecution, in respect of the alleged occurrence, P.W.1 and P.W.2 had given evidence as the alleged occurrence had happened on 10.09.2013. Thereafter, upon receipt of the complaint given by P.W.1, a case has been registered against the accused on 15.09.2013. In the meantime, on 12.09.2013, the victim child on account of her birthday, gave Chocolates to the accused. In this regard, the victim child when at the time of giving evidence as P.W.2 has stated in her cross-examination as on her birthday, i.e., 12.09.2013, she gave chocolates to all including the accused. Thereafter, within two days from the said date, she reported the occurrence to her mother, which creates a doubt over the alleged occurrence. If really, the alleged occurrence had happened on 10.09.2013, it is improbable for P.W.2 to distribute Chocolates to the accused with pain.

14.Secondly, it is specific evidence given by P.W.1 that there was a contusion on the vagina of P.W.2. In this aspect, the Doctor, who examined the victim child on the next day, had given evidence that there was no external injury on the body of P.W.2. Therefore, in respect of injury sustained by P.W.2, the evidence given by the victim child and P.W.1 is not in accordance with the evidence given by the Doctor.

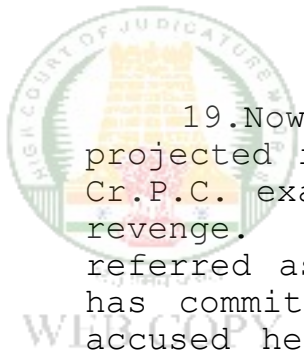


15.From the evidence given by P.W.11, it is quite clear that only due to the reason that the hymen of P.W.2 was ruptured, she presumed that there was a sexual assault on P.W.2. In this regard, in her cross-examination, she had admitted that due to riding of bicycle, there may be a possibility for rupturing the hymen. Further, in this regard, the victim child has also stated before the trial Court as she is having the habit of running bicycle.

16.One another aspect, which is necessary to be decided in this case is that, before the trial Court P.W.2 gave evidence as when at the time, the accused attempted to take her, she bite the accused and ran away from the said place. In this aspect, P.W.13, who recorded the statement from P.W.2, had given evidence as in respect of biting of accused and in respect of the second day occurrence, the victim child has not stated anything while at the time of recording 161 Cr.P.C. Statement. Further, in this case, the provision narrated under Section 25 of the POCSO Act has not been complied with by recording the statement of the victim child by the learned Magistrate. Accordingly, the evidence let in by the prosecution witnesses are all clear that there was discrepancy in respect of the injury sustained by P.W.2. Further, it seems that there was a contradictory evidence found available in respect of the second day occurrence. Hence, these factors create a doubt whether the prosecution has approached the trial Court with true story.

17.One another important lapse found available in this case is that, as per the evidence given by P.W.2, the accused herein after putting her in a stone bench, committed the alleged offence. In this respect, P.W.13, who is the Investigation Officer, gave evidence as there was no stone bench available in the occurrence place. So, in respect of the place of occurrence also, the evidence given by P.W.2 creates a doubt and the same would sufficient to disbelieve the entire case of prosecution. Further, P.W.1 in her cross-examination has specifically stated that during the time when she was entering into the Police Station, the accused found available in the Police Station. On the other hand, the Investigation Officer gave evidence as the accused in the present case was arrested only after registration of the present case. Therefore, in this respect also, the case of the prosecution becomes doubtful.

18.Further, before the trial Court the Investigation Officer gave evidence that on the day of occurrence, there was a Pooja till 08.00 p.m. in the Temple, which is situated near the occurrence place. If really, such Pooja is performed in the evening hours, there may be a possibility for assembling number of persons in and around the Temple. In the said circumstance, it would not be possible for the accused to take the victim child from the said place, hence, the same also creates a doubt over the case of prosecution.



19.Now, on going through the said contradictions with the story projected in the statement filed by the accused at the time of 313 Cr.P.C. examination, it is possible that such a case was filed for revenge. Further, the trial Court without appreciating the above referred aspects in proper perspective, concluded that the accused has committed the offence, which is erroneous. So, in all, the accused herein shows probability as only due to previous enmity, this case has been foisted against him and thereby, without any hesitation, I am of the considered view that the prosecution has not proved their case in the manner known to law and therefore, conviction and sentence imposed on the accused by the trial Court is liable to be set aside.

20.In the result, this Criminal Appeal is allowed and the conviction and sentence dated 28.03.2016, imposed in Spl.S.C.No.1 of 2015, by the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi, is set aside and the appellant is acquitted from the charges. The fine amount, if any, paid by him shall be refunded to him. Bail bond, if any, executed by the appellant shall stand cancelled.

Sd/-

Assistant Registrar (W)

// True Copy //

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Sub Assistant Registrar(CS)

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To

- 1.The Sessions Judge,
Mahalir Neethimandram
[Fast Track Mahila Court],
Thoothukudi.
- 2.The Judicial Magistrate,
Thiruchendur, Thoothukudi District.
- 3.Do through
The Chief Judicial Magistrate,
Thoothukudi.
- 4.The Inspector of Police,
Kulasekarapattinam Police Station,
Thoothukudi District.



5.The Superintendent Central Prison,
Palayankottai.

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

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Copy to

The Record Keeper,
Criminal Records Section,
Madurai Bench of Madras High Court,
Madurai.

Criminal Appeal (MD) No.129 of 2016
20.09.2021

RK (30.09.2021) 9P 9C