



BAIL SLIP

Senthilkumar S/o.Gopal Kumar, male aged about ____ year, is released on bail vide court order dated:31.03.2016 made in Cr1.MP (MD)No.1452/2016 in CRL.A(MD)No.31/2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 02.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Cr1.A (MD)No.31 of 2016

Senthilkumar : Appellant

Vs.

State rep by its
The Inspector of Police,
Thuvarankurichi Police Station,
Trichy City.
(in Crime No.260 of 2013)

: Respondent

PRAYER: The Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, to allow the appeal and set aside the judgment dated 08.01.2016 made in Spl.S.C No.12/2014 on the file of the Sessions Judge, Mahila Court, Tiruchirapalli.

For Petitioner	: Mr.N.Anandakumar
For Respondent	: Mr.E.Antony Sahaya Prabahar Government Advocate (crl.side)

JUDGMENT

This present Criminal Appeal is filed against the conviction and sentence dated 08.01.2016 made in Spl.S.C No.12/2014 on the file of the learned Sessions Judge, Mahila Court, Tiruchirapalli.

2.The appellant is the sole accused. He stood charged for the offence punishable under Section 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred as "POCSO Act") and Section 450 of IPC r/w Section 3(1)(XII) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act. After full-fledged trial, the learned Sessions Judge, Mahila Court, Tiruchirapalli, came to the conclusion that the appellant was found guilty for the offence under Section 8 of POCSO Act and Section 451 of IPC and accordingly, the appellant was convicted under Section 8 of POCSO Act and sentenced to undergo Rigorous Imprisonment for five years and to pay a fine of Rs.1,000/-, in default, to undergo simple Imprisonment for three months. Further he has been convicted under Section 451 of IPC and sentenced to undergo Rigorous Imprisonment for one year and to pay a fine of Rs.500/-, in default, to undergo simple Imprisonment for one month. The sentences are directed to run concurrently. In respect to the other offence, the accused was acquitted. Challenging the said conviction and sentence, the



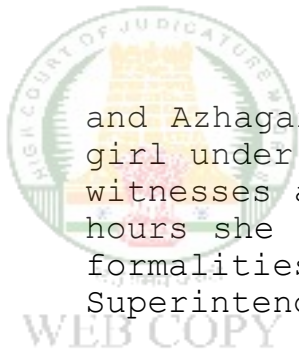
appellant is before this Court, by way of filing the present Criminal Appeal.

3. The case of the prosecution in brief is as follows:-

(i) PW1- the victim girl aged about 9 years was studying in 4th standard. During the relevant point of time, when she was playing in the street, the accused came there and asked her to charge his mobile phone. Obliging the request made by the accused, in order to charge the mobile phone, she went to her home and during such time, the accused has followed her. When at the moment the victim girl entered into her home, the accused closed her mouth and after removing his kaily, the victim girl's skirt, lay down on her. At that moment, PW5-Pradeep residing nearby in order to return the pen, which was received from the victim girl, came there and saw the occurrence. Immediately, on seeing the occurrence, he stabbed the accused in his back side and afterwards, the accused went off from the victim girl's house. Thereafter, PW5 informed the occurrence to the villagers as well as PW2, who is the father of the victim. In turn, the villagers got the accused and brought him to the Samathuvapuram. From where after getting information, the police persons came there and took the accused. In this regard, the victim girl along with her father went to the police station wherein PW2 lodged the complaint before PW13.

(ii) PW13-Buveneswari the then Sub Inspector of Police, Thuvarankurichi Police Station on 25.12.2013 at 23.30 hours after receipt of the complaint given by PW2, registered the case against the accused in Crime No.260 of 2013 under Section 376 of IPC r/w Sections 4 and 10 of POCSO Act. The copy of the FIR was marked as Ex.P8 and the complaint given by PW2 was marked as Ex.P2. After registration of the case, he made arrangements for examining the accused and the victim girl medically. During the time of medical examination, PW10-Dr.Saravanan attached with Government Medical College Hospital, Trichy, on 26.12.2013 around 12.30 noon examined the accused and issued the certificate under Ex.P5 stating that there is nothing to suggest that the above examined male individual is incapable of performing sexual intercourse. In otherwise, he did not say that the accused sustained any injury. Similarly, PW15-Dr.Thiruselvi attached with the same Hospital examined the victim girl and issued the Accident Register copy under Ex.P12 that she is normal. She collected the vaginal smear and sent the same for chemical examination. In the chemical examination, there was no semen is detected. Along with Accident Register she issued the discharge summary and the same was marked as Ex.P13.

(iii) In continuation of investigation, on 26.12.2013, PW13 visited the scene of occurrence and in the presence of PW6-Soundaram and one Rasu, she prepared an observation mahazar under Ex.P3. She drew the rough sketch and the same was marked as Ex.P9. On the same day, around 8.00 am in the presence of PW7-Aathimoolam



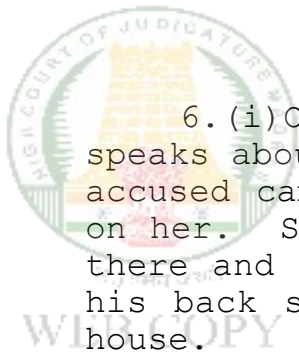
and Azhagar, she recovered the skirt and midi dressed by the victim girl under a cover of seizure mahazar under Ex.P4. She examined the witnesses and recorded their statements. On the same day, around 15 hours she sent the accused for remand and after completing the said formalities, she handed over the case records to Deputy Superintendent of Police, Manaparai for further investigation.

(iv) PW16-M.Ganesan the then Deputy Superintendent of Police, Manaparai Sub Division, on receipt of the case records from PW13 in view of the order passed by the Superintendent of Police, dated 02.01.2014, conducted further investigation and during such time, under Ex.P14 he submitted the requisition before the Chief Judicial Magistrate for recording 164 Cr.P.C statement from PW1. In turn, in view of the orders passed by the Chief Judicial Magistrate, the learned Judicial Magistrate No.3, Trichy, on 07.04.2014, examined the victim girl and recorded 164 Cr.P.C statement from PW1 under Ex.P1. In continuation of investigation, PW16 recovered kaily (M.O.3) dressed by the accused through Form-95. The same was marked Ex.P17. He submitted an application before the learned Sessions Judge, Mahila Court, Trichy, for sending the said material objects to chemical examination and thereafter, in view of the proceedings issued by the learned Sessions Judge, PW11-Jeya, who is the Scientific Assistant working in Forensic Science Department, Trichy, examined M.O1 to M.O3 and issued the report under Ex.P6 stating that there is no semen and blood detected in M.O1 to M.O.3.

(v) However, PW16 altered the Section of law under Ex.P16 from 376 of IPC r/w Sections 4 and 10 of POCSO Act to 376 of IPC r/w Sections 4 and 10 of POCSO Act r/w Section 3(1)(XII) of SC/ST Act. Thereafter, since he got transfer, he handed over the case records to PW17-R.Mutharasu for further investigation. PW17, the then Deputy Superintendent of Police, Manaparai, on receipt of the case records from PW16, examined the victim girl and recorded her statement. Ultimately, after concluding the investigation, he came to the positive conclusion that the accused herein is liable to be convicted under Section 6 of POCSO Act, Section 450 of IPC and Section 3(1)(XII) of SC/ST Act and filed the final report accordingly.

4. Based on the materials available on record, the trial Court framed the charges for the offences under Section 6 of POCSO Act and Section 450 of IPC r/w Section 3(1)(XII) of SC/ST Act. The accused denied the charges and opted for trial. Therefore, the accused was put on trial.

5. During the course of trial proceedings, in order to prove their case, on the side of the prosecution, 17 witnesses were examined as PW1 to PW17 and 22 documents were exhibited as Ex.P1 to Ex.P22, besides three material objects (M.O1 to M.O.3).



6.(i) Out of the above said witnesses, PW1 being the victim girl speaks about the occurrence as during the relevant point of time the accused came into her house and after removing her dress, lay down on her. She further states that during such time, PW5-Pradeep came there and after seeing the said position, he stabbed the accused on his back side and after seeing PW5, the accused went off from her house.

(ii) PW2-Sakthivel, who is the father of the victim girl, speaks about the occurrence on 25.12.2013 around 6.30 pm when at the time he was collecting entrance fee in the toilet, PW5 came there and reported the occurrence. Immediately, he went to her home and on search, secured the accused in bus stand. Thereafter, he lodged the complaint before the Police Officer.

(iii) PW3- Mariammal who is the grandmother of PW1 claims that on 25.12.2013 she heard the news and thereafter after securing the accused, PW1, PW2 and herself went to the police station and lodged the complaint. PW4-Muthuraman, who the resident of same locality, narrated the occurrence as during the relevant point of time, there was a crowd found in the house of PW3.

(iv) PW5-Pradeep who is the student studying in 9th standard in the school, in which, PW1 was studied speaks about the occurrence as upon entering into the house of PW1 for returning the pen, which has been received from PW1, he saw the accused herein in the position he was lying on PW1. PW6-Soundaram has stated in respect to the preparation of observation mahazar as PW13 prepared the observation mahazar in his presence. PW7-Aathimoolam, is also a person attested in the seizure mahazar gave evidence as PW13 recovered the skirt and midi from PW1 in his presence.

(v) PW8-Vellasamy, alleged occurrence witness did not support the case of the prosecution, hence, he was treated as hostile witness. PW9-Kumar @ Adaikkalam who is the co-worker of the accused gave evidence as the alleged occurrence was informed to him by PW2. PW10-Dr.Saravanan gave evidence in respect to the examination of accused.

(vi) PW11-C.Jaya, who is the Scientific Assistant, Forensic Science Department, gave evidence in respect to the examination of M.01 to M.03. PW12-Veeramani, the then Tahsildar, Manaparai, speaks about the requisition given by Investigation Officer in respect to the issuance of community certificate to PW1. According to him, PW1 belongs to community of Pallar which is recognized as Scheduled Caste. Further, he certified that the accused belongs to the community of Hindu Yathavar.

(vii) PW13-Buveneswari, the then Sub Inspector of Police, Thuvankurichi, speaks about the receipt of complaint from PW2 and the registration of case. PW14-K.Alli, the then Judicial



Magistrate, gave evidence in respect to recording of 164 Cr.P.C statement from PW1. PW15 Dr.Thiruselvi gave evidence in respect to the examination of victim girl and about the issuance of Accident Register and discharge summary. PW16 and PW17 are police officers speaks about the investigation and about the filing of final report.

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7. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C., the accused denied the same as false. However, on his side, he examined three witnesses as DW1 to DW3.

8. Out of the said witnesses, DW1-Palani gave evidence as on 17.11.2013 around 10.00 am the accused herein met him and reported the quarrel happened in the hotel, in which he was working as Labourer. DW-2 Aariyappan and DW3-A.Palanisamy are also gave similar evidence as the accused herein is having the dispute with his master in respect to the payment of salary and other things.

9. Having considered all the above, the learned Sessions Judge, Mahila Court, Tiruchirapalli, came to the conclusion that the accused found guilty for offence under Section 8 of POCSO Act and Section 451 of IPC and sentenced as stated in paragraph No.2 of this judgment. Aggrieved by the said conviction and sentence, the appellant/accused is before this Court with this appeal.

10. I have heard Mr.N.Anandakumar, learned counsel appearing for the appellant/accused and Mr.E.Antony Sahaya Prabahar, learned Government Advocate (crl.side) appearing for the State and also perused the records carefully.

11. The learned counsel appearing for the appellant would contend that the evidences given by the prosecution witnesses are having lot of contradictions in respect to the alleged occurrence. Only the evidence found available in support of the evidence given by PW1 is the evidence given by PW5. He would further submit that since PW1 and PW5 are the children, their evidence has to be looked into with great caution and in otherwise, the learned trial Judge without looking into their evidence with great caution and without looking into the contradictions found in their evidence, convicted the accused, which is erroneous in law.

12. Per contra, the learned Government Advocate appearing for the respondent would contend that the evidence given by the prosecution witnesses in respect to the occurrence are cogent and in the farm of inspiring the confidence of this Court. Only because of the reason that PW1 and PW5 alleged eye witnesses are the child witnesses, their evidence cannot be thrown away easily. According to him, interference of this Court in the finding arrived at by the trial Court does not require.



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

14.It is the evidence given by PW15 is that the age of the victim girl is 9 years at the time of occurrence. Though there is no document has been produced to show the age of PW1/victim child, during the course of trial proceedings on the side of the accused, there was no denial that PW1 is not a child having 9 years at the time of occurrence. So, in order to resolve the issue raised in this appeal, this Court has determined the age of the victim girl as 9 years.

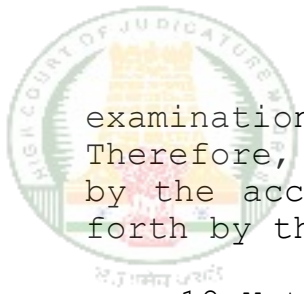
15.Secondly, on going through the nature of the allegations levelled against the accused during the relevant point of time, the accused in the absence of others in PW1's home after removing the skirt and midi owned by the PW1, lay down on her and assaulted her sexually. In this occasion, in respect to sexual assault, Section 7 of POCSO Act has narrated as follows:-

"7. Sexual Assault:- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

16.Now on going through the said definition, the same appears for proving the offence of sexual assault, it would necessary to see the following ingredients:-

- 1.touching the vagina, penis, anus, or breast of the child;
- 2.making the child touch the vagina, penis, anus, or breast of such person or any other person;
- 3.doing any other act which involves physical contact without penetration.

17.All of the above acts, however, must have been done with 'sexual indent'. On that score, applying the materials available in this case, the evidence given by PW1 is very clear that during the time of occurrence, the accused came there and after made request to charge his mobile phone, when at the time she was entered into her house, he followed her and after removing the skirt and midi, lay down on her. The said evidence is corroborated through the evidence of PW5, who is also the student studying in the same school. His evidence is fully in support of the evidence given by PW1 as after seeing the position of PW1, he stabbed the accused on his back side and thereafter, the accused is run away from the scene of occurrence. The entire cross examination of PW1 and PW5 was not in the form of assailing the character and validity of the chief



examination given by PW1 and PW5 in respect to the occurrence. Therefore, their evidence in respect to the sexual assault committed by the accused is more than sufficient to hold that the story put forth by the prosecution is found correct.

18.Yet another circumstance found available in support of the case of the prosecution is that as per the evidence of PW5 after the occurrence, he reported the same to the neighbours as well as to the father of PW1. In this regard, the father of PW1 has stated in his evidence as PW5 alone reported the occurrence to him. On the other hand, it is the case of the prosecution that PW2 lodged the complaint before the police station on the same day in night hours. The evidence given by PW13, who is the Police Officer is also in support of the same that on the date of occurrence itself PW2 came there and lodged the complaint. Further, the fact that the peoples gathered in the occurrence place secured the accused and produced before the police, is also not denied on the side of the accused. So, in all the evidence given by the prosecution witnesses, is fully in support of the case of the prosecution and inspired the confidence of this Court.

19.On considering the submission made by the learned counsel appearing for the accused in respect to the evidence given by the child witnesses, it would be relevant to see Section 118 of Indian Evidence act 1988, which states that there is no minimum age for the witness. The children have three years old have been given evidence before the trial Court in the case of sexual assault. In general, any person who appears before a Court so as to give evidence against any person involved, is called as witness. In otherwise, any person may be a witness, who can understand the question put to him and rationally answer them. Further, usually during the trial, the Court before recording the testimony of the child witnesses, put questions regarding his or her competency on the basis of their ability to give rational answer. In this regard, now on go through the deposition recorded by PW1 and PW5, the learned trial Judge before recording the testimony, put so many questions and only after came to the conclusion that the child is capable for giving evidence, then only the said evidence is recorded.

20.In order to consider the competency of the child as a witness the Court conducts the test called "voir dire". In this case, the judge personally asked the questions which are unrelated to the case to a child before starting the proceedings of the case, in order to determine whether the child is of a rationale and sound mind or not. Some of the questions put forth by the Court are name of the child, place of residence, date of birth, name of the school, etc. If the Court is fully satisfied with the answers given by him during the enquiry done by them, then only the Court can recorded the statements. As already stated, in this case also, the said procedure is properly applied by the trial Court and therefore, I



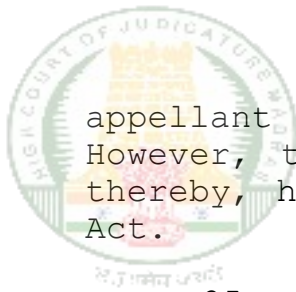
school going students, cannot be rejected merely on the ground that they are child. Accordingly, the said submission made by the learned counsel appearing for the appellant that the witness given by the child cannot be accepted, is not having any much force.

21.The another submission made by the learned counsel for the appellant that PW2 and the accused is having enmity and due to the same, a false case has been foisted against the accused. In this regard, it would be relevant to see the evidence given by DW1 to DW3. All the witnesses examined on the side of the accused as DW1 to DW3 have stated that there was a dispute between the accused and his Master and not with PW2. In the said circumstances, in order to prove the previous enmity except the evidence of DW1 to DW3, no material is shown on the side of the accused that the accused and PW2 is having previous enmity. Accordingly, this submission also is not having any much force to disbelieve the evidence given by PW1.

22.It is the contention raised by the learned counsel appearing for the accused that the Doctor, who examined the victim girl has not stated about the injury sustained by the victim. He has further added that if such type of occurrence narrated by the prosecution is occurred, definitely it would be possible to cause injury to the victim girl.

23.Now, on considering the said submission, it is true on going through the Accident Register (Ex.P12) and discharge summary (Ex.P.13) issued by the Doctor, who examined the victim girl, stated that there was no injury found on the body of the victim girl. May be the doctor who examined the victim girl has stated in his cross-examination as if the person lied over on the child, there may be a possibility of causing injury. Considering the said evidence with the normal course, it is not at all necessary that every child has to be sustained injury in these type of occurrence. More than that, it is the case of the prosecution that immediately after lied over the victim girl, PW5 came there and stabbed the accused. So, in the said circumstances, only because of the reason that the child is not sustained any injury, we cannot disbelieve the entire case of the prosecution as false one.

24. So in all, on going through the evidence given by the prosecution witnesses and the exhibits marked on the side of the prosecution, I am of the considered opinion that the prosecution has proved its case beyond reasonable doubt. However, on going through the punishment awarded to the accused, the trial Court convicted the accused under Section 8 of the POCSO Act which is nothing, but erroneous in law. In fact, on a conjoint reading of Sections 7 to 9 of POCSO Act, it seems that if the person committed an offence of sexual assault on a child below 12 years, the same has come under the purview of Section 9 (m) of the POCSO Act, which means the sexual assault termed as aggravated sexual assault. The



appellant under Section 8 of POCSO Act, which is found not correct. However, the same cannot be a reason for allowing the appeal and thereby, he is liable to be convicted under Section 9 (m) of POCSO Act.

25. In the light of above discussions stated supra, I find that the accused is guilty under Section 9(m) of POCSO Act, convicted and sentenced to undergo Rigorous Imprisonment for five years and to pay a fine of Rs.1,000/-, in default, to undergo simple Imprisonment for three months. In respect to other offence, the conviction and sentence awarded by the trial Court is confirmed. The sentences are ordered to run concurrently. The period of imprisonment already undergone by the appellant shall be set off. Bail bond, if any, executed by the appellant shall stand cancelled. The trial Court is directed to secure the appellant and commit him in prison to undergo the remaining period of sentence.

26. In view of the above modification, this Criminal Appeal is Dismissed.

Sd/-

Assistant Registrar (T&P)

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/ /2021
Sub Assistant Registrar(CS)

cp

To:-

1. The Sessions Judge, Mahila Court, Tiruchirapalli.

2. The Inspector of Police,
Thuvarankurichi Police Station,
Trichy City.

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

4. The Section Officer,
Criminal Section records,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

5. The Superintendent,
Central Prison, Trichirappali.

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