



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Crl.A. (MD) No. 203 of 2017

Murugesan : Appellant/Sole Accused

.Vs.

The State rep. by
Inspector of Police,
Cheranmahadevi Police Station,
Tirunelveli District.
(Crime No.189 of 2013).

: Respondent/Complainant

PRAYER: The Criminal Appeal is filed under Section 374 of the Code of Criminal Procedure, to set aside the conviction and sentence, dated 10.03.2016 imposed upon the petitioner in Special S.C.No.17 of 2014, on the file of the learned Sessions Judge, Mahalir Neethimandram, Tirunelveli and acquit the appellant/accused herein.

For Appellant : Mr.K.K.Samy
Legal Aid Counsel
For Respondent : Mr.M.Muthumanikkam
Counsel for Government
of Tamil Nadu (Crl.side)

JUDGMENT

The present Criminal Appeal is directed against the conviction and sentence, dated 10.03.2016, made in Special S.C.No.17 of 2014, on the file of the learned Sessions Judge, Mahalir Neethimandram, Tirunelveli.

2. The appellant herein is the sole accused. He stood charged for the offences punishable under Section 363 IPC and Section 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred as "POCSO Act").

3. After full-fledged trial, the learned Sessions Judge, Mahalir Neethimandram, Tirunelveli, came to the conclusion that the appellant was guilty for an offence punishable under Section 6 of POCSO Act, convicted and sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs.1,000/-, in default, to undergo Simple Imprisonment for 1 year. In respect to the offence under Section 363 IPC, the learned Sessions Judge acquitted the accused from the charge. Challenging the said conviction and



sentence, the appellant is before this Court with this 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.2-X- is the victim girl. P.W.1-Ravichandran is her father and P.W.3-Meena is her mother. During the relevant point of time, P.W.2 and her family were residing in a rented house at Tirunelveli. When at the time, the accused visited the house which is situated opposite to the house of P.W.2. On 19.06.2013 around 12.30 p.m., the victim girl met the accused and asked to go to Bombay, for which, the accused said, after getting permission from P.Ws.1 & 3 we will go to Bombay. After hearing the same, the victim girl told the accused that if any permission is asked from her parents, definitely they would create a problem and further if she has not brought to Bombay, she would commit suicide. Ultimately, in view of the said threatening made by the victim girl, both the accused and the victim went to Madurai and then to Bombay wherein, both of them were stayed in a house which belongs to one Sunil. In Bombay, while at the time, they were staying in Sunil's house, the accused has not touched the victim girl.

(ii) After some time from the said elopement, P.W.1 came to Bombay and informed to them a case has been registered in Tirunelveli, in respect to the said elopement. After hearing the same, both the accused and the victim girl returned to Tirunelveli and surrendered before the Cheranmahadevi Police Station, wherein, the police recovered the dresses owned by the victim girl and the accused.

(iii) In the mean time, after knowing the elopement of the victim girl, P.W.1 lodged a complaint before one Vijayalakshmi, the then Sub-Inspector of Police, Kalakadu Police Station. In turn, the said Sub-Inspector of Police, registered a case against the accused in Crime No.189 of 2013 under Section 366(A) of IPC. The complaint given by P.W.1 was marked as Ex.P2 and the printed FIR was marked as Ex.P11.

(iv) On 19.06.2013 around 08.30 p.m., P.W.11-Thiru.Lakshmanan took up the case for investigation and after visiting the occurrence place, in the presence of P.W.10-Ganesan and one Prakash, he prepared an Observation Mahazar under Ex.P10. He drawn the Rough Sketch and the same has been marked as Ex.P12. He examined the witnesses and recorded their statements.

(v) On 04.07.2013 in a house which belongs to one Kavitha, he examined the victim girl and recorded her statement. On the same day, around 11.00 a.m., he arrested the accused and recorded his confession statement given by him. In the confession statement, the



accused admitted the commission of offence and willing to produce the dresses owned at the time when the victim girl and the accused indulging in a sexual intercourse. Pursuant to the said statement, on the same day around 13.00 hours, the accused brought by the Investigating Officer to the house which belongs to one Kavitha and identified the M.Os.1 to 6. In turn, the said Material Objects were recovered under the cover of Mahazar Ex.P4. The admissible portion of the confession statement given by the accused was marked as Ex.P3.

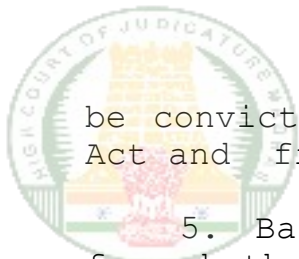
(vi) After made recovery as above, the accused was sent to remand and thereafter, P.W.11 submitted an application before the Court requesting to make an arrangements for examining the victim girl and the accused medically. Later, in view of the reference issued by the Court, the victim girl had been produced before P.W.7-Dr.Muthuprabha, Assistant Professor, Government Medical College Hospital, Tirunelveli, for medical examination. During such time, the victim girl made a statement before the doctor that on 19.06.2013 due to her own volition she eloped with accused to Bombay, wherein, both of them involved in the sexual activities.

(vii) Ultimately, after receiving the report in respect to the victim girl, P.W.7 issued a wound certificate stating that the victim girl is not a virgin and there is no evidence for recent sexual intercourse. The Accident Register copy and the wound certificate issued by P.W.7 were marked as Ex.P5 and Ex.P6 respectively.

(viii) Similarly, upon the receipt of reference issued by the Court, P.W.9-Dr.Sudalaimuthu examined the accused and issued a certificate stating that there is nothing to suggest that the accused is impotent. Further, he certified that there is no evidence of external or genital injuries. The said certificate issued by the doctor was marked as Ex.P9.

(ix) In continuation of investigation, P.W.9 submitted an application before the Court requesting to send the Material Objects collected for chemical examination. In turn, P.W.8-Balamurugan, Scientific Assistant working in the Forensic Science Department, Tirunelveli, examined M.O.1 to M.O.6 and after examination, issued a report that there is no semen detected in M.O.1 to M.O.6. The report issued by P.W.7 was marked as Ex.P7 and Ex.P8.

(x) After receipt of the said report, since P.W.11 got transferred, P.W.12-Sureshkumar took up the case for investigation and examined the Scientific Assistant, who analysed M.O.1 to M.O.6. Thereafter, due to the reason that he was also transferred, P.W.13-Baskaran continued the investigation and after examining the witnesses, he altered the section of law from 366(A) of IPC to Section 366(A) of IPC and Section 8 of POCSO Act. Ultimately, he



be convicted under Section 366(A) of IPC and Section 8 of POCSO Act and filed a final report, accordingly.

5. Based on the above materials available, the trial Court framed the charges for an offence under Section 363 of IPC and Section 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 their case on the side of the prosecution, 13 witnesses have been examined as P.W.1 to P.W.13 and 13 documents were marked as Ex.P1 to Ex.P13, besides 6 Material Objects (M.O.1 to M.O.6).

7. Out of the above said witnesses, P.W.1-Ravichandran, who is the father of the victim girl, speaks about the occurrence as after knowing the details in respect to the elopement of his daughter, he lodged a complaint before the Kalakadu Police Station.

(i) P.W.2, who is the victim girl, speaks about the occurrence as during the relevant point of time, only in view of the request made by her, the accused brought her to Bombay, wherein, he had not involved in the sexual activities.

(ii) P.W.3-Meena, who is the mother of the victim girl, gave a similar evidence which already given by P.W.1.

(iii) P.W.4-Kalef and P.W.5-Arumugam are the resident of same locality gave evidence as after knowing the elopement of the accused with the victim girl, they were informed the same to the relatives of victim girl.

(iv) P.W.6-Ravichandran claims that on 04.07.2013 when he was in Pathamada Police Station, P.W.10 arrested the accused and recorded the confession statement from him, in which, he signed as a witness.

(v) P.W.7-Dr.Muthuprabha, who is the doctor attached with the Government Medical College Hospital, Tirunelveli, who examined the victim girl, gave evidence as on 05.07.2013 around 6.15 p.m., she examined the victim girl and found the following symptoms:-

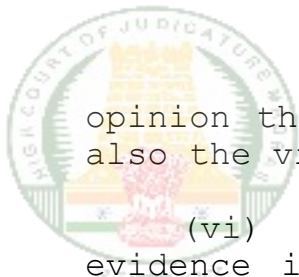
(i) No external marks of violence over breasts, thigh, urethra and external genitalia.

(ii) Hyper not intact

(iii) Vagina admits one finger freely.

She has further stated that she collected pubic hair clippings cervical and vaginal smear and sent the same for chemical examination. It was the further evidence given by P.W.7 is that

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opinion that there is no evidence of recent sexual intercourse and also the victim girl is not a virgin.

(vi) P.W.8-Balamurugan is the Scientific Assistant gave evidence in respect to the chemical examination made on M.O.1 to M.O.6. According to him, no semen was detected in the said M.Os.

(vii) P.W.9-Sudalaimuthu is the doctor speaks about the medical examination of accused and about the issuance of report in respect to the potency test.

(viii) P.W.10-Ganesan, P.W.11-Lakshmanan and P.W.12-Sureshkumar are the Police Officers gave evidence in respect to receipt of complaint, registration of the case, examination of the witnesses, arrest of accused, recovery of Material Objects and about the filing of final report.

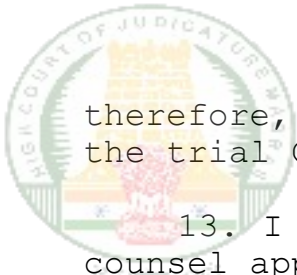
8. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C., he denied the same as false. However, he did not chose to examine any witness or mark any document on his side.

9. Having considered all the above materials placed before him and after considering the arguments advanced by the learned counsels appearing on either side, the learned Sessions Judge, Mahalir Neethimandram, Tirunelveli, convicted and sentenced the revision petitioner as stated above. Aggrieved over the said conviction and sentence, the appellant is before this Court with this appeal.

10. I have heard Mr.K.K.Samy, Legal Aid Counsel appearing for the appellant/accused and Mr.M.Muthumanikkam, 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 since the accused herein has been charged for an offence under Section 6 of POCSO Act, it is for the prosecution to show the prima facie case that the accused herein indulged in sexual activities with the victim girl. He would further submit that before the trial Court, the victim girl while at the time of giving evidence as P.W.2 did not give any evidence against the accused particularly, in respect to the sexual activities alleged to be committed by him. Without appreciating the same, the trial Court by believing the statement given by the victim girl before the doctor, convicted the accused, which is erroneous in law.

12. Per contra, the learned Government Advocate (Crl.side) appearing for the respondent would contend that the statement given before the doctor, who examined the victim girl, is sufficient to hold that during the relevant point of time, in Bombay, the accused committed the sexual assault on the victim girl and



therefore, interference of this Court in the findings 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.

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14. Before the trial Court, the case of the prosecution is that during the relevant point of time, the accused with an intention to commit sexual intercourse with the victim girl kidnapped her to Bombay and during the time, when they were staying in Bombay, he sexually assaulted the P.W.2.

15. Herein, it is a case, since the appellant herein is facing the charge for an offence under Section 366(A) of IPC and Section 6 of POCSO Act, it is for the prosecution to show that during the relevant point of time, the accused herein, induces the P.W.2, who is under the age of eighteen years, to go to Bombay with intent to force her or seduced to illicit intercourse with another person.

16. Further, it should be necessary for the prosecution to show the prima facie case that at the time of occurrence, the accused committed aggravated penetrative sexual assault on the victim girl. In this regard, P.W.2 being the victim girl is the competent person to say about the occurrence as well as about the act committed by the accused. In this regard, P.W.2 in her evidence has stated that during the relevant point of time, she only compelled and threatened the accused to go to Bombay. In otherwise, she did not say anything about the inducement made by the accused and in respect of the sexual intercourse alleged to be committed by the accused in Bombay. In fact, in this regard, P.W.2 had given a categorical evidence as "எதிரி என்னுடைய விருப்பமில்லாமல் என்னைத் தொடவில்லை". Therefore, the evidence given by P.W.2 is absolutely not in accordance with the case of the prosecution. Therefore, in the absence of any evidence in respect to the aggravated penetrative sexual assault committed by the accused, we cannot come to the conclusion that the accused is guilty under Section 6 of POCSO Act.

17. Now, on going through the judgment rendered by the trial Court, it is seen that by believing the statement given by the victim girl before the doctor and also on believing the specific evidence I.e., "எதிரி என்னுடைய விருப்பமில்லாமல் என்னைத் தொடவில்லை" given by the victim girl, the trial Court has come to the conclusion that the accused is found guilty under Section 6 of POCSO Act.

18. In this aspect, our Hon'ble Apex Court in ***Pattipati Venkaiah vs. State of Andhra Pradesh*** reported in **1985 Cr1 LJ 2012** wherein it was observed that,

"A doctor is not at all concerned as to who committed the offence or whether the person



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brought to him is a criminal or an ordinary person. His primary effort is to save the life of the person brought to him and inform the police in medico-legal cases. It is well settled that doctors before whom dead bodies are produced or injured persons are brought, both themselves take the dying declaration or hold the post-mortem immediately and if they start examining the informants they are likely to become witnesses of the occurrence which is not permissible".

In yet another decision reported in **1993 Cri LJ 2173**, in the case of **Basheer vs. State by Sub Inspector of Police, Madurai**, it has been held as follows:

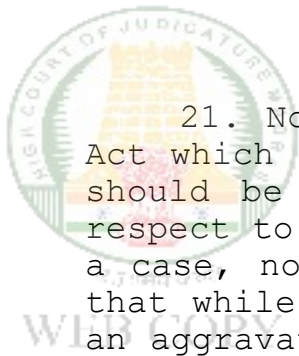
"It is advisable that in all cases, it is better for the medical officers, while mentioning about the assailant, note whether he is a known person or unknown person, but they are not expected to note the name of the person."

In the case of **P.Babu and Ors. vs. State of Andhra Pradesh** reported in **AIR 1994 SCC 424**, it has been held as follows:

"It is a matter of common knowledge that such entry in the injury certificate does not necessarily amount to a statement. At that stage, the doctor was required to fill up that column in a normal manner and it was not the duty of the doctor to enquire from the injured patient about the actual assailants and that the inquiry would be confined as to how he received the injuries namely the weapons used etc.,"

19. Thus, based upon the above decision and also coupled with the practise of Standard Operative Procedure (SOP) prescribed into the Tamil Nadu Medical Code, the note of the Doctor in the wound certificate or Accident Register cannot be taken as a substantive evidence to fix the culpability or non-culpability of the accused or otherwise, the certificate has to be relied on only for the limited purpose of ascertaining the nature of the injuries sustained by the injured or the victim girl.

20. In the said circumstances, believing the negative evidence is also not necessary as the same does not disclose the occurrence and during the relevant point of time, the accused committed an aggravated penetrative sexual assault. Without any specific evidence in respect to the act committed by the accused, we cannot come to the conclusion that mere evidence given by P.W.2 as above before the doctor is sufficient to hold that the accused committed an offence as alleged by the prosecution.



21. Now, on going through the definition of Section 3 of POCSO Act which is a same meaning assigned to Section 5 of POCSO Act. It should be necessary for the prosecution to show the evidence in respect to the aggravated penetrative sexual assault. Herein, it is a case, nothing was adduced on the side of the prosecution to show that while at the time of occurrence, the accused herein, committed an aggravated penetrative sexual assault and therefore, I am of the considered opinion that the findings arrived at by the trial Court is liable to be set aside.

22. Therefore, in the light of the above discussion, I am of the firm opinion that the prosecution has failed to prove their case beyond reasonable doubt. The Criminal Appeal is allowed and the conviction and sentence imposed on the appellant/accused, by the learned Sessions Judge, Mahalir Neethimandram, Tirunelveli in Special S.C.No.17 of 2014, dated 10.03.2016, is set aside and the appellant/accused is acquitted of all the charges. The fine amount, if any, paid by them, shall be refunded to them. Bail bond, if any, executed by the appellants shall stand cancelled.

Sd/-

Assistant Registrar (Per.Admn)

// True Copy //

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Sub Assistant Registrar(CS)

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To:-

- 1.The Session Judge,
Mahalir Neethimandram
Tirunelveli.
- 2.Do through The Principal District Judge,
Tirunelveli.
- 3.Do Through The Chief Judicial Magistrate,
Tirunelveli.
- 4.The Judicial Magistrate,
Tirunelveli.
- 5.The District Collector,
Tirunelveli.
- 6.The Director General of Police,

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Mylapore, Chennai.

7.The Inspector of Police,
Cheranmahadevi Police Station,
Tirunelveli District.

8.The Superintendent,
Central Prison,
Palayamkottai.

9.The Judicial Magistrate,
Cheranmahadevi,
Tirunelveli.

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

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

+1 CC to M/s.K.K.SAMY, Advocate (SR-28464[F] dated 07/09/2021)

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