



Crl.A.No.911 of 2022

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 24.11.2022

CORAM:

THE HONOURABLE MR. JUSTICE **P.VELMURUGAN**

**Crl.A.No.911 of 2022 and
Crl.M.P.No.12708 of 2022**

Amanulla Khan

...Appellant

Vs.

The State represented by
The Inspector of Police,
Erode All Women Police Station,
Erode.
(Cr.No.9/2020)

...Respondent

This Criminal Appeal is filed under Section 374(2) of Cr.P.C. to set aside the judgment of conviction and sentence dated 18.04.2022 made in Spl.S.C.No.10 of 2021 by the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court), Erode.



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For Appellant : Mr.K.Prabhakaran
For Respondent : Mr.S.Sugendran
Additional Public Prosecutor

JUDGMENT

The criminal appeal has been filed against the judgment of conviction and sentence dated 18.04.2022 made in Spl.S.C.No.10 of 2021 by the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court), Erode.

2 The respondent police registered a case in Cr.No.9 of 2020 against the appellant for the offence under Section 365 IPC, Section 7 punishable under Section 8, Section 9(m), 9(n) punishable under Section 10 and Section 11(iii) punishable under Section 12 of the Protection of Children from Sexual Offences Act, 2012 (in short “POCSO Act”). After completing investigation, the respondent police laid a charge sheet before the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court), Erode,

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which was taken on file in Spl.S.C.No.10 of 2021. The learned Sessions Judge, after hearing both the accused and the prosecution and after perusing the records, since there is *prima facie* case, framed charges against the appellant/accused for the offence under Section 365 IPC and Section 9(m), 9(n) punishable under Section 10 and Section 11(iii) punishable under Section 12 of the POCSO Act.

3 Before the trial Court, in order to prove the case of the prosecution, as many as 12 witnesses were examined as P.Ws.1 to 12 and Exs.P1 to P18 were marked. After completing examination of prosecution witnesses, when incriminating circumstances culled out from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C., he denied the same as false and pleaded not guilty. On the side of the defence, D.W.1 was examined and no document was marked.

4 The learned Sessions Judge, Magalir Neethi Mandram (Fast Track Court), Erode, on completion of trial and hearing arguments advanced on either side, by judgment dated 18.04.2022 acquitted the appellant for the



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offence under Section 365 IPC and Section 11(iii) punishable under Section 12 of the POCSO Act observing that prosecution has not proved the above charges and convicted the appellant for the offence under Section 9(m) and 9(n) punishable under Section 10 of the POCSO Act and sentenced him to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for a further period of three months. The learned trial Judge further ordered compensation of 50,000/- and directed to pay the same to the victim after deducting the interim compensation of Rs.10,000/- already paid. Aggrieved against the said judgment of conviction and sentence, the accused has preferred the present criminal appeal before this Court.

5 The learned counsel appearing for the appellant/accused would submit that the alleged incident taken place on 20.05.2020 at about 7.00 p.m., but, FIR came to be registered only on 28.05.2020, which is an inordinate delay and prosecution has failed to explain the same, which is fatal to the case of the prosecution and the same creates suspicious on the case of the prosecution.



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5.1 It is the main allegation of the prosecution that the appellant/accused shown obscene video to the victim in his mobile phone, but, prosecution has failed to recover the mobile phone, which is the crucial evidence and therefore there is doubt in the origin of the case itself. The Court below also failed to draw adverse inference under Section 114 of the Indian Evidence Act, for non recovery of the Mobile phone.

5.2 P.W.5, who has spoken about the investigation made by the respondent police, has not supported the case of the prosecution and turned hostile. P.W.1, who made the complaint before the respondent police has not clearly stated about the writing of the complaint Ex.P1. Further, there is contradiction between the statement under Section 161 Cr.P.C. recorded from P.W.1 and her cross examination, which was overlooked by the trial Court, while convicting the appellant/accused.



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5.3 The appellant refused to marry the daughter of sister of P.W.1 and hence in order to wreck vengeance, P.W.1 foisted false case against the appellant making use of her own daughter. Even P.W.1 mother of the victim child admitted the refusal of marriage by the appellant as requested by P.W.1, but the trial Court has failed to appreciate the same.

5.4 Evidence of D.W.1 shows that the appellant was not at all available in the house at the time of alleged occurrence and there is no such occurrence taken place as projected by the prosecution. There were contradictions in the evidence of P.Ws.1, 10 and 11 with regard to writing of complaint and who has given the same to the Police Officer and who received the complaint.

5.5 The trial Court has miserably failed to consider the above facts and erroneously convicted the appellant/accused, which warrants serious interference of this Court and the learned counsel prays to allow the appeal



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by setting aside the conviction recorded against the appellant.

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6 The learned Additional Public Prosecutor appearing for the respondent police would submit that on 20.05.2020, P.W.1 went to the house of the appellant along with her child, to see the appellant's father, who is maternal uncle of P.W.1, since he fell in sick. At that time, the appellant took the victim child and shown obscene videos and asked her to touch his private parts and when the victim refused the same, he pulled the her hands and inserted in his underwear. The statement under Section 164 of Cr.P.C. was recorded from the victim child, in which she has clearly narrated the incident, which itself would suffice to record conviction against the appellant. Subsequently, while examining before the Court also she has clearly stated about the act of the appellant, which is the offence falls under the POCSO Act.

6.1 The contradictions pointed out by the learned counsel for the appellant/accused are not material contradictions and the same would not affect the case of the prosecution. Prosecution has proved its case beyond all



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reasonable doubt and the trial Court has rightly recorded conviction against the appellant, which does not call for any interference of this Court.

7 Heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for respondent police and perused the materials available on record.

8 Case of the prosecution in brief: The victim child was 9 years old and was studying 3rd standard at the time of occurrence. The appellant Amanullakhan is son of Sait Babu, who is the maternal uncle of P.W.1 mother of the victim. On 20.05.2020 at 7.00 p.m. P.W.1 along with her daughter went to see Sait Babu who was ill. At that time, the appellant called the victim child and took her in the next room which is 25 feet away and showed obscene video to the child in his phone and he also asked the victim child “shall we do like this?”. Further the appellant told her that he got pain in his private part, since he was hit by ball and asked her to rub his penis with oil and when the victim refused to do the same, he pulled her hands and inserted into his inner wear and made her to touch his penis.



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Thereafter the victim ran away to her mother and insisted her to go home and after reaching home, the victim narrated the incident to her mother and P.W.1 lodged complaint against the appellant. Hence present case was registered against the appellant.

9 This Court, being an Appellate Court, is a final Court of fact finding, which has to necessarily re-appreciate the entire evidence and give an independent finding. Accordingly, this Court has re-appreciated the entire oral and documentary evidence produced before this Court.

10 P.W.1 is mother and P.W.3 is father of the victim. P.W.2 is victim child; P.W.6 is the Doctor, who examined the victim child. P.W.9 is the Doctor, who conducted medication examined on the appellant/accused. P.W.7 is the Head Master of the School, in which the victim studied. P.W.8 is the Registrar (Birth and Death), who issued Ex.P9 Birth Certificate to the victim.



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11 As far as the age of the victim child is concerned, evidence of victim child and her mother P.W.1 clearly shows that the victim was 9 years old at the time occurrence. To prove the age of the victim, prosecution has marked Ex.P7 Bonafide certificate of the victim issued by P.W.7 Head Master of the School, in which the victim studied, Ex.P9 Birth Certificate and also Ex.P17 Age certificate and from the above documents, prosecution has proved that age of the victim at the time occurrence was only 9 years and hence she is a child under the definition of Section 2(1)(d) of POCSO Act.

12 As far as commission of offence under Section 365 IPC is concerned, as per the evidence of P.W.1 mother of the victim itself, the appellant took the victim child in the presence of P.W.1 under the guise of watching TV that too only 25 feet away from P.W.1 and hence the appellant has not removed the custody of the child without consent of the lawful guardian and prosecution has not proved same with cogent evidence.



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Therefore the trial Court has rightly acquitted the appellant for the offence under Section 365 IPC, in which this Court does not find any perversity.

13 Coming to the other charge under Section 11 punishable under Section 12 of the POCSO Act, it is the allegation of the prosecution that the appellant took the victim girl and shown obscene videos in his Mobile phone and asked her “shall we do like this?”. But, prosecution has failed to recover the Mobile phone, which is the crucial evidence to prove the offence under Section 11 punishable under Section 12 of the POCSO Act, for which prosecution has not offered any explanation. Therefore, the trial Court acquitted the appellant for the offence under Section 11 of the POCSO Act.

14 As far as the offence under Section 9(m) and 9(n) punishable under Section 10 of the POCSO Act is concerned, statement of the victim under Section 164 Cr.P.C. child was recorded and the same was marked as Ex.P2, in which the victim child has clearly narrated the incident. On the date of occurrence, P.W.1 along with her daughter the victim child went to her maternal uncle's home, which was not denied by the defence.



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Even though, the appellant took a defence of previous enmity and the motive for foisting the present case, however, failed to substantiate the same either by examining any witness or by cross examining the prosecution witnesses. In this case, there is no penetrative sexual assault, but P.W.6 the Doctor in her evidence has stated that since the victim shown hesitation, vaginal test could not be done and there is no external injury, but however, in the history of the case, she has stated that she was informed about the sexual assault committed by the appellant on the victim.

16 It is the contention of the learned counsel for the appellant that it is not possible for the accused to commit the offence as alleged by the prosecution, when mother of the victim was available within 25 feet, but, it is not the case of the prosecution that somebody noticed the occurrence or in the presence of other witness the accused has committed the offence. The culprits will always take advantage of the loneliness of the children and exploit their innocence for satisfying the sexual lust of the culprits.



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Cr.P.C. has clearly stated about the act of the appellant and subsequently while examining before the Court also she has reiterated the same. If both the Magistrate, who recorded the statement of the victim under Section 164 Cr.P.C or the learned trial Judge has got any suspicious on the victim's statement, they can very well note down the demeanor of the evidence given by the victim in their report. Therefore, if the Court finds that evidence of the victim is cogent, consistent and natural and also inspires the confidence of the Court, the Court can record the conviction against the accused. Once prosecution proved the foundational facts of sexual assault committed by the accused falls under Section 9(m) of the POCSO Act, presumption under Section 29 and 30 would come into play and it is for the accused to rebut the presumption in the manner known to law. In the present case on hand, the appellant/accused has not rebutted the presumption. There may be some contradictions here and there as contended by the learned counsel appearing for the appellant, for which, the evidence of the victim cannot be brushed aside, which is cogent and consistent. In all the cases of this nature, the



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victims are child and the accused are adults. Hence soon after the occurrence, the mind set of the child would be different and will not be in a normal mode and hence we cannot expect from the child to speak about the occurrence as it is happened. Further, in most of the cases, the accused will be relative or neighbour or known person to the victim and they will wait for the right time or some of the accused commit the offence spontaneously making use of the situation. Further, we cannot follow the straight jacket formula in every cases to prove the charges and every case has got its own facts and circumstances and the Court has to carefully peruse the evidence and appreciate the facts and circumstances of the case to arrive at the conclusion.

18 A careful perusal of the evidence of P.Ws.1 to 3 and 6 to 8, Exs.P1, 2, 4, 7 and 9 shows that the prosecution has proved the offence under Section 9(m) and 9(n) punishable under Section 10 of the POCSO Act. The trial Court has rightly convicted the appellant for the above offence and this Court does not find any perversity and there is no valid ground to interfere with the judgment of conviction made by the trial Court.



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In fine, this Court come to the conclusion that there is no merit in the appeal and there is no sound reason to interfere with the judgment of conviction and sentence. Accordingly, this criminal appeal is dismissed. Consequently connected miscellaneous petition is closed. The trial Court is directed to secure the appellant/accused to serve remaining period of imprisonment, if any.

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To

1. The Sessions Judge, Magalir Neethi Mandram
(Fast Track Mahila Court), Erode.
2. The Inspector of Police,
Erode All Women Police Station, Erode.
3. The Public Prosecutor, High Court of Madras.



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P.VELMURUGAN, J.,

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