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Crl.A.No. 1058 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.11.2022

Coram

THE HON'BLE MR. JUSTICE P.VELMURUGAN

**Crl.A.No. 1058 of 2022
and
Crl.MP.No. 14097 of 2022**

Venkatesh

...Appellant

-Vs-

State rep. By
The Inspector of Police,
All Women Police Station,
Tiruppur North Police Station,
Tiruppur District.
(Crime No. 13 of 2021)

..Respondent

PRAYER : Criminal Appeal filed under Section 374(2) Cr.P.C., praying to set aside the conviction imposed in judgment dated 07.06.2022 made in Spl. Sessions Case No. 65/2021 on the file of Sessions Judge, Mahila Court (FTC), Tiruppur.

For Appellant : Mr.C.Venkatesan
Legal Aid Counsel.
For Respondent : Mr.S.Sugendran, APP



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ORDER

WEB COPY This Criminal Appeal is filed challenging the judgment dated 07.06.2022 made in Spl. Sessions Case No.65/2021 on the file of Sessions Judge, Mahila Court (FTC), Tiruppur.

2. The respondent police registered a case against the appellant in Crime No. 13 of 2021 against the appellant for the offences under Section 5(m) punishable under Section 6 of POCSO Act. After completing investigation, laid charge sheet before the Special Court since the offence is against the child falls under POCSO Act, Sessions Judge, Tiruppur taken the case on file in Spl.SC.No. 65 of 2021. After completing procedural formalities framed charges against the appellant for the offences under Section 5(m) punishable under Section 6 of POCSO Act

3. After framing charges and completing procedural formalities, during trial, on the side of the prosecution, in order to substantiate the case of the prosecution as many as six (6) witness were examined as PW1 to PW6 and 11 documents were marked as Ex.P1 to P11 and no material



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objects was exhibited. On the side of the Defence, three (3) witnesses were examined as DW1 to DW3 and no document was marked. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused/appellant and questioned under Section 313 of Cr.P.C and he denied all the incriminating circumstances as false and pleaded not guilty.

4. The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that the accused/appellant is guilty for the offence under Section 5(m) punishable under Section 6 of POCSO Act 2012 and convicted and sentenced him to undergo 20 years rigorous imprisonment and pay a fine of Rs.1,000/-, in default to undergo simple imprisonment for a period of six months.

5. Challenging the said Judgment, the present appeal has been filed by the accused/appellant before this Court.

6. It is the specific case of the prosecution that on 27.07.2021 the accused/appellant who aged about 42 years had committed aggravated



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penetrative sexual assault on the victim who was aged 3 years and hence the accused/appellant was charged for the offence under Section 5(m) punishable under Section 6 of POCSO Act. Thereafter the respondent police after investigation laid charge sheet for the above said offences. The trial Court, after trial, found the appellant guilty for the above said charges and convicted him.

7. The learned legal aid counsel for the appellant would submit that the date of occurrence itself is doubtful and the victim has not stated about the date of the occurrence to his father and there is a delay in filing complaint before the respondent police and the medical evidence also does not corroborate with the evidence of the Pws 1 to 3. Further the doctor who conducted medical examination on the victim was not examined before the trial Court. The learned counsel would further submit that the victim was 3 years at the time of recording statement before the Judicial Magistrate under 164 Cr.p.c, the victim girl has not spoken by words, but spoken in sign language. The learned Judicial Magistrate has recorded the said statement of the victim girl in the absence of any experts to confirm the



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statement made by the victim in sign language, which vitiates the case of the prosecution, which is against the provisions enumerated under Rule 3 of POCSO Act. In order to rebut the presumption under Section 29 of POCSO Act, the appellant examined DW1/Kowsalya Kumar who has clearly stated that the appellant was not available on the date of occurrence i.e. on 26.07.2021 and he was with him assisting his work from 9.00 am to 8.30 pm, therefore the appellant would not have committed such offence on that day as alleged by the prosecution. Further DW2/Sivaraj in his evidence has stated that there exists previous enmity between the appellant and the mother of the victim girl and due to the same, a false complaint has been foisted against the appellant by using the victim girl as a tool to wreck vengeance against the appellant. Further, the medical evidences also not corroborated with the evidence of PW1 to PW3.

8. The learned counsel for the appellant has further submitted that the mother of the appellant /DW3, in her statement has clearly stated that on the date of occurrence, the appellant was not in the house, he left for work, therefore, there would not be any possibilities for the appellant to commit



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the offence as alleged by the prosecution. Unfortunately, the trial Court failed to follow the mandatory procedures and convicted the appellant, which warrants interference.

9. The learned Additional Public Prosecution would submit that the age of the victim at the time of occurrence was only three years. The date of birth of the victim is 21.01.2018, the date of occurrence on 26.07.2021, therefore as per Ex.P1/Birth Certificate of the victim, the victim was aged three years on the date of the occurrence and she is a child under the definition of Section 2(1)(d) of POCSO Act.

10. As far as commission of offence is concerned, the victim girl was examined as PW1 and she clearly narrated the entire incident. The mother of the victim was examined as PW2 and she also clearly deposed that on 27.07.2021 while her husband was lying with a lungi at home, her 3rd child/ victim girl untied the lungi and touched the private part of her father and asked to do the same on her as Hari father used to do the same on her. Due to the said unexpected and uncommon activities of her 3 year old child, her



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father shocked and alerted PW2/mother of the victim to enquire. PW2 clearly stated that the victim girl used to go to the appellant's house to play with his son Hari and hence she used to call the appellant as Hari father. Subsequently, she gave a complaint before the respondent police against the appellant on 27.09.2021 and the respondent police had registered FIR and completed the investigation.

11. Since the doctor who conducted the medical examination had resigned the job, the prosecution was not in a position to examine him as a witness. However, the medical officer was examined and marked the documents viz., Copy of the Accident Register and Medical Examination report of victim as exhibits P7 & P8 respectively, wherein it is clearly stated as *“redness on vaginal area, tenderness around introits, hymen is intact and possibility of mishandling in the vaginal area.”*. Therefore, the medical evidence corroborated the evidence of the victim and the trial Court rightly appreciated the evidence of prosecution witnesses. Though the defence side had examined three witnesses i.e DW1 to DW3, they have not produced any materials to substantiate their defence to that effect that on the date of



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occurrence, the appellant was not in the house and he left for his work. The evidence of DW2 who had deposed that due to previous enmity between the appellant and the mother of the victim, the mother of the victim has falsely lodged a complaint against the appellant. The said evidence of DW2 is not trustworthy. The victim girl in her evidence has clearly stated that she used to go to the appellant's house to watch TV. If really there exist any previous enmity between two families as deposed by DW2, the victim's family will not send their minor girl to the appellant's house for playing or watching TV or entertainment activities. Therefore, the defence not proved their case and the trial Court rightly analysed the statement of the witnesses and evidences and rightly convicted the appellant/accused.

12. Heard Mr.C.Venkatesan, learned legal aid counsel for the appellant and Mr.S.Sugendran, learned Additional Public Prosecutor appearing for the respondent and perused the materials available on record.

13. Admittedly, the age of the victim girl is three years, the date of birth of the victim is 21.01.2018, the date of occurrence on 26.07.2021,



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therefore as per Ex.P1/Birth Certificate of the victim, the victim was aged three years on the date of the occurrence and she is a child under the definition of Section 2(1)(d) of POCSO Act.

14. Out of 6 witnesses, the victim was examined as PW1. Even though the learned counsel for the appellant vehemently contended that the victim was not having capacity to speak/communicate by words and her evidence was not recorded through expert by the Judicial Magistrate. The trial Court, through demeanour has recorded the statement of the victim. The victim also showed touching her part of the body before the judicial magistrate and after carefully observing the sign language of the victim, the judicial magistrate has recorded the statement of the victim under Section 164 Cr.p.c. Therefore, the trial Court as well as Judicial Magistrate have rightly considered the evidence of victim girl and recorded her statement, therefore mere non compliance of provisions of Rule 3 would not fatal the case of the prosecution and since the evidence of the victim not recorded in the presence of expert cannot be a sole ground to discard or disbelieve the evidence of the victim when the judge understood the way in which the victim communicated her grievance against the appellant.



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15. Further in the previous statement of the victim exhibit P1 clearly proves that the offence committed by the appellant came into light only when the father of the victim was lying with a lungi at home, her 3rd child/ victim girl asked her father to untie the lungi and touched the private part and asked to do the same on her. When her father alerted and asked the victim, she told that Hari father used to do this and you should do this. It is very unfortunate to hear these kind of words from a three year old child by her father. It is also unfortunate for this country to face such untolerable and unbearable sexual offence by a tender aged three year old girl child from a 45 years old person. Though the learned counsel for the appellant pointed out some discrepancies, those discrepancies are not material contradictions, which would go to the root of the case of the prosecution.

16. It is proved from the evidences as well as complaint that the occurrence had taken place on 26.07.2021, the victim girl was examined by the doctor on 29.07.2021 and submitted a report and the same was marked as Ex.P8. The doctor has observed as follows;



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“redness on vaginal area, tenderness around introits, hymen is intact and possibility of mishandling in the vaginal area.”.

17. Therefore, this Court finds that the prosecution has proved the offence committed by the appellant on the victim. Section 29 of the POCSO Act clearly says that once the foundational fact of commission of offence made by the appellant on the victim is proved by the prosecution, then it is for the accused to rebut the presumption under Section 29 of the Act and disprove the offence. Therefore, it is for the appellant/accused to prove that he had no sexual intent.

18. Though the appellant made an attempt to defend his case by examining three witness as DW1 to DW3, the depositions of the said three witnesses are not helpful to disprove the case of prosecution. Therefore, this Court finds that the statement made by the victim girl who was aged 3 years, before the Judicial Magistrate and the trial Court are cogent and consistent and finds no reason to discard or disbelieve the evidence of the victim. This Court also finds that the prosecution has substantiated the foundational fact and the defence has not rebutted the presumption and the



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evidence of defence witnesses failed to disprove the offence.

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19. Under these circumstances, this Court finds that the appellant committed offence under Section 3 (a) which is punishable under Section 4 of POCSO Act. Since the victim is tender aged and below 12 years and the penetrative sexual assault committed by the appellant on the victim girl was also clearly proved, hence the offence committed by the appellant falls under Section 5(m) punishable under Section 6 of POCSO Act.

20. The occurrence had taken place after the amendment of the Act. As per the amendment of act, the minimum sentence for the said offence is 20 years and the trial Court has rightly appreciated the evidence and convicted the appellant. This Court, being an Appellate Court and a final Court of fact finding, which has to necessarily re-appreciate the entire evidence and give an independent finding. Hence considering such a grievous offence committed by the appellant who was aged about 45 years on the victim who is a three year old child, this Court finds no mitigating circumstances to reduce the sentence imposed by the trial Court. This Court



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finds no merits in the case and liable to be dismissed.

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21. In the result, the Criminal Appeal is dismissed. No costs.

Consequently, connected Miscellaneous Petition is closed.

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Index:Yes/No

Speaking order/Non-speaking order

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To

1.The Inspector of Police,
All Women Police Station,
Tiruppur North Police Station,
Tiruppur District.

2. The Sessions Judge,
Mahila Court (FTC),
Tiruppur.



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