



Crl.A.No.634 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.09.2022

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

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Nethaji

... Appellant

Vs.

The State by
The Inspector of Police,
All Women Police Station,
Tiruchengode.
Namakkal District.
(Crime No.06 of 2018)

... Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to call for the records relating to the judgment dated 10.11.2021 made in Spl.C.C.No.08 of 2019, on the file of the learned Sessions Judge, Fast Track Mahila Court, Namakkal and set aside the same.

For Appellant : Mr.N.Manoharan

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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J U D G M E N T

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This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 10.11.2021 made in Spl.C.C.No.08 of 2019, passed by the learned Sessions Judge, Fast Track Mahila Court, Namakkal.

2. The respondent-police has registered a case against the accused / appellant for the offence under Section 7 r/w 8 of Protection of Children from Sexual Offences Act, 2012 (for brevity “the POCSO Act”) and under Section 506 (i) IPC. After investigation, laid a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Namakkal. The learned Judge, framed charges against the appellant/accused for the offences under Sections 506 (i) IPC and Section 7 r/w 8 of the POCSO Act, and conducted the trial.

3. After considering the evidence on record and hearing either side, the learned Sessions Judge, by judgment dated 10.11.2021, convicted the accused for the offence under Section 506 (i) IPC and sentenced him to undergo rigorous imprisonment for two years and convicted him for the offence under Section 8 of POCSO Act and sentenced him to undergo rigorous imprisonment for five years



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and to pay a fine of Rs.5,000/- in default to undergo simple imprisonment for six months.

4. Challenging the conviction and sentence passed by the learned Sessions Judge, the appellant / accused has come up with this appeal.

5. The learned counsel for the appellant would submit that due to previous enmity, the appellant was falsely implicated in this case and there is a material contradiction from the evidence of P.W.3 and P.W.5. P.W.2 has spoken about the alleged occurrence on 04.11.2008, and even the existence of public toilet has not been proved. According to the learned counsel, the witnesses admitted that there is a toilet available in the victim house itself and when the toilet is available in the house of the victim, what is the necessity of going to public toilet, which falsifies the case of the prosecution, and only in order to implicate the appellant, a false case has been foisted against him.

6. The learned counsel further submitted that the alleged occurrence has taken place on 04.11.2018, however, P.W.1-mother filed Ex.P1-complaint only on 26.12.2018 with a delay and the said delay in filing Ex.P1-complaint has not



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been properly explained by the prosecution, therefore, the benefit of doubt should have been extended to the accused/appellant. The learned counsel further argued that the prosecution has not proved the initial burden, therefore, no presumption would arise under Section 29 of the POCSO Act. The burden is upon the prosecution to prove the existence of facts, which have to be present before presumption can be drawn. Even otherwise, the onus upon the accused is not heavy as is normally upon the prosecution to prove the guilt of the accused. The defence has successfully rebutted the presumption to show that the materials on record are consistent with the innocence of the accused, which may cast a doubt on the version of the prosecution, then the accused should be entitled to acquittal. The evidence of P.W.1 to P.W.3 would not lend support to the prosecution to prove the sexual intent. Mere reading of sexual assault as defined under Section 7 of the Act would show that the alleged act of hugging will not attract Section 7 of the POCSO Act, unless it is proved sexual assault. According to the learned counsel, even the alleged act of the accused, at the behest, was only punishable under Sec. 354 IPC and not under Sec. 8 of the POCSO Act. Therefore, the commission of offence has not been established and the appeal is to be allowed and the conviction and sentence passed by the trial Court is liable to be set aside.



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7. The learned Additional Public Prosecutor appearing for the respondent-

Police would submit that the prosecution has established that at the time of occurrence, the victim was aged about 14 years and studying 9th standard. He would also argue that two months before the incident, the appellant approached the victim under the guise of love and enticed her by saying she is extremely beautiful and he loves her and on the date of occurrence, viz., 04.01.2018 at 8.00 p.m., near the public toilet located near the victim's house, the appellant pulled her and hugged her with sexual intent, and thereby the appellant committed the offence under Section 7 of POCSO Act, which is punishable under Section 8 of the POCSO Act. In order to substantiate the case, the victim was examined as P.W.2, she has narrated the incident and the victim's grandmother was examined as P.W.4, she corroborated the evidence of P.W.2-victim. He would further submit that though the medical evidence show that there is no external injury found on the victim and it is not the case of the prosecution that there was a penetrative sexual assault and the only allegation against the appellant is that he expressed his love and hugged her with the sexual intent in the public toilet. Once the prosecution has established through the witness that the appellant hugged and there was a physical contact, presumption under Section 29 of the POCSO Act come into play, and it is for the accused to rebut



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the presumption that he had no sexual intent at the time of occurrence. The evidence of P.W.2 victim itself shows that the appellant expressed his love by saying that she is beautiful and he is loving her and hugged her. Therefore, the prosecution proved its case and there is no material to show that the appellant rebutted the presumption in the manner known to law. The trial Court rightly appreciated the evidence and convicted the appellant and there is no merit in the appeal and the appeal is liable to be dismissed.

8. Heard the learned counsel on either side and perused the materials available on record.

9. The prosecution claims that previous to the incident, the accused approached the victim under the guise of love and tempted her by claiming, "she is extremely attractive and he loves her." While doing so, on 04.11.2018 at around 8.00 p.m., at the public toilet located near the victim's residence, the accused pulled the victim's hands and hugged her. After hearing the scream of the victim (P.W.2), the mother (P.W.1) came to the place of occurrence and found that the appellant was hugging her daughter (P.W.2). When she (P.W.1) questioned about it, the accused threatened her by saying, "*If you reveal this*



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incident to anybody, I will kill you," and thereby committed the offence punishable under Section 506 (i) IPC. Thereafter, the mother of the victim gave a complaint. Based on which, the respondent-Police registered a case against the appellant for the offence under Sections 7 (m) r/w 8 of POCSO Act and 506 (i) IPC. Subsequently, the Investigating Officer, investigated the matter and laid a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Namakkal.

10. In order to prove the case of the prosecution, 16 witnesses were examined as P.W.1 to P.W.16 and 15 documents were marked as Exs.P1 to P15 and no Material Objects were exhibited. After completing the examination of the prosecution witnesses, the incriminating circumstances culled out from the prosecution witnesses were put before the accused, the same was denied as false and on the side of the accused, no witness was examined and no document was produced. The learned Sessions Judge, Fast Track Mahila Court, Namakkal, after hearing the arguments on either side and considering all the materials placed on record, found that the accused/appellant is guilty and awarded punishment, as referred above, which is challenged in this Criminal Appeal.

11. Since this Court is an Appellate Court and also final Court of fact



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finding, has to re-appreciate the entire evidence and come to the conclusion independently.

12. A reading of the evidence of the victim child, who was examined as P.W.2, has clearly narrated the act committed by the accused. In her evidence, she deposed that when she goes to School, the accused come behind her and told that he will marry her. On 04.11.2018, at about 8.00 pm., when she went to the public toilet to attend natural calls, the accused came on back of her and caught hold of her hand and hugged her. The mother of the victim was examined as P.W.1. In her testimony, she stated that after hearing her daughter's voice, she went to the scene of occurrence and found the appellant hugging her daughter and when she questioned, he told that "If she reveal this incident to anybody, he will kill her" and thereafter, she took her daughter (P.W.2) to her house and informed the same to her husband (P.W.3), who is also hearsay evidence has spoken about the incident. The grandmother of the victim child was examined as P.W.4, who is also hearsay evidence. In cases of this nature, presence of eyewitnesses are mostly improbable, because, culprits take the chance of loneliness of the victims, and they would commit these type of offences.



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13. It is to be noted that at the time of occurrence, the victim child was aged about 14 years. In order to prove the age of the victim child, the prosecution has marked Ex.P9-School Certificate of the victim child. As per Ex.P5, birth certificate, the date of birth of the victim child is 13.03.2005 and the occurrence said to have taken place on 04.11.2018, therefore, the victim child was aged only 14 years and, she would fall under the definition of Section 2 1(d) of POCSO Act.

14. Though P.W.9 doctor had stated that there was no external injury, in the present case, it is not the case of the prosecution that due to forcible sexual assault committed by the appellant with the victim child, she sustained injury. The case of the prosecution is that the appellant hugged the victim child with an sexual intent and thereby, he had physical contact with the victim and committed the offence under Section 7, which is punishable under Section 8 of the POCSO Act.

15. At this juncture, it would be useful to refer the Section 7 of POCSO Act:-

Section 7



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"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. A close look of the above mentioned provision shows that touching the vagina, penis, anus or breasts of the child or making the child touched the vagina, penis, anus or breasts of the offender or any other person with sexual intent does not only constitute the offence of sexual assault but whoever does any other act with sexual intent which involves physical contact without penetration amounts to sexual assault. In the instant case it is stated by the victim child that the accused caught hold of her hand and hugged her. The sexual intent of a person can be gathered from the specific contact of the accused and the surrounding circumstances. There cannot be any direct evidence of sexual intent. In the instant case the act of the accused entering into the public toilet and hugging the victim child would show that the accused had sexual intent and, therefore, the act involves physical contact by the accused with the victim. A perusal of evidence of P.W.1 and also statement recorded under Section 164 of Cr.P.C., it could be seen that the appellant has



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committed an offence Section under Section 7, which is punishable under Section 8 POCSO Act.

17. Though the learned counsel for the appellant would argue that the victim admitted that the toilet is available in her house, there is no need to go to a public toilet, for which the victim's evidence and her mother's evidence clearly show that there was no toilet in existence at the relevant point in time, and it was constructed only six months prior to the date of adducing evidence. Therefore, once the victim has stated reason for approaching the public toilet, and victim has clearly stated that the appellant hugged her with an sexual intent, and the Court drawn the presumption under Section 29 and 30 of the POCSO Act, it is for the accused to rebut the presumption that he had no sexual intent to do the act.

18. The next contention of the learned counsel for the appellant is with regard to delay in filing complaint. In this case delay was properly explained by the prosecution. In POCSO Act cases, no parent would take a hasty decision and immediately rush to the police station and file a complaint. It will affect the future of the female child. Therefore, the parents would naturally think about



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the future of the child and also about the reputation of the family. Normally, they used to take advise of the elders in the village. Mere delay in filing the complaint is not a sole ground to disbelieve or discard the evidence of the prosecution.

19. Yet another contention of the learned counsel for the appellant is that there was a motive to foist a false case against the appellant due to business dispute. In this case, there is no reason to disbelieve her or disregard the evidence of the victim child. Further, there was no necessity to foist such a false serious case against the appellant by spoiling the life of the P.W.2-victim child. It is pertinent to mention here that parent of the victim child need not say all these things and also the parent of the victim child will not spoil the future of the victim child. Therefore, the above contention of the learned counsel for the appellant is rejected. Further, there was no reason to discard the evidence of victim child. Normally, corroboration of witness is necessary, whereas, offence under POCSO Act, the evidence of the victim child is sufficient and the Court cannot expect the eyewitness, since it is not the case of the prosecution that the offence had taken place in the presence of some other eye witness. Further, the defence has not established that for that reason, they



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foisted a false case against the appellant. Though the appellant had taken the defence of motive behind the complaint, but however, it has not been proved in the manner known to law. Therefore, this Court finds that there is no reason to discard or disbelieve the evidence of P.W.2 victim child, and there is no doubt about the trustworthiness of the victim child, who is aged about 14 years at the time of occurrence, and she cannot be tutored by the prosecution for these type of offences.

20. In view of the above, this Court is of the view that the prosecution has proved its case beyond reasonable doubt for convicting the appellant for the offence under Section 7 punishable under Section 8 of POCSO Act, however, this Court finds that there is no material to convict the appellant for the offence under Section 506(i) of IPC.

21. However, the learned Sessions Judge imposed maximum punishment prescribed by Section 8 of the POCSO Act. In the considered view of this Court, the facts and mitigating circumstances of the case, if the substantive sentence is



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reduced to 3 years Rigorous Imprisonment from 5 Years Rigorous Imprisonment, will suffice to meet the ends of justice. Accordingly, the substantive sentence of Rigorous Imprisonment is reduced to 3 years Rigorous Imprisonment for the offence under Section 8 of the POCSO Act. The conviction and sentence imposed by the learned Sessions Judge, for the offence under Section 506 (i) IPC is set aside. In respect of punishment in the form of fine, and the default clause, this Court finds no reason to interfere with.

22. In the result, the Criminal Appeal is partly allowed with the above modification.

30.09.2022

Speaking Order / Non-speaking order

Index : Yes / No.

Internet : Yes.

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To

1.The Sessions Judge, Fast Track Mahila Court,
Namakkal.

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2. The Inspector of Police,
All Women Police Station,
Tiruchengode.
Namakkal District.



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P.VELMURUGAN, J.

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