



Crl.A.No.617 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 28.09.2022

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

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Anb hazhagan

...Appellant

Vs.

The State represented by
The Inspector of Police,
All Women Police Station,
Thiruvarur.
(Crime No.09 of 2020)

...Respondent

This Criminal Appeal is filed under Section 374(2) of Cr.P.C. against the judgment of the learned Sessions Judge, Magalir Neethimandran (Fast Track Mahila Court), Thiruvarur, in Spl.S.C.No.29 of 2020 dated 20.04.2021.

For Appellant : Mr.Swami Subramanian

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGMENT

WEB COPY The criminal appeal has been filed against the judgment of the learned Sessions Judge, Magalir Neethimandran (Fast Track Mahila Court), Thiruvarur in Spl.S.C.No.29 of 2020 dated 20.04.2021.

2 The respondent police registered a case in Cr.No.09 of 2020 against the appellant for the offence under Section 5(m) punishable under Section 6 of Protection of Children from Sexual Offences Act, 2012 (for brevity “the POCSO Act”) and also 9(m) punishable under Section 10 of the POCSO Act. After completing investigation, the respondent police laid a charge sheet before the learned Sessions Judge, Magalir Neethimandran (Fast Track Mahila Court), Thiruvarur, which was taken on file in Spl.S.C.No.29 of 2020. The learned Sessions Judge, after hearing 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 5(m), which is punishable under Section 6 of the POCSO Act and 9(m), which is punishable under Section 10 of the POCSO Act.



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Before the trial Court, in order to prove the case of the prosecution, on the side of the prosecution, as many as 16 witnesses were examined as P.Ws.1 to 16 and Exs.P1 to P9 were marked and no material object was exhibited. 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, no one was examined and no document was marked.

4 The learned Sessions Judge, Fast Track Mahila Court, Tiruvarur, on completion of trial and hearing arguments advanced on either side, found the appellant/accused not guilty for the offence punishable under Section 6 of the POCSO Act, but, found the appellant/accused guilty for the offence under Section 9(m) punishable under Section 10 of the POCSO Act and hence by judgment dated 20.04.2021 convicted the appellant/accused and sentenced him to undergo simple imprisonment for a period of five years with fine of Rs.3,000/-, in default, to undergo simple



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imprisonment for a further period of six months. Aggrieved against the said judgment of conviction and sentence, the accused has preferred this criminal appeal.

5 The learned counsel appearing for the appellant/accused would submit that there are contradictions between the evidence of P.W.1 mother of the victim and P.W.15 the Inspector of Police regarding arrest of the appellant/accused. P.W.1, during cross examination, admitted the presence of the appellant's brother's daughter at the time of occurrence, but nowhere has stated anything about the same and hence suppression of available witness at the scene of occurrence cause serious doubt over the prosecution. As per the prosecution, the alleged occurrence had taken place between 10.00 and 10.30 a.m., but P.W.1 reached police station only at 3.00 p.m., which also creates doubt over the proposition case.

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5.1 The learned counsel would further contend that P.W.2 the victim, during cross examination had admitted that P.W.1 taught everything and from which it is clear the P.W.1 tutored the victim to speak as per the prosecution version. The Doctor P.W.3, who examined the victim child clinically had stated that there is no injury or reddishness on the private parts of the victim and no medical evidence supported the case of the prosecution, even though the victim was examined on the same day of the alleged occurrence. If at all the accused had committed offence as alleged by the prosecution, there must be some marks in the private part of victim, but nothing found, which itself clearly shows that the appellant has not committed any offence as alleged by the prosecution.

5.2 The trial Court disbelieved the evidence of the prosecution witnesses as far as penetrative sexual assault is concerned, but given finding that there was aggravated penetrative sexual assault. P.W.s 4, 7, 8 and 9 are only hearsay witnesses and there are many contradictions in their evidence. One Natarajan was not examined, on whose custody the child was handed over at the time of occurrence, which is fatal to the case of the prosecution.



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WEB COPY 5.3 The learned counsel would further submit that the statement under Section 164 of Cr.P.C. of the victim child was recorded only after 13 days from the date of occurrence and P.W.1 tutored the victim to speak against the appellant. Further there was previous enmity between P.W.1 and the appellant and hence in order to wreck vengeance, false case has been foisted against the appellant. It is to be noted that as admitted by P.W.1, during cross examination, appellant's brother's daughter was also available in the home and hence it is not possible or easy for the appellant to do such act on the victim child, which is highly improbable. The court below had come to the conclusion that there is no iota of evidence for the offence of sexual assault, but convicted the appellant wrongly observing that P.W.1 evidence corroborated with the evidence of P.W.2, which is highly illegal and unsustainable under the law.

5.4 The trial Court erred in convicting the appellant for the offence



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under Section 9(m) punishable under Section 10 of the POCSO Act, believing that the evidence of P.W.1 corroborates with the evidence of P.W.2 and failed to consider the above aspects. Hence, the conviction and sentence made against the appellant by the learned trial Judge warrants interference of this Court.

6 The learned Additional Public Prosecutor appearing for the respondent police would submit that the victim child was aged about 4 years only at the time of occurrence. When P.W.1 called the victim child, she came out of the house of the appellant's brother by weeping and having her panty at her hand and when she asked the victim child as to why she removed her panty, the victim child narrated the entire incident, which would attract offence under the POCSO Act. The victim child was examined as P.W.2 and her statement was also recorded under Section 164 of Cr.P.C./Ex.P2, in which she has clearly stated the act of the appellant. The mother of the victim child has been examined before the Court as P.W.1 and she has also clearly narrated the incident as informed by the victim child, which corroborates with the evidence of P.W.2 the victim



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child.

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6.1 The trial Court, after considering all the defence taken by the appellant/accused and after appreciating the evidence of prosecution witnesses in a proper manner, has recorded the conviction against the appellant/accused for the offence under Section 9(m) punishable under Section 10 of the POCSO Act, which does not call for any interference and the appeal is liable to be dismissed.

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 is that on 26.05.2020 at about 10.30 a.m. when P.W.1 went in search of the victim child, who gone out for playing in the house of the P.W.1's father in law's brother, the victim child came out of the house of one Selvaraj, who is the brother of the appellant/accused, by weeping and when P.W.1 questioned the victim child,



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she told that the appellant/accuse, who came to his brother's house, has removed panties and penetrated his finger into the private part of the victim child, who was only 4 years at the time of occurrence and also applied and shook his private part on the private part of the victim child and she complained pain over her private parts. Hence the present case was registered against the appellant for the offence punishable under Sections 6 and 10 of the POCSO Act.

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 Admittedly at the time of occurrence the victim child was aged about 4 years only, which is not disputed by the defence and she is a child under definition of Section 2(1)(d) of the POCSO Act. The specific case of the prosecution is that the appellant took the victim child and removed her inner garments and penetrated his fingers and also applied and shook his



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private parts on the private part of the victim child and hence charges were framed for the offence under Sections 5(m) punishable under Section 6 and 9(m) punishable under Section 10 of the POCSO Act. In order to substantiate the charges, mother of the victim child was examined as P.W.1 and the victim child was examined as P.W.2 and to prove the age of the victim, Ex.P3 Birth Certificate of the child was marked. Admittedly there is no eye witness except the victim child P.W.2 and all other witnesses are only circumstantial witnesses. The victim child was produced before the learned Judicial Magistrate for recording statement under Section 164 of Cr.P.C., in which, the victim child stated as follows.

சின்ன தாத்தா வீட்டில் நான் விளையாடிட்டு இருந்தப்போ தூக்கிட்டுபோய்
ஜட்டிய கழட்டி படுக்கவைச்சான். ஒன்னுக்குபோற இடத்துல அவன் குஞ்சி
வைச்சி இப்படி இப்படி ஆடனான். எனக்கு வலிச்சிச்சி வலிச்சப்போ நான்
கத்துனேன். அதான் நடந்துச்சி அவன் பேரு அன்பழகன்.



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11 Thereafter, the victim child was examined before the Court as P.W.2, wherein she has not stated anything about the penetrative sexual assault, however, the victim child has clearly stated that the appellant is the persons one who lifted her and removed panty and applied and shook his private part on her private parts and since she felt pain she cried. However, the trial Court found that the prosecution has not substantiated the charges for the offence under Section 5(m) of the POCSO Act.

12 Even though the appellant took a defence that one Natrajan, in whose custody the child was handed over at the time of occurrence as per the evidence of P.W.1, was not examined and due to previous enmity false case has been foisted against the accused, from the materials available it could be seen that the same has not been substantiated through examining any witnesses or by cross examining the prosecution witnesses.

13 In the cases of this nature, we cannot expect any eye witnesses and evidence of the victim would suffice to convict the accused, if it is cogent and consistent. On reading of evidence of P.Ws. 1 to 4 and Exs.P1 to P3, it is clear that the appellant committed offence under Section 9(m) of the POCSO Act, which is punishable under Section 10 of the POCSO Act. The



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contradictions pointed out by the learned counsel appearing for the appellant are not material contradictions and the same will not go into the root of the case of the prosecution. There is no reason to disbelieve the evidence of P.Ws.1 to 3, which are cogent and consistent. Even though there is no medical evidence, when there is no penetrative sexual assault and when the victim child clearly stated that the appellant took her and removed her inner garments and applied and shook his private part on her private part, which is the aggravated penetrative sexual assault, since the victim child is below the age of 12 years.

14 This Court finds that the appellant has committed offence under Section 5(m) punishable under Section 6 of the POCSO Act. However, neither the State nor the victim side filed any appeal against the acquittal for the offence under Section 5(m) punishable under Section 6 of the POCSO Act.

15 Though there is materials to prove the charges for the offence under Section 5(m), the trial Court has wrongly come to the conclusion that prosecution has proved that the appellant committed offence of aggravated penetrative sexual assault only, which falls under Section 9(m) punishable



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under Section 10 of the POCSO Act and convicted accordingly and since this appeal is filed by the accused against the conviction, this Court cannot go beyond the judgment of conviction and sentence made by the trial Court.

16 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. The trial Court is directed to secure the appellant/accused to serve remaining period of imprisonment, if any.

28.09.2022

Index : Yes/No

Speaking order/Non Speaking order

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To

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

P.VELMURUGAN, J.,

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