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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22.06.2022

Coram::

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Crl.A.No.618 of 2017

Ganesan (M/A 57 years),
S/o.Vellaisamy,
Thirupathi Naiker Street,
Muthuramalingampuram,
Madurai District.

... Appellant/Accused

/versus/

State Rep. by its,
The Inspector of Police,
All Women Police Station,
Avinashi,
Tiruppur District.
Crime No.03/2015

... Respondent/Complainant

Prayer: Criminal Appeal is filed under Section 374 (2) of Cr.P.C., to set aside the judgment passed in Spl.S.C.No.28/2015 on the file of Mahilar Needhimandram (Fast Track Mahilar Court), Tiruppur.

For Appellant : Mrs.S.Tamizharasi, Legal Aid Counsel

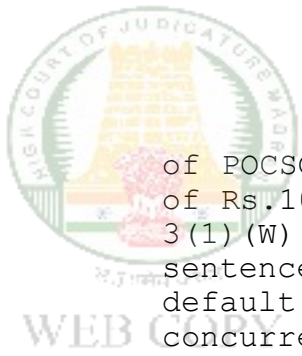
For Respondent : Mr.S.Udaya Kumar,
Government Advocate (Crl.Side)

J U D G M E N T

Heard the Learned Counsel for the appellant and the Learned Government Advocate (Crl.Side) for the respondent.

2. The appellant herein was tried for the offences under Section 366 read with 5(1) r/w 6 of POCSO Act 2012 and Section 3(1)(W)(i) of SC/ST (POA) amendment Act 2014.

3. The trial Court, on appreciating the evidence found the accused guilty and sentenced him to undergo 10 years R.I and fine of Rs.1000/- in default 6 months R.I for offence under Section 366 of I.P.C. For offence under Section 5(1) read with 6



of POCSO Act 2012 sentenced him to undergo 10 years R.I and fine of Rs.1000/- in default 6 months R.I. For offence under Section 3(1)(W)(i) of SC/ST (POA) amendment ordinance Act 2014, sentenced him to undergo 5 years R.I and fine of Rs.500/- in default 6 months R.I. The period of sentenced ordered to run concurrently.

4. The case of the prosecution is that, on 25.02.2015, at about 10.00a.m., the victim girl aged about 14 along with her mother went to the nearby temple to have their free meal. At about 10.30 a.m., the victim girl came out of the temple. The accused saw her and entices her offering tea and bread and took her to the temple tank bund behind the temple and committed penetrative sexual assault. The mother, who found her daughter missing, enquired with the persons in the tea shop and found that, daughter has gone along with the accused towards Thamarai Kulam near Avinashiappar temple. The mother of the victim minor girl then went to the Thamarai Kulam and saw her daughter, who was weeping. On enquiry, she told about the penetrative sexual offence committed by the accused. She, thereafter took her daughter to hospital and informed the police about the incident. She belongs to Devendra Kula Vellalar community and the accused belongs to Vaduga Naicker community. So requested the police to take appropriate action. A case was registered on the same day, at about 12.15 hours, for offence under Section 3 & 4 of POCSO and Section 3(1)(W)(i) of SC/ST (POA) amendment Act 2014.

5. The complaint was given by the father of the victim girl and he was examined as P.W.2, her mother was examined as P.W.6. The victim girl was examined as P.W.1. The Doctor, who examined the victim girl at Government Hospital, Avinashi was examined as P.W.11 and the Accident Register is marked as Ex.P.7. The Assistant Surgeon, Government Headquarters, Thiruppur has given a certificate after physical examination of the victim girl and same is marked as Ex.P.15. The prosecution examined P.W.11 Dr.Raju, P.W.12 Dr.Ramya, P.W.13 Dr.Saravana Prakash and P.W.15 Dr.Ram Kumar, who all examined the victim girl and given their opinion. The relevant medical records are Ex.P.7, Accident Report, Ex.P.8 Chemical analysis report, Ex.P.9 medical certificate Ex.P.10 final opinion and Ex.P.11 and Ex.P.12 the certificate and opinion given by P.W.13 regarding the psychology of the victim girl.

6. The Trial Court relied upon the evidence of P.W.1-the victim girl, the evidence of P.W.2-father of the victim girl and P.W.6-mother of the victim girl, besides the evidence of P.W.3 and P.W.4, the husband and wife who were running the tea



shop near the temple where the victim girl and the accused had tea together before the occurrence, had arrived at a conclusion that the appellant is guilty of the charges.

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7. However, the Learned Counsel for the appellant/accused would draw the attention of this Court to the contradictions in the deposition of witnesses and the reason for implicating this appellant for the grave charges. Particularly, the Accident Register (Ex.P.7) which is the earliest document in this case which is supposed to have been recorded on 25.02.2015 at 11.20 a.m. This exhibit reveals that, the victim girl been accompanied by her mother to the hospital and had informed the Duty Doctor that at about 10.00 a.m., behind Avinashilingaappar Temple, her daughter was sexually assaulted by one unknown person. The F.I.R in this case was registered on 25.02.2015 at 12.15 hours. In that F.I.R, the name of the accused, the community of the accused and other details been furnished. While, the earliest document in this case informs that the victim was sexually assaulted by an unknown person, in the F.I.R which came to be registered after one hour discloses not only the assailant name but also his community. The witnesses admit that the assailant is known person to the victim family, more particularly a close friend of the defacto complainant, the father of the victim. While so, the case of the prosecution is tainted.

8. As far as the alleged occurrence is concerned, the Learned Counsel for the petitioner submitted that the evidence of P.W.4-Malliga, who is the wife of the tea shop owner, bristles with infirmities. In her chief examination, she has stated that, on 25.02.2015 was festival day and there was crowd in the temple and her tea shop. The occurrence alleged to have been taken place behind the temple. While, P.W.6 (Pappammal) the mother of the victim girl, in her chief examination had deposed that, on knowing from the tea shop owner that her daughter was taken by the accused towards the temple tank, she rushed to the place and she saw her daughter nude and weeping. Whereas, in the cross examination, she say that, while knowing from P.W.4 that her daughter had gone along with the accused, she went towards the road leading to Rayampalayam and she saw the accused and her daughter coming from Thamari Kullam side. Her daughter told that, she was raped by the accused. At that time, her daughter was fully dressed.

9. The Learned Counsel for the appellant pointing out that P.W.2 admittedly was never in the scene of occurrence, but he is the 1st informant and he has deposed what he heard from the others and he is not an eye witness. He has deposed that at the hospital his daughter told that the accused removed her dress



and raped her. This is contrary to the entries in Accident Register (Ex.P.7).

10. Now, coming to the medical evidence which is relied by the prosecution, the Accident Register marked as Ex.P.7 does not disclose any external injury over breast or genitalia. The only injury noticed is injury on chest and tenderness over both breast. The medical certificate (Ex.P.9) also records that, no external injury in genitalia and vagina easily admits two fingers and hymen absence. Vaginal smear was sent to clinical analysis test and the report says, did not deduct spermatozoa on either of the two slides. Also referring to the medical report of the appellant which is marked as Ex.P.14, the Learned Counsel for the appellant submitted that the doctor on physical examination of the accused has opined that there is no evidence for the recent sexual intercourse.

11. Pointing out the contradictions and embellishments in the prosecution case, the Learned Counsel for the appellant submitted that the petitioner herein, who is an associate of P.W.1, the father of the victim had money transaction with P.W.2 and due to money dispute, the present complaint has been lodged and same has been suggested to the witnesses but denied. Though, they have denied it, the probable explanation to rebut the presumption has been placed before the Trial Court. However, the Trial Court has ignored the same. The probable explanation coupled with the contradictions in the prosecution witnesses and the medical evidence which is totally against the case of the prosecution ought to have been considered by the Trial Court and acquitted the accused.

12. Further, the Learned Counsel submitted that, just because the victim girl belongs to scheduled caste, offence under SC/ST Act, cannot be attracted. Unless and until, the alleged crime was directed against the victim, for the reason, he or she belongs to SC/ST community. None of the witness had deposed that the alleged crime was committed by the appellant because the victim girl belongs to SC/ST. Even this minimum requirement for convicting a person under SC/ST Act not been placed before the Court, except the community certificate. However, the trial Court had convicted the appellant even for the offence under SC/ST Act. When there is no material placed before the Court to infer that the offence was committed because the victim belongs to scheduled caste and scheduled tribe.

13. The Learned Government Advocate for the respondent referring Section 29 of POCSO Act submitted that, there is a statutory presumption casted upon the accused persons to prove



his innocence. While the victim girl had spoken about the incident and her gesture been recorded by the Learned Judge and not impeached by cross examination, the sole evidence of P.W.2 is enough to convict the accused.

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14. The Learned Government Advocate (Crl.Side) for the respondent rely upon the judgment of the Hon'ble Supreme Court in *Parminder @ Alias Ladka Pola -vs- State of Delhi* reported in (2014) 2 SCC 592, wherein, it has been repeatedly held that, absence of hymen or absence of sign of sexual violence per se will not inure the benefit of doubt in favour of the accused involved in sexual offence. More so, if the victim is the minor child, the burden to prove his innocence is on the accused. This Court totally agree with the proposition submitted by the Learned Government Advocate (Crl.Side) for the respondent.

15. When the evidence of the victim as well as the other circumstantial evidence are unimpeachable and inspires the confidence of the Court, one need not search for medical evidence. However, in this case, neither the victim nor the other witnesses for prosecution could place before this Court the true fact and convince the Court that they are reliable witnesses. The case of the prosecution from the inception bristles with infirmity. The Accident Register is marked as (Ex.P.7) which happen to be recorded at 11.30 a.m., and the F.I.R registered on the information given by P.W.1, who is admittedly not an eye witness to the occurrence. The testimony of witnesses basically contradicts each other. After the alleged occurrence how and where the victim girl was found is not been consistently spoken neither by the victim nor her mother nor the so called independent witnesses namely P.W.3 and P.W.4. This infirmity in the prosecution case cumulatively leads to a conclusion that though the accused has discharged the burden by preponderance of probability, the prosecution has failed to prove the guilt of the accused.

16. In the said circumstances, this Court holds that the trial Court failed to appreciate the evidence holistically, instead it has been carried away by the allegation that the victim girl is around 14 years and the appellant is around 52 years and therefore, convicted him for offence under Section 366 read with 5(1) r/w 6 of POCSO Act 2012 and Section 3(1)(W)(i) of SC/ST (POA).



17. In view of the infirmity in the prosecution side evidence and for the reasons stated above, the Criminal Appeal is allowed. The judgment passed in Spl.S.C.No.28 of 2015 on the file of Mahilar Needhimandram (Fast Track Court), Thiruppur is hereby set aside. Fine amount paid if any, shall be refunded to the appellatant. Bail bond executed shall stand discharged.

Sd/-

Assistant Registrar (CS-IX)

//True copy//

Sub Assistant Registrar

bsm

To,

1. The II Additional District Sessions Judge,
Tiruppur.
2. -do-Through The Principal District cum Sessions Judge,
Tiruppur.
3. The Mahilar Needhimandram
(Fast Track Mahilar Court),
Tiruppur.
4. The Inspector of Police, All Women Police Station,
Avinashi, Tiruppur District.
5. The Superintendent,
Central Prison, Coimbatore.
6. The Public Prosecutor,
High Court, Madras.

Copy To

1. The Section Officer,
Criminal Section,
High Court, Madras.
2. The Hon'ble POSCO Committed,
High Court, Madras-104.

+1cc to Ms.Thamizharasi, Advocate SR.No.38422

Cr1.A.No.618 of 2017



GK (CO)

GMY (04/07/2022)

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