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CRL A No.661 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.10.2022

Coram:

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

Criminal Appeal No.661 of 2021

and

Crl.M.P.No.13518 of 2021

Palanisamy

... Appellant

Vs.

State represented by

Inspector of Police

All Women Police Station

Gobichettipalayam, Erode District

Crime No.4 of 2019

... Respondent

Prayer : Criminal Appeal filed under Sections 374(2) of Criminal Procedure Code, praying to set aside the sentence and conviction imposed by the learned Sessions Judge, Magalir Neethi Mandram, Fast Track, Mahila Court, Erode in special Sessions Case No.18 of 2019 dated 27.10.2021.

For Appellant : Mr.S.Parthasarathy

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been filed seeking to set aside the conviction and sentence imposed by the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court) Erode in Special Sessions Case No.18 of 2019 dated 27.10.2021.

2.The respondent police registered the case against the appellant in Crime No.4 of 2019 for offences under Section 366 IPC and Section 9(m) read with Section 10 POCSO Act and after completing the investigation, laid charge sheet before the Court of Session, Magalir Neethimandram (Fast Track Mahila Court), Erode. The learned Sessions Judge after completing the formalities, taken cognizance of the case on file in Spl.S.C.No.18 of 2019 and framed charges against the appellant for offence under Section 366 IPC and Section 9(m) read with Section 10 POCSO Act.

3. After framing the charges, in order to prove the case of the prosecution during trial before the trial Court, totally 13 witnesses were



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examined as P.W.1 to P.W.13 and 18 documents were marked as Exs.P.1 to P.18 and no material object was exhibited.

4. After completing the examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C. However, the accused denied the same as false and pleaded not guilty. On the side of the defence, no oral or documentary evidence was produced.

5. On conclusion of trial after hearing the arguments advanced on either side and considering the materials, the learned Sessions Judge found the accused guilty for the offences under Section 366 IPC and Section 9(m) punishable under Section 10 of POCSO Act 2012 and convicted and sentenced to undergo 5 years of rigorous imprisonment and to pay fine of Rs.1,000/- in default to undergo simple imprisonment for a further period of 2 months for the offence under Section 366 IPC; to undergo 5 years of rigorous imprisonment and to pay fine of Rs.1,000/-



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in default to undergo simple imprisonment for a further period of 2 months for the offence under Section 9(m) punishable under Section 10 of POCSO Act. Challenging the said Judgment of conviction and sentence, the accused has filed this present appeal before this Court.

6. The case of the prosecution is that the victim girl is a five years old child. The appellant was working at a tailoring shop situated opposite to the house of the victim child. The owner of the said tailoring shop had also rented a place in the first floor of the same building where the victim's family was residing. The parents of the victim were doing Soup business near the staircase in the ground floor of their house. On 13.03.2019 at about 9.00 p.m., when the victim child walked through the place of the tailoring shop in their building, the appellant took her to his shop, switched off the lights, removed her panties and touched her private parts and caused scratch injuries. In the meantime, the mother of the victim who went in search of the child, found the slippers of the victim child outside the shop of the appellant and by calling her name, went to the shop the appellant. On seeing the mother of the victim child,



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the appellant pushed her away. Thereafter, the mother of the victim taken the victim child to her house by scolding her as to why she went alone. Next day, the victim complained of pain in her private parts and when enquired, the victim child revealed offence committed by the appellant. Thereafter, the mother of the victim informed the same to her husband and lodged the complaint on 18.03.2019.

7. The learned counsel for the appellant would submit that due to previous enmity, a false case has been foisted against appellant. The parents of the victim child were doing Soup business under the stair case which caused inconvenience to the persons who came to the first floor. Hence, the same was questioned by the appellant due to which, they developed enmity against the appellant and subsequently lodged the false complaint against the appellant. He would further submit that there is a delay of 4 days in lodging the complaint which is fatal to the case of the prosecution and it would clearly show it is a false case. Further, the Medical Officer/P.W.8 who conducted medical examination on the victim child has clearly deposed that there is no external injury on the body and



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private parts of the victim child which also would clearly show that a false case has been foisted against the appellant. More over, there is no independent witness to substantiate the involvement of the appellant in this case. P.W.1 and P.W.3 are the parents of the victim child and apart from them, no other witness have spoken about the occurrence and the character of the appellant. He would submit that the evidence of the child witness cannot be relied on as the same is a tutored one. The charges as against the appellant create many doubts as there is no injury on the victim child and there is no eyewitness to the occurrence. The prosecution has not proved its case and therefore, there is no presumption in favour of the prosecution. Hence, the appellant need not rebut the presumption. The Investigating Officers viz., P.W.11 and P.W.12 have not properly investigated the case and the trial Court failed to consider the facts and circumstances of the case and awarded maximum punishment which warrants interference. Further he would submit that the delay in filing the complaint has not been properly explained and even the explanation offered by the prosecution is not believable. On the date of occurrence, the father of the victim was very much available. Even the



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evidence of P.W.1/mother of the victim clearly shows that at the time of occurrence, the father was very much available. However, the complaint was given only after 4 days as if, the father of the victim was not in station and he had gone to Trichy. Further, as per the prosecution, the victim child was treated by a private hospital doctor on the very next day to the date of occurrence. However, the said doctor was not examined in this case which itself would show that in order to take vengeance over the enmity with the appellant, the parents of the victim child have foisted the false case against the appellant. Therefore, the Judgment of the trial Court has to be set aside.

8. The learned Additional Public Prosecutor appearing for the respondent police would submit that the date of birth of the victim is 08.03.2014 and the occurrence took place on 13.03.2019 and therefore, the age of the victim was only about 5 years at the time of occurrence . Hence, she was a child under the definition of POCSO Act at the time of occurrence. The father of the victim was doing Soup business in the ground floor and the appellant was working in a Tailor shop in the first floor. On the date of occurrence, the victim went to upstairs to use



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bathroom. At that time, the appellant took her to his shop and made her to lie on the floor and tried to commit penetrative sexual assault during which, he caused scratch injury to the victim at her private parts. In the mean time, the mother of the victim who was searching for the victim child, saw the slippers of the victim child outside the tailor shop of the appellant and by calling her name went to the shop of the appellant. On seeing the mother of the victim, he pushed the victim child. The mother of the victim child took her to home and at that time, the victim child did not say anything to her mother. On the next day, the victim child got pain in the private parts and only thereafter, she revealed about the act of the appellant to her mother. By that time, the father of the victim had left to Trichy and after he returning to home, they lodged the complaint on 18.03.2019 and therefore, there was a delay of 4 days in lodging the complaint and it is not fatal to the case of the prosecution. Though the complaint was lodged belatedly, immediately after the complaint was registered, the victim was produced before the doctor and also before the Judicial Magistrate for recording statement under Section 164 Cr.P.C. Thereafter, she was examined as P.W.2 before the Court below. The



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victim girl in her evidence before the trial Court and in the statement made before the Magistrate under Section 164 Cr.P.C., has clearly stated that the appellant caused scratch injuries on her private parts. Therefore, the prosecution proved its case beyond reasonable doubt and the trial Court rightly convicted the appellant. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

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

10. In order to substantiate the case of the prosecution, on the side of the prosecution, totally 13 witnesses were examined out of which, the mother of the victim was examined as P.W.1 and she has spoken that on the date of occurrence while she was searching for her daughter, she saw the slippers of her daughter outside the shop of the appellant and by calling her name, she went there. On seeing her, the appellant pushed her daughter away. Thereafter, she took her daughter to home. Next day, the victim child complained of pain in the private parts and on enquiry, the



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victim revealed that the appellant took her to his shop, switched off the lights, removed her panties and caused scratch injuries in her private parts. Immediately, she informed the same to her husband over phone. Thereafter, applied oil on the injuries and subsequently, took her to a private hospital and gave medicine for 3 days and after her husband returning to home, they lodged the complaint.

11. The victim child was examined as P.W.2 and she has clearly spoken about the incident.

12. P.W.3 is the father of the victim child and he has spoken about the incident heard from his wife and giving complaint.

13. P.W.8 is the doctor who conducted medical examination on the victim child. P.W.9 is the doctor who conducted medical examination on the appellant.



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14. Perused the evidence of the victim child/P.W.2 made before the trial Court and the statement of the victim made before the Magistrate under Section 164 Cr.P.C./Ex.P.8 wherein, the victim child has clearly spoken about the incident.

15. Admittedly, in this case, there is no eyewitness and the other witnesses are only hearsay witnesses. In the case of this nature, no eyewitness can be expected as the culprits always take advantage of the aloofness of the children or take the children to a secluded place and exploit them sexually. In some cases, some of the children are fortunately saved by parents or neighbors or someone else before the offence is committed but in many cases, it comes to light belatedly. It is settled proposition of law, if the evidence of the sole witness/injured witness is cogent and consistent, conviction can be recorded. In this case, the victim child has clearly narrated the incident. The evidence of the victim child is cogent, consistent and natural. Therefore, there is no reason to disbelieve or discard the evidence of the victim child.



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16. The learned counsel for the appellant contended that the medical evidence does not corroborate with the case of the prosecution as there is no external injuries found on the victim child. The date of occurrence is on 13.03.2019 and the date of complaint is on 18.03.2019. Immediately, on the same day, the victim child was clinically examined by the doctor/P.W.8 which is after 4 days of the date of occurrence. Further, P.W.1/the mother of the victim has clearly stated that when the victim child complained of pain in her private parts, she applied oil in the painful area and also took her to a private hospital and gave medicine for three days. Therefore, there are less chances to find injuries on the victim child after 4 days of occurrence as there are possibilities of the minor injuries getting healed by that time. Even otherwise, if no injuries found on the victim child, it may not be a sole ground to discard the evidence of the victim child. The victim child has clearly stated about the act of the appellant. Since there are contradictions or discrepancies between the evidence of the victim and medical evidence, it would not give privilege to the medical evidence.



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17. Though the learned counsel for the appellant tried to convince this Court that there was previous enmity between the parents of the victim and the appellant and in order to wreck vengeance against the appellant the child has been tutored, on a reading of the evidence of the victim child, this Court does not find any reason to disbelieve or discard the evidence of the victim child. Further, there is no material to show that the victim was tutored and victimized due to enmity with the appellant. No mother or father would sacrifice the future of their child and go to that extent and spoil the reputation of their own child just to take vengeance on a third person. Therefore, this Court does not accept the contention raised by the appellant.

18. The further contention of the learned counsel for the appellant is that there was delay of 4 days in lodging the complaint. The mother of the victim/P.W1 clearly stated that when her daughter came from the shop of the appellant, she did not say anything. On the next day early morning, her husband left to Trichy and thereafter, the victim child has complained about pain in the private parts and when she enquired, the



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victim child revealed the entire incident. Thereafter, the mother of the victim informed the same to her husband and after 4 days when her husband returned to home, they have lodged the complaint. Therefore, the delay in filing the complaint is not fatal to the case of the prosecution. Especially in the cases of this nature, mere delay in filing the complaint would not affect the case of the prosecution. Further, at the time of occurrence, the victim child was only about 5 years old and she had not revealed the incident to her mother immediately after the occurrence as she might have not understood what had happened to her or even if she had understood, she would have afraid to reveal the same on fear of her parents that they would scold her or beat her as to why she went alone and would now allow her to play outside thereafter. Therefore, since because the victim child not revealed the incident immediately or the mother of the victim not filed the complaint immediately, the prosecution case would not be vitiated.

19. This Court being an appellate Court and final Court of fact finding, while re-appreciating the entire evidence, finds that the appellant



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has committed offence under Section 366 IPC since, he has taken the victim who was a child to his place, without the consent of natural/lawful guardian, with ill intention to sexually exploit her. Further, the appellant removed the panties of the victim child and caused scratch injuries in the private parts of the victim child which shows that the appellant attempted to commit penetrative sexual assault on the victim child. Hence, the act of the appellant falls under aggravated penetrative sexual assault under Section 3 punishable under Section 4 of POCSO Act. However, since the victim was under the age of 12 years, the offence committed by the appellant falls under Section 5(m) punishable under Section 6 of POCSO Act, whereas the trial Court based on the medical evidence since there was no external injuries on the private parts of the victim child, not framed charge for aggravated penetrative sexual assault and framed charge only for the offence under Section 9(m) punishable under Section 10 of POCSO Act. Neither the prosecution nor the victim has filed any appeal. This is one of the unfortunate case that the trial Court failed to look into the evidence of the victim child and framed charge under Section 9 (m) punishable under Section 10 of POCSO Act which



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provides lesser punishment. However, this Court cannot go beyond the scope of the appeal. Now the present appeal is filed by the accused against the conviction and sentence passed by the trial Court.

20. This Court does not find any mitigating circumstances to reduce the sentence and there is no merit in the appeal. Therefore, the appeal is liable to be dismissed.

21. Accordingly, this Criminal appeal is dismissed. Consequently connected Miscellaneous Petition is closed. The respondent police is directed to secure the appellant to undergo the remaining period of sentence if any.

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Index:Yes/No



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1. The Magalir Neethi Mandram, Fast Track, Mahila Court, Erode
2. Inspector of Police
All Women Police Station
Gobichettipalayam, Erode District
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.



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P.VELMURUGAN, J

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