



Crl.A.No.684 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 22.11.2022

Pronounced On : 06.12.2022

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.684 of 2021

Udhayakumar

... Appellant/Accused

Versus

State Rep by

The Inspector of Police,

W-1, All Women Police Station,

Thousand Lights, Greams Road,

Chennai – 600 006.

(Crime No.3/2018)

... Respondent/Complainant

PRAYER: Criminal Appeal is filed under Section 374 of Cr.P.C, to set aside the conviction and sentence imposed on the appellant by the learned Sessions Judge, Special Court for Exclusive Cases Under POCSO Act, Chennai in Special S.C.No.184 of 2018 by a judgment dated 22.11.2021 by allowing this appeal.

For Appellant

: Mr.P.G.Perumal Pandian
Legal Aid Counsel

For Respondent

:Mr.S.Sugendran



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Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal is preferred by the appellant/accused against the judgment passed by the learned Sessions Judge, Special Court for Exclusive Cases Under POCSO Act, Chennai in Special S.C.No.184 of 2018 dated 22.11.2021.

2. The case of the prosecution is that when the victim visited the temple along with her grandmother, the accused pinched on her private part. Therefore, the mother of the victim lodged a complaint before the respondent police.

3. In order to prove the case of the prosecution before the trial Court, on the side of the prosecution, as many as 8 witnesses were examined as P.W.1 to P.W.8 and marked 15 documents as Exs.P.1 to P.15 and two material objects were marked as M.O-1 and M.O-2. On the side of the defence, as many as 5 witnesses were examined as D.W.1 to D.W.5 and marked 2 documents as Exs.D.1 and D.2 and two material objects were marked as M.O-3 and M.O-4. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused and questioned under



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Section 313 of Cr.P.C., wherein 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 the accused is guilty and convicted for the offence under Section 10 of POCSO Act and sentenced him to undergo 5 years of Rigorous Imprisonment and imposed a fine of Rs.5,000/- in default to undergo 3 months of Simple Imprisonment and also ordered a sum of Rs.1,00,000/- as compensation to the victim girl.

5. Challenging the said conviction and sentence imposed by the learned Sessions Judge, Special Court for exclusive trial of cases under POCSO Act, the appellant filed this appeal before this Court.

6. The learned counsel for the appellant would submit that the name of the accused has not been found in the FIR. P.W-1 has identified the appellant after his arrest. When the victim was examined by the Investigation Officer on 21.04.2018, she has not stated anything about the



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incident. The only witness, who has spoken about the incident, was the mother of the victim and she has never stated about the temple at any point of time and the victim has not stated anything against the appellant while recording the statement under Section 164 of Cr.P.C by the learned Judicial Magistrate. During the chief examination and recording of statement under Section 164 of Cr.P.C., the victim has given two different versions and improved version in her deposition during chief examination. The evidence of P.W-1 was not corroborated with the evidence of P.W-3 and P.W-2. P.W-1 to P.W-3 are the interested witnesses and they were given contradictory statements which are inconsistent. Therefore, their evidence cannot be accepted. Further, he would submit that the evidence of P.W-8/ Investigating Officer would show that there was no direct eye witness and the temple is the public domain and the so-called incident occurred in the open place but no public witness has been examined. Even, one of the public witnesses was a friend of the father of the victim and he was in elsewhere and not in and around the Choolaimedu which is said to have been the occurrence place. The evidence of P.W-2 and P.W-3 is contradictory to the evidence of P.W-1. The trial Court lost sight of the fact



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that P.W-1 has deposed that she had been taken to two temples – one is Akka Temple and another one is Yanai Temple. P.W-3 clearly stated that she had taken P.W-1 to one temple and the same temple where the so-called incident taken place. Further, he would submit that there were two Iyers in the temple and she had not identified the appellant as the person who is alleged to have sexually assaulted her. The deposition of P.W-1 that there were two Iyers in the temple as pointed out by P.W-3 in her deposition during the cross-examination. During recording the statement of the victim under Section 164 of Cr.P.C., her mother tutored her about what is to be stated about the incident. P.W-1 has not experienced that she was sexually assaulted by the appellant on any occasion. P.W-3 also said that her granddaughter came by crying to her on the said day. She also does not say that her granddaughter was sexually assaulted by the appellant on any day. P.W-3 said that P.W-1 refused to come to the temple after the said incident. Though P.W-1 to P.W-3 have not specifically stated about the date of occurrence but they stated only the month of March and they have not stated how many times it had happened. P.W-1 has stated in her statement under Section 164 of Cr.P.C., that she was pinched by the Iyer when prasadam



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was served. In her chief-examination, she said that she was taken to room and pinched her private part. She gave two different statements which are contrary to each other. Therefore, the evidence of the victim is not of a sterling quality and the victim is untrustworthy witness. P.W-2/mother and P.W-3/grandmother of the victim are not eye witnesses and they have not spoken the truth and therefore, it is unsafe to convict the appellant with uncorroborated evidence. Further, he would submit that P.W-3 has not informed the flower vendor but she admits that the flower vendor was in temple on the date of alleged occurrence is said to have taken place and nowhere P.W-2 and P.W-3 stated that they approached the person who maintain the temple immediately and made an oral statement about the misbehaviour alleged to have been committed by the appellant and there is contra statement. P.W-1 during her statement recorded under Section 164 of Cr.P.C., stated that she informed her grandmother-P.W-3. Whereas in her deposition during evidence, she said that she informed her mother/P.W-2 at the time, her grandmother left to another temple. Therefore, it is not known, how P.W-3 came to know about the incident. It is the case of the prosecution that P.W-3 took the victim and at the time of occurrence, victim



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has not informed about the occurrence to P.W-3. Whereas they came to the house and P.W-3 left to other temple, therefore, she informed her mother which is highly improbable. Further, he would submit that no priest or pujari would commit this type of offence in the temple premises and even behind the idol while serving prasadam. There is enmity between the appellant and the victim's family and in order to wreck vengeance, they foisted the false case against the appellant and to extract money from the appellant. In this case, no injury found on the victim and the evidence of P.W-7 also clearly shows that there is no injury on the private part of the victim. The evidence of P.W-7 shows that the victim did not utter the word and only P.W-2/her mother has spoken to the Doctor about the alleged incident that have taken place. Since the prosecution has not specifically given the date of occurrence and the same was not proved in the manner known to law. There are material contradictions between the evidence of P.W-1 to P.W-3 and they are all interested witnesses. Based on the evidence of untrustworthy witnesses, the appellant cannot be convicted and the victim was only four years completed, she is not in a position to communicate either the learned Magistrate or the Doctor or the Judge and it is the



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complete tutored version. The four years old girl has been tutored the words like “Akka temple”, “Yanai temple” and “the accused was shoted”.

It clearly shows that the victim was tutored in such a way, in order to foist a false case against the appellant and to wreck vengeance and also to extract money from the appellant. Therefore, the judgment of the trial Court warrants interference and conviction and sentence imposed by the trial Court is liable to be set aside and the appeal is to be allowed.

7. The learned Additional Public Prosecutor would submit that the age of the victim is four years and she was studying LKG. While going to temple, her grandmother used to take the victim to the temple. In the month of March, 2018, they went to temple where the appellant was serving as priest/pujari. While serving prasadam, he pinched her private part and also other parts with sexual intention. Subsequently, when the victim was taken to her house, she informed the grandmother that don't go to the temple and she also informed her mother that what had happened in the temple. Therefore, the mother of the victim gave a complaint. In order to prove the age of the victim, the prosecution has produced birth certificate of the victim



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and the same was marked as Ex.P-1 and there is no contra evidence.

Though the learned counsel for the appellant submits that the copy of the birth certificate was obtained only for the purpose of filing the case and it was not obtained earlier, which creates a doubt, the birth certificate is a public document and the same was produced and marked as Ex.P-1. On reading of Ex.P-1, the date of birth of the victim is 11.06.2014. The date of occurrence is in the month of March 2018. Therefore, at the time of occurrence, the victim has completed 4 years only and in the evidence of P.W-2-mother of the victim, the same is also stated. Therefore, the victim is a child under the definition of POCSO Act and there is no dispute about the age of the victim. As far as the commission of offence is concerned, victim was P.W-1, she has narrated the occurrence before the learned Judicial Magistrate and the same was recorded under Section 164 of Cr.P.C and the same was marked as Ex.P-3. The learned Magistrate also recorded the communication capacity of the victim and therefore, the mother of the victim was examined as P.W-2 and she has also narrated the incident as spoken by the victim. Therefore, the victim was produced before the Medical Officer. The Doctor, who was examined as P.W-7, stated that the victim was brought



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by her mother. The victim and her mother stated that one month prior to the date of examination by the Doctor, they went to Kanniga Parameshwari Temple which is situated at Choolaimedu. When the victim went along with her grandmother, one priest/pujari was serving vibudhi and kumkum. At the time of serving prasadam, the appellant pinched the victim on her chest, cheek and also her private part. When Doctor conducted clinical examination on the victim, she found no injuries and the hymen is also intact and the certificate issued by the Doctor/P.W-7 is Ex.P-11. Therefore, even when the victim was examined by the learned Magistrate in her previous statement, also while examining her witness before the Court and when she was produced before the Doctor, she has narrated the same about the incident and the victim has no intention to make false allegation against the appellant. The victim, who is four years old, does not even know what is good touch and what is bad touch. While examining the witness, the victim has shown by touching the parts where the appellant pinched and touched her. Even though there is no eye witness, if eye witness also implicated, no one can suspect the incident. As the age of the victim is also four years, the accused is a priest/pujari while serving prasadam in the temple, no one can



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suspect either the incident or the appellant. Therefore, the trial Court has rightly appreciated the evidence and convicted the accused and also the prosecution has proved its case beyond reasonable doubt. There is no merit in the appeal and hence, the appeal is liable to be dismissed.

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

9. Admittedly, the age of the victim is only four years. When the victim went to the temple in the month of March, 2018 along with her grandmother, the appellant pinched her private part and also other parts like cheek and chest. Therefore, the same was informed by the victim to the mother and the mother gave a complaint. As far as the age of the victim is concerned, the prosecution produced Ex.P-1 which is the birth certificate of the victim. As per the complaint, the occurrence took place in the month of March 2018, at that time, the victim has completed four years and defence has not produced any contra evidence to show that the victim has not completed four years and therefore, this Court finds that the victim is the



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child under the definition of Section 2(1) (d) of the POCSO Act. As far as the commission of offences is concerned, out of eight witnesses examined by the prosecution, victim is P.W-1 and her statement recorded by the learned Judicial Magistrate under Section 164 of Cr.P.C., is marked as Ex.P-3 and the statement of mother of the victim is marked as Ex.P-4. When the victim was examined as P.W-1, she has substantiated the entire incident as stated before the learned Judicial Magistrate and the evidence recorded from the victim, the trial Court has the advantage to note the demeanour of the victim and the victim has touched and said that where the appellant pinched and touched her. Further, when the learned Magistrate recorded her statement, the learned Magistrate has satisfied himself/herself and stated that the primary questions were put to the victim, she is very well understood and she is well in position to communicate her grievance. Therefore, the victim was examined by the learned Judicial Magistrate. During the trial, the trial Court observed that the victim touched the part of the body and saying that the place where the appellant touched her, even though it is a temple, which is improbable to say that the person who is serving in the temple as priest/pujari committed the offence and also observed that the age of the



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victim is four years, which is intolerable. Though the learned counsel for the appellant vehemently contended that as per Section 7 of POCSO Act, the sexual intention of the accused is to be established by the prosecution. The appellant never touched the victim with sexual intention and no independent witnesses were examined. All the witnesses examined on the side of the prosecution are interested witnesses and they are all not independent witnesses. Though in this case, the age of the victim is four years, she would not be in a position to inform the same immediately since the evidence of P.W-3 itself says that she insisted her grandmother to go to the house. P.W-2 and P.W-3 clearly says that the victim has stated that the person in the Akka Temple has committed the offence and also informed the mother and grandmother not to go to the temple. The victim has not sustained any injuries and the medical records also show that no injuries were found. Therefore, the case has been foisted against him. Though it is the case from the evidence of P.W-1 to P.W-3 that the prosecution has proved the case, the offence committed by the appellant is under the definition of Section 7 of POCSO Act. Since the victim is below 12 years, the offence committed by the appellant falls under the term “aggravated



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sexual assault” which is under Section 9 (m) of the POCSO Act. Therefore, the trial Court has convicted the accused for the offence under Section 9(m) of POCSO Act which is punishable under Section 10 of POCSO Act. In this case, there is no eye witness and no corroborated evidence, however, the evidence of the victim is natural, cogent and consistent and therefore, this Court does not find any valid reason to discard the evidence of the victim, the victim need not say false evidence against the appellant, that too, who is the Poojari of the temple. Further, if the evidence of the prosecutrix is trustworthy, the Court can convict the accused based on the sole evidence of the prosecutrix and on reading of the deposition of P.W-1, no one can tutor such a lengthy statement to the victim who is aged about four years unless she directly seen or suffered. Therefore, the contention of the learned counsel for the appellant is not acceptable that there is no reason to discard the evidence of the victim even though the victim is in the tender age. In the evidence of the victim, the trial Court observed that the victim touched and shown her parts while saying the evidence where the appellant touched her. Therefore, there is a foundational fact that the appellant has committed the offence under Section 9 (m) of the Act. It is a duty of the defence to rebut



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the presumption that there is no sexual intent and he did not touch the victim girl. While reading the evidence of P.W-1/victim, P.W-2-mother, P.W-3-grandmother, P.W-6 – Village man and P.W-7- Doctor, who are prosecution witnesses, proved that the prosecution case is beyond reasonable doubt. Even though, on the side of the defence, five witnesses were examined and two documents were marked. But nothing has been elicited by the defence. Though it is a settled proposition of law that the prosecution has to prove its case beyond reasonable doubt, the foundational fact that the commission of offence has to be proved by the Prosecution. The appellant need not plead any defence under substantiated the same. However, in this case, it is already stated that the evidence of P.W-2, who is the mother of the victim, who set the law into motion by filing the complaint and subsequently she was examined by the learned Judicial Magistrate by recording her statement under Section 164 of Cr.P.C and further the victim was also examined as P.W-1 by the learned Judicial Magistrate and the same was recorded as videograph and that were marked as M.O-1 and M.O-2 and the photo series and photo DVD also marked as M.O-3 and M.O-4. On the side of defence, four witnesses were examined and they have not disproved the case of the



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prosecution. Even though the appellant was examined as D.W-4, the evidence of D.W-4 who is the appellant clearly states that during the relevant point of time, the appellant was working as temporary priest/poojari in the said temple at Cholaimedu, the victim used to come to the temple and they also admitted that during the same suspicious date, the victim came to the temple and he was serving prasadam to her grandmother and he used to put the prasadam on the victim. He has also stated that the victim played with other children and she used to come only with her grandmother and he also admitted that he was attacked by four persons and therefore, it is probable that some untoward incident would have taken place. The appellant has not stated that he is not working as Poojari in the temple and not stated that he does not know P.W-3/grandmother and P.W-1/victim and also he stated that somebody attacked him on the occasion. The Inspector of Police also called him and got signatures and also after attacking the persons, they took the appellant to the Police Station. But the appellant has not given any complaint against the persons who attacked him. The other defence witnesses are interested witnesses and they have also stated that there was no sufficient space behind the idol. Therefore, this Court finds



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that they have no defence that has not elicited anything except the space behind the idol. The victim is four years old girl, she may not be in a position to identify where exactly the occurrence took place. But she clearly stated that it is the temple and she also identified the accused, who committed the offence and also admittedly, who touched her body. Therefore, it is not the case of the appellant that since the victim is four years old girl and without having any bad intention or sexual intent, he administered the prasadam to the victim. Since the appellant admitted that he is serving as Priest or poojari and also he did not deny that he was not aware of the victim and her grandmother and particularly somebody attacked him and no case was given and registered against the persons who attacked him, this Court finds the foundational fact was proved by the prosecution. Normally, in the criminal offence, the prosecution has to prove its case beyond reasonable doubt. But the offences of this nature, the age of the victim starts from six months to 18 years, the culprits committing the offence taking advantage of their age and exploiting them sexually and the prosecution cannot prove the case beyond reasonable doubt. But the prosecution with preponderance of probability are able to prove foundational



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fact. Then, it is for the accused to rebut the presumption that he has no sexual intention. In this case, the appellant has not denied the fact that he was not aware of the victim and her grandmother. Therefore, under those circumstances, this Court is the appellate Court as the final Court of fact finding, re-appreciated the entire evidence, finds that the trial Court has rightly appreciated the evidence and convicted the appellant. This Court, while reappreciating the evidence, does not find any perversity in the appreciation of evidence by the trial Court. There is no merit in this appeal and the same is liable to be dismissed.

Accordingly, this Criminal Appeal is dismissed.

The Legal Aid Counsel who is appeared on behalf of the appellant/accused is entitled for remuneration as per rule.

06.12.2022

dh

Index: Yes/No

Internet: Yes/No

To

1. The learned Sessions Judge,
Special Court for Exclusive Cases
Under POCSO Act, Chennai.

19/21



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2. The Inspector of Police,
W-1, All Women Police Station,
Thousand Lights, Greams Road,
Chennai – 600 006.

3. The Public Prosecutor,
Madras High Court,
Madras.



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P.VELMURUGAN, J.

dh

Pre-delivery Judgment made in
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