



CRL A No.723 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.10.2022

Coram:

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

Criminal Appeal No.723 of 2021

S.Moses

... Appellant

Vs.

State represented by
The Inspector of Police
All Women Police Station
Dharapuram
(In Crime No.2 of 2018)

... Respondent

Prayer : Criminal Appeal filed under Sections 374 (2) of Criminal Procedure Code, praying to call for the records pertaining to the impugned order dated 11.11.2021 in Special S.C.No.11 of 2019 on the file of the learned Fast Track Mahila Court Judge and set aside the Judgment of conviction and sentence of the appellant in Spl.SC.No.11 of 2019 dated 11.11.2021 on the file of the learned Fast Track Mahila Court Judge.

For Appellant : Mr.N.Shanmuga Thayumanavan

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been filed seeking to set aside the Judgment of conviction and sentence passed in Special S.C.No.11 of 2019 dated 11.11.2021 on the file of the Mahila Court, Tiruppur.

2.The respondent police registered the case in Crime No.2 of 2018 initially against the appellant/A2 and one Manoj Kumar/A1 for the offences under Sections 5(g), 5(l), 5(n), 5(j)(ii) punishable under Section 6 of POCSO Act and during the course of investigating, it was found that one Prakash also sexually assaulted the victim and impregnated her. Hence, the said Prakash was arrayed as A3 and the offences were altered into Sections 5(l), 5(n), 5(j)(ii), 6, 3(a), 4 of POCSO Act and Section 506 (2) IPC and after completing the investigation, the respondent police filed charged sheet before the Mahila Court, Tiruppur for the offence under Sections 3(a) punishable under Section 4 of POCSO Act, 2012 against the 1st accused; Section 5(l) punishable under Section 6 of POCSO Act, 2012 against the 2nd accused/the appellant herein and; Section 5(l), 5(j)(ii) punishable under Section 6 of POCSO Act, 2012 and



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Section 506 (2) IPC against the 3rd accused. The learned Sessions Judge, taken the charge sheet on file in Spl.S.C.No.11 of 2019 and framed charges against the 1st accused for the offences under Sections 3(a) punishable under Section 4 of POCSO Act, 2012; against the 2nd accused/the appellant herein for the offences under Sections 5(l), 5(n) punishable under Section 6 of POCSO Act, 2012; against the 3rd accused for the offence under Section 5(l), 5(j)(ii) punishable under Section 6 of POCSO Act, 2012 and Section 506 (2) IPC.

3. After framing the charges, in order to prove the case of the prosecution, during trial before the trial Court, totally 11 witnesses were examined as P.W.1 to P.W.11 and 27 documents were marked as Exs.P.1 to P.27 and one 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



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pleaded not guilty. On the side of the defence, no oral or documentary evidence were produced.

5. On conclusion of trial after hearing the arguments advanced on either side, considering the materials, the learned Sessions Judge, found the first accused not accused guilty and thereby, acquitted him from all the charges. However, the learned Sessions Judge found the guilt of the 2nd and 3rd accused and thereby convicted and sentenced them. The 2nd accused was convicted and sentenced to undergo 20 years rigorous imprisonment and to pay fine of Rs.10,000/- in default to undergo rigorous imprisonment for a further period of six months for the offence under Sections 5(l) punishable under Section 6 of POCSO Act 2012; to undergo 20 years rigorous imprisonment and to pay fine of Rs.10,000/- in default to undergo rigorous imprisonment for a further period of six months for the offence under Section 5(n) punishable under Section 6 of POCSO Act, 2012. Challenging the said Judgment of conviction and sentence, the 2nd accused has filed the present appeal before this Court.



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6. The case of the prosecution is that the victim girl had love affair with A1 and she used to talk with A1 through the cell phone of her father without his knowledge and whenever, she was not able to get her father's cellphone, she used to get the cellphone of the appellant and talk with A1. The appellant is the distant relative of the victim and residing in the neighboring house of the victim and the victim used to call him as Thatha (Grandpa). Noting the victim talking to A1, the appellant by blackmailing the victim stating if she does not yield to his lust, he would disclose about her love affair with A1 to her parents, had sexual intercourse with the victim on several occasions. Subsequently, the victim became pregnant. Hence, the father of the victim lodged a police complaint against and initially the complaint registered against the appellant and A1. During investigation, it was found that one Prakash also sexually assaulted the victim. Hence, the said Prakash was arrayed as A3.

7. The learned counsel for the appellant would submit that the trial Court acquitted the main accused/A1 and simply convicted the present appellant/A2 from the very same evidence and materials which is against law. The main allegation against the appellant is that the victim girl had



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love affair with A1 and she used to talk with A1 through the cell phone of her father without his knowledge and whenever, she was not able to get her father's cellphone, she used to get cellphone from the present appellant and talk with A1. Noting the same, the appellant by blackmailing the victim stating if she does not yield to his lust, he would disclose about her love affair with A1 to her parents, had sexual intercourse with the victim on several occasions. He would submit that the appellant has not committed any offence as alleged by the prosecution. Neither the cell phone call details of A1 nor the appellant were collected and produced by the prosecution and therefore, the prosecution failed to prove alleged cell phone conversations between the victim and A1 over the cell phone of the appellant. Further he would submit that initially the victim had not disclosed the name of A3 and only when the DNA test report of the appellant came negative, she revealed the name of A3. Thereafter, DNA test was conducted on A3 and subsequently, the DNA profile of A3 matched with the DNA of the child born to the victim and the test result confirmed that A3 is the biological father of the child born to the victim which itself shows that the victim



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girl is a sterling character and she has suppressed the truth and falsely implicated the appellant since the appellant had informed her father regarding the contact between the victim and A1. He would further submit that the DNA test result clearly shows that the appellant is not the father of the child born to the victim and there is no material to connect the appellant in this case. Further, there are discrepancies and contradictions between the own statement of the victim made before the Court while examining as P.W.1 and made before the Magistrate under Section 164 Cr.P.C. and the contradictions are material contradictions which would go into the route of the prosecution. The prosecution failed to conduct the investigation in a fair manner and also failed to establish the case against the appellant. Further the brothers of the victim were not examined as witness which creates doubts. Even as per the prosecution, the victim was in the age of 17 years at the time of occurrence and therefore, she must be knowing all the consequences and if at all the appellant had threatened her, she might have informed to her parents or to her kith and kin, whereas, she had not informed to anyone about the act of the appellant until her pregnancy came to light which, clearly



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shows that no such occurrence took place. Further, only when the DNA test report of A1 and A2/appellant came negative, she revealed the name of A3 which itself would show the conduct and character of the victim. The trial Court failed to appreciate the same and also failed to find out as to whether the evidence of the victim inspires the confidence of the Court. Therefore, there is perversity in the findings given by the trial Court. Hence, the appeal has to be allowed and the judgment of conviction and sentence passed against the appellant by the trial Court is liable to be set aside.

8. The learned Additional Public Prosecutor would submit that the date of birth of the victim is 26.04.2000 and the age of the victim was 17 years at the time of occurrence and she had not completed the age of 18 years and therefore, she was a child under the definition of Section 2(1)(d) of POCSO Act. The appellant is the neighbour of the victim and the victim used to call him as Thatha (Grandpa). The victim had love affair with A1 and she used to talk with A1 through the cell phone of the appellant. Taking advantage of the love affair between the victim and



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A1, the appellant had sexual intercourse with the victim girl by blackmailing her stating if she does not yield to his lust, he would inform to her parents about her love affair with A1. Hence, the victim yielded to the lust of the appellant. Since, the appellant had also threatened the victim not to reveal the same to anyone, she did not disclose the same to anyone. Subsequently, the victim became pregnant. Only thereafter, she informed about the love affair with A1 and the act of the appellant to her family members. Thereafter, the case came to be lodged and subsequently, the victim delivered a male baby. Thereafter, both A1 and the appellant/A2 were subjected to DNA test and when the DNA test report of A1 and the appellant/A2 came negative, she revealed the name of A3. A3 is the relative of A1 and he knows about the love affair of A1. One day, the victim had enquired A3 about A1 for which, A3 by stating that A1 is in a particular place, took the victim to a secluded place and by threatening her, forcibly had sexual intercourse with her. Subsequently, by threatening the victim, A3 had sexual intercourse with the victim on several occasions. When the victim got pregnant, she did not know who was the cause of her pregnancy and therefore, she did not reveal the



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name of A3 in the first instance. Thereafter, when the DNA test report of A1 and the appellant/A2 went negative, she disclosed the name A3. Subsequently, DNA test was conducted on A3 and the DNA test result confirmed that A3 is the biological father of the child born to the victim. The victim was examined as P.W.1 and the father of the victim was examined as P.W.2 and he is hearsay witness and he has spoken about giving complaint. From the evidence of the P.W.1, the statement of the victim recorded by the Magistrate under Section 164 Cr.P.C./Ex.P.20, the evidence of the doctor/P.W.3, medical records, the prosecution proved its case against the appellant beyond all reasonable doubt and 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.

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



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10. In order to substantiate the case of the prosecution on the side of the prosecution, totally 11 witnesses were examined and 27 documents were marked. Out of the 11 witnesses, the victim was examined as P.W.1.

11. A combined reading of the evidence of the victim/P.W.1 and the statement of the victim recorded by the Magistrate under Section 164 Cr.P.C. shows that the victim had love affair with A1 and on coming to know about the love affair of the victim with A1, the appellant blackmailed the victim and for not to reveal the same to her parents, had sexual intercourse with the victim on several occasions.

12. The father of the victim was examined as P.W.2 and he has spoken about lodging of the complaint initially against A1 and the appellant/A2 and subsequently, they came to know that one Prakash/A3 is the biological father of the child born to the victim who has sexually assaulted the victim by threatening her with dire consequences.



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13. The doctor who conducted medical examination on the victim was examined as P.W.3 and the doctor has stated that the hymen of the victim was not intact based on the Scan report, the doctor given opinion that the victim was 21 weeks pregnant. Further, the doctor has stated that the victim had informed her that she was subjected to sexual assault by 2 persons.

14. Admittedly, there is no other eye witness to this case and all the other witnesses are only hearsay witnesses. In the cases of this nature, the Court cannot expect independent eyewitness since the culprits always take advantage of the weakness and aloofness of the children exploit them sexually either by threatening them or offering them likely things and inducing with by sweet quoted words.

15. The main contention of the learned counsel for the appellant is that initially the victim had not disclosed the name of the 3rd accused and only when the DNA test report of the appellant/A2 and A1 came negative, she revealed the name of the 3rd accused and therefore, the



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victim girl does not have a sterling character and the evidence of the victim has to be discarded. Naturally, when a girl child is subjected to sexual assault, she would not reveal the same to anyone immediately for one or other reasons. It may be because of the fear of her parents or on the society or the threat made by the accused. At one point of time, when the victim child feels that she has no other option than to reveal, she would disclose the same. In this case, the victim girl who was a child under the definition of POCSO Act, had love affair with a teenage boy and on coming to know about the same, she has been threatened and blackmailed by more than one persons who have exploited her sexually for their lust. As stated above, no girl child would come forward to reveal immediately that she was subjected to sexual assault. Especially when a girl child is sexually assaulted by more than one persons, one cannot expect her to reveal everything at a time. The victim in her evidence has clearly stated that since the 3rd accused had threatened her with dire consequences to take away the life of her kith and kin, she did not reveal the name of the 3rd accused at the time of giving complaint and giving statement before the Magistrate. Thereafter, since the DNA test reports of



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the appellant/A2 and A1 came negative, the victim had no other option than to reveal the name of the 3rd accused. Therefore, subsequently the victim disclosed that she was also subjected to sexual assault under threat by the 3rd accused. Therefore, the reason for non mentioning the name of the 3rd accused in her previous statements, is acceptable which may not be a sole ground to discard the evidence of the victim.

16. Though in this case the DNA test report shows that the appellant/A2 is not the biological father of the child born to the victim, it does not mean that the appellant did not sexually exploited the victim. This Court finds that the evidence of the victim is very clear, cogent and natural and inspires the confidence of this Court. Therefore, this Court finds that the prosecution proved its case beyond all reasonable doubts that the appellant/A2 committed sexual assault on the victim girl for more than once and therefore, the appellant has committed the offence under Section 5(1) punishable under Section 6 of POCSO Act.



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17. Further, it is seen that the appellant has been convicted by the trial Court for the offence under Section 5(n) punishable under Section 6 of POCSO Act. But this Court finds that though the victim has stated that the appellant is her distant relative and grandfather in relation, the prosecution has not established that the appellant is the relative of the victim. For better understanding, Section 5(n) of POCSO Act is extracted hereunder;

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

18. In this case, since the prosecution has not established the relationship between the victim and the appellant, this Court finds that the conviction and sentence passed by the trial Court against the appellant for the offence under Section 5(n) punishable under Section 6 of POCSO Act is perverse and against law which warrants interference of this Court.



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19. Therefore, the findings of the trial Court in respect of the conviction for the offence under Section 5(n) punishable under Section 6 of POCSO Act, 2012 alone is set aside. Since the prosecution proved from the evidence of the victim that the appellant has committed penetrative sexual assault on her more than once which terms into aggravated penetrative sexual assault under Section 5(l) of POCSO Act, the conviction and sentence passed by the trial Court against the appellant for the offence under Section 5(l) punishable under Section 6 of POCSO Act is confirmed.

20. Accordingly, this Criminal Appeal is partly allowed. 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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To

1. The Mahila Court, Tiruppur.

2. The Inspector of Police
All Women Police Station
Dharapuram

3. The Public Prosecutor Officer, High Court, Madras

4. The Section Officer, Criminal Section, High Court, Madras.



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