



Crl. A(MD)No.244 of 2019

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 21.06.2022

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH
AND
THE HONOURABLE Mrs. JUSTICE R.HEMALATHA

Crl. A(MD)No.244 of 2019

Nataraj : Appellant

Vs.

State represented by
The Inspector of Police
All Women Police Station
Bodi
Theni District
Crime No.16/2017 : Respondent

PRAYER: Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, against the judgment dated 20.11.2018 in S.C.No. 48/2017 on the file of the Fast Track Mahila Court, Theni.

For Appellant : Mr.G.Karuppasamy Pandian
for Mr.R.Nireshkumar

For Respondent : Mr.T.Senthilkumar
Additional Public Prosecutor



Crl. A(MD)No.244 of 2019

WEB COPY

JUDGMENT

P.N.PRAKASH, J.

This criminal appeal is filed against the judgment and order dated 20.11.2018 in S.C.No.48/2017 on the file of the Fast Track Mahila Court, Theni. By the said Judgment and order, the trial Court convicted and sentenced the appellant/accused to undergo life imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo rigorous imprisonment for one year for the offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter “the POCSO Act” for brevity). Challenging the said conviction and sentence, the appellant has come up with this Criminal Appeal.

2.The prosecution story runs thus:

For the sake of anonymity, the victim girl in this case is referred to as “X”. “X” was 3 years old at the time of the incident. She is the daughter of Periyakaruppan [P.W.-1] and Selvapriya [P.W.-2] and great-granddaughter of Vellaiyan [P.W.-5]. They are a family of hairdressers and residents of



Crl. A(MD)No.244 of 2019

WEB COM

Silamalai Village, Bodinayakkanur Taluk, Theni District. Periyakaruppan [P.W.-1] has his saloon in his house and his grandfather Vellaiyan [P.W.-5] also has his saloon in the next door. Like all hairdressers in the villages, the house of both Periyakaruppan [P.W.-1] and Vellaiyan [P.W.-5] are attached to their saloons. Periyakaruppan [P.W.-1] has two children including “X”.

2.1. On 04.08.2017, around 9 in the morning, “X” was playing in the saloon-cum-house of her great-grandfather Vellaiyan [P.W.-5]. Shortly thereafter, “X” came crying to her father and told him that a person there had pinched and caressed her private parts. Immediately, Periyakaruppan [P.W.-1] and his wife Selvapriya [P.W.-2] rushed with “X” and they saw the appellant fleeing. Since Periyakaruppan [P.W.-1] knew the name of the appellant, who is also from the same village, he gave a written complaint [Ex.P-1], based on which, a case in Bodinayakkanur All Women Police Station Crime No.16 of 2017 under Section 6 of the POCSO Act was registered by the Inspector of Police [P.W.-14] on 04.08.2017 at 8 hrs. The printed FIR [Ex.P-5] was sent to the jurisdictional Court and the same was received at 1.30 p.m. on 05.08.2017.



Crl. A(MD)No.244 of 2019

WEB COPY

2.2. “X” was examined by Dr.Priya [P.W.-13], who did not find any visible injuries in the private parts. The appellant was arrested by the police on 05.08.2017 at 7.00 a.m. and was sent in judicial custody. At the request of the police, Mrs.Sundari, [P.W.-15], Judicial Magistrate, Theni, recorded the Section 164 Cr.P.C. statement of “X” and the same has been marked as Ex.P-7, wherein, X has stated that a person, whose name she does not know, touched her at her private parts, pinched and caressed her. Her statement has also been videographed and the same has been marked as Ex.P-9. After completing the investigation, the Investigating Officer filed a final report in Spl.S.C.No.48/2017 in the Special Court for POCSO Act cases (Fast Track Mahila Court), Theni for the offence under Section 6 of the POCSO Act against the appellant.

3. On appearance of the appellant, the provisions of Section 207 Cr.P.C. were complied with and a charge under Section 6 of the POCSO Act was framed against the appellant. When questioned, the appellant pleaded “not guilty”.



Crl. A(MD)No.244 of 2019

WEB COPY

4. To prove the case, the prosecution examined 15 witnesses and marked 9 exhibits. When the appellant was questioned under Section 313 Cr.P.C., on the incriminating circumstances appearing against him, he denied the same. He did not offer any explanation whatsoever. After considering the evidence on record and on hearing either side, the trial Court, by judgment and order, dated 20.11.2018 in Spl.S.C.No.48/2017, has convicted the appellant of the offence under Section 6 of the POCSO Act and sentenced him to imprisonment for life and to pay a fine of Rs.5,000/-, in default, to undergo one year rigorous imprisonment. Challenging the same, the appellant is before this Court.

5. Heard Mr.G.Karuppasamy Pandian, learned counsel for the appellant and Mr.T.Senthilkumar, learned Additional Public Prosecutor for the respondent.

6. At the outset, Mr.G.Karuppasamy Pandian contended that it is a case of no evidence, inasmuch as “X” was not examined as a witness in the trial Court and that the trial Judge has proceeded to convict and sentence the



Crl. A(MD)No.244 of 2019

WEB COPY

appellant based on the Section 164 Cr.P.C. statement (Ex.P-7) of “X” and nothing more. At the first blush, this submission did look attractive. However, on a closer scrutiny of the evidence, it appears otherwise to us. It is true that “X” was not examined as a witness, may be, because of her tender age. On instructions from the police, learned Additional Public Prosecutor submitted that the child was brought to the Court, but when she started crying, they dispensed with her examination. But, that does not, by itself, mean that the fact in issue has not been proved by the prosecution via collateral evidence. In this case, we have the evidence of Periyakaruppan [P.W.-1] and Selvapriya [P.W.-2]. Periyakaruppan [P.W.-1] has stated, “I am residing in Silamalai Village; I am running a saloon ; I know the accused ; I have two children ; My daughter's name is Nithyashree and she is three years old and my son's name is Sabarinathan; on 04.08.2017, at 9 O' clock, my daughter Nithyashree was playing in my grandfather Vellaiyan's [P.W.-5] house ; my wife and I were in our house; at that time, my daughter came shouting “அப்பா”; “என் மகள் அந்த ஆளு தாத்தா வீட்டிற்கு கூட்டு போயி என்னை அடித்து உயிர்தளத்தில் கிள்ளி, தடவி வைத்தார் என்று என் மகள் கூறினார்.” therefore, I and my wife rushed out of our house and saw; when we



Crl. A(MD)No.244 of 2019

WEB COPY

went there, the appellant escaped and ran away. Thereafter, we came to the police station and gave the complaint [Ex.P-1].

7. The defence was not able to make any dent in the testimony of Periyakaruppan [P.W.-1] and in fact, in the cross-examination, Periyakaruppan [P.W.-1] has clearly stated that when the appellant saw them, he ran away. The evidence of Selvapriya [P.W.-2], who is the mother of “X”, is also on the same lines. Even in the cross-examination of Selvapriya [P.W.-2], it was suggested to her that when they came there, they saw the appellant running, which suggestion was accepted by her. It is not the case of Periyakaruppan [P.W.-1] and Selvapriya [P.W.-2] that they had themselves witnessed the occurrence. It is their clear evidence that “X” came running to them crying and when they asked her, she stated that the man there had caressed and pinched her private parts and so when they immediately went next door, where Vellaiyan's [P.W.-5] saloon is located, the accused saw them and ran away.



Crl. A(MD)No.244 of 2019

WEB COPY

8. Caressing of “X” by the appellant in Vellaiyan's [P.W.-5] saloon, which is next door; the coming of the weeping child to her house and complaining to her parents and the parents going with X to look out for the person and the appellant running away from the place, have all occurred in the course of the same transaction and therefore, the evidence of Periyakaruppan [P.W.-1] and Selvapriya [P.W.-2] is relevant as *res gestae* evidence under Section 6 of the Indian Evidence Act, 1872. The conduct of the accused fleeing from the saloon of Vellaiyan (P.W.-5) on seeing Periyakaruppan [P.W.-1] and Selvapriya [P.W.-2] and the child is relevant under Section 8 of the Evidence Act. In fact, in the cross-examination of Selvapriya [P.W.-2], it was suggested to her that the appellant had come to the saloon of Vellaiyan [P.W.-5] for hair cutting and when Vellaiyan [P.W.-5] was not there, he left the shop. Thus, the presence of the appellant in Vellaiyan's [P.W.-5] saloon at the relevant point of time has been admitted by him.

9. It is the assertion of Periyakaruppan [P.W.-1] and Selvapriya [P.W.-2] that “X” was playing in Vellaiyan's [P.W.-5] shop at the relevant



Crl. A(MD)No.244 of 2019

point of time. Vellaiyan [P.W.-5], being her own great-grandfather, has stated in his evidence that he knows the accused, who is his customer and at the relevant point of time, he had gone out and on his return only, he learnt about the incident in question. Thus, had Vellaiyan [P.W.-5] been in his saloon, the incident would not have occurred at all. Thus, the absence of Vellaiyan [P.W.-5] in the saloon coupled with the presence of the appellant in the saloon, X reporting to her parents that the appellant had misbehaved with her and the accused fleeing on seeing Periyakaruppan [P.W.-1] and Selvapriya [P.W.-2] clearly prove the fact in issue satisfactorily. Thus, the non examination of X pales into insignificance in the peculiar facts and circumstances of this case.

10. It would be traumatic for a child of 4 years to testify in a Court of law about sexual abuse she has suffered, when she was 3 years old. In fact, in the cross-examination of Selvapriya [P.W.-2], the appellant has suggested that he [appellant] used to frequently consume liquor and ganja in front of her [P.W.-2's] house and therefore, he has been falsely implicated. This suggestion itself shows that the appellant was known to Periyakaruppan



Crl. A(MD)No.244 of 2019

WEB COPY [P.W.-1] and Selvapriya [P.W.-2] earlier and was not a stranger.

11. Now, coming to the medical evidence, it no doubt supports the case of the appellant, in that, no injuries or redness were found in the private parts, which only shows that there was no aggravated penetrative sexual assault as defined by Section 5 of the POCSO Act. Even X had told her parents that the appellant had pinched her and caressed her. Therefore, we find that there is sufficient evidence to convict the appellant for sexual assault punishable under Section 9 (m) of the POCSO Act.

12. The appellant has not satisfactorily discharged the twin presumptions under Sections 29 and 30 of the POCSO Act, for which, Mr.G.Karuppasamypandian, learned counsel for the appellant, contended that it is the duty of the prosecution to prove the foundational facts and only thereafter, the aid of the presumptions could be resorted to.

13. What are foundational facts?

Foundational facts differ from case to case. In this case, the



Crl. A(MD)No.244 of 2019

foundational facts are, a three year old child was playing in her great grandfather's saloon; The appellant, who came for haircutting, did not find the owner of the saloon there, but found “X”; He is said to have caressed and pinched “X” in her private parts. In this case, these foundational facts have been satisfactorily proved by the prosecution and therefore, automatically, the presumption under Sections 29 ad 30 of the POCSO Act would come in and in the absence of the appellant dislodging them satisfactorily, he cannot escape criminal liability.

14. Mr.G.Karuppasamypandian, learned counsel for the appellant, contended that the prosecution has not proved the age of child. We are afraid, this submission lacks substance inasmuch as the parents of “X”, namely, Periyakaruppan [P.W.-1] and Selvapriya [P.W.-2] as well as the Doctor Priya [P.W.-13] and Mrs.Sundari, [P.W.15], the Judicial Magistrate, have uniformly recorded the age of X as three, which has not been challenged by the appellant in their cross-examination.



Crl. A(MD)No.244 of 2019

WEB COPY

15. In the result, this appeal is partly allowed; the conviction and sentence of the appellant for the offence under Section 6 of the POCSO Act are set aside and instead, the appellant is convicted of the offence under Section 9(m) of the POCSO Act and sentenced to undergo five years rigorous imprisonment under Section 10 of the POCSO Act. The sentence of fine imposed by the trial Court stands confirmed. The period of sentence already undergone by the accused/appellant is ordered to be set off under Section 428 Cr.P.C.

[P.N.P., J.] & [R.H., J.]
21.06.2022

Index : Yes/No

Internet : Yes

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To

1.The Fast Track Mahila Court
Theni District.

2.The Inspector of Police
All Women Police Station
Bodi, Theni District

3.The Additional Public Prosecutor
Madurai Bench of Madras High Court, Madurai.



WEB COPY



Crl. A(MD)No.244 of 2019

P.N.PRAKASH, J

AND

R.HEMALATHA, J

RR

4.The Record Keeper,
Vernacular Records Section,
Madurai Bench of Madras High Court, Madurai.

Judgment made in
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