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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 07/11/2022

CORAM:

THE HON'BLE MR JUSTICE G.ILANGO VAN

Crl.A(MD)No.565 of 2022

Raju : Appellant/Sole Accused

Vs.

State through
The Deputy Superintendent of Police,
Theni Sub Division,
Palanichettipatti Police Station,
Theni District.
(In Crime No.707 of 2015) : Respondent/Complainant

Prayer: Criminal Appeal is filed under section 374 of the Criminal Procedure Code to call for the entire records connected with the judgment rendered by the Sessions Judge, Fast Track Mahila Court, Theni, in Special SC No.68 of 2015, dated 30/05/2018 and set aside the same and consequently, acquit the appellant.

For Appellant : Mr.R.Prakash
For Respondent : Mr.SS.Madhavan
Government Advocate
(Criminal side)

**J U D G M E N T**

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This Criminal Appeal has been preferred against the judgment passed by the Sessions Judge, Fast Track Mahila Court, Theni, in Special SC No.68 of 2015, dated 30/05/2018.

2.The case of the prosecution, as narrated through the evidence, is briefly stated as follows:-

PW1 was doing Ph.D. in Chennai. Because of her illness, she came to Theni Aranmanaipudhur parental home. The victim, who was a close relative was staying in their house. On 17/08/2015, he was found missing. Search was made and at that time, the victim came from the house of the accused. The accused was working as watchman in a company called '**Sun Products Gee Company**'. The victim informed her that he was sexually assaulted by the accused person and criminally intimidated not to disclose the same to others. At that time, Arocika Marry was in the house. Over the above said occurrence, she gave a written complaint under Ex.P1.



3.The victim was taken to Theni Government Hospital. The victim belongs to Scheduled Tribe and the accused person belongs to Asari community. The above said complaint was received by PW13, who was working as Sub Inspector of Police, attached to Chinnamanur Police station during the relevant time. On 17/08/2015, at about 11.30 pm, he received a complaint from PW1 and registered the case in Crime No.707 of 2015 for the offences punishable under sections 506(i) IPC, section 4 of POCSO Act, 2012 and 3(2)(v) of SC/ST (POA) Act, 1989. EX.P7 is the printed FIR. As per the procedure, he submitted the original complaint and FIR to the concerned court and the copies to the higher officials. The victim was examined by PW15, the Doctor, who was working in the Government Hospital during the relevant time. On 18/08/2015 at about 0.05 hours, the victim was produced by the police. On enquiry, it was revealed by him that he was sexually assaulted by one person, it was repeated for about one month. The victim was admitted in the hospital and issued a wound certificate stating that the injury sustained by the victim is simple in nature.



4. Further investigation was undertaken by the Deputy Superintendent of Police during the relevant time. As per the direction of the Superintendent of Police, Theni, he took up the investigation and visited the place of occurrence, on 18/08/2015 at about 6.30 am and he prepared the rough sketch, observation mahazar, etc. He recorded the statement of the witnesses, by examining them. The accused was arrested at 08.45 am in Aranmanaipudur area. He was remanded to custody and further investigation was undertaken by him, on 19/08/2015 and recorded the statement of the witnesses and he sent the accused person for medical examination, on 28/08/2015. After recording the statement of the Doctors, received community certificate of the accused as well as the victim. The victim was produced for recording statement under section 164 Cr.P.C. He recorded the statement of the revenue officials, who issued the community certificate to the accused as well as the victim boy. He received the statement of the witnesses, recorded under section 164 Cr.P.C and after completing the formalities of investigation, filed final report, on 05/11/2015.



5.PW2, as mentioned above, is the victim, who was aged about 13 years at the time of cross examination before the trial court. He has stated in his evidence that he was sexually assaulted by the accused by subjecting him to penetrative sexual assault in a unnatural way. He informed the above said occurrence to PW1 and PW3; over the above said occurrence, the case has been registered.

6.PW3 is the mother of PW1 and she supported and corroborated the evidence of PW2.

7.PW4 was informed about the occurrence and he knew that search was made when PW2 was missing. PW5 is the neighbour. He has stated that he was informed about the occurrence of sexual assault by the accused person on the victim.

8.PW6 was present, when the Investigating Officer visited the place of occurrence, prepared observation Mahazar and sketch.



9.PW7 is the material witness. PW8 has issued the birth certificate of the victim. According to him, the victim was born on 10/05/2001. PW9 is the material witness. PW10 issued a community certificate of the victim. PW11 submitted a report stating that the victim belongs to Scheduled Tribe community. PW11 issued a community certificate of the victim stating that he belonged to Hindu Pallar community. PW12 issued the community certificate for the accused person. According to him, he belongs to Kamalar community.

10.PW14 medically examined the physical fitness of the accused, on 25/08/2015 and issued the medical certificate stating that the accused person is physically fit for sexual activity.

11.With the examination of these witnesses, the prosecution side witness was closed. The accused was put to section 313 Cr.P.C questioning and he disputed the facts deposed by the witnesses. On his side, none was examined.



12.At the conclusion of the trial process, the trial court found the charges against the accused was proved beyond all reasonable doubt and accordingly, convicted and sentenced him to undergo 7 years Rigorous Imprisonment and imposed a fine of Rs.15,000/-, in default to undergo 2 years Rigorous Imprisonment for the offence under section 4 of POCSO Act; 2 years Rigorous Imprisonment and to pay a fine of Rs.1,000/-, in default to undergo 6 months Rigorous Imprisonment for the offence under section 506(i) IPC; and both the sentences are directed to run concurrently.

13.Now challenging the above said conviction and sentence, this criminal appeal has been preferred by the accused person.

14.Before going into the disputed factual issue, let us bear in mind the circumstance, under which the above said occurrence said to have been taken place.

15.The victim-PW2 is the distant relative of PW1 and PW3 and was staying in the house of PW3 for about a month. He was attending the domestic work in their house.



Later, he was working in a Gee company, wherein the accused was working as watchman. He was also attending some work for PW3. Later, there was no talking terms. In the above said circumstances only, the above said sexual assault has been committed by the accused person.

16.From the evidence of PW1, PW3 and the community certificate issued by PW11, the Special Tashildar, Theni, it is seen that the victim belongs to Hindu Pallar community. It is not disputed by the accused person. Similarly, the age of the victim has also been proved by the prosecution through the evidence of PW8, who was the Headmaster in Government Adi-Draavidar Higher Secondary School, Coonoor. On the basis of the entry, that was available in the school, he has stated that the date of birth is 10/05/2001. The school certificate is marked as Ex.PW3. From the evidence of PW8, it is established that on the date of the alleged occurrence namely 17/08/2015, he was aged about 14.

17.From the community certificate issued for the accused, it is seen that he belongs to Hindu Kammalar community, from the evidence of PW12 and the community



certificate Ex.P6. All the factual issues are not disputed by the accused person. But the age of the accused was not fixed.

18.PW14 medically examined the physical fitness of the accused. During his evidence, he has stated that he did not examine the correct age, approximate age of the accused, since no such request was made to him. So on the basis of the entry, that was available in the document submitted to him, it came to know that he is aged about 75 years. So that can be taken, as approximate age, even it is not seriously disputed.

19.The next circumstance is that at one point of time, the accused picked up quarrel with PW3 and PW1 stating that the victim was treated as a slave and PW1 has admitted during the cross examination about his quarrel. The relevancy of this circumstance, can be decided in the later portion of the judgment. So these are the factual backgrounds. Now coming to the alleged occurrence, let us straightway go to the evidence of PW2 by leaving the oral evidence of others for time being.



20.The competency of the victim boy, who gave the evidence was tested by the trial court and after satisfying the requirement of law and finding that the victim is competent to give evidence and knowing about the natural events, he was examined and he has stated that on the particular date, the accused person put him down, his dress was taken away and the accused person committed penetrative sexual assault through his anus. He was crying out of pain. He was criminally intimidated by the accused person not to disclose the same to others and he has also admitted that his statement was recorded under section 164 Cr.P.C by the concerned Magistrate. So this portion of the evidence by PW2 is heavily relied upon by the trial court, to record a finding of conviction.

21.During the cross examination, he has stated that he was instructed by PW1 to PW3 as to how he must give evidence and statement before the police. So this piece of his admission during the cross examination was projected by the appellant and he was requested the court to consider this portion of admission in the background of the admission that was made by PW1 about the alleged



immediately, he informed them about the sexual assault made by the accused person. This is the spontaneous disclosure. The above said information is admissible under section 6 of the Indian Evidence Act. Since, it is form part of the same transaction, it will come under the category of *res-gestae*. There is no reason for discarding the evidence of two independent witnesses.

25.Now we shall go to the medical evidence.

26.From the evidence of PW14, the Doctor, who medically examined the physical fitness of the accused person to have sexual intercourse and activity, has stated that he is capable of performing sexual activities, even though he was aged about 75 years.

27.From this, there is no reason to discard his evidence. From his evidence, it was established that there was capable of doing sexual activity.

28.PW15 is the Medical Professor, who examined the victim. According to him, there was simple injury and issued wound certificate Ex.P9. So from the evidence of



29. Now under this background, the next question, which arises for consideration is that whether presumption under sections 29 and 30 of the POCSO Act has been successfully rebutted by the accused.

30. From the above said factual basic circumstantial evidence and direct evidence, the prosecution has established the guilt of the accused.

31. Now it is fortified by the prosecution under sections 35 and 40 of the Act. Whether any preponderance of probabilities of defence has been made out by the appellant.

32. In this context, let us go back to the evidence of PW1 and PW3 about the previous enmity. Both of them, as mentioned above, admitted that there were pressure on the side of the accused to admit the victim to the school. So the question, which arises for consideration



is in the light of the above said previous enmity in the background of the admission made by the victim, that he was under instructed by PW1 and PW3 as to how give statement or evidence before the court. It is contended that the preponderance of probability has been made out by the accused. But from the statement of the victim, it is seen that the above said sexual assault did not happen on a particular day only and according to him, it was continued for about a month. Under threat only, he did not disclose to PW1 or PW3, but on the particular date, it came to light. Even though, there was some sort of previous enmity between them, I am of the considered view that the statement of the victim cannot be discarded, in the light of the above said enmity. So there is no corroborative evidence from the side of the accused to show that the above said enmity continued till the above said date of sexual assault. So I am of the considered view that the above said enmity is not sufficient enough to discard the evidence of the victim.

33. Now the next argument is that PW1 is stated that they informed the police about the occurrence and the police came to the occurrence place and only they



took the accused to the police station and the victim. But quite contra to this, PW13, who was working as Sub Inspector of Police has stated that PW1 came to the police station and lodged a complaint and as per the evidence of PW16, the accused was arrested at about 8.45 pm in Aranmanaipudhur Amlet area. According to the appellant, the very genesis and the origin of the complaint itself is doubtful. But no cross examination was done to PW1 and PW3 on this aspect. Even though, it is considered that PW1 came to the police station and lodged a complaint, PW10 stated that the complaint was given in the police station itself. So probably all these persons took PW1 to the police station. In the police station, PW1 would have given a complaint. This small discrepancy cannot be given any importance. So, I am of the considered view that the presumption under sections 29 and 30 has not be successfully discharged by the appellant. So even though the appellant is aged about 75 years at that time of the alleged occurrence, now he is running 77 +, I am of the considered view that the minimum sentence has been awarded by the trial court. So there is no reason to interfere into the sentence also. So, I find that no valid ground has been made by the



appellant to interfere into the sentence passed by the trial court.

34.In the result, this criminal appeal fails and the same is **dismissed**.

07/11/2022

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Internet:Yes/No
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To,

- 1.The Deputy Superintendent of Police,
Theni Sub Division,
Palanichettipatti Police Station,
Theni District.
- 2.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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G. ILANGO VAN, J

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