



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10.10.2023

Coram:

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Crl.A.No.536 of 2018
and
Crl.M.P.No.11742 of 2018
]

Kutti @ Kumar : Appellant/Single Accused

Vs

State Rep By:
AWPS, Kondalamapatty Police Station
Salem District
(Crime No.2 of 2014) : Respondent/Complainant

PRAYER: Criminal Appeal is filed under Section 374(2) of Cr.P.C to set aside the judgment of conviction dated 31.07.2018 in S.C.No.345 of 2014 on the file of the learned Sessions Judge, Fast Track Mahila Court, Salem.

For Petitioner	..	Mr.B.Vasudevan
For Respondent	..	Mrs.G.V.Kasthuri Additional Public Prosecutor

ORDER



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This Criminal Appeal has been filed to set aside the judgment dated 31.07.2018 in S.C.No.345 of 2014 on the file of the learned Sessions Judge, Mahila Court, Salem.

2. The Learned Counsel for the Appellant submitted his argument. As per his submission, the Appellant was convicted for the offence under Section 5(m) r/w.6 of the POCSO Act, 2012. From the date of judgment, the Accused-1 was in prison and he was not released on date. The learned Counsel for the Appellant invited the attention of the Court to the charges framed by the learned Sessions Judge, Fast Track Mahila Court, Salem in S.C.No.345 of 2014 under Section 366 of IPC and Section 5(m) r/w.6 of the POCSO Act, 2012. Since the Accused denied the charges, the learned Sessions Judge, Fast Track Court, Salem ordered trial. During trial, the Prosecution examined P.W-1 to P.W-14 and Ex.P-1 to Ex.P-26 and M.O-1 to M.O-5.

3. The learned Counsel for the Appellant submitted that the Appellant was a neighbour to the Victim. The Victim's Mother died three years prior to the alleged date of occurrence. The Victim's Father deserted them. The Victim



was brought up by her Grandparents. P.W-1 is the Grandmother of the Victim. P.W-2 is the Victim. P.W-3 is the Grandfather of the Victim. P.W-4 to P.W-6 were hearsay witnesses. P.W-7 is the Mahazar witness. P.W-8 is the Doctor who had examined the Victim. P.W-9 is the Doctor who examined the Accused. P.W-10 is the Doctor who had examined the Victim/P.W-2 regarding her age. P.W-13 is the Sub Inspector of Police, All Women Police Station, Kondalampatti who received the complaint from P.W-1 and registered the FIR. P.W-14 to P.W-16 are Investigation Officers.

4. The learned Counsel for the Appellant invited the attention of this Court to the depositions of P.W-1/Grandmother of the Victim and P.W-2/the Victim. It is his submission that the oral evidence of the Victim is to be believed that the Accused is alleged to have had sexual intercourse with the Victim aged 6 years, on the alleged date of occurrence. The learned Sessions Judge, Fast Track Mahila Court, Salem failed to appreciate the fact that the evidence of P.W-1 and P.W-2/Victim had not been corroborated by the medical evidence. P.W-8 the Doctor who had examined the P.W-2 had clearly stated in her report that there were no symptoms of alleged sexual intercourse



on her and there were no visible injuries on the body of the Victim. While so, the learned Sessions Judge, Fast Track Mahila Court, Salem by judgment dated 31.07.2018 had convicted the Accused.

5. Also the learned Counsel for the Appellant invited the attention of this Court to the Forensic Report where it was stated that there was no semen found on the vagina of the P.W-2/Victim. Therefore the judgment of conviction dated 31.07.2018 cannot be sustained as the alleged occurrence and the charges framed by the Court under Section 5(m) r/w. 6 of POCSO Act, 2012, had not been proved.

6. The learned Counsel for the Appellant invited the attention of the Court that it is mandatory that the Investigation Officer had to seek the recording of statement of the Victim under Section 164 of Cr.P.C before the learned Judicial Magistrate. But is was not recorded in this case.

7. It is the defence of the Accused that one Ramachandran who was the ward Councillor of the area where the Victim and the Accused reside was



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inimical towards the Accused. As the Accused belongs to Barber Community and majority of the people belongs to Vanniyar Community, the said Ramachandran attempted to purchase the house and house site of the Accused for which he had refused. To settle scores he had foisted this case with the help of P.W-1 and P.W-3.

8. The defence of the Accused had been probabalized through the evidence of Prosecution witness in the cross examination. It is the contention of the learned Counsel for the Appellant that the Investigation Officer in this case was aware of the case. Therefore he had not recorded the 164 CrPC statement of the Victim. The learned Sessions Judge, Mahila Court, Salem failed to appreciate those facts available in the evidence of witnesses. The Prosecution miserably failed to prove the charges against the Accused. Under those circumstances, the learned Sessions Judge, Mahila Court, Salem had convicted the Accused which is perverse and is to be set aside.

9. The learned Additional Public Prosecutor vehemently objected to the line of arguments of the learned Counsel for the Appellant stating that the



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evidence of the Victim have to be believed as per Section 29 of the POCSO Act 2012. There are sufficient materials available before the Court. Therefore it is the contention of the learned Additional Public Prosecutor that in the light of P.W-1 to P.W-16 and Ex.P-1 to Ex.P-26, the charges framed against the Accused under Section 5(m) r/w.6 of POCSO Act 2012 had been proved. There is no merit in this appeal. The Appeal has to be dismissed.

Point for consideration

Whether the Judgement of the learned Sessions Judge, Fast Track Mahila Court, Salem, in S.C.No.345 of 2015 has to be set aside as perverse and Accused is to be acquitted from the charges?

10. Heard the learned Counsel for the Appellant. Heard the learned Public Prosecutor. Perused the evidence of P.W-1 to P.W-16 and Ex.P-1 to Ex.P-26.

11. On perusal of the depositions of all witnesses P.W-1 to P.W-16, and the documents under Ex.P-1 to Ex.P-26 it was found that the Investigation Officer had not recorded the statement of the Victim under Section 164 of Cr.P.C.



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12. On perusal of the records, it was found that P.W-1 is the maternal Grandmother of the Victim who is the Complainant before the All Women Police Station, Kondalampatti. She had in her evidence stated that her daughter died when the Granddaughter/Victim herein was four months old child due to the depression as her husband deserted her. Therefore she had been bringing up the Granddaughter. The alleged occurrence took place on 20.01.2014. The next day she had lodged the Complaint under Ex.P-1. The P.W-1 came to know about the occurrence only from the Victim. When P.W-1 was giving bath to the Victim to prepare her to attend the School on the next day since the child complained of itching and pain in the genitals. P.W-1 had observed the genitals of the Victim/Granddaughter. She found the genitals of the Victim was reddish in colour and swollen. Therefore She informed her sister P.W-4 Irusama. P.W-4 also examined the child's genitals, it was found to be Reddish in colour and became swollen. Therefore they preferred the complaint to the All Women Police Station Kondalampatti. 13.

P.W-1 was the Complainant/Grandmother of the Victim. P.W-, Irusamma was the sister of P.W-1 who was at her evidence stated that they had taken the help of Ramachandran to write down the Complaint. P.W-7 Ramachandran



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had deposed regarding the identity of the Accused on the request of the Investigation Officer who had arrested the Accused on identification by P.W-

7. Also he had deposed that he had signed the Confession Statement of the Accused. One Palanisamy also signed the same.

14. P.W-2 is the Victim. She had also in her evidence deposed regarding the alleged occurrence. P.W-3 is the maternal Grandfather of the P.W-2/Victim. He had also in his evidence narrated the evidence as informed to him by his Wife P.W-1 Chella. P.W-1 and P.W-2 were not cross examined. In the cross examination, defence of the Accused that the said Ramachandran sought purchase of the house and house site belonging to the Accused which was refused by him was denied by P.W-7. P.W-3 also denied the said suggestion. P.W-3 in his cross examination had stated that the P.W-7 Ramachandran was the person who had written down the complaint. P.W-7 denied in his cross examination. The defence of the Accused that the P.W-7 Ramachandran sought purchase of the property either for him or for other parties. But the Accused refused to sell it. Therefore only to grab the property the services of the P.W-1 and P.W-3 were utilised by P.W-7/Ramachandran is the defence of the Accused. It was denied by P.W-3 and P.W-7. P.W-1 and



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P.W-2 were not cross examined. P.W-5 is Suresh, the nephew of P.W-3. He had also deposed evidence supporting the deposition of P.W-1. In his cross examination P.W-5 admitted he can read and write. To the pointed question why then P.W-7 helped them sought to give written complaint, P.W-5 would submit that P.W-7 is well informed and worldly wise. Therefore he had been requested to write complaint on behalf of P.W-1.

15. P.W-6 is kumar is also a witness to Observation Mahazar. The defence of the Accused that the P.W-1 and P.W-3 sought purchase of the house and house site belonging to Accused which was refused therefore this case was foisted was denied by her in cross examination. P.W-7/Ramachandran the person who had assisted the P.W-1 in lodging the complaint had written the complaint by his own hand. P.W-7 had denied the defence of the Accused that he had vested the case with the help of P.W-1 to drive out the Accused from the village, where majority of them are Vanniyar and only the Accused was a minority. (Barber community) P.W-11 is Palanisamy is also Mahazar witness. P.W-12 is Senthil Kumar serving under the mobile unit of the Forensic Laboratory at Salem. He had in his evidence



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deposed regarding the materials obtained from the Court of Judicial Magistrate, Salem. When examined, no Semun was found in the material sent to the Forensic Department.

16. P.W-13 is the Sub-Inspector of Police, All Women Police Station, Kondalampatti registered the case under offence under POCSO Act in Crime No.2/14 on the file of the All Women Police Station, Kondalampatti for offences under 3 and 4 of POCSO Act, 2012. In the column for delay in registering the FIR, it was stated, delay caused by the Complainant. P.W-8 is Dr.Padmapriya is the Doctor who had examined the Victim/P.W-2. She had examined the Victim on 21.01.2014 and issued Ex.P-4 to Ex.P-8. Ex.P-5 is the Medical Examination Report of the Victim in which it is stated as follows, ***“ No External injuries seen on the Breast and External Genitalia and Oral Cavity. Hymen intact. No abnormal discharge seen. No injuries noted”***. As per her report and her evidence, there were no symptoms of sexual assault on the Victim.

17. The witness P.W-3 to P.W-7. except P.W-7, others are relative of



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the Victim. P.W-3 to P.W-6 in cross examination denied the suggestion that the case has been foisted only to wreck vengeance on the Accused for his refusal to part with the property of house and house site which was caused by persons in the Village where majority of the people belong to Vanniyar community and only 3 people belong to other community residing in the village. The Accused belongs to Barber community. This suggestion was partly admitted. The fact that the village is dominated by majority of the Vanniyar community which was admitted by P.W-7 in his cross examination, denied the suggestion stated that he does not belong to Vanniyar community and he belongs to Brahmin Community. He admitted that he had assisted the P.W-1 in lodging the Complaint. He denied the suggestion that the majority of the people in the village seeking to purchase the property belonging to the Accused for which P.W-7 also held talks was denied by P.W-7.

18. Even though, the suggestions of the learned Defence Counsel was denied in the cross examination, the evidence of the Doctor who was well trained in the examination of the victim in sexual assault by their experience had clearly stated that there were no symptoms of sexual assault. If the



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evidence of the P.W-1 and P.W-3 is to be believed that the Accused is alleged to have involved in sexual assault on the minor child aged 6 years, if that be so, the Grandmother clearly stated that the child experienced pain and itching in the genitalia, the sexual assault was informed by the Grandmother also, but the Doctor had on medical examination clearly stated that there were no symptoms of sexual assault. One of the allegations made by the maternal Grandmother of the Victim was that the Accused had thrust his penis into the mouth of the Victim and there was no seminal discharge in the mouth of the child which had caused the wound through blisters (புண்) because of which the child suffered for nearly 15 days. P.W-8 the Doctor clearly stated that there were no visible injuries including mouth of the child and also it has to be noted that the child was examined immediately after lodging the FIR on the very same day. Therefore the learned Sessions Judge, Fast Track Mahila Court, Salem believing the evidence of the Victim and rejected the medical evidence is found unreasonable and perverse which had resulted in the Accused being sentenced to imprisonment. Based on penal provisions of law to punish the person to wreck vengeance for not parting with his property as per the demands of some influential people in the Village belonging to



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majority community based on Accused affinity that the Accused belong to Barber community and utilising the service of the P.W-1 and P,W-3 who are daily wage earners who are susceptible. This sort of influence are peer pressure from the people of their community for monetary benefits. The defence of the Accused that the Accused had obtained direction from the Court to allow them to reside in the Village as they had threatened him not to enter the Village is found reflected in the medical evidence not supporting the claim of the Victim and the Complainant/P.W-1/Maternal Grandmother of the Victim. Therefore the presumption under Section 29 of the POCSO Act, cannot be invoked mechanically.

19. As rightly pointed out by the learned Counsel for the Appellant if the evidence of the Victim has to be believed, the same is to be corroborated with the evidence of Doctors. Here in this case, the Doctor who was examined as P.W-8 had stated that there were no symptoms of sexual intercourse. Further the judgment of the learned Sessions Judge, Fast Track Mahila Court, Salem is found perverse. The same is set aside.



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20. The Victim evidence was corroborated by the evidence of P.W-1 and P.W-3, the Grandparents of the Victim. The Suggestion of the Defence that false Complaint was given as though the Accused committed offence under POCSO Act, 2012 by the Ward Councillor Ramachandran was stoutly denied by the Grandparents of the Victim/P.W-1 and P.W-3 was admitted in their cross examination that the Complaint was given to the Police written by Ramachandran. From those circumstances, it can be concluded that the Defence of the Accused was almost certain and it was admitted in the cross examination even though P.W-1 and P.W-3/Grandparents of the Victim had stoutly denied it was a false case. If the version of the Victim is to be believed, the Doctor's opinion and the Certificate which is mandatory in Sexual assault cases should have corroborated the version of the Victim.

21. On perusal of the mandatory Certificate issued by the duty Doctor in the Government Hospital in sexual assault the Doctor/P.W-8 specifically stated that there were no symptoms of sexual assault. Therefore the argument of the learned Additional Public Prosecutor that in POCSO cases, the Court has a duty to believe the version of the Child/Victim under Section 29 of the



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POCSO Act. The judgment passed by the learned Sessions Judge Mahila Court, Salem convicting the Accused is a well reasoned order does not warrant any interference and cannot be sustained. Medical evidence is in conflict with the version of the Child/Victim. When there were no symptoms of sexual assault, the version of the Child/Victim has to be rejected. If the Section 29 of POCSO Act is mechanically taken by the trial Courts then invariably in all cases of POCSO, the Accused has to be remanded in Prison which amounts to miscarriage of Justice.

22. Here, the defence of the Accused is probalised in the cross examination of P.W-1 and P.W-3 the Grandparents of the Victim. When there was no symptom of sexual assault, the presumption under Section 29 of POCSO Act cannot be invoked. Therefore the submission of the learned Additional Public Prosecutor prayed for the dismissal of the appeal as it has no merits can not at all be accepted. Hence the same is rejected.

23. As rightly pointed out by the learned Counsel for the Appellant, the defence of the Accused had been probabilized in the cross examination of P.W-1 and P.W-3 Grandparents of the Victim and also it is admitted the fact



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that they had admitted, Ramachandran, the Ward Councillor was available before the Police Station when they went to Police Station to lodge a complaint. Also they had admitted that the Complaint was drafted by Ramachandran. Under those circumstances, the probability of the circumstances leading to foisting the case against the Accused are found reasonable and acceptable. When the defence, probabalize the case, the Court cannot convict the Accused merely on the presumption under Section 29 of POCSO Act. If that is the fact it will result in miscarriage of Justice by sentencing the Appellant/Accused to undergo rigorous imprisonment in Prison for no fault of his.

24. In the light of the above discussion, the Accused is acquitted from the charges. The Judgement of the learned Sessions Judge, Fast Track Mahila Court, Salem in convicting the Accused and sentenced him to undergo imprisonment is found perverse. Therefore the same is set aside. Point for consideration is considered in favour of the Appellant and against the Prosecution.

25. The judgment of conviction and sentence imposed on the



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Appellant/Accused in S.C.No.345 of 2014 on the file of the learned Sessions Judge, Mahila Court, Salem, dated 31.07.2018, is set aside and the Appellant/Accused is acquitted from the charges under Sections 6 of POCSO Act, 2012. **In view of the above, the Criminal Appeal is allowed. Consequently, connected Miscellaneous Petitions are closed. No costs.**

The Jail Authority is directed to release the Appellant/Accused forthwith, unless he is required in connection with any other case. The bail bond, if any executed by the Accused, shall stand cancelled. The fine amounts, if paid by the Appellant/Accused, shall be refunded to him.

Before parting with the judgement, the Respondent Police is advised that while giving News report, the identity of the Victim shall not be disclosed either directly or indirectly. The names of the relatives of the Victim shall be avoided. Media Report shall not contain identity of the Accused even through relatives. The Victim has to be referred only as Victim and other witnesses as relatives. The Accused also shall not be identified as to indirectly indicate the Victim. No Photographs either of the Accused or the Victim shall be published.



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10.10.2023

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Index: Yes/No

Internet: Yes/No

Speaking Order/Non-speaking Order

TO:

1. The Session Judge
Fast Track Mahila Court,
Salem
2. The Inspector of Police,
All Women Police Station,
Kondalampatty Police Station,
Salem District.
3. The Public Prosecutor,
High Court, Madras.

SATHI KUMAR SUKUMARA KURUP, J.

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