



WEB COPY



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of reservation : 02/03/2023

Date of pronounced : 30/03/2023

CORAM

The Hon'ble Mr. Justice **G. ILANGO VAN**

Cr1.A(MD)No.49 of 2020
and
Cr1.MP(MD)No.2408 of 2020

Usman : Appellant/Sole Accused

Vs.

The Inspector of Police,
Cantonment All Women Police Station,
Trichy City.

(Crime No.15 of 2017) : Respondent/Complainant

PRAYER:-This Criminal Appeal has been filed under section 374 of the Criminal Procedure Code, to call for the records pertaining to the order made in Special S.C No.07 of 2018, dated 21/10/2019 on the file of the Sessions Judge (Mahila Court), Trichy and set aside the same.

For Appellant : Mr.K.M.Karunakaran

For Respondent : Mr.B.Nambiselvan
Additional Public Prosecutor

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

This Criminal Appeal has been preferred against the judgment passed in Special S.C No.07 of 2018, dated 21/10/2019 by the Sessions Judge (Mahila Court), Trichy.

2.The case of the prosecution in brief:-

On 20/10/2017, when the victim girl, who was aged about 7 years going to the school in an auto owned by the accused along with other students, she was taken by the accused to a Church and misbehaved with her. Based upon the above said occurrence, on the basis of the complaint given by the de-facto complainant, who is the mother of the victim girl, a case in Crime No.15 of 2017 was registered for the offences punishable under sections 7 and 8 of POCSO Act, 2012. The accused was arrested and after completing the formalities of the investigation, filed a final report. After completing 207 Cr.P.C proceedings, framed the charges for the offences punishable under sections 7 and 8 of POCSO Act, 2012.



3. During the trial process, on the side of the prosecution, 15 witnesses have been examined and 13 documents marked. On the side of the accused, no oral or documentary evidence was adduced.

4. **The case of the prosecution, as narrated through the prosecution witnesses:-**

PW2 is the victim girl. She was aged about 7 years at the time of examination and occurrence. She was studying 2nd Standard in Little Flower Nursery and primary School. She used to come to the school in an auto owned by the accused. Along with her, several other students were also travelling to the school by this auto. On one day, she was taken by the accused to a Church and misbehaved with her by rubbing his private part in her face; by lifting her uniform touched her private part and inserted his finger. She shouted due to pain. At that time, one Lakshmi came to that place. On seeing the above misbehaviour by the accused, the above said Lakshmi assaulted the accused with chappal. Later, she was taken him to home by the accused himself. She experienced pain in her private parts, informed the same to her mother I.e., PW1 and in turn, her mother informed the same to other relatives.



5.PW1 is the mother of the victim girl. On the particular date of occurrence namely 20/10/2017, the victim girl had fever. On her information, she noticed some reddish injury in her private part. So she lodged a complaint under Ex.P1 before the All Women Police Station, Cantonment, Trichy.

6.PW14 was working as Sub Inspector of Police, All Women Police Station, Cantonment, Trichy. She received the complaint from PW1 and registered a case in Crime No.15 of 2017 for the offences punishable under sections 7 and 8 of POCSO Act, 2012. She recorded the statement of the witnesses and sent the victim girl for medical examination; visited the place of occurrence, prepared parvai mahazar; rough sketch. On 23/10/2017 at about 04.00 pm, the complainant identified the accused near a Church and she arrested him and sent for remand. She made a request for recording the statement of the victim girl under section 164 of the Criminal Procedure Code. She has collected the birth certificate of the victim girl. The accused was also subjected to medical examination through the court. Further investigation was undertaken by PW15.

7.PW9 examined the victim girl. On her examination, she found that her hymen was torn and her private part admitted one finger. Vaginal smear was collected and sent



for medical examination. But no semen was found. She issued the Accident Register (Ex.P5) and Discharge Summary (Ex.P6) .

8.PW12 Medical Officer subjecting the accused to medical examination. On his examination, no abnormality was found. He gave a certificate that there is no indication that the accused is not capable of performing sexual activity.

9.PW15 undertook the further investigation from PW14 and done re-examination of the witnesses; they have stated the very same facts, narrated before the previous Investigating Officer. He collected the medical records from the Medical Officer, examined the victim as well as the accused. After collecting the report from the Forensic Science Laboratory and after examining them, completed the investigation and filed a final report against the accused for the offences under sections 7 and 8 of POCSO Act, 2012.

10.PW3 was not the eye witness to the occurrence. But he has spoken about the subsequent events. PW4 Renuka is also not an eye witness and has spoken the further events.



11.PW5 also corroborated PW2 with regard to the occurrence.

WEB COPY

12.PW6 was working as Headmistress in Little Flower Nursery and Primary School. He supplied the birth certificate of the victim at the request made by the Investigating Officer. PW7 corroborated PW2 and Lakshmi over the above said occurrence.

13.With these, the prosecution evidence was over and the accused was subjected to section 313 Cr.P.C questioning. He denied the prosecution evidence. On his side, none was examined.

14.At the conclusion of the trial, the trial court found the accused guilty, convicted and sentenced him to undergo five years rigorous imprisonment and imposed a fine of Rs.1,000/- with default clause for the offence under section 7 r/w 8 of the Protection of Children from Sexual Offence Act, 2012.

15.Against the above said conviction and sentence, this criminal appeal has been preferred by the appellant.

16.Heard both sides.



17. **The background facts:-**

WEB COPY

PW1 is the mother of the victim and is living separately from her husband. She was having two childrens, among which, the victim is the first children. At the time of occurrence, she has gone for job. At the time of the occurrence, the victim used to go to the school along with other childrens by an auto owned by the appellant and he was also the driver of the auto. This fact is not denied by the accused.

18. With regard to the subsequent event, it is seen that some Association also came to be involved in the process of filing the complaint, etc.

19. PW4 was the District President of All India Democratic Women's Association (AIDWA). She was known to one Dineshkumar, who was examined as PW3. PW3 is the neighbour of PW1. He was informed about the misbehaviour by PW1. PW5 in-turn informed PW4 about the occurrence. She was approached by PW1 and PW3 for lodging the complaint. On 23/10/2017 along with PW1 and others, she also went and lodged a complaint.

20. The subsequent events show that on the information given by PW2, further steps have been taken by



PW1 for lodging the complaint with the help of PW3 and PW4. The further events brought on record are also reliable in nature, which requires no contra finding. Of course, there is a delay of 3 days in lodging the complaint. But the occurrence of this nature requires some sort of breathing time for thinking by the parents. So this cannot be taken as issue doubting the very prosecution case.

21. Now let us go to the medical evidence, before we go into the main occurrence. As stated above, PW9 examined the victim, on 23/10/2017. On her examination, the victim hymen was found not intact. But no other injuries were found. So this shows that when child of 7 years age was subjected to sexual misbehaviour, the hymen found to have been torn.

22. PW1 has also stated that she noticed some reddishness in the private part of the victim girl. PW2 has also stated that she expressed pain in her private part and there was a reddishness. So the evidence of PW1 and PW2 fully corroborated by the evidence of the Doctor. These are the foundation facts that have been laid by the prosecution with regard to the allegation. I find no doubt can be raised in the prosecution case about these facts.



23. Now let us go to the main allegation. The victim has spoken about the occurrence in a clear manner. Her capacity to give evidence was also assessed by the trial court through preliminary enquiry. Finding that she was capable of knowing the things and worldly affairs, the trial court examined her.

24. As stated in the preamble portion, she has given clear picture about the occurrence. I have also extracted the substance of the evidence. But she has stated that she was taken to an isolated place by the accused and he rubbed his private part in her face and also inserted his finger in her private part, causing pain. When she cried, one Lakshmi came to that place, assaulted the accused with chappal on noticing the misbehaviour.

25. Now let us go to the evidence of the above said Lakshmi, who has been examined as PW5. She has stated that she was known to PW1 and PW3. On 20/10/2017 at about 03.30 pm, when she was crossing the Church area, she noticed an auto parked in that area. Nearing the auto, she saw the occurrence. The accused rubbed his private parts in the face of the child. She informed the above said misbehaviour to a person, who was standing in a nearby place called 'Kamaraj'. He was examined as PW7 on the side of the prosecution. He told that on 20/10/2017 between 04.00 pm to



04.30 pm, the above said Lakshmi came and informed about the misbehaviour by the accused. Along with Lakshmi, he also went to the place of occurrence. But by the time, they reached the place the accused went away from that place by taking the children. They followed the accused and questioned him, for which, the accused abused them in filthy language. The evidence of these persons fully corroborated the evidence of the PW2. Absolutely, there is no evidence to disbelieve the same. No motive was also suggested to them. So from the facts narrated above, the prosecution is successful in establishing the facts.

26. In the written submission, it has been stated by the accused that there is a delay of 3 days in filing the FIR; There was previous enmity between the accused and PW1; There was a delay in sending the FIR to the court.

27. So the question, which arises for consideration is whether these points are legally sustainable and sufficient enough for disproving the prosecution evidence and rebutting the presumption.

28. Section 29 of the POCSO Act, 2012 reads as follows:-



WEB COPY



"29.Presumption as to certain offences.-Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

29.During the course of examination of PW1, no motive was suggested to PW1 with regard to the false implication. She has simply stated that they demanded Rs. 1,00,000/- from the accused. When he refused to pay the money, the belated complaint has been given at the instance of some political persons. The complaint has been given only to extract money from the accused. Except this, no other motive has been suggested.

30.As mentioned above, there is a delay of 3 days in registering the FIR. In such circumstances of this case, the delay does not assume any importance at all. She has further stated that on the date of the complaint itself, the accused was brought to the police station at about 12.00 noon and the police enquired the accused in her



presence. This shows that there is contradiction with regard to the arrest particulars.

WEB COPY

31.PW14 has stated that on 23/10/2018 at about 4.00 pm, the accused was identified by the victim near a Church and he was arrested. PW1 has stated that the accused was brought to the police station on the same day by the police. So who identified the accused assumes no importance at all, since he was already known to the witnesses. These two contradictions, I am of the considered view that these are not sufficient enough to rebut the presumption under section 29 of the Act. So, with regard to the conviction, I find that no interference is required.

32.With regard to the sentence, a plea was taken by the learned counsel appearing for the appellant on record that the accused was aged about 75 years at the time of occurrence and now he would have crossed 78 years. At this advanced stage, modification of the sentence portion may be considered by this court.

33.But this is not a simple sexual assault, but a penetrative sexual assault that has been committed by the appellant. But however, the charge was not framed.



34.Considering the facts and circumstances of this case, the trial court has imposed five years rigorous imprisonment. So I find no reason to modify the sentence also.

35.In the result, this criminal appeal fails and the same is **dismissed**. Consequently, connected Miscellaneous Petition is closed.

30/03/2023

Index:Yes/No

Internet:Yes/No

er



To,

1. The Sessions Judge,
Mahila Court,
Trichy.

2. The Inspector of Police,
Cantonment All Women Police Station,
Trichy City.

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



WEB COPY



G.ILANGOVAN, J

Cr1.A (MD) No.49 of 2020

30/03/2023