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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 24.11.2022

Pronounced on : 23.02.2023

CORAM

THE HONOURABLE MR.JUSTICE **G.ILANGOVA**

Crl.A(MD)No.295 of 2021

Jaffer Ali : Appellant/Sole Accused

Vs.

The Inspector of Police,
Jeeyapuram All Women Police Station,
Tiruchirapalli,
Trichy District.

(In Crime No.04 of 2018) : Respondent/Complainant

Prayer: Criminal Appeal filed under section 374(2) of the Criminal Procedure Code, to call for the records in Special Sessions Case No.56 of 2018 on the file of the Sessions Judge, Mahila Court, Tiruchirappalli and set aside the conviction passed by judgment, dated 16/04/2021.

For Appellant : Mr.M.M.Manivelpandian

For Respondent : Mr.S.Manikandan
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 of conviction passed in Special Sessions Case No.56 of 2018 by the Sessions Judge, Mahila Court, Tiruchirappalli, dated 16/04/2021.

2.The case of the prosecution in brief:-

The minor victim was aged about 8 years at the time of the occurrence. On 01/06/2018, when she went to her friend's home for playing with her, at that time, the accused brought her to the backyard of one Bharathi's house and committed penetrative sexual assault on her. Upon which, a case in Crime No.4 of 2018 was registered for the offence punishable under section 10 of the Protection of Children from Sexual Offences Act, 2012. After completing 207 Cr.P.C proceedings, framed the charges under sections 7,8, 9(m) and 10 of POCSO Act, 2012.

3.During the trial process, on the side of the prosecution, 13 witnesses were and 11 documents marked. On the side of the accused, no oral and documentary evidence was adduced.



4.The case of the prosecution, as narrated through.

the prosecution witnesses is as follows:-

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PW1 is an Auto Driver by profession and his wife namely Sivagami, who is examined as PW3 is his wife and the victim girl PW2 is his daughter and she was studying 4th Standard during trial. On 01.06.2018, as usual, he dropped PW2 in the school. The wife also went for job. At about 8.30 pm, he returned to the house. At that time, PW2 informed him about the sexual assault, that was made by the accused.

5.PW2 the victim girl has spoken about the occurrence. She returned to house on the date of the occurrence in the noon. The school declared Holiday in the afternoon session. After taking food, she went to play. At the time, the accused kissed her and also misbehaved by touching her private parts. When she is crying, the accused left her. After PW1 returned to the house, she informed the above said misbehaviour.

6.In the meantime, PW3 returned to the house from the office; She was informed by the victim with regard to the misbehaviour. Along with PW3, PW1 went to Manachanallur Police Station. After enquiry, they directed him to



approach the All Women Police Station, Jeeyapuram, Trichy.

At that time, it was late night, so on the next day morning, they went to All Women Police Station, Jeeyapuram, Trichy and lodged a complaint under Ex.P1.

7.Now the further event is spoken by PW13, who was working as Inspector of Police, during the relevant time in the All Women Police Station, Jeeyapuram, Trichy, received the complaint from PW1, on 02/06/2018 and registered a case in Crime No.4 of 2018 under section 10 of the Protection of Children from Sexual Offences Act, 2012. The original FIR was sent to the concerned Court and the copies to the higher officials, recorded the statement of the witnesses, visited the place of occurrence, prepared the rough sketch and mahazar. Finding that the prosecution complaint is true, on 26/06/2018 at about 4.30 pm, she arrested the accused, who was available in Manachanallur. On the date itself, the victim was taken for medical examination to the Government Hospital, Trichy. She obtained the birth certificate of the victim, which was marked as Ex.P9. The accused was sent for medical examination and recorded the statement of the accused and made arrangement to record the statement of the victim, on 11/07/2018. The accused was sent for medical examination, on 26/08/2018 to the Government Medical College Hospital, Trichy. He obtained



the certificate from the Doctor about the potency of the accused; Later, she recorded the statement of the Scientific Assistant, Chennai and after obtaining the forensic lab examination report and after completing the formalities of investigation, filed a final report on 18/10/2018 for the offences as stated above.

8.PW4 is stated to be the eye witness to the occurrence that took place at 9.00 am in the house of the accused. At that time, PW1 tried to assault the accused. He pacified PW1 and he was informed about the assault that was made by the accused on PW2. On the next day, he was examined by the Investigating officer.

9.PW5 was present, when the Investigating Officer visited the place of occurrence and prepared parvai mahazar and signed in the documents.

10.PW6 turned hostile and he has stated that he did not know the occurrence.

11.PW7 also signed in the parvai mahazar, which was prepared by the Investigating Officer.



12.PW8 is the Doctor, who medically examined the victim. At the time of examination, she found no internal injuries and the accused was sent for medical examination and the report has been received stating that no semen was found. The AR copy that was prepared by her was marked as Ex.P5 and the discharge summary as Ex.P6.

13.PW9 is the neighbour and she informed about the misbehaviour of the accused.

14.PW10, PW11 and PW12 are not the material witnesses, since they have taken the witnesses and the accused for the medical examination. With that, the prosecution side evidence was closed.

15.The accused was put to section 313 Cr.P.C proceedings. He denied the truth of the facts deposed by the prosecution witnesses.

16.At the conclusion of the trial process, the trial court found the accused guilty, convicted and sentenced him to undergo **5 years Rigorous Imprisonment** and imposed a fine of Rs.1,000/- with default clause for the offence under section 10 of the Protection of Child from Sexual Offences Act.



17.Challenging the judgment of conviction and sentence, this criminal appeal has been preferred.

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18.Heard both sides.

19.Here the offence punishable under sections 10 and 29 of the POCSO Act, 2012 reads as under:-

"10.Punishment for aggravated sexual assault:-.Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine."

"29.Presumption as to certain offences.-Where a person is prosecuted for committing of 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."

20.So when the offences of this nature, which are mentioned in sections 3, 5, 7 and 9 of the Act, presumption is available in favour of the prosecution, of course, if



foundation case are laid by it. So on that basis, let us go further as to whether the foundation facts have been laid by the prosecution to draw the presumption.

21. Now let us straightaway go to the evidence of PW2, the victim girl. She was aged about 9 years. On her examination before the trial court, she has stated that she is studying 4th standard in the Manachanallur Middle School. In the preliminary enquiry, the victim was very intelligent and knowing the day today and worldly affairs. She also known that she is subjected to examination by the court. After making preliminary enquiry with regard to the capacity to give evidence, further recording was undertaken by the trial court. No grievance has been expressed for this by the accused.

22. She has stated in her evidence that on the first June, when she was studying 4th Standard, returned to the house, since there was no school in the afternoon session. After taking food, she went to her friend's house namely Kavinaya. At that time, the accused called her and she went by responding the call, he touched her private parts and kissed it. When she made cry, the accused left her. That was intimated to PW1, who is her father. PW1 enquired the accused, also tried to assault him. Later, the matter also



intimated to the mother of the victim. Later, the statement of the victim was recorded by a Judge. Based upon the above said occurrence, as mentioned in the preamble portion, PW1, who is the father of the victim also stated that he made enquiry with regard to the above said misbehaviour of the accused. He returned to the house at about 8.30 pm on that date. He has also further stated that within 15 minutes of the arrival, PW3 the mother of the victim girl also returned to the house. When enquiry was undertaken by the police, the accused was in the police station or available in the police station. The above said statement of PW1 and PW2 also corroborated by PW3, the mother of the victim girl, as mentioned earlier. The above said complaint was registered by PW13, the Inspector of Police, as mentioned in the preamble portion. These are the foundation of facts that have been laid by the prosecution. So, naturally presumption under section 29 of the POCSO Act comes into play.

23. With this in mind, now let us go to the other circumstances, that was relied by the prosecution and the accused person.

24. During the course of argument, the contradiction available in the prosecution case has been relied on.



25.The learned counsel appearing for the appellant would submit that the age of the victim was 8+, at the time of the occurrence. Originally, enquiry was undertaken by the Manachanallur Police Station; But what happened to the above said enquiry has not been disclosed by the prosecution; Even before registration of the FIR, the accused was in the police Station; So the arrest is not believable. PW2 is not also supporting the case of the prosecution.

26.Per contra, the learned Additional Public Prosecutor would submit that the injuries were available in the private parts of the victim girl and the place of the occurrence is also clearly established and the victim girl statement is also corroborated by PW1 and PW3. So according to him, no interference is called for.

27.Before we go into the findings of the trial court, now we can make an independent discussion with the regard to the allegations in the light of the arguments advanced by both sides.

28.Apparently, there are some contradictions with regard to the small fact regarding the age of the victim girl. But here, the birth certificate is also produced,



which is marked as Ex.P9. When we see that the date of birth of the victim girl is 25/07/2010, the date of occurrence is stated to be on 01/06/2018. She would not have even attained the age of 9 at the time of the occurrence. So, she is below the prescribed age under section 9(m) of the POCSO Act.

29.PW1 has stated that after hearing the above said information from the victim, he enquired the accused. Originally, he lodged the complaint with the Manachanallur Police Station and they did not take the case. But later, he would say that the complaint was given to the Jeeyapuram All Women Police Station. So, he lodged a complaint on the next day as mentioned earlier. He further stated that soon after the above said complaint with the Manachanallur Police Station, they visited the place of occurrence and enquired. Since at that time, it was 12 hours in the mid night, on the next day, he lodged the complaint. One Advocate was also accompanied them. So this evidence is relied by the accused to show that even before filing the FIR, the accused was taken to the Manachanallur Police Station and he was very well available in the police station. During the chief examination also, he has stated that originally, he lodged a complaint with the Manachanallur Police Station and after enquiry, they



informed him to give the complaint before the Jeeyapuram All Women Police Station. The victim girl has also corroborated PW1 with regard to the above said complaint with the Manachanallur Police Station and taking the accused to the above said police station and availability of one advocate in the police station. She has also stated that the above said occurrence took place behind one Bharath's house; But she has not disclosed the same, either to her friends or her brother, who was available in the house.

30. Reading of the cross examination further shows that she used to visit one Bharathi's house for watching TV. She was very intelligent to deny the suggestion that was made to her over the complaint, there was dispute between the accused and PW1; By using her, the above said false complaint has been given.

31. Now let us go to the evidence of PW3. During the course of the cross examination, she has stated that before the Manachanallur Police Station also, they lodged a complaint and that complaint was written by her. But she has not admitted that PW2 has written in her hands. The above said Advocate, according to her, is her relative. So I find no material contradiction in her evidence with



regard to the lodging of the complaint and the information that was given to her by the victim girl. So nothing is brought on record to discard the evidence of PW1 to PW3 over the above said occurrence. The minor contradictions need not be given any importance at all.

32. In the light of the above said evidence, the learned counsel appearing for the appellant would submit that as per the evidence of PW13, the Investigating Officer, arrest was made only, on 02/06/2018 at about 04.30 pm and he was taken to the police station for remand. No doubt that this is not the evidence of PW1 to PW3. According to them, at about 10.00 am, on 02/06/2006, the accused was available in the Jeeyapuram Police Station and the accused was taken to the Manachanalalur Police Station on the date of the occurrence itself. But records shows that only the arrest was made on 02/06/2013 at about 04.30 pm.

33. The learned Additional Public Prosecutor would explain that before that, enquiry was undertaken and during the course of enquiry only, he was available in the police station and that cannot be construed as arrest. Even if it is considered that the date of arrest and time is not believable, but the facts remain that the occurrence took place, which cannot be doubted on any ground.



34.PW4, who is neighbour also corroborated the enquiry that was made by PW1 with the accused. He pacified both of them; at that time, he was informed about the misbehaviour by the accused and the Manachanallur Police came to the spot at about 12.00 in the morning; But on the next day, he was enquired by the Jeeyapuram Police.

35.His evidence also relied on by the appellant for the purpose that the alleged occurrence said to have taken place in the public place and the movement of the public is very well available, so absolutely, there is no possibility of such occurrence had taken place in the public area. But the evidence of PW4 corroborated the occurrence. He was not inimical towards the accused.

36.The appellant would rely upon the evidence of PW6, who turned hostile. But he has stated to be the landlord of one Muralitharan, who is examined as PW5. He is not the eye witness. According to him, he was called by the above said PW5; They made enquiry over the above said occurrence; He has not interested in it and asked the above said Muralitharan to vacate the house. So, he is not the eye witness to the event that took place. His evidence cannot be taken advantage by the appellant/accused.



37. In the light of the above said, I find absolutely no reason to disbelieve the prosecution version with regard to the misbehaviour.

38. Now let go to the **medical evidence**.

39. As mentioned above, the Medical Officer, PW8 would say that there was no external injury, either on the private parts or on the body of the victim. She was admitted in the hospital for further management. So, it is seen that there was no external injuries on the private parts of the child.

40. Now let us go to the penal provision, which is attracted to the offence.

41. Section 9 of the Act, reads as under:-

"Aggravated sexual assault. - (a)

Whoever, being a police officer, commits sexual assault on a child -

(i) within the limits of the police station or premises where he is appointed; or



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(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as a police officer; or

(b) whoever, being a member of the armed forces or security forces, commits sexual assault on a child

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the security or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known or identified as a member of the security or armed forces; or

(c) whoever being a public servant commits sexual assault on a child; or

(d) whoever being on the management or on the staff of a jail, or remand home or protection home or observation home, or other place of custody or care and protection established by or under any law for the time being in force commits



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sexual assault on a child being inmate of such jail or remand home or protection home or observation home or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or

(g) whoever commits gang sexual assault on a child.

Explanation.—when a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or



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(i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits sexual assault on a child, which

(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (1) of section 2 of the Mental Health Act, 1987 or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or

(ii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

(k) whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or

(l) whoever commits sexual assault on the child more than once or repeatedly; or

(m) whoever commits sexual assault on a child below twelve years; or



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

(o) whoever, being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or

(p) whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits sexual assault on a child knowing the child is pregnant; or

(r) whoever commits sexual assault on a child and attempts to murder the child; or

(s) whoever commits sexual assault on a child in the course of [communal or sectarian violence or during any natural calamity or in any similar situations]; or



(t) whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

(u) whoever commits sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated sexual assault.

(v) whoever persuades, induces, entices or coerces a child to get administered or administers or direct anyone to administer, help in getting administered any drug or hormone or any chemical substance, to a child with the intent that such child attains early sexual maturity; is said to commit aggravated sexual assault.

42.If a person commits sexual assault on a child below 12 years, it is construed as '**aggravated sexual assault**'.

43.Now section 7 of the Act reads as follows:-

"7. Sexual assault.-Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the



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child touch the vagina, penis, anus or breast of such person or any other person, or does any other Act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

44. In the light of the above said definition clause, if we look into the act of the accused on the victim girl, we can conclude that the above said misbehaviour of the accused fits into the above said definition.

45. Now coming to the presumption clause, in the light of section 29 of the Act also come into operation and no explanation or rebuttal has been successfully made by the accused. The motive suggested by the accused is also not believable; Not substantiated even by any circumstantial evidence. So the conviction is required to be confirmed and no interference is called for.

46. With regard to the sentence, the trial court has awarded five years RI and imposed Rs.10,00/- as fine. The minimum sentence prescribed under section POCSO Act is five years.



47.Considering the age of the accused, the trial court thought it fit to impose minimum sentence of five years, which also requires no interference at the hands of this court.

48.Accordingly, the criminal appeal stands **dismissed.**

23/02/2023

Index:Yes/No
Internet:Yes/No

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To,

- 1.The Sessions Judge,
Mahila Court, Trichy.
- 2.The Inspector of Police,
Jeeyapuram All Women Police Station,
Trichy.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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G. ILANGO VAN, J. ,

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