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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 21.08.2023

CORAM

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

CrI.A.(MD).No.575 of 2022

Kumar @ Rakkapan

.. Appellant/Sole Accused

Vs.

The State represented by
The Inspector of Police,
All Women Police Station,
Sivagangai District.
(Crime No.9 of 2016)

.. Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code, to call for the records and set aside the conviction and sentence imposed in Spl.S.C.No.37 of 2016 dated 29.03.2022 on the file of the learned Sessions Judge, Special Court for Exclusive trial of cases under POCSO Act, 2012, Sivagangai.

For Appellant : Mr.P.Krishnaswamy
For Mr.P.Pitchaimuthu



For Respondent : Mr.R.Sivakumar
Government Advocate (Criminal side)

JUDGMENT

The sole accused in Spl.S.C.No.37 of 2016 on the file of the learned Sessions Judge, Special Court for Exclusive trial of cases under POCSO Act, 2012, Sivagangai, filed this appeal challenging the judgment dated 29.03.2022 in which he was convicted for the offence Section 6 r/w 5(m)(n) of the POCSO Act, 2012 and sentenced to undergo 10 years rigorous imprisonment and to pay fine of Rs.5,000/-, in default, to undergo one month simple imprisonment.

2. Case of the Prosecution:

On 09.05.2016, PW.1, mother of the victim girl cleaned her after defecation and wore the trouser to the victim girl. Then, she went inside her house leaving the victim girl outside for preparing cool drink to give to the victim girl. Thereafter, when PW.1 came outside the house to give the cool drink, she found the victim girl was missing. While searching, she found that the victim girl was inside the house of the appellant situated next to PW1's house. In the said house, the appellant kept the victim girl in his



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thigh by expanding his both legs and the same was not clearly ascertained due to the darkness. She immediately entered into his house and took the child and found sperm in the vagina and thigh of the victim girl. Thereafter, while she bathing her daughter, her skin was found as peeled and her thigh was reddish. Hence, she asked the victim girl whether the appellant pressed his penis on her vagina. To that, the victim girl replied 'yes'. So, on 10.05.2016, PW.1 preferred complaint Ex.P1 to the respondent police and the same was registered in Crime No.9 of 2016 for the alleged offence under Sections 6 r/w 5(m)(n) of the POCSO Act.

2.1. On the same day, the appellant was arrested. Further the 164 Cr.P.C statement of the victim girl and PW.1 was recorded and investigation was completed after obtaining necessary medical opinion and other documents. After completion of the investigation, final report was filed for the offence under Section 6 r/w 5(m)(n) of the POCSO Act, before the learned Sessions Judge, Special Court for Exclusive trial of cases under POCSO Act, 2012, Sivagangai.

3. The learned Special Judge taken the final report on file in



Spl.S.C.No.37 of 2016. Thereafter, he furnished the copies under Section 207 Cr.P.C to the appellant. After furnishing the copies, he framed necessary charges and questioned the appellant and the appellant pleaded not guilty and hence, the trial was conducted.

4. To prove the charges, the prosecution examined PW.1 to PW.17, marked Ex.P1 to Ex.P21 and produced M.O.1 to M.O.4. The learned trial Judge, questioned the appellant under Section 313 Cr.P.C by putting the incriminating circumstances available against him and the appellant denied the same as false. Neither witness nor document was produced on the side of the defence.

5. The learned trial Judge, after considering the above evidence, convicted the appellant under Section 6 r/w 5(m)(n) of the POCSO Act and sentenced him as stated supra and also granted compensation to the victim girl for a sum of Rs.5,00,000/- (Rupees five lakhs only).

6. Challenging the conviction and sentence passed in the impugned judgement dated 29.03.2022, the appellant preferred this appeal on the



ground stated in the memorandum of grounds of appeal.

7. The learned counsel for the appellant reiterating the grounds stated in the memorandum of grounds of appeal made the following submissions:

7.1. The case of the prosecution is that the appellant is said to have committed penetrative sexual assault, but the same was not proved in accordance with law. The victim girl, at the time of recording the statement under Section 164 Cr.P.C before the learned Judicial Magistrate, did not state about any penetrative sexual assault. The statement was not recorded on the ground that the victim girl was not in a position to disclose the fact. The investigation was conducted on the basis of the statement of PW.1 and other hearsay evidence and no medical evidence was adduced to prove the penetrative sexual assault. So, he pleaded for acquittal under Section 5(m) (n) r/w 6 of the POCSO Act.

7.2. The learned counsel for the appellant further submitted that at the time of alleged occurrence, the victim was LKG studying girl and after going to nature call, without cleaning, she entered into the house of the appellant and hence, he cleaned the victim girl. Due to the previous motive,



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he was falsely implicated in the above occurrence with fibre threads of false allegation and the same was clearly proved from the circumstances available in the prosecution evidence itself.

7.3. He further submitted that there are number of contradictions between the evidence of PW.1 and other witnesses and the said contradiction itself proved that the appellant never committed the offence.

8. During the course of the examination before the trial Court, the victim girl stated that she went to the appellant's house to play and she further stated that he placed his private part in the private part of the victim girl. There was no symptoms of any penetrative sexual assault. So, the learned counsel for the appellant submitted that even assuming the evidence of the victim girl is true, offence under Section 5(m)(n) r/w 6 of the POCSO Act is not made out. Only offence under Section 9 r/w 10 of the POCSO Act alone made out. He further submitted that the appellant is inside the jail from the date of the judgment and hence, seeks further reduction of sentence.



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9. Per contra, the learned Additional Public Prosecutor submitted that eventhough the victim girl was unable to state anything before the learned Judicial Magistrate at the time of recording the 164 Cr.P.C statement, before the trial Court, she clearly stated that the appellant placed his private part in the private part of the victim girl. So, the offence under Section 5 (m)(n) r/w 6 of the POCSO Act is clearly made out. Absence of the injuries is not a ground to disbelieve the evidence of the victim girl. In the said circumstances, the prosecution clearly proved the offence and hence, he seeks for dismissal of the appeal by confirming the judgment of the trial Court.

10. This Court has considered the rival submissions made by both parties and perused the records and also the impugned judgment passed by the learned trial Judge.

11. According to PW.1, when she entered into the house of the appellant, the appellant kept the victim girl in his thigh by expanding his legs and the same was not clearly visible due to darkness. Further, she stated



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that some sperm was found in the vagina and thigh of the victim girl. She also found that some injuries in the thigh and private of the victim girl. So, she gave the complaint and also the victim girl was taken to the hospital. But the hospital authorities did not find any injury. It is the case of the penetrative sexual assault on the victim girl aged about 4 ½ years. In that event, according to PW.12-Doctor, she examined the victim girl on 10.05.2016 at 1.40 p.m and she found that there was no injuries in the thigh and private parts of the victim girl. Further, the victim girl was unable to say anything on the date of recording the 164 Cr.P.C statement. Thereafter, the examination was conducted after number of years, she deposed that the appellant placed his private part in the private part of the victim girl. Even in her belated version, there is no material overtact of penetrative sexual assault. Therefore, the evidence of the victim girl is not sufficient to convict the appellant under Section 6 r/w 5(m)(n) of the POCSO Act.

12.1. Even as per the evidence of PW.3, they made a complaint after discussion with the President of the village. The victim girl stated that on the day itself the complaint was preferred. So, in all circumstances, this



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Court presumes that the allegation of the penetrative sexual assault is improved version. The same was revealed from the absence of the 164 Cr.P.C statement of the victim girl. According to the evidence of PW.1, the trouser of the victim girl was not recovered by the investigation agency to prove the presence of the sperm in the said dress. The chemical analysis report relating to the test conducted in the lungi of the appellant also not in favour of the prosecution case. The report said that there was no trace of presence of sperm. Hence, the case of the prosecution that the appellant committed penetrative sexual assault on the victim girl is not proved beyond reasonable doubt.

12.2. Eventhough the victim girl stated that her mother was tutored her, the victim girl's version of sexual assault cannot be termed as exaggeration. The evidence of the victim girl regarding the sexual assault is natural and trustworthy. The available evidence as held earlier, the appellant has committed only sexual assault on the victim girl. Since the victim girl is below 10 years, the case of the appellant comes under Section 9(m) of the POCSO Act. Hence, the appellant is liable to be convicted under Section 10



of the POCSO Act.

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13. In the result, the Criminal Appeal is partly allowed. The conviction and sentence passed against the appellant under Section 6 r/w 5(m)(n) of the POCSO Act, in Spl.S.C.No.37 of 2016 dated 29.03.2022 by the learned Sessions Judge, Special Court for Exclusive trial of cases under POCSO Act, 2012, Sivagangai, is set aside. The appellant is accordingly convicted under Section 9(m) r/w 10 of the POCSO Act and sentenced to undergo 5 years rigorous imprisonment and to pay a fine of Rs.5000/-, in default, to undergo 2 months simple imprisonment. In view of the above conviction, the award of compensation granted to the victim girl need not be disturbed.

21.08.2023

NCC :Yes/No
Index :Yes/No
Internet :Yes/No
PJJ



To

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1. The Sessions Judge,
Special Court for Exclusive trial of
cases under POCSO Act, 2012,
Sivagangai.

2. The Inspector of Police,
All Women Police Station,
Sivagangai District.

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



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K.K.RAMAKRISHNAN, J.

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