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CRL.A.NO.821 OF 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 25 / 08 / 2023

JUDGMENT PRONOUNCED ON: 23 / 02 / 2024

CORAM:

THE HON'BLE MR.JUSTICE R.SAKTHIVEL

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Selvaraj ... Appellant

Versus

State Rep by Inspector of Police
All Women Police Station (West)
Coimbatore. ... Respondent

PRAYER: Criminal Appeal filed under Section 374 of the Code of Criminal Procedure, 1973, praying to set aside the conviction and sentence imposed on the appellant by the learned Sessions Judge, Magalir Neethimandram (Mahila Court) Coimbatore, dated October 22nd, 2016 in Special C.C.No.58 of 2014.

For Appellant : Mr.B.Kumarasamy
for Mr.S.Dhassaiya

For Respondent : Mr.A.Gokulakrishnan
Additional Public Prosecutor



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JUDGMENT

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This Criminal Appeal is preferred, assailing the judgment dated October 22nd, 2016, passed by the 'learned Sessions Judge, Magalir Neethimandram (Mahila Court) Coimbatore' (henceforth 'Trial Court' for the sake of brevity) in Special C.C.No.58 of 2014, by the 'appellant herein' (henceforth 'accused' as per Trial Court's description), in which he was convicted and sentenced to undergo five years of Rigorous Imprisonment with a fine of Rs.20,000/- (Rupees Twenty Thousand Only), in default thereof, to undergo three months of Simple Imprisonment for the offences under Section 7 read with Section 9(m) read with Section 10 of 'Protection of Children from Sexual Offences Act, 2012' [henceforth 'POCSO Act' for the sake of brevity].

2.The case of the prosecution, in brief, is as follows:

2.1.The defacto complainant and the accused are residing in the same locality. The defacto complainant's daughter xxx (name masked for the



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sake of privacy of the victim) (P.W.2) is aged ten years and pursuing 5th

Standard in a school. The accused is running a grocery shop in the same area.

On December 4th 2013, when the minor girl xxx came back from the school, her mother asked her to buy Areca nut and hence, she went to the accused's grocery shop and asked him to give Areca nut. At that point of time, the accused called the minor girl xxx inside the shop, but she refused. Thereafter, the accused who was sitting inside the shop, stood up and held and squeezed her breasts with his hands and then inserted his hand into her Chudithar Pant and fondled with her vulva asking her if that was pleasurable. Scared due to the acts of the accused, the minor girl xxx ran away crying and informed the incident to her mother (P.W.1). In turn, P.W.1 informed the same to her husband (P.W.7) and thereafter, they went to Kuniamuthur Police Station the next day i.e., on December 5th, 2013 and lodged complaint (Ex-P.1) to the then Special Sub Inspector of Police, Kuniamuthur Police Station (P.W.9) who in turn registered FIR (Ex-P.6) under Sections 8 and 9(m) of POCSO Act and submitted the same to the Court and to the Inspector of Police, All Women Police Station, Coimbatore City (West) (henceforth 'Investigating Officer I') (P.W.12) for investigation.



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2.2. Upon receiving the case file, the Investigating Officer I (P.W.12) visited the place of occurrence and prepared Observation Mahazar (Ex-P.4) and Rough Sketch (Ex-P.9) in the presence of one Balamuralikrishnan (P.W.6) and also examined the witnesses including the victim, her father and mother. On December 9th, 2013, Investigating Officer I arrested the accused after P.W.1 identified him. On December 10th, 2013, Investigating Officer I sent the victim girl xxx for medical examination.

2.3. On December 6th, 2013, the Doctor (P.W.11) attached to Government Medical College Hospital, Coimbatore examined the victim girl and issued Accident Register (Ex-P.8).

2.4. On December 11th, 2013, P.W.5 who conducted the Ossification test to the victim, issued Ex-P.3 Radiology Report stating that the victim's age is between 11 and 13 years.

2.5. The then learned Judicial Magistrate, Additional Mahila Court, Coimbatore (P.W.8), recorded the victim's statement under Section 164



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of Cr.P.C., in accordance with law and submitted the same under Ex-P.5 along with Compact Discs containing the video recording of the same.

2.6.P.W.13 is the successor of P.W.12. P.W.13 will henceforth be referred to as Investigating Officer II. The Investigating Officer II examined the Doctors who examined the victim girl and recorded their statements. After completion of the investigation, Investigating Officer II filed a charge sheet against the accused under Sections 8 and 9(m) of the POCSO Act.

2.7.On appearance of the accused, after furnishing copies under Section 207 of Cr.P.C., and after hearing both sides, the learned Sub Judge found that there are sufficient materials available on record to presume that the accused committed the offences and accordingly, framed charges under Section 7 read with Section 8 and Section 9(m) read with Section 10 of POCSO Act against the accused and explained the same to the accused. The accused denied the charges as false and pleaded not guilty. Hence, trial was ordered.



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2.8. In order to prove the prosecution's case, the prosecution side examined P.W.1 to P.W.13 and marked Ex-P.1 to Ex-P.10. No material objects were marked on the side of the prosecution. On the accused's side, the accused himself was examined as D.W.1; his wife, daughter and brother-in-law were examined as D.W.2 to D.W.4 respectively; one Selvam was examined as D.W.5; and Ex-D.1 document was marked. The incriminating circumstances against the accused based on the available evidence was put forth to the accused in the form of questions under Section 313 of Cr.P.C., and the accused denied the same as false.

2.9. After hearing both sides, the Trial Court came to the conclusion that the prosecution has proved the offences under Section 7 read with Section 9(m) read with Section 10 of POCSO Act and recorded conviction and punishment as stated *supra* in paragraph No.(1).

2.10. Feeling aggrieved with the above said conviction and sentence, the accused has preferred this Criminal Appeal under Section 374 of Cr.P.C.

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Arguments

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3.The learned counsel for the accused has argued that the Trial Court has not considered and appreciated the prosecution evidence in the right perspective; that according to the prosecution, the alleged occurrence happened on December 4th, 2013, but the FIR has been registered on December 5th, 2013, i.e. after a delay of 22 hours; that the prosecution did not examine any independent witness; that the evidence of P.W.4 tends to belie the prosecution's case; that the medical evidence has also not supported the prosecution's case; that the Trial Court has not appreciated the evidence of D.W.1 to D.W.5 in a proper manner; and that the accused is an innocent and he did not commit any offence as alleged. Accordingly, he prayed to allow the Criminal Appeal, set aside the impugned judgment and acquit the accused.

4.In response to the above argument, learned Additional Public Prosecutor has submitted that the prosecution proved that the victim girl xxx was studying 5th Standard and aged 10 years, at the time of occurrence and her date of birth is June 9th, 2003; that the evidence of victim girl has been

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corroborated by her mother and father's evidence (P.W.1 and P.W.7); that the evidence of P.W.1 is natural and trustworthy and there is no reason to reject her evidence; that therefore, this case attracts the presumption stated under Sections 29 and 30 of the POCSO Act; that the accused failed to rebut the said presumptions; and that the alleged enmity between the victim's family and one Jayaraj was not established by the accused side and hence, the Trial Court after considering all the evidence and documents, came to the conclusion that the accused committed the offence and there is no need to interfere with the same. Accordingly, he prayed to dismiss the Criminal Appeal and sustain the conviction recorded and sentence imposed by the Trial Court.

Point for consideration

5.This Court has perused the case file and heard either side. The point that arise for consideration is whether the prosecution has proved the offence under Section 7 read with Section 9(m) read with Section 10 of POCSO Act beyond reasonable doubt?

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Decision and Discussion

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6.P.W.7 and P.W.1 are parents of the victim girl, P.W.7 being the father engaged in plastic business and P.W.1 being the mother. P.W.2 - victim girl was aged 10 years and pursuing 5th Standard at the time of occurrence.

7.P.W.1 who is none other than the mother of the victim has deposed that the accused was running a grocery shop in the premises belonging to P.W.4; that on December 4th, 2013, P.W.1 was unwell, took tablets and felt nauseating at about 05.00 p.m; that when P.W.2 victim girl came back from school, she asked her to buy Areca nut; that P.W.2 minor xxx went to the accused's grocery shop which is situated near their house and asked him for Areca nut; that at that time, the accused called the victim inside the shop but the victim refused; that then the accused fondled with her breasts and vulva with his hand asking her if that was pleasurable; and that the victim girl ran home crying and when P.W.1 asked her as to why she was crying, she revealed about the conduct of the accused and the occurrence.

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8.P.W.1 further deposed that her husband (P.W.7) had gone to Tirupur for work and after his return, she informed him about the occurrence and thereafter, on December 5th, 2013 all of them went to Police Station and preferred complaint (Ex-P.1).

9.P.W.2 is the victim girl. She deposed that she was studying 5th Standard and she knew the accused; that the accused is running a grocery shop which is situated just two houses away from her house; that on December 4th, 2013 at 5.00 p.m., her mother asked her to buy Areca nut as her mother felt nauseated; that P.W.2 went to the accused's shop and asked him for Areca nut, by paying one rupee; that the accused asked her to come inside the shop; that P.W.2 refused to go inside the shop; that at that time, the accused fondled with her breasts and vulva with his hand asking her whether it was pleasurable; and that the victim girl ran home crying and when P.W.1 asked her as to why she was crying, she revealed about the conduct of the accused and the occurrence.

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10.P.W.3 deposed about the arrest and confession of the accused and vouched for his attestation under Ex-P.2 in the confession statement.

There is no admissible evidence in the alleged confession. Hence, alleged confession given by the accused is inadmissible. But, evidence of P.W.3 corroborates the Investigating Officer I's evidence with regard to date of arrest of the accused.

11.P.W.4 was the landlord. Under him, the accused was a Tenant and running a grocery shop. He deposed that he was the landlord and the accused was a tenant and was running a grocery shop in the said premises for the past ten months prior to the date of occurrence and on the night of December 4th, 2013, there was a crowd in front of the accused shop and one neighbour informed about the same to him and when he came there, it was informed that the police had taken the accused and hence, he went to police station and enquired and came to know that the accused misbehaved with a neighbour girl.



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12.P.W.5 is the Radiologist of Coimbatore Medical College Hospital, who conducted Ossification test on the victim on December 11th, 2013 and determined her age as between 11 years and 13 years and she issued Ex-P.3 Radiology report to that effect.

13.P.W.8 learned Judicial Magistrate, Additional Mahila Court, Coimbatore has recorded the statement of the victim girl under Section 164 of Cr.P.C., on December 13th, 2013 and the same is marked as Ex-P.5 along with a Compact Disc containing the videograph of the proceedings.

14.P.W.11 Doctor, who examined the victim has deposed that she examined the victim girl on December 6th, 2013 at about 12.30 hours; that the minor victim girl reported that she had pain on her left breast; that she collected vaginal smear and sent the same for chemical analysis and no spermatozoa was detected in it; that there is no external injuries on her body; and that hymen was intact. Chemical Analysis Report is marked as Ex-P.7 and Accident Report is marked as Ex-P.8.

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Age of the victim

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15.P.W.1 has deposed that at the time of occurrence, the minor girl was studying 5th Standard and 10 years old. P.W.2 has also deposed along the same line. The Investigating Officer marked the Birth Certificate (Ex-P.10). Photocopy of Ex-P.10 has been annexed with the final report and a copy of the same has also been furnished to the accused under Section 207 of Cr.P.C. As per the ossification report, the age of the victim was between 11 and 13 years. In view of the evidence of P.W.1 and P.W.2 and Ex-P.10 Birth Certificate, this Court concludes that the prosecution proved that the victim was 10 years old at the time of alleged occurrence.

Presumptions

16.The evidence of P.W.1 and the victim coupled with the statement of the victim girl recorded under Section 164 of Cr.P.C., proves that offence has been committed against the victim by the accused. As alluded to *supra*, the prosecution has proved that the victim was a minor aged 10 years



at the material point of time. In short, the prosecution has proved the foundational facts. Since the prosecution has established the foundational facts beyond reasonable doubt, the prosecution is entitled to the presumption contemplated under Section 29 and Section 30 of POCSO Act which reads thus:

'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.

30.Presumption of culpable mental state

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.



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(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.'

Therefore, the onus is now upon the accused to rebut the presumption.

Delay in FIR

17. In this case, the learned counsel for the accused contended that the FIR has been filed with a delay of 22 hours. This Court observes that the delay in filing the FIR in cases of sexual offences, especially those covered by POCSO, should be treated distinctively and not equated with delays in other types of cases. Such a delay is natural and usual in such cases, as the parents of the victims would generally have concerns about privacy and social stigma. Parents of victims may naturally hesitate to approach the police and may require time to carefully consider their decision. Therefore, this Court finds the delay of 22 hours is reasonable. Moreover, P.W.1 in her evidence has deposed that her husband (P.W.7) had gone to Tirupur for his job related purpose. The said reason convinces and satisfies this Court.

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18.In order to rebut the presumptions stated under Sections 29 and 30 of the POCSO Act, the accused side examined D.W.1 to D.W.5 and marked Ex-D.1. The accused himself was examined as D.W.1 and he has deposed that he did not commit any alleged offence; that he was not available in the shop on the alleged date of occurrence, on the other hand, his wife alone was available on that date; that one Jayaraj was running a grocery shop near his shop; that Jayaraj and the landlord of his shop wanted him to vacate the shop; and that, since he refused to do so, they gave a false complaint against the accused. D.W.2, D.W.3 and D.W.4 have also deposed along the same lines of D.W.1. Further, the accused in his evidence has deposed that on December 4th, 2013 the Police called him to the Police Station and he went there.

19.The learned counsel for the accused invited the attention of this Court to the above said portion of the evidence of P.W.4 – landlord and submitted that the evidence of P.W.4 alone is sufficient to come to the conclusion that the genesis of the prosecution's case is doubtful. Further submitted that the prosecution has suppressed the earlier complaint and that the prosecution did not explain the delay in lodging the complaint.

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20.The defense side examined one Selvam as D.W.5. His evidence is not natural and believable and therefore, does not inspire confidence of this Court.

21.This Court has considered the evidence of D.W.1 to D.W.5 along with Ex-D.1 medical records. It is true that, P.W.4 has deposed that the police arrested the accused on December 4th, 2013. Investigating Officer I who arrested the accused has deposed that she arrested the accused on December 9th, 2013. The said evidence has been corroborated by P.W.3 and other evidence. In view of the evidence of the Investigating Officer I and the evidence of P.W.1, this Court is of the view that P.W.4 could have erroneously stated wrong date of arrest. Hence, this Court is of the considered view that the arguments raised by the learned counsel for the accused with regard to the discrepancy between the prosecution's case and the evidence of P.W.4 does not help the accused.

22.The evidence of the victim girl is corroborated by the evidence of P.W.1 and P.W.7. Further, her evidence is in line with her statement under Section 164.

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23.As per the medical evidence, there is no external injury on the victim girl. Learned counsel for the accused submitted that P.W.2 is a tutored child and her evidence is to be scrutinized with great caution. He further submitted that with a view to vacate the accused from that area, false case has been registered and that P.W.2 has been tutored to give evidence so as to support the false case; that the evidence of P.W.2 not trustworthy and believable; and that further medical evidence does not support the prosecution case and it is unsafe to record conviction solely based on the oral statement of the victim and victim's mother.

24.This Court is unable to accept the above arguments since the evidence of P.W.1 and P.W.2 are natural, believable and trustworthy. Moreover, a conjoint reading of the statement of the victim recorded under Section 164 of Cr.P.C., and the deposition of P.W.2 inspires confidence of this Court. To attract the offence under Section 7 of the POCSO Act, merely touching the breast, vulva or other parts of the body with sexual intent alone is sufficient.



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25. In this regard, it is apposite to cite the decision of the Hon'ble

Apex Court in ***ATTORNEY GENERAL FOR INDIA VS. SATISH AND ANOTHER*** [2022 (5) SCC 545: 2021 SCC ONLINE 1076] wherein it is held thus:

'...So far as Section 7 of the POCSO Act is concerned, the first part thereof exhausts a class of act of sexual assault using specific words, and the other part uses the general act beyond the class denoted by the specific words. In other words, whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, would be committing an offence of "sexual assault". Similarly, whoever does any other act with sexual intent which involves physical contact without penetration, would also be committing the offence of "sexual assault" under Section 7 of the POCSO Act. In view of the discussion made earlier, the prosecution was not required to prove a "skin to skin" contact for the purpose of proving the charge of sexual assault under Section 7 of the Act.'



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26.This Court is of the view that the evidence of the victim girl is believable and trustworthy and that the evidence of D.W.1 to D.W.5 are not sufficient to rebut the presumptions under Sections 29 and 30 of the POCSO Act. Hence, this Court holds that the evidence of D.W.1 to D.W.5 did not satisfactorily rebut the presumptions.

Conclusion

27.In view of the above discussion and the authority cited, this Court is of the view that the Trial Court after considering the evidence and materials on record, has rightly concluded that prosecution proved the offence under Section 7 read with Section 9(m) read with Section 10 of POCSO Act beyond reasonable doubt. The point that arose for consideration in this appeal is answered accordingly against the accused and in favour of the prosecution.

28.Resultantly, this Criminal Appeal is dismissed. The

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conviction and sentence imposed by the learned Sessions Judge, Mahalir Neethimandram, (Mahila Court) Coimbatore, in Special C.C.No.58 of 2014 dated October 22nd, 2016 is hereby confirmed. Thirty days time counting from today is granted to the accused for surrendering before the Trial Court. If not surrendered within thirty days from today, the Trial Court is directed to take necessary steps to secure the accused and commit him to the prison to undergo the remaining period of sentence.

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Index : Yes
Internet : Yes
Neutral Citation : Yes
Speaking Order
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To

1.The Sessions Judge
Magalir Neethimandram
(Mahila Court), Coimbatore.

2.Inspector of Police
All Women Police Station (West), Coimbatore.

3.The Public Prosecutor
High Court of Madras.

R.SAKTHIVEL, J.

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PRE-DELIVERY JUDGMENT MADE IN
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