



Crl.A.No.384 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	19.06.2024
Pronounced on	02.08.2024

CORAM :

THE HONOURABLE MR. JUSTICE M.S. RAMESH
AND
THE HONOURABLE MR. JUSTICE SUNDER MOHAN

Crl.A.No.384 of 2019

Anandan @ Manavari Anandan

...Appellant

Vs.

State rep. by
The Inspector of Police,
All Women Police Station,
Uthukottai, Tiruvallur District.

...Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code to set aside the conviction and sentence imposed on the Appellant by the Magalir Neethimandram (Fast Track Mahila Court), Tiruvallur dated 25.02.2019 made in Special Sessions Case No.17 of 2017 and acquit the appellant herein.

For Appellant : Mr.S.Manoharan

For Respondent : Mr.E.Raj Thilak,
Additional Public Prosecutor

JUDGMENT



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M.S.RAMESH,J.

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The appellant herein has been convicted and sentenced to the following imprisonment, through the judgment of the learned Sessions Judge, Magalir Neethimandram Tiruvallur, dated 25.02.2019, passed in Special Sessions Case No.17/2017:-

“The accused is guilty of the offences punishable u/s 5(m) r/w 6 of Protection of Children from Sexual Offences Act, 2012 and Section 506(i) of IPC. This Court convicted the accused u/s 5(m) r/w 6 of Protection of Children from Sexual Offences Act, 2012 and sentenced him to undergo LIFE imprisonment and also imposed a fine of Rs.10,000/- in default sentenced to undergo six month rigorous imprisonment and the accused is convicted u/s 506(i) of IPC and sentenced him to undergo one year rigorous imprisonment.

The sentences imposed u/s 5(m) r/w 6 of POCSO Act 2012 and u/s 506(i) of IPC shall run concurrently. The period of detention already undergone if any is ordered to be set off u/s 428 of Cr.P.C.”



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2. The aforesaid judgment is under challenge in the present appeal.

For the sake of convenience, the parties to the appeal are addressed according to the rank in the trial Court.

3. The case of the prosecution is that the victim girl was born on 21.09.2008 and was aged about 9 years at the time of occurrence, when she was studying 4th Standard at Panchayat Union Primary School, Ellapuram. On 12.04.2017, when the victim's mother was combing her daughter's hair, she discovered some nail marks behind the right ear of the victim girl. When questioned, the child narrated that on 10.04.2017 at about 08.30 A.M., after her mother had gone to work at Ambattur and when she was alone at her home, the accused carried the victim girl to the bedroom of the house and put her on a cot and thereafter had pressed his penis on her vagina. When the victim girl started crying, the accused threatened her that he will kill her if she discloses the incident to her mother. The victim's mother had then given a written complaint to the Inspector of Police, All Women Police Station, Uthukottai on 12.04.2017 at 09.30 P.M., which came to be registered in FIR.No.02/2017, dated 12.04.2017 against the accused for the offences under Section 376(1)



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IPC, Section 6 read with Section 5(m) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act') and Section 506(i) of Indian Penal Code (IPC). On completion of the investigation, a final report was laid for the like offences.

4. Before the trial Court, the incriminating circumstances in the charges framed against the accused were read over, to which he had pleaded that he was “not guilty”. In order to prove the charges against the accused, the prosecution had examined 15 witnesses P.W.1 to P.W.15 and marked 10 documents Exs.P.1 to P.10. On the side of the defence, no oral or documentary documents were let in.

5.1. The evidences let in by the prosecution before the trial Court are as follows:-

5.2. P.W.1, namely Nirmala, who is the mother of the victim girl, had narrated the incident that was informed to her by her daughter. She had then given a written complaint (Ex.P.1) with the help of her neighbors before the Police.

5.3. P.W.2 is the victim girl, who in her evidence has stated that she



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was studying 5th Standard. On the date of the incident, after her mother had gone to work, the accused had come inside the house and lifted her and after putting her on the bed, he had removed her panties and kept his penis on her vagina and pressed it. When she cried in pain, the accused had threatened her that if she discloses the incident to anybody, he would kill her and then left the house. Thereafter, she had locked her house and went to the school crying. She further states that she returned home in the evening and did not disclose about the incident to anybody and started to play. On the next day, when her mother enquired about the scratch marks behind her right ear while she was combing her daughter's hair, the victim girl narrated the sexual assault by the accused. Her mother had then informed the neighbors. It is her further submission that her mother had took the help of someone and recorded a complaint in the Police Station. Thereafter, she states that she was taken to the hospital, as well as before a Judge at Tiruvallur, who enquired her. The statement that she had given before the Judge under Section 164 of the Criminal Procedure Code (hereinafter referred to as 'Cr.P.C.') was marked as Ex.P.2. When the curtains in the in-camera proceedings were partially lifted, she had identified that it was the accused who assaulted her earlier.



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5.4. P.W.3, P.W.4 and P.W.5 are the close relatives of P.W.1, who are hearsay witnesses to the incident.

5.5. P.W.6, namely Nagaraj, and P.W.7, namely Suresh, were the witnesses to the observation mahazar and the signatures therein were marked as Ex.P.3 and the rough sketch was marked as Ex.P.4.

5.6. The accused was arrested in the presence of Balaji (P.W.8) and Prakash (P.W.9), who were standing near Thamaraipakkam Cross Road for their personal work.

5.7. P.W.10 is the Headmistress of the School in which the victim girl was studying and the bonafide certificate, evidencing her Date of Birth as 21.06.2008, was marked as Ex.P.5.

5.8. P.W.11, namely Arumugam, is the Head Constable, who took the accused to General Hospital for conducting potency test and the doctor, who had issued the accident register copy of the accused (Ex.P.8) and the potency certificate (Ex.P.9), holding that there was no evidence against the accused to be impotent, was examined as P.W.13.

5.9. P.W.12 is the doctor, who had issued the accident register of the victim girl (Ex.P.6) and after examining her, had given the sexual offence certificate (Ex.P.7). According to P.W.12, the victim girl had no



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injuries on her body and that there was no trace of any sexual assault on her body.

5.10. P.W.14, namely Shanthi, is the Head Constable, who had taken the victim girl to P.W.12.

5.11. P.W.15 is the Investigating Officer and the FIR (Ex.P.10) registered in this case was marked through her. According to P.W.15, on registration of the FIR, she had examined several witnesses and had arrested the accused on 13.04.2017 at 11.30 A.M. Thereafter, she had obtained the confession statement of the accused and took steps to remand him. She had then examined the other witnesses, including the Headmistress of the School and the doctor, who had examined the victim girl and recorded their statements. She had then sent the accused for medical checkup on 20.04.2017 along with the Head Constable. On the same day, she had also produced the victim girl before the Judicial Magistrate and recorded her statement under Section 164 Cr.P.C. On completion of the investigation, she had filed the final report.

6. The learned counsel appearing on behalf of the accused submitted that apart from the evidence of P.W.2, there are no other



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evidence connecting the accused to the crime. He submitted that while P.W.1 is the mother of P.W.2, P.W.3, P.W.4 and P.W.5 are her close relatives and all of them are hearsay witnesses and hence, much credibility cannot be given to their testimonies. He also submitted that from the evidence of the doctor (P.W.12), it is established that there was no sign of any sexual assault and therefore, in the absence of any other material to corroborate the version of P.W.2, who has also made contradictory statements in her testimony and her version to P.W.1, as well as her statement under 164 Cr.P.C. He further submitted that there was a dispute touching upon the loan obtained by P.W.1 in her flower business, when the accused refused to stand as a surety for P.W.1 and therefore, with this grudge, a false case has been concocted.

7. Per contra, the learned Additional Public Prosecutor submitted that the victim, who was born on 21.06.2008, was aged about 9 years only at the time of occurrence. Even though there are minor discrepancies in her version to her mother and in the oral testimony, as well as in the Section 164 Cr.P.C. statement, the same would not totally discredit her testimony. He submitted that though the doctor (P.W.12), who had



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examined the victim, had certified that she was not subjected to sexual assault, the medical examination was after three days and therefore, no adverse conclusion could be arrived at based on the sexual offence certificate (Ex.P.7).

8. We have given careful consideration to the submissions made by the respective counsels.

9. P.W.2 was studying in 4th Standard at Panchayat Union Primary School, Ellapuram, She was born on 21.06.2008 and as per the evidence of P.W.10, who is the Headmistress of the School in which P.W.2 was studying, her Date of Birth is established through a bonafide certificate (Ex.P5). The defence has not cross examined P.W.10 to disprove the age of P.W.2. Thus, in our considered view, the prosecution has clearly established that as on 10.04.2017, P.W.2 was aged about 9 years and is a child within the definition under the POCSO Act.

10. The occurrence is said to have taken place on 10.04.2017 and P.W.2 had informed her mother P.W.1 about the incident on 12.04.2017.



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P.W.1 had given a complaint (Ex.P.1) to the Police on 12.04.2017 at 09.30 P.M., which was registered as FIR (Ex.P.10) in Crime No.2/2017 by P.W.15. The registered FIR was dispatched to the Judicial Magistrate on 13.04.2017 at 06.30 P.M. As per the version of P.W.2 to P.W.1, which was reproduced in the form of a complaint (Ex.P1), it is stated that on 10.04.2017 at 08.30 A.M., the accused had carried P.W.2 and put her on the bed and had pressed his penis on her vagina forcefully, owing to which P.W.2 started crying. The accused had threatened her not to disclose the incident to her mother, failing which he would kill her. In her oral testimony before the Trial Court, P.W.2 had stated that after her mother had left for work, the accused had lifted her and put her on the bed and kept his penis on her vagina and pressed it. When she had cried, the accused caused a threat to her. In the oral testimony of P.W.1, she claims that on 12.04.2017, P.W.2 had told her that on the day of incident, the accused had kept his penis on her vagina and pressed it. She then has stated that she inspected her vagina and found it to be swollen. In the statement made by P.W.2 under Section 164 Cr.P.C., P.W.2 had stated that the accused had kept and took away his penis on her vagina and that nothing else happened on the morning of 12.04.2017. P.W.12 is the



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doctor, who had issued the accident register (Ex.P.6). According to her statement, when she had examined P.W.2 on 13.04.2017 at 11.15 A.M., her medical condition was normal and that there was no injury on her lips, chest portion, inner thighs or her vagina. She also had issued the accident register (Ex.P.7), certifying that there was no trace of any sexual assault.

11. From the aforesaid discussion of evidence, it would be clear that the evidence of the doctor, who had made entries in the accident register (Ex.P6) would suggest that there was no evidence of sexual offence on the victim. The doctor had further noted that there were no injuries in the lips, both mammary area, medial side of the thigh and there were no injuries in any other parts of the body. The doctor had noted a minimal abrasion over the right external ear. The injury is said to have been caused by 'sexual assault by a known person'. The earliest version which came two days after the occurrence, only suggests that there was a sexual assault and there were no information relating to penetrative sexual assault or evidence suggesting any sexual offence.



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12. Section 3 of the POCSO Act *inter alia* provides that the offence of penetrative sexual assault would be said to have been committed after a person penetrates his penis, to any extent, into the vagina of a child.

13. In the case of ***State of U.P. Vs. Babul Nath*** reported in (1994) 6 SCC 29, the Hon'ble Supreme Court, while interpreting the term 'penetration', had held that in order to constitute the offence of rape, it is not at all necessary that there should be complete penetration of the male organ and even a partial or slightest penetration of the male organ within the *labia, majora or the vulva or pudenda* with or without any emission of semen, would amount to penetration.

14. We also find from the evidence of P.W.2 that though she originally has stated that after the accused has committed sexual assault on her and left, she had locked the house and went to school and she was normal till 12.04.2017, when she narrated the incident to her mother. However, in her cross examination, she has stated that after the incident on 10.04.2017, she did not go to school at all. She has also stated in her testimony before the trial Court that the accused is already known to her



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and whenever he passes by the street of her house and finds the children playing there, he used to affectionately caress all the children and that on 10.04.2017 also, the accused affectionately touched her ears and left from there. Though such a statement casts a doubt as to whether the incident could have occurred in the manner alleged by the prosecution, we are of the view that a sexual assault committed by the appellant, has been established by the prosecution.

15. The Hon'ble Supreme Court has time and again dealt with the reliability on the testimony of a child witness and in several cases, including the case in ***Panchhi Vs. State of U.P.*** reported in (1998) 7 SCC 177, had held that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell her and thus, a child witness is an easy prey to tutoring. It was further observed therein that the evidence of a child witness must find adequate corroboration before it is relied upon.

16. Thus, from the oral evidences of P.W.1 and P.W.2 and from the medical evidence of P.W.2, what could be safely inferred is that the



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accused had indeed committed sexual assault on the child, but the assault cannot be termed to be as 'penetrative sexual assault', as defined under Section 3 of the POCSO Act.

17. It could also be seen that the charge against the accused for the offence under Section 5(m) read with Section 6 of the POCSO Act was only based on the evidences of P.W.2 and P.W.1, along with the medical evidence of P.W.12. When there was no iota of allegation that the accused had committed the act of penetration even to the smallest extent, we are unable to endorse the views of the trial Court that the accused had committed the offence of penetrative sexual assault, punishable under Section 6 of the Act. On the other hand, when the evidences otherwise go to show that there was an act of sexual assault, since the accused had touched his penis on the vagina of P.W.2, the offence under Section 7 of the POCSO Act would be attracted. When admittedly P.W.2 was less than 12 years and the accused has committed a sexual assault on her, the same would amount to an aggravated sexual assault, punishable under Section 9(m) of the Act.



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18. We are of the view that for commission of such an offence, the accused could be punished and sentenced to undergo a period of five years imprisonment under Section 10 of the Act.

19. Insofar as the offence under Section 506(i) IPC, for which the accused was found guilty and sentenced to undergo one year rigorous imprisonment, is concerned, it is the consistent statement of P.W2 that at the time of incident, when she had cried, the accused caused a death threat to her, if she discloses about the incident to her mother. P.W.2 had also informed her mother about the threat caused to her by the accused. P.W.1, in turn, had recorded this part of the statement made to her by P.W.2 in her complaint (Ex.P.1), as well as in her oral testimony. The defence could not discredit this portion of the evidence let in against the accused. As such, we do not find any infirmity or illegality in the finding of the trial Court, holding the accused guilty for the offence under Section 506(i) IPC and the consequential sentence imposed for the same.

20. For all the foregoing reasons, the judgment passed by the Magalir Neethimandram (Fast Track Mahila Court), Tiruvallur, dated



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25.02.2019 in Special Sessions Case No.17 of 2017, insofar as it has found the accused/ appellant guilty of having committed the offence under Section 5(m) read with 6 of the POCSO Act, is set aside and the accused is acquitted from this offence. Consequently, this Court finds the accused/appellant guilty of having committed the offence under Section 9(m) read with Section 10 of the POCSO Act and accordingly, the accused is convicted and sentenced to undergo five years of rigorous imprisonment, together with fine of Rs.10,000/-, in default of which he shall undergo six months of further rigorous imprisonment. The conviction of the accused/appellant by the trial Court for the offence under Section 506(i) IPC stands upheld. The sentences imposed under Section 9(m) read with Section 10 of the POCSO Act, as well as for the offence under Section 506(i) IPC, shall run concurrently. The period of detention already undergone by the appellant is ordered to be set off under Section 428 Cr.P.C.

21. In the result, the Criminal Appeal stands partly allowed.

[M.S.R.,J.]

[S.M.,J.]



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Index: Yes

Neutral Citation: Yes

Speaking order

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To

1. Magalir Neethimandram
(Fast Track Mahila Court),
Tiruvallur
2. The Superintendent of Prisons,
Central Prison, Puzhal.
3. The Inspector of Police,
All Women Police Station,
Uthukottai, Tiruvallur District.
4. The Public Prosecutor,
High Court of Madras.



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M.S.RAMESH, J.
and
SUNDER MOHAN, J.

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Pre-delivery judgment made in
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