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Crl.A.No.11 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.12.2024

CORAM :

THE HON'BLE MR. JUSTICE SUNDER MOHAN

Crl.A.No.11 of 2023

Manikandan @ Sudukattan ... Appellant/Sole Accused

vs.

State represented by
Inspector of Police,
Karipatty Police Station,
Salem District.

(Crime No.77/2020) ... Respondent/Complainant

Criminal Appeal filed under Section 374 of Code of Criminal Procedure, 1973, to call for the entire records in connection with the Spl.S.C.No.77 of 2020 on the file of the learned Sessions Judge, POCSO Principal Special Court, Salem and set aside the Judgment dated 29.03.2022.

For Appellant : Mr.A.Thiyagarajan, Sr. Counsel
for Mr.K.M.Jaypal

For Respondent : Dr.C.E.Pratap
Government Advocate (Crl. Side)



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JUDGMENT

This Criminal Appeal has been filed by the sole accused challenging the conviction and sentence imposed upon him vide judgment dated 29.03.2022 in Spl.S.C.No.77 of 2020, on the file of the learned Sessions Judge, POCSO Principal Special Court, Salem.

2(i) It is the case of the prosecution that the appellant and the victim belong to the same village; that the family of the appellant and the victim are known to each other; that on 22.02.2020, the victim aged about eight years, informed her mother [PW1] that she want to play with PW4, the brother-in-law of PW1; that on the same day at about 7.00 p.m., the appellant took the victim to a nearby field and removed the dress of the victim and committed penetrative sexual assault on the victim; that when the victim shouted, the appellant fled from the place; that the victim came home and informed about the occurrence to PW1 and on the complaint of PW1, a case was registered against the appellant for the offence under Section 3 r/w 4 of the POCSO Act, in Cr.No.77 of 2020.



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(ii) The investigation was conducted by PW13 and a final report was filed against the appellant for the offence under Section 5(m) r/w 6 of the POCSO Act before the learned Sessions Judge, POCSO Principal Special Court, Salem, which was taken on file as Special S.C.No.77 of 2020.

(iii) On the appearance of the accused, the provisions of Section 207 Cr.P.C., were complied with and the trial Court framed charges against the accused, and when questioned, the accused pleaded 'not guilty'.

(iv) To prove the case, the prosecution examined 13 witnesses as P.W.1 to P.W.13, marked 27 documents as Exs.P1 to P27 and marked three material objects as M.O.1 to M.O.3. When the accused was questioned, u/s.313 Cr.P.C., on the incriminating circumstances appearing against him, he denied the same. On the side of defence, no oral or documentary evidence was let in.

(v) On appreciation of oral and documentary evidence, the trial Court



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found that the prosecution had established its case beyond reasonable doubt and held the appellant/accused guilty of offences under Sections 363 and 366 of the IPC and 5(m) r/w 6 of the POCSO Act and sentenced him as follows:

<i>Offence under Section</i>	<i>Sentence imposed</i>
363 IPC	To undergo rigorous imprisonment for three years and to pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for three months.
366 IPC	To undergo rigorous imprisonment for three years and to pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for three months.
5(m) r/w 6 POCSO Act	To undergo rigorous imprisonment for twenty years and to pay a fine of Rs.30,000/-, in default to undergo simple imprisonment for six months.
The sentences were ordered to run concurrently.	

Challenging the above conviction and sentence, the accused has filed the instant appeal.

3. Heard, Mr.A.Thiyagarajan, learned senior counsel appearing for the appellant/Accused, and Dr.C.E.Pratap, learned Government Advocate (Crl. Side), appearing for the respondent/State.

4. Mr.A.Thiyagarajan, the learned Senior counsel appearing for the



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appellant would submit that the conviction is based on the sole testimony of the victim; that PW3, the father of the victim had deposed that the case was instituted falsely against the appellant; that PW2, the victim had admitted that there were disputes between the two families prior to the occurrence; that all the witnesses turned hostile, except PW1 and PW2; that the appellant has been falsely implicated in the above case; and that in the absence of any corroboration to the evidence of PW2, it would be highly unsafe to convict the appellant for the offence under Section 5(m) r/w 6 of the POCSO Act and prayed for acquittal.

5. Learned Government Advocate (Crl. Side) *per contra* submitted that even though the other witnesses had turned hostile, the evidence of PW1 and PW2, is corroborated by the evidence of the Doctor [PW11], who had given the report [Ex.P14] and had noticed a bleeding injury in the private part of the victim; and that there is no reason to disbelieve the evidence of the victim and prayed for dismissal of the appeal.

6. I have carefully considered the rival submissions and perused all



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the relevant materials available on record.

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7. As stated earlier, the prosecution had examined thirteen witnesses to prove the case. PW1, is the mother of the victim; PW2 is the victim; PW3, is the father of the victim; PW4 is a relative of the victim, who is said to have gone to the police station along with the victim turned hostile; PW5, is another close relative of PW3, who also turned hostile; PW6 is the observation mahazar witness, who turned hostile; PW7 is the witness to the confession of the accused, who turned hostile; PW8 is the doctor, who examined the accused and issued reports [Ex.P7 and Ex.P8]; PW9 is the Headmaster of the school in which the victim studied and had issued the certificate [Ex.P10], to prove the date of birth of the victim; PW10 is the seizure mahazar witness and turned hostile; PW11 is the doctor, who had examined the victim and issued reports [Ex.P14 to Ex.P17]; PW12 is the Sub Inspector of Police, who registered the FIR; and PW13, is the investigating officer, who filed the final report.

8. From the above description, it would be clear that the prosecution rests on the evidence of PW1, PW2 and the evidence of the doctor [PW11]. The earliest version of the victim to the doctor, is found in Ex.P14, which



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reads as follows:

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“Recorded as said by victim in her own words. She was playing in the farm of the father's brother where three persons were repairing bore, the person name Manigandan took her alone and removed her dress and tried to have sexual contact with her, as she shouted that person left her and she came back home”

The doctor [PW11] had deposed that the above facts have been recorded by her, as stated by the victim. Thus, the first version of the victim is that there was an attempt to have sexual contact. The victim nowhere in her deposition has stated that the appellant had committed penetrative sexual assault by sexual intercourse.

9. The father of the victim [PW3] who was treated hostile had deposed as follows:

“...ஆஜர் எதரிமீது வீண்பழி போட்டு வழக்கு
போட்டுள்ளார்கள். எனக்கு வேறு எதுவும் தெரியாது...”

Though PW3 had deposed that a false case has been filed against this accused, this Court cannot ignore completely or disbelieve the evidence of PW2, which is corroborated by the evidence of the Doctor, PW11.



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10. PW1 is the mother of the victim and is a hearsay witness. She spoke about the complaint of the victim to her in the evening of 22.12.2020. She would also admit that she did not examine the private part of the victim.

11. Be that as it may. In the light of the evidence of PW3, the father of the victim that it is a false case against the accused and the evidence of PW1 that she did not examine the private part of the victim and in view of the contradictions in the evidence of PW2, the victim as regards the exact sexual assault committed by the appellant, the evidence of the Doctor [PW11] who examined the victim would assume significance.

12. The Doctor [PW11], in her final opinion [Ex.P17] had observed that Spermatozoa was not detected in the slide and that the possibility of sexual contact could not be ruled out. The Doctor had also referred to only a sexual contact and not given any definite opinion about the possibility of sexual intercourse. That apart, the doctor, had observed as follows:

“No local injuries seen.



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No injuries / nail markings / bite markings

Vulva, Vagina- Normal

Hymen not intact

Fresh mild bleed + minimal seen near hymen

The doctor had also deposed in the examination that the hymen can be ruptured for various reasons. The doctor however, had stated about a minor bleeding injury in the private part. The relevant portion reads as follows:

“....சிறுமியின் உடல் பகுதிகளில் காயங்களோ, கடித்த மற்றும் நகக்கீறல் காயங்கள் ஏதும் இல்லை, பாலுறுப்பில் சிறிய அளவிலான ரத்த ஒழுகு காணப்பட்டது. ஆனால் பெருமளவில் ரத்த ஒழுகு இல்லை....”

13. From the above evidence of the doctor and the earliest version of the victim, that there was only an attempt to have sexual contact, it would be highly unsafe to convict the appellant for the offence of penetrative sexual assault under Section 5(m) r/w 6 of the POCSO Act. However, the evidence of the victim to the extent that there was a sexual assault committed by the appellant can be accepted and no infirmity has been pointed out by the learned counsel for the appellant with regard to the evidence of PW1 on this aspect. Therefore, this Court is of the view that the prosecution had established the offence of aggravated sexual assault as defined under



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Section 9(m) punishable under Section 10 of the POCSO Act.

14. Considering the nature of the evidence adduced by the prosecution and the age of the appellant, this Court is of the view that it would subserve the interest of justice if the appellant is sentenced to rigorous imprisonment of five years, for the aforesaid offence. Accordingly, it is ordered as follows:

(i) The conviction and sentence imposed on the appellant for the offence under Section 5(m) r/w 6 of the POCSO Act, is set aside and the appellant is convicted for the offence defined under Section 9(m) punishable under Section 10 of the POCSO Act and sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.15,000/- in default to undergo simple imprisonment for three months;

(ii). The conviction and sentences imposed by the trial Court for the offence under Sections 363 and 366 of the IPC, are confirmed;



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(iii) The fine amount, if any paid, shall be adjusted towards the fine amount now imposed by this Court;

(iv) The sentences are directed to run concurrently; and

(v) The period of sentence already undergone by the petitioner is directed to be set off under Section 428 Cr.P.C.

15. With the above modification, the Criminal Appeal stands partly allowed.

17.12.2024

Index : yes/no
Neutral citation : yes/no
Speaking/Non-speaking order
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SUNDER MOHAN,J.

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Copy to:

- 1.The Sessions Judge,
POCSO Principal Special Court, Salem
- 2.The Inspector of Police,
Karipatty Police Station,
Salem District.
3. The Superintendent of Prisons,
Central Prison, Salem.
- 4.The Public Prosecutor,
High Court, Madras.

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