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Cr1.A(MD)No.31 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserved	29/10/2024
Date of Pronounced	28/11/2024

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THE HONOURABLE MR. JUSTICE G.ILANGOVAN

Cr1.A(MD)No.31 of 2020

Kamu : Appellant/Sole Accused

Vs.

State Represented by
Inspector of Police,
Thenkarai Police Station,
Theni District.
(Crime No.311 of 2017)

: Respondent/Complainant

Prayer:- This Criminal Appeal is filed under Section 374 of Criminal Procedure Code, to call for the records and to set aside the judgment passed by the Sessions Judge, Mahila Court, Theni, in Special SC No.39 of 2017, dated 27/11/2019 and acquit the appellant herein.

For Appellant : Mr.K.P.S.Palanivelrajan
Senior Counsel of
for M/s.K.P.S.Law Associates

For Respondent : Mr.M.Sakthi Kumar
Government Advocate

J U D G M E N T

This Criminal Appeal is filed against the judgment passed by the Sessions Judge, Mahila Court, Theni, in Special SC No.39 of 2017, dated 27/11/2019 and acquit the appellant herein.



2.The case of the prosecution in brief:-

The victim girl is the daughter of the complainant and she was aged about 15 years. On 26/05/2017 in the night at about 11.00 pm, the accused trespassed into the house, when the victim girl mother was went out for natural calling, sat on her, tried to commit sexual assault. She was crying. On hearing the noise, the mother and the neighbours gathered, he ran away from that place. Upon the occurrence on the basis of the complaint given by the de-facto complainant, a case in Crime No.311 of 2017 was registered by the respondent for the offences under section 448 IPC and sections 7 and 8 of the POCSO Act against the accused person. After completing the investigation, filed a final report and it was taken cognizance in Special Sessions Case No.39 of 2017 by the Sessions Judge, Fast Track Mahila Court, Theni. After completing 207 Cr.P.C proceedings, framed the charges for the offence punishable under sections 448 IPC and section 4 r/w 18 of POCSO Act 2012.

3.The following charge was framed against the accused persons:-

(i)On 26/05/2017 at about 11.00 in the night when the victim girl was alone in her house, the accused trespassed into the house



WEB COPY



CrI.A(MD)No.31 of 2020

and tried to commit the sexual assault and thereby the accused committed the offence punishable under section 448 of IPC; and

(ii) In the course of the above said occurrence, the accused tried to grab the hands of the victim girl and subjected to make sexual assault and thereby he has committed the offence punishable under section 4 r/w 18 of the POCSO Act.

4.To that, the accused pleaded not guilty and claimed to be tried.

5.On the side of the prosecution, 15 witnesses were examined and 9 documents marked. On the side of the accused, 2 witnesses were examined and no document was marked.

6.**PW1** is the mother of the victim girl. On hearing the noise of PW2, she returned back to the house. At that time, she found the accused sat on the victim girl. When she was made crying, the accused escaped from that place. After hearing the occurrence from PW2, she lodged a complaint under Ex.P1.



7.**PW14** was working as Sub Inspector of Police attached to Chinnamanur Police Station. On 27/05/2017 she received Ex.P1 complaint from PW1 and registered a case in Crime No.311 of 2017 for the offences under sections 7 and 8 of POCSO Act. She submitted the originals to the Court and copies to the higher authorities.

8.**PW15** was the Investigating Officer. She was working in Thenkarai Police Station on 27/05/2017, took up the investigation and recorded the statement of the witnesses, visited the place of occurrence, prepared rough sketch and parvai mahazar. On finding that the complaint is a true one, he arrested the accused at about 02.30 pm, subjected the accused and the victim girl for medical examination. Through proper source obtained the birth certificate of the victim girl to know the age, made a request for recording the statement of the victim girl under section 164 of Cr.P.C. After recording the statement of the the Medical Officer, who examined the accused and the victim girl, completed the investigation and filed the final report.

9.**PW3** is the neighbour. He heard the noise from the house of PW2. He went to that place. At that time, the accused ran away from that place.



10.**PW4** was the Judicial Magistrate working in Theni. He recorded the statement of the victim girl under section 164 Cr.P.C, on 12/06/2017 at the request made by the Investigating Officer.

11.**PW5** is the neighbour. According to him, he was stayed in the house at about 11.00 in the night. He heard the noise and found the accused grabbing the hands of PW2, on the next day the accused was arrested by the police.

12.**PW6** is another neighbour. She does not know the occurrence.

13.**PW7** was the Medical Officer working in the Government Hospital, Thenkarai and she gave her opinion on the questions raised by the Investigating Officer and examined the victim girl. On her examination, she found no injuries on the private parts of the victim girl. On the basis of the opinion given by the Radiologist, she opined that the victim girl was aged about 14 to 17.

14.**PW10** was the Medical Officer, who examined the accused on the request made by the Investigating Officer. On his examination, he found the accused is capable of performing sexual activities and found no external injuries on the private parts.



15.**PW11** was working as Headmaster of the Government Higher Secondary School, Periyakulam. On the request made by the Investigating Officer, he supplied the birth certificate of the victim girl under Ex.B5. According to him, as per the records available in the school, the date of birth of the victim girl is 21/06/2022.

16.**PW12** says that on the date of the occurrence according to him, he was staying in the house. At about 11.00 night he heard the noise and found the accused holding the hands of PW2 and on the next day, the accused was arrested by the police.

17.**PW13** is hearsay witness, but present in the place of occurrence when the Investigating Officer visited the place and prepared the rough sketch and observation mahazar. With that, the prosecution side evidence was closed.

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

19.At the conclusion of the trial, the trial court found the accused guilty, convicted and sentenced him to undergo **10 years Rigorous Imprisonment** and imposed a fine



Cr1.A(MD)No.31 of 2020

of Rs.10,000/- in default to undergo 2 years Rigorous Imprisonment for the offence under section 18 of POCSO Act and sentenced to undergo **one year of Rigorous Imprisonment** and imposed a fine of Rs.1,000/- in default to undergo 2 months Simple Imprisonment for the offence under section 448 of IPC and directed the sentences to run concurrently.

20. Against the judgment of conviction and sentence, this criminal appeal is preferred by the accused as appellant.

21. Heard both sides.

22. A preliminary ground was made by the learned Senior Counsel appearing for the appellant with regard to the age of the victim girl. According to him, when the age itself is not established by the prosecution beyond doubt, framing of charge under section 4 r/w 18 of the POCSO Act by the trial court and the conclusion reached are vitiated.

23. We will take up that issue first, before we go into the other aspects.

24. In fact, the trial court also framed this point as one of the issues. According to the trial court, the



Headmaster of the school where the victim girl studied was examined as PW11. She issued the birth extract under Ex.P5. Apart from that, the victim was subjected to medical examination to assess the age. She was examined by PW7. As per the opinion of PW7, the age of the victim is assessed between 14 and 17. According to the trial court, the victim was below 18 years at the time of the occurrence. Whether this finding is correct or not is to be considered first.

25. In ***P.Yuvaprakash Vs. State Rep. By Inspector of Police (2023 SCC OnLine SC 846***, the Hon'ble Supreme Court wherein has held that the school certificate of the victim girl is not the conclusive proof of the age. Para 13 of the judgment requires reproduction:-

"13.It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order to which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:-



WEB COPY

CrI.A(MD)No.31 of 2020



"(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available, and in the absence thereof:

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board."

26. So, according to the appellant, none of the above said conditions are satisfied here. So, the evidence of PW11 and the Medical Officer cannot be taken into account at all.

27. Ex.P5 reads that it is an educational certificate as per the records available in the school records. The date of birth is 02/06/2002. So, it appears that this information is furnished by PW11 on the basis of the entries made in the school records. It is not equivalent to the birth certificate. Whether the birth



certificate was produced at the time of the admission in the school and available with the school, there is no clear evidence by PW11. He simply stated that he did not peruse the birth certificate, but the date of birth information was given only based upon the entries made in the school records.

28.Now we will go to the evidence of the Medical Officer. PW7 is the Medical Officer. She has stated that as per the opinion of the Radiologist/Medico Legal test, she gave opinion that the victim age is between 14 and 17. So, it appears that PW10, based upon the ossification test, conducted by the medico legal test. The medical officer was not examined on the side of the prosecution. Absolutely, nothing is on record to discard the opinion of PW10. Even if we discard the evidence of PW11 with regard to the age, PW7's evidence on the basis of the ossification test cannot be disbelieved. The omission on the part of the Investigating Officer to collect either the birth certificate from the school or from the concerned authorities may not affect the prosecution case.

29.It is not the case of the prosecution that the birth certificate was not available with the concerned authorities. This contention on the part of the appellant herein is not well founded and the finding recorded by the



trial court that the age of the victim girl is between 14 and 17 requires no interference.

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30.Now having cleared the preliminary issue, now we will go further as to the next preliminary argument raised by the learned Senior Counsel appearing for the appellant.

31.According to him, the charge itself is not properly framed. He is referring the second charge, wherein it has been stated that the accused tried to grab the hands of the victim girl and subjected to make sexual assault. So, he is charged the offence under section 4 r/w 8 of the POCSO Act.

32.Perusal of the records shows that at the initial stage, on the basis of the complaint, section 7 of the POCSO Act is mentioned in the FIR. After the investigation, finding that section 7 of the Act is not attracted, so also 8, the final report was filed charge sheeting under section 4 r/w 18 of the POSCO Act and section 448 of IPC.

33.Now as per the final report, it has been stated on 26/05/2017 at about 11.00 pm in the night, the accused trespassed into the house of the victim girl, pulled her down and attempted to commit sexual assault.



WEB COPY



Crl.A(MD)No.31 of 2020

34. Section 4 of the Act reads as under:-

"4. Punishment for penetrative sexual assault.—3 [(1)] Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.

(3) The fine imposed under subsection (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."



35. So, this is the punishment section for the offence under section 3 of the POSCO Act.

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36. Section 18 of the POSCO Act reads as follows:-

"18. Punishment for attempt to commit an offence.—Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both."

37. So, the combined reading of sections 4 and 18 of the POSCO Act, as pointed by the learned Senior Counsel appearing for the appellant will not go together. If at all, section 3 r/w 8 of the Act will go together. So, the charge itself is not properly framed. But at the same time, as mentioned in the final report, whether the accused



attempted to commit the offence under section 3 of the POCSO Act must be addressed, since because section 3 and 4 r/w 18 of the Act are cognizable offences.

38.In this connection, we will go to section 222

Cr.P.C :-

"222. When offence proved included in offence charged. (1)When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2)When a person is charged with an offence and facts are proved which reduce it to minor offence, he may be convicted of the minor offence, although he is not charged with it.

(3)When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(4)Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."



39. In the light of the above said, improper framing of the charges by the trial court, whether caused any prejudice to the accused will be decided in the later portion of the judgment.

40. Now we will go to the main issue.

41. PW2 is the victim girl. In a cryptic manner, she has stated that on 26/05/2017 at about 11.00 pm, when her mother was away to bathroom, the accused pulled her down and sat on her and tried to commit rape. She raised noise. On hearing the noise, neighbours and her mother came to that place, she informed them about the occurrence.

42. PW1 the mother of the victim girl has stated that on hearing the noise of PW2, they went to the house and found the accused sat on the victim girl. When raised alarm, the accused ran away. PW2 informed about the occurrence. When she made enquiry with the accused about the occurrence, she was criminally intimidated.

43. PW3 is the neighbour. He corroborated PW1 and PW2 with respect to raising of noise. According to him, on hearing the noise, he went to that place and the neighbours gathered and the accused ran away from that place.



44. Another neighbour was examined as PW5 and he has also stated like that. So, the evidence of these persons corroborating each other with regard to the material particulars about the occurrence.

45. By pointing out these evidences, it is contended on the part of the prosecution that the guilt of the accused was proved beyond all reasonable doubt, that was confirmed by the judgment of the trial court.

46. Now we will go to the argument advanced by the appellant regarding the reliability of these witnesses.

47. The first contention is that the place of occurrence is not established by the prosecution. But reading of the evidence of PW1 and PW2 clearly indicates that the place of occurrence is, inside of the house of the victim girl. There is no infirmity in between the evidence of PW1 and PW2 on this aspect. He would submit that the evidence of PW1 is contradicting with the evidence of PW2 victim girl.

48. According to her, their house consist of three rooms. In the front side room, the victim girl was sleeping, her brother was sleeping in another room. When she returned to the house, the accused ran away from that



house. Further she says they did not witness the occurrence, except saying that the accused ran away from that place. The victim girl during the course of the cross examination has stated that before the occurrence, the accused used to tease her. On those occasions, she warned him. For about two times, the accused teased her. For the third time by standing in front of the house, he called her in singular, she immediately called her mother, later, the accused entered into the house and grabbed her hands. At that time, her brother and elder sister were sleeping in separate rooms. Reading of her evidence does indicate that the accused used to tease her repeatedly. On the particular date of occurrence, he was teasing. But the non-examination of PW2's sister and brother assumes importance and we will deal this aspect later.

49.PW3, as mentioned, is another neighbour. He was not the direct witness to the attempt of sexual assault. But from his evidence, it is clear that there was some issue on that date between PW2 and the accused. PW5, as mentioned above, is another neighbour. His evidence also does indicate the above said fact during the cross examination. PW5 is the relative of the accused. On the date of the occurrence, the mother of the accused tendered apologize for the occurrence, took the accused to her house, locked the house. This also corroborated the



evidence of the neighbours to show that some occurrence took place on the date.

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50.In this context, now we will go to the evidence of PW4, the Judicial Magistrate, who recorded the statement of the victim under section 164 of Cr.P.C. She would say that the victim has not stated anything about the attempt of sexual assault. Further admits that the victim girl has not stated anything about the accused sat on her when she was alone in the house.

51.Now we will go to Ex.P2. In Ex.P2, she has stated that on 26/05/2017 at about 11.00 pm, her elder sister Muthu Priya to for bathroom. She was following her, at that time, the accused closed her mouth, pushed her down, sat on her. She pushed him away and the mother enquired the accused about that. This contradiction was not elicited during the course of cross examination by the accused from the victim girl. But this contradiction was raised to the Investigating Officer, who recorded the statement of the victim girl. Ex.P2 may not be taken into account, since it is not substantial piece of evidence. But it is admitted that she is contradicting herself with regard to the place of occurrence.



52.Now we will go to Ex.P1 complaint in this context. In the complaint, PW1 has stated that on the particular date of occurrence, when the victim girl was alone in the house, the accused trespassed into the house, grabbed her hands to commit the sexual assault. The victim girl raises alarm, neighbours gathered, the accused ran away from that place. So, this is quite contra to the evidence before the court. This was elicited from the Investigating Officer. The Investigating Officer further admitted that during the course of investigation, nothing was found that the accused teased the victim girl twice. So, reading of the evidence of PW2 the victim girl and her statement under section 164 Cr.P.C, contra distinction of PW2 and her sister, the possibility of exaggerating the occurrence cannot be ruled out.

53.Going to the judgment of the trial court, it is taken into account the statement recorded under section 161(3) Cr.P.C by the Investigating Officer, tried to explain away the contradictions pointed out by the accused, relied upon the evidence of PW5 as to the conduct of the mother of the accused in taking him to the house and locked and pleaded apologize. But, as mentioned above, it does not indicate that the accused committed the attempt of sexual assault upon the victim girl.



54.No doubt that the belated attempt was made by the accused to project the motive over the draining of the gray water. But that was not suggested to PW1 at the time of cross examination. So, the belated attempt may not be taken into account. But, as mentioned above, the possibility or probability of exaggerating the occurrence enures to the benefit of the accused.

55.On that account, the judgment of conviction and sentence imposed by the trial court is liable to be set aside and accordingly, it is set aside.

56.In the result, this criminal appeal is **allowed**. The judgment of conviction and sentenced passed by the trial court are set aside and the accused is acquitted of the charges framed against him. Fine amount, if any paid shall be refunded to him. But this judgment will not affect if any compensation is already disbursed to the victim girl as ordered by the trial court. Since the benefit of doubt was extended to the accused, it does not amount to honourable acquittal.

28/11/2024

Index : Yes/No
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Cr1.A(MD)No.31 of 2020

To,

- 1.The Sessions Judge,
Mahila Court,
Theni.
- 2.The Inspector of Police,
Thenkarai Police Station,
Theni District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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Cr1.A(MD)No.31 of 2020

G. ILANGO VAN, J

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Cr1.A(MD)No.31 of 2020

28/11/2024