



WEB COPY



Crl.A.(MD).No.53 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 20.09.2024

CORAM:

THE HON'BLE MR JUSTICE G.ILANGO VAN

Crl.A.(MD).No.53 of 2022

Irudhayadasan

... Appellant/Sole Accused

Vs.

The Inspector of Police,
Kanniyakumari All Women Police Station,
Kanniyakumari District.
Crime No.1 of 2016

... Respondent/Complainant

Prayer: Criminal Appeal has been preferred under Section 374 Cr.P.C., to call for the records relating to Judgment dated 29.07.2019 made in Spl.S.C.No.6 of 2017 on the file of the Sessions Judge, (Fast Track Mahila Court), Kanniyakumari District at Nagercoil and set aside the same as illegal.

For Appellant : Mr.A.Robinson (Legal Aid Counsel)

For Respondent : Mr.Sakthi Kumar
Government Advocate (Crl. Side)

J U D G M E N T

This Criminal Appeal has been filed by the appellant against the judgment of conviction, dated 29.07.2019 made in Spl.S.C.No.6 of 2017 on the file of the Sessions Judge, (Fast Track Mahila Court), Kanniyakumari District at Nagercoil.



WEB COPY



Crl.A.(MD).No.53 of 2022

2.The case of the prosecution:-

On 02.01.2016 around 07.00 p.m., the accused, took the victim girl along with two other children, who are the victim's cousin brothers, promising them to buy sweets, took them to the shop and after getting the sweets and giving it to the children, he asked the victim girl's cousin brothers to play in beach at Keezha Manakudy, took the victim girl near the boat, which was stationed near old church. The accused took the victim girl behind the boat spread both his legs, removed the pant and underwear of the victim girl and made her to sit on his lap, inserted his male organ inside the female organ of the victim child. When she cried out of pain, he removed his male organ and again forcibly inserted his male organ inside the female organ and thereby committed penetrative sexual assault upon the victim girl. Based upon the above said occurrence and complaint, case was registered by the Inspector of Police, All Women Police Station, Kanniyakumari for the offences punishable under Sections 4, 5(m) & 5(n) r/w 6 of the POCSO Act. After completing the formalities of the investigation, final report was filed before the Special Court. Alteration report was also filed altering the section into Sections 5(m) and 5(n) r/w 6 of the POCSO Act. The same was taken cognizance in Special S.C.No.06 of 2017 and the following charges were framed by the learned Sessions Judge, Fast Track Mahila Court, Kanniyakumari at Nagercoil, against the accused.



WEB COPY

Crl.A.(MD).No.53 of 2022



3.Charge against the accused person:-

(i) The accused who is the grandfather of the victim girl, took her along with two other male children, who are her cousin brothers, to the beach area, on promising to get sweets, on 02.01.2016 at about 07.00 p.m. Where, he left the male children to play in the beach area and picked up the victim girl alone to behind of the stationed boat near the old church. Where he committed aggravated penetrative sexual assault upon the victim girl by inserting his male organ into the female organ of the victim girl, by removing her pant and underwear. Thereby, he committed offence under Section 5(n) r/w 6 of the POCSO Act.

(ii) By knowing that the victim girl is below 12 years, who is his own grandchild, he committed the above said sexual assault. Hence, he committed offence punishable under Section 5(m) r/w 6 of the POCSO Act.

The accused namely, the appellant herein denied the charges and claim to be tried.

4.In pursuance of the above said plea, the trial before the trial Court commenced and to prove the prosecution case, 16 witnesses have been examined on the side of the prosecution and 15 documents marked. No material objects were marked in this case. On the side of the accused



persons no witness was examined and no documents were marked.

WEB COPY

5.At the conclusion of the trial, the trial Court found guilty the accused. The accused was convicted by the trial Court for the offence punishable under Sections 5(m), 5(n) and 6 of the POCSO Act. He was sentenced to undergo 10 years rigorous imprisonment, imposed fine of Rs.25,000/- in default to undergo one year rigorous imprisonment for the offence under Section 5 (m) r/w 6 of the POCSO Act, also sentenced to undergo 10 years rigorous imprisonment and imposed fine of Rs.25,000/- in default to undergo one year rigorous imprisonment for the offence under 5(n) r/w 6 of the POCSO Act. The sentences were ordered to run concurrently and set off under Section 428 Cr.P.C. was ordered. The total fine amount is Rs.50,000/-.

6.Now against the conviction and sentence imposed upon the appellant/accused, he preferred this appeal.

7.The case of the prosecution as narrated through the evidence:

7.1.PW1 the defacto complainant lodged a complaint stating that the victim girl was aged about 8 years at the time of occurrence and was



studying 2nd standard. On 25.12.2016, a church festival was held. To participate in the Church festival, her relatives came to her house. On 02.01.2016, her mother went out for shopping and at that time, she left the victim girl with her sister-in-law. At about 08.30 p.m., she returned to the house. At that time, the victim girl informed her that she is suffering pain in her private parts. On further enquiry, she told that at about 07.00 p.m., the accused took her along with two children, promising to get sugar candy. They were taken by the accused to a nearby area, where a boat was kept standing. After removal of the dress, the accused committed penetrative sexual assault. The victim girl cried out of pain. That was heard by the neighbours and they gathered there. On seeing the neighbours the accused dressed the victim girl, brought her to the house and left there. On the basis of the above said complaint, case was registered.

7.2.The complaint was registered by the PW13, Jeyalakshmi, who was working as Sub Inspector of Police attached to All Women Police Station, Kanniyakumari. On 03.01.2016, she recorded the statement of the witnesses, visited the place of occurrence, prepared the observation mahazar and rough sketch in the presence of witnesses. The victim girl was sent to Medical Examination through proper escort namely PW6 on the same day.

7.3.She produced the victim girl before PW12. PW12 the Medical Officer attached to the Government Medical College Hospital,



Kanniyakumari. She examined the victim girl at about 8.30 p.m. on 03.01.2016. PW1 defacto complainant informed her about the occurrence. On her examination, the hymen was found torn and there was bleeding. It admits one finger. Vaginal swab was taken and sent for analysis.

7.4.After the above said process was over, PW15 made a request to the learned Judicial Magistrate, to record the statement of the victim girl under Section 164 of Cr.P.C. The above said request was received by PW10, Mary Anitha and she took the child to the learned Judicial Magistrate No.I, Nagercoil, for recording the statement.

7.5.After that she was transferred and further investigation was undertaken by PW16, the successor in office. She again visited the place of occurrence, enquired all the witnesses again, they repeated the very same statement given before her predecessor, she recorded the further statement of witnesses and made a request to subject the accused for medical examination.

7.6.The above said request was taken along with the accused by PW8 on 02.03.2016. She was accompanied by PW9. He was examined as PW11, the Medical Officer attached to the Kanniyakumari Medical College Hospital. After the examination of the accused, he gave an opinion that there is nothing to suggest that the accused was incapable to perform sexual activities.



WEB COPY

7.7. Later PW16, submitted all the material objects and vaginal swab taken from the victim girl to the laboratory for examination. He recorded the statement of remaining witnesses, the Medical Officers and submitted alteration report altering the sections into 5(m) & 5(n) r/w 6 of POCSO Act. After completing the investigation and official formalities, filed the final report, charge sheeting the accused for the offence punishable under Sections 5(m) & 5(n) r/w 6 of POCSO Act.

7.8. PW2, the relative of PW1, she corroborated the evidence of PW1 with material particulars with regard to the occurrence and the pain, disclosed by the victim girl.

7.9. PW3 was present when the investigating officer visited the place of occurrence and prepared the rough sketch and mahazar. PW4 is the victim girl, she has narrated the events that took place and stated that she was subjected to the penetrative sexual assault as stated in the complaint.

7.10. PW5 is the brother of PW1 and he has also corroborated PW1 with regard to the material particulars and subsequent events.

7.11. PW14 is the Scientific Assistant attached to Regional Forensic Laboratory, Ramanathapuram he examined the material objects and found that no sperm was found in the objects.



8. After examination of all the witnesses are over, the accused was subjected to Section 313 Cr.P.C proceedings. He denied the facts narrated by the prosecution witnesses. Even though he was granted time to examine defence witnesses, none was examined on his side and no document was marked.

9. At the conclusion of the trial process, the trial Court found the accused guilty for the offences under Sections 5(m) and 5(n) r/w 6 of the POCSO Act, convicted and sentenced him to undergo 10 years rigorous imprisonment for each section and imposed fine of Rs.25,000/- for each section. Total fine imposed was Rs.50,000/-.

10. Against the judgment of conviction and sentence the accused is before this Court by way of this appeal.

11. Heard both sides.

12. Before we entering into the issue, the background facts may be kept in mind. The accused is the father-in-law of PW1 namely the paternal grandfather of the victim girl. On the date of occurrence, the accused namely the appellant herein came to PW1's house for attending the church



festival. PW1's husband is working in abroad. Apart from that accused, on that date, PW2 the sister of PW1 was also present in that place. By leaving the child in the custody of the sister-in-law of PW1, PW1 and PW2 went for shopping. In the meantime, it appears the occurrence stated to have taken place.

13.Now we will straight away go to the evidence of the victim girl. Because PW1 is only a hearsay witness. Victim was aged about only 11 years at the time of evidence. A preliminary enquiry was made by the Special Judge with the victim girl after satisfying that the victim was capable of understanding the worldly affairs and competent to give evidence, she was subjected to examination. In the course of examination, she has stated that on 02.01.2016, the appellant, PW2, the cousin brothers were came to the house. The accused by promising to get sugar candy, taken all the children to beach area. In the beach area, the victim girl alone was taken to a near by place, where a boat was available and in that place he removed the pant and underwear of the victim girl and make her to sit on his lap and he inserted his male organ into the female organ of the victim girl. At that time, she raised cry, because of the pain. Then he removed the organ and again he inserted his male organ into her female organ. At that time two persons came on hearing the noise and assaulted the accused. After that she



14. The fact that she was subjected to penetrative sexual assault is confirmed by the Medical Officer, who examined the victim girl and as stated in the preamble portion, PW12 has stated that there was bleeding in the private part. The hymen was not intact and it was found teared. So this itself *prima facie* evidenced that she was subjected to penetrative sexual assault.

<https://www.mhc.tn.gov.in/judis>



WEB COPY



“3.Penetrative sexual assault.—A person is said to commit “penetrative sexual assault” if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

16. When this *prima facie* factual ground namely the foundation facts are made out by the prosecution, presumption under Section 29 of the Act comes into operation and section 30 also. So it is the duty of the defence to rebut the above said presumption. In the light of the above said, now we will go to the arguments advanced by the appellant.

17. The learned counsel for the appellant would submit that the



prosecution case is not consistent. Different versions are stated differently at different times. One in the FIR, one before the Doctor and one by PW1 and another by the victim girl with regard to the very same occurrence. It is further submitted that section 6 of the POCSO act is not attracted to the allegations. According to him, only Section 10 of the Act will be attracted, he is in custody, ever since from the date of judgment and before that he was arrested on 03.01.2016 and released on bail on 04.03.2016.

18.Per contra, the learned Government Advocate (Crl. Side) would submit that the definition clause under Section 5(n) of the Act, squarely attracts and there is clear evidence on the side of the victim girl, which is supported by the medical evidence, which *prima facie* indicates that she was subjected to penetrative sexual assault. According to him, no indulgence need to be shown.

19.Now we will go to the contradictions. As mentioned above, there is some contradictions the manner in which the penetrative sexual assault was made. It has been established by the prosecution beyond reasonable doubt that the victim was subjected to penetrative sexual assault, due to the support of the medical examination, I find no iota of doubt in this regard. The child is about 8 years old at the time of occurrence. Because of



the penetrative sexual assault, she was found with bleeding. Nothing more is required to say that it is nothing but, penetrative sexual assault as defined in Section 3 of the POCSO Act. The contention that only Section 10 of the POCSO Act is attracted to the factual circumstances cannot be accepted.

20.As mentioned above, the victim was the grandchild of the appellant. As rightly pointed out by the learned Additional Public Prosecutor, Section 5(n) of the Act is clearly attracted. So also Section 6 of the Act be attracted and finding of the trial Court on that aspect requires no interference at all. Apart from that the trial Court also convicted the appellant under Section 5(m) r/w Section 6 also. 5(m) of the POCSO Act reads as under.

“5. Aggravated penetrative sexual assault.—

.....

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child;”

21.So it was rightly held so. But, the arguments advanced by the

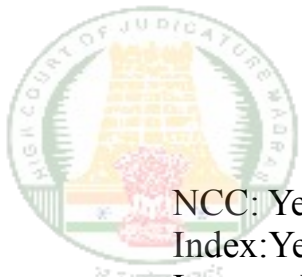


appellant are not convincing they are not sufficient enough to rebut the presumption under Section 29 of the Act. The contention that the sister-in-law of the PW1, in whose custody the child was left, the two persons who came to the place of occurrence on hearing the crying noise of the victim girl were not examined are not sufficient enough to discard the evidence of the victim girl. Non examination those three persons has no bearing upon the ultimate conclusion reached by the trial Court.

22.Considering the above said factual grounds and the evidence available on record, I find that the trial Court has correctly come to the conclusion, which is legal and proper, which requires no interference at all. On the above said grounds, the conviction and sentence requires no interference they are confirmed.

23.In the result, the judgment of conviction and sentence, dated 29.07.2019 passed in Spl.S.C.No.6 of 2017 on the file of the Sessions Judge, (Fast Track Mahila Court), Kanniyakumari District at Nagercoil, against this appellant are hereby confirmed. This criminal appeal stands dismissed.

20.09.2024



Crl.A.(MD).No.53 of 2022

NCC: Yes/No
Index: Yes/No
Internet: Yes/No
TM

To

- 1.The Sessions Judge, (Fast Track Mahila Court), Kanniyakumari District at Nagercoil.
- 2.The Inspector of Police,
Kanniyakumari All Women Police Station,
Kanniyakumari District.
Crime No.1 of 2016
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.



WEB COPY



Crl.A.(MD).No.53 of 2022

G.ILANGOVA, J

TM

Crl.A.(MD).No.53 of 2022

20.09.2024