



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:29.02.2024

CORAM:

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
and
THE HONOURABLE MR.JUSTICE C.KUMARAPPAN**

CRL.A(MD) No.128 of 2020

A.Jeganathan

... Appellant/sole accused

-VS-

The State of Tamil Nadu,
represented by
The Inspector of Police,
All Women Police Station,
Palayamkottai,
Tirunelveli District.
(Crime No.64 of 2017

... Respondent

PRAYER : Criminal Appeal filed under Section 374 of Criminal Procedure Code praying this Court to call for the records of the Judgment made in Special S.C.No.55 of 2017, dated 19.08.2019, on the file of the District Sessions Judge(Mahila Court),Tirunelveli in Crime NO.04 of 2017, on the file of the respondent and to set aside the same and to acquit the appellant/sole accused from the charges.

For Appellant : Mr.I.Pinaygash



WEB COPY



For Respondent : Mr.E.Antony Sahaya Prabahar,
Addl.Public Prosecutor

JUDGMENT

DR.G.JAYACHANDRAN,J.
AND
C.KUMARAPPAN,J.

This Criminal Appeal is filed against the order of the trial Court holding the appellant/accused is guilty of offence under Section 5 of the POCSO Act and punished him under Section 6 of the said Act, by ordering life imprisonment with a fine of Rs.1 lakh and in default, to undergo one year simple imprisonment. Besides, a compensation of Rs.2 lakhs was awarded to the victim minor girl. Being aggrieved by the above said order, the appellant/accused has filed the present Criminal Appeal.

2.The learned counsel for the appellant/accused argued that the complaint is a motivated one engineered by the wife and brothers of the appellant to arm twist him and to settle their property dispute. The learned counsel would further contended that the wife of the appellant has used her own daughters to settle her scores. It was also contended that the trial Court failed to appreciate the evidence in



WEB COPY

a proper perspective, and that though there is no evidence to attract the ingredient of Section 5 of POCSO Act(herein after called as 'Act'), the appellant has been convicted for the offence under Section 5 of the Act and sentenced him under Section 6 of the Act to undergo life imprisonment.

3.The learned counsel for the appellant drew the attention of this Court to the testimony of P.W.2, medical evidence and the testimony of the Doctor, who issued the Certificate of examination for sexual offence. Referring to Wound Certificate, Ex.P12, the learned counsel submitted that in the absence of evidence of any penetrative sexual assault, the trial Court ought to have acquitted the appellant, since the charges framed against him and the substance of the charges has not been proved through reliable evidence.

4.Per contra, the learned Additional Public Prosecutor appearing for the respondent/State submitted that it is a case of penetrative sexual assault by the father against his own daughter, aged 12 years and nine months at the relevant point of time. The appellant and his wife were living separately and the children were



under the custody of the father(accused). Taking advantage of that, during the month of February 2017, when P.W.2 and P.W.3 were in sleep in their room, the accused/appellant has entered into the room and had committed the offence of penetrative sexual assault and that such offence has been proved through ocular evidence of the minor victim child, as well as through the statement of Doctor, who indicates that the hymen of the victim girl was ruptured.

5.This Court has given its anxious consideration to the rival submissions made on either side and upon perusing the evidence relied on the prosecution, this Court find that the complaint marked as Ex.P1, dated 24.2.2017, was initiated by P.W.1, the District Child Welfare Officer. As per his testimony, on 19.02.2017, Sunday, while he was in his house, being a public holiday, one Vanitha of Child Line called him over phone and reported about the incident of sexual assault on a minor child by her own father, and she informed that such information was passed on to Vanitha by the grand-father of the minor child. Based on the same, he went to the residence of the paternal uncle of the victim, who is a retired Village Administrative Officer.He was present along with his wife and the victim child. After enquiry, he



found that a cognizable offence has been committed and hence, he has given a complaint marked under Ex.P1. Thereafter, Probation Officer has been appointed to conduct an enquiry and to file a report and he has also filed his report. Having set the criminal law in motion, the matter has been taken up for enquiry and the statement of the minor girl was recorded by the respondent Police as well as by the learned Judicial Magistrate under Section 164 of Criminal Procedure Code, and the same is marked as Ex.P3. The victim girl has been subjected to medical examination and the Doctor, who examined her, has given the Wound Certificate marked as Ex.P12. From the Accident Register copy marked as Ex.P11 and the Wound Certificate marked as Ex.P12, this Court is able to find that the victim girl PW2 had not attained puberty on the date of examination. Her hymen is not intact.

6.PW.17-Dr.Shanthi, who has examined the victim girl has opined that there is no evidence for recent sexual intercourse. No spermato is detected from the smear as per the report of the Forensic Doctor attached to Tirunelveli Medical College Hospital. P.W.13 Ananthi, the Scientific Officer attached to the Regional Forensic Laboratory was also examined. Rest of the witnesses and evidence are not so relevant



to decide whether the minor girl P.W.2 was subjected to penetrative sexual assault by the appellant/accused.

7.As per P.W.2,victim girl, on the date of occurrence, the accused has removed her garment and placed his hand on her breast. The same was corroborated by P.,W.3, who is the elder sister of P.W.2. However, when the victim was taken to the learned Judicial Magistrate for recording the statement, she had stated that her father, the accused herein, had lie on her and made her to touch his private part. This part of the accusation found in the Section 164 statement of the victim girl, has not been spoken to when her statement was recorded in the course of trial. The difference between penetrative sexual assault and sexual assault lies in proof of the said accusation. Since the charge of manipulating the part of the body or to make the others to do so, is absent in this case, and what has been spoken to by the victim girl and supported by medical evidence, was the touching the brest of the child with sexual intent. Thus the the involvement of the physical contact without penetrative sexual assault comes within the contour of Section 7 of the Act qua Sexual Assault. The same could be punishable under Section 8 of the Act.



WEB COPY

8.The learned Additional Public Prosecutor appearing for the respondent-State submitted that, the observation in the Wound Certificate that the hymen of the minor child was not intact, shall be taken note of to presume that the child was subjected to aggravated sexual assault.

9.However, in the absence of specific evidence either through the testimony of the victim girl or through other circumstances, such presumption cannot be drawn, only on the premise that the hymen of the victim girl was not intact. There are several reasons for tear of the hymen and that cannot be the sole reason to arrive at a positive conclusion towards penetrative sexual assault. Further, the Doctor has not noticed any injury on the body of the victim.The minor girl was subjected to medical examination on 25.2.2017. The alleged incident has taken place on 19.2.2017. However, the complaint came to be given on 25.2.2017. Before that, the District Child Welfare Officer has obtained the statement from the minor child P.W.2, marked as Ex.P2, which also does not say anything specific about the penetrative sexual assault.



10. Thus, on a cumulative assessment of the material placed before this Court, though the prosecution is able to prove the offence of sexual assault, the material is not sufficient to conclude it is an offence of penetrative sexual assault or aggravated penetrative sexual assault. Therefore, in the absence of any proof either directly or indirectly for penetration, what has been proved before the Courts attract only Section 7 of the Act. For ready reference, Section 7 of the Act is extracted herein below:

'7. Sexual assault:--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, or does any other Act with sexual intent which involves physical contact without penetration is said to commit sexual assault.'

11. For all the reasons stated above, since there is no evidence against the accused, to substantiate the charge, this Criminal Appeal is partly allowed and the conviction and sentence imposed on the appellant under Section 6 of the POCSO Act by the Court below is set aside. And for the proven offence under Section 7 of the Act,



WEB COPY

sentence is modified under Section 8 of the POCSO Act and the appellant/accused is directed to undergo rigorous imprisonment for five years with a fine of Rs.1 lakh and in default, to undergo further one year simple imprisonment. The period of incarceration already undergone by the appellant-accused shall be set off under Section 428 of Cr.P.C. Regarding the compensation ordered by the trial Court under Section 357-A of Cr.P.C., the same shall stand confirmed.

12. The bail bond, if any, executed by the appellant/accused shall stand cancelled and fine amount, if any paid by him is ordered to be refunded. The appellant/accused shall surrender before the trial Court within 30 days from today, to undergo the remaining period of sentence. Failing which, the respondent Police shall secure him and commit him to undergo the remaining period of sentence, after expiry of the said period of 30 days.

[G.J.,J.] [C.K.,J.]

29.02.2024

NCS : Yes/No
Index : Yes / No
Internet : Yes / No

vsn

9/11



WEB COPY

To:

- 1.The District Sessions Judge,
(Mahila Court),
Tirunelveli.
- 2.The Inspector of Police,
All Women Police Station,
Palayamkottai,
Tirunelveli District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 4.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



DR.G.JAYACHANDRAN,J.
AND
C.KUMARAPPAN,J.

vsn

JUDGMENT MADE IN
CRL.A(MD) No.128 of 2020

29.02.2024