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Crl.A.(MD)No.345 of 2017



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date : 14.07.2025

CORAM:

THE HONOURABLE Dr.JUSTICE R.N.MANJULA

Crl.A.(MD)No.345 of 2017

Barathan

... Appellant

vs.

The State rep. by
The Inspector of Police,
Eral Police Station,
Thoothukudi District.

...Respondent

PRAYER : This Criminal Appeal has been filed under Section 374(2) of Criminal Procedure Code against the Judgement of the learned Sessions Judge, Fast Track Mahila Court, Thoothukudi, dated 31.07.2017 in Special S.C.No.6 of 2015.

For Appellant : Mr.G.Aravinthan

For Respondent : Mr.K.Gnanasekaran
Government Advocate (Crl. Side)

J U D G E M E N T

This appeal has been filed challenging the Judgement of the learned Sessions Judge, Fast Track Mahila Court, Thoothukudi, dated 31.07.2017 in Special S.C.No.6 of 2015.



2.1. The appellant is the sole accused, who has been charged under

Section 7 r/w Section 8 of POCSO Act and convicted and sentenced by the learned Sessions Judge as under.

Accused	Offences under Sections	Punishment	Fine	In default Sentence
Sole Accused	Section 7 r/w Section 8 of POCSO Act	Rigorous Imprisonment for 3 years	Rs.1,000/-	Rigorous Imprisonment for 3 months

2.2. Set off under Section 428 Cr.P.C. was ordered.

3.1. As per the case of the prosecution, the accused is running a provisional shop in his place. The victim girl was studying in 4th standard at the time of occurrence and was living along with her parents. On 06.05.2013, at about 01.30 p.m., when the victim girl went to the provisional shop of the accused to buy chocolate, the accused took her to his house on the eastern side of the shop and committed penetrative sexual assault. As the child screamed, he left her.



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3.2. On the complaint given by mother of the victim girl, a case has been registered in Crime No.117 of 2013 on the file of the Eral Police Station, Thoothukudi. After conclusion of the investigation, charge sheet has been filed against the accused for the offence punishable under Section 8 of POCSO Act, 2012.

3.3. After completing the legal mandates of furnishing copies and all other legal formalities, charges have been framed against the accused for the offence under Section 7 r/w Section 8 of POCSO Act, 2012. When the accused was questioned, he denied his involvements and claimed to be tried.

3.4. Before the Trial Court, on the side of the prosecution PW1 to PW13 have been examined and Exs.P1 to P8 have been marked. On the side of the accused, no oral or documentary evidence has been marked.

3.5. After the conclusion of trial, the learned Sessions Judge found the accused guilty for the offence under Section 7 r/w Section 8 of POCSO Act, 2012 and convicted and sentenced him as mentioned supra. Aggrieved over that, the appellant / accused has preferred this appeal.



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4. Mr.G.Aravinthan, learned counsel appearing for the appellant submitted that no independent witness has been examined; the victim girl has taken a chocolate without paying money and that problem has been exaggerated as commission of sexual assault by the accused; there is a previous enmity between the defacto complainant / mother of the victim girl (PW1) and the appellant; and these facts were not properly dealt by the Trial Court.

5. Mr.K.Gnanasekaran, learned Government Advocate (Crl. Side) appearing for the respondent submitted that there was no motive for PW1 to give a false case against the appellant and the victim girl has narrated the occurrence to her mother and her mother had subsequently given the complaint.

6. In the complaint Ex.P1 lodged by PW1, she has stated that her daughter had gone to the shop of the appellant on 06.05.2013, at about 01.30 p.m. to buy chocolate and while returning she was crying. When enquired, her daughter told that the appellant lifted her to his house and sexually assaulted her by lifting her skirt and panties and by licking her private parts.



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7. The victim girl was 10 years old at the time of occurrence and she has been examined as PW2. During her evidence, the learned Sessions Judge had put lot of questions to confirm her mental capability to understand the Court proceedings. After having been satisfied with the answers to the questions, he proceeded to enquire her. The victim girl had stated the occurrence in her evidence also. Her evidence before the Court is cogent, consistent and hence it appears to be reliable. Cross examination of PW2 has also not yielded any favourable result for the appellant.

8. The mother of the victim child has been examined as PW1 and she has stated in her evidence as to how she came to know about the occurrence from the mouth of PW2. PW1 has stated that on the day of occurrence her daughter came crying and told her about the sexual assault committed by the appellant.

9. For the occurrence that had taken place on 06.05.2013, complaint has been given on the same day at about 09.00 p.m.

10. At this juncture, the learned counsel appearing for the appellant submitted that there is a delay in giving the complaint and the victim girl

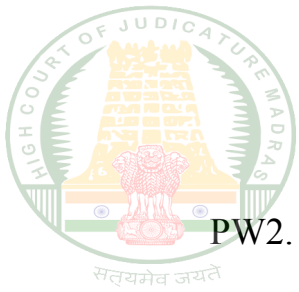


(PW2) or her mother (PW1) has not given any statement under Section 164 Cr.P.C.

11. The delay in lodging the complaint has been explained through PW1's evidence where she has stated that she was waiting for her husband to return from work and then they proceeded to lodge the complaint. There are some exaggerations in the evidence of PW1 where she has stated that the appellant had pressed the neck of her daughter, closed her mouth and then had taken her to his house. However, her evidence as to how the appellant had sexually assaulted the victim girl is clear, consistent and tallies with the PW2's statement before the Court.

12. The victim girl who was examined as PW2 has stated in her evidence that on the day of occurrence, at about 01.30 p.m., she went to the shop to buy chocolate and at that time, the appellant had closed her mouth, removed her panties and licked her private parts. When she was confronted that there was a previous enmity between her parents and the appellant, she denied it.

13. Even though statement under Section 164 of Cr.P.C. has not been recorded, that cannot be the reason to discredit the evidence of



PW2. It is at the option of witnesses either to give statement under Section 164 Cr.P.C. before the Court or not. In the instant case, it appears that the victim girl and her family have not opted to appear before the Court to give statement under Section 164 Cr.P.C. So, the failure to record statement under Section 164 Cr.P.C. alone cannot come to the rescue of the appellant when the materials available on record and substantive evidence of PW1 and PW2 confirm the act of sexual assault committed by the appellant. PW1 and PW2 were subjected to a lengthy cross examination. But their cross examination did not in any way falsified their evidence given in chief.

14. There is no dispute as to the age of the victim girl. As per the School Certificate Ex.P6, her date of birth is 01.10.2003. The Headmaster of the School, who issued the above Certificate has been examined as PW12. A child who is studying in 4th or 5th standard can be aged only 9 or 10 years old. In the instant case, the victim girl who was studying 4th standard at the time of occurrence was found to be 10 years old. Hence, the victim child is below 18 years of age and she comes within the definition of child under POCSO Act.

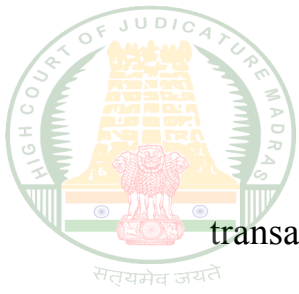


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15. When the victim was taken to PW8 Doctor, she has stated the same facts to the Doctor and the evidence of PW8 Doctor also strengthened the case of the prosecution.

16. Whenever a person is prosecuted for the offence of sexual assault or penetrative sexual assault, initial presumption would lie in favour of the prosecution under Sections 29 and 30 of POCSO Act. Once the foundational facts are proved before the Court, the burden would shift upon the appellant / accused to rebut the initial presumption that went in favour of the prosecution. In the case on hand, the appellant did not disprove that the occurrence is false or brought any other strong evidence to rebut the initial presumption in favour of the prosecution. All that the accused had stated before the Sessions Court is that there was some previous money transaction between himself and the father of the victim girl (PW3) and that was the reason for lodging the complaint.

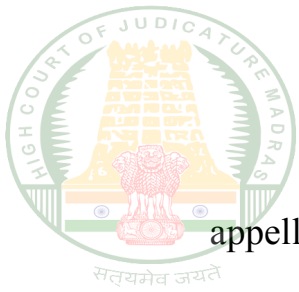
17. Except the suggestion put to PW3 on this aspect, no material evidence has been produced to substantiate the previous enmity as alleged by the appellant / accused. Even when suggesting that there was some dispute between the appellant and PW3 relating to money



transaction, PW3 has answered that there was no such enmity subsisted between himself and the appellant. In the absence of any motive, it is difficult to presume that the parents of the victim girl had chosen to give false complaint at the cost of modesty of their own child. The child has also given evidence before the Court as to how she has been assaulted.

18. In fact, the learned Sessions Judge ought to have charged the accused for aggravated type of sexual assault or penetrative sexual assault, but for the reasons best known to him, he framed charges for the offence under Section 7 r/w Section 8 of POCSO Act. The appellant did not demolish the initial presumption. On the strength of evidence on the side of the prosecution along with the proof of foundational facts, initial presumption given in favour of the prosecution has culminated into conclusive proof against the appellant.

19. The victim girl had consistently stated the occurrence to her mother, to the Doctor and before the Court and she had the capability to answer the questions to the Court by understanding the Court proceedings. Whichever angle her evidence is looked at, it deserves to be reliable. The learned Sessions Judge had also rightly appreciated the evidence by understanding the principle of presumption against the



appellant and had relied on the evidence of PW1 and PW2 and rightly convicted the accused.

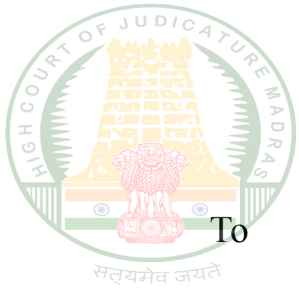
20. Hence, I do not find any ground now raised by the appellant / accused has the strength to demolish the strength of the prosecution evidence, which was relied by the Court.

21. Sofaras the wrong charges framed is concerned, the prosecution ought to have filed a Cross Appeal. In the absence of the same, taking advantage of the appeal now filed by the appellant / accused, this Court does not incline to interfere and charge him for aggravated form of sexual assault.

22. In view of the above discussions, this Criminal Appeal is dismissed. The Judgement of the learned Sessions Judge, Fast Track Mahila Court, Thoothukudi, dated 31.07.2017 in Special S.C.No.6 of 2015 is confirmed. The Sessions Court shall take steps to secure the appellant / accused for undergoing the remaining period of sentence, if any.

14.07.2025

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To

1.The Sessions Judge,
Fast Track Mahila Court,
Thoothukudi.

2.The Inspector of Police,
Eral Police Station,
Thoothukudi District.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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Dr.R.N.MANJULA, J.

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