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Crl.A.No.1 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.11.2024

CORAM

THE HONOURABLE MR.JUSTICE SUNDER MOHAN

Crl.A.No.1 of 2023

Vimal Raj @ Sapiyan
S/o.Sivanantham

...

Appellant /Accused

Vs.

The Inspector of Police
Panrutti All Women Police Station
Cuddalore District
(Crime No.15 of 2019)

...

Respondent

Prayer: Criminal Appeal filed under Section 374 (2) of Cr.P.C praying to call for the records in Spl.S.C.No.140 of 2019 on the file of learned Special Court for Exclusive Trial of Cases under POCSO Act, Cuddalore and set aside the judgment dated 24.09.2021 made in Spl.S.C.No.140 of 2019.

For Appellant : Mr.P.Muthamizh Selvakumar

For Respondents-1 & 2 : Mr.C.E.Pratap
Government Advocate(crl.side)



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JUDGMENT

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This Criminal Appeal has been filed to set aside the judgment of conviction and sentence passed by the learned Special Court for Exclusive Trial of Cases under POCSO Act, Cuddalore in Spl.S.C.No.140 of 2019 dated 24.09.2021.

2. The case of the prosecution is that the appellant and the victim were neighbours and that the victim is a mentally challenged girl aged about 14 years; that when the parents of the victim were not in the house, the appellant went into the house of the victim and committed the offence of penetrative sexual assault by forcing his penis into the mouth of the victim and had also committed sexual assault by touching the stomach and back of the victim inappropriately.

3. It is the further case of the prosecution that this incident was witnessed by PW5, the sister of the victim and on information given by PW5 to their parents, PW3, the mother of the victim lodged a complaint to the



respondent police for the offences under Section 506(ii) and Section 9(k) read with Section 10 of the “Protection of Children from Sexual Offences Act, 2012 (No.32 of 2012)” [hereinafter 'POCSO Act' in short].

4. The First Information Report was registered by PW11-Special Sub-Inspector of Police in Crime No.15 of 2019 and PW12- the Inspector of Police took up the investigation and examined the witnesses and also took steps to get the statement of the victim recorded under Section 164(5) of Cr.P.C and accordingly, the statement was recorded on 18.06.2019. PW12 thereafter handed over the investigation to PW13. PW13 conducted further investigation and after examination of other witnesses and on obtaining the opinion of the Deputy Director of Prosecution, filed an alteration report by altering offences to Section 450, 506(ii) of IPC and Section 5(k) read with Section 6 of POSCO Act read with Section 376(3) of IPC and after obtaining the Birth Certificate of the victim filed the final report for the alleged offences.



5. Before the trial Court, the prosecution examined 14 witnesses and marked Exs.P1 to P14. The trial Court on the basis of evidence found the accused guilty of the offence under Section 450 IPC and Section 5(k) punishable under Section 6 of POCSO Act read with Section 376(3) of IPC and sentenced the appellant as under:

Provision under which convicted	Sentence
Section 450 IPC	Rigorous imprisonment for 10 years and fine of Rs.2,000/-, in default, to undergo 3 months simple imprisonment.
Section 5k punishable under Section 6 of POCSO Act read with Section 376(3) of IPC	Rigorous imprisonment for 20 years and fine of Rs.2,000/-, in default, to undergo 3 months simple imprisonment.

The sentences were ordered to run concurrently. The trial Court had further directed payment of a sum of Rs.5,00,000/- [Rupees Five Lakhs only] as compensation under Compensation Scheme for Women Victim Survivors of sexual Assault Other Crimes 2018 or any other Scheme under the Government of Tamil Nadu.

6. The learned counsel for the appellant submitted that the case was originally registered only for offence under Section 9(k) read with Section



10 of POCSO Act and subsequently the case was altered on the basis of further statements which is an afterthought; that the earliest version given in the FIR and before the doctor would show that the appellant was accused of only the offence of sexual assault and that in any case, the evidence of witnesses do not inspire confidence; that PW5 could not have seen the occurrence though a window as no such window is shown either in the observation mahazar or in the rough sketch and that since there was prior enmity, the case has been foisted against the appellant. The learned counsel for the appellant would further submit that the occurrence took place prior to the amendment and therefore the minimum sentence of imprisonment of 20 years ought not to have been imposed.

7. Per contra, the learned Government Advocate (crl.side) would submit that the version of the victim version has been consistent and her statement given under Section 164 Cr.P.C and her deposition in Court would show that she was subjected to penetrative sexual assault and hence, there is no reason to disbelieve the evidence of victim and hence, the trial Court had rightly convicted the petitioner for the offence under Section 450 IPC read with Section 5(k) read with Section 6 of POCSO Act.



WEB COPY 8. Heard learned counsel for the appellant and learned Government Advocate (Crl.side) for the respondent.

9. PW1 is the victim girl, PW2 is the Special Teacher who had translated the victim girl's statement in Court as well as during investigation. PW3 is the mother of the victim girl and is also the *de facto* complainant. PW4 is the doctor who had examined the victim girl. PW5 is the sister of the victim who is said to have witnessed the occurrence. PW6 is the observation mahazar witness and PW7 is the doctor who had examined the appellant and had issued potency certificate. PW8 is the Constable who had accompanied the victim to the hospital. PW9 is the Constable who had assisted the Investigating Officer. PW10 is the Police Videographer and Pws 11 to 13 are the Investigating Officers as stated earlier and PW14 is the Headmistress who had issued the school certificate mentioning the date of birth of the victim.



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10. The above narration of facts would show that the prosecution has relied upon the evidence of PW1, PW3 and PW5 to prove the offence alleged against the appellant. In order to establish the age of the victim, the prosecution had examined PW14, who was the Headmistress of the School born on 27.11.2003 on the basis of entries made in the Admission Register. Nothing has been elicited in the cross-examination to disbelieve in which the victim studied. PW14 had issued a certificate that the victim was her version. That apart, PW4 had also recorded in her report that the victim was aged 13 years. Therefore, the age of the victim is established. The victim girl has mental disability which is not in dispute. PW2, the Special Teacher had deposed about the victim's mental disability and had also translated the victim's statement before the Court and during investigation.

11. The next question is whether the appellant had committed penetrative sexual assault on the victim. It is the case of the prosecution that the appellant locked himself inside the room along with the victim (PW1) and on hearing the cry of the victim, PW5, her sister peeped into the room and saw the appellant lying over the victim with both of them only in their



inner wears and when PW5 enquired with the victim, she had narrated about the incident and after the parents had arrived, PW3 had lodged the complaint. As stated earlier, according to the complaint of PW3, the victim was subjected to sexual assault and inasmuch as the appellant is said to have touched the breast of the victim inappropriately and also had bitten her lips and pinched her thighs. The appellant had also allegedly threatened the victim stating that he would do away with her if she informed about the incident to any other person.

12. However, subsequently, the version of the witnesses was that the appellant had forced his private part into the mouth of the victim. Charge No.3 reads as follows:

“மேற்படி சம்பவத்தின் தொடர்ச்சியாக எதிரி ஆகிய நீர் மனநலம் பாதிக்கப்பட்ட சிறுமியின் மேலே படுத்து மார்பை தடவி உதட்ட கடிச்சும் பின்னர் குழந்தையின் பட்டக்கையும் வயித்துலயும் கையை வச்ச தடவி பேண்ட்டை கழட்டியபோது அவர் பேண்ட்டை போட்டுக்கிட்டதால் உன்னுடைய உடல் உறுப்பு அவர் வாயில் வச்சுள்ளதன் மூலம் குழந்தைகளை பாலியல் குற்றங்களில் இருந்து பாதுகாக்கும் சட்டம் (POCSO Act)



பிரிவு 5(k) உ/இ பிரிவு 6 மாற்றாக இ.த.ச பிரிவு 376(3)-ன் கீழ் தண்டிக்கத்தக்கதும், இந்நீதிமன்றத்தில் என்னால் விசாரிக்கத்தக்கதுமான குற்றம் ஒன்றை செய்துள்ளீர் என்றும், ”

13. Even during the examination by the doctor, the victim had not made any statement. The mother (PW3) had given the information to the Doctor. She also did not say about the alleged penetrative sexual assault.

14. Thus the earliest version only refer to the sexual assault committed by the appellant. It is PW5's version that the victim had informed her about the occurrence immediately after the occurrence and in her deposition in the Court, PW5 would state that the victim had stated immediately after the occurrence that the appellant had forced his penis into the mouth of the victim. If that be the case, PW5 would have certainly informed PW3, as that is a very serious act and that would have been the basis for the FIR, which is not so in this case. Hence, this Court is of the view that since there is an improvement as regards the manner in which the sexual assault has been committed and considering the evidence of PW1, PW3 and PW5, it is highly



unsafe to convict the appellant for the offence of penetrative sexual assault punishable under Section 6 of the POCSO Act and Section 376(3) IPC.

However, as it is the consistent version of the witness that there is a sexual assault and the appellant had touched inappropriately the breast and other parts of the victim's body, there is no doubt that the appellant is guilty of sexual assault. Since the victim girl suffers from mental disability, the appellant is guilty of aggravated sexual assault punishable under Section 9(k) read with Section 10 of the POCSO Act. Considering the nature of the act committed by the appellant, this Court is of the view that the maximum sentence of 7 years has to be imposed on the appellant together with fine of Rs.25,000/- for the said offence. As regards the offence of house trespass, this Court finds that there is no infirmity in the finding of guilt by the trial Court that the appellant had committed house trespass but since the house trespass was committed in order to commit an offence and that offence is not punishable with imprisonment for life, the appellant cannot be held guilty for the offence under Section 450 IPC. However, the appellant would be guilty of offence under Section 452 IPC. This Court is of the view that a sentence of 7 years rigorous imprisonment ought to be imposed for the said



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offence.

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15. Accordingly, the appellant is convicted for offences under Section 9(k) read with Section 10 of the POCSO Act and 452 IPC and sentenced to undergo 7 years rigorous imprisonment and to pay a fine of Rs.25,000/- and in default to undergo 3 months simple imprisonment for offence under Section 9(k) read with Section 10 of the POCSO Act for the said offence and 7 years rigorous imprisonment and to pay a fine of Rs.25,000/- and in default to undergo 3 months simple imprisonment for offence under Section 452 IPC. Sentence imposed for these two offences shall run concurrently. The appellant shall surrender within a period of three weeks to serve the remaining part of the sentence. The period for which the appellant had been in custody pending investigation and trial can be set off.

In the result, this Criminal Appeal is partly allowed.

22.11.2024

Index : Yes/No
Speaking Order/Non Speaking Order
Neutral Citation: Yes/No
Internet: Yes/No
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SUNDER MOHAN, J.

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To

- 1.The Special Court for Exclusive
Trial of Cases under POCSO Act, Cuddalore
2. The Inspector of Police
Panrutti All Women Police Station
Cuddalore District
- 3.The Superintendent of Police,
Central Prison, Vellore.
- 4.The Public Prosecutor,
High Court, Madras.

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