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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 23.04.2015

CORAM:

THE HONOURABLE MR. JUSTICE S. NAGAMUTHU

CRIMINAL APPEAL (MD).No.129 of 2014

and

M.P.No.1 of 2015

A.Raja @ Arokiya Raj

: Appellant/Accused

Vs.

The State, rep by

The Inspector of Police, All Women Police Station,

Cantonment, Trichy,

Crime No.10 of 2013.

: Respondent/Complainant

PRAYER: Appeal is filed under Section 374 of the Code of Criminal Procedure against the Judgment dated 10.02.2014 passed by the learned Second Additional District and Sessions Judge/Mahila Court, [FAC], Trichy, made in Spl.S.C.No.3 of 2013 and allow this appeal.

For Appellant

: Mr.B.Jameel Arasu

For Respondent

: Mr.C.Mayilvahana Rajendran

Additional Public Prosecutor

JUDGMENT

The appellant is the sole accused in Special S.C.No.3 of 2013, on the file of the learned Second Additional District and Sessions Judge/Mahila Court, [FAC], Trichy. He stood charged for the offences punishable under Sections 457 of the Indian Penal Code and Section 8 of the Protection of Children from Sexual Offences Act, 2012, [for brevity, "the POCSO Act"]. By Judgment dated 10.02.2014, the Trial Court, convicted him under both the charges and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.2,000/- in default to undergo simple imprisonment for three years, for the offence under Section 457 of the Indian Penal Code and to undergo rigorous imprisonment for five years and to pay a fine of Rs.3,000/- in default to undergo simple imprisonment for three months for the offence under Section 8 of the POCSO Act. The sentences have been ordered to run concurrently. As against the said conviction and sentence, the appellant has come up with this Criminal Appeal.

2. The sentence imposed on the appellant has not been suspended so far by this Court and he is, right now, in Central Prison, Trichirappalli, undergoing the imprisonment.

3. The case of the prosecution, in brief, is as follows:-

3.1. PW-2 is a resident of Renga Nagar in Thiruchirappalli Town. Her husband was then a driver by profession. She had three children, of whom, PW-1 is the first female child, who was hardly 10 years old at the time of occurrence. PW-1 was then studying in fifth standard in a private school. The accused also belongs to the same locality and he was known to PW-1 and others.

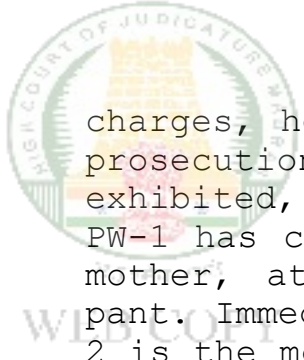


3.2. On 07.02.2013, PW-2's husband was not at home, as he had gone out on account of his profession. PW-2 stayed at her home with her children, including PW-1. On the night, intervening 07.02.2013 and 08.02.2013, PW-2 was sleeping along with her children, including PW-1. The door of the house was closed and tied with rope. They were all sleeping on a mat. During midnight, PW-2, who was fast asleep, was awakened by the cry of PW-1. She enquired PW-1 as to what had happened to her. PW-1 told her that the accused - Raja removed her pant. Since she wept, he ran away. PW-2 suddenly rushed out of the house and found the accused standing in front of the house. PW-2 questioned the accused about his behaviour. PW-2, then, went to the neighbours and informed about the occurrence. They all decided to inform the parents of the accused. Then, the neighbours went to the house of the accused and told the parents of the accused. They were persuaded by the mother of the accused that the matter could be discussed on the next day morning. The neighbours returned and informed the same to PW-2. Since PW-2's husband had gone out, she went to one Mr.J.Nelson [PW-5] and discussed with him as to what could be done in the matter. On his advise, then, she proceeded to the All Women Police Station, Cantonment Police Station, Trichirappalli and made a complaint on 08.02.2013 at 11.30 AM. On the said complaint, PW-11 registered a case in Crime No.10 of 2013, under Sections 498 and 354 of the Indian Penal Code and Sections 4 and 8 of the POCSO Act. EX-P1 is the complaint and EX-P8 is the First Information Report. She forwarded these two documents to the Jurisdictional Magistrate.

3.3. Taking up the case for investigation, she proceeded to the place of occurrence, prepared an Observation Mahazer and a Rough Sketch, showing the place of occurrence. Then, she examined PW-1, the victim child, PW-2 to PW-6 and recorded their statements. She recovered a Jatti and a black colour pant worn by PW-1 at the time of occurrence. Then, she forwarded PW-1 to the Hospital for examination.

3.4. PW-7, Dr.Karpagam, examined PW-1, on 08.02.2013 at 02.00 PM and found that there were no external injuries and there was no spermatozoa found on the body of PW-1. PW-11 arrested the accused on 12.02.2013 at Thiruvaiyar Railway Station, at 08.00 AM and brought him to Trichirappalli and produced before the Court concerned for judicial remand. On a request made by PW-11, he was forwarded for medical examination. PW-10, Dr.A.Ravikumar, examined him on 16.02.2013 and found that the accused was not an impotent. He further recorded that the accused was a drunkard. On completing the investigation, he filed a final report.

4. Based on the above materials, the Trial Court framed appropriate charges, as detailed in the first paragraph of this Judgment. When the accused was questioned in respect of the



charges, he pleaded innocence. In order to prove the charges, the prosecution examined as many as 11 witnesses and 14 documents were exhibited, besides two Material Objects. Of the said 11 witnesses, PW-1 has clearly stated that when she was sleeping along with her mother, at her house, during midnight, the accused removed her pant. Immediately, she cried and therefore, he left the house. PW-2 is the mother of PW-1 and she has stated that PW-1 told her that the accused attempted to remove her pant. PW-3 to PW-6 are all neighbours, who have spoken about the subsequent events. PW-7, PW-9 and PW-10 have spoken about the medical examinations conducted by them. PW-8 has spoken to about the investigation conducted by her. When the Trial Court examined the accused under Section 313 of the Code of Criminal Procedure in respect of incriminating evidences available against him, he denied the same as false. However, he did not choose to examine any witnesses nor to exhibit any documents.

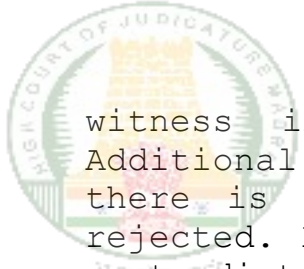
5. Having considered all the above materials, the Trial Court convicted the appellant, as detailed in the first paragraph of this Judgment and punished him accordingly. That is how, the appellant is now before this Court with this Criminal Appeal.

6. I have heard the learned counsel appearing for the appellant, the learned Additional Public Prosecutor appearing for the respondent and also perused the records carefully.

7. The learned counsel appearing for the appellant would submit that the evidence of PW-1 cannot be believed, because, according to him, she has been tutored by PW-2, due to previous motive. A child, who is prone to tutoring, should be not be believed in the absence of any corroboration. He would point out that PW-1 has contradicted PW-2, where PW-2 has not stated that the accused touched the vagina of PW-1. The learned counsel would further submit that because of this contradiction, which is material, the accused is entitled for acquittal. The learned counsel would also point out that before PW-7, the doctor, PW-1 has stated that one unknown person had sexually assaulted her, whereas, according to the case of the prosecution, the accused is a known person to PW-1. He would also point out certain other contradictions.

8. Referring to these grounds, the learned counsel would submit that the conviction and sentence imposed on the appellant is not sustainable.

9. Per contra, Mr.C.Mayilvahana Rajendran, the learned Additional Public Prosecutor, would vehemently oppose this Criminal Appeal. According to him, it is not the Rule that the evidence of a child witness should be rejected. It is his further submission that the evidence of a child witness can be the foundation for conviction, provided the evidence of a child



witness inspires the confidence of the Court. The learned Additional Public Prosecutor would also submit that absolutely, there is no reason as to why the evidence of PW-1 should be rejected. He would also add that as a matter of fact, there is no contradiction between the evidences of PW-1 and PW-2 and the so-called contradictions pointed out by the learned counsel appearing for the appellant, according to the learned Additional Public Prosecutor, are immaterial, which cannot be given weightage of.

10. The learned Additional Public Prosecutor would further submit that the statement made by PW-1 to the doctor cannot be used as a substantive evidence. He would also submit that the motive alleged by the accused that a false case has been registered, due to previous motive, has not been proved. The learned Additional Public Prosecutor would further submit that the narration of the events made by PW-1 would clearly go to prove that the accused had committed the offence.

11. I have considered the above submissions. In this case, the evidence of PW-1, who is hardly nine years old, at the time of occurrence, assumes importance. The argument of the learned counsel appearing for the appellant is that since the child is always prone to tutoring, the evidence given by her should be rejected. This argument does not persuade me at all. What all, that is required, is that the evidence of a child witness requires a close scrutiny. Therefore, simply because PW-1 happens to be a child, who could be easily tutored, her evidence cannot be rejected.

12. Keeping in mind the above settled rule of caution in mind, let us now look into the evidence of PW-1. In her evidence, PW-1 has stated that when she was sleeping, the accused removed her Pant and her Jatti and touched her vagina. Immediately, after the occurrence, PW-1 raised alarm, which awakened PW-2. What was said immediately to the mother, namely, PW-2, by PW-1 is relevant under Section 6 of the Indian Evidence Act, 1872. Such statement of PW-1 made at that time, which is substantive in nature, also assumes importance, as it happens to be the earliest statement made by PW-1. A close scrutiny of the chief examination of PW-1 would go to show that PW-1 told PW-2 that the accused only removed her pant alone. At that time, PW-1 did not tell PW-2 that the accused removed her Jatti and also touched her vagina.

13. As I have already stated, this statement of PW-1 made to PW-2, at the earliest point of time, falling within the purview of Section 6 of the Indian Evidence Act, 1872, should carry much weightage. Had it been true that the accused had removed her Jatti and touched her vagina, by all probabilities, quite naturally, PW-1 would have told PW-2 that the accused removed her Jatti and touched her vagina. The very fact that she had not stated the above fact, at the earliest point of time, would go to show that it is only an improvement subsequently made by her that the



accused removed her jatti and touched her vagina. This improvement may be due to tutoring. When there is such a contradiction between these two versions, quite naturally, the version in favour of the accused has to be taken into consideration. From the above contradictions, it can only be concluded that the accused had removed only the pant and not removed jatti and did not touch the body of PW-1.

14. Now, let us have a look into Section 7 of the POCSO Act, which defines the sexual assault, for which the penal provision is Section 8 of the Act. Section 7 of the POCSO Act reads as follows:-

"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 does any other Act with sexual intent which involves physical contact without penetration is said to commit sexual assault".

15. A reading of Section 7 of the Act would go to show that fundamentally, it is required that there should have been a sexual intent on the part of an accused. For the purpose of this provision, criminal intent can be presumed by this Court under Section 3 of the Act.

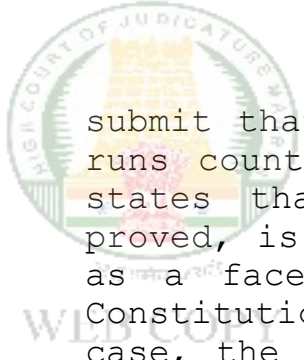
16. The next basic ingredients required to be proved is that the accused should have touched vagina or breast of the child or should have made the child to touch the penis, anus or breast of such person or should have done any other Act with sexual intent which involves physical contact without penetration.

17. In this case, as I have already concluded, there is only evidence to show that the accused had removed the pant of PW-1 and he did not touch her vagina, breast or any part of the body. Therefore, I hold that the act of the accused does not fall within the definition of sexual assault, as defined in Section 7 of the POCSO Act and therefore, he is not liable to be punished under Section 8 of the POCSO Act.

18. The learned Additional Public Prosecutor would submit that the presumption under Section 29 of the POCSO Act is also available for the prosecution. Section 29 of the POCSO Act reads as follows:-

"29. Presumption as to certain offences:- Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved".

19. The learned counsel appearing for the appellant would



submit that this provision is ultra vires the Constitution, as it runs counter to the fundamental principle of criminal law, which states that the presumption of innocence, until the guilt is proved, is cardinal. This has been recognized by the Indian Courts as a facet of fair trial guaranteed under Article 21 of the Constitution of India. But, in my considered view, in the instant case, the constitutionality of Section 29 of the POCSO Act cannot be gone into. Under Section 29 POCSO of the Act, such presumption can be drawn, provided the basic ingredients of Section 7 of the POCSO Act have been established. As I have already pointed out, the basic ingredients of Section 7 of the POCSO Act have not been established and therefore, it is not possible for this Court to raise presumption under Section 29 of the POCSO Act also.

20. If the act of the accused does not fall within the ambit of Section 8 of the POCSO Act, now, the next question is as to what is the offence, precisely committed by the accused by removing the Pant of PW-1. Section 11 of the POCSO Act defines the sexual harassment in the following terms:-

"11. Sexual harassment:- A person is said to commit sexual harassment upon a child when such person with sexual intent,-

(i). utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii). makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii). shows any object to a child in any form or media or contacts a child either directly or through electronic, digital or any other means; or

(iv). repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v). threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi). entices a child for pornographic purposes or gives gratification therefor".

21. In my considered opinion, the act of the accused, in the instant case, would clearly fall within Section 11(ii) of the POCSO Act. The expression, "making the child to exhibit her body" as employed in Section 11(ii) of the POCSO Act, is a larger term, which would include the removing the dress of the child so as to get the body exposed of the child. Therefore, in my considered view, in the instant case, the act of the accused removing the pant of PW-1 would fall within the definition of sexual



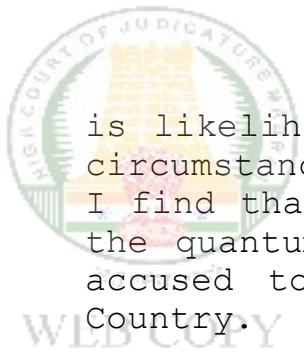
harassment, as defined in Section 11(ii) of the POCSO Act and therefore, he is liable to be punished under Section 12 of the POCSO Act.

22. The learned counsel for the appellant would submit that at the earliest opportunity, PW-1 told the doctor that she was sexually assaulted by an unknown person, whereas, according to the case of the prosecution, the accused is known to PW-1. From and out of this, the learned counsel for the appellant would point out that the occurrence itself is doubtful. In my considered view, the statement made by PW-1 to the doctor, being a former statement, could be used either for corroboration under Section 157 of the Indian Evidence Act 1872 or to contradict the maker under Section 145 of the Indian Evidence Act, 1872. In other words, the said statement cannot be held as a substantive evidence. Here, in this case, the said statement has not been used to contradict PW-1. The attempt of the learned counsel for the appellant to use such a statement as a substantive statement cannot succeed and therefore, this argument is rejected.

23. The learned counsel for the appellant would submit that due to previous motive, PW-1 had foisted this case falsely against the appellant. This argument of the learned counsel does not persuade me at all, as there is no material produced by way of evidence on record even to infer that there was a dispute between the accused and PW-2 due to which, she had tutored PW-1 to depose falsely. Insofar as the argument regarding the possibility of tutoring of PW-1 is concerned, I find no evidence at all. PW-1, who was hardly nine years old, has withstood the lengthy cross-examination and has stated that she was not at all tutored. Thus, I find no material on record that PW-1 would have been tutored.

24. In view of all the above, I have no hesitation to hold that the accused had trespassed into the house of PW-1 and had committed the offence punishable under Section 12 of the POCSO Act and he is liable to be punished under Section 457 of the Indian Penal Code.

25. Now, turning to the quantum of punishment, it is an important task of the Court to measure the gravity of the offences, to have regard to the mitigating circumstances and then, to impose appropriate punishment on the accused. It involves an adjudication and the same cannot be decided in a mechanical fashion. A reading of the Judgment of the Lower Court would go to show that the Lower Court has recorded the aggravating circumstances as well as the mitigating circumstances. The accused, at the time of occurrence, was hardly 19 years old. Probably, driven by hormonal imbalance, as he was just at the marriageable age, he would have gone into the house of PW-1 and committed the offence. The accused has got no bad antecedents. He was in the Borstal School, from where also, it is not reported that he exhibited any errant behaviour. Therefore, it is clear that there



is likelihood of his reformation. Therefore, when the aggravating circumstances and the above mitigating circumstances are balanced, I find that this Court has to take a lenient view, while deciding the quantum of punishment so as to afford an opportunity for the accused to reform and to become a responsible citizen of this Country.

26. It is reported to this Court that the accused has already served sentence of one year and three months. Having regard to the same, I am inclined to reduce the sentence to the period already undergone and to confirm the fine amount imposed on him by the Trial Court.

27. In the result, this Criminal Appeal is partly allowed in the following terms:-

(i).The conviction imposed on the appellant under Section 457 of the Indian Penal Code is confirmed. But, the sentence is reduced to the period of sentence already undergone and the fine amount imposed by the Lower Court is confirmed.

(ii).The conviction imposed on the appellant under Section 8 of the Protection of Children from Sexual Offences Act, 2012, is set aside and instead, he is convicted under Section 12 of the said Act and he is imposed with the sentence, which is equivalent to the sentence, which he has already undergone and he is directed to pay a fine of Rs.3,000/-, in default to undergo rigorous imprisonment for one month.

(iii).The fine amount of Rs.5,000/- already paid by the appellant shall be adjusted.

(iv).The appellant is entitled to be set at liberty forthwith by the Prison Authorities.

Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(AE)

/True Copy/

Sub-Assistant Registrar

To

1.The Second Additional District Judge Sessions Judge,
Mahila Court, [FAC], Trichy.

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

3.The Inspector of Police, All Women Police Station,
Cantonment, Trichy.

4.The Superintendent, Central Prison, Trichy
+One cc to Mr.B.Jameel Arasu, Advocate, SR.No.21763

NB

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<https://hcservices.ecourts.gov.in/hcservices/>

JUDGMENT MADE IN

CRIMINAL APPEAL (MD) .No.129 of 2014

23.04.2015