

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.06.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

AND

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.139 of 2014

M.Loganathan

...

Appellant/Accused

Vs

State rep. By
Inspector of Police,
Kadathur Police Station,
Erode District.

...

Respondent/Complainant

Prayer:- Criminal Appeal filed under Section 374(2) Cr.P.C., against the judgment dated 06.02.2014 in S.C.No.110 of 2013 on the file of the learned Sessions Judge, Mahila Court, Erode convicting the appellant/accused for life imprisonment under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and under Section 377 I.P.C.

For Appellant : Mr.A.S.Baalaji

For Respondent : Mr.M.Maharaja,
Additional Public Prosecutor

JUDGEMENT

(Judgment of the Court was delivered by S.Nagamuthu.J)

The appellant is the sole accused in S.C.No.110 of 2013 on the file of the learned Sessions Judge, Mahila (Fast Track) Court, Erode stands convicted for offences under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (In short, "the POCSO Act") and Section 377 I.P.C. He has been sentenced to undergo imprisonment for life and to pay a fine of Rs.1,05,000/-, in default to undergo simple imprisonment for one month for offence under Section 4 of the POCSO Act and to undergo imprisonment for life and to pay a fine of Rs.5,000/- in default to undergo simple imprisonment for one year for offence

under Section 377 I.P.C. Challenging the said conviction and sentence, the appellant is before this Court with this Criminal Appeal.

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

P.W.2, an young girl, hardly aged about 11 years, is the daughter of P.W.1. P.Ws.1 & 2 were living along with the other family members at Arasurpudur Village, Erode District. P.W.2 was studying VI Standard during the relevant time of occurrence. The accused belongs to the same village. At the time of occurrence, he was aged about 31 years. On 28.09.2012, at about 2.30 pm, P.W.2 was playing in front of her house. The accused at that time, came to the said place and deceived her to come with him by offering sweet. The accused held the hands of P.W.2 and took her into the nearby sugarcane grow. Inside the sugarcane grow, without being noticed by anybodyelse, in a secluded place, the accused removed his undergarment and by force, inserted his penis into her vagina. Then he took out his penis from her vagina and inserted the same into the mouth of P.W.2. Then, the accused, leaving P.W.2 at the place of occurrence, fled away from the scene of occurrence. She raised alarm, out of pain. P.W.3, who came there incidentally, for collecting grass, heard the alarm raised by P.W.2 and went into the sugarcane grow. He found P.W.2 standing with her undergarment. She held her petti coat in her hand. He found the accused fleeing away from the scene of occurrence. P.W.3 enquired P.W.2 as to what had happened to her. P.W.2 narrated the entire event to P.W.3. Then, P.W.3 took P.W.2 to her house and handed over her to P.W.1 and her husband.

3.P.W.1, being a poor woman, along with her husband, without knowing what to do next, went to the village elders and informed the occurrence to them. The villagers advised them to keep calm and cool as, it involved the life of an young girl. However, P.W.1 got persuaded herself and later on she went to Kadathur Police Station, Erode, at 11.30 am on 11.10.2012 and made a complaint. Ex.P.1 is the complaint and Ex.P.20 is the F.I.R. P.W.10, the then Sub Inspector of Police received the said complaint and forwarded both the documents viz., Exs.P.1 and P.20 to the Court, which were received by the learned Jurisdictional Magistrate at 10.00 pm on 11.10.2012.

4.P.W.11, the then Inspector of Police, Kadathur Police Station, Erode, took up the case for investigation. At 12.30 pm on 11.10.2012, he visited the place of occurrence and prepared an observation mahazar and a rough sketch in the presence of P.W.4 and another witness. He recovered the petti coat and jacket of P.W.2 from P.W.1 under a mahazar. He examined P.Ws.1 to 4 and recorded their statements. On 11.10.2012, he arrested the accused near Sathyamangalam Gounder Mess and forwarded him

to Court for judicial remand. He produced P.W.2 before the jurisdictional Magistrate, with a request to the Magistrate to forward her for medical examination. Similarly, he made a request to the Court to forward the accused also for medical examination.

5.P.W.5, Dr.Kalanjiyarani examined the accused on 16.10.2012. She made entry in Ex.P.5, the Accident Register. She gave opinion that the accused was not impotent. On the same day, she examined P.W.2 and she found no external injuries on the body of P.W.2, hymen was intact and there was no vaginal discharge. The vaginal smear collected and sent for chemical examination proved that there was no spermatozoa on the smear. P.W.7 Dr.Thenmozhi examined P.W.2, to ascertain her age. On such examination, P.W.7 estimated her age at less than 14 years. The clothes of P.W.2 were sent for chemical examination. The report revealed that there was no spermatozoa in the clothes of P.W.2 also. The investigation was continued by P.W.12. On completing investigation, he laid charge sheet against the accused.

6.Based on the above materials, the trial Court framed charges as detailed in the first paragraph of this judgment, against the accused. The accused denied the same. In order to prove the case of the prosecution, on the side of the prosecution, as many as 12 witnesses were examined and 22 documents were exhibited, besides 2 Material Objects.

7.Out of the said witnesses, P.W.1, the mother of P.W.2, has stated about what was told by P.Ws.2 & 3 to her and the complaint made by her. P.W.2, the victim girl has spoken vividly about the entire occurrence. P.W.3 has stated that at or about the time of occurrence, incidentally, when he had gone to the sugarcane grow, he heard the alarm raised by P.W.2 and he went into the sugarcane grow where, he saw the accused fleeing away from the scene of occurrence and P.W.2 standing inside the sugarcane grow and that she was wearing only an undergarment and the petti coat was in her hands. P.W.4 has spoken about the preparation of observation mahazar and the rough sketch prepared. P.Ws.5 to 7 have spoken about the medical examination of the accused as well as P.W.2. P.W.8, the Junior Scientific Officer, Regional Forensic Lab, Coimbatore, has spoken about the chemical examination conducted on the clothes of P.W.2. According to him, spermatozoa was not found on the same. P.W.9 is the Head Clerk of jurisdictional Magistrate. He has stated that on the orders of the Court, he forwarded the Material Objects for chemical examination. P.W.10 has spoken about the registration of the case. P.Ws.11 & 12 have spoken about the investigation done and the final report filed in this case.

8. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. On his side, one Mr. Poobathi was examined as D.W.1 and a xerox copy of the Identity card of Mr. Poobathi was marked as Ex.D.1.

9. Having considered all the above materials, the trial Court convicted the appellant/accused as stated in the first paragraph of this judgment. Challenging the same, the appellant/accused is before this Court with this Criminal Appeal.

10. We have heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

11. The learned counsel for the appellant would submit that though, it is alleged that the alleged occurrence was on 28.09.2012, the F.I.R., came to be registered only on 11.10.2012 and there is no explanation at all for the said inordinate delay. According to the learned counsel, this creates enormous doubts in the case of the prosecution. He would further submit that P.W.1, during cross examination has stated that on the day of occurrence itself, she took P.W.2 to the Erode Government Hospital for medical examination. She has further stated that at that time, one woman police also accompanied her to the hospital. She has also stated that she made a complaint to the said Woman Constable but, the said complaint given according to P.W.1 on 28.09.2012 has been suppressed. Thus, according to the learned counsel, this creates further doubt in the case of the prosecution.

12. The learned counsel for the appellant would further submit that P.W.2, during cross examination, has admitted that before she was examined during trial, she was taken to the Police Station where, she was tutored, as to how she should give evidence in Court. Similarly, tutoring was made at the instance of the Police to P.W.1 and her husband namely, the father of P.W.2. According to this part of evidence, P.W.2, being a child, when there is clear evidence that she was tutored should be disbelieved, he contended.

13. The learned counsel would further submit that the medical evidence does not corroborate the evidence of P.W.2. He would further submit that out of some other motive, the present case has been foisted against the accused. Thus, according to him, the appellant/accused is entitled for acquittal.

14. The learned counsel would further submit that the conviction and sentence imposed on the appellant for the offence under Section 4 of the POCSO Act, is illegal and unconstitutional. According to him, the said act came into

force only with effect from 14.11.2012 whereas, the alleged occurrence in this case was on 28.09.2012. Therefore, the conviction of the appellant/accused for offence under Section 4 of the POCSO Act, which does not in force as on the date of the alleged occurrence, is illegal. The learned counsel would therefore pray for acquittal of the accused.

15.The learned Additional Public Prosecutor appearing for the State would vehemently oppose this Criminal Appeal. According to him, though, there are certain discrepancies in the evidence of P.Ws.1 & 2, on that score, their entire evidence cannot be rejected. He would further submit that though, there was delay in preferring the complaint, the same has been duly explained by P.W.1. The said explanation is plausible and acceptable, he contended.

16.He would further submit that ofcourse, P.W.2 during cross examination has admitted that she was taken to the Police Station before giving evidence in Court and she was tutored as to how she should give evidence in Court. The learned Additional Public Prosecutor would submit that it does not mean that P.W.2 was tutored but, it was only instruction given by the Police to P.W.2 as to how she should give evidence in Court. He would further submit that since, P.W.2 was examined by the Doctor after several days of the occurrence, one cannot expect corroboration from the medical evidence.

17.So far as the conviction of the appellant/accused under Section 4 of the POCSO Act, is concerned, the learned Additional Public Prosecutor would submit that instead of Section 4 of the POCSO Act, the appellant/accused can be convicted for offence under Section 376 I.P.C. Thus, according to the learned Additional Public Prosecutor, there is no merit in the criminal appeal and the same is liable to be dismissed.

18.We have considered the above submissions.

19.P.W.2, the victim, at the time of occurrence, was a child, hardly aged 11 years. It is common knowledge that a child is prone to tutoring. But, it does not mean that on account of the said apprehension, a child should always be viewed with suspicion and her evidence should be rejected. However, prudence requires close scrutiny of the evidence of a child witness.

20.In this case, when we closely peruse the evidence of P.W.2, we find that her evidence is so convincing and the same cannot be rejected at all. P.W.2 has narrated the entire occurrence in a quite natural way, in her own familiar language. She has stated that the accused held her hand and took her into

the sugarcane grow by deceiving her that he would give her sweet. She has further stated that on reaching the sugarcane grow, after having ascertained that there was none else in the vicinity and after having gone to the secluded place, the accused had committed the heinous crime. She has stated that the accused removed his undergarment and inserted his penis into the vagina of P.W.2. Then after dragging his penis from out of the vagina of P.W.2, he inserted the same into her mouth. The act of the accused in inserting his penis into the vagina of P.W.2 makes out an offence of rape. It is needless to point out that in order to make out an offence of rape, it is not necessary that the accused should have a complete penetration. Even partial penetration would be sufficient to make out an offence of rape. In the instant case, since, the insertion of penis into the vagina of P.W.2 was only partial. That is why when P.W.2 was examined by P.W.6, the hymen was found intact. P.W.2 has not stated that there was ejection from the penis of the accused at the time when he did the above heinous act. Therefore, it was quite natural that there was no spermatozoa found either on the smear which was taken from P.W.2 or, on her undergarments. Therefore, the argument of the learned counsel that the medical evidence as well as the evidence of the Chemical Analyst (P.W.8) do not corroborate the evidence of P.W.2, deserves only to be rejected.

21. The learned counsel would submit that P.W.2 has stated that she was taken to the Police Station two days before she was examined in Court during trial and she was informed as to how she should give evidence in Court. As rightly contended by Mr.M.Maharaja, learned Additional Public Prosecutor appearing for the state, from this evidence of P.W.2, it cannot be readily inferred that she was tutored by the Police to falsely depose against the accused. The fact that P.W.2 would have been taken to the Police Station prior to giving evidence by P.W.1 only indicates that she would have been explained as to how she should behave in Court. Absolutely, nothing has been elicited from P.W.2 that in the Police Station, she was tutored. Therefore, this argument of the learned counsel that P.W.2 has been tutored by the Police, deserves to be rejected.

22. The learned Additional Public Prosecutor would submit that the evidence of P.W.3 duly corroborates the evidence of P.Ws.1 & 2. We find force in the said argument. P.W.3 had no axe to grind against the accused. After all, he is an independent witness. He has stated that he incidentally, went to the sugarcane grow for collecting grass for cattle. At that time, according to him, he heard the hue and cry of P.W.2 and when he rushed into the sugarcane grow, he found the accused fleeing away from the scene of occurrence and P.W.2 standing

with her undergarment and holding her petti-coat in her hands. He would further submit that when he enquired P.W.2, she narrated the entire occurrence.

23.The learned counsel for the appellant would further that the evidence of P.W.3 is hit by the hearsay rule. But, according to us, it is not so. As per the evidence of P.W.2, P.W.3 came to the place of occurrence and rescued her. At that time, she told about the entire occurrence to P.W.3. These evidences of P.Ws.2 & 3 squarely fall within the ambit of Section 6 of the Indian Evidence Act and the same is not hit by hearsay rule. Thus, the evidence of P.W.3 duly corroborates the evidence of P.W.2, in full.

24.The learned counsel for the appellant would further submit that there was delay in preferring complaint. Ofcourse it is true. But, in a case of this nature, one cannot expect the victim to rush to the Police Station with complaint because, rape of a girl will have adverse effect not only on the body of the victim but also on her modesty. In a village situation, when it is alleged that a girl of tender age is raped, neither the girl nor her parents would not be tempted to rush to the Police Station immediately. It is a natural human conduct, of the parents of the victim to have some reluctance to rush to the Police station and to make the entire event public, as it will have worst consequences on the future of the child. P.W.1 has stated so. After some time, out of fear that the accused would repeat the said act, according to her, having persuaded herself, she went to the Police Station to make the complaint. Thus, in our considered view, the delay has been duly explained and the said delay does not create any doubt at all in the case of the prosecution.

25.In view of the foregoing discussions, we have no doubt in our mind that what has been stated by P.W.2 is true. The accused had committed rape on P.W.2 and had also committed unnatural offence falling within the scope of Section 377 I.P.C.

26.The learned counsel for the appellant would submit that there was no charge under Section 376 I.P.C., but there was only a charge under Section 4 of the POCSO Act. The learned counsel would further submit that the conviction of the accused under Section 4 of the POCSO Act, is illegal. We fully agree with the said argument of the learned counsel.

27.Article 20(1) of the Constitution of India, mandates that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. In the instant

case, admittedly, the occurrence was on 28.09.2012 whereas, the of the POCSO Act, came into force only with effect from 14.11.2012. Thus, as on the date of the alleged occurrence, the POCSO Act was not in force and therefore, the conviction of the appellant under Section 4 of the POCSO Act, is unconstitutional as it violates Article 20(1) of the Constitution of India, which has been guaranteed as a fundamental right. Therefore, the conviction of the appellant for offence under Section 4 of the POCSO Act deserves to be set aside.

28.Now, the question is whether the accused could be convicted for offence under Section 376 I.P.C., instead of Section 4 of the POCSO Act, though, there was no charge framed by the trial Court under Section 376 I.P.C.

29.In this regard, we may refer to Section 222(1) of the Criminal Procedure Code which reads as follows:-

"222. When offence proved included in offence charged.

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it."

30.Now the next question is whether Section 376 I.P.C., is a minor offence in terms of Section 222(1) Cr.P.C., to Section 4 of the POCSO Act.

31.Section 4 of the Protection of Children from Sexual Offences Act, 2012 reads as follows:-

"4.Punishment for penetrative sexual assault. - Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine."

32.What is a penetrative sexual assault has been defined in Section 3 of the POCSO Act. It states that penetrating the 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, amounts to penetrative sexual assault.

33. Undoubtedly, a rape on a child is graver than a rape on an adult woman. Thus, the penetrative sexual assault by penetrating the penis into the vagina as defined in Section 3 of the POCSO Act, is nothing but a rape as defined in Section 375 I.P.C. If rape as defined in Section 375 I.P.C., is committed, as a child, it is an offence under Section 4 of the POCSO Act. Thus, it is ipso facto clear that rape as defined in Section 375 I.P.C., and penetrative sexual assault by penis into vagina have got all common ingredients but, penetrative sexual assault has one more incident (particular) that the victim should be a child. Thus, undoubtedly, Section 376 I.P.C., is a minor offence for the offence under Section 4 of the POCSO Act. It needs to be mentioned that in the matter of extent of punishment also, Section 376 I.P.C., is a minor offence to Section 4 of POCSO Act.

34. Now, let us have a quick look into Section 464 of the Code of Criminal Procedure:-

"464. Effect of omission to frame, or absence of, or error in, charge.

(1) No finding sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) In the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge.

(b) In the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

35. In the instant case, the accused was put on notice that the accusation against him is that the penetrating his penis into the vagina of P.W.2. The accused also contended the said accusation. Thus, there shall occur no failure of justice if he

is convicted under Section 376 I.P.C., instead of Section 4 of the POCSO Act.

36. For these reasons, we hold that Section 222(1) Cr.P.C., is applicable to the facts of the present case and accordingly, the conviction imposed on the appellant under Section 4 of the POCSO Act, is liable to be set aside and instead, the appellant is liable to be convicted for offence under Section 376(1) I.P.C.

37. As we have already concluded, for the act of inserting his penis into the mouth of P.W.2, the appellant/accused is liable to be punished for offence under Section 377 I.P.C.

38. Now, turning to the quantum of punishment, it is reported that at the time of occurrence, the accused was hardly aged 31 years and he has been in jail from the date of his arrest. It is not reported that he had bad antecedents and after the occurrence also, he has repeated any such crime. There are lot of chances for reformation. So far as the fine amount is concerned, the trial Court had not taken into account the economic status of the accused. Having regard to the aggravating as well as the mitigating circumstances, we are of the view that, sentencing the accused to undergo rigorous imprisonment for five years and to pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for four weeks, for offence under Section 376(1) I.P.C., and sentencing him to undergo rigorous imprisonment for five years and to pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for four weeks for offence under Section 377 I.P.C., would meet the ends of justice.

39. Though, the minimum punishment provided for the offence under Section 376(1) I.P.C., is imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years, as per proviso to Section 376(1) I.P.C., for adequate and special reasons, in law, lesser punishment i.e., sentence of imprisonment for a term of less than seven years may also be imposed. Here, in this case, for the special reasons which have stated herein above, we are inclined to impose rigorous imprisonment for five years and to pay a fine of Rs.1,000/-.

40. In the result, the Criminal Appeal is allowed in part in the following terms:-

(i) The conviction of the appellant/accused for offence under Section 377 I.P.C., is confirmed however, the sentence of imprisonment for life imposed on him is set aside and instead, he is sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for four weeks;

(ii)The conviction and sentence imposed on the appellant/accused for offence under Section 4 of the POCSO Act, is set aside and instead, he is convicted for offence under Section 376(1) I.P.C., and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for four weeks and

(iii) It is directed that the sentences imposed herein on the appellant/accused shall run concurrently and the period of sentence already undergone by the appellant is directed to be set off under Section 428 Cr.P.C.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

- 1.The Sessions Judge,
Mahila Court,
Erode.
- 2.-Do-Thro The Principal Sessions Judge,
Chennai.
- 3.The Judicial Magistrate No.II,
Gobichettipalayam, Erode.
- 4.-Do- Thro The Chief Judicial Magistrate,
Erode.
- 5.The Inspctor of Police,
Kodathur Police Station,
Erode District.
- 6.The Public Prosecutor,
High Court, Madras.

+1cc to M/S.A.S.Balaji, Advocate Sr.29392

CrI.A.No.139 of 2014

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