

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

and

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.122 of 2016

N.Ravindra Kumar

.. Appellant

- Vs -

The State rep. by
The Inspector of Police,
Thirukanur Police Station,
Puducherry.
(Cr.No.55 of 2014)

.. Respondent

Prayer:- Appeal filed under Section 374(2) of the Code of Criminal Procedure against the judgment passed by the learned Special Judge under the POCSO Act, 2012 - Principal Sessions Judge, Puducherry in Spl.S.C.No.1 of 2015 dated 07.08.2015.

For Appellant: Mr.G.Ilanthiraiyan
for M/s.Sai Bharath and Ilan

For Respondent: Mr.V.Balamurugane
Additional Public Prosecutor (Pondy)

J U D G M E N T

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

The appellant, the sole accused in Spl.S.C.No.1 of 2015 on the file of the learned Special Judge under the Protection of Children from Sexual Offences Act, 2012 (Principal Sessions Judge, Puducherry), a primary class teacher, stands convicted for having allegedly committed sexual offences against three young female children aged 10 years, 10 years and 9 years respectively, in the very school where they were studying. By judgment dated 07.08.2015, the trial Court convicted him under Sections 4 (3 counts), 6 (3 counts) and 10 (3 counts) of the POCSO Act and under Section 377 I.P.C. (3 counts) and sentenced him as detailed below:

Penal provision(s) under which convicted	Sentence
Section 4 of POCSO Act (3 counts)	Imprisonment for life for each count and to pay a fine of Rs.10,000/- for each count (no default sentence imposed).
Section 6 of POCSO Act (3 counts)	Imprisonment for life for each count and to pay a fine of Rs.10,000/- for each count and (no default sentence imposed).
Section 10 of POCSO Act (3 counts)	Rigorous Imprisonment for seven years for each count and to pay a fine of Rs.5,000/- for each count and in default to undergo rigorous imprisonment for two years for each count.
Section 377 of I.P.C. (3 counts)	Rigorous Imprisonment for ten years for each count and to pay a fine of Rs.5,000/- for each count and in default to undergo rigorous imprisonment for two years for each count.

Challenging the said conviction and sentence, the appellant has come up with this appeal.

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

2.1. P.Ws.1, 2 and 3 are the victims. Admittedly, they were hardly aged 10 years, 10 years and 9 years respectively and thus they are children as defined in the POCSO Act of 2012. They were all studying in a Government High School at Sellipattu in 4th standard, 6th standard and 4th standard respectively. The accused was the class teacher in the said school for the second standard.

2.2. It is alleged that prior to 19.06.2014, on various days for about eight months, the accused used to call P.Ws.1 to 3 to a secluded place in the school where the accused, intentionally with sexual motive, touched the private parts of the children and also made them to suck the penis. The children were pleased by him by offering pencil, rubber, pen etc., so as to not to disclose the same to anybody.

2.3. P.W.5, a woman teacher, was the class teacher for 4th standard. On 28.08.2013, the fellow students of P.Ws.1 to 3 told her that P.Ws.1 to 3 had gone to the class room of the accused during lunch break. P.W.5, summoned all the three children and enquired. P.Ws.1 to 3 told her that the accused used to call them to his class room during lunch break, kiss them, hug them and also used to touch their private parts and

asked them to suck his penis. P.W.5 was shocked by the said statement of P.Ws.1 to 3.

2.4. P.W.5 took P.Ws.1 to 3 to P.W.6, another woman teacher working in the same school. P.W.5 told about the statement of P.Ws.1 to 3 to P.W.6. P.W.6, in turn, enquired P.Ws.1 to 3 and they repeated the same statement to her also. P.Ws.5 and 6 informed P.W.8 another male teacher in the school. On 28.08.2013, the headmaster of the school had left the school early as he fell sick and had requested P.W.8 to take care of the school. Thus, P.W.8 was in charge of the school on that day.

2.5. P.Ws.5 and 6 took P.Ws.1 to 3 to P.W.8 and informed about the above occurrence. P.W.8 in turn enquired the children (P.Ws.1 to 3). They repeated the same thing. Immediately, P.W.8 spoke to the headmaster of the school (P.W.7) and informed the above. P.W.7 the headmaster of the school returned to the school. He in turn enquired P.Ws.1 to 3, they repeated the same statement. Then, 11 teachers of the said school including P.Ws.5, 6 and 8 gave a written complaint to P.W.7 about the above occurrence. They requested for a detailed enquiry into the above occurrence and to take appropriate action against the accused. P.W.7 forwarded the same along with his report to the Chief Educational Officer, Puducherry. The Chief Educational Officer, in turn, assured P.W.7 that he would take appropriate action departmentally.

2.6. The Chief Educational Officer (P.W.4) acting on the said report of P.W.7, requested the Deputy Collector (Revenue) cum Special Divisional Magistrate (South), Villianur to hold enquiry into the above allegations and to submit a report. He held an enquiry and submitted a report, wherein, inter alia, he concluded as follows:

"When the said students were enquired they deposed that he hugged, kissed them and compelled them to suck his private parts during lunch hours. According to them, this had been happening for the past 8-9 months."

2.7. On receipt of the said report of the Deputy Collector, P.W.4 the Chief Educational Officer forwarded a complaint to the Station House Officer, Thirukkanur Police Station, Puducherry along with the complaint made by the teachers including the enquiry report of the Deputy Collector etc.,

2.8. P.W.14, the then Sub Inspector of Police of Thirukkanur Police Station on receipt of the said complaint, registered a case in Crime No.55 of 2014 under Section 377 I.P.C. against the accused on 19.06.2014 at 09.30 a.m. He

forwarded the complaint and the F.I.R., to the Court, which was received by the learned Magistrate at 09.00 a.m. on 20.06.2014. P.W.14 took up the case for investigation. He examined P.W.4 and recorded his statement. On the same day, he arrested the accused at 12.30 p.m. and forwarded him to the Court for judicial remand.

2.9. P.W.15, the then Inspector of Police took up the case for further investigation. He examined P.Ws.1 to 10 and recorded their statements. The examination of the children took place in the presence of a woman Sub Inspector of Police. He made request to the Court to forward the accused for medical examination. Accordingly, Dr.R.Balaraman (P.W.12) examined him on 15.09.2014 and gave opinion that the accused was capable of performing penile sexual intercourse with a woman. Ex.P.12 is the certificate issued by him. On completing the investigation, P.W.14 laid charge-sheet against the accused before the Special Court under the POCSO Act alleging that the accused had committed offences under Section 377 I.P.C. and Sections 4, 6 and 10 of the POCSO Act (3 counts).

2.10. Based on the above materials, the trial Court framed charges. For better understanding, let us extract the charges as framed by the trial Court:

"Firstly, that prior to 19.06.2014 on various dates for about eight months, at the Government High School, Sellipet, Puduchery, you while working as Primary School Teacher of the above said school, had penetrated your penis into the mouths of the school children namely (1) XXX (name omitted) (aged 10 years) (2) YYY (name changed) (10 years) and (3) ZZZ (Name changed) (19 Years) (sic.), and also kissed them and touched their vagina and breast and thereby committed penetrative sexual assault as defined u/s 3(a) of the POCSO Act, 2012 and aggravated penetrative sexual assault as defined u/s 5 of the POCSO Act, 2012 and thereby committed an offences punishable under Sections 4 and 6 of the POCSO Act, 2012 (3 counts) and with my cognizance.

Secondly that during the same period and place and during the course of the same transaction, you also committed aggravated sexual assault on the said three children as defined u/s 9(f) of the POCSO Act, 2012 and thereby committed an offence punishable under Section 10 of the POCSO Act, 2012 (3 COUNTS) and within my cognizance.

Thirdly, that during the same period and place and during the course of the same transaction, you also had carnal intercourse against the order of nature with the said three children and thereby committed an offence punishable under Section 377 IPC (3 counts) and within my cognizance."

The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 15 witnesses were examined, 21 documents were marked and no material object was marked.

2.11. Out of the said witnesses, P.Ws.1 to 3 are victims - the children. They have stated that the accused used to call them to the fourth standard class room and used to hug them, kiss them. He also used to touch their chest and the private parts and asked them to suck his penis. They have further stated that they told the same to P.W.5 when P.W.5 enquired them. P.Ws.5 and 6 the women teachers in the school have stated that when they enquired, P.Ws.1 to 3 made the same statement to them. P.W.8, yet another male teacher in the school has also stated that when he enquired P.Ws.1 to 3, they made similar allegations.

2.12. P.W.7 the Headmaster of the school has stated that on receipt of the phone call from P.W.8, he rushed back to the school and when he enquired, P.Ws.1 to 3 made the same allegations against the accused. P.W.7 has further stated about the written complaint made by the teachers. He has further stated that he forwarded the same to P.W.4. P.W.4, the Chief Educational Officer, has stated that he requested the Deputy Collector(Revenue)-cum- Sub Divisional Magistrate to hold an enquire and submit a report. The report revealed that there was truth in the allegations and therefore, according to him, he forwarded a complaint to the police. P.W.9 is a male teacher in the same school. He has also stated that he was present when P.Ws.1 to 3 made allegations against the accused to the women teachers. He has further stated that he was one among the signatories in the complaint made to the headmaster.

2.13. P.W.10 the then Deputy Collector has stated that he held detailed enquiry into the allegations and submitted a report to P.W.4. P.W.11 the then Tahsildar has stated that she assisted P.W.10 when P.W.10 held enquiry into the allegations against the accused. P.W.11, has further stated that when she went along with P.W.10 on 27.09.2013, for enquiry, the headmaster and other teachers declined to disclose the identity of the children who were subjected to sexual offences by the accused. They told that the disclosure of the names of the children would spoil their future. Therefore, on 27.09.2013, they could not make a detailed enquiry. Again on 04.10.2013, according to her, she went to

the school along with P.W.10 and at that time, the female children studying in the school were separated and they were enquired. During that, according to her, they identified P.Ws.1 to 3 who were children who were subjected to sexual offences and that is how P.W.10 submitted a report to P.W.4.

2.14. P.W.12 Dr.R.Balaraman, has stated that he examined the accused on 15.09.2014 and found that he was sexually potent to perform penile sexual intercourse with a woman. P.W.13 the Protection Officer, Child Protection Society, Puducherry, during the relevant time. According to her, there was a request from the Investigating Officer to forward two women officers to assist the investigating officer. Accordingly, she went along with two other Child Welfare Officers. During enquiry, P.Ws.1 to 3 made the same allegations against the accused. P.W.14, the then Sub Inspector of Police has spoken about the registration of the case and P.W.15 has spoken about the investigation done in detail and his final report to the Court.

3. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. However, he did not choose to examine any witness nor mark any document on his side. His defence was a total denial. Having considered all the above, the trial Court convicted and sentenced him as detailed in the first paragraph of this judgment. Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

4. We have heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor (Puducherry) appearing for the respondent and also perused the records, carefully.

5. One of the main contentions of the learned counsel appearing for the appellant is that the trial Court had failed to examine the competence of P.Ws.1 to 3 who are admittedly child witnesses. The learned counsel would further submit that in the instant case, there is no indication in the records of the trial Court that the competence of P.Ws.1 to 3 to testify was tested by the trial Court. Thus, according to the learned counsel, P.Ws.1 to 3 are incompetent to testify and therefore their evidences should be rejected.

6. He would further submit that the children were prone to tutoring. In this case, there are evidences on record to gather that P.Ws.1 to 3 had been tutored by the fellow teachers of the accused out of personal animosity and therefore, their evidences cannot be the sole foundation for the conviction, he contended. The learned counsel would further submit that the complaint was made by the fellow teachers of the accused only out of personal animosity against him and there is no truth in the allegations made by them.

7. The learned counsel would further submit that the trial Court has failed to follow the mandatory procedure contemplated in the POCSO Act while conducting the trial. At any rate, according to the learned counsel, the trial Court ought not have acted solely on the basis of the evidence of P.Ws.1 to 3, the learned counsel contended. His last contention was that the conviction and sentence imposed on the accused under various penal provisions amount to double jeopardy, which is violative of Article 20(2) of the Constitution of India. Thus, according to the learned counsel, the appellant is entitled for acquittal.

8. The learned Additional Public Prosecutor (Puducherry) would oppose this appeal. He would submit that P.Ws.1 to 3 had no grudges against the accused to falsely depose. He would further submit that there is no evidence to prove that P.Ws.1 to 3 were tutored to depose falsely against the accused. The learned Additional Public Prosecutor would further submit that the trial Court was right in convicting the accused. However, he was not able to justify the punishment imposed under various penal provisions for one and the same crime committed by the accused. Eventually, he prayed for the dismissal of the appeal.

9. We have considered the above submissions.

10. Admittedly, in this case, the trial Judge has not administered oath on P.Ws.1 to 3. In *Rameshwar Vs. State of Rajasthan* reported in AIR 1952 SC 54, the Hon'ble Supreme Court examined the provisions under Section 5 of the Indian Oaths Act, 1873 and Section 118 of the Indian Evidence Act, 1872 and held that every witness is competent to depose unless the Court considers that he is prevented from understanding the question put to him or from giving rational answers by reason of tender age, extreme old age, disease, whether on body or mind or any other cause of the same kind. The Court further went on to say that there is always competency for a person to depose unless the Court consider otherwise. The Hon'ble Supreme Court has further held as follows:

".....It is desirable that the Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion, I think, be gathered from the circumstances when there is no formal certificate...."

11. From the above judgment of the Hon'ble Supreme Court, it is crystal clear that it is the duty of the trial Court, before examining a child witness to make an assessment as to

whether the child is not incompetent on account of any of the disqualifications stated in Section 118 of the Evidence Act. In the instant case, the trial Court has miserably failed to discharge the said onerous judicial obligation to examine the competence of P.Ws.1 to 3 and to certify the same. There is no indication anywhere in the record that the trial Court made any effort to test the competence of the child witnesses. This in our considered view is a serious lapse on the part of the trial Court.

12. Now, the question is whether on that score, as it is contended by the learned counsel, the evidences of P.Ws.1 to 3 could be rejected holding that they were incompetent to testify. While considering such a situation when there had been omission on the part of the trial Court to assess the competence of the witness to testify, the Hon'ble Supreme Court in Rameshwar case (cited supra) has held that the competence of the witness can be gathered by the appellate Court from the rational answers given to the questions both during chief examination as well as during cross examination.

13. In Suresh Vs. State of Uttar Pradesh reported in AIR 1981 SC 1122 the Hon'ble Supreme Court examined the question of competence of a five year old child. The Court held that the age of the child was of no consequence because in that case, on facts, the mental faculties and understanding of the child were fully matured.

14. Applying the said yardstick to the facts of this case, though the trial Court has failed to examine the competence of P.Ws.1 to 3 who were children as on the date of their respective examination, as held by the Hon'ble Supreme Court, first of all it has to be presumed that they are competent and secondly from the narration of facts by them both during the chief examination and cross examination, we find that there is nothing to suggest that they were incompetent. Therefore, on the ground that the trial Court had failed to record its opinion that the child understood the questions put to her, their evidences cannot be rejected.

15. The learned counsel for the appellant would submit that P.Ws.1 to 3 would have been tutored by the fellow teachers of the accused out of personal animosity. Though this argument is attractive, we do not find any materials even to remotely suggest that P.Ws.1 to 3 had been so tutored by any of the fellow teachers against the accused. The learned counsel for the appellant would submit that children are in general prone to tutoring and thus in the instant case, such tutoring cannot be ruled out. We are not persuaded by this argument for, there is vast difference between tutoring a witness and counselling a sexually assaulted survivor. Encouraging a child to depose the truth and to counsel the child to come out of the trauma suffered by the sexual assault cannot be treated on par with tutoring. Tutoring, is nothing

but driving a child to depose something of which the child has no knowledge. Encouraging a child to speak the facts of which the child has knowledge would not amount to tutoring. Often, there is some confusion in the mind of the stakeholders in respect of counselling or encouraging and tutoring. In the instant case, there is evidence to infer that the children were encouraged to tell the facts which they knew and they were not at all tutored. Therefore, this argument is rejected.

16. The third argument advanced by the learned counsel for the appellant is that even assuming that the evidences of P.Ws.1 to 3 are reliable, that would not make out the offences for which the accused has been punished. We find no force in the said argument. In her evidence, P.W.1 has stated that the accused kissed her and touched her chest. Further, P.W.1 has stated that the accused wanted her to suck his penis. But she has not stated that she did so. Thus, her evidence would go to only prove that there was sexual assault made on her as defined in Section 7 of the POCSO Act and there was an attempt to commit an offence of penetrative sexual assault. P.W.2 has stated that the accused kissed her and wanted her to suck his penis and he further touched her vagina. She has not stated that the accused inserted her penis thereby making penetrative sexual assault. By his act, the accused has committed an offence of sexual assault and also an attempt to commit penetrative sexual assault. P.W.3 has stated that the accused wanted her to suck his penis and she has not stated that she did so. From these evidences of P.Ws.1 to 3, the prosecution has proved that the accused made an attempt to commit penetrative sexual assault which is punishable under Section 18 of the POCSO Act (3 counts). Accordingly, he is liable to be punished.

17. Now turning to the quantum of punishment, the appellant has got no other bad antecedents. After the occurrence also he has not committed any crime. Having regard to the aggravating as well as the mitigating circumstances, we are of the view that sentencing the appellant / accused to undergo rigorous imprisonment for seven years and pay a fine of Rs.10,000/- (for each count) for offence punishable under Section 18 r/w Section 4 of the POCSO Act would meet the ends of justice.

18. In the result, the appeal is partly allowed. The conviction and sentence imposed on the appellant / accused for offences under Sections 4, 6 and 10 of POCSO Act (3 counts) and Section 377 of I.P.C. are set aside and instead he is convicted under Section 18 r/w Section 4 of the POCSO Act (3 counts) and sentenced to undergo rigorous imprisonment for seven years and pay a fine of Rs.10,000/- (for each count) in default to undergo rigorous imprisonment for three months for each count. These sentences shall run concurrently. It is further directed that the period of detention already

undergone by the accused shall be set off under Section 428 Cr.P.C. The fine amount now imposed shall be adjusted from the fine amount already paid, if any, and the excess, if any, shall be refunded to the appellant.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

Tsi/dixit/kk

To

1. The Special Judge (under the POCSO Act),
Principal Sessions Judge, Puducherry.
2. The Director General of Police,
Mylapore, Chennai.
3. The Collector, Officer of the Collectorate,
Chennai.
4. The Superintendent of Central Prison,
Kalapet, Puducherry.
5. The The Inspector of Police,
Thirukanur Police Station,
Puducherry.
6. The Additional Public Prosecutor (Puducherry),
Madras High Court.

+ 1 cc to M/s. Sai, Bharath & Ilan, Advocate SR.43281
+ 1 cc to Government Pleader Puducherry Sr.43447

PPA (CO)

CrI.A.No.122 of 2016