

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.08.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
AND
THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.214 of 2016

Ramu @ Elavarasan

Appellant

Vs

State rep. By
Inspector of Police,
All Women Police Station,
Jeyankondam, Ariyalur District,
Cr.No.10 of 2015

Respondent

Prayer:- Criminal Appeal filed under Section 374 Cr.P.C., to set aside the conviction and sentence imposed on the appellant by the learned Sessions Judge, [Fast Track Mahila Court] Ariyalur, by judgment dated 30.09.2015, passed in S.C.No.14 of 2015.

For Appellant : Mr.K.Gandhikumar
For Respondent : Mr.V.M.R.Rajendran
Additional Public Prosecutor

JUDGEMENT

(Judgment of the Court was delivered by V.Bharathidasan.J)

The sole accused in S.C.No.14 of 2015 on the file of Fast Track Mahila Court, Ariyalur, is the appellant herein. He stood charged for offences under Sections 5(m) read with 6 of Prevention of Children from Sexual Offences Act, 2012 (herein after called POCSO Act) and 506(ii) IPC. After trial, by judgment dated 31.09.2015, the trial court convicted the appellant under both the offences and sentenced him to undergo Rigorous imprisonment for 3 years and to pay a fine of Rs.5000/- in default to undergo rigorous imprisonment for 6 months for the offence under Section 506(ii) IPC and sentenced him to undergo imprisonment for life and to pay a fine of Rs.25,000/- in default to undergo rigorous imprisonment for 2 years for the

offence under Section 6 of POCSO Act. The trial Court ordered all the sentences to run concurrently. Challenging the above said conviction and sentence, the appellant is before this Court with this appeal.

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

The victim girl, in this case, aged about 9 years, is the daughter of P.Ws.2 and 3. She was studying 4th standard at the time of occurrence. On 25.05.2015, at about 6.00 p.m., victim girl, P.W.1, went to her maternal aunt's (sister of her mother) house to get some spinach. When she was returning back to home, the accused was sitting in the Venmankondan bridge. While P.W.1 was crossing the bridge, the accused pulled the bicycle and caught hold of the victim girl and took her to a nearby cashew grove. Then, the accused sexually assaulted her by putting his penis into the private part of P.W.1, for some time. When, P.W.1 tried to escape, the accused threatened her with knife. Then, the accused asked her to lay down for some time. Then, she returned to her house, crying.

3. P.W.2, mother of P.W.1, after seeing P.W.1 crying, came to know about the occurrence. P.W.2 informed the same to her husband-P.W.3, P.W.7 and neighbours. All of them went to the scene of occurrence. On seeing them, the accused ran away. Immediately, P.W.2 gave a complaint-Ex.P.2, before the respondent police.

4. P.W.18, Inspector of Police, attached to the All Women Police Station, Jayankondam, on receipt of the complaint, registered a case in Crime No.10 of 2015 for the offences under Sections 5(m) read with 6 of POCSO Act and 506(ii) IPC. Then, he sent the First Information Report, Ex.P.10, to the Judicial Magistrate court and copies of the same to the higher police officials. Thereafter, he sent P.W.1, victim girl, for medical examination with a memo. Then, P.W.18 proceeded to the scene of occurrence and prepared an Observation Mahazar, Ex.P.6, and a Rough Sketch, Ex.P.11, in the presence of witnesses. He also recovered a pen knife (M.O.1) under a cover of Mahazar, Ex.P.12. P.W.18 also recovered the skirt (M.O.2) and panties of victim girl in the presence of witnesses.

5. P.W.18, arrested the accused at about 12.00 p.m., near Udayarpalayam bus stand. On such arrest, he voluntarily gave a confession and based on the disclosure statement of the accused, P.W.18 recovered a lungi of the deceased (M.O.3). On 27.05.2015, P.W.18 sent the accused for medical examination and he also took steps to record statement of P.W.1 under Section 164 Cr.P.C.

6. P.W.17, Assistant Civil Surgeon, working in the

Government Hospital, Jayankondam, examined P.W.1 and found the following injuries:-

" 1. Refer to dentist at Government Hospital Ariyalur for opinion.

2. No external injuries over body and external genitalia.

3. Hymen was intact/no injuries.

4. No external injuries/ vaginal swab taken and sent for semen test/ mild congestion over the pubis and vagina.

Vaginal swab test- no sperm."

Ex.P.9 is the Accident register issued by P.W.17.

7. P.W.16, Doctor, working in the Government Hospital, Udayarpalayam, examined the accused and issued Accident Register, Ex.P.8 and he gave the following opinion:-

" Based on the above physical examination, I am of the opinion that there is nothing to suggest that he is impotent, no evidence of recent sexual intercourse. "

8. P.W.18 recorded the statement of witnesses. After completion of investigation, he laid charge sheet against the accused.

9. Based on the above materials, the trial Court framed the 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 18 witnesses were examined and 17 documents were exhibited, besides 3 Material Objects.

10. Out of the witnesses examined, P.W.1 is the victim girl. According to her, on 25.05.2015 at about 6.00 p.m., when she was returning back from her aunt's house in a bicycle, the accused was sitting on the Venmankondan bridge and while, she was crossing the bridge, the accused pulled her bicycle and caught hold of her and took her to a nearby cashew grove and sexually assaulted her by putting his penis into her private part and kept it there for some time. She has further stated that when she tried to escape, he threatened her with a knife and asked her to lay down and also intimidated her that if she reveal it, he will take photographs of her and telecast it in the television and hence, she was sitting there for some time and thereafter, the accused asked her to lay down and she laid down and then, she came back to her house. P.W.2, the mother of the deceased has stated that after coming to know about the occurrence, she informed the same to her husband, P.W.7 and neighbours and all of them went to the scene of occurrence, where they saw the accused standing and on seeing them, he ran away and therefore, she lodged a complaint before the respondent

police.

11. P.W.2 is the mother of P.W.1. According to her, P.W.1 was studying 4th standard at the time of occurrence and on the date of occurrence, P.W.1 went to the house of her sister to get some spinach in her bicycle, and since P.W.1 did not return back, P.W.2 asked her sister over phone and she informed her that already P.W.1 left her house. It is her further evidence that immediately, she went in her TVS XL vehicle in search of P.W.1 and at that time, she saw P.W.1 holding her panties in her hand and crying and informed her about the occurrence and immediately, she informed the same to her husband-P.W.7, over phone and when, they went to the scene of occurrence, they saw the accused sitting there and when they questioned the accused, he denied the same and thereafter, she lodged a complaint before the respondent police. P.W.3 is another girl in the same village, who was studying 7th standard. According to her, some time before the present occurrence, when she was coming from the school, the accused intercepted her and asked her to come in his bicycle and on the way, he has given Rs.20/- and thereafter, he took her to a cashew grove and tried to molest her, but, she escaped from him and ran away and when she informed the same to her parents, her parents questioned the accused, but he denied the occurrence and her parents warned him. Hearing the occurrence in this case, since the accused is a habitual offender of doing similar acts, P.W.3 voluntarily gave evidence before the Court. P.W.4 is another girl, studying 10th standard in the same village. According to her, when she was studying 6th standard, the accused tried to molest her and she also escaped and her parents, after coming to know about the facts, they beat the accused.

12. P.W.5 is the mother of P.W.4. She had also corroborated the evidence of P.W.4. P.W.6 is the mother of P.W.3. She has also corroborated the evidence of P.W.3. P.W.7 is the father of P.W.1. According to him, P.W.2 informed him about the occurrence and he, along with other persons, went to the scene of occurrence, where the accused was sitting in an intoxicated mood and at that time, other neighbours also came there and on seeing them, the accused ran away inside the cashew grove. P.W.8 is the aunt of P.W.1 and sister of P.W.2. P.W.9 is a neighbour of P.W.1 and according to him, after coming to know about the occurrence, he, along with others, went to the scene of occurrence, where the accused was sitting and after seeing them, he ran away. P.W.10 is also another neighbour and it is his evidence that he also went along with others to the scene of occurrence, where the accused was sitting and P.W.1 identified the accused and when they enquired him, he ran away. P.W.11 is the Head Master of the school, where P.W.1 was studying.

13. P.W.13 is the village Assistant. He has spoken about the arrest of the accused and also recovery of M.O.3. P.W.14 is a friend of P.W.7. He has also stated that he, along with P.W.7 went to the scene of occurrence, where P.W.1 identified the accused and he found the accused in a fully drunken mood and when they enquired him, the accused ran away. P.W.15 turned hostile. P.W.16 is a doctor, who examined the accused and gave the Accident Register, Ex.P.8. P.W.17 is a doctor, who examined P.W.1 and gave Accident Register, Ex.P.9. P.W.18, Inspector of Police, registered the case, conducted investigation, arrested the accused and recorded the statement of witnesses. On completion of investigation, he laid charge sheet against the accused.

14. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. He examined one Karunanithi as D.W.1, however, he did not choose to mark any documents.

15. According to D.W.1, he knew both the accused as well as P.W.1's family and on the date of occurrence, at about 6.30 p.m., he saw a crowd near Venmankondan bridge and he also found the accused standing there and when he enquired P.W.1, she told him about the occurrence and thereafter, the people standing there beat the accused and hence, he advised them to hand over the accused to police station.

16. Having considered all the above, the trial Court found the accused guilty under the said charge and accordingly, sentenced him as detailed in the first paragraph of this judgment. Aggrieved over the same, the accused/appellant is before this Court with this appeal.

17. We have heard Mr.K.Gandhi Kumar, learned counsel appearing for the appellant and Mr.V.M.R.Rajendran, learned Additional Public Prosecutor appearing for the State.

18. Learned counsel for the appellant would submit that there is some doubt in P.W.2 giving complaint. According to him, there was an earlier complaint which was suppressed by the prosecution and the evidence of P.Ws.2 to 6 are interested witnesses and they are not trustworthy and their evidence is unnatural and unworthy and no reliance can be placed on the evidence. It is his further submission that the prosecution has not proved the recovery beyond any reasonable doubt and the medical evidence also does not corroborate the evidence of the prosecution and hence, the learned counsel would submit that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt and sought for acquittal. He further submitted that at any rate, the act of the accused will not fall under Section 6 of the POCSO Act and sought for lesser punishment.

19. Per contra, learned Additional Public Prosecutor would submit that P.W.1 is the victim girl and she has categorically stated about the occurrence and the medical evidence also corroborates the evidence of P.W.1. Further, he submitted that the accused is a habitual offender and the evidence of P.Ws.3 to 6 clearly establishes the same. In the above circumstances, he would contend that the prosecution has clearly proved the guilt of the accused and sought for dismissal of the appeal.

20. We have considered the rival submissions and perused the records carefully.

21. P.W.1 is the victim girl in this case. She was 9 years old minor child and studying 4th standard at the time of occurrence. P.W.11, Head Master of the school has also issued a certificate, Ex.P.3 to that effect. The evidence of P.W.1 was that on the date of occurrence, at about 6.00 p.m., she went to her aunt's house to bring some spinach and when she was returning back in her bicycle, the accused, who was sitting on the bridge, pulled her bicycle and took her to a nearby cashew grove and sexually assaulted her, by putting his penis in her vagina for some time and it was paining for her. It is her further evidence that when she tried to escape, the accused intimidated her by showing a knife and also threatened her that he would take photographs of the victim and telecast them in television and when she was sitting there for some time, the accused asked her to lay down and she laid down at the scene of occurrence and thereafter, she went back to her house holding her panties in her hand. P.W.2, mother of the victim girl, noticing that P.W.1 did not return back to her house, took her TVS XL vehicle and went in search of P.W.1. and on the way, she found P.W.1 holding her panties in her hand and crying and when she enquired P.W.1, she informed about the occurrence. Immediately, she has called her husband, P.W.7 and neighbours and went to the scene of occurrence, where the accused was sitting and when they questioned him, he ran away and escaped. P.W.2 also corroborated the evidence of P.W.1. P.Ws.9, 10, 14, who are neighbours of P.W.1, went along with P.Ws.1 and 2 to the scene of occurrence, have stated that the accused was sitting there in an intoxicated mood and P.W.1 identified the accused and when they questioned him, he ran away from the scene of occurrence.

22. According to D.W.1, on the date of occurrence, a crowd of people were standing near the bridge, where the accused was standing and when, they enquired P.W.1, she identified the accused and immediately others beat the accused and he advised them to take the accused to the police station and went away.

23. P.W.1 is a victim girl. She has categorically narrated the occurrence and she has also identified the accused, immediately after the occurrence and a complaint has also been lodged, immediately, on the same day.

24. In a case of this nature, the evidence of victim will have a great weight, notwithstanding absence of any corroboration. Hence, there is no reason to disbelieve the evidence of P.W.1, victim girl.

25. The trial Court convicted the accused under Section 5(m) r/w. 6 of POCSO Act. Section 5(m) of the Act reads as follows:

" whoever commits penetrative sexual assault on a child below twelve years "

Section 6 of the Act reads as follows:

" whoever commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life and shall also be liable to fine"

26. Section 5 of the POCSO Act deals with aggravated penetrative sexual assault. The penetrative sexual offence has been defined under Section 3 of the act. Section 3 of the Act reads as follows:

" A person is said to commit penetrative sexual assault if-

(a) he penetrates his 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; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, anus , urethra of the child or makes the child to do so to such person or any other person."

To bring home an offence under Section 5 of the Act, prosecution should establish that the act of the accused falls under Section 3 of the Act. Section 3 of the Act states that a person is said to have committed penetrative sexual act, if he penetrates his penis to any extent into the vagina or he inserts to any extent

or any object or a part of the body, not being the penis into the vagina, urethra or anus , etc., or he manipulates any part of the body of the child so as to cause penetration into the vagina , urethra, anus or any part of the body or he applied his mouth to the penis, vagina, anus, urethra of the child.

27. But, in the instant case, according to the evidence of P.W.1, the accused had only touched the vagina of P.W.1 and kept it for some time. According to her, there is no other penetration. P.W.17, doctor, who examined P.W.1, also corroborated the same that the hymen was intact and she found no injuries and there were no external injuries. From the vaginal swab taken, P.W.17 only found mild congestion over the pelvis and in the vaginal swab test no sperm was seen. Hence, as per the evidence of P.W.1 and P.W.17, there is no penetration into the vagina of P.W.1. Hence, the act of the accused will not fall under Section 5 and 6 of the Act. But the prosecution has clearly established that the accused has sexually assaulted P.W.1. Section 7 of the Act defines sexual assault and it reads as follows:

" 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 any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault"

28. If any person commits any sexual assault on a child below 12 years of the age, it would fall under aggravated sexual offence under Section 9 (m) of the Act. Section 9(m) of the Act read as follows:

" Whoever commits sexual assault on a child below twelve years"

Section 10 of the Act prescribes the punishment for the sexual assault. Section 10 of the Act reads as follows:

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

On a careful scrutiny of the testimony of P.Ws.1 and 17, we are of the considered view that the act of the accused would only fall under Section 9(m) of the Act and consequently he is liable to be punished under Section 10 of the Act. The victim girl is a 9 years old school going girl, at the time of occurrence and she was sexually assaulted by the accused. From the evidence of P.Ws.3 to 6, it could be seen that the accused is a habitual offender. Even though any amount of monetary compensation may

not cure the scar inflicted and traumatic experience undergone by the victim and it leaves an unforgettable scar on her. In the above circumstances, the trial Court has rightly directed the Taluk Legal Services Authority, Ariyalur, to assess and fix a proper compensation to the victim under the Victim Compensation Scheme. We further direct the Taluk Legal Services Authority to expedite the process and take steps to pay adequate compensation to the victim girl.

29. So far as the quantum of punishment is concerned, sentencing the accused to undergo rigorous imprisonment for 5 years and to pay a fine of Rs.2000/- would meet the ends of justice. The conviction under Section 506(ii) IPC is liable to be confirmed.

30. In the result, the Criminal Appeal is partly allowed. Confirming the conviction and sentence imposed on the appellant in S.C.No.14 of 2015 under Section 506(ii) IPC, the conviction and sentence imposed on the appellant for offence under Section 5(m) r/w. Section 6 of POCSO Act, is set aside and instead, he is convicted for the offence under Section 9(m) r/w. 10 of POCSO Act, and sentenced to undergo Rigorous Imprisonment for 5 years and to pay a fine of Rs.2000/-. The fine amount is ordered to be paid to the victim as compensation under Section 357 Cr.P.C. Both the sentences are to run concurrently. The Taluk Legal Services Authority is directed to assess and fix the proper compensation under the Victim Compensation Scheme Framed under Section 357 (A) Cr.P.C within a period of four weeks from the date of receipt of a copy of this order. The period of sentence already undergone by appellant/accused shall be given set off under Section 428 Cr.P.C.

s/d-
Assistant Registrar(CS-V)

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Sub-Assistant Registrar

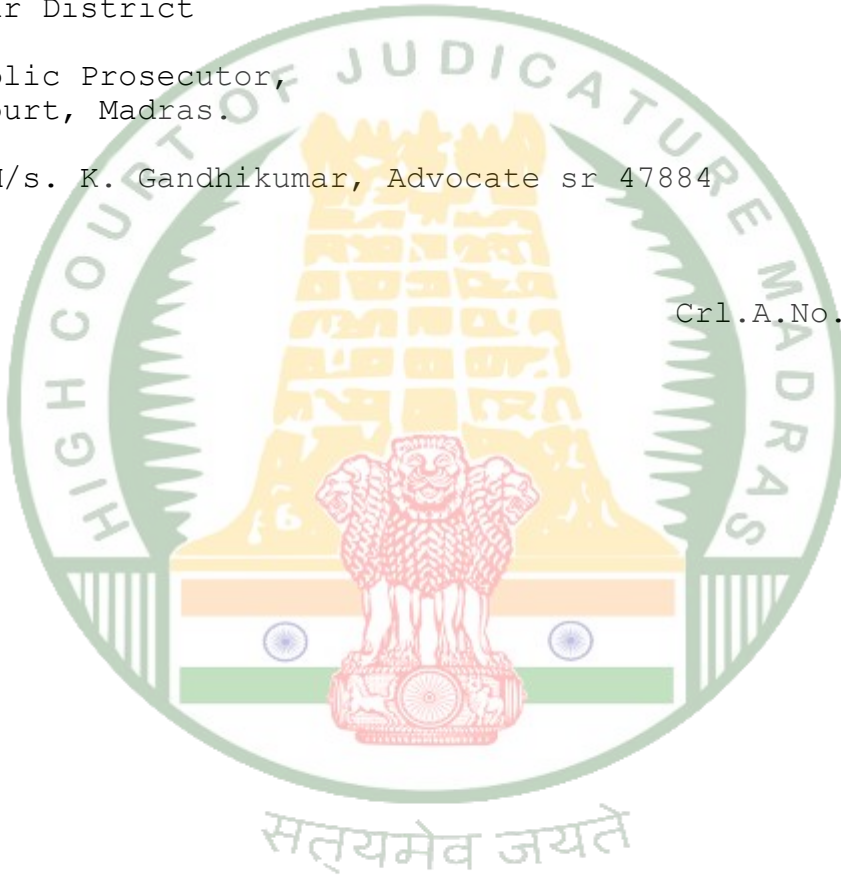
To

1. The Sessions Judge,
Fast Track Mahila Court,
Ariyalur.
2. The Taluk Legal Services Authority,
Ariyalur
3. Through The District Legal Services Authority
Ariyalur

4. The District Collector, Ariyalur
 5. The Superintendent, Central Prison,
Trichy
 6. The Director General of Police
Mylapore, Chennai
 7. The Inspector of Police
All Women Police Station
Jeyamkondam
Ariyalur District
 8. The Public Prosecutor,
High Court, Madras.
- +1 CC to M/s. K. Gandhikumar, Advocate sr 47884

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CP (CO)
sp/27/2



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