



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 24.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU
AND
THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRL.A[MD].No.27 of 2016

Sureshkumar : Appellant/Sole Accused

Vs.

State Rep by
The Inspector of Police,
All Women Police Station,
Jeeyapuram, Tiruchirappalli,
Tiruchirappalli District,
[Crime No.1 of 2015]. : Respondent/Complainant

PRAYER: Appeal is filed under Section 374(2) of the Code of Criminal Procedure against the Judgment and conviction dated 17.12.2015 made in S.C.No.6 of 2015, on the file of the learned Sessions Judge, Mahila Court, Tiruchirappalli.

For Appellant : Mr.P.Andiraj
For Mr.M.Kathiravan
For Respondent : Mr.C.Ramesh
Additional Public Prosecutor

JUDGMENT

[JUDGMENT of the Court was delivered by **S.NAGAMUTHU, J**]

The appellant is the sole accused in Special Sessions Case No.6 of 2015, on the file of the learned Sessions Judge, Mahila Court, Tiruchirappalli. He stood charged for the offences punishable under Sections 366-A of the Indian Penal Code, Sections 3(a), 3(d) r/w Section 4, 5(m) and 5(r) r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012, [hereinafter referred to as the "POCSO Act"]. By Judgment dated 17.12.2015, the Trial Court convicted the accused and sentenced him, as detailed below:-



WEB COPY

Section of Law	Sentence of imprisonment	Fine amount
366-A IPC	To undergo rigorous imprisonment for seven years.	Rs.500/- in default to undergo simple imprisonment for two months.
3(a), 3(d) r/w Section 4 of POCSO Act	To undergo imprisonment for life.	Rs.1,000/- in default to undergo simple imprisonment for six months.
5(r) r/w Section 6 of POCSO Act.	To undergo rigorous imprisonment for ten years.	Rs.1,000/- in default to undergo simple imprisonment for six months.

The sentences have been ordered to run consecutively. Challenging the said conviction and sentence, the appellant has come up with this Criminal Appeal.

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

PW-1 is a resident of Pichavaram Village in Srirangam Taluk, Trichirappalli District. She had a sister, by name, Jothi. Jothi and her husband died leaving behind their daughter. Therefore, PW-1 adopted the daughter of his sister and kept her in her custody. Her sister [hereinafter referred to as "the victim"] was studying in eighth standard in a local school. Her date of birth is 25.01.2003. The accused is a neighbour of PW-1. On 20.01.2015, PW-1 had gone out to her field for work. PW-2, the victim girl, was just playing in front of her house.

2.1. Around 06.00 PM, the accused gave a chocolate to PW-2, enticed her and took her to a nearby Banana Grove. Inside the Banana Grove, the accused, by force, removed her inner garments. Then, the accused touched her breast and then, inserted his penis into her vagina. He further rubbed his penis against her face. At that time, the accused was in a drunken state. Then, the accused challenged PW-2 as to who will come to rescue her. He further told her that on an earlier occasion, he had raped PW-1 and also the sister of PW-2. He then threw a stone on PW-2. PW-2 tried to escape. The accused caught hold of her neck and caused nail marks on her neck. PW-2, however, managed to escape from the said place.

2.2. At that time, one Mr.Kesavan came. PW-2 went near him and informed about the same. Thereafter, PW-2 returned to her house and informed PW-1 about the occurrence. PW-1, immediately, went to the house of the accused and questioned him. The accused came out of the house with an aruval and attempted to attack her. Therefore, PW-1 returned home.



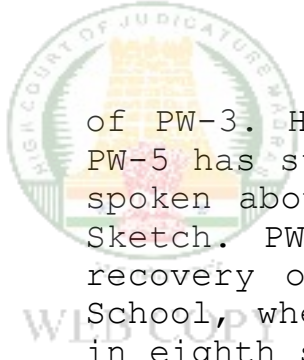
2.3. On 21.01.2015, at 03.00 PM, PW-1 went to the Jeeyapuram Police Station and made a complaint. On receipt of the said complaint, PW-15 registered a case in Crime No.1 of 2015, under Sections 3(a), r/w Section 4 of the POCSO Act. EX-P1 is the complaint and EX-P14 is the First Information Report. Then, she forwarded both the documents to the Court, which were received by the learned Judicial Magistrate at 09.00 AM, on 22.01.2015.

2.4. Taking up the case for investigation, PW-15 proceeded to the place of occurrence, prepared an Observation Mahazer and a Rough Sketch, showing the place of occurrence in the presence of the witnesses. She recovered dress materials worn by PW-2 in the presence of the witnesses. On the same day, at 06.00 PM, he arrested the accused in the presence of the witnesses. Then, she recovered lungi worn by the accused. She forwarded the material objects to the Court with a request to forward the same for chemical examination. During medical examination, it turned out that the accused was sexually potential to have sexual intercourse with a woman. Similarly, PW-15 forwarded PW-2 also for medical examination. The report revealed that there was no sign of any sexual intercourse on PW-2. Her hymen was intact. There was neither contusion nor any other injury on her private parts. The vaginal smears were forwarded for chemical examination. The report revealed that there was no spermatozoa found on the same. PW-15, then, examined the doctors, collected the medical records and on completing the investigation, she laid charge sheet against the accused.

2.5. 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, on the side of the prosecution, 15 witnesses were examined, 25 documents and two material objects were marked. MO-1 is the Chudithar Tops worn by PW-2 and MO-2 is the lungi recovered from the accused.

2.6. Out of the said 15 witnesses, PW-1, the mother of PW-2, has stated that on the day of occurrence, around 07.00 PM, since PW-2 was not found, she went in search of her. After sometime, PW-2 came out of the Banana Grove and told PW-1 that the accused took her to the Banana Grove, removed her Jatti by tearing the same and Chudithar and then, inserted his penis into her vagina. PW-1 has further stated that PW-2 had narrated the entire occurrence.

2.7. PW-2, the child, has narrated the entire occurrence in a vivid fashion. PW-3 has stated that she found the accused taking PW-2 into the Banana Grove. She has further stated that she accompanied PW-1 in search of PW-2 and she witnessed PW-2 informing about the entire occurrence to PW-1. PW-4 is the husband



of PW-3. He has stated that he heard about the occurrence later. PW-5 has stated that he heard about the occurrence later. PW-6 has spoken about the preparation of Observation Mahazer and the Rough Sketch. PW-7 has spoken about the arrest of the accused and the recovery of lungi from the accused. PW-8, the Headmaster of the School, where PW-2 was studying, has stated that PW-2 was studying in eighth standard and her date of birth is 25.01.2003.

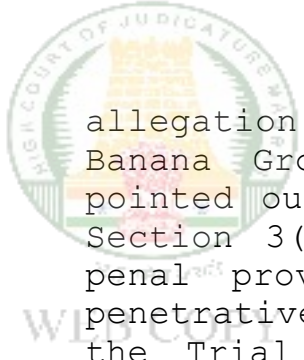
2.8. PW-9, a Scientific Assistant of the Regional Forensic Lab, has stated that he examined the vaginal smears of PW-2 sent by the doctor and on examination, he found neither blood nor semen in the same. EX-P9 is the certificate issued by the doctor. PW-10, Dr.S.Saravanan, has stated that he examined the accused on 29.01.2015 at 11.55 AM and found that the accused was sexually potential to have sexual intercourse with a woman. He further found that there was no injury on him.

2.9. PW-11, the learned Judicial Magistrate No.VI, Tirchirappalli, has stated that she recorded the statement of PW-2 under Section 164 of the Code of Criminal Procedure. EX-P3 is the statement of PW-2. PW-12, a Constable, has stated that she took PW-2 to the hospital for medical examination, as directed by the Investigating Officer. PW-13, Dr.Packiyavathi, has stated that she examined PW-2, on 22.01.2015 and found that her hymen was intact and there was no sign of any sexual intercourse, neither contusion nor any injury was found on the private parts of PW-2. EX-P12 is the Accident Register. EX-P13 is the Discharge Summary. PW-14, a Grade II Constable, has stated that he took the accused to the hospital for medical examination, as directed by PW-15. PW-15 has spoken about the registration of the case on the complaint made by PW-1, the investigation conducted by her and the filing of final report.

2.10. When the Trial Court examined the accused under Section 313 of the Code of Criminal Procedure in respect of the incriminating evidences available against him, he denied the same as false. However, he did not choose to examine any witness nor to exhibit any document. 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.

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

4. Before going into the merits of the case, let us look into the charges framed by the Trial Court. As we have already extracted in the first paragraph of this Judgment, the first charge is under Section 366-A of the Indian Penal Code on the



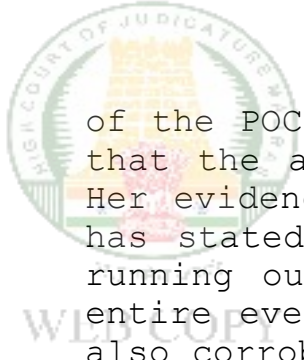
allegation that PW-2 was kidnapped by the accused and taken to the Banana Grove. Regarding this charge, there can be no defect pointed out at all. But, the second charge has been framed under Section 3(a) of the POCSO Act. 3(a) of the POCSO Act is not a penal provision at all and it only defines as to what the penetrative sexual assault is. It is not understandable as to how the Trial Court could frame a charge invoking the definition provision, without framing charge under the penal provision.

5. The third charge is under Section 3(d) r/w Section 4 of the POCSO Act, which speaks of the penetrative sexual assault by applying the mouth of an accused to her vagina, after making the child to apply her mouth to the penis. In this case, there is no such allegation at all even by the police that the accused either applied his mouth to the vagina or made PW-2 to apply her mouth to the penis of the accused. Thus, the third charge framed under Section 3(d) r/w Section 4 of the POCSO Act is also without any material on record.

6. The fourth charge framed by the Trial Court is under Section 5(m) of the POCSO Act. Section 5 of the POCSO Act defines aggravated penetrative sexual assault. It is not a penal provision. It is not understandable as to how the Trial Court could frame charge by invoking the provision, which defines an offence instead of framing charge under the penal provision.

7. The fifth charge is under Section 5(r) r/w Section 6 of the POCSO Act. Section 5(r) of the POCSO Act defines aggravated penetrative assault on a child and attempts to murder the child. This is punishable under Section 6 of the POCSO Act. In the instant case, there is no material on record to make out a *prima facie* case that the accused attempted to murder PW-2. Thus, this charge is also not sustainable.

8. Now, let us go into the evidence let in by the prosecution. PW-2 has categorically stated that the accused took her into the nearby Banana Grove, where the accused removed her skirt and Jatti and by force inserted his penis into her vagina. But, the medical evidence does not support this version. According to the doctor, her hymen was intact and there was neither any contusion nor any other injury on the private parts of PW-2. PW-2 has further stated that the accused touched her breast and rubbed his penis against her face. Though this witness has been cross-examined at length by the accused, nothing has been elicited to disbelieve her evidence in toto. From her evidence, it could be presumed that the accused had committed the offences under the Act, as provided under Section 29 of the POCSO Act. Of course, the said presumption is rebuttable. Such rebuttal can be had either by direct evidence or by circumstantial evidence. But, in this case, the accused had failed to rebut the said presumption by any means. Thus, the un rebutted presumption raised against the accused under Section 29



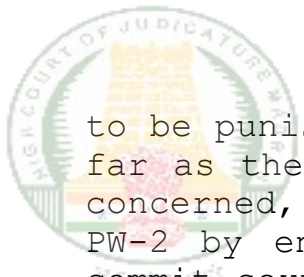
of the POCSO Act, based on the evidence of PW-2 would go to prove that the accused had committed the offences under the POCSO Act. Her evidence is further corroborated by the evidence of PW-1, who has stated that when she went in search of PW-2, she found PW-2 running out of the Banana Grove. PW-2, immediately, narrated the entire event to PW-1. Thus, the evidences of PW-1 and PW-3 would also corroborate the evidence of PW-2.

9. Having come to the said conclusion, now, the next immediate question is as to what was the offence, that the accused had committed by his act. From the medical evidence, it is crystal clear that the accused had not inserted his penis into the vagina of PW-2. The very fact that the hymen was intact and the very fact that there was no contusion or any other injury on her private parts of the body and there was neither blood nor semen on her dress materials would all go to prove that the accused had not inserted his penis into the vagina of PW-2. PW-2 is a child. Her evidence cannot be understood by giving a literal meaning each word spoken her. It should be appreciated by understanding the meaning that she wanted to convey her language, which was familiar to her as a child. Thus, we understand from her evidence that what she meant was that the accused attempted to insert his penis into her vagina. Since the accused was under the influence of alcohol, she escaped from him. Thus, the offence committed by the accused was an attempt to commit penetrative sexual assault and thus, he is liable to be punished under Section 18 r/w Section 4 of the POCSO Act.

10. Unfortunately, as we have already pointed out, charges were not framed properly. Whether on that score, could it be said that the accused cannot be punished for the offences committed?. In this regard, we may refer to Section 464 of the Code of Criminal Procedure, which states that due to the defects in the charges, in the opinion of this Court, if it is found that there has occurred failure of justice, then only, the Appellate Court can set aside the conviction and remand the case back to the Trial Court for fresh disposal.

11. But, in this case, the charge No.II has been framed under Section 3(a) of the POCSO Act. Though the penal provision contained in Section 4 of the POCSO Act has been omitted to be mentioned in the charge, the statement of the charge, which was put to the accused, is that he inserted his penis into her vagina. Thus, the accused was not, in any manner, prejudiced by the omission of mention of Section 4 of the POCSO Act in charge No.II and thus, there has occurred no failure of justice so far as the second charge is concerned.

<https://hcservices.courts.gov.in/hcservices/> 12. However, since as we have already found, the accused did not, in fact, insert his penis into the vagina of PW-2 and he only made an attempt to insert his penis into her vagina, he is liable



to be punished under Section 18 r/w Section 4 of the POCSO Act. So far as the charge under Section 366-A of the Indian Penal Code is concerned, the accused is liable to be punished, as he had taken PW-2 by enticing her into the Banana Grove with evil desire to commit sexual assault on her. Therefore, the conviction imposed on the accused under Section 366-A of the Indian Penal Code needs to be confirmed. So far as the conviction imposed on the accused under the other other charges are liable to be set aside.

13. Now, turning to the quantum of punishment, the accused is an young boy, aged about 22 years. He has got no bad antecedents. There are lot of chances for reformation. After this occurrence, he has not committed any other crime. Driven by lust and urge for sex, that too, when he was in a drunken state, the accused had committed this offence.

14. Having regard to all the mitigating as well as these aggravating circumstances, we are of the considered view that sentencing the accused to undergo rigorous imprisonment for five years and to pay a fine of Rs.50,000/-, for the offence under Section 18 r/w Section 4 of the POCSO Act and to sentence him to undergo rigorous imprisonment for two years with fine of Rs.1,000/- for the offence under Section 366-A of the Indian Penal Code, would meet the ends of justice.

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

- The conviction of the accused under Section 366-A of the Indian Penal Code is confirmed, however, the sentence is reduced and he is sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for four weeks.
- The accused is convicted under Section 18 r/w Section 4 of the POCSO Act and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.50,000/-, in default to undergo rigorous imprisonment for eight weeks.
- The conviction and sentence imposed on the accused under all the other charges are set aside and he is acquitted of the same.
- On realization of the entire fine amount of Rs.51,000/- [Rupees Fifty One Thousand only] from the accused, the Trial Court shall pay the same to PW-1 on behalf of PW-2 as compensation.
- It is directed that the above sentences shall run concurrently and the period of sentence already undergone by the appellant shall be given set off as required under Section 428 of the Code of Criminal Procedure.

Sd/-

Assistant Registrar[CO]

/True copy/



To

1.The Sessions Judge, Mahila Court, Tiruchirappalli.

2.The District Collector, Tiruchirappalli District

3.The Superintendent, Central Prison, Tiruchirappalli

4.The Director General of Police, Chennai.

5.The Inspector of Police,
All Women Police Station,
Jeeyapuram, Tiruchirappalli,
Tiruchirappalli District.

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

7.The Record Keeper,
Criminal Section, Madurai Bench of Madras High Court,
Madurai.

CRL.A[MD].No.27 of 2016
24.11.2016

NB

KK-PN-SAR2-08.02.2017-8p-5c

sm:RR:SAR 2:07/03/2017:8P/8C