

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.10.2019

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

Crl.A.No.327 of 2015,Crl.M.P. Nos.13085 of 2016
& 12856 of 2017

J.Venkatesan .. Appellant/Accused

Vs.

State represented by
The Inspector of Police,
V1-Villivakkam Police Station,
Villivakkam,
Chennai-600 049. .. Respondent/Complainant

Criminal Appeal filed under Section 374 Cr.P.C. against the judgment and order dated 05.05.2015 passed in S.C.No.185 of 2014 on the file of the Sessions Mahila Court (Special Court for the Protection of Children from Sexual Offences Act, 2012), Chennai.

For Appellant : Mr.B.Natarajan
for D.Durairaj

For Respondent : Mrs.P.Kritika Kamal,
Government Advocate
(Crl. Side)

JUDGMENT

This criminal appeal has been preferred calling into question the legality and validity of the judgment and order dated 05.05.2015 passed in S.C.No.185 of 2014 on the file of the Sessions Mahila Court (Special Court for the POSCO Act cases), Chennai.

2. Minus the minute details, the facts germane which are just necessary for deciding this appeal are stated as under:

2.1 It is the case of the prosecution that on 06.01.2014, around 5.30 p.m., the appellant committed sexual assault on the victim girl "X" (name not divulged for the sake of anonymity), who was aged about 1½ years, in his residence, which was seen by "X's" mother Kala (PW1).

2.2 On a written complaint (Ex-P1) lodged by Kala (PW1), the respondent/police registered a case in C.S.R.No.4 of 2014 on 06.01.2014 and thereafter, Nagalakshmi (PW9), Sub-Inspector of Police, registered a regular case in Crime No.31 of 2014 under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (for brevity "the POCSO Act") and prepared the printed FIR (Ex-P3).

2.3 The investigation of the case was taken over by Gladson Josh (PW10), Inspector of Police, who went to the place of occurrence and prepared the Observation Mahazar (Ex-P2) and Rough Sketch (Ex-P4). The appellant was arrested on 07.01.2014.

2.4 After completing the investigation, the police filed a final report in S.C.No.185 of 2014 before the Sessions Mahila Court, Chennai.

2.5 On appearance of the appellant, the provisions of Section 207 Cr.P.C. were complied with and the trial Court framed charge for the offence under Section 10 of the POCSO Act, against the appellant. When questioned, the appellant pleaded "not guilty".

2.6 To prove the case, the prosecution examined ten witnesses and marked four exhibits.

2.7 When the appellant was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same. On behalf of the appellant, no witness was examined nor any document marked.

2.8 After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 05.05.2015, convicted the appellant of the offence under Section 10 of the POCSO Act and sentenced him to undergo seven years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default to undergo three months simple imprisonment.

2.9 Challenging the above conviction and sentence, the appellant is before this Court.

3. Heard Mr.B.Natarajan (Enrollment No.1063 of 1993), learned counsel representing Mr.D.Durairaj (Enrollment No.3234 of 2007), learned counsel on record for the appellant and Mrs.P.Kritika Kamal, learned Government Advocate (Crl.Side) for the respondent/State.

4. At the outset, Mr.B.Natarajan, learned counsel for the appellant submitted that he is not going into the merits of the case, but, he is pleading only for leniency in the sentence imposed on the appellant by the trial Court.

5. When the appeal has been admitted, it is imperative for this Court to go into the merits of the case in order to satisfy about the correctness of the findings of the trial Court.

6. This Court carefully perused the evidence on record.

7. Kala (PW1) was examined-in-chief on 25.08.2014. In her evidence, she has stated that she is residing with her husband Sivakumar (PW2) and two daughters, aged about 4½ years and 1½ years, in Door No.7C, 9th Cross Street, South Jagannathan Nagar, Villivakkam, Chennai-49; her husband is working as mason; on 06.01.2014, around 5.30 p.m., while she (PW1) was attending to her household chores, her younger daughter "X", aged about 1½ years was playing in the street; the appellant, who lives in the neighbourhood and who is known to her, took the child ("X") to his house; after completing her work, she (PW1) went to the appellant's house to take back her daughter; at that time, the appellant's wife was in the kitchen; she (PW1) went inside the house and was shocked to find that the appellant was sitting on the floor with his legs spread, with the child ("X") between his spread legs and his penis in the hands of the child ("X"); she (PW1) raised a hue and cry, hearing which, everyone came there and she pulled the child ("X") from the appellant; the appellant ran away from his house; she (PW1) called her husband (PW2) and told him what she had seen; at 8.30 p.m., her husband returned home and together, they went to the police station and lodged the complaint (Ex-P1).

8. She was not cross-examined on the same day of her examination-in-chief and was cross-examined only on 12.12.2014. The defence was not able to make any serious dent in the testimony of Kala (PW1), but, it was ultimately suggested to her that she has foisted a case against the appellant to wreak vengeance, which suggestion, she has denied. Apart from this bare suggestion, no other motive has been suggested to Kala

(PW1), for falsely implicating the appellant.

9. Sathya (PW3), in her evidence, has stated that she is living in Door No.9, 9th Cross Street, South Jagannathan Nagar, Villivakkam, Chennai-49; her husband is working in a canteen; she is a fishmonger; she knows the appellant's family and Kala's (PW1) family as they are living in the same neighbourhood; she knows the two daughters of Kala (PW1); on 06.01.2014, around 5.30 p.m., she (PW3) and her friend Jaya (PW4) were standing near their house and were talking; at that time, she (PW3) saw Kala (PW1) fetching water from the nearby tap and taking it to her house; her younger daughter "X" was playing in the street; she saw the appellant carrying the child ("X"), playing with her and taking her inside his house; thereafter, she (PW3) went inside her house and was engaged in household chores; she (PW3) suddenly heard Kala (PW1) hollering and so, she (PW3) went there to enquire; when she (PW3) went out, she saw Kala (PW1) standing opposite the house of the appellant and crying; when she (PW3) enquired with Kala (PW1), the latter told her that she (PW1) saw the appellant keeping her daughter amidst his spread legs and making her ("X") fondle his penis; she (PW3) also joined Kala (PW1) in berating the appellant; the appellant ran away; thereafter, he was caught and handed over to the police.

10. Sathya (PW3) was not cross-examined on the day she was examined-in-chief. She was recalled and cross-examined on 12.12.2014. In the cross-examination, she (PW3) has reiterated her version in the chief-examination by saying that she saw the appellant taking the child ("X") inside his house while Kala (PW1) was busy fetching water for her house from the tap and when Kala (PW1) raised a hue and cry, she (PW3), along with others, rushed out from their home and questioned the appellant. Though Sathya (PW3) was not an eye-witness, yet, her evidence as to what Kala (PW1) told her (PW3) immediately with regard to the fact in issue is relevant as res gestae evidence under Section 6 of the Evidence Act. Thus the evidence of Kala (PW1) touching upon the fact-in-issue is admissible under Section 5, *ibid* and that of Sathya (PW3) is relevant under Section 6, *ibid*.

11. The other witnesses in this case viz., Sivakumar (PW2), husband of Kala (PW1), Jaya (PW4), Ezhumalai (PW5), Shobana (PW6) and Vasantha (PW7) are purely hearsay evidence as they came to know about the occurrence much later. Therefore, this Court has no reason to discard the cogent testimony of Kala (PW1) and Sathya (PW3), for extending the benefit of acquittal to the appellant.

12. Thus, this Court does not find any infirmity or perversity in the judgment and order passed by the Court below warranting interference. The conviction of the appellant of the offence under Section 10 of the POCSO Act, is confirmed.

13. Coming to the quantum of sentence, the learned counsel for the appellant submitted that the appellant has been in prison since 05.05.2015 and hence, the substantive sentence of imprisonment may be reduced. Acceding to his submission, the substantive sentence of imprisonment imposed on the appellant by the trial Court for the offence under Section 10 of the POCSO Act is reduced from seven years rigorous imprisonment to five years rigorous imprisonment. Fine amount imposed by the trial Court, is maintained.

In the result, this criminal appeal is partly allowed. Connected Crl.M.Ps. are closed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

nsd
To

1. The Sessions Judge,
Mahalir Neethimandram,
(Special Court for the POSCO Act cases),
Chennai.
2. The Inspector of Police,
V1-Villivakkam Police Station,
Villivakkam,
Chennai-600 049.
3. The Public Prosecutor,
Madras High Court,
Chennai - 104.
4. The Superintendent
Central Prison, Puzhal Chennai

Crl.A.No.327 of 2015

mp(co)
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