

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.09.2019

DELIVERED ON : 26.09.2019

CORAM:

THE HON'BLE MR.JUSTICE P.N. PRAKASH

Crl.A. No.774 of 2015

Dhanavel

..Appellant/Accused

vs.

State by
the Inspector of Police
All Women Police Station
Jayankondam
Ariyalur District

..Respondent/Complainant

Criminal Appeal preferred under Section 374 Cr.P.C. challenging the judgment and order dated 04.07.2015 passed by the Fast Track Mahila Court, Ariyalur, in Special S.C. No.5 of 2015.

For appellant: Mr. K. Gandhi Kumar
for Mr. Ananthanarayanan

For respondent: Mrs. P. Kritika Kamal
Govt. Advocate (Crl. Side)

JUDGMENT

This criminal appeal is directed against the judgment and order dated 04.07.2015 passed in Special S.C. No.5 of 2015 on the file of the Fast Track Mahila Court, Ariyalur.

2 A digest of the facts leading to the institution of the instant criminal appeal are as under:

2.1 The victim girl "X"-P.W.4 (name not disclosed for the sake of anonymity) was studying in III standard on the date of the incident, viz., 08.04.2015. She hails from Udayarpalayam Village and was living with her maternal grandmother, Susila (P.W.1), since her father had deserted her mother and her mother was employed in Coimbatore District. "X"'s (P.W.4's) maternal aunt, Selvi (P.W.6), the eldest daughter of Susila (P.W.1), was living in the nearby Chozhankurichi Village.

2.2 On 08.04.2015, "X" (P.W.4) was returning from school and was waiting in the Udayarpalayam Bus Stop to take a bus to Chozhankurichi as Susila (P.W.1) had told her to come to Selvi's (P.W.6's) house. While she was waiting in the bus stop, the appellant came by his TVS-50 (M.O.2) and offered lift to her. So, she got on to his TVS-50 (M.O.2). En route, the appellant diverted the motorcycle into a nearby cashew grove, undressed her and sexually abused her. She was seen naked by a group of farm workers hailing from Chozhankurichi who were working in a nearby farm. They enquired her and took her to Chozhankurichi and left her with Susila (P.W.1) and Selvi (P.W.6).

2.3 On a complaint (Ex.P.1) lodged by Susila (P.W.1), Kavitha (P.W.9), Inspector of Police, registered a case in Cr. No.5 of 2015 under Sections 376(2)(f) IPC and Section 5(m) read with Section 6 of the Protection of Children from Sexual Offences Act ("the POCSO Act" for short) and prepared the printed F.I.R. (Ex.P.8), in pursuance whereof, the appellant was arrested.

2.4 "X" (P.W.4) was examined by Dr. Prabhavathy (P.W.8), who issued examination certificate (Ex.P.6). The appellant was examined by Dr. Elavarasan (P.W.7), who issued potency certificate (Ex.P.5).

2.5 After completing the investigation, the police filed a final report in Special S.C. No.5 of 2015 before the Fast Track Mahila Court, Ariyalur, against the appellant.

2.6 On appearance of the appellant, the provisions of Section 207 Cr.P.C. were complied with and charges for the offences under Section 363 IPC and Section 5(m) read with Section 6 of the POCSO Act were framed against him. When questioned, he pleaded not guilty.

2.7 To prove the case, the prosecution examined 9 witnesses and marked 11 exhibits and 2 material objects.

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

2.9 After considering the evidence on record and hearing either side, the Trial Court, by judgment and order dated 04.07.2015 in Special S.C.No.5 of 2015, convicted and sentenced the appellant as under:-

Provisions under which convicted	Sentence
Section 363 IPC	3 years rigorous imprisonment and fine of Rs.5,000/-, in default to undergo 6 months rigorous imprisonment.
Section 6 of the POCSO Act	14 years rigorous imprisonment and fine of Rs.10,000/-, in default to undergo 2 years rigorous imprisonment.

2.10 Out of the total fine amount of Rs.15,000/-, a sum of Rs.10,000/- was ordered to be paid as compensation to "X" (P.W.4) towards compensation under Section 357 Cr.P.C.

2.11 Assailing the aforesaid conviction and sentences passed by the Trial Court, the accused is before this Court.

3 Heard Mr. K. Gandhi Kumar, learned counsel representing Mr. Ananthanarayanan, learned counsel on record for the appellant and Mrs. Kritika Kamal, learned Government Advocate (Crl. Side) appearing for the respondent State.

4 The case of the prosecution hinges on the evidence of "X" (P.W.4), Kaliya Perumal (P.W.2), Kalaimani (P.W.3) and Dr. Prabhavathi (P.W.8).

5 "X" (P.W.4), in her examination-in-chief, has stated that she was studying in III Standard in the Panchayat Union Primary School at Udayarpalayam and was staying with her grandmother in the said village; her mother was working in Coimbatore; her maternal aunt Selvi (P.W.6) was living in Chozhankurichi; she ("X"-P.W.4) used to go alone by bus from Udayarpalayam to Chozhankurichi; a few days prior to the annual summer vacation, she was waiting in the bus stop at 4.30 p.m. to board a bus to Chozhankurichi; while she was standing in the bye-pass bus stop, Dhanavel (appellant) came in his TVS-50 (M.O.2) and offered her lift by introducing himself and further saying that he knows that she belongs to Chozhankurichi; he told her that he would drop her in the ration shop at Chozhankurichi; initially, she was not agreeable; but, when he insisted, she got on to his TVS-50 (M.O.2); while nearing Chozhankurichi, he turned left into a cashew grove; when she started crying, he slapped her on her cheek and undressed her.

6 At this juncture, it may be relevant to stop the narration for a moment and state verbatim, as to what "X" (P.W.4) deposed in Tamil. She has said "கெட்டப் பழக்கம் செய்தார்". Literally translated, it means "He did bad habit". One should bear in mind that "X" was 8 years old at the time of the incident and one cannot expect her to say anything more in colloquial Tamil. For any prudent man, the expression "கெட்டப் பழக்கம் செய்தார்" would mean "sexually abused". She has further testified that the white beaded necklace worn by her got cut and fell down; she collected her clothes and ran and at that time, people who were peeling groundnuts nearby, heard her cry and came to her; when they enquired her, she told them as to what had happened; they took her to Chozhankurichi and left her with her grandmother; she ("X"-P.W.4) narrated everything to her grandmother and aunt. She identified the beads of her necklace which were marked as M.O.1 series. She further identified the appellant in the dock and also the motorcycle, viz., TVS 50 in which he had taken her and it was marked as M.O.2.

7 In the cross-examination, she has stated that normally, children will ask for lift from bikers, but, on that day, she did not ask the appellant for lift. When she was asked as to whether the appellant misbehaved with her while going in the bike, she replied that he did not do anything then. She has further stated in the cross-examination that she had pain or swelling in her back, but, there was no pain in the place through which she would urinate.

8 Much argument was advanced by the learned counsel for the appellant on the above answer and it was submitted that the allegation that the appellant sexually abused "X" (P.W.4) was false. However, a reading of the answer as given by "X" (P.W.4) shows that she was not having pain or swelling at the time of deposing. However, she has stated in the cross-examination that she did not have any bleeding injury at the time of the incident in the place through which she would urinate.

9 At this juncture, it may be relevant to allude to the evidence of Dr.Prabavathi (P.W.8), who has stated that she found an abrasion measuring 2x2 cms. on the back of "X" (P.W.4) and "X" (P.W.4) had complained of pain in her under belly and thighs. She (P.W.8) has also noted an injury measuring 0.2 cm. near the hymen and there was contusion in the vaginal area. In fact, she (P.W.8) has noted the injury as a fresh injury. She (P.W.8) was subjected to a grilling cross-examination by the defence and based on the answers given by her (P.W.8) that the 0.2 c.m. injury was not on the hymen, but, was on the right side of it, the defence counsel contended that there was no penetrative sexual assault.

10 It is true that even Dr. Prabavathi (P.W.8) has stated that there would not have been complete penetration. But, that, by itself, will not absolve the appellant from criminal liability under the POCSO Act, where, penetration is not necessary in a case where the victim is less than 12 years of age. In the instant case, when "X" (P.W.4) gave evidence, she was 8 eight years old and she has stated that she was studying in III standard when the incident took place. This has not been challenged by the appellant in the cross-examination. However, Kavitha (P.W.9), Inspector of Police has marked the birth certificate extract (Ex.P.11) obtained from the school which shows the date of birth of "X" (P.W.4) as 09.07.2007. The learned defence counsel contended that the birth certificate has not been proved in a manner known to law. Even if we keep aside the birth certificate, "X"'s (P.W.4's) assertion that she was studying in III standard when the incident took place was not denied by the defence. A girl of 12 years and above will not possibly study in III standard.

11 As alluded to above, the evidence of Kaliya Perumal (P.W.2) and Kalaimani (P.W.3) assume great significance. They have stated that they hail from Chozhankurichi and they had come to the farm of one Thangavel for peeling groundnuts; along with them, there were other workers, viz., Pazhanivel, Poosari and Pichammal; while all of them were engaged in the work of peeling groundnuts, they heard the cries of a child and hence, they rushed to the cashew grove and found "X" (P.W.4) naked and weeping; when they asked her (P.W.4), she (P.W.4) told them that Dhanavel uncle had done that to her; they dressed "X" (P.W.4) and took her to Chozhankurichi and handed over her to her grandmother and aunt.

12 Susila (P.W.1) and Selvi (P.W.6) have stated that Kaliya Perumal (P.W.2), Kalaimani (P.W.3), Pichammal (not examined) and Pazhanivel (not examined) brought "X" (P.W.4) to Chozhankurichi and told them as to what "X" (P.W.4) said.

13 Though Kaliya Perumal (P.W.2) and Kalaimani (P.W.3) were not eye-witnesses, yet, their evidence as to what "X" (P.W.4) told them immediately after the incident is relevant as res gestae evidence under Section 6 of the Evidence Act. In the cross-examination of any of the witnesses, including "X" (P.W.4), no motive has been suggested by the defence for foisting this case on the appellant. Further, these witnesses have stated that in the evening, a village panchayat was held and the brothers of the appellant even assaulted him (appellant) for what he had done to "X" (P.W.4). The appellant belongs to Chozhankurichi and is well known to the villagers, including Susila (P.W.1), Kaliya Perumal (P.W.2), Kalaimani (P.W.3) and Selvi (P.W.6).

14 Next, the contention of the learned counsel for the appellant that there was no aggravated penetrative sexual assault does not cut ice with this Court, because, when any penetrative sexual assault is committed on a child below 12 years of age, it automatically becomes an aggravated penetrative sexual assault by virtue of Section 5(m) of the POCSO Act.

15 The learned counsel for the appellant further contended that when "X" (P.W.4) had stated that she did not know the appellant earlier, her identification of the appellant in the dock becomes suspect. The answer given by the Trial Court in this regard is worth extracting:-

"41. It is not an abnormal conduct of any person. Normally, a person would tell his name and village to another person particularly when the other person also belongs to the same village. In this case, P.W.4 is a native of Chozhankurichi Village and the accused also belongs to the same village. Thus, such introduction was only normal.

42. The victim after ascertaining that the accused belongs to her own village, trusted the accused and accepted the offer of pillion ride. The victim had a fair chance of seeing the accused very closely under broad day light at about 4.30 p.m. at the bye-pass road bus stop of Udayarpalayam. They had a conversation for some time. Thus, the victim had a good chance of identifying the accused."

16 This Court has no reason to disagree with the aforesaid findings. "X" (P.W.4) has clearly stated in her evidence that the appellant told her his name and said that he is from Chozhankurichi and he is going there and that he knows her family as well. She had spent sufficient time with the appellant. Further, it is pertinent to point out that the incident had taken place around 4.30 p.m. in April 2015. This Court can take judicial notice of the fact that the sun will be scorching in the month of April in most parts of Tamil Nadu and the dusk would be invariably only after 6.00 p.m. Thus, in view of these two reasons, this Court can safely arrive at a conclusion that "X" (P.W.4) could not have had any difficulty in seeing the countenance of the appellant for her to identify him in the dock. That apart, the police have recovered the necklace beads from the place of occurrence under the cover of mahazar (Ex.P.3) and the beads were marked as M.O.1 series through "X" (P.W.4). "X" (P.W.4) disclosed the name of the appellant to Kaliyaperumal (P.W.2) and Kalaimani (P.W.3) immediately and that is why, the villagers were able to call for a panchayat that night. In fact, Susila (P.W.1) has stated that the appellant

offered her money to put a quietus to the case, but, she firmly refused the offer and decided to inform the police.

17 In view of the foregoing discussion, this Court does not find any reason to interfere with the finding of guilt arrived at by the Trial Court. Accordingly, the conviction of the appellant of the offences under Section 363 IPC and Section 6 of the POCSO Act is confirmed. However, the sentence of 14 years rigorous imprisonment imposed on the appellant for the offence under Section 6, *ibid*, is reduced to 10 years rigorous imprisonment.

In the result, this criminal appeal is allowed in part.

cad

Sd/-

Assistant Registrar (CS VIII)

//True Copy//

Sub Assistant Registrar

To

- 1 The Inspector of Police
All Women Police Station
Jayankondam, Ariyalur District
- 2 The Fast Track Mahila Judge, Ariyalur
- 3 The Public Prosecutor
High Court of Madras
Chennai 600 104
- 4 The Deputy Registrar
(Crl.Side ,
High Court of Madras
Chennai 600 104. } with a direction to
transmit the original
records to the Trial
Court.
- 5 The Superintendent
Central Prison, Trichy

+1cc to Mr.K.Gandhi Kumar, Advocate, SR.No.82147

Crl.A. No.774 of 2015

Kak(01/11/2019)