



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 23.11.2019 (Special Sitting)	Pronounced on: 27.11.2019
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Coram::

The Honourable Dr.Justice G.Jayachandran

Criminal Appeal No.424 of 2018

Sembu Singh,
S/o.Lathu Singh,
Luna Village, Pothrose Taluk,
Jesanmeer District,
Rajasthan District. Appellant/Accused

/versus/

State: Rep. by
The Inspector of Police,
R-4, Soundarapandiyanar Angadi Police Station,
Thiyagaraya Nagar,
Chennai - 600 017.
Cr.No.148/2016 Respondent/Complainant

Prayer: Criminal Appeal is filed under Section 374 (2) of Cr.P.C, to set aside the judgment and sentence passed by the Sessions Judge, Mahila Court (Mahalir Neethimandram, Chennai) in S.C.No.302 of 2016 dated 09.07.2018, by convicting the Appellant and sentenced to undergo for 7 years Rigorous Imprisonment and imposing a fine of Rs.50,000/- in default to undergo further period of 1 years Rigorous Imprisonment for the alleged offence under Section 4 of Protection of Children from Sexual Offences (POCSO) Act, 2012.

For Appellant : Mr.K.Kannan

For Respondent : Mr.R.Ravichandran
Additional Public Prosecutor

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J U D G M E N T

Heard the Learned Counsel for the Appellant and the Learned Additional Public Prosecutor for the Respondent.

2. The Appellant was tried by the Special Court for cases under Protection Of Children from Sexual Offences (POCSO) Act/Mahalir Neethimandram, Chennai, for offence under section 4 of the POCSO Act, 2012 in S.C.302 of 2016. The Sessions Judge,

after examining 10 prosecution witnesses, 2 defence witnesses and 21 Exhibits along with 2 material objects found the accused guilty and sentenced him to under 7 years R.I and imposed fine of Rs.50,000/-. Also awarded compensation of Rs.2,00,000/- payable by the State Government from the victim compensation Fund or other Fund or Scheme as prescribed under Rule 7(4) & (5) of the POCSO Act, 2012.

3. Aggrieved by the Conviction and Sentence, the accused has preferred this appeal, on the ground that there is no proper identification of the accused during the investigation and in the trial. The victim was not examined since he died during trial. The mother of the victim admits in the cross examination that the victim did not disclose the name of the assailant. They were several North Indian carpenters working at the alleged place of crime (Hotel Rohini International, T.Nagar, Chennai). The defence witnesses D.W.1 who was the Manager of the Hotel Rohini International has categorically stated that, no such incident occurred in his hotel premises and DW-2, the brother of the accused has deposed that his brother voluntarily went to the police Station for interrogation but he was taken into custody by police on false promise and case was foisted against him. The defence evidence was not taken note by the trial court in proper perspective.

4. The Learned Counsel referring the depositions of the PW-2, PW-3 and PW-4 submitted that, they are all hearsay witnesses. No one has seen the occurrence or identified the accused. The victim died during the course of trial. He died committing suicide and his death was not due to the injury sustained in the alleged sexual assault. The statement of the victim boy does not fall either under Section 32 or Section 33 of the Indian Evidence Act. Therefore, his previous statement recorded under Section 164 of Cr.P.C. have no evidentiary value.

5. The learned Additional Public Prosecutor submit that, the victim boy aged 12 years immediately after the occurrence on 05.03.2016 at about 11.00 p.m reported it to his mother P.W-2, who in turn took the boy to the Royapettai Government Hospital. The victim boy was treated by P.W-1 and in the Accident Register the cause of injury and nature of injury was mentioned. The victim in his written complaint Ex.P.18 has named the accused and later when his statement was recorded by the Judicial Magistrate under Section 164 Cr.P.C, the victim has narrated the incident and again named the accused. The cloth of the accused was recovered based on the confession of the accused and it was sent to chemical analysis. The chemical report proves presence of O⁺ blood strains. Since, the prosecution has cogently without any scope for doubt has proved the charge against the

accused, the Trial Court has imposed the minimum prescribed sentence taking note of the age of the accused.

6. The case of the prosecution as unravelled through the witnesses and documents, establishes that the victim was living with his mother next to the building in which the accused and others were carrying on carpentry work. The victim and the accused were known to each other. On 05.03.2016, at about 11.00 p.m the victim has returned home with bleeding injury in his anus. He has reported to his mother P.W-2 that the person staying in the adjacent building took him inside the building promising to offer chocolate. Inside the building, he gagged the victim's mouth, removed the dress of the victim and inserted his male genital into the victim's anus. The boy out of pain escaped from the accused and reported the matter to his mother. Immediately, thereafter the mother has called '100' and reported to the police. The boy was taken to the hospital. Ex.P.1 the Accident Register discloses the nature of injury. The doctor, who treated the boy was examined as P.W-1. The doctor has noticed bleeding in the boy's anus. A 0.5 cm lacerated wound 1 cm inside the anus and 0.3 x 0.3 cm lacerated wounds near anus, noted on the body of the victim. The Doctor has opined that those injuries might have caused due to sexual assault.

7. P.W.2 the mother of the victim has narrated the facts naturally without iota of embellishment. She has deposed that immediately after the incident, she called police and took her son to the hospital. In the hospital, he was treated as in patient for nearly one week. In the hospital, at about 3.00 a.m the police came and took the complaint from the victim. He signed in the complaint. P.W.2 has identified the signature of her son found in the complaint Ex.P.18.

8. In Ex.P.18, the name of the accused is mentioned. Based on this complaint, the First Information Report Ex.P.19 has been registered. These are the contemporaneous documents which disclose the facts which form part of same transaction.

9. Jeyachitra (P.W.2) has deposed that, immediately after the incident, her son rushed home crying "help", "help". She saw her son bleeding through anus. This part of the P.W.2 evidence discloses the facts which form part of the same transactions admissible under Section 6 of Indian Evidence Act. Soon after that, the boy was taken to the hospital and in the hospital by 11.30 p.m, P.W.10 Tr.N.S.Kumar, Inspector of Police has recorded the complaint statement of the accused (Ex.P.18). In the complaint statement, the victim boy has signed and he has

mentioned the name of the accused in the complaint statement.

10. Gulab Singh (D.W.2), the brother of the accused has deposed that, the accused was engaged in a carpentry work in the Rohini International building, next to the victim's residence. On 05.03.2016, midnight at 2.00 p.m the Manager James (D.W.1) called him over phone and has informed him that, some untoward incident has taken place in the hotel and therefore, he should come and meet on the next day. Thereafter, he took his brother (accused) to the police. He has stated that, he checked the CCTV camera of the hotel and found that no suspicious movement or incident recoded.

11. The Learned Counsel for the appellant strongly rely upon the evidence of Gulab Singh (DW.2) to emphasis that, the version of the police regarding the identification of the accused and arrest of the accused is false. Per contra, the Additional Public Prosecutor states that, if really CCTV camera footage was available, D.W.2 could have given it to police during investigation or atleast produce it before the Court for appreciation, which he has not done.

12. From the evidence, it is clear that, the accused was working in the Rohini International Hotel at relevant point of time. The victim, in his complaint, has stated about his acquaintance with the accused. On the date of incident, the victim has rushed to his house and reported the matter to his mother. Unfortunately, the victim boy has committed suicide on 02.12.2016 without bearing the ignominy of the said incident. This has been spoken by the victim mother Jeyachitra (P.W.2) in her deposition. The death of the victim boy cannot be taken advantage by the assailant. The complaint signed by the victim naming the accused, the res gestae evidence of PW.2 regarding the facts which form part of the same transaction immediately after the occurrence, the evidence of the doctors P.W.1 and P.W.6 who treated the victim boy proves the penetrative sexual assault committed against the victim boy. The evidence of PW.2 corroborated by the evidence of P.W.4 Saravanan, the brother of PW.2. Proved the appellant is the assailant. The chemical analysis report coupled with the evidence of P.W.1 & P.W.6, the Doctors who have given treatment to the victim boy establishes the fact that, the boy was sexually assaulted. Therefore, this Court finds no improper appreciation of evidence by the Trial Court.

13. The learned Counsel for the appellant would submit that, the under Section 164, statement of the petitioner will

not fall under the definition of Sections 32 or 34. Therefore, it cannot be relied upon. No doubt, the statement of the victim boy recorded under Section 164 of Cr.P.C does not fall under Section 32 of Indian Evidence Act, since the statement is not related to his cause of death. Similarly, that statement will not fall under Section 33 since the appellant had no opportunity to cross examine the maker of the statement. However, the evidence of P.W.2 and P.W.4, speaks about the facts which form part of the same transaction, so relevant under Section 6 of the Indian Evidence Act. The victim has named the accused in his complaint. PW.2 has deposed that the victim identified the accused in the hospital. Therefore, there is no doubt about the identity of the accused in view of the above said evidence. In addition, it is not the case of the accused that, he is a stranger. His own brother, who has examined as D.W.2 admits that, the accused was working as a carpentry work in the building next to the victim's residence and he was called by the police on next day of the occurrence.

14. The trial Court, after considering the evidence and incriminating material against the accused, has held the accused is guilty for offence under Section 4 of the POSCO Act. The overall evidence let in by the prosecution proves the penetrating sexual assault against the victim boy and the perpetrator of the offence is the appellant. While so, there is no reason to interfere the well considered judgment of the trial Court. Hence, the judgment of Conviction and sentence passed in S.C.No.302 of 2016, dated 09.07.2018 on the file of POSCO is confirmed. Accordingly, the Criminal Appeal is dismissed.

Sd/-

Assistant Registrar (CS-VIII)

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Sub Assistant Registrar

bsm

To,

1. The Sessions Judge,
Mahila Court,
Mahaleer Neethimandram,
Chennai.

2. The Inspector of Police,
R-4, Soundarapandiyanar Angadi Police Station,
Thiyagaraya Nagar,
Chennai - 600 017.

3.The Additional Public Prosecutor,
High Court, Madras.

+lcc to M/s.K.Kannan, Advocate SR.100032

delivery judgment in
Criminal Appeal No.424 of 2018

KJ(CO)
CB(13/01/2020)



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