

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 17.12.2018

Delivered on: 03.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

Criminal Appeal No.164 of 2016

Manivanan

... Appellant/Accused

vs.

State, rep.by
The inspector of Police
All Women Police Station,
Ariyalur District
(Crime No.3/15)

... Respondent/Complainant

Criminal Appeal filed under Section 374 of Cr.P.C., against the judgment dated 29.12.2015 made in Spl.S.C.No.23 of 2015, by the the Mahila Court (Fast Track Court), Ariyalur.

For appellant : Mr.C.D.Johnson

For Respondent : Mrs.V.Saradha Devi
Government Advocate (Crl.Side)

JUDGMENT

The appellant herein is the sole accused in Special Sessions Case No.23 of 2015, on the file of the Fast Track Mahila Court, Ariyalur. He stood charged for the offences under Sections 341, 323, 506(i) of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act' for short). After trial, by judgment dated 29.12.2015, the trial Court convicted him for the offence under Section 4 of POCSO Act and sentenced him to undergo Rigorous Imprisonment for seven years and to pay a fine of Rs.5,000/-, in default, to undergo Rigorous Imprisonment for three months; for offence under Section 341 of IPC he was sentenced to undergo simple imprisonment for one month and to pay a fine of Rs.200/-, in default, to undergo simple imprisonment for one week, for offence under Section 366 IPC to undergo Rigorous Imprisonment for two years and to pay a fine of Rs.1000/-, in default, to undergo

rigorous imprisonment for three months and for the offence under Section 323 IPC to undergo rigorous imprisonment for three months and to pay a fine of Rs.1000/-, in default, to undergo rigorous imprisonment for one month. Challenging the said conviction and sentences, the appellant is before this Court with this appeal.

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

(i)The victim girl, who is the daughter of the complainant, was studying 10th Standard in a school in Kuzhumoor. The victim girl is a resident of Vanagaram Village. On 20.06.2015, at about 5.00 p.m., the victim girl was returning from her school after attending the special class along with her friends P.Ws.11 and 12. The accused waylaid the victim girl near Anaivaari Stream and told her friends P.Ws.11 and 12 to go home and took the victim girl near the stream and committed penetrative assault on her and thereafter, threatened the victim girl if she reveals the incident to anyone, he would kill her. The victim girl was around 14 years old and the accused was around 18 years.

(ii)On the basis of the complaint lodged by the mother of the victim girl P.W.2, on 23.06.2015, an FIR was registered and after observing legal formalities, final report was filed before the trial Court. The trial Court framed charges against the against Sections 341, 366, 323, 506(i) of IPC and Section 4 POCSO Act, 2012 and after trial, convicted and sentenced the appellant as mentioned supra.

3.The prosecution has examined 21 witnesses as P.Ws.1 to P.W.21 on its side and marked 14 documents, viz., Exs.P1 to P14. However, the prosecution did not mark any material object. On the side of the defence, one witness was examined as D.W.1 and no document was marked.

4.P.W.1, the victim girl, had given a statement under Section 161(3) of Cr.P.C., to the police narrating the incident that took place at about 5.00 p.m., on 20.06.2015 and the statement was also reiterated before the Judicial Magistrate. Immediately after the incident, it appears that when the mother had come to know about the same, she had informed her relatives who are the neighbours, viz., Arjunan (P.W.10) and Amirdhalingam(P.W.13). All of them together went to the house of the accused and informed his family members of the incident. This happened on the night of 20.06.2015, the date of occurrence.

5.Thereafter, it appears that the mother of the victim girl had contacted her son Rajivegandhi, who was

working in Chennai and her brother Palanivel, who was in another village and narrated them about the incident. The son Rajivegandhi was examined as P.W.4 and Palanivel was examined as P.W.3. After being informed, the said Rajivgandhi and Palanivel came to the village after two days and thereafter, on 23.06.2016, a complaint was lodged by P.W.2-the mother of the victim girl.

6. During trial, P.W.1, the victim girl was examined. She has narrated the incident that had happened at about 5.00 p.m., on 20.06.2015, when she was returning from the school and she has clearly stated as to what happened at the hands of the appellant/accused. According to her evidence, the appellant/accused had committed a penetrative sexual assault on that day and she stood by her testimony in the cross-examination. P.W.2 is the mother of the victim girl, who, on being informed by her daughter, deposed that being a single woman, without her husband, she had to wait for her son and other relatives to come to her aid and thereafter, a complaint was lodged on 23.06.2015. The delay was due to the fact that there was no proper guidance extended to her, as there was no male member in the family at that time when the incident had occurred. According to P.W.2, she saw P.W.1 was coming from Anaivaari Stream, crying and on enquiry, P.W.1 had narrated the incident of sexual assault. Immediately thereafter, P.W.2 informed P.Ws.10 and 13, who are from the same village and all of them went together to the house of the accused and shouted at the parents of the accused on the same night on 20.06.2015.

7. P.W.2 would further depose that the clothes worn by the victim girl, at the time of occurrence, were all torn and the same were initially washed by her and subsequently they were burnt. P.W.3 Palanivel, the relative of P.W.2, and P.W.1 accompanied the complainant (P.W.2) to the Police Station on 23.06.2015 and a complaint was lodged. P.W.4, viz., the son of P.W.2, had deposed on the basis of what was narrated to him by P.W.2. P.W.5, one Robert, was the Headmaster of the school in which the victim girl studied and through him, her school certificate was marked, indicating the date of birth of the victim girl as 04.04.2001 and the same has been marked as Ex.P3, the certified copy of which has been marked as Ex.P4. P.W.5 also confirmed that on 20.06.2015, P.W.1 attended the special class. P.W.6 is the Tamil Teacher, who confirmed that P.W.1 attended the special class on the date of occurrence. P.W.7 is the Doctor, who examined the accused and found him to be potent to indulge in sexual intercourse. The certificate given by him is marked as Ex.P.5. P.W.8-Kavidhapriya, the Dentist, has examined the accused and the

victim girl to determine their age. According to her, the age of the accused was about 18 years and the victim girl's age was somewhere between 14 to 16 years. The certificates issued by the Dentist were marked as Ex.P.6 and Ex.P.7. P.W.9 is the Doctor, who examined the victim girl and as per the report of the Doctor, the victim had lost her virginity and there was no injury found on the body or private parts of the victim girl. P.W.10 is the brother-in-law of P.W.2, who had accompanied P.W.2, on being heard about the incident, at about 7.30 p.m. and informed the father of the accused about it. P.W.11 and P.W.12 are the two friends of P.W.1, the victim girl, who accompanied the victim girl on their way back home on the date of occurrence. P.W.13, Amirthalingam, is a local villager, who corroborated the evidence of P.W.10, the brother-in-law of P.W.2. P.W.14 is the Grade-I Police Constable, who took the victim girl to the hospital, on 23.06.2015, for medical examination. P.W.15 is the Grade-I Constable, who escorted the accused to the hospital along with another Constable. P.Ws.16, 17 and 18 are Mahazar Witnesses. P.W.19 is the Sub Inspector of Police, All Women Police station, Ariyalur, who had received the complaint from P.W.2 and registered the case in Crime No.3 of 2015. The FIR was marked through P.W.19. P.W.20 is the Head Constable, who had accompanied P.W.15, who escorted the accused for medical examination. P.W.21, the Inspector of Police, All Women Police Station, Ariyalur, is the investigating Officer and she narrated about the incident, the investigation done in this case, the identification of spot and also the preparation of rough sketch and mahazar, viz., Exs.P12 and 13.

8.On behalf of the defence, one Kaliyaperumal was examined as D.W.1 and as per his evidence, the accused was with him at Kuzhumoor, at the relevant time and they returned to the village only on 20.06.2015 at about 8.00 p.m., and his evidence was that this incident, said to have happened at 5.00 p.m. on 20.06.2015, could not have happened, as the accused was with the him at that point of time, searching for his missing father.

9.On the basis of the oral evidence and the materials placed for consideration, the trial Court has come to the conclusion that there was sufficient evidence to hold the appellant/accused guilty of the charges and as far as the POCSO Act is concerned, under Section 29 of the Act, the Courts can presume in favour of the prosecution unless the contrary is proved by the accused. The trial Court has held that the accused did not discharge his burden of proving the contrary. The Court below has held that the evidence of the Prosecutrix, the victim girl, was clear and cogent and her testimony in the Chief Examination was not

varied or disturbed during the cross-examination. In the absence of any previous enmity between the families, the trial Court has held that there was no scope for disbelieving the cogent version of the incident narrated by the victim girl.

10. In order to prove the offence under the provisions of the POCSO Act, the victim girl must be below the age of 18 years and if she is below the age of 18 years, her consent was immaterial. In the case on hand, the trial Court found that the age of the victim girl was not assailed at all and therefore, once the incident has been presented cogently by the victim girl herself and corroborated sufficiently by the two other independent witnesses, viz., P.Ws.10 and 13, who accompanied P.W.2, the mother of the victim girl, to the house of the accused on the night of the date of occurrence and enquired about the conduct of the accused with his parents.

11. The trial Court did not accept the evidence of D.W.1 that the accused was in a different location on the date of occurrence, as such evidence by the interested witness was questionable and further, the trial Court held that it was still possible for the accused to be in both the places in the same vicinity.

12. The trial Court has also disbelieved the crucial evidence of P.Ws.11 and 12, who are the friends of the victim girl, who accompanied her on the fateful day when the accused said to have waylaid the victim girl and asked P.Ws.11 and 12 to go away and took the victim girl to a secluded place. P.Ws.11 and 12 turned hostile and they disowned the factum of their accompanying the victim girl on that particular day. However, these two witnesses were not cross-examined. The other independent witness, viz., P.W.16, who had allegedly accompanied the complainant to the house of the accused on the night of the occurrence, also turned hostile. However, despite the same, the trial Court has come to the conclusion against the accused on the basis of the fact that the complainant visiting the house of the accused was an admitted fact and therefore, the version of P.W.16 was of no significance on that aspect.

13. On behalf of the defence, several infirmities were pointed out in the conduct of investigation and also the evidence collected by the prosecution. The evidence of the Doctor, who was examined as P.W.9, would show that there was no sign of any injury appearing in the body of the victim girl and the Doctor also deposed that it was possible that the victim girl had sexual intercourse earlier on several occasions. In view of the fact that the victim girl

could have had sex earlier, her hymen was not intact. The case of the defence was that the penetrative sexual assault was not proved by any medical evidence, since no Material Objects were recovered or marked. In fact, the trial Court has placed every reliance on the evidence of P.W.1-the victim girl alone as she was the only person, who could speak about the incident in unmistakable terms and according to the trial Court, her evidence as inspiring and believable and therefore, her evidence alone is sufficient enough to hold the accused guilty of the charges framed against him. The trial Court has not considered certain infirmities and the contradictions pointed out by the defence, while arriving at final conclusion against the accused. Finally, the trial Court had convicted the accused under Section 4 of POCSO Act and sentenced him to undergo rigorous imprisonment for a period of seven years and found not guilty under Section 506(i) of IPC and acquitted him of the charge. The said conviction is put to challenge in the present appeal.

14.The learned counsel for the appellant/accused would at the outset submit that there are several lacunae in the prosecution theory, which unfortunately, were overlooked by the trial Court. According to the learned counsel appearing for the appellant/accused, first of all, the complaint was not registered immediately on the date of occurrence i.e. on 20.06.2015. It was admittedly filed only on 23.06.2015, after three days. The reason for not preferring the complaint on the same day i.e there were no male members in the family, was quite unacceptable. Admittedly on the same night P.W.2, along with two other male members, one of them happened to be the relatives, went to the house of the accused and scolded them. Nothing prevented the complainant party to prefer a complaint on the same day. Therefore, the lodging of complaint after three days raises a vital doubt in the genuineness of the complaint filed by P.W.2.

15.The learned counsel would further argue that between the date of occurrence and the lodging of complaint, a Panchayat was held and according to the appellant, in the panchayat, the appellant was forced to marry the victim girl and when the same was refused, a complaint was preferred in order to wreak vengeance on the accused. The learned counsel would draw the attention of this Court to the deposition of P.W.1 herself, in which, she admitted that there was Panchayat held immediately after the date of occurrence and before the date of complaint. However, she did not say what transpired in the Panchayat.

16.The learned counsel would further submit that the friends who accompanied her, viz., P.Ws.11 and 12, have

not given evidence in favour of the prosecution and in their deposition they say that they did not accompany the victim girl on the date of occurrence. The evidence of P.Ws.11 and 12 would take away the substratum of the prosecution case built on the evidence of P.W.1, since she had said that P.Ws.11 and 12 were with her at the time when the accused accosted her, waylaid and committed penetrative sexual assault.

17.The learned counsel would further submit that in the absence of any medical report suggesting penetrative assault, the charge under Section 4 of POCSO Act will fall flat and cannot be said to be proved at all. He would submit that no material objects have been seized or marked. Ultimately, it is the case of the prosecution that the clothes, which were worn by the victim girl, were subsequently burnt and the same were not available as a piece of evidence. If only the clothes have been made available, probably, the same could have clinchingly established the case of the prosecution. The learned counsel would also submit that the witnesses P.W.15-Grade-I Constable and P.W.20-Head Constable, who accompanied the accused for medical examination, had stated that after the medical examination, the accused was dropped in the Borstal School, which means, the accused himself was a minor at that point of time.

18.According to the learned counsel, no proper investigation was conducted by the investigating officer and on the basis of such investigation, the trial Court cannot come a conclusion against the accused. The learned counsel would therefore submit that the conclusion by the trial Court, only on the basis of the solitary evidence of P.W.1, on the ground that the same was inspiring the confidence of the Court, cannot be countenanced both on law and on facts.

19.The learned counsel would submit that in the facts and circumstances of the case, in the absence of corroborative evidence, the evidence of the victim girl alone cannot be a basis for convicting the appellant/accused under Section 4 of the POCSO Act. Such deposition of the victim girl must be supported by strong medical evidence. He would also submit that the reasoning by the trial Court that there was no enmity between the family cannot also be correct for the reason that there was a Panchayat held in between the dates of occurrence and lodging of complaint and the accused appears to have refused the request of his marriage to the victim girl and that triggered further action at the hands of P.W.2. According to the learned counsel, there was demand of money also in the Panchayat and

since it was not acceded to, the family had conspired and filed a false case of penetrative sexual assault against the appellant/accused. Finally, the learned counsel would submit that unfortunately the trial Court has over looked several vital infirmities in the case of the prosecution and was guided by the evidence of P.W.1 alone.

20.The learned Government Advocate appearing for the prosecution would submit that time and again the Courts have held that if the evidence of the victim girl is cogent and clear and the testimony is not found to be tainted, the conviction can be inferred on the basis of such evidence alone. She would submit that in this case, the evidence of P.W.1 is cogent and clear and she stood by her version in the cross-examination. The evidence of P.Ws.11 and 12, as they turned hostile during the trial, did not impact much on the prosecution case, in the face of clear deposition of P.W.1. Moreover, the evidence of P.Ws.10 and 13, who accompanied P.W.2 to the house of the accused, was an admitted fact and in such an event, the occurrence of the incident on 20.06.2015 was established. The defence is only trying to give undue highlight to certain minor discrepancies in the case of the prosecution and the trial Court has rightly overlooked such minor discrepancies, as such contradictions did not have any bearing on the ultimate conclusion reached by the trial Court. She would therefore submit that the conviction by the trial Court does not call for interference in the appeal.

21.The Court has given its anxious consideration to the submissions made on behalf of the counsels, perused the evidence and other materials placed on record.

22.Although it is a fact that the victim girl, viz., P.W.1 has given evidence in clear terms about what happened on 20.06.2015 at about 5.00 p.m., but her evidence alone is not sufficient to attract Section 4 of POCSO Act, viz., penetrative sexual assault, unless her statement stands fortified by a clear medical report.

23.In the instant case, admittedly the evidence of the Doctor is that there was no visible injury on the victim girl and the victim girl could have had sexual intercourse in the past. The evidence of the Doctor is on the basis of his examination of the victim girl. Nowhere it is suggested that there was a penetrative sexual assault on the particular day. May be this was due to the fact that the girl was taken to the hospital after a delay of three days

and the complaint itself was lodged only on that day i.e. after three days. Another important thing which this Court has to see is that there were no Material Objects recovered or marked in the trial. In the absence of such Material Objects establishing the fact of sexual assault, the prosecution theory of committing offence under the provisions of POCSO Act becomes questionable. Admittedly, the clothes worn by the victim girl were subsequently washed and burnt as per the evidence of P.W.2. Unfortunately, the investigating officer was not alert enough to recover the clothes worn by the victim girl on the date of occurrence. May be, at the time when the complaint was lodged after three days, it became too late for the investigating officer to recover any such clothes or the material objects, since P.W.2 herself has stated that the clothes were burnt in the meanwhile. It is also an admitted fact that Panchayat was held in the village between the date of occurrence and the date of lodging of complaint and although it was not clear as to what transpired in the Panchayat, but it can be reasonably inferred that the relationship of the appellant/accused and the victim girl ought to have been the topic of discussion in the Panchayat. Further, as rightly contended by the learned counsel appearing for the appellant/accused, the reason given for lodging the complaint after three days from the date of occurrence, is not acceptable, as on the same date of occurrence, P.W.2, the mother of the victim girl, had gone to the house of the accused along with two male members, one happened to be a close relative and what prevented them from lodging a complaint immediately thereafter was not properly explained, except stating that there was no male member in the family. Any delay in lodging of a complaint will always raise serious doubt about the theory of prosecution. One other factor this Court has to seriously take note of is that both Constables, who had accompanied the accused, for medical examination, viz., P.W.15 and P.W.20, have stated that after examination, the accused was left in the Borstal School. In which event, the age of the accused was not properly ascertained, so as to come to a conclusion as to whether the accused himself was a minor or not. No proper medical certificate has been obtained by subjecting the victim girl for medical examination in order to establish the fact of sexual assault on her. In such a case, the opinion of the Doctor assumes larger significance and in this case, the opinion of the Doctor, viz., the evidence P.W.9 hardly supports the case of the prosecution. The Doctor has clearly stated in his evidence that the hymen of the victim girl was not intact in view of the fact that she could have had sexual intercourse earlier on several occasions and there was absolutely no injury suffered by the victim girl.

24. Although there is no doubt that the trial Court can place reliance on the cogent evidence given by the victim girl herself in order to come to a conclusion in respect of the offences under the POCSO Act, particularly with reference to the presumption in favour of the prosecution, at the same time, one cannot lose sight of the fact that the evidence of the victim girl, in all probabilities, must establish the ingredients of Section 3 of the POCSO Act, warranting conviction under Section 4 of the POCSO Act. After all, the victim girl being a minor could have exaggerated the incident unwittingly from peer pressure.

25. From the materials and the evidence and the submissions made on behalf of the counsels on both sides, this Court is of the considered view that the investigation has not been properly conducted. May be it was due to the fact that the victim girl's family had approached the police belatedly after three days of the date of occurrence, and no clinching evidence has been produced in order to support the evidence of P.W.1. This was more so when two young classmates of the victim girl have turned hostile and refused to acknowledge the initial fact that they accompanied the victim girl on the date of occurrence. The trial Court has held that the burden cast upon the accused under the provisions of the POCSO Act has not been discharged. This Court finds that such reason by the trial Court is without reference to lack of materials on the side of the prosecution. It is always possible for the defence to rely on the prosecution evidence to prove the contrary and in this case, in the opinion of this Court, the defence was able to establish that the incident could not have happened on that day. No doubt, the evidence of the victim girl cannot be brushed aside in its entirety as no motive could be attached to the young girl to come and depose in the trial. At the same time, in the facts and circumstances, the evidence of the victim girl appears to be not fully inspiring the confidence of this Court in view of several infirmities as pointed out by the learned counsel appearing for the appellant/accused.

26. This Court ultimately finds that there are gaping holes in the theory of prosecution in order to establish the offence against the appellant/accused under Section 4 of the POCSO Act. There appears to be a genuine doubt in regard to the prosecution case and the benefit of doubt can be extended to the accused in the present case.

In the result, this criminal appeal is allowed; the conviction and sentence imposed on the appellant by the trial Court are set aside and the appellant/accused is

acquitted. Bail bond, if any, executed by him shall stand cancelled. Fine amount, if any, paid by him is ordered to be refunded forthwith. The appellant/accused is therefore ordered to be released forthwith by the prison authorities.

Sd/-

Assistant Registrar(CS iii)

//True Copy//

Sub Assistant Registrar

msk

To :

1.The Judicial Magistrate ,Ariyalur.

2.The Chief Judicial Magistrate,Ariyalur.

3.The Judge, Special Court for cases under POCSO Act 2012/
Fast Track ,Mahila Court, Ariyalur.

4.The inspector of Police
All Women Police Station,
Ariyalur District

5.The Superintendent of Prison,
Central Prison, Trichy.

6.The Public Prosecutor,
High Court, Madras

+1cc to Mr.C.D.Johnson , Advocate SR.No. 475

CrI.A.No.164 of 2016

ASK(08/01/2019)