

IN HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	27.07.2019
Pronounced On	11.05.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Crl.A.No.708 of 2016

Venkatesh @ Gullu .. Appellant / Sole Accused

vs

State through
The Inspector of Police,
W8, All Women Police Station,
Thirumangalam,
Chennai.

(Crime No: 2 of 2015)

.. Respondent / Complainant

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C, to call for the records in S.C.No.106 of 2015 on the file of the Hon'ble Court of Sessions, Mahilir Neethimandram, Chennai and to set aside the same.

For appellant : Mr.R.Ganesh Kumar

For Respondent : M/s.V.Saratha Devi

Govt. Advocate (Crl. Side)

J U D G M E N T

The present Criminal Appeal is directed against the impugned Judgment dated 22.02.2016 passed by the Sessions Judge, (Mahalir Neethimandram), Chennai in S.C.No.106 of 2015.

2.By the impugned Judgment, the Sessions Judge has found the appellant:-

- i. Guilty for the offence under Section 6 of Protection of Children from Sexual Offences Act, 2012; and
- ii. Not guilty of charges framed under Section 506 (ii) of IPC.

3.The appellant has been sentenced to undergo 10 years rigorous imprisonment and has been asked to pay fine of Rs.5,000/- and in default to undergo a further period of 6 months rigorous imprisonment.

4.The period under which the appellant was under remand has been directed to be set off against the period of imprisonment. The appellant also has been directed to pay a sum of Rs.10,000/- to the PW2 victim as compensation.

5.The appellant was aged about 18 years at the time when Ex.P1 complaint/ Ex.P11 FIR both dated 20.01.2015 was filed. PW 2 victim's age was shown as 15 years.

6.The appellant and the PW2 are closely related. The appellant is the son of PW1's sister-in law. PW1 is the mother of victim. It is stated that both the families were staying next door. PW2 victim developed intimacy with the appellant and had sex with him for over a period one year before the date of the complaint/FIR.

7.PW2 herself has deposed that she has visited beach, Vandalur Zoo and parks on many occasion with the appellant and had sexual intercourse with the appellant when ever they were alone in the appellant's house.

8.The case of the prosecution is that PW2 had complained of stomach ace to PW1 and was therefore taken Vijayalakshmi Hospital, Maduravoyal, Chennai for treatment. She was initially given prescription for ordinary stomach pain.

9.Since the pain did not subside, PW2 was taken to the said hospital again the following day. On scanning and screening, it was found that the PW2 victim was pregnant. PW2 is said to have confessed to PW1 that she had sexual intercourse with the appellant. It appears that PW2 took medicine to abort the foetus. This led to profused bleeding.

10.The PW2 was therefore taken to the same hospital. Since PW2 was found profusely bleeding and weak and anaemic, she was directed to go to the Govt.Maternity Hospital, Egmore, Chennai for further treatment.

11.PW2 was admitted in the Govt. Maternity Hospital, Egmore, Chennai and was given treatment in the ICU and under procedure for abortion of the fetus.

12.Since the age of the PW2 victim at the time of admission into the hospital was given as 15 years, an intimation was sent to the Inspector of Police, W8, All Women Police Station, Tirumangalam, Chennai as it involved medico legal case. This set the law in motion.

13.A formal complaint was obtained from PW1 though unwillingly. The appellant was thereafter Charge Sheeted for offence under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) and Section 506 (ii) of CPC which eventually culminated in conviction of the appellant for the offence under POCSO, 2012.

14.Aggrieved by the impugned order, the appellant has preferred the present appeal. In the appeal, the appellant has questioned the basis on which he has been found guilty.

15.It is stated that the victim was not a minor. It is stated that School certificate with Exhibit P2 was neither the birth certificate nor a school transfer certificate. The appellant has stated that the production of Exhibit P2 was not in accordance with law and appears to have been created for the purpose of finding the appellant guilty. It is stated that it does not bear any seal on the photograph and therefore the document was inadmissible to find the appellant guilty of the offence under section 6 of the POCSO Act, 2012.

16.I have perused the records of the case and considered the arguments of the appellant and the learned government counsel for the respondent state. This is a case where the family wanted to hush up the case by treating the pregnancy of the PW2 as a minor aberration. However, respondent police could not ignore the case and therefore they proceeded to prosecute the appellant.

17.On behalf of the respondent State, 7 witnesses were examined and 13 Exhibits were marked. The 7 witnesses examined on behalf of the respondent State are as follows:-

- PW 1 - defacto complainant (mother of the victim)
- PW 2 - victim girl
- PW 3 - Father of the victim
- PWs 4 & 5 - Doctors who were examined the appellant and the victim girl respectively.

- PW 6 - Metropolitan Magistrate, FTC - I,
Egmore, Chennai.
- PW 7 - Inspector of Police.

18.The appellant has not examined any witness examined nor marked any documents. Appellant has crossed examined all the witnesses except PW4.

19.Exhibit P1 bears thumb impression/signature of PW1, the mother of the PW2 victim. Exhibit P2 is the Student Particulars of the PW 2 dated 02.06.2014 Govt. (Adi Dravidar Welfare) Middle School, Maduravoyal.

20.It shows the date of birth of PW2 victim as 19.08.1999 and bears the signature of the PW 1 defacto complainant (mother of the victim girl).

21.In Exhibit P2 consist of Student Particulars and School Record Sheet bearing signature of the Headmaster of the Govt. (Adi Dravidar Welfare) Middle School, Maduravoyal

22.Exhibit P3 is the statement obtained from the victim by PW6 Metropolitan Magistrate under Section 164 of Cr.P.C. PW6 Metropolitan Magistrate has recorded the statements under Section 164 of Cr.P.C from PW2.

23.PW6 has stated that PW2 victim was examined along with defacto complainant (mother of the victim) on 18.02.2015. In the said statement the age of PW2 victim is shown as about 15 years.

24.Exhibit P3 dated 18.2.2015 recorded by the PW6 Metropolitan Magistrate records that the victim was aged about 15 years and was born on 09.09.1999 though the date of birth of PW2 victim girl in the Exhibit P2 Student Particulars and Record Sheet signed by the Headmaster of the Govt. (Adi Dravidar Welfare) Middle School, Maduravoyal is shown as 19.08.1999.

25.In her statement before the PW6 Metropolitan Magistrate under Section 164 of Cr.P.C., the PW2 victim has narrated the background leading to her pregnancy and her journey to the Govt. Maternity Hospital, Egmore Chennai for eventual abortion where she was given treatment as an inpatient for 10 days.

26.Exhibit P5 is the potency test of the appellant. It confirms that the appellant was not impotent.

27.Exhibit P6 is the Accident Register from the Govt. Maternity Hospital, Egmore which states that the PW2 victim girl had history of sexual contact with a known person for the past one year, about twice a month and that she administered abortion kit by herself on 12.01.2015 which led to profuse bleeding and abdominal pain.

28.Exhibit P7 is the requisition of Inspector of police on 20.01.2015 to Maternity Hospital (Government Maternity Hospital, Egmore). It is stated that on 20.01.2015 at 06.15 P.M , the police station received an information about PW2 that PW2 girl had been raped by the appellant herein. Though the pregnancy was aborted, the respondent requested to save the foetus in deep freezer.

29.Exhibit P8 is the requisition of the Inspector of Police to the Maternity Hospital for conducting DNA test. Exhibit P9 is the medical report given by PW5 doctor. The said report records the age of the victim as 15 years by her own statement.

30.The said report states that PW2 an unmarried girl was brought by her parents on 20.01.2015 at 2.40 pm to causality with alleged H/o intake of MTP (abortion) pills one weeks back with the complaint of bleeding for past one week and she had sexual contact with the known person for the past one year.

31.The victim girl and her parents had refused to lodged police complaint and thereafter the AR entry was made as it was construed as medico legal case.

32.The doctor was confirmed that the victim girl was examined and had to be administered four units of blood and blood for stabilization and thereafter procedure was planned.

33.In Exhibit P9, the doctor DNA examination can be done by a forensic expert and since she was gynecologist she was not competent to give an expert opinion.

34.Exhibit P10 is the court proceedings for recording statements under Section 164 of Cr.P.C.

35.Exhibit P11 is the FIR dated 20.01.2015 generated pursuant to PW1 defacto complainant (mother of the victim girl PW 2).

36.Exhibit P12 is the requisition of the Inspector of Police, W 8 All Women's Police Station to send the appellant for medical examination pursuant to which Exhibit P5 potency test dated 29.01.2015 was given.

37.Exhibit P13 is the copy of the letter dated 16.02.2015, addressed to the Assistant Commissioner of Police, Tirumangalam by the Inspector of Police, W8 All Womens Police Station. Thereafter, it was forwarded to the Forensic department to confirm the whether the formalin preserve foetus (2 months old foetus) procedure conception in fit for DNA analysis.

38.The undisputed facts that emanates from a cumulative reading of the court records including the deposition of the witnesses is that PW2 victim and the appellant were related to each other. They had developed physical intimacy and had indulged in sex on more than one occasion which eventually lead to her pregnancy. This was unforeseen.

39.PW2 victim and her family members were unwilling to give a complaint against the appellant perhaps on account of the fact that appellant is related to them and possibly intended that the appellant and the PW2 would eventually settle down in matrimony at a later point of time.

40.However, they got caught in the web of legal tangle as the attempt to terminate the pregnancy by PW2 victim herself misfired which led to serious health complication warranting her admission to government hospital for medical termination of pregnancy.

41.Exhibit P2 is the Student Particulars and Record Sheet of PW2 produced by the marked through PW7. It bears the signature of PW-1.

42.Exhibit P2 has not been produced in the manner of law. Yet the appellant has been convicted.

43.The court also cannot lose sight of fact that the appellant himself was aged 18 years on the date of the Exhibit P1 complaint dated 20.1.2015 on date of Exhibit P11 FIR dated 20.1.2015 and would have been 17 years when the alleged offence was committed.

44.PW1 and 3 who are the parents of victim have themselves sought to downplay the case of the prosecution by stating that PW2 victim was aged 18 years which statement has not been effectively contradicted by the respondent State.

45.PW1, the defacto complainant (mother of the PW 2) in her deposition has stated that the age of the PW 2 victim girl was 18 years. In her cross examination she has also stated that she did not know to read and write and was unaware of the content of statements obtained from her by the police.

46.PW 3 (father of the PW 2) in his cross examination has also confirmed that his daughter was aged 18 years and that she was born on 19.08.1996 and that she studying in 10th standard in Government (Adi Dravidar Welfare) Middle School, Maduravoyal.

47.He has also stated that to get admission in the school her date of birth was deliberately given as 19.08.1999. This statement of PW 3 (father of the PW 2) has not been controverted.

48.The Exhibit P2 is the Student Particulars and Record Sheet undersigned by the Headmaster of the Govnt. (Adi Dravidar Welfare) Middle School, Maduravoyal. This was marked through PW7 Inspector of Police. This document should have been marked through PW2 herself. During her cross examination PW 7 Inspector of Police has however stated that the Exhibit P2 was obtained from PW2. There is no however explanation as to why this document was marked through PW7.

49.Though the Court in Sunil vs State of Haryana, (2010) 1 SCC 742; (2010) 1 SCC (Cri) 910 observed that "We are not laying down as a rule that all these tests must be performed in all cases, but in the instant case, in the absence of primary evidence, reports of the dental surgeon and the radiologist would have helped us in arriving at the conclusion regarding the age of the prosecutrix.

50.The Court there held that the failure of getting the prosecutrix examined from a dental surgeon or the radiologist was a serious flaw in the prosecution version.

51.Since the age of the PW2 on the date of alleged offence remains unconfirmed, the prosecution should have got the certificate of the radiologist.

52.Further the evidence of PW 7 also confirms that no attempt was made to verify the correctness of the age found in Exhibit P 2 Student Particulars and Record Sheet undersigned by the Headmaster of the Govnt. (Adi Dravidar Welfare) Middle School, Maduravoyal.

53.The respondent State has also not given any explanation as to why no attempt was made to produce the Headmaster of the said school who had purportedly signed in the Exhibit P2. If a report of the radiologist was obtained or P2 was corroborated with other certificates confirming the age of the victim, it can be said that the prosecution has proved the case beyond reasonable doubt. The impugned judgment has also not dealt with this aspect. Therefore, the appellant is entitled to the benefit of doubt.

54.This court in a scholarly judgement authored by Justice V Parthiban had expressed his lament while passing an order dated 26.4.2019 in Criminal Appeal No. 490 of 2018. In paragraph 27 he has observed as under:-

"27.When the girl below 18 years is involved in a relationship with the teenage boy or a little over the teenage, it is always a question mark as to how such relationship could be defined, though such relationship would be the result of mutual innocence and biological attraction. Such relationship cannot be construed as an unnatural one or alien to between relationship of opposite sexes. But in such cases where the age of the girl is below 18 years, even though she was capable of giving consent for relationship, being mentally mature, unfortunately, the provisions of POSCO Act get attracted if such relationship transcends beyond platonic limits, attracting strong arm of law sanctioned under the provisions of the POSCO Act, catching up with the so-called offender of sexual assault, warranting a severe imprisonment of 7/10 years.

55.While offence against children by sexual predators is on the rise and the society and the law enforcement authorities are required to be vigilant and should strictly prosecute the offenders under the provisions of the POSCO Act,2012 so that such measures act as a deterrence in the society, yet in appropriate case like in the present case, the prosecution should have been more circumspect in rushing to prosecute the appellant particularly when there were questions raised regarding the age of PW2.

56.Court also should not lose sight of the fact the appellant himself was young man who was himself as mature and as immature as PW 2. The appellant has also been exposed to harsh life in prison which would have unfortunately exposed him to other criminals.

57.The appellant has already undergone imprisonment even though there were serious doubts regarding applicability of the stringent provisions of POSCO Act, 2012 to the facts of the present case.

58.In view of the above observation, the judgment passed by the Sessions Court is liable to be set aside as the prosecution has not proved the case beyond reasonable doubt. As observed above, the appellant is entitled to benefit of doubt.

59.The authorities are therefore directed to release the appellant from the prison immediately.The above appeal stands allowed. No cost.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Inspector of Police,
W8, All Women Police Station,
Thirumangalam,
Chennai. (Crime No.2 of 2015)

2. The Sessions Judge,
Sessions Court,
Mahilir Neethimandram, Chennai.

copy to: The Section Officer,
Criminal Section, High Court, Madras.

+1 cc to Mr.R.Ganesh Kumar, Advocate, S.R.No.92018

Crl.A.No.708 of 2016

PVS (CO)
SSM(14/11/2019)



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