

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 03.01.2019
Pronounced on : 22.01.2019

CORAM:

THE HONOURABLE MR. JUSTICE V.PARTHIBAN
Crl.A.No.65 of 2017

Hakkim ... Appellant/Accused

Vs.

State
Represented by Inspector of Police,
Devarshola Police Station,
Gudalur, Nilgiris. ... Respondent/Complainant

The Criminal Appeal filed under Section 374 of Code of Criminal Procedure praying to set aside the judgment dated 23.12.2016 passed in Spl.S.C.No.16 of 2016, by the Sessions Judge, Mahila Court [Fast Track Court], Udthagamandalam.

For Appellant : Mr.Mohammed Ghouse

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

JUDGMENT

Challenging the judgment, dated 23.12.2016, passed by the learned Sessions Judge, Mahalir (Fast) Needhimandram, Udthagamandalam, in Spl.C.C.No.16 of 2016, convicting the appellant/accused under Section 3(A) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act' for brevity) and sentencing him to undergo Rigorous Imprisonment for ten years and to pay a fine of Rs.5,000/-, in default, sentencing him to undergo Rigorous Imprisonment for one year, the present Criminal Appeal is focused.

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

(a)The appellant/accused was charged for offences under Sections 377 of Indian Penal Code and Section 5(L) read with Section 6 of the POCSO Act. According to the prosecution, the

appellant/accused had committed unnatural sexual offence on a seven year old boy, who was a neighbor and also committed penetrative assault on him. The victim boy was 7 years old at the time of occurrence and in support of the same a certificate was also marked as Ex.P-1. The case of the prosecution was that on 08.04.2016, around 10.00 am, the appellant/accused lured the victim boy by giving him chocolates and took him to his house and committed sexual assault on him. The assault was witnessed by none other than the victim boy's grandmother, who had gone there for giving some refreshment to the victim boy and saw the boy being sexually assaulted by the appellant/accused, by peeping through the window of the house of the appellant/accused.

(b) Immediately on seeing the incident, the grandmother of the victim boy, who was examined as PW2, had informed the boy's mother, who was examined as PW1. It appears that immediately thereafter, a complaint was lodged on 09.04.2016, but since no action was forthcoming from the respondent police, another complaint was filed on 22.04.2016. On the basis of the complaint by PW1- the mother of the victim boy, an FIR was registered. On the basis of the registration of the FIR, further investigation was conducted and thereafter, the appellant/accused was charge-sheeted for offences under Section 377 of the Indian Penal Code read with Sections 5(1) & Section 6 of the POCSO Act.

3. On behalf of the prosecution, 12 witnesses were examined as PW1 to PW12 and 17 documents were marked as Exs.P-1 to P-17. The recording of statement under Section 164 Cr.P.C., as contained in CD was the only Material Object marked in the Trial. On behalf of the defence no witness was examined nor any document was marked.

4. PW1-the mother of the victim boy, being a witness to the sexual assault committed by the appellant/accused on her son, has deposed the entire incident that took place on 08.04.2016, as narrated by her mother PW2, who had also witnessed the incident. Both the witnesses, viz., Pws.1 & 2 have given a cogent evidence and narrated the incident without any contradiction. PW3-the victim boy, who had given a statement before the Magistrate under Section 164 Cr.P.C., had clearly stated that he was subjected to sexual assault by the appellant/accused on several occasions. In fact, all the three witnesses, viz., Pws.1 to 3 have given 164 statements and the same were recorded by the Jurisdictional Magistrate and they have reiterated their statements before the Trial Court. PW4 and PW5 are the Mahazar Witnesses, who have deposed in support of the case of the prosecution. PW6 and PW7 are the witnesses to the confession statement of the appellant/accused, which is marked as Ex.P-8. PW8 is the Inspector of Police, who initially took the complaint. PW9 is the Sub-Inspector of Police, who

registered the FIR. PW10 is the Doctor, who examined the appellant/accused and had given an opinion that the appellant/accused was incapable of having sex, but he is capable of committing sexual assault. PW11 is another Doctor, who examined the victim boy, who had of course given opinion that there was no palpable or visible marks on the body of the victim boy. PW12 is the Inspector of Police, who investigated the occurrence.

5.All the above witnesses, apart from Pws.1 to 3, have cogently given evidence in support of the prosecution, without any variation or contradiction. On the basis of the evidence and the documents marked on behalf of the prosecution, the Trial Court has come to the conclusion that offence under Section 3(A) read with Section 4 of the POCSO Act is attracted and therefore, convicted the appellant/accused and sentenced him to undergo Rigorous Imprisonment for ten years and also imposed a fine.

6.The case of the defence before the Trial Court was that the victim boy's mother PW1 was not a reliable character, as she had given complaints against her brother and also against her own husband and therefore, her evidence or complaint could not be relied upon in order to support the case of the prosecution. The other defence put forth on behalf of the appellant/accused was that there was a considerable delay in giving complaint on 22.04.2016, when the incident is stated to have taken place on 08.04.2016. Therefore, the delay raises a serious doubt in regard to the veracity of the complaint. The defence also argued that P.W.10-the Doctor's opinion about the incapacity of the appellant/accused in having intercourse was not also considered by the Trial Court.

7.However, the Trial Court, after advertng into the materials placed on record, has come to the conclusion against the appellant/ accused. In fact, the Trial Court has relied on a decision of the Hon'ble Supreme Court of India in the State of U.P. vs. Babulnath (1994 (6) SCC 629) in regard to the sexual assault of the victim boy and also another decision of the Hon'ble Supreme Court of India in the State of Himachal Pradesh v. Glan Chand(AIR 2001 Supreme Court 2075) in regard to the delay in filing the complaint. According to the Trial Court, the delay was properly explained by the prosecution and therefore, the same could not be construed as fatal to the prosecution. Moreover, the Trial Court has come to the conclusion that no evidence was let in on behalf of the defence to prove the contrary, as there was absolutely no materials placed for consideration that the appellant/accused was not present at the time when the incident was witnessed by Pws.1 and 2. The defence has not set up any case to even remotely come up with the explanation for the involvement of the appellant/accused in the

incident. In the said circumstances, the Trial Court, after giving elaborate reasons and findings, convicted the appellant/accused. The present appeal is against the said conviction and sentence passed by the trial Court.

8.The learned counsel appearing for the appellant/accused would reiterate the defence taken before the Trial Court.

9.From the narration as unfolded above, this Court is unable to appreciate the arguments advanced on behalf of the appellant/accused, since this Court is of the considered view that it is almost an open and shut case for the prosecution for convicting the appellant/accused for offence under Section 3 of the POCSO Act.

10.From the materials as disclosed, it is amply clear that the appellant/accused has enticed a minor boy of age seven years, by giving him chocolates and let him to his house on the fateful day, and committed sexual assault on him. The incident was witnessed by PW2 and was immediately narrated to PW1 and their evidence was cogent and inspiring. The other witnesses, who had given statements under Section 164 Cr.P.C., to the Magistrate along with Pws.1 to 3, have also spoken about the incident in clear terms. The official witnesses, who are the Police Officers and the Doctors, have also corroborated the evidence let in on behalf of the prosecution. On the whole, the evidence let in on behalf of the prosecution is complete without any flaw, pointing to the guilt of the appellant/accused for the offence charged against him. In fact, as rightly held by the Trial Court, the defence has not spared any effort to disprove the charge against the appellant/accused and no evidence was let in on his behalf to prove the contrary. In the absence of any evidence on behalf of the defence, the case of the prosecution will get further strengthened, more particularly, with reference to Section 29 of the POCSO Act, which raises presumption in favour of the prosecution, unless the contrary is proved on behalf of the defence. In this case, the defence has hopelessly failed to prove the contrary and therefore, the Trial Court has come to the right conclusion against the appellant/accused and convicted him for offence under Section 3 of the POCSO Act.

11.The submissions made on behalf of the defence before the Trial Court about the character of PW1 and the delay in lodging the complaint are unworthy of legal consideration and the same have been made only for the purpose of the defence and the same do not have any merit and substance. Therefore, the Trial Court has rightly rejected the said submissions.

12.The learned counsel appearing for the appellant would finally submit that since the appellant/accused is about 70

years old and is also short of hearing and visually impaired, the sentence imposed on him is more than the minimum sentence mandated under Section 3 of the POCSO Act and therefore, reduction in sentence may be considered by this Court.

13. This Court has given its anxious consideration to the submission made on behalf of the appellant/accused. Although, the minimum imprisonment as prescribed under Section 3 of the POCSO Act is seven years, the Trial Court has imposed 10 years Rigorous Imprisonment. Normally, in a case of this nature, it is not spelt out in extenuating circumstances for the Courts to consider the quantum of sentence imposed on the accused. The accused being charged for un-natural offence, committed on the boy of tender age of seven years old, cannot normally expect any lenient view in the matter in regard to the sentence imposed on him.

14. However, considering the age of the accused and also his disability, as an exceptional case, this Court is of the view that the sentence of ten years Rigorous Imprisonment imposed on the appellant/accused is to be modified to the minimum of sentence as prescribed in the statute itself, viz., seven years Rigorous Imprisonment.

In the above said circumstances, the criminal appeal is partly allowed. The conviction of the appellant for the offence under Section 3(A) r/w. Section 4 of the POCSO is confirmed. However, the sentence imposed for this offence is reduced and the appellant/accused is sentenced to undergo rigorous imprisonment for seven years. The fine amount is confirmed. The period of sentence already undergone by the appellant shall be given set off as required under Section 428 Cr.P.C. It is represented by the learned counsel for the appellant/accused that the fine amount has already been paid.

Sd/-

सत्यमेव जयते
Assistant Registrar

//True Copy//

Sub Assistant Registrar

pns/msk

To

1. Inspector of Police,
Devarshola Police Station,
Gudalur, Nilgiris.

2. The Sessions Judge, Mahila Court, [Fast Track] Court,
Udhagamandalam.

3. The Public Prosecutor,
High Court of Madras.

Copy To:
The Section Officer,
Criminal Section,
High Court, Madras.

Judgment in
Crl.A.No.65 of 2017

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