

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.02.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.13 of 2021 and
Crl.M.P.No.269 of 2021

Kumar ... Appellant/Accused

-Vs-

The State by
Inspector of Police,
All Women Police Station,
Sooramangalam,
Salem District.
Crime No.9 of 2016

... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 of Code of Criminal Procedure, to set-aside the conviction and sentence imposed on the appellant by the judgment dated 5.8.2020 passed in Special S.C.No.74 of 2016 (New Special S.C.No.30 of 2019) on the file of the Special Court for Exclusive Trial under POCSO Act, Salem convicting the appellant and sentenced to undergo seven years imprisonment and to pay a fine of Rs.50,000/- in d/f one year S.I under Sec.9(m), 9(n) r/w Sec.10 and 18 of The Protection of Children from Sexual Offences Act.

For Appellant : Mr.M.Karthik for
Mr.C.Vasudevan

For Respondent : Mr.R.Suryaprakash,
Government Advocate [Crl. Side]

JUDGMENT

This Criminal Appeal has been filed against the conviction and sentence imposed by the learned Sessions Judge, Special Court for Exclusive trial of cases under the Protection of Children from Sexual Offence Act, Salem in Special S.C.No.30 of 2019, dated 05.08.2020.

2.The respondent Police have registered a case in Crime No.9 of 2016, for offence under Section 5(m) r/w 6 of Protection of Children from Sexual Offence Act, 2012 (hereinafter referred to as 'POCSO Act') against the appellant on the complaint (Ex.P1) given by PW1. After completing investigation, the respondent police laid a charge sheet before the learned Sessions Judge, Special Court for Exclusive trial of cases under the Protection of Children from Sexual

Offence Act, Salem and the same was taken on file in Special S.C.No.74 of 2016 and subsequently, it was renumbered as Special S.C.No.30 of 2019.

3.After completing the formalities under Section 207 Cr.P.C., since there was a prima facie material to frame charges against the appellant, the learned Sessions Judge framed charges under Section 6 of POCSO Act.

4.After completing the trial and hearing the arguments advanced on either side and also considering the oral and documentary evidence, the Sessions Judge found that the appellant was guilty and convicted and sentenced him to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.50,000/-, in default, to undergo one year Simple Imprisonment for offence under Section 9(m), 9(n) r/w 10 and 18 of POCSO Act.

5.Challenging the judgment of conviction and sentence, the present appeal has been preferred by the appellant.

6.The learned counsel for the appellant would submit that the family members of the appellant and the family of the victim girl (PW.2) are relatives and the appellant is the paternal uncle (rpj;jg;gh) of the victim girl (PW.2). The appellant belongs to 'Two Leaf' party and one Sathish (PW.4) belongs to 'Rising of Sun' party. There was a prior enmity between them before the occurrence. Due to which, a complaint was lodged by the appellant against the said Sathish (PW4), which is pending. The mother of the victim girl (PW1) has stated that the complaint (Ex.P1) was written by Sathish (PW.4). The said Sathish (PW.4) misguided the parents of the victim girl, foisted a false case against the appellant. The mother of the victim girl (PW.1) has stated that for one hour, her daughter (PW.2) was found missing, whereas the house of the appellant is nearer to the house of the victim girl. The learned counsel would further submit that the victim girl was sustained injury in the leg, whereas the Doctor has stated that there was no injury at the time of clinical examination. Further, the case of the prosecution is that the appellant has committed the aggravated penetrative sexual intercourse with the victim girl, whereas the Doctor (PW.7) has stated that there was no symptoms of penetrative sexual assault and therefore, there are material contradictions between the prosecution witnesses and documents, especially in the ocular evidence and the medical evidence. The learned trial Court failed to consider the same. Further, in this case no independent witnesses were examined by the prosecution to prove the guilt of the appellant and all the witnesses were turned hostile and not supported the case of the prosecution.

7.The learned counsel for the appellant would further submit that in order to help Sathish (PW4), the parents of the victim girl (PW.1 and PW.3) have given a false evidence

against the appellant, since the appellant had given a complaint against Sathish (PW.4). Under these circumstances, the judgment of the learned trial Court is liable to be set aside. The learned counsel would further submit that the occurrence said to have taken place on 18.06.2016 and the complaint (Ex.P1) was given after due deliberation on 19.06.2016. Hence, there is a delay of one day in lodging the complaint (Ex.P1) and the delay has not been properly explained. The victim girl (PW.2) was not produced before the Doctor immediately soon after the occurrence and she was produced only on 20.06.2016. Though the trial Court not found guilty for offence under Section 5(m) r/w 6 of POCSO Act, however wrongly convicted him under Sections 9(m), 9(n) r/w 10 and 18 of POCSO Act.

8.Thus, the trial Court failed to appreciate the oral and documentary evidence and hence, the conviction and sentence recorded by the learned Sessions Judge is unwarranted, which needs interference of this Court.

9.Mr.R.Suryaprakash, learned Government Advocate (Crl. Side) appearing on behalf of the respondent Police would submit that there was no previous enmity between the appellant and Sathish (PW4) as alleged by the learned counsel for the appellant and no witnesses have stated that the mother of the victim (PW.1) has given a false case against the appellant and further, no case is pending against Sathish (PW4). He would further submit that the victim girl (PW2) has clearly deposed that the brother of the appellant asked her to buy tea powder and after purchasing the tea powder, the victim girl (PW.2) handed over the same to the brother of the appellant. While returning, the appellant took her inside the house and made her to lay on the floor and committed the aggravated penetrative sexual assault. While recording the statement of the victim girl (PW.2) under Section 164 Cr.P.C., she narrated the same. Even before the Doctor (PW.7) in the presence of the victim girl (PW.2), her mother (PW.1) has stated that she was sexually assaulted by a known person.

10.The learned Government Advocate would further submit that immediately after the occurrence, the mother of the victim girl (PW.1) lodged the complaint (Ex.P1) to the respondent and the same was registered in Crime No.9 of 2016 for offence under Section 5(m) r/w 6 of POCSO Act. The delay in lodging the complaint has been properly explained that due to the non availability of the father of the victim girl (PW.3), she could not prefer the complaint immediately soon after the occurrence. The mother of the victim girl, who was examined as PW.1 has stated that since on the date of occurrence was a holiday, the victim girl was playing near the house of the appellant and subsequently, she was found missing. Despite made search of the victim girl (PW2), she could not be found. At that time, there was heavy radio sound from the house of the appellant, therefore, the mother of the victim girl (PW.1) asked her son to search the victim girl

(PW.2) in the appellant's house. The son also found her sister was in the house of the appellant. Thereafter, the victim girl (PW.2) came out from the appellant's house and crying and when she enquired about the same, she narrated the incident. At that time, the father of the victim girl (PW.3) was not in the native. After his arrival and consulting with the neighbours, they decided to lodge a complaint (Ex.P1) and therefore, the delay of 2 days in lodging the complaint has been properly explained. Though the Doctor (PW.7) has stated that there is no symptoms with regard to penetrative sexual assault, the victim girl (PW.2) while recording her statement under Section 164 Cr.P.C., and while deposing before the trial Court, has clearly stated that the appellant one who has committed the offence. Thus, the learned Sessions Judge has rightly appreciated the oral and documentary evidence produced by the prosecution and rightly convicted the appellant, which does not warrant interference of this Court.

11. Heard the learned counsel appearing for the appellant and the learned Government Advocate (Crl. Side) appearing for the respondent and also perused the materials available on record.

12. The case of the prosecution is that at the time of occurrence, the the victim girl was aged about 12 years and she was studying 7th standard and living with her parents. The date of occurrence is on 18.06.2016, which is a holiday. When the victim girl was playing near the house of the appellant, the brother of the appellant asked the victim girl (PW2) to buy tea powder. The victim girl (PW2) after purchasing the tea powder, she handed over the same to the brother of the appellant. The house of the appellant's brother and the house of the appellant are in the same locality. When she crossing the appellant's house, the appellant pulled her into the house and made her to lay on the floor and committed the penetrative sexual assault. Since for one hour, the victim girl (PW2) was found missing. The mother of the victim girl (PW1) started to search his daughter and asked her son to search her in the appellant's house. PW1's son found the victim girl was in the house of the appellant. Then, the victim girl (PW.2) came out from the appellant's house and crying and when she was enquired, she narrated the incident. After consulting with the neighbours, the parents of the victim girl lodged a complaint (Ex.P1) to the respondent Police.

13. Based on the complaint (Ex.P1) given by PW1, an First Information Report [Ex.P10] in Crime No.9 of 2016 was registered for offence sunder Section 5(m) r/w 6 of POCSO Act. After completing investigation, the respondent police laid a charge sheet before the learned Sessions Judge, Special Court for Exclusive trial of cases under the Protection of Children from Sexual Offence Act, Salem and same was taken on file in Special S.C.No.74 of 2016 and thereafter, renumbered as Special S.C.No.30 of 2019.

14. In order to prove the case of the prosecution, on the side of the prosecution, as many as 10 witnesses were examined, 14 documents were marked and 1 material object was exhibited. After completing the examination of prosecution witnesses, when incriminating circumstances were culled out from the prosecution witnesses put before the accused, they had denied as false. On the side of the defence, no witnesses were examined and documents were marked.

15. After completing trial and hearing of the arguments advanced on either side, the learned Sessions Judge, by judgment dated 05.08.2020 in Special S.C.No.30 of 2019, convicted and sentenced the appellant as stated above.

16. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.

17. On a perusal of the records, it is seen that out of 10 witnesses examined on the side of the prosecution, the victim girl was examined as PW2, her mother was examined as PW1 and her father was examined as PW3. A reading of the evidence of the victim girl (PW2), she has clearly stated that the appellant is her paternal uncle (rpj;jg;gh). On 18.06.2016, when the victim girl was playing near the house of the appellant, the brother of the appellant called the victim girl and asked her to buy tea powder. The victim girl went to the shop and bought tea powder and handed over the same to the appellant's brother. When she crossing the appellant's house, the appellant pulled her into his house and made her to lay on the floor and committed the penetrative sexual assault. While recording the statement under Section 164 Cr.P.C., the victim girl has clearly narrated the incident. The age of the victim girl is below 12 years, the age certificate of the victim girl was marked as Ex.P9 to prove the age of the victim girl, in which, the date of birth is mentioned as 20.02.2005 and the date of occurrence is 18.06.2016. Therefore, at the time of occurrence, the victim girl (PW2) was only completed 11 years of age. The victim girl (PW2) has clearly narrated the occurrence that the appellant pulled her into the house and made her to lay on the floor and he also laid on her and put his private part into her private part. Though the trial Court found that there was no penetrative sexual intercourse, based on the evidence of the victim girl and her statement recorded under Section 164 Cr.P.C., the trial Court has come to the conclusion that the appellant has committed the aggravated sexual assault which falls under Section 9(m), 9(n) r/w 10 and 18 of POCSO Act. Since the age of the victim child is below 12 years at the time occurrence and the appellant is being the paternal uncle of the victim girl, the offence falls under Section 9(m) and 9(n) of POCSO Act, and he shall be punished under Section 10 of POCSO Act.

18.The learned counsel for the appellant has taken a defence that there was a dispute between the appellant and Sathish (PW4), who belong to different political parties. Due to the dispute, Sathish (PW4) misguided the parents of the victim girl and foisted a false case against the appellant. Normally, no mother would scurrilously make her daughter to give such false allegations to the extent that the appellant pulled her daughter and made her to lay on the ground and committed the penetrative sexual assault. Particularly, the relationship between the victim and appellant are prohibited relationship i.e., paternal uncle. The parents will not sacrifice the future of the victim child for flimsy reason. Therefore, the defence taken by the appellant is not acceptable.

19.Further, there is a presumption under Section 29 of POCSO Act. It is for the appellant to rebut the presumption by cogent and reliable evidence. In this case, the appellant has not rebutted the presumption that he never pulled the victim girl into the house and committed sexual assault. Thus, when the victim girl was playing nearby the house of the appellant, the brother of the appellant asked to buy tea powder and after purchasing the tea powder and handing over the same to the appellant's brother and while crossing the appellant's house, the appellant pulled her into the house and had a sexual assault on her.

20.A reading of the cross examination of the victim girl (PW2), it is seen that the victim girl denied the question put by the defense counsel that a false case has been foisted against the appellant due to the enmity between Sathish (PW4) and the appellant. Therefore, under these circumstances, this Court has come to the independent conclusion that though the prosecution has not proved the case as per alleged charge, the prosecution has proved its case from the evidence of the victim girl (PW2) and the statement recorded under Section 164 Cr.P.C., that the appellant has committed the offence under Sections 9(m), 9(n) r/w 10 and 18 of POCSO Act. Thus, the trial Court by appreciating the evidence and materials in proper, rightly not convicted the appellant for the offence punishable under Section 6 of POCSO Act.

21.This Court does not find any perversity or illegality in the judgment dated 05.08.2020 in Special S.C.No.30 of 2019 passed by the learned Sessions Judge, Special Court for dealing the cases under the Protection of Children from Sexual Offence Act, Salem and the same is, hereby, confirmed.

22.In the light of the above discussion, this Court does not find any merit in this appeal and the appeal is liable to be dismissed. Considering the facts and circumstances of the case and the age of the appellant, this Court modifies the sentence of Seven years rigorous imprisonment imposed by the

trial Court for the offence under Section 9(m), 9(n) r/w 10 and 18 of POCSO Act to five years rigorous imprisonment.

23.This Criminal Appeal is dismissed with modification. The respondent Police is directed to secure the appellants for sufferance of the remaining period of sentence. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Sessions Judge,
Special Court for Exclusive trial of cases
under the Protection of
Children from Sexual Offence Act, Salem.
- 2.The Inspector of Police,
All Women Police Station,
Sooramangalam,
Salem District.
- 3.The Public Prosecutor,
High Court, Madras.

Copy to:
The Hon'ble Chairman,
POCSO Committee,
High Court, Madras-104

+1CC to M/s.I.C.Vasudevan, Advocate, Sr.No.11052

Cr1.A.No.13 of 2021

RK (CO)
R.K. (14.07.2021)

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