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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.02.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Cr1.A.No.32 of 2021

Settu

...Appellant

Vs

State. Rep. by the Inspector of Police,
All Women Police Station,
Vellore,
Vellore District.

...Respondent

(Crime No.3 of 2017)

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to call for the entire records in connection with Special S.C.No.37 of 2017, on the file of the learned Special Judge (Special Court for Exclusive Trial of Cases under Protection of Child from Sexual Offences Act, 2012), Vellore and set aside the Judgment dated 28.12.2020.

For Appellant : Mr.E.Kannadasan

For Respondent : Mr.R.Suryaprakash
Government Advocate

J U D G M E N T

This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 28.12.2020 made in Special S.C.No.37 of 2017, by the learned Judge, Special Court for Exclusive Trial of Cases under Protection of Child from Sexual Offences Act, 2012, Vellore.

2. The respondent-police has registered a case against the appellant for the offence under Sections 366, 506 (ii) IPC and under Section 6 r/w 5 (m) and 5 (i) r/w (3) (b) of Protection of Children from Sexual Offences Act, 2012 (for brevity "the POCSO Act"). After investigation, laid a charge sheet before the learned Judge, Special Court, Vellore. The learned Judge, framed charges against the appellant for the offences under Sections 366, 506 (ii) IPC and under Section 6 r/w 5 (m) and 5 (i) r/w (3) (b) of POCSO Act and conducted the trial.

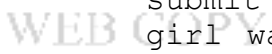


3. After considering the evidence on record and hearing on either side, the learned Judge, by Judgment dated 28.12.2020, convicted the appellant for the offence under Section 5 (i), 5 (m) r/w 6 of POCSO Act, and sentenced him to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.5,000/- in default, to undergo there months Rigorous Imprisonment; and convicted and sentenced to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.1,000/- in default to undergo one month Rigorous Imprisonment for the offence under Section 366 of IPC; and convicted and sentenced to undergo Rigorous Imprisonment for one year for the offence under Section 506 (ii) of IPC.

4. Aggrieved against the Judgment of conviction and sentence, dated 28.12.2020, the appellant / accused had preferred the present Criminal Appeal before this Court.

5. The learned counsel for the appellant would submit that there was no abduction or kidnapping, and therefore, the ingredients of Section 366 of IPC has not been made out in this case. The learned Judge, failed to consider the evidence of the victim girl and wrongly convicted the appellant for the offence under Section 366 of IPC and further, there is no threat, however wrongly convicted the appellant the offence under Section 506 (ii) of IPC. Further, there is no eyewitness in this case and soon after the occurrence, the victim girl has not produced before the Doctor for medical examination, and even the victim girl has not stated in her evidence that the appellant had committed a penetrative sexual intercourse and the learned Judge failed to consider the above said aspects, however, convicted the appellant on the ground of sympathy, which warrants interference.

6. The learned counsel for the appellant would further submit that as per evidence of P.W.1-mother, she came to know sexual assault of the appellant with her daughter-P.W.3 on 14.04.2017 itself, when they were at Chennai, but she (P.W.1) has not chosen to give treatment for the child (P.W.3) at Chennai and she came to Vellore on 16.04.2017 and admitted the child in the private Hospital, Vellore and there was no explanation for non-giving treatment for the child at Chennai, which creates a doubt. It is further submitted that occurrence has not taken place on 11.04.2017, as stated by the prosecution, if the occurrence had occurred on 11.04.2017, definitely, the child would have intimated to her mother immediately, but whereas, P.W.1-mother filed Ex.P1-complaint only on 17.04.2017 with a delay and the said delay in filing Ex.P1-complaint has not been properly explained by the prosecution, therefore, the benefit of doubt should have been extended to the accused/appellant, however, the trial Court failed to consider



7. The learned Government Advocate for the respondent would submit that at the time of occurrence, the age of the victim girl was below 12 years and the appellant is a neighbor and in the absence of his parents, he called the victim child and forcibly inserted his finger in the private part of the victim child and the victim child was sustained injury in her private part, and as such, the appellant committed an offence under Section 5 (i), 5 (m) r/w 6 of POCSO Act. In order to prove the case of the prosecution, the victim girl was examined as P.W.3 and she has clearly narrated the occurrence, and further, since the appellant threatened the victim girl not to reveal anybody, if do so, he would take away her life and therefore, the victim girl did not inform the occurrence to her mother immediately and when she (P.W.1) was giving bath to her daughter (P.W.3), she revealed the occurrence on 15.04.2017 and thereafter, they came to Vellore, and gave treatment to the victim child at CMC Hospital, Vellore, mere non-given of treatment in Chennai is not a fatal to the case of the prosecution. The doctor, who examined the victim girl was examined as P.W.4, and in his evidence, he has clearly deposed that the victim was subjected to sexual assault and also noted the injury sustained by the victim girl. It is further submitted that a bare perusal of the evidence of P.W.3, the victim girl and the evidence of P.W.4-doctor, would reveal that the prosecution has proved its case beyond reasonable doubt. Since the appellant removed the victim girl from the custody of the natural guardian, Section 366 of IPC would attract. P.W.3-victim girl during her evidence has clearly deposed that the appellant had threatened her not to reveal anybody, if reveals, he would take away her life and therefore, the learned Judge framed charge against the appellant for the offence under Section 506 (ii) of IPC and convicted for the said offence also. Therefore, there is no merit in the appeal and the same is liable to be dismissed.

9. The case of the prosecution is that on 14.04.2017, P.W.3 had come to Chennai to attend a funeral, and on the next day, viz., 15.04.2017, when she (P.W.1) was giving bath to her minor child (P.W.3), she complained pain on her private part, when she (P.W.1) enquired, she (P.W.3) revealed the entire fact stating that while she (P.W.3) went along with her grandmother to throw the garbage in the dustbin, and after throwing the garbage, her grandmother asked her (P.W.3) to go home alone, and while returning to home, the accused waylaid her and took her into his residence, and inserted his finger on her private part, and



when she (P.W.3) shouted, the accused closed her mouth with his fingers by putting some chocolates and threatened not to disclose anybody, if reveals, he would take away her life. Thereafter, they returned to Vellore and her mother (P.W.1) admitted her daughter (P.W.3) in CMC Hospital, Vellore and Hospital Authorities informed the same to Police Station and based on which, the respondent-Police registered a case against the appellant for the offence under Sections 366, 506 (ii) IPC and under Section 6 r/w 5 (m) and 5 (i) r/w (3) (b) of POCSO Act. Subsequently, the Investigation Officer, investigated the matter and laid a charge sheet before the learned Judge, Special Court for Exclusive Trial of Cases under Protection of Child from Sexual Offences Act, 2012, Vellore.

10. On the side of the prosecution, 5 witnesses were examined as P.W.1 to P.W.5 and 9 documents were marked as Exs.P1 to P9. After completion of the examination of the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant, the same was denied as false and on the side of the defence, one Kavitha was examined as D.W.1 and no document was marked. The learned Judge, after hearing the arguments on either side and considering all the materials placed on record, found that the appellant is guilty and convicted and sentenced, as referred above, which is challenged in this Criminal Appeal.

11. Since this Court is an Appellate Court and also final Court of fact finding, has to re-appreciate the entire evidence and come to the conclusion independently. A careful reading of the statement recorded under Section 164 of Cr.P.C. of the victim child before the learned Magistrate, it could be seen that the victim child has narrated the entire occurrence, which was marked as Ex.P3 and also during evidence also, she deposed the entire occurrence. In her statement, she has clearly stated that the accused is her neighbour and he took her into his residence and inserted his finger on her private part and when she cried, the accused closed her mouth with his fingers by putting some chocolates. She further stated that the accused also threatened her not to disclose to anyone. On 15.04.2017, when she (P.W.3) was taking bath, informed the occurrence to her mother (P.W.1). Her mother was examined as P.W.1. P.W.1 is not an eyewitness and hearsay evidence. Subsequently, after registering F.I.R., the respondent-Police investigated the matter and also produced the victim child before the doctor for medical examination. The doctor, who examined the victim child was examined as P.W.4. In his evidence, the doctor, had clearly stated that the victim girl sustained injury in her private part and he had also issued Ex.P6-medical certificate, in the report, it has been stated that "overall findings are consistent with sexual assault" Subsequently, the victim child was produced



before the learned Magistrate for recording statement under Section 164 of Cr.P.C. and accordingly, the learned Magistrate has also recorded the statement of the victim child on 12.05.2017, which was marked as Ex.P3. In the statement, P.W.3, has clearly stated that the accused took her to his house and inserted his finger on her private part, when she cried, he closed his mouth, by putting some chocolates and further stated that he gave a sum of Rs.2/- and she thrown away the said amount in the canal. In cases of this nature, no eyewitnesses can be expected and no corroboration can be made. The culprits are waiting for chance of the loneliness of the children and taking advantage of loneliness, they used to exploit them. In this case, admittedly, nobody was in the house of the accused, and when he was alone, called the victim child and committed the offence. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible. In cases of this nature presence of eyewitnesses are mostly improbable.

12. A combined reading of the evidence of P.W.3, victim child and also the statement recorded under Section 164 of Cr.P.C. by the learned Magistrate and also the evidence of P.W.4 doctor and in his Ex.P6 report, the prosecution has proved his case that the appellant committed an offence under Section 5 (i), 5 (m) r/w 6 of POCSO Act. Depth of penetration is immaterial, mere touching of private part would be sufficient so as to constitute the offence.

13. At this juncture, it would be useful to refer the Sections 3(b), 5 (i) and 5 (m) of POCSO Act:-

"Section 3. Penetrative sexual assault:-

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

Section 5. Aggravated penetrative sexual assault:-

(i) Whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child;

(m) whoever commits penetrative sexual assault on the child below 12 years; or

A careful reading of the language of the said provisions of law and also the evidence of P.W.3, the victim child, it could be seen that the appellant has committed the offence, which is punishable under Sections 5 (i), 5 (m) r/w 6 of POCSO Act.



14. It is also to be further noted that even as per the prosecution witnesses, the appellant is only neighbour, living in the next door of the victim child. The prosecution has not proved the case for the offence under Section 366 of IPC beyond reasonable doubt with cogent evidence. However, the victim child has clearly stated that, after the occurrence, the appellant threatened her not to reveal anybody, if reveals, he would take away her life. Therefore, the prosecution has proved for the offence under Section 506 (ii) of IPC.

15. Accordingly, the conviction and sentence imposed by the learned Judge, for the offence under Section 366 of IPC is set aside. The conviction and sentence passed under Section 5 (i), 5 (m) r/w 6 of POCSO Act and Section 506 (ii) of IPC, are confirmed.

16. In the result, the Criminal Appeal is partly allowed with the above modification.

Sd/-

Assistant Registrar (CO)

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Sub Assistant Registrar

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To

1.The Special Judge,
(Special Court for Exclusive Trial of Cases under
Protection of Child from Sexual Offences Act, 2012),
Vellore.

2.The Inspector of Police,
All Women Police Station,
Vellore,
Vellore District.

3.The Principal Sessions Judge,
Vellore.

+1cc to M/s.E.Kannadasan, Advocate, S.R.No.9454

Crl.A.No.32 of 2021

BP(CO)
RVM(29/07/2021)