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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.07.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.NO.30 OF 2020

AND

CRL.M.P.NO.632 OF 2020

Shanthakumar

...Appellant

Vs

State represented by
The Inspector of Police,
Namakkal All Women Police Station,
Namakkal District,
Crime No.1 of 2017.

...Respondent

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to set aside the judgment dated 09.12.2019 made in Spl.C.C.No.12 of 2018 by the learned Sessions Judge, Fast Track Mahila Court, Namakkal.

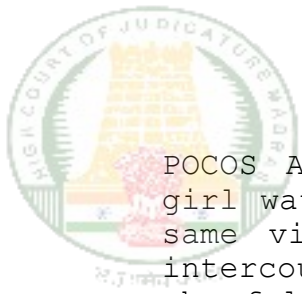
For Appellant : Mr.K.K.P.Raja Raja Chozhan
Legal Aid Counsel

For Respondent : Mr.S.Sugendran
Government Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 09.12.2019 in Spl.C.C.No.12 of 2018 by the learned Sessions Judge, Fast Track Mahila Court, Namakkal.

2.The case of the prosecution is that at the time of occurrence, the victim, who is aged about 13 years was studying 8th standard. The accused and the victim girl belonged to same village, prior to the date of occurrence i.e. on 15.01.2017, the accused took the victim girl to an isolated place and threatened her and attempted to commit sexual assault on her and at that time, the mother of the victim girl/de facto complainant intervened and saved the victim girl. Thereafter, on many occasions with sexual intention repeatedly watched the victim girl directly, signaled her and sang songs using her name and thereby, he committed an offence under Section 11(iv) r/w 12 of



POCSO Act. On 15.01.2017, at about 8.00 p.m when the victim girl watching Kabadi match nearby Bhagavathi Amman Temple in the same village, the accused with an intention of having sexual intercourse with the victim induced her to follow him and when she followed him to a narrow lane, he gagged her mouth and took her to the unfinished house of one Shanmugam and committed an offence punishable under Section 366 IPC. Hence, P.W.1/mother of the victim girl, filed a complaint/Ex.P1 against the accused/appellant.

3.The respondent-Police registered a case in Crime No.1 of 2017 against the appellant for the offence under Sections 366 IPC and 11(4) of The Protection of Children from Sexual Offences Act, 2012 [hereafter referred to as 'POCSO Act' for the sake of convenience]. After completing the investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Namakkal. The offence is against a child which falls under the definition of Section 2(1) (d) of POCSO Act and the learned Sessions Judge has taken cognizance of the case on file in Spl.C.C.No.12 of 2018. After completing the formalities, the learned Sessions Judge framed charges against the appellant for the offence under Section 11(iv) which is punishable under Section 12 of POCSO Act and Section 363 IPC.

4.In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 9 witnesses were examined as P.W.1 to P.W.9 and also marked 8 documents as Exs.P1 to P8 and no material object was marked. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant/accused and questioned under Section 313 of Cr.P.C., wherein he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence one witness was examined as D.W.1 and no documentary evidence was produced.

5. The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that the appellant is guilty for the following offences :

i. For the offence under Section 363 IPC the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.1,000/-, in default, to undergo simple imprisonment for a period of six months ;

ii. For the offence under Section 11(iv) which is punishable under Section 12 of POCSO Act, the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.1,000/-, in default, to undergo simple imprisonment for a period of six



place. He would further submit that there was no independent eye witness to the said occurrence. Therefore, the trial Court failed to appreciate the contractions and discrepancies and also failed to consider the previous enmity, erroneously convicted the appellant only based on untrustworthiness of the evidence of the victim girl and hence, the judgment of conviction and sentence passed by the trial Court against the appellant is liable to be set aside.

7.1 The learned Government Advocate (Crl.Side) for the respondent would submit that at the time of occurrence, the victim girl was 13 years old and was studying 8th standard. On 15.01.2017, there was Pongal Celebrations in the village, P.W.1/mother of the victim girl asked the victim girl to buy milk, at that time, the appellant followed her and attempted to commit penetrative sexual assault on her. During that time, the appellant received a phone call, when he tried to attend the call, the victim girl pushed the accused and escaped from the scene of occurrence and informed the said incident to her mother/P.W.1. He would further submit that prior to the occurrence, when the victim girl went for attending the nature's call at that time the appellant tried to misbehave with her. From the evidence of the victim girl, the prosecution proved that the appellant followed the victim girl and tried to commit sexual assault on her, therefore, he committed the offence under Section 11(iv) which is punishable under Section 12 of POCSO Act.

7.2 The learned Government Advocate (Crl.Side) would further submit that after the occurrence i.e. on 15.01.2017, P.W.1/mother of the victim girl informed the said incident to her husband. Since her husband was working in the out of station, he informed that he will come to the house within two days thereafter, we can proceed further. Since no male member was available in their house on the date of alleged occurrence, the complaint was registered belatedly. Therefore, the delay in filing the complaint is properly explained and the same cannot be a sole ground to disbelieve the case of the prosecution. He would further submit that after registration of the complaint, the victim girl was produced before the Judicial Magistrate for recording her statement under Section 164 Cr.P.C, in which, she has clearly deposed both incidents. Since in the present case there was no penetrative sexual assault, no necessity to produce the victim girl before the Doctor for medical examination. He would further submit that the victim girl herself is a affected person, in cases of this nature, no independent witnesses can be expected.

7.3 The learned Government Advocate (Crl.Side) would further submit that P.W.2/victim girl in her deposition clearly



stated that prior to the occurrence, the appellant tried to commit sexual assault on her, at that time the mother of the victim girl secured her. Further on 15.01.2017, the appellant tried to commit sexual assault on her, at the time the victim girl escaped from the place of occurrence and immediately she informed the said incident to her mother and aunt. P.W.1/mother of the victim girl, who in turn informed the said incident to her husband and thereafter, they preferred the complaint. Further, P.W.1/mother of the victim girl has clearly deposed that prior to the occurrence i.e. on 15.01.2017, the appellant tried to misbehave with her daughter, at that time, she secured the victim girl and warned the appellant. Therefore, from the evidence of P.W.2/victim girl and P.W.1/mother of the victim girl, the prosecution has rightly established their case that on two occasions the appellant had taken the victim girl, who is aged about 13 years from the custody of her lawful guardians and tried to commit sexual assault on the victim girl. Therefore, the trial Court has rightly appreciated entire evidence and convicted and sentenced the appellant and hence, the appeal is liable to be dismissed.

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

9. 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.

10. On a careful reading of the evidence of the victim girl/P.W.2 it reveals that at the time of occurrence the victim girl was studying 8th standard and the appellant is residing nearby her house. During the month of May, 2016 when the victim girl went for attending nature's call, at that time the appellant tried to misbehave with her and P.W.1/mother of victim girl intervened and warned the accused and secured the victim girl. Thereafter, the accused on may occasions with sexual intention repeatedly followed the victim girl. On 15.01.2017, there was Pongal celebrations in their village at that time she went to buy milk and the appellant followed her and took her into an unfinished house and pushed the victim girl down and tried to commit sexual assault on her, at that time the appellant received a phone call, the victim girl escaped from that place and informed the said incident to her mother and complaint/Ex.P1 has been registered against the appellant. Subsequently, the victim girl was produced before the Judicial Magistrate for recording her statement under Section 164 Cr.P.C/Ex.P3, in which, she has clearly narrated both incidents. Further, the evidence of P.W.2/victim girl is corroborated with the evidence of P.W.1/mother of the victim girl.



11. The defence taken by the learned counsel for the appellant is that there was a delay in preferring the complaint. However, the delay is concerned, P.W.1 and P.W.2 clearly stated that at the time of occurrence the father of the victim girl is not in station, after his arrival they preferred the complaint and hence, the delay has been properly explained by the prosecution. Further, in POCSO Act cases, no parent would take a hasty decision and immediately rush to the police station and file a complaint. The parents would naturally think about the future of the child and also about the reputation of the family. Normally, they used to take advice of the elders in the village and when, the culprit did not obey the advice of the elders, then only they approach the police station. Therefore, the delay in filing the complaint is not fatal to the case of the prosecution and hence, the contention raised by the learned counsel for the appellant is not acceptable.

12. The other defence taken by the learned counsel for the appellant is that the victim girl was not subjected to medical examination. The appellant tried to commit sexual assault on the victim girl and there was no injury and no necessity to produce the victim girl before the Doctor for medical examination. Therefore, non conducting of the medical examination is not fatal to the case of the prosecution. Further, the contention raised by the learned counsel for the appellant is that there was no independent eye witness to the said occurrence. The victim girl, who is the sole witness to the occurrence has clearly deposed that at the time of occurrence no other person was present in that place. Therefore, mere non-examination of the independent eye witnesses is not fatal to the case of the prosecution. In cases of this nature, presence of independent eye witnesses are mostly improbable, if the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible.

13. On a combined reading of the evidence of the victim girl during trial as P.W.2 and her statement recorded under Section 164 Cr.P.C., it would reveal that the evidence of the victim girl is cogent, credible and trustworthy. Though P.W.1/mother of the victim girl is a hearsay witness, her evidence is corroborated with the evidence of P.W.2/victim girl.

14. On a perusal of the entire materials, it would reveal that the appellant more than once attempted to commit sexual assault on the victim girl and thereby, the appellant has committed the offence under Section 11 (iv) which is punishable under Section 12 of POCSO Act. Insofar as Section 363 is concerned, at the time of occurrence, the victim girl is 13 years, the appellant took her from the custody of her lawful guardians and attempted to commit penetrative sexual assault on



her.. For better appreciation, it is appropriate to extract Section 361 of Indian Penal Code which reads as follows:

''361. Kidnapping from lawful guardianship –

Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.''

Therefore, on a reading of the evidence of the victim girl clearly shows that the appellant took her to an unfinished house and tried to commit sexual assault on her. Therefore, taking custody of the victim girl from their guardians without her consent is punishable under Section 363 IPC.

15. In light of the above facts, this Court as an Appellate Court, in order to give factual finding and independently re-appreciated the entire evidence and materials finds that the prosecution has proved their case beyond all reasonable doubts. Hence, this Court finds no reason to interfere with the judgment of conviction and sentence passed by the trial Court. Therefore, this Court does not find any merit in the appeal and the appeal is liable to be dismissed.

16. Accordingly, this Criminal Appeal is dismissed and the conviction and sentences passed in Spl.C.C.No.12 of 2018 by the learned Sessions Judge, Fast Track Mahila Court, Namakkal is confirmed.

Hence, the trial Court is directed to secure the appellant/accused to undergo the remaining period of sentence, if any. The period of incarceration already undergone, if any, shall be given set off. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

// True Copy //

Sub Assistant Registrar

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To

1.The Sessions Judge,
Fast Track Mahila Court,
Namakkal.



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

3.The Public Prosecutor,
High Court, Madras.

4.The Deputy Registrar | with a direction to send back the
 (Criminal Section), | original records, if any, to the
 High Court, Madras. | trial Court

+1cc to Mr.K.P.P.Raja Raja Chozhan, Advocate Sr.No.36644

CRL.A.No.30 of 2020
and CrI.M.P.No.632 of 2020

MT(CO)
RVM(01/03/2022)