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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.07.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Cr1.A.No.81 of 2020

Ravi ... Appellant/Accused

Vs.

State Rep. by the Inspector of Police,
All Women Police Station,
Neively, Cuddalore District. ... Respondent/Complainant
(Crime No.9 of 2017)

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the Judgment made in Spl.S.C.No.12 of 2019, dated 21.01.2020 by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under Section POCSO Act, Cuddalore.

For Appellant :Mr.S.N.Arunkumar

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

J U D G M E N T

This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 21.01.2020 made in Special S.C.No.12 of 2019, on the file of the learned Sessions Judge, Special Court for Exclusive Trial of Cases under Section POCSO Act, Cuddalore.

2. The respondent Police have registered a case in Crime No.9 of 2017, for offence under Section 5(j) (ii), 5 (k), 5 (l) of the Protection of Children from Sexual Offence Act, 2012 (Hereinafter called as 'POCSO Act'), which is punishable under Section 6 of the '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 Section POCSO Act, Cuddalore and the same was taken on file as



Special S.C.No.12 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 Special Judge framed charges under Section 6 of POCSO Act and Section 366 of IPC.

4. After completing the trial and hearing the arguments advanced on either side and also considering the oral and documentary evidence, the trial Judge found the appellant not guilty for the offence under Section 366 of IPC and acquitted from the said charge and found guilty for offence punishable under Section 6 of the POCSO Act and convicted and sentenced him to undergo rigorous imprisonment for 12 years and to pay a fine of R.2,000/-, in default to undergo simple imprisonment for a period of one year.

5. Challenging the above said Judgment of conviction and sentence, the appellant has filed the present appeal before this Court.

6. The learned counsel for the appellant would submit that P.W.2 in her evidence has clearly stated that in her house Television is available and therefore, the prosecution theory that P.W.2 went to see television to the appellant's house has become doubtful. It is further contended that the case was registered on 13.12.2017, whereas the statement under Section 164(5) of Cr.P.C. was recorded only on 01.03.2018 and the delay in recording statement of the victim child under Section 164 (5) of Cr.P.C. will rise suspicion that the statement was tutored or it is her own statement. The learned counsel would further contend the doctor who initially treated the victim child was not examined as a witness and therefore, non examination of the said doctor, is fatal to the case of the prosecution. It is also further contended that P.W.2 was 7 months pregnant at the time of registering the case and however, P.W.7, the Investigating Officer not chosen to conduct DNA profiling test as early as possible. Further, DNA report excludes the appellant from paternity of P.W.2's male child viz., Vignesh Prasath and therefore prays that the conviction and sentence passed by the learned Sessions Judge is liable to be set aside.

7. The learned Government Advocate (Criminal Side) would submit that the victim is aged about 17 years, studied upto 5th standard and dropped out and the parents of the victim are daily wages and she also a neighbour to the accused. The victim child was alone in the house and she used to go to the appellant's



house for watching TV at that time, one day on 03.07.2017, at about 2 pm., when the victim was watching TV in the house of the appellant, the appellant asked the victim to accommodate for her joys, and when she refused to accept her joys and tried to leave from his house, the appellant pulled her and locked the door from inside and had a penetrative sexual assault against her will and thereafter, he threatened her that if she would not give consent for sexual assault, he would commit suicide and in that way called her several times and had sexual intercourse with her, subsequently, the victim got pregnant and thereafter, the mother came to know the pregnancy of the victim child and made enquiry about the same with the accused for pregnancy, and subsequently, she gave a birth to a male child and thereafter gave a complaint. Thereafter, the victim child gave a birth and DNA test was taken and the report shows that the appellant is not the biological father. However, the fact remains that when the victim child used to go to watch TV in the appellant's house and taking advantage of the loneliness, he had forcible sexual intercourse and also threatened her not to disclose anybody, if do so, he would commit suicide. Thereafter, he had sexual intercourse with her for several times. Subsequently, the victim child was produced before the Doctor, and before the doctor also she has stated that a known person, who is neighbour had sexual intercourse and thereafter, she was produced before the learned Magistrate to record statement under Section 164(5) of Cr.P.C., which also reveals that the victim child named the appellant, one who had forcible sexual intercourse with her. Further, the medical evidence and the statement of the learned Magistrate recorded under Section 164(5) of Cr.P.C. would clearly prove that the appellant had committed the offence under Section 5 of the POCSO Act, which is punishable under Section 6 of the POCSO Act. Though the appellant has not taken the custody of the victim child and the victim child gone to the house of the appellant for watching TV and at that time, he had penetrative sexual assault and the trial Court acquitted the appellant for the offence under Section 366 of IPC, however, rightly convicted the appellant for the offence under Section 6 of POCSO Act, and therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

8. Heard the learned counsel for the appellant and the learned Government Advocate (Criminal Side) for the respondent and perused the materials placed on record.

9. The case of the prosecution is that on 13.02.2017, at about 12.00 hours, the defacto complainant, the mother of the victim child lodged a complaint before the respondent-Police by stating that she is residing at Veeran Kovil Street, and she



having two daughters, viz., Kirthana and Andhini, victim, aged about 17 years. The accused Ravi is the neighbour of the complainant and the victim child often used to go to the accused house for the purpose of watching television. While so, the accused had intercourse with her before the six months several times, due to that, the victim child conceived and now he is in the stage of 6 month pregnancy and the accused also threatened the victim child, if she would not give consent for sexual intercourse, he would commit suicide by writing a suicide note and hence, the mother of the victim child filed Ex.P1 complaint before the respondent Police.

10. On the side of the prosecution, 7 witnesses were examined as P.W.1 to P.W.7 and 13 documents were marked as Exs.P1 to P13. 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 under Section 313 of Cr.P.C., however, the same was denied as false. On the side of the defence, no witnesses were examined and no documents were marked. The learned Sessions Judge, Special Court for Exclusive Trial of Cases under Section POCSO Act, Cuddalore. 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 independent conclusion.

12. In this case, the trial Court has framed two charges against the appellant viz., under Section 366 of IPC and Section 5 of the POCSO Act. In order to prove the said charges, on the side of the prosecution, totally 7 witnesses were examined and 13 documents were marked. Out of 7 witness, the victim child was examined as P.W.2. A careful perusal of the evidence of the victim child, she has clearly deposed that she used to go to the appellant's house for watching television. At that time, except the appellant and the victim child, no one was there and he asked her to give a company, when she refused and tried to leave from his house, he forcibly took her and locked door from inside and threatened that if she would not give consent for sexual intercourse, he would commit suicide, by writing a suicide note. Further, he had undergone penetrative sexual assault on several times in that way and also threatened her not to reveal anybody. Though the victim child got pregnancy and she was admitted in the hospital and gave a birth of child, and the evidence of Ex.P8,



medical record shows that the victim child looks mentally sub normal and she is pregnancy of six months and she had sexual contact with her neighbour Ravi, on and off on his compulsion and the report further shows that the appellant threatened the victim child not to reveal the same to even her mother. Further, opinion shows that her hymen was not intact and vagina admits two fingers easily. Further, radiology report shows that the age of the victim child would be 17 years. Subsequently, she was produced before the learned Magistrate to record statement under Section 164 (5) of Cr.P.C and the statement was marked as Ex.P11. A perusal of Ex.P11, it could be seen that the victim child has clearly stated that whenever TV is repair and not function, she used to go for watching TV on the appellant's house and in the place of occurrence, except the appellant and the victim no one was there and he locked the door from inside and had forcibly sexual intercourse with her and he called her frequently to his house, by threatening her that if she does not come to his home, he would commit suicide by leaving a suicide note. Therefore, she also used to go there whenever, he calls to have sexual intercourse with him on several times. Since her mother (P.W.1) suspected of pregnancy, she brought her daughter (P.W.2) before one doctor Kuili and thereafter, she brought the victim child (P.W.2) before P.W.6 Doctor for medical examination and the doctor (P.W.6) stated that the victim child is in the stage of 6 month pregnancy. Subsequently when the DNA samples are taken and the report shows that the appellant is not the biological father. However, the issue in this Appeal is whether the appellant is the biological father of the child born to the victim child or not and the only question is to be tested, whether the appellant has committed the offence which is punishable under Section 6 of the POCSO Act. In the case on hand, it is to be noted that the victim child is a minor and completed the age of 18 years and in order to prove the age of the victim, the transfer certificate was marked as Ex.P5. A perusal of transfer certificate (Exs.P5) and SSLC Certificate (Ex.P2), the date of birth of the victim child was mentioned as 19.05.2001 and the date of occurrence is said to have occurred on 13.07.2017, therefore, the victim is only 17 years and not completed the age of 18 years, and in order to prove Ex.P5 and P6, the headmaster (P.W.4) was examined and therefore, from the evidence of P.W.4, Exs.P5 and P6, it could be seen that the victim child is aged about 17 years and not completed the age of 18 years, therefore, she is a child under the definition of 2 (1)(d) of the POCSO Act.

13. As far as commission of offence is concerned, the victim child has clearly stated that when she used to go to watch television on the appellant's house, who is aged about 40 years,



when his family members were not there in the house and taking advantage of the loneliness of the victim child, he has committed penetrative sexual assault and also called her on several times in that way by threatening that if she would not give consent for sexual assault, he would commit by leaving a suicide note. Though DNA report is against the prosecution case however, it is to be noted that the victim child has clearly deposed the facts during her evidence and even the statement recorded under Section 164 (5) of Cr.P.C., also she has clearly narrated. Though the statement recorded under Section 164 (5) of Cr.P.C. is not substantive evidence, however, victim was examined as P.W.2, before the Court and prove the evidence, she is substantiated statement recorded by the learned Judicial Magistrate under Section 164(5) of Cr.P.C.

14. Though the learned counsel for the appellant would submit that P.W.2 in her evidence has clearly stated that in her house Television is available and therefore, the prosecution theory that P.W.2 went to see television to the appellant's house has become doubtful it is to be noted that the victim child has clearly stated before the learned Magistrate that when Television in her house was not working or repair, at that time she used to go to watch movie in the house of the appellant and therefore, the defence taken in this regard is rejected.

15. The next contention of the learned counsel for the appellant is that the case was registered on 13.12.2017, whereas the statement under Section 164(5) of Cr.P.C. was registered only on 01.03.2018 and therefore the statement recorded under Section 164(5) of Cr.P.C. will rise suspicion that the statement was tutored or it is her own statement. It is pertinent to mention that the occurrence was said to have occurred six months prior to 13.12.2017 and the case was registered on 13.12.2017, after receipt of complaint (Ex.P1) received from the mother of the victim child (P.W.2). It is to be noted that the victim child was initially brought before one Doctor Kuyili and thereafter, she was taken before the Government Headquarters Hospital, Cuddalore and the victim child was treated by the doctor (P.W.6) on 10.01.2018 and she examined the victim child and also opined that her hymen was not intact and her vagina easily admits two fingers and issued Ex.P6 certificate to that effect. In so far as the delay in recording the statement under Section 164(5) of Cr.P.C. is concerned, it is not within the control of the victim, and it is purely laches on the part of the prosecution. Mere laches on the part of the prosecution will not be the reason to discard the evidence of the victim and also appellant is entitled for acquittal.

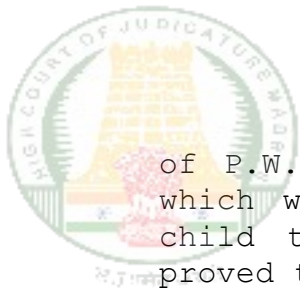


16. Yet another contention of the learned counsel for the appellant is that non examination of the doctor, who treated the victim initially, is fatal to the case of the prosecution. As far as non examination of the doctor viz., Kuyili, is concerned, it is to be noted that the mother of the victim child (P.W.2) took the victim child initially before Dr.Kuyil and however, thereafter, the victim child was brought before P.W.6, who conducted medical examination on the victim child and found that the victim child was six months pregnant and her hymen was not intact and her vagina easily admits two fingers and also issued Ex.P6 to that effect. Therefore, mere non examination of the doctor, who has examined the victim child is not a fatal to the case of the prosecution as P.W.6 doctor has thoroughly examined the victim child and also issued Ex.P8 certificate to that effect and therefore, the contention of the learned counsel for the appellant is not merit acceptable. It is also to be noted that even assuming that the victim is a prostitute or the even assuming that the victim had intimacy with several person, the question is that the victim child is minor and not completed the age of 18 years, and the appellant is aged 40 years, and the appellant had committed penetrative sexual assault on the victim child, and the evidence of P.W.6 clearly shows that the victim child was subjected to sexual assault.

17. Therefore, from the evidence of P.W.2, P.W.6 and also the statement recorded under Section 164 (5) of Cr.P.C., further medical evidence Ex.P8 clearly show that the appellant has committed penetrative sexual assault on the victim child. In the case on hand, the victim child is aged about 17 years and the appellant had committed penetrative sexual assault on the victim child on several times, and therefore, the offence committed by the appellant would fall under Section 5 (1) of the POCSO Act, which is punishable under Section 6 of the POCSO Act.

18. As far as Section 366 of IPC is concerned, it is to be noted that, it is not the case of the prosecution that the appellant took the victim child from the lawful custody of her parents or without their consent and it is the case of the prosecution that the victim child herself had gone to the house of the appellant for watching TV and at that time, he had committed penetrative sexual assault, and therefore, the trial Court rightly gave a finding that the appellant has not committed the offence under Section 366 of IPC.

19. A combined reading of the evidence of P.W.2-the victim child, P.W.1-the mother of the victim child, the evidence



of P.W.6-doctor, who examined the victim child and her report, which was as Ex.P8, and Ex.P2-SSLC Certificate of the victim child to prove the age of the victim, the prosecution has proved that the appellant has committed the offence under Section 5 of the POCSO Act, which is punishable under Section 6 of the POCSO Act. The contradictions pointed out by the learned counsel for the appellant are only minor contradictions, and which are not material contradictions that would affect the case of the prosecution.

20. Considering the nature of the offence and the age of the victim child, the appellant is not deserved to be any sympathy. Therefore, under the circumstances, this Court does not find any merit in the appeal and the Appeal is liable to be dismissed, accordingly, it is dismissed.

Sd/-

Assistant Registrar(CS-VI)

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Sub Assistant Registrar

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To

- 1.The Sessions Judge, Special Court for
Exclusive Trial of Cases under Section POCSO Act, Cuddalore.
- 2.The Inspector of Police,
All Women Police Station,
Neively, Cuddalore District.
- 3.The Superintendent,
Central prison,
Cuddalore.
- 4.The Public Prosecutor,
High Court, Madras.

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

Cr1.A.No.81 of 2020

PA(CO)
CB(15/12/2021)