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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.09.2021

Coram:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Criminal Appeal No.72 of 2020
and
Crl.M.P.No.1466 of 2020

Arumugam ... Appellant/Accused

Vs.

State, represented by
The Superintendent of Police (South)
Karaikal
Puducherry State

... Respondent/Complainant

Prayer : Criminal Appeal filed under Section 374(2) of Criminal Procedure Code praying to set aside the conviction and sentence imposed in Spl.S.C.No.10 of 2018 dated 22.01.2020 on the file of Spl.Judge, under POCSO Act 2012, Karaikal, Puducherry is unjust and illegal to secure the ends of justice.

For Appellant : Mr.R.Sankarasubbu

For Respondent : Mr.D.Bharatha chakravarthy
Public Prosecutor (Puducherry)

J U D G M E N T

(The case has been heard through video conference)

The Criminal Appeal has been filed against the conviction and sentence imposed in Spl.S.C.No.10 of 2018 dated 22.01.2020 on the file of the learned Spl. Judge, under POCSO Act 2012, Karaikal, Puducherry.

2. The respondent police registered the case in Crime No.33 of 2018 against the appellant for the offence under Section 376 AB IPC and Section 6 of POCSO Act, 2012. After investigation, they laid charge sheet before the Special Court since, the offence is against women especially children under the definition of Section 2(1)(d) of POCSO Act. The learned Special



Judge taken the charge sheet on file in Special S.C.No.10 of 2018 and after completing the formalities, framed charges for the offence under Section 18 of POCSO Act which is punishable under Section 6 of POCSO Act and also under Section 3(2)(v) of SC/ST (PoA) Act, 1989.

3. After framing charges, during trial, on the side of the prosecution, in order to substantiate the charges, totally as many as 18 witnesses were examined as P.W.1 to P.W.18 and 27 documents were marked as Exs.P.1 to P.27 besides 8 material objects were exhibited as M.O.1 to M.O.8.

4. On completion of examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant by questioning under Section 313 Cr.P.C. However, he denied the same as false and he pleaded not guilty. On the side of the defence no oral or documentary evidence was marked.

5. On completion of trial and conclusion of arguments advanced by both the counsel and considering the materials available, the learned Special Judge found the accused not guilty for the offence under Section 3(2)(v) of SC/ST (PoA) Act, 1989. However, found him guilty for the offence punishable under Sections 6 and 8 of POCSO Act, 2012 and convicted and sentenced him to undergo 10 years rigorous imprisonment and to pay fine of Rs.10,000/- in default, to undergo one year simple imprisonment for the offence punishable under Section 6 of POCSO Act and also sentenced him to undergo 3 years rigorous imprisonment and to pay fine of Rs.10,000/- in default to undergo 6 months simple imprisonment for the offence punishable under Section 8 of POCSO Act and the sentences were ordered to be run concurrently. Further a sum of Rs.5 lakhs was awarded as compensation. Challenging the 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 the charge itself is vague and it is not clear. Even the name of the victims are not properly given against whom the offence was committed by the appellant. Further, there are material contradictions between the complaint and the previous statement recorded from the victim/P.W. and also the evidence of the victim/P.W.1 when she was produced before the Court and that the said contradictions are material contradictions. The victim girl/P.W.1 has not stated anything in her statement recorded under Section 164 Cr.P.C. that she was subjected to penetrative sexual assault and that the ingredients of either Section 3 or 5 or 7 of POCSO are not made out. Even assuming, it was only an attempt and the same would attract only half the sentence



whereas, the trial Court failed to appreciate the evidence and the offence is not substantiated with the charge framed against the appellant. The prosecution has not substantiated the charge and the case as projected by the prosecution is false and the same is not proved beyond all reasonable doubt. The trial Court failed to appreciate the evidence and failed to give effect to the contradictions pointed out by the defence and simply convicted the appellant only on presumption and on the ground of sympathy. The learned Counsel relied on the Judgment of this Court and the other High Courts and also the Hon'ble Supreme Court, which are as follows:

1. CrI.Appeal No.706 of 2013 (Vidhya Sekar Vs. State of Tamilnadu)
2. C.A.No.839 of 2019 (Janardan Pandurang Kapse Vs. State of Maharashtra) (Bombay)
3. C.A.No.161 of 2020 (Satish Vs. State of Maharashtra) (Bombay)
4. (1989) CriLJ 707 (Premnarayan Vs. State of M.P.)
5. (2006) 3 SCC (CrI) 373 (Yerumalla Latchaiah Vs. State of A.P.)
6. (1997) 8 SCC 386 (State of Maharashtra Vs. Rajendra Jawanmal Gandhi)

The learned Counsel would further submit that the ingredients of the Sections are not made out and the charges are not properly framed and that the appellant was not given opportunity to defend the case and without knowing the charge against him, it was difficult for the appellant to defend the case and take the defence. In this case, the medical evidence clearly shows that there is no symptoms of penetrative sexual assault and no external injury is found on the victim girl/P.W.1 and the hymen was intact. Therefore, at the outset, the offence under Section 354 IPC alone would be made out and not any other offence under POCSO Act and special Act viz., SC /ST Act. Therefore, the learned Counsel would submit that taking into consideration, the evidence of the victims/P.W.1 and P.W.3, the doctor/P.W.13 and the previous statement recorded from the victim/P.W.1 under Section 164 Cr.P.C., and the ingredients of Section 3, 5 and 7 of POCSO Act and the fact that the prosecution had miserably failed to prove its case beyond all reasonable doubt and the ingredients of the alleged offences are not been made out and that the trial Court had failed to appreciate the same, he would pray for setting aside of the conviction and sentence imposed on the appellant. He would further submit that there was previous enmity between the son in law of P.W.2 and the appellant and due to the enmity, they have foisted a false case against the appellant. Further no oral or documentary evidence was produced to legalise the decision. Therefore, the Judgment of the trial Court is liable to be set aside.



7. The learned Public Prosecutor (Pondicherry) would submit that there are two victims in this case and the age of the victim/P.W.1 is 11 years at the time of occurrence and the appellant is the neighbor of the victim. On the date of occurrence, the victims/P.W.1 and P.W.3 along with other friends were playing near the house of the appellant and the appellant called the children to come and play in his house and when they went there, he caught hold of the victims / P.W.1 and P.W.3 and asked the other children to get out of his house. However, one of the victims/P.W.3 escaped from the appellant and that the appellant committed the offence against P.W.1. The victim/P.W.1 was produced before the Judicial Magistrate for recording statement under Section 164 Cr.P.C. wherein , she has clearly narrated that the appellant applied saliva mixed with Hans on his private part and also applied the same on her private part and he also touched her private parts which attracts Section 3 (c) of the POCSO Act and since, the victim/P.W.1 was below 12 years, the offence falls under Section 5(m) which is termed as aggravated penetrative sexual assault. Further, the appellant has pulled the hands of the another victim/P.W.3 who was aged 12 years, with sexual intent and thereby, the appellant has committed offence under Section 7 of POCSO Act. The victim / P.W.1 was also produced before the doctor/P.W./13 for medical examination wherein, the victim has narrated the incident and stated that a known person committed sexual assault on her. So the extent of the penetration is immaterial. Since because the hymen was intact and no injury was found in the private part of the victim, it does not mean that there was no sexual assault. A reading of the evidence of the victim / P.W.1 and her previous statement recorded by the Judicial Magistrate and the history of the case mentioned by the medical officer clearly show that one of the victim/P.W.1 was subjected to penetrative sexual assault and on the other victims/P.W.3, the appellant has made an attempt to commit sexual assault. Though in the charges 2 names of the victims were mentioned in different manner, however, on questioning and on further proceedings, it was clearly revealed that the actual offence committed by the appellant and therefore, the appellant understood the charges and he participated in the trial proceedings and taken defence in this case. But he could not succeed in his defence. The trial Court rightly appreciated the entire evidence and found guilty of the accused and the prosecution proved its case beyond all reasonable doubt. Further, the case on hand is entirely different and the decisions referred to by the appellant are not applicable to the present case on hand and no way helpful to the case of the defence in this case. Further, the contradictions pointed out by the defence are not material contradictions and thereby, the trial Court rightly found the accused guilty and convicted him for the offence as stated above. 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 Public Prosecutor (Pondicherry) and perused the materials on record.

9. The case of the prosecution is that the age of the main victim/P.W.1 was 11 years and her date of birth as per Ex.P.26/birth certificate is 30.07.2007. On 24.04.2018 at around 8 a.m., the victims/ P.W.1 and P.W.2, the brother of the victim/P.W.3 by name Hathish and one Gayathri were playing hide and seek in the street. At that time, the accused asked them to come and play in his house. Therefore, the children went to the house of the accused and were playing. At that time, the accused caught hold of the hands of the victims / P.W.1 and P.W.3 and twisted. However, P.W.3 managed to pull her hands from the clutches of the accused and fled away. The accused continued to hold the hands of P.W.1 and took her to his bed room where, he made her to lie down and removed her panties and thereafter, he took saliva with Hans and smeared on his private part and also on the private part of the victim. Further, the accused pressed his private part against the private part of the victim./P.W.1 At that time one Murugesan came and knocked the door of the accused. Hence, the accused went to open the door. At that time, the victim/P.W.1 escaped from the house of the accused through backyard. The victim/P.W.1 had irritation on her private part and therefore, she took bath and thereafter, she reported the same to her Aunt one Arulselvi which was noticed by the mother of the victim/P.W.1 and when she questioned, the victim/P.W.1 reported the incident to her mother. Thereafter, P.W.2/the mother of the victim/P.W.1 informed about the incident to P.W.6/Mahewari who in turn informed the same to the Childline. Thereafter, the Childline Officials came and examined the victim/P.W.1. Since, the victim/P.W.1 reported stomach pain to her mother, the victim/P.W.2 was taken to the Government General Hospital, Karaikal, wherein she was admitted as an inpatient. Thereafter, P.W.2/the mother of the victim/P.W.1 lodged the complaint.

10. In this case, since this Court is the Appellate Court of fact finding, it has to re-appreciate the evidence independently and to give its findings. Accordingly, this Court gone through the entire materials and Judgment of the trial Court and appreciated the entire evidence independently and gives its finding.

11. In order to substantiate the charges framed against the appellant, on the side of the prosecution as many as 18 witnesses were examined as P.W.1 to P.W.18 and 27 documents were marked as Exs.P.1 to P.27 besides 8 material objects were



exhibited as M.O.1 to M.O.8.

12. A reading of the entire materials and proceedings show that the appellant nowhere stated before the Special Court at any stage of proceedings that the charges were not properly explained and he was not in a position to understand the charges and thereby, he was in difficult to take defence. Under these circumstances, this Court finds that no prejudice would be caused to the appellant. Even otherwise as per Section 464 Cr.P.C., the findings of sentence is not invalid as there is no failure of justice has in fact been occasioned. Therefore, the defence taken by the counsel for the appellant that the trial Court not properly framed the charges and the charges were not understandable and he was prejudiced, cannot be countenanced. Further, the appellant has not proved in what way he was prejudice.

13. There are two victims in this case. As far as the age of the main victim is concerned, she was examined as P.W.1 and the another victim was examined as P.W.3. P.W.1 in her evidence has very clearly stated that when she was playing with other friends nearby the house of the appellant, she was subjected to penetrative sexual assault. In this case, whether the offence falls under POCSO Act for which, the Court has to find out the age of the victim/P.W.1. In order to prove the age of the victim/P.W.1, the prosecution marked the birth certificate of the victim / P.W.1 and the same was marked as Ex.P.26 in which, the date of birth is mentioned as 30.07.2007 and the date of occurrence is on 24.04.2018. Therefore, the age of the victim/P.W.1 was only 10 years at the time of occurrence. The copy of the birth certificate was produced before the Court and the same was marked as Ex.P.26 and the prosecution proved the age of the victim. Since, one of the victim/P.W.1 is 10 years old, she is a child under the definition of 2(1)(d) of POCSO Act and since the victim child/P.W.1 was subjected to sexual assault, the offence falls under POCSO Act.

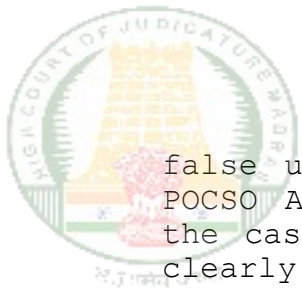
14. Further, the Court has to see whether the sexual assault committed by the appellant is a penetrative sex. Whether, it is aggravated penetrative sexual assault. In order to prove the said points, the main victim was examined as P.W.1. A reading of the evidence of P.W.1, shows that while she was playing with other friends nearby the house of the appellant on 24.04.2018 at 10 'O' clock, the appellant took her and other victim/P.W.3 to his house and pulled their hands. At that time P.W.3 shook her hands and escaped from the clutches of the appellant. Since, P.W.1 could not escape from the clutches of the appellant, he took her to the bedroom and made her to lie down and removed her inner wear and when she started crying, he applied saliva in his private part and also on the private part of the victim and he



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also pressed his private part into the private part of the victim. At that time, his sister's son knocked the door of the appellant and thereby, the appellant stood up and opened the door during which, the victim/P.W.1 immediately stood up and escaped from the place of the appellant through back door. Subsequently, when the neighbours asked the victim, she informed the same. Previously the victim was produced before the Judicial Magistrate to record her statement under Section 164 Cr.P.C. A reading of the statement of the victim recorded under Section 164 Cr.P.C. wherein, she has clearly identified the appellant by naming the appellant and also narrated the above incident. Though the learned counsel for the appellant contended that in the previous statement recorded under Section 164 Cr.P.C., the victim has not given any details regarding penetrative sexual assault, however, a reading of the statement of the victim/P.W.1, would show that she has clearly stated that the appellant took her into his house and put saliva in her private part and also lied on her following which, she has complained of pain on her private part. Since the victim was only 10 years, she cannot be expected to disclose all the details in direct version and entire things. A girl without ashame would not disclose entire things to everyone each and every time. The fact remains that the appellant took the victims/P.W.1 and P.W.3 and the victim's friend/P.W.3 manage to escape from the appellant. However, P.W.1 was subjected to penetrative sexual assault. Though there are contradictions in the statement made before the Judicial Magistrate and the evidence, however, both evidence and the statement clearly show that the appellant took the victims into his house and further took the victim/P.W.1 to his bed room and also touched her private part and lied on her and did something. Therefore, it is clear that the victim/P.W.1 was subjected to penetrative sexual assault. As stated by the learned Public Prosecutor, a reading of Section 3 especially sub clause (c) of Section 3 would go to show that even touching of the any parts of the body of the child with an intent to commit sexual assault is sufficient to convict the accused for penetrative sexual assault and the extent of the penetration is immaterial. The provision clearly says that "at any extent".

15. A combined reading of the evidence of P.W.1 and the ingredients of Section 3 of POCSO Act and since, the victim / P.W.1 was below 12 years, this Court finds that the appellant committed penetrative sexual assault as per Section 3 of POCSO Act. Since the victim is below 12 years, it is termed as aggravated penetrative sexual assault as per Section 5 (m) of POCSO Act which is punishable under Section 6 of POCSO Act. Further the appellant has also made an attempt to commit sexual assault on the other victim/P.W.3. However, she escaped from the clutches of the appellant. Therefore, the act of the appellant



false under Section 7 which is punishable under Section 8 of POCSO Act. Though the medical evidence not helpful either to the case of the prosecution, or to the defence, the doctor has clearly stated that the victim/P.W.1 had stated that a known person took her to his house and lied on her. Though the hymen was intact and no external injury was found on the private part of the victim, the victim was subject to penetrative sexual assault as per Section 3 and 5 of POCSO Act. Therefore, it is punishable under Section 6 of POCSO Act. Since, because her hymen was intact and no injury was found on the victim/P.W.1, this Court cannot say that no penetrative sexual assault at all. Therefore, the trial Court after analyzing the entire evidence and oral and documentary evidence, had arrived at a correct conclusion. A combined reading of the previous statement recorded under Section 164 Cr.P.C./ Ex.P.1 and the evidence of P.W.1 and the evidence of the doctor/P.W.13 and also the medical examination report Ex.P11, in which the history of the case is mentioned that a known person had committed penetrative sexual assault on the victim. Further, in the evidence of P.W.3, she has clearly stated that the appellant took P.W.1 and P.W.3 to his house. Though immediately she left from the house of the appellant since her mother called, she has further stated that the appellant was holding the hands of the P.W.1. Therefore, P.W.3 is an eyewitness to this case but not for sexual assault, but she had seen the victim / P.W.1 in the house of the appellant.

16. Therefore, from evidence of P.W.1 to P.W.4 and Exs.P1/statement of the victim recorded under Section 164 Cr.P.C., Ex.P.11/Medical Examination Report of the victim/P.W.1, Ex.P.26 /Birth Certificate of the victim/P.W.1 and Ex.P27/Forensic Science Laboratory Report, this court also finds that the prosecution proved the case beyond all reasonable doubt. The contention raised by the counsel for the appellant would not helpful to the defence case. And the citations referred to by the appellant is not applicable to the present case on hand. In this case. P.W.1 and P.W.3 have clearly stated that the appellant had pulled their hands. Therefore, Section 29 and 30 of POCSO Act is clear and there is a presumption and that it is for the appellant to rebut the presumption in the manner known to law. Further, the prosecution witnesses especially P.W.1 and P.W.3 have clearly narrated the incident and there is no reason to discard the evidence of P.W.1 and P.W.3 and their evidence is cogent, consistent and also natural which inspires the confidence of this Court. What ever contradictions pointed out by the counsel for the appellant is according to this Court are not material contradictions which would not go into the root of the prosecution. Therefore, there is no reason to discard the evidence of P.W.1. This Court as the Appellate Court finds that the appellant/accused is guilt of the



offence. There is no merit in the appeal and the appeal is liable to be dismissed. Further, considering the facts and age of the main victim and grave in nature of offence, this Court does not find any mitigating circumstances to reduce the sentence. Therefore, the appeal is dismissed by confirming the Judgment of the Court below. Consequently, connected Miscellaneous Petition is closed. Trial Court is directed to secure the appellant/accused to serve remaining period of imprisonment, if any.

Sd/-
Assistant Registrar(CS VII)

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Sub Assistant Registrar

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To

- 1.The Special Judge, under POCSO Act 2012,
Karaikal, Puducherry.
- 2.The Superintendent of Police (South),
Karaikal,
Puducherry State.
- 3.The Superintendent of Prison,
Central Prison, Kalapet,
Puducherry.
- 4.The Public Prosecutor Officer,
High Court, Madras.
- 5.The Section Officer,
Criminal Section, High Court,
Madras.

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JPL (CO)
PR (22/10/2021)