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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.07.2021
Pronounced on : 20.07.2021

C O R A M

THE HON'BLE MR.JUSTICE P.N.PRAKASH
AND
THE HON'BLE MR.JUSTICE R. PONGIAPPAN

Criminal Appeal No.239 of 2018

Vijayan

...Appellant/Sole Accused

-vs-

The State Rep. By
Inspector of Police,
All Women Police Station,
Bhavani, Erode District.
(Crime No.09 of 2015)

...Respondent/Complainant

Criminal Appeal filed under Section 374 (2) of the Code of Criminal Procedure, to set aside the conviction and sentence passed by the learned Sessions Judge, Mahila Court [Fast Track Court], Erode dated 23.12.2016 in Spl.S.C.No.09 of 2016.

For Appellant : Mr.E.C.Ramesh
for M/s.T. Muruganantham

For Respondent : Mr.Hasan Mohamed Jinna
State Public Prosecutor
Assisted by Mr.M.Babu Muthu Meeran
Additional Public Prosecutor.

J U D G M E N T

R.PONGIAPPAN, J.

The present appeal has been filed to set aside the conviction and sentence passed in Spl.S.C.No.09 of 2016 dated 23.12.2016, on the file of the learned Sessions Judge, Mahila Court [Fast Track Court], Erode.

2. The appellant is the sole accused in the above referred case. He stood charged for the offence under section 5(1) r/w Section 6 and Section 5(j) (ii) r/w Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. The accused denied the charge and opted for trial.



3. After full pledged trial, the learned Sessions Judge, Mahila Court [Fast Track Court], Erode, convicted the accused under section 5(1) r/w Section 6 of the POCSO Act, 2012 and sentenced him to undergo imprisonment for life and to pay fine of Rs.100/-, in default to undergo simple imprisonment for six months. Further, he was convicted under Section 5(j) (ii) r/w Section 6 of the POCSO Act, 2012 and sentenced to undergo imprisonment for life and to pay fine of Rs.100/-, in default to undergo simple imprisonment for six months. The sentences are directed to run concurrently. Challenging the conviction and sentence, the accused is before this Court, by way of filing the present Criminal Appeal.

4. The relevant facts of the case, which gave rise to filing of this appeal are necessary to be recapitulated for the disposal of this appeal.

(i) PW2-Jamuna, is the victim girl in this case. At the time of occurrence, she was aged about 15 years and studying 9th standard. PW1-Tamil Selvi, is the mother of the victim girl. The appellant/accused viz., Vijayan, was working in a petty shop viz., Sri Murugan Essence Traders, which is located opposite to the house of PW2. Previous to the occurrence, the victim girl, after coming from school, regularly visited the shop, wherein the appellant/accused was working and used to do her homework. One day, in the year of 2014, when PW2 was in the said shop for doing her homework, the appellant/accused forcibly took her to the backside of the store and removed her chudidhar pant and panties. When the same was resisted by her, the appellant/accused had made promise for marrying her. Thereafter, he committed penetrative sexual assault on her and the same was extended for 10 minutes. During such time, PW2 had no knowledge of the consequences of sexual relationship. After completing everything the accused threatened her not to disclose the same to others. Afterwards, two to three times, the accused committed penetrative sexual assault. After the occurrence, when the victim girl intimated her mother-PW1 that she did not have her monthly periods for two/three months, PW1, brought the victim girl to PW12-Dr.Mangai, wherein the said Doctor had advised her to take vitamin tablets.

(ii) After the said occurrence, the appellant/accused, married some other girl. On the other hand, the victim girl, regularly attended the school and did not go to the shop. Since the health condition of the victim girl had worsen, she was admitted in the hospital, wherein, she gave birth to a male child. After giving birth, she was shifted to Government Hospital, Erode, for further treatment.



(iii) On information, PW20-Tmt.Mageshwari, the then Sub Inspector of Police, All Women Police Station, Bhavani, on 30.08.2015 at about 23.30 hours, visited the Government Hospital, Erode and recorded the statement from PW2, under Ex.P1. On the next day i.e. 31.08.2018, at about 1.00am, upon the report given by PW2, she registered the case in Cr.No.9 of 2015 under Section 5(l) r/w section 6 of the POCSO Act, 2012. After registration of the case, she handed over the case records to PW23-Tmt.Ruby, Inspector of Police, All Women Police Station, Bhavani, for investigation. The intimation received from the hospital was marked as Ex.P30 and the printed FIR was marked as Ex.P31.

(iv) PW23, at the time of investigation, visited the scene of occurrence and prepared the observation Mahazar, under Ex.P3. She had drawn the rough sketch under Ex.P38. She examined the witnesses and recorded their statements. On 31.08.2015 at about 9.00am, in the presence of PW4-Raja and one Kuppusamy, she arrested the appellant/accused and recorded his confession statement.

(v) In continuation of investigation, on 31.08.2015, she sent a requisition to the Government Hospital, Erode, for medical examination of victim girl. She altered the section of law as section 5(l) r/w Section 6 and Section 5(j) (ii) r/w Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 and the alteration report dated 31.08.2015 was marked as Ex.P39.

(vi) On 01.09.2015, PW23 examined the teachers, who were working in the school in which the victim girl studied and recorded their statements. On 02.09.2015, she sent a requisition under Ex.P40 to the learned Judicial Magistrate, for the medical examination of accused. Further, she submitted an application before the Chief Judicial Magistrate, Erode, under Ex.P41 for recording the 164 Cr.P.C. statement of the victim girl, also she submitted an application under Ex.P42, for sending the material objects, which were collected, during the time of investigation for chemical examination. She made arrangements by submitting the application under Ex.P43 for DNA Test. Thereafter, she recorded the statements from the Doctors, who are all participated in the process of investigation. Finally, after the receipt of DNA report, certificates from the Doctors and after seeing the transfer certificate of the victim girl, she came to the conclusion that the appellant/accused has committed the offence under section 5(l) r/w Section 6 and Section 5(j) (ii) r/w Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 and filed the final report, accordingly.



5. Based on the materials available, the trial Court framed charge for the offence under section 5(1) r/w Section 6 and Section 5(j) (ii) r/w Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. The accused denied the charge and opted for trial. Therefore, the accused was put on trial.

6. During the course of trial proceedings, in order to prove the case of prosecution, as many as 25 witnesses [PW1 to PW25] were examined on the side of the prosecution and 47 documents were exhibited as Ex.P1 to Ex.P47.

7. Out of the above said witnesses, PW1-Tamil Selvi, the mother of the victim girl, has stated that during the relevant point of time, the victim girl visited the shop in which the appellant/accused was working. She has stated further that upon the information given by the victim girl in respect to the mensuration period, she brought her to the Mangai Hospital, wherein the Doctor had advised her to give vitamin tablets to PW1. At that time, she does not know about the pregnancy and other things.

(ii) PW2-Jamuna, is the victim girl in this case. In her evidence, she has stated in detail about the sexual assault committed by the accused and about the details of delivery. She has also stated about the lodging of complaint and about the statement given before the learned Judicial Magistrate.

(iii) PW3-Gowri, is the aunt of the victim girl [mother's elder sister]. PW4-Raja is the relative of the appellant/accused. Both of them have stated that before the occurrence, the victim girl regularly went to the shop, wherein the appellant/accused was working and did her homework. PW5-Shanmugasundaram, is the resident of Bhavani. He has stated about the preparation of the observation mahazar by PW23.

(iv) PW6-Malathy, and PW7-Savithri, are the teachers working in the school, wherein the victim girl was studying. They have stated in their evidence as the victim girl has regularly attended the school without fail. Further, they have stated that they are not aware of the details of pregnancy.

(v) PW8-Dr.Ramesh Babu, attached with Erode Government Hospital, has stated in his evidence that on 03.09.2015 at about 5.20pm, PW23 submitted an application for conducting medical examination for the appellant/accused-Vijayan. According to him, the accused is a potent man.



(vi) PW9-Dr.Prakash, attached with Government Hospital, Bhavani has stated that on 30.08.2015, the victim girl in this case was brought to the hospital for stomach ache. He has stated that on examination he found that the victim girl was a pregnant woman and on the same day at about 3.30pm, the victim girl gave birth to a male child and thereafter, after seeing the DNA report pertains to the male child, he issued a final opinion that the accused is the biological father of the male child.

(vii) PW10-Dr.Suresh Kumar, attached with Government Hospital, Erode, has stated about the collection of blood from the new born baby in FTA Card for the purpose of DNA test.

(viii) PW11-Dr.Sasirekha, attached with Government Hospital, Erode has deposed about the medical examination conducted on the victim girl in respect to the blood group and other things. PW12-Dr.Mangai Senthilkumaran, running a private hospital, has also stated about the treatment given to the victim girl, during the pregnancy period.

(ix) PW13-Dr.Kavitha, attached with Government Hospital, Erode, speaks about the medical examination of the victim girl and also in respect to the new born baby.

(x) PW14-Dr.Sivakumar, is the Radiologist in Government Hospital, Erode and has stated in his evidence that as per the radiologist examination, the age of the victim girl is between 18 and 20 years. PW15-Dr.Sasikala, attached with the same hospital, has deposed about the weight of the new born baby.

(xi) PW16-Shanthi, is the Assistant Headmistress and she has deposed about the issuance of certificate pertains to the victim girl. According to her, the date of birth of the victim girl is 06.07.2000. PW17, Subha, is the Municipal Commissioner, Satyamangalam Municipality. She speaks about the extract of the birth certificate issued to the victim girl. According to her on 06.10.2000, the victim girl Jamuna was born. PW18-Sivakumar, Sanitary Inspector of the said Municipality, has also corroborated the evidence given by PW17.

(xii) PW19, Uma Mageswari, is the Child Welfare Officer, Erode and she has stated about the examination of the victim girl by the Inspector of Police, All Women Police Station, Bhavani.

(xiii) PW21-Vijaya Kumar, PW22-Yuvarani and PW24-K.Nalina, are the Scientific Assistants working in the Forensic Science Department. They have stated about the receipt of blood samples and about the result of the DNA Test.



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(xiv) PW25-Ramesh, is the Headmaster of the School, wherein the victim girl studied and he has deposed about the issuance of transfer certificate to the victim girl. According to the said transfer certificate, the victim girl was born on 06.07.2000.

(xv) PW20-Mageswari and PW23-Ruby, are the then police officers, in the All Women Police Station, Bhavani. They have stated in their evidence in respect to the receipt of complaint from the victim girl, manner of investigation conducted and about the filing of final report.

8. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C., he denied the same as false. However, he did not chose to examine any witness or mark any document on his side.

9. The learned Sessions Judge, Mahila Court [Fast Track Court], Erode, after perusing all the above materials and on considering the arguments advanced by the learned counsel on either side, convicted and sentenced the appellant as stated supra. Aggrieved by the said conviction and sentence, the appellant is before this Court with this Appeal.

10. We have heard Mr.E.C.Ramesh, learned counsel appearing for the appellant/accused and Mr.Hasan Mohamed Jinna, learned Public Prosecutor, appearing for the State. We have also perused the records carefully.

11. The learned counsel appearing for the accused/appellant would contend that before the trial Court, except PW2, none have been examined to speak about the occurrence. The evidence given by PW2 is also having discrepancy to the level of disbelieving her evidence. Further, in order to prove the age of minor girl, two set of evidence have been adduced. Accordingly, the necessary ingredients which are required to prove the charge framed against the accused, are not available. But, without considering the same, the learned trial Judge convicted the accused and therefore, the appeal has to be allowed.

12. Per contra, Mr.Hasan Mohamed Jinna, learned Public Prosecutor, appearing for the State would contend that the solitary testimony of the prosecutrix is sufficient to hold the entire case of the prosecution. Here it is a case, the trial Court before examining the PW2 minor girl has observed the necessary conditions, which are required for recording the evidence from a minor girl. Further the evidence given by the victim girl is corroborated through the evidence given by the medical officers. The decision rendered by the trial Court is fully within the four corners of law. According to him,



13. We have considered the rival submissions made by the learned counsel appearing on either side.

17. The victim girl in her evidence has categorically narrated the entire evidence in support of the prosecution. In order to assail the said evidence, no material is available in



her cross examination. Since the alleged occurrence pertains to the sexual assault, we cannot expect specific corroborative evidence in support of the evidence given by the victim girl. However, PW3, who is the neighbour to the occurrence place, has stated in her evidence that before the occurrence, the victim girl has regularly visited the shop for the purpose of doing her homework, etc.

18. Pitiabile thing in this case is that during the relevant point of time, due to poverty, the victim girl, went to the shop in which, the accused was working and by using the light available there, she has studied. Only by utilizing the said opportunity, the accused herein has committed the offence.

19. In this occasion, before the trial Court, the prosecution examined the doctors viz. PW8 to PW13 and PW15, who have given certificates in respect to the delivery of male child by the victim girl and as to the potency of the accused. The evidence given by those Doctors, is not at all disputed on the side of the appellant/accused. Before the trial Court, the DNA Test pertains to appellant/accused and the child born to the victim girl was marked as Ex.P37. In this regard, in respect to the collection of the samples/materials which are required for the DNA Test, the doctors who were all examined on the side of the prosecution have given a clear picture that as per the requisition of the investigation officer, they collected the blood in the FTA Card. Accordingly, the witnesses examined on the side of the prosecution have proved the fact that the accused herein is the biological father of the new born baby.

20. It is a settled proposition that the result of the DNA test is a conclusive proof for identifying the paternity of the father. Applying the same, to the case on hand, herein also, the prosecution has proved that only due to sexual assault committed by the appellant/accused the victim girl has given birth to a male baby. So, the said circumstances also is in support to the case of the prosecution.

21. In respect to the aggravated penetrative sexual assault, PW2, has clearly stated in her cross examination as during the time when the accused attempted for physical contact, she raised serious objection. Even after knowing the fact that the victim girl has not consented for sexual relationship, the accused forcibly compelled the victim girl and committed the offence as alleged by the prosecution. A women, who is the victim of sexual assault, is not an accomplice to the crime, but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice.



22. In the case of Chacko alias Aniyan Kunju and others Vs. State of Kerala, reported in 2004(12) SCC 269, in respect to the testimony of single witness, our Hon'ble Apex Court has held as follows:

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"Section 134 of the Evidence Act, 1872 clearly states that no particular number of witnesses is required to establish the case. Conviction can be based on the testimony of single witness if he is wholly reliable. Corroboration may be necessary when he is only partially reliable. If the evidence is unblemished and beyond all possible criticism and the Court is satisfied that the witness was speaking the truth then on his evidence alone conviction can be maintained."

23. By applying the ratio laid down in the judgment referred to above, with the case in our hand, as a general rule, court can and may act on the testimony of a single witness though uncorroborated, that unless corroboration is insisted upon by statute, the court should not insist upon corroboration except in cases where the nature of the testimony of a single witness itself requires the same as a rule of prudence, e.g. in the case of a child witness, or of a witness in a position analogous to that of an accomplice, and that whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case. There may be three classes of witnesses, viz., (a) wholly reliable, (b) wholly unreliable and (c) neither wholly reliable nor wholly unreliable. The question of corroboration arises only in the case of the witnesses of the last category in which the Court is called upon to be circumspect. Witness when is neither reliable nor unreliable, it needs corroboration. In otherwise, conviction on the testimony of solitary witness is legal, if he is wholly reliable.

24. Therefore, in the light of the above, we are of the opinion that the evidence given by the victim girl cannot be discarded that too, when the said evidence is corroborated through the evidence given by the medical officers. The trial Court has also upon the belief of the evidence given by PW2, held that the appellant herein committed the offence as alleged by the prosecution.

25. Finally, in respect to the conviction awarded by the trial Court the learned counsel appearing on behalf of the appellant/accused would contend that after the occurrence the appellant married another girl and leads a matrimonial life. In the said circumstances, if he is punished with the life imprisonment, the entire family would get affected and



therefore, he prays that some leniency may be shown to the accused in awarding the punishment.

26. Now, on considering the said submission with the relevant records, it is true, PW1 and PW2 in their evidence have admitted that after the occurrence, the accused married another girl. Further, the age of the accused is 36 years. In the said circumstances, we are of the opinion that some leniency is necessary in imposing the punishment and that 10 years of rigorous imprisonment is sufficient to meet the ends of justice.

27. Thus in the light of the above discussion, this Criminal Appeal is partly-allowed and the conviction and sentence imposed upon the appellant/Accused, by the learned Sessions Judge, Mahila Court [Fast Track Court], Erode in Spl.S.C.No.09 of 2016, dated 23.12.2016, is modified as follows:

"(i) Conviction awarded by the trial Court for the offence under section 5(l) r/w Section 6 and Section 5(j) (ii) r/w Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012, is confirmed. In respect to the sentence imposed by the trial Court, the same stand reduced to rigorous imprisonment of ten years, along with fine of Rs.1000/- [One Thousand only] in default to undergo six months simple imprisonment for each offence.

(ii) It is also directed that the period of sentence already undergone by the appellant, if any, shall be set off, as required under Section 428 Cr.P.C.

(iii) The fine amount, if any, already paid by the appellant/accused, has to be adjusted, for the sentence now provided."

s/d-

Assistant Registrar (CS-VIII)

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Sub-Assistant Registrar

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To

1. The Sessions Judge,
Mahila Court [Fast Track Court], Erode.



2. The Public Prosecutor,
High Court, Madras.

3. The Inspector of Police
All Women Police Station
Bhavani, Erode District
(Crime No. 09/2016)

+1 CC to Mr.E.C.Ramesh, Advocate sr 34720.

Criminal Appeal No.239 of 2018

SRII(CO)
SP(13/08/2021)