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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.02.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.319 of 2019

1.Dhinakaran

2.Kaarthi

3.Jegadish @ Appu

4.Joseph @ Sankar

.. Appellants

.Vs.

The State by

The Inspector of Police,

All Women Police Station,

Ambur, Crime No.5 of 2015.

.. Respondent

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to set aside the judgment of conviction and sentence passed against the appellants by the learned Sessions Judge, Mahalir Court, Vellore District, Vellore in Spl.S.C.No.52 of 2016 dated 21.12.2018 and acquit them.

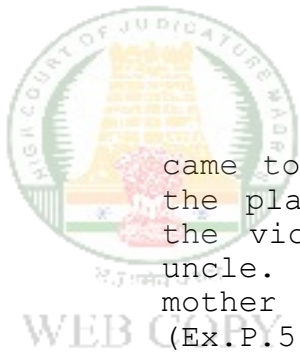
For Appellants : Mr.M.R.Thangavelu

For Respondent : Mr.R.Surya Prakash
Government Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 21.12.2018 in Spl.S.C.No.52 of 2016 on the file of the learned Sessions Judge, Mahalir Court, Vellore District, Vellore.

2.The case of the prosecution is that on 18.10.2015, at 7.45 p.m., when the victim girl was going to church, the appellants with a sexual intention, forcibly pulled her and dragged her shawl and by stuffing of cloth in her mouth, took the victim girl into a hidden place and the first appellant removed her clothes and committed sexual assault with the victim girl, the appellants 2 to 4 have abetted for commission of alleged offence. When she raised screaming voice, the old man Panneer,



came to the place of occurrence and the accused/appellants left the place. At the time one Manikandan, who came over and took the victim girl (P.W.4) to her house and handed over to her uncle. Thereafter, on enquiry she revealed the same to her mother and uncle. Thereafter, they preferred a complaint (Ex.P.5) to the respondent police.

3.The respondent police registered a case in Crime No.5 of 2015 against the appellants for the offence punishable under Section 341, 376 IPC and Section 4 of The Protection of Children from Sexual Offences Act, 2012 [hereafter 'POCSO Act' for the sake of convenience]. Subsequently, the charges were altered into Section 341, 342 r/w 34 IPC and 17 r/w 4 of POCSO Act. After investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Mahila Court, Vellore and the same was taken on file in Spl.S.C.No.52 of 2016 and charges were framed against the appellants for the offence under Sections 341 r/w 34, 342 r/w 34, 363, 366, 376(2)(i) of IPC and Section 4 of POCSO Act.

4.In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 11 witnesses were examined as P.W.1 to P.W.11 and also marked Exs.P1 to P16, besides that material objects M.O.1 to M.O.3 were marked. After completion of the prosecution side evidences, the incriminating circumstances were put to the appellants/accused by examining the appellants/accused under [Section 313](#) of Cr.P.C and they have denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, no oral and 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 accused/appellants are guilty of the offence and awarded punishment are as follows:-

(i) The first appellant was convicted under Section 366 IPC and sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.2,000/- and in default, to undergo rigorous imprisonment for a period of two months; under Section 342 r/w 34 IPC sentenced to undergo rigorous imprisonment for a period of one year; and under Section 4 of POCSO Act sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.3,000/- and in default, to undergo rigorous imprisonment for a period of three months and ordering the sentences to run concurrently.

(ii) The trial Court framed the charges against the appellants 2 to 4/A2 to A4 for the offence punishable under Section 341 r/w 34, 342 r/w 34, 363 r/w 34, 366 A IPC and



Section 4 r/w 17 of POCSO Act. They were convicted under Section 366 A IPC and sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.2,000/- and in default, to undergo rigorous imprisonment for a period of two months; under Section 342 r/w 34 IPC and sentenced to undergo one year Rigorous Imprisonment; under Section 4 r/w 17 of POCSO Act and sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.3,000/- and in default, to undergo rigorous imprisonment for a period of two months.

6. Being aggrieved by the said judgment of conviction and sentence, the appellants/A1 to A4 are before this Court.

7. The learned counsel for the appellants would submit that due to previous enmity between two villages a false case has been foisted against the appellants. The victim girl, who was examined as P.W.4 has clearly deposed that Panneer and Manikandan, were said to have been present in the scene of occurrence, but, the prosecution has failed to examine the said witnesses. There is no independent witness to the said occurrence. The victim girl has deposed that the first appellant committed penetrative sexual assault with her about 10 minutes, however, the Doctor (P.W.2), who examined the victim girl has deposed that the hymen of the victim girl is intact and no external injuries found on the body of the victim girl. Therefore, the evidence of the victim girl (P.W.4) is contradictory to the evidence of the Doctor (P.W.2) and the same is fatal to the case of the prosecution. He would further submit that the learned Judicial Magistrate, who recorded the statement of the victim girl under Section 164 Cr.P.C was not examined as a witness. The trial Court has failed to consider the material contradictions and discrepancies and convicted the appellants only on conjectures and on sympathy, and therefore, the judgment of conviction and sentences passed by the trial Court against the appellants, are liable to be set aside.

8.1 The learned Government Advocate (Crl.Side) would submit that soon after the occurrence, the victim girl (P.W.4) was produced before the Doctor (P.W.1) and he has clearly deposed that at the time of clinical examination the victim girl has stated that the first appellant had sexual intercourse with her and the appellants 2 to 4 abetted for commission of offence. Further, the Doctor has opined that the hymen of the victim girl was intact, however, she was having some pain and contusion in her private part. Subsequently, the victim girl was produced before another Doctor (P.W.2) and her evidence corroborated with the evidence of P.W.1. Thereafter, the victim girl was produced before the learned Judicial Magistrate for recording statement under Section 164 Cr.P.C and clearly narrated the said incident. Therefore, the evidence of Doctors (P.W.1, P.W.2) and the



statement under Section 164 Cr.P.C of the victim girl (Ex.P6) are corroborated with the evidence of the victim girl (PW.4). He would further submit that there was no eye witness to the said occurrence. In cases involving sexual harassment, molestation, etc. the evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The statement of the victim girl under Section 164 Cr.P.C is not the substantive evidence and it can be used for corroboration. Further, the victim girl in her statement under Section 164 of the Cr.P.C., as well as in her testimony during trial, clearly alleged that the first appellant had taken her to the bath room and committed penetrative sexual intercourse with her, the appellants 2 to 4 abetted for commission of offence. Therefore, from the evidence of the victim girl (P.W.4) and the evidence of Doctors (P.W.1 and P.W.2), the prosecution has proved its case beyond reasonable doubt.

8.2 The learned Government Advocate (Crl.Side) would further submit that the presumption under Sections 29 and 30 of the POCSO Act can very much be drawn against the accused. Since, in this case, the said presumption has not been rebutted by the accused in the manner known to law. Therefore, the prosecution has clearly established their case beyond reasonable doubts that the first appellant is the prime accused, who directly involved in the charged offence and the other accused 2 to 4 abetted for commission of offence. Therefore, the trial Court has rightly convicted the appellants and hence, the appeal is liable to be dismissed.

9. Heard the learned counsel for the appellants and the learned Government Advocate (Crl.Side) for the respondent and also perused the materials available on record.

10. 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.

11. On a careful perusal of the complaint (Ex.P5), it reveals that the first appellant has committed penetrative sexual assault with the victim girl and the appellants 2 to 4 abetted for commission of offence. Initially the case was registered against the appellants for the offence punishable under Sections 341, 376 IPC and Section 4 of POCSO Act, which was altered into Sections 341, 342 r/w 34 IPC and 17 r/w 4 of POCSO Act. After completing the formalities, charges were framed against the appellants as stated above.

12. In order to substantiate the above charges, the prosecution examined the victim girl as P.W.4 and she has



clearly narrated the entire incident. There was no eye witness to the said occurrence. Even though, Manikandan and Panneer were said to have been present at the time of occurrence, the prosecution has not examined them. For the reason that after hearing the screaming voice of the victim girl, the old man Panneer switched on the light in his house and rushed to upstairs along with his son, but, he has not directly seen the said occurrence. Further, the victim girl has stated that Manikandan has not involved in the said offence. Therefore, mere non examination of the independent witnesses would not be fatal to the case of the prosecution.

13.This Court held that in cases involving sexual harassment, molestation, etc. the court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof.

14.It is the specific case of the prosecution that soon after the occurrence, the victim girl was produced before the Doctor (P.W.1), who conducted the clinical examination and clearly stated that there was a pain and contusion in the private part of the victim girl, however her hymen was intact. It is a well settled proposition of law, the depth of penetration is immaterial to attract the offence. Though the learned counsel for the appellants would submit that the victim girl (P.W.4) has stated that about 10 minutes, the first appellant had sexual intercourse with her. It is not the case of the prosecution that she has consented or co-operated for the sexual assault. The Doctors who examined the victim girl have stated that hymen of the victim girl is intact. For this reason, the evidence of the victim girl may not be disallowed or disbelieved. Further, the medical evidence supported the case of the prosecution, since there was a pain and contusion in the private part of the victim girl. From the evidence of the victim girl (P.W.4) and the evidence of the Doctors (P.W.1 and P.W.2), this Court come to the conclusion that the first appellant committed penetrative sexual assault with the victim girl. Though the victim girl was produced before the learned Judicial Magistrate for recording statement under Section 164 Cr.P.C it is not a substantive evidence and it can be used by the



prosecution for corroboration or by the accused for contradictions and no contradictions were established by the appellants. The prosecution has clearly substantiated by examining the victim girl that the appellants forcibly pulled the victim girl and when the first appellant committed penetrative sexual assault with the victim girl, appellants 2 to 4 abetted for commission of said offence to A1.

15. The learned counsel for the appellants would submit that the appellants attempted to commit sexual assault with the victim girl and hence, Section 3 of the POCSO Act is not attracted in this case.

16. It is pertinent to extract relevant provisions of the POCSO Act which reads as follows:

Sections 3, 4, 16 and 17 of the POCSO Act reads thus :

'3. Penetrative sexual assault. - A person is said to commit "penetrative sexual assault" if -

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(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

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.'

'4. Punishment for penetrative sexual assault.

1[(1)] Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than 2 [ten years] but which may extend to imprisonment for life, and shall also be liable to fine.

3[(2)] Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished



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with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.''

16. Abetment of an offence.—A person abets an offence, who— First.—Instigates any person to do that offence; or Secondly.— Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that offence; or Thirdly.— Intentionally aids, by any act or illegal omission, the doing of that offence.

Explanation I.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence.

Explanation II.—Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act. Explanation III.—Whoever employ, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of any offence under this Act, is said to aid the doing of that act.

17. Punishment for abetment.—Whoever abets any offence under this Act, if the act abetted is committed in consequence of the abetment, shall be punished with punishment provided for that offence. Explanation.— An act or offence is said to be committed in consequence of abetment, when it is



committed in consequence of the instigation, or in pursuance of the conspiracy or with the aid, which constitutes the abetment.''

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The above reading of provisions and evidence of the victim child are clearly proved that the prosecution established its case that the first appellant committed penetrative sexual assault on the victim girl, which is punishable under Section 4 of the POCSO Act. The appellants 2 to 4 abetted for commission of the above said offence to A1. Therefore, the contention of the learned counsel for the appellants is not acceptable. As per Section 3(a) and (b) of POCSO Act to attract penetrative sexual assault depth of penetration is immaterial, if the accused penetrate his penis, to any extent, into the vagina of the victim it is an offence under Section 3 of POCSO Act, which is punishable under Section 4 of POCSO Act.

17. On combined reading of the evidence of the victim girl (P.W.4); the Doctors (P.W.1 and P.W.2); the medical certificate (Ex.P2), Education Certificate (Ex.P4); and the statement of the victim girl under Section 164 of Cr.P.C (Ex.P6) this Court finds that the appellants committed the charged offence. Therefore, the trial Court, as a fact finding Court has rightly appreciated the entire evidence and convicted the accused/appellants as stated in the foregoing paragraphs of this judgment.

18. In fine, this Criminal Appeal deserves to be dismissed and accordingly, the same is dismissed. The conviction and sentences passed in Spl.S.C.No.52 of 2016 by the Sessions Judge, Mahalir Court, Vellore District, Vellore is confirmed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Mahalir Court,
Vellore District, Vellore.



2. The Superintendent,
Central Prison, Vellore.

3. The Inspector of Police,
All Women Police Station,
Ambur.

4. The Public Prosecutor,
High Court, Madras.

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

6. The Director General of Police,
Dr.Radhakrishnan Salai,
Mylapore, Chennai - 04.

7. The Honourable POSCO Committee,
High Court, Madras.

+1cc to Mr.C.Anbu, Advocate, S.R.No.11749

CRL.A.No. 319 of 2019

KV(CO)
RLP(20/07/2021)