

IN THE HIGH COURT OF JUDICIATURE AT MADRAS

RESERVED ON : 22.09.2021

PRONOUNCED ON : 04.10.2021

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Criminal Appeal No.139 of 2021

State represented by
The Inspector of Police,
Thirubuvanai Police Station,
Puducherry
Through Public Prosecutor,
Puducherry.
(Cr.No.38 of 2018)

... Appellant/Complainant

vs.

Earlam Pereira

... Respondent/Sole Accused

Prayer: Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to set aside the judgment passed by the learned Special Judge (Under the POCSO Act, 2012) Puducherry, dated 06.10.2020 in Spl.S.C.No.18 of 2018.

For Appellant : Mr.D.Bharatha Chakravarthy
Public Prosecutor (Pondicherry)

For Respondent : Mrs.V.Kamala Kumar
Mr.M.Nallathambi,
Legal Aid Counsel

J U D G M E N T

Aggrieved over the judgment of acquittal passed by the learned Special Judge under POCSO Act dated 06.10.2020 in Spl.S.C.No.18 of 2018.

2 Originally, the appellant/Police has registered a case

against the respondent in Crime No.38 of 2018 for the offence under Section 6 and 10 of the Protection of Children from Sexual Offences Act, 2012 [hereinafter called as "POCSO Act"] and Section 506(ii) of IPC. After investigation, they laid a charge sheet against the respondent before the learned Sessions Judge (under the POCSO Act), Puducherry, since the offence charged against the respondent was against woman, especially a minor child falls under the POCSO Act, the learned Special Judge, had taken the case on file in Spl.S.C.No.18 of 2018 and framed the charge against the respondent.

3 In order to prove the case of the prosecution, on the side of the prosecution, as many as 23 witnesses were examined and marked 18 documents as Exs.P1 to 18 besides 6 material objects as M.Os.1 to 6. After completion of examination of prosecution witnesses, when incriminating circumstances culled from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C., he denied the same as false and pleaded not guilty. On the side of the defence, no one was examined and no document was marked.

4 After completing trial and hearing of arguments advanced on either side, the learned Special Judge found not guilty of the respondent for any of the charges framed against him and thereby, acquitted him. Challenging the said judgment of acquittal passed by the learned Special Judge, the State/complainant has filed this appeal.

5 Mr.D.Bharatha Chakravarthy, learned Public Prosecutor (Pondicherry) appearing for the appellant/State would submit that the learned trial Judge acquitted the respondent on the main ground that the evidence of P.Ws.1 & 3 parents of the victim child, P.W.2 the victim child are not consistent, cogent and trustworthy and medical evidence also does not support the case of the prosecution and comes to the conclusion that based on their evidence conviction cannot be recorded against the respondent/accused and prosecution failed to prove its case beyond all reasonable doubts. The finding of the trial Court is completely erroneous and that, in cases of aggravated sexual assault on a child who was only studying U.K.G., the support of medical evidence is not always a necessity and evidence of the sole victim would suffice to record conviction.

6 A plain reading of Section 7 of POCSO Act, would reveal that touching of the vagina, penis, anus or breast of the child with sexual intent would amount to a sexual assault. In such incidents, in most of the cases, there would be no medical evidence proving a sexual assault and therefore, medical evidence would not always reveal a sexual assault.

7 Further, the learned Public Prosecutor submitted that the medical evidence is not always necessary to prove cases of sexual assault. The absence of visible injuries or marks would not mean that the victim child was not subjected to sexual assault committed by the accused. Medical evidence is only for the purpose of corroboration, where required, and medical report by itself has to be weighed on the surrounding facts and circumstances. Therefore, the finding of the learned Judge with regard to the medical evidence for acquitting the accused is completely erroneous and is not sustainable.

8 As per the provisions of Section 29 of the POCSO Act, once a person is prosecuted for the offences under Sections 3, 5 7 and 9 of the POCSO Act, there is a statutory presumption that the accused has committed the offence. Therefore, the accused has to rebut the presumption under Section 29 of the POCSO Act.

9 The learned trial Judge has failed to appreciate the evidence of the prosecution and wrongly applied the provisions of law and erroneously acquitted the respondent stating that the prosecution has failed to prove its case. The victim girl was produced before the learned Magistrate for recording evidence under Section 164 Cr.P.C., at the time of occurrence, the victim girl was only studying U.K.G. and one cannot expect such an infant to speak about the occurrence even she did not understand, what is good touch and bad touch and the intention of the culprit is to be seen in this type of offence. We cannot expect from the child, who was only about 4 years to speak the same words at all the times. The respondent/accused, being a teacher in a School, has committed aggravated penetrative sexual assault on the child, who was only aged about 4 years at the time of occurrence. Therefore, the trial Judge has failed to understand the scope and object of the POCSO Act.

10 As far as appreciation of the evidence of prosecution witnesses is concerned, the trial Court held that the evidence of P.W.1 cannot be relied on for the reason that the same is not consistent, cogent and trustworthy and the victim child was tutored, as there was no corroboration of the fact, but it is seen that the trial Court has miserably failed to appreciate the fact that the corroboration is not always required if there are circumstances to dispense with such requirement.

11 The learned Public Prosecutor would further submit that P.W.1, P.W.3 and P.W.17 have categorically stated in their evidence that they have found reddishness on the breast and vaginal region of the victim child. But the trial Court has omitted to consider the same in a right perspective. Further, the trial Court has failed to note that the victim child was

then admitted to the Hospital due to aggravated pain in her private part and fever. P.W.8, the Doctor, had deposed that she found erythema at bilateral labia major and that the said erythema could have caused by rubbing frequently at the external genitalia and she has also stated that it is possible to cause erythema by using fingers.

12 Further, in the instant case, through Ex.P12, it is proved that the accused attended the School on the disputed days and hence in this regard, the evidence of P.W.1 has been corroborated with the documentary proof. From the evidence of independent witnesses P.Ws.4, 6, 7, 15 and 16, prosecution has proved the fact that the accused used to keep the victim child on his lap on many occasions. P.Ws.4 and 6 have categorically stated that the accused used to close the windows and doors of the classroom. The trial Court has failed to consider the corroborative evidence of the prosecution witnesses. P.W.1 has clearly deposed that on an earlier occasions she has noticed reddishness and contusion on the private parts of the victim child and the victim child also in 164 Statement, which is recorded in the earliest point of time, has clearly stated that the accused used to keep her on his lap and inserted fingers into her private parts and thereby sexually assaulted the victim child. On reading of the statements recorded under Section 164 Cr.P.C from P.W.1 and P.W.2, it is seen that the accused used to keep the victim child on his lap by closing the one side door of the room and committed the offence as narrated in the complaint and statements under Section 164 Cr.P.C. Under these circumstances, there is sufficient circumstantial evidence to corroborate the fact that there was sexual assault on the victim child and that the victim child was subsequently admitted to Hospital due to fever and erythema.

13 Per contra, the respondent/accused led no evidence whatsoever to rebut the presumption under Section 29 of the POCSO Act and considering the totality of the facts and circumstances, there is sufficient evidence beyond reasonable doubt to convict the accused. The impugned judgment has however error by failing to consider the above evidences and not properly appreciated the evidence of the prosecution witnesses, which resulted in unmerited acquittal of the respondent/accused. Therefore, the judgment of the trial Court is liable to be set aside and the appeal may be allowed.

14 The learned counsel appearing for the respondent/accused would submit that the learned trial Judge has rightly and carefully analysed the evidence of prosecution witnesses, namely, P.W.1 to P.W.9 and P.W.14 and heard the arguments of both sides and acquitted the respondent / accused from all the offences charged against him.

15 P.Ws.1, 3 and P.W.23, the Investigating Officer, had stated that the alleged occurrence taken place on 27.03.2018 even the complaint and charge sheet also reveals the same, but the fact remains that from 27.03.2018 to 01.04.2018 the school was remain closed and hence prosecution has miserably failed to prove the date on which the alleged occurrence took place. Further, the place of occurrence is also highly doubtful, since U.K.G. Class has been taken in the hall only and not in a separate room. P.W.1 and P.W.3 and also P.W.23 have admitted in their cross examination that the UKG class has been taken in the hall only not in a room. According to evidence of P.W.11 the Correspondent of the School, U.K.G class has been conducted in a hall only, which is in fact visible to all and the doors of the hall will always kept open. Therefore, in such a visible place, the alleged offence could not have taken place as projected by the prosecution.

16 There are many contradictions in the evidence of P.Ws.1 to 3 regarding date and place of occurrence. The victim girl P.W.2 has improved her version at stage by stage. P.W.2, in 164 Statement has stated that when she reveals the occurrence to her mother P.W.1, she shocked and later lodged complaint in the police station. The words "அம்மா அப்படி shock ஆயிட்டாங்க" will not naturally come from 4 years old girl and it seems to be unnatural one, which clearly shows that the victim was tutored by her mother P.W.1. Further, P.W.2, the victim during examination before the Court, has stated the she forgotten something, which her mother P.W.1 taught while proceeding in the Car to the Court, which itself clearly proves the fact that the victim was tutored by her mother P.W.1. It is seen that P.Ws.1 and 2 have exaggerated the alleged incidents.

17 The mother of the victim P.W.1 used to share her personal matters to the respondent and he informed the same to P.W.3 the husband of P.W.1. Hence, in order to wreck vengeance, P.W.1, being a mother of 5 years old female child, had gone to the extent of using her own child for making allegations of this nature. In this case, prosecution alleged that the respondent inserted his fingers into the private part of the victim child, if that being the allegation, there should be some injuries, but the medical records does not say so and the Doctor P.W.8, who examined the victim child clinically, has deposed that there was no injuries found on the body of the victim. Therefore, medical

evidence has not supported the case of the prosecution.

18 As per the evidence of P.Ws.1 & 3, even prior to the alleged occurrence, the victim got itching and irritation in her private part and hence the pain and burning, which the victim had, might have occurred due to urinal infection. Further, the witnesses examined by the prosecution have stated only that they have seen the respondent made the victim to sit in his lap and P.W.16, one Saisaran, who is also studying in the same U.K.G. class has deposed that while the victim sitting in the lap of the respondent, she never cried and he also deposed that the respondent made him also to sit in the lap. Hence, there is no proof to show that the respondent committed the offence as alleged by the prosecution.

19 The evidence of P.W.1 and P.W.3 are not cogent and consistent and there are lot of contradictions between the complaint and 164 statements and also deposition made before the Court during examination. P.W.2 the victim child also stated that her mother taught something, which she forgotten. Therefore, there are material contradictions and the prosecution has failed to substantiate its case, the medical evidence also not supported the case of the prosecution and there are delay in filing the complaint and the trial Court has rightly considered the oral and documentary evidence, acquitted the respondent / accused and hence, there is no merit in the appeal and the appeal is liable to be dismissed.

20 Heard the learned Public Prosecutor (Pondicherry) appearing for the appellant/State, the learned counsel appearing for the respondent and also the Legal Aid Counsel for the respondent and perused the materials available on record and also carefully perused the judgment of the trial Court.

21 Since this Court, being an appellate Court is a final Court of fact finding in this case and it has to independently re-appreciate the entire evidence and give independent finding, accordingly, this Court also thoroughly gone into the entire materials and re-appreciated the entire evidence on record.

22 The case of the prosecution is that on several occasions prior to 03.04.2018 at St.Josept Play School, Thiruvalluvar Street, Sugumar Nagar, Kalitheerthalkuppam, Puducherry, the respondent/accused, who was working as English Teacher in UKG Class of the said school, with sexual intent, knowing fully well that victim minor child is below twelve years, in the evening hours, after closing the doors of the class room, forcibly made her to sit on his lap, touched and kissed all over her body and squeezed her breast, inserted his finger into her vagina and thereby committed aggravated sexual

assault on her; during that time, the accused on 27.03.2018, the respondent/accused criminally threatened the victim minor child with dire consequences by forcibly closing her nose and mouth by saying if she reveals to anyone, he would kill her. Therefore the present case has been registered against the respondent for the offence under Section 6 and 10 of the POCSO Act and under Section 506(ii) of IPC.

23 Out of 23 witnesses examined, on the side of the prosecution, the mother of the victim child was examined as P.W.1, the victim was examined as P.W.2 and the father of the victim child was examined as P.W.3. Since the victim girl was only 4 years old at the time of occurrence, one cannot expect the infant to speak about the occurrence to their parents immediately even she did not understand what is happening to her. In this case, the mother of the victim child was examined as P.W.1, she narrated the incident and she is not an eye-witness for the occurrence, she is circumstantial witness and she clearly spoken that on 02.04.2018, when she gave bath to her child and cleaned her vagina, the victim child by crying said that "why are you giving torture by keeping hand there and in the School, the sir also doing the same". Prior to that also her activities were not in normal, she used to wake up from sleeping and was crying by saying that she felt burning in her vagina and found contusion over her left side chest. Hence it is clear that even prior to the alleged date of occurrence, the accused used to commit sexual assault on the victim child. But, due to fear, the victim child had not revealed anything to her parents.

24 Even though, the learned counsel for the respondent vehemently contended that the child was tutored by her mother P.W.1, whose evidence also not consistent, cogent and trustworthy, the fact remains that P.W.2 the victim child, during recording of statement under Section 164 of Cr.P.C., which was the earliest version, has stated that "அடிக்கடி இப்படி பண்ணுவாரு, Dance Practise பண்ணும்போதும் இப்படி பண்ணுவார்," she also deposed that when her mother applying soap on her private parts, she complaints pain saying that "நீயம் கை வைக்குற அந்த இடத்துல தான் சாரும் கை வைக்குறார் ". The victim being a child, who only aged about 5 years at the time of occurrence, cannot speak about the occurrence in all the stages by parrot version and it could not be expected from the victim that she should remember all the incidents and the acts of the accused, she may forgot something and P.W.1, to whom the victim stated about the sexual assault committed by the respondent/accused, may remember those acts to the victim P.W.2. Therefore, for the said reason we cannot throw away the evidence of the victim child, who in fact subjected to sexual assault by the respondent/accused.

25 The learned counsel for the respondent/accused contended that, if the respondent committed sexual assault by inserting his fingers into the vagina of the victim child, there might have some injuries, but as per the Doctor's evidence there was no injury, but, the respondent/ accused, who wants to satisfy his lust may touched the vagina gently and it is not necessary for the victim to sustain injuries, and it cannot be concluded that since there was no injuries, the occurrence could not have take place.

26 On a careful reading of the evidence of the defacto complainant P.W.1, it reveal that she may exaggerate some incidents, but, as far as the sexual assault committed by the accused is concerned, it was proved that P.W.1 also stated that while giving bath to her child she said "why are you torturing me by keeping hand there and in school sir also doing the same" and it is seen that the victim child also stated that while her mother gave bath to her, she stated that you are touching there and in school sir also touching there only. Therefore for the reason that there are some exaggerations, it cannot be concluded that entire case of the prosecution has been set up by P.W.1 the mother of the child.

27 It is stated by the learned counsel for respondent that due to enmity, P.W.1 foisted false case using her own child. But, the learned counsel for the respondent is not in a position to establish the motive for P.W.1 to lodge a false complaint against the respondent. Without any strong reason, no mother will go to the extent of making allegations of this nature by using her own 4 years old child studying U.K.G. Hence the contention of the learned counsel for the respondent regarding enmity is not acceptable.

28 On reading of evidence of P.W.1, it clearly shows that what had happened to the victim child. No mother would rush to the Police Station immediately soon after the occurrence. Naturally, the mother would think about the future of the child and reputation of the family. The evidence of P.W.3 / father of the victim child clearly reveals that P.W.1 informed P.W.3 about the occurrence and thereafter complaint was lodged against the respondent/accused.

29 Even though, there is a delay in lodging the complaint and as stated by the learned counsel for the respondent that on earlier occasions, when the victim had pain in her private parts, no complaint has been lodged, but, cases like this, the delay is not fatal to the case of the prosecution. As stated earlier, the victim child was only 4 years, one cannot expect the victim child to speak everything, even she did not understand what is happening to her and she felt pain, she

complained the pain to her mother and the mother explained the same what was stated by the victim child, we cannot expect more than that and immediately, she informed to her husband / P.W.3.

30 In this case, there is no eye-witness and the victim child was only 4 years old, she had a pain and the victim child has clearly stated before her mother that the respondent used to keep her on his lap and inserted his fingers into her private parts and there by sexually assaulted the victim child. As already explained, cases like this, mere delay in filing the FIR, is not fatal to the case of the prosecution and also the reason for delay though specifically not given, one cannot expect the family members of the victim child would rush to the Police immediately soon after the occurrence. Therefore, the learned trial Judge has failed to consider the facts that the victim child was only 4 years and she may not know what is happening to her and act of the respondent is good or bad and in that situation, the Court cannot expect the victim child to speak about the occurrence in all the stages in a parrot version.

31 The victim girl, who is only aged about 4 years, is not in a position to communicate all her grievance by verbal and since she felt pain in her private parts and while the mother giving bath touched the same, the victim got irritated and shouted at her by crying said that " why are you torturing me by keeping hands there and in School, sir also doing the same". On hearing the above statement, naturally the mother, out of anxiety, might have aided the child by saying the name of the parts of the body, since the child being 4 years old could not remember and say all the acts of the accused and hence it does not mean that the mother only taught the entire things. The mother, due to anxiety, might have exaggerated certain things, but for which, it cannot be concluded that entire case of the prosecution is false and set up by P.W.1 the mother of the victim child. The victim child, before the Magistrate, has clearly stated about the act of the accused and certain things she forgotten for which, she said that she forgotten what her mother told. This Court is of the opinion that P.W.1 the mother of child might have explained the child how to express the act of the accused by words, which the child forgot and it cannot be said that the mother only introduced the alleged offence said to have been committed by the respondent on the child and she only induced the child to make such allegations against the respondent. The victim child has every right to live with dignity and to enjoy the rights guaranteed under the constitution. Therefore the evidence of the victim child cannot be simply brushed away for the reasons stated by the trial Court.

32 It is seen that age of the victim is not in dispute and the same was proved through Ex.P9 Birth Certificate of the victim child and the fact that the respondent is a Teacher in the School, in which the victim child studied and also from the evidence of P.Ws.1 to 4, 6, 7 and 16, the fact that the respondent used to keep the victim child on his lap is also proved and not disputed by the respondent. Therefore, from the evidence of P.Ws.1 to 8 and P.W.16, Ex.P.1 / complaint, Ex.Ps.2 to 4 and 6 / 164 Statements and Ex.P.12 / the staff attendance register., this Court finds that the prosecution has proved its case beyond all reasonable doubt.

33 The culprits are escaping for the technical reason and unfortunately Investigation Wing also not upto the standard and due to either defect in investigation or fault in investigation, most of the cases, the culprits are escaping. Therefore, mere technicalities should not be allowed to stand in the way of administration of justice.

34 The trial Courts also, sometimes not applying their minds and searching for proof beyond all reasonable doubt and taking advantage of the flaw in the investigation, giving the benefit of doubt to the accused. But cases like this, we cannot give much importance to the technical ground of proof. In this case, the victim is an infant, aged below 5 years, she is not in a position to speak out the charges of crimes or atrocities, under such circumstances, the mother has spoken and no corroboration can be expected, since because the inability of the victim child, the culprit cannot be escaped from the clutches of law.

35 Now, this Court has come to the conclusion that the respondent / accused has committed the offence and the Court has invoked presumption clause and it is for the accused to rebut the presumption in the manner known to law. Though it is settled proposition of law that the accused need not come into the witness box and prove his innocence, however, this is not an offence comes under IPC, this is the offence comes under the POCSO Act. The POCSO Act itself designed in such a way that once the prosecution proved the offence and the Court drawn the presumption under Section 29 of the POCSO Act, it is for the accused to rebut the presumption, but, in this case, this Court finds that the respondent / accused has committed the offence of aggravated penetrative sexual assault and draw presumption under Section 29 of the POCSO Act and also finds that the respondent / accused has not rebutted the presumption. Therefore, this Court finds that the accused committed the offence under Sections 5(f) and (m), which are punishable under Section 6 of POCSO Act and this Court finds the respondent/accused not guilty for the offence under Section 506(ii) of IPC and the acquittal of the

respondent for the offence under Section 506(ii) is hereby confirmed. The judgment of the trial Court dated 06.10.2020 acquitting the respondent/accused for the offence punishable under Section 6 of the POCSO Act is hereby set aside.

36 Accordingly, this Criminal Appeal is allowed. The judgment of acquittal passed by the learned Special Judge (Under the POCSO Act, 2012) , Puducherry in Spl.S.C.No.18 of 2018 dated 06.10.2020, is hereby set aside.

37 Since it is a reversal judgment and it is necessary to direct the respondent / accused to appear before this Court for asking question of sentence to be imposed against him. Accordingly, the respondent is directed to appear before this Court on 08.10.2021.

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Dated: 04.10.2021

This case having been listed on 08.10.2021 for Questioning on sentence in the presence of Mr.D.Bharatha Chakravarthy, Public Prosecutor, Pondicherry, for the Appellant and of Mr.Kamalakumar and Mr.M.Nallathambi, Legal Aid Counsel, counsel for the Respondent, this Court made the following Order:

Today, in compliance with the order of this Court dated 04.10.2021, the respondent appeared before this Court and he has been questioned regarding the sentence to be imposed on him. The respondent stated that he never committed the offence as projected by the prosecution and false case has been foisted against him and he is the sole breadwinner of his family and prays mercy of this Court. He also stated that P.W.1 the mother of the child only tried to have close relationship with him and since he rejected the same she foisted false case.

2 This Court heard the respondent/accused and his contention is not acceptable, since most of the witnesses including the independent witnesses have deposed that the respondent/ accused used to keep the victim child on his lap and the victim also clearly stated about the offence committed by the respondent/ accused. Considering the representations made by the respondent/accused and the age of the victim child and the offence committed, which is grave in nature and also the fact that the respondent has committed the offence in the School itself, while working as Teacher, there is no mitigating circumstances to award lesser punishment. The respondent is convicted for the offence under Sections 5(f) and 5(m) of the POCSO Act. Since for the above offence under the POCSO Act, minimum punishment prescribed is imprisonment of 10 years, the respondent/accused is sentenced to undergo rigorous imprisonment

for a period of 10 years and fine of Rs.10,000/- (Rupees Ten thousand only), in default, to undergo rigorous imprisonment for a further period of one year for the offences under Section 5(f) of the POCSO Act and sentenced to undergo rigorous imprisonment for a period of 10 years and fine of Rs.10,000/- (Rupees Ten thousand only), in default, to undergo rigorous imprisonment for a further period of one year for the offence under Section 5(m) POCSO Act. The sentence of imprisonment shall run concurrently.

Sd/-
Assistant Registrar(CS VII)
//True Copy//

Sub Assistant Registrar

cgi

To

1. The Special Judge (POCSO Act)
Puducherry.
2. The Superintendent of Jail,
Kalapet, Puducherry.
3. The Inspector of Police,
Thirubuvanai Police Station, Puducherry.
4. The Public Prosecutor,
Pudhucherry.

Copy to:

The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to Mr.M.Nallathambi, Advocate, S.R.No.53464 (17/02/2022)

Crl.A.No.139 of 2021

AD (CO)
K.RK. (08.10.2021)
SU(17/02/2022)