



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.07.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.No.193 of 2020

Paramasivam @ Siva

.. Appellant

.Vs.

State by:

The Inspector of Police,
Mudaliarpur Police Station,
Puducherry,
Crime No.60 of 2014.

.. Respondent

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to call for the records and set aside the judgment dated 27.11.2019 made in Spl.S.C.No.03 of 2015 by the learned Principal Sessions Judge/Special Judge (Under the POCSO Act, 2012) Puducherry.

For Appellant : Mr.A.Arasu Ganesan
For Respondent : Mr.D.Bharatha Chakravarthy
Public Prosecutor (Pudhucherry)

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 27.11.2019 in Spl.S.C.No.03 of 2015 by the learned Principal Sessions Judge/Special Judge (Under the POCSO Act, 2012) Puducherry.

2.The case of the prosecution is that prior to the complaint i.e on 14.06.2014, on several occasions the accused/appellant repeatedly committed penetrative sexual assault on the victim girl, who is aged about 16 years, due to that she become pregnant and thereby, P.W.1/mother of the victim girl filed a complaint/Ex.P1 against the appellant.

3.The respondent-Police registered a case in Crime No.60 of 2014 against the appellant for the offence under Section 4 of The Protection of Children from Sexual Offences Act, 2012 [hereafter referred to as 'POCSO Act' for the sake of convenience], subsequently, altered into Section 376 (1) IPC and



Section 4 of POCSO Act. After completing the investigation, the respondent police filed a charge sheet before the learned Principal Sessions Judge/Special Judge (Under the POCSO Act, 2012) Puducherry. The offence is against a child which falls under the definition of Section 2 (1) (d) of POCSO Act and the learned Special Judge, taken cognizance of the case on file in Spl.S.C.No.3 of 2015. After completing the formalities, the learned Special Judge framed charges against the appellant for the offence punishable under Section 6 of POCSO Act and Section 376 IPC.

4. In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 17 witnesses were examined as P.W.1 to P.W.17 and marked 17 documents as Exs.P1 to P17 and two material objects were marked as M.O.1 and M.O.2. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant/accused and questioned under Section 313 of Cr.P.C., wherein he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, no oral and no 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 appellant is guilty for the following offences :

i. For the offence punishable under Section 6 POCSO Act, the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.2,000/-, in default, to undergo rigorous imprisonment for a period of three months;

ii. For the offence punishable under Section 376 IPC, the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.2,000/-, in default, to undergo rigorous imprisonment for a period of three months and ordering the sentences to run concurrently. Besides this the Court below awarded a sum of Rs.5,00,000/- to the victim girl as per the victim compensation. Challenging the said conviction and sentences, the appellant is before this Court.

6.1 The learned counsel for the appellant would submit that no such occurrence had taken place as alleged by the prosecution. There are material contradictions between the evidence of P.W.1/mother of the victim girl; P.W.2/victim girl; P.W.15/ Inspector of police, who registered the First Information Report and P.W.17/ Investigating Officer. As per the case of the prosecution, on 10.05.2014, when the victim girl was having stomach pain, P.W.1/mother of the victim girl took



her daughter to the hospital and on medical examination, it was found that there is miscarriage of pregnancy of the victim girl. Subsequently, on enquiry, it was found that the appellant is responsible for her pregnancy. However, the complaint was not registered, immediately, after deliberation, the complaint was registered on 14.06.2014. Therefore, there was a delay in filing the complaint and the same has not been properly explained by the prosecution and the unexplained inordinate delay is fatal to the case of the prosecution.

6.2 The learned counsel for the appellant would further submit that there are contradictions regarding how many times the appellant had sexual intercourse with the victim girl and how the victim girl miscarried her pregnancy. In one place the mother of the victim girl has stated that she has given pills for miscarriage of her daughter's fetus, whereas the victim girl has stated that she herself took pills for miscarriage of her pregnancy and another place the victim girl has stated that she consumed papaya fruit. Therefore, there are contradictions with regard to the miscarriage of pregnancy of the victim girl and there is no clarity as to whether the victim was pregnant and subsequently terminated on 10.05.2014 and hence, the evidence of the victim girl and her mother was not trust worthy. If at all miscarriage had been taken place, the Doctor/P.W.11, who examined the victim girl would have deposed as to how the miscarriage has been happened. Therefore, the prosecution has failed to establish its case beyond all reasonable doubts. He would further submit that there was discrepancy in the F.I.R/Ex.P11, statement of the victim girl recorded under Section 164 Cr.P.C/Ex.P2 and chief examination of the victim girl as P.W.2 and there was an improvement in every stage and the same is fatal to the case of the prosecution. He would further submit that the prosecution has suppressed the earlier complaint filed by the family of the victim girl. Though the mother of victim girl in her chief examination has deposed that soon after knowing the said fact, they approached the police and there was a compromise talk arose between them, subsequently, there was a dispute, they filed the present complaint against the appellant.

6.3 The learned counsel for the appellant would further submit that the appellant was not responsible for the pregnancy of the victim girl and he has not committed any penetrative sexual assault on the victim girl. The victim girl is having relationship with some other person, in order to suppress the fact and escape from that the mother of the victim girl filed a false complaint against the appellant. There is no evidence to show that the appellant had sexual relationship with the victim girl. However, the learned Magistrate failed to appreciate the contradictions and wrongly convicted and sentenced the appellant



only on assumption and sympathy and hence, the judgment of the trial Court against the appellant is liable to be set aside.

7.1 The learned Government Advocate (Crl.Side) for the respondent would submit that there is no contravention that the victim girl was below 18 years. At the time of occurrence, P.W.2/victim girl was aged about 16 years and in order to prove her age, the prosecution exhibited the birth certificate/Ex.P17, which shows that the date of birth of the victim girl is 04.08.1998, where as the date of occurrence was in the year 2013 and the complaint was filed in the year 2014. Therefore, at the time of occurrence and registering the complaint, since the victim girl was below 18 years, she is a child under the definition of Section 2(1) (d) of POCSO Act. Further, P.W.2/victim girl in her chief examination has clearly deposed that the appellant had committed sexual assault on her for more than once and that she became pregnant and the same was corroborated with the statement of the victim girl recorded under Section 164 Cr.P.C.

7.2 The learned Government Advocate (Crl.Side) would further submit that P.W.1/mother of the victim girl has clearly deposed that she came to know about the pregnancy of the victim girl, only after victim girl suffered from stomach pain. Subsequently, on enquiry, she came to know that the appellant is responsible for the pregnancy of the victim girl. Thereafter, she informed the same to her husband, who is residing abroad and after four days her husband came to Puducherry and then they went to Mudaliarpet Police Station and narrated the same to the police; on enquiry, the appellant admitted the same and agreed to marry the victim girl. Since the victim girl was aged about 16 years, her parents asked to confirm the marriage through engagement, but, the appellant refused the same and told that he is not responsible for her pregnancy. Subsequently, P.W.1/mother of the victim girl filed the complaint/Ex.P1 against the appellant on 14.06.2014. Therefore, the delay in preferring the complaint has properly explained by P.W.1/de facto complainant. In POCSO Act cases, no parent would take a hasty decision and immediately rush to the police station and file a complaint, since it will affect the future of the female girl. Therefore, the parents would naturally think about the future of the child and also about the reputation of the family. Normally, they used to take advise of the elders in the village and when, the culprit did not obey the advise of the elders, then only they approach the police station. Therefore, the contention of the learned counsel for the appellant that the delay in filing the complaint is not acceptable. He would further submit that even in the complaint itself, the victim girl has stated that the appellant had committed sexual assault on her more than once. The victim girl (P.W.2), during her deposition before the trial Court and



her statement recorded under Section 164 P.C./Ex.P2 has clearly narrated that for more than once she was subjected to sexual assault by the appellant and the Doctor (P.W.11) who examined the victim girl, has clearly stated that the victim girl told her that on two occasions, she was subjected to sexual assault by the appellant and that she got pregnant and the same was terminated and the Doctor entered the history of the case and given Medical Examination Report/Ex.P5. Therefore, the contradictions pointed out by the learned counsel for the appellant were not material contradictions and hence, the evidence of the victim girl cannot be discarded. Therefore, the trial Court has rightly appreciated the entire evidence and convicted and sentenced the appellant and there is no merit in this appeal and the same is liable to be dismissed.

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

9. 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.

10. The Special Court framed charges against the appellant for the offence under Section 376 IPC and also for the offence under Section 6 of POCSO Act. In order to substantiate the same, on the side of the prosecution totally 17 witnesses were examined as P.W.1 to P.W.17, out of which, the victim girl was examined as P.W.2.

11. On a reading of the evidence of P.W.2/victim girl, it would reveal that the victim girl knew the appellant, who was residing back side of her house and the appellant frequently talking with her and told that he fell in love with her. In such a way they had physical relationship for more than once, due to that she got pregnant. Even assuming that if the victim girl has given her consent to the appellant for sexual intercourse, since she was a child, her consent is immaterial. Further P.W.1/mother of the victim child also clearly deposed about the relationship between the appellant and victim child. P.W.11/Doctor who examined the victim girl has also clearly deposed that the victim child was subjected to penetrative sexual assault and due to that she got pregnant and the same was terminated.

12. On a combined reading of the evidence of P.W.1/mother of the victim child, P.W.2/victim child, P.W.11/Doctor, Ex.P1/Complaint, Ex.P2/Statement recorded under Section 164 Cr.P.C, Ex.P5/Medical Examination Report and Ex.P17/Birth certificate of the victim child clearly show that the victim was



below the age of 18 years, even at the time of occurrence or on the date of complaint. It is not in dispute, once the prosecution has proved that the victim child is below 18 years, since she is a child, it falls under the definition of Section 2 (1) (d) of POCSO Act. The prosecution has proved that the victim girl was subjected to penetrative sexual assault and the appellant, who has committed the said offence is liable to be punished.

13. The defence taken by the learned counsel for the appellant is that there was no eye witness to the said occurrence. In cases like this, one cannot expect independent eye witness, since the culprits will take a chance only on the loneliness of the minor children and make use of their innocence and exploit them sexually and also give false promise to marry her. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible.

14. Under these circumstances, this Court finds that the appellant has committed the offence under Section 5(1) of POCSO Act, which is punishable under Section 6 of POCSO Act. In the considered view of this Court that there is no mitigating circumstances to reduce the sentence for the offence under Section 6 of POCSO Act. As far as Section 376 is concerned, the trial Court has imposed seven years rigorous imprisonment. For better appreciation, it is appropriate to extract Section 42 of POCSO Act which reads as follows:

'42.Alternate Punishment.- Where an act or omission constitutes an offence punishable under this Act and also under Sections 166-A, 354-A, 354-B, 354-C, 354-D, 370, 370-A, 375, 376, [376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB], 376-E, Section 509 of the Indian Penal Code (45 of 1860) or Section 67-B of the Information Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.'

Therefore, once the trial Court found the appellant guilty for the offence under Section 5(1) punishable under Section 6 of POCSO Act and he was convicted and sentenced to undergo ten years rigorous imprisonment and also sentenced to undergo seven years rigorous imprisonment for the offence under Section 376 IPC, which is no use, since both the sentences are ordered to run concurrently.



WEB COPY

15. However, considering the scope of Section 42 of POCSO Act, the substantive sentence of imprisonment against the appellant for the offence punishable under Section 376 IPC is alone set aside. However, the conviction and sentence imposed against the appellant for the offence punishable under Section 6 of POCSO Act is confirmed.

16. In the result, this Criminal Appeal is dismissed with the above modification. If the appellant/accused is not in duress, the trial Court is directed to take appropriate steps to secure the presence of the appellant to serve the remaining period of sentence.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

ms

To

1. The Principal Sessions Judge/
Special Judge (Under the POCSO Act, 2012)
Puducherry.
2. The Inspector of Police,
Mudaliarpur Police Station,
Puducherry,
3. The Public Prosecutor,
Pudhucherry.
4. The Deputy Registrar | with a direction to send back the
(Criminal Section), | original records, if any, to the
High Court, Madras. | trial Court

CRL.A.No.193 of 2020

UM(CO)
HS(19/08/2021)