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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.08.2021

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THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.NO.132 OF 2020

C.Gurunathan

.. Appellant/
Accused

.Vs.

The State by
Inspector of Police,
All Women Police Station,
Erode, Erode District,
Crime No.13 of 2016.

.. Respondent/
Complainant

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to call for the records relating to the judgment dated 07.02.2020 made in Spl.S.C.No.20 of 2018 on the file of the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court) Erode and set aside the same by allowing this Criminal Appeal.

For Appellant : Mr.N.Manoharan

For Respondent : Mr.S.Sugendran
Government Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 07.02.2020 made in Spl.S.C.No.20 of 2018 by the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court) Erode.

2. The case of the prosecution as per the de facto complainant/ P.W.1 is that she is the second wife of the accused/appellant. They got married on 10.2.2008 after demise of the appellant's first wife. The accused had one daughter Mythili through his first wife. The accused and P.W.1 have two daughters viz., P.W.2 and P.W.3/victim girls, who were aged about 8 and 7



years, respectively. There was a misunderstanding between P.W.1 and the accused and a complaint is pending before the Perundurai Police Station against the accused. On 20.11.2016, when P.W.1/mother of the victim girls, came back to her house, after purchasing mutton, she saw her children were very tired and on enquiry they revealed that her father/accused took them to Mallika's house and has committed penetrative sexual assault on them, in the presence of four other persons. Hence, a complaint/Ex.P1 has been registered against the appellant.

3.The respondent-Police registered a case in Crime No.13 of 2016 against the appellant for the offence under Section 8 of The Protection of Children from Sexual Offences Act, 2012 [hereafter referred to as 'POCSO Act' for the sake of convenience] and subsequently, altered into Section 6 of POCSO Act (2 counts). On completion of the investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court) Erode and the same was taken on file in Spl.S.C.No.20 of 2018. After completing the formalities, the learned Sessions Judge framed charges against the appellant for the offence under Section 6 of POCSO Act (2 counts).

4.In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 16 witnesses were examined as P.W.1 to P.W.16 and marked 28 documents as Exs.P1 to P28 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 found guilty for the offence punishable under Section 6 of POCSO Act (2 counts) and convicted and sentenced him to undergo rigorous imprisonment for a period of twenty years, each count and to pay a fine of Rs.5,000/-, each count, in default, to undergo simple imprisonment for a period of three months, each count and ordering the sentences of each count to run concurrently. Besides that the trial Court recommended the Government of Tamil Nadu to compensate a sum of Rs.2,00,000/- each to the victim girls 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 genuineness of the First Information Report itself is doubtful. According to the prosecution, the Investigating Officer/P.W.14 has deposed that when the victim girls were admitted in Government Hospital, Perundurai, on information, she went to the hospital and recorded the statement of P.W.1/mother of the victim girls, since victim girls are minor and that would be the first information report and Ex.P1/complaint is not the first information report. However, the earlier statements of the victim girls were suppressed by the prosecution for the reasons best known to them. The Doctor/Ex.P9, who examined the victim girl has not stated about the injuries sustained by the victims on their private parts, but, he has mentioned the history of the case as attempt to rape in the Accident Register/Exs.P25 and P26. The allegations mentioned in Ex.P25 and Ex.P26 are different from the allegations mentioned in Ex.P1/complaint and Ex.P21/Medical Certificate. He would further submit that the version of the victims under Section 164 Cr.P.C is very clear that the mother of the victims has tutored them against their father/accused. Further, one of the victim girls P.W.3 has not spoken about the occurrence, at the time of her statement recorded under Section 164 Cr.P.C by the learned Judicial Magistrate.

6.2 The learned counsel for the appellant would further submit that in the complaint P.W.1/mother of the victim girls has stated that the alleged occurrence had taken place in front of one Mallika and her husband and their relatives, whereas, she has taken different stand in the evidence before the trial Court that no other witnesses were present at the time of alleged occurrence. Further, the place of occurrence is doubtful, either the alleged occurrence said to have taken place in the house of Mallika or the house of Perumayee is not clear. Hence, the version given in Exs.P25 and P.26/Accident Register, Ex.P1/complaint and Exs.P2 and P3/statements recorded under Section 164 Cr.P.C is totally contradictory. He would further submit that the evidence of P.W.1/mother of the victim girls has clearly shows that there was a frequent quarrel between the appellant and herself. Even prior to the date of occurrence, due to quarrel she made a complaint against the appellant and he was arrested and released on bail, thereafter, the appellant had not gone to her house and the same was admitted by P.W.2 and P.W.3. He would further submit that the elder daughter of the accused has given her statement before the Investigating Officer stating that her step mother/P.W.1 was in the habit of accusing the appellant for grabbing the properties of the appellant. In order to avoid the appellant from transferring the property to his



elder daughter, P.W.1 filed a false complaint against the appellant. Though the evidence of the victim girls during chief examination is contradictory from their statements recorded under Section 164 Cr.P.C., there are material contradictions and there was an improvement in every stage and the same is fatal to the case of the prosecution. Therefore, the prosecution has not proved its case beyond all reasonable doubt. Further, the medical evidence also not supported the case of the prosecution.

6.3 The learned counsel for the appellant would further submit that the prosecution has not examined the eye witnesses, who were named by P.W.1, which creates a doubt and the same is fatal to the case of the prosecution. He would further submit that no father would act against his own daughters, who were aged about 8 and 6 years, respectively. There is a motive against the appellant, due to such motive and to take vengeance, P.W.1/mother of the victim girls has foisted a false case against the appellant. Further, the Investigating Agency has not conducted a fair investigation, only based on the false statements given by P.Ws.1 to 3 they have filed a final report against the appellant. There are material contradictions between the evidence of prosecution witnesses and medical evidence and also evidence of Investigating Officer, which will go to root of the case of the prosecution. Therefore, the prosecution has failed to prove its case beyond all reasonable doubts. The trial Court has failed to appreciate the entire evidence 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 the appellant is none other than the father of the victim girls/P.Ws.2 and 3, who were aged about 8 and 6 years, respectively. Though P.W.1/ mother of the victim girls admitted that there is a quarrel between herself and the appellant and it is also admitted that P.W.1 was not co-operating for intimacy with the appellant, since their house is very small and girl children were there and she left the appellant's first wife daughter, who is aged about 18 years in her brother-in-law's house. The accused had the habit of torturing her and children continuously and therefore, she gave a complaint before the Perundurai Police Station and he was arrested and remanded to judicial custody and released on bail. On the date of occurrence i.e. on 20.11.2016, P.W.1 gone for her regular work, the appellant came to her house and sexually assaulted the victim girls on their private parts using his fingers. Subsequently, the mother of the victim girls came to the house and saw that her children were tired and on enquiry the victim girls revealed the said incident. Immediately, P.W.1 took them to hospital and gave information to the police and



registered the complaint/Ex.P1 against the appellant.

7.2 The learned Government Advocate (Crl.Side) would further submit that the Doctor/P.W.13, who examined the victim girls has clearly deposed that the hymen of the victim girls were not intact and inflammation and contusion were found in mucous on both the victims and she gave Medical Certificate/Ex.P21 and Final Opinion/Ex.P22 for P.W.2 and P.W.3, which clearly shows that the victim girls were subjected to sexual assault. The victim girls were produced before the learned Judicial Magistrate for recording their statements under Section 164 Cr.P.C/Exs.P2 and P3, in which, P.W.2 has clearly stated that her father took her to Perumayee's house and assaulted her and her sister/P.W.3 on their private parts using his hands. Therefore, the evidence of the victim girls/P.W.2 and P.W.3 were corroborated with the medical evidence P.W.13, Ex.P21 and Ex.P22 and hence, the prosecution has proved its case beyond all reasonable doubt. Since the victims were below the age of 12 years, the trial Court has rightly appreciated the entire evidence and convicted and sentenced the appellant, 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 final Court of fact finding, which has to necessarily re-appreciate the entire evidence and give an independent finding.

10.Admittedly, on the date of occurrence i.e. 20.11.2016, the age of the victim girls is 8 and 6 years, respectively. In order to prove the age of the victim girls, the prosecution has produced the copy of the birth certificates/Exs.P4 and P5, which clearly show that the date of birth of P.W.2 and P.W.3 is 24.12.2008 and 02.04.2010, respectively, whereas, the date of occurrence is 20.11.2016. Therefore, on the date of occurrence the age of the victim girls are 8 and 6, respectively. Since the victim girls are minors, it falls under definition of Section 2(1) (d) of POCSO Act.

11.In order to prove the charges against the appellant, the prosecution totally examined 16 witnesses as P.W.1 to P.W.16, out of which, victim girls were examined as P.W.2 and P.W.3, respectively and they have clearly spoken about the penetrative sexual assault committed on them by their father. The mother of the victim girls was examined as P.W.1 and she has clearly spoken about the complaint filed against the appellant. P.W.9/Doctor, who made entries in Accident Register and referred the victims for further treatment and examination.



P.W.13/Doctor, who conducted medical examination on the victim girls gave her evidence, which clearly shows that hymen of the victim girls were not intact and found reddishness in the private part of the victims. Therefore, the evidence of the victims P.W.2 and P.W.3 are corroborated with the evidence of the medical evidence i.e P.W.13, Ex.P21 and Ex.P22. P.W.2/victim girl has clearly narrated the said incident before the learned Judicial Magistrate for recording her statement under Section 164 Cr.P.C./Ex.P2.

12.The learned counsel for the appellant vehemently contended that P.W.1/mother of the victim girls has stated that in the presence of other witnesses the appellant alleged to have committed the said offence, but, the prosecution has not examined the witnesses, who were named by P.W.1. In the present case, the age of the victims are 8 and 6 years, respectively and they have clearly spoken about the said incident before the Doctor, but, Doctor/P.W.9 in his own language he mentioned in the Accident Register as 'attempt to rape', for which, the victims cannot be faulted. Further, P.W.13/Doctor has clearly stated that hymen of the victim girls were not intact and found reddishness in the private part of the victims. Therefore, mere non-examination of other witnesses may not be a sole ground to disbelieve or discard the evidence of the victims.

13. Further, there is no dispute regarding identification, the victim girls/P.W.2 and P.W.3 have clearly stated that the appellant, who is none other than their father sexually assaulted them. Further, mere lapse on the part of the investigation may not be a reason for disbelieving the evidence of the victim girls and the accused cannot be acquitted on the said ground.

14.It is a well settled proposition that defects in the investigation cannot be a sole ground to disbelieve the case of the prosecution. Lapse on the part of the prosecution should not lead unmerited acquittal, which is subjected to rider and in such a situation evidence on record should be clinching, so that lapse of prosecution can be condoned. Therefore, the appellant is not entitled to get acquittal on the ground of defective prosecution.

15.Though the prosecution has not properly conducted the investigation and not properly followed the legal procedures contemplated under POCSO Act, it is fate of the litigant public, for which, the victims cannot be suffered and the culprits should not be escaped from the clutches of law. Further, the contradictions pointed out by the learned counsel for the appellant are not material contradictions and it will not affect the case of the prosecution.



16. It is settled proposition that a conviction can be recorded based on the evidence of victims/injured witnesses, unless there is a reason to discard their evidence. In the present case, the evidence of the victims are cogent, consistent, convincing and trustworthy and there is no reason to disbelieve or discard their evidence.

17. Though the learned counsel for the appellant vehemently contended that no father would go to the extent of misbehaving with her children, P.W.1 tutored the victim girls against their father and made a false complaint. In the very same view, no daughter would give a false information against her own father. Further, the evidence of P.W.1 clearly shows that when she doubted about the character of her husband/appellant, she left the appellant's first wife daughter, who is aged about 18 years at her relatives house. Since P.W.1 not co-operated for intimacy with the appellant, he gone to that extent and committed the said offence. This Court cannot encourage this type of offences, it will endanger to the society. Therefore, this Court is of the opinion that the evidence of the victim girls are cogent and trustworthy and the same was corroborated with the evidence of medical evidence and there is no reason to discard the evidence of the victim girls. The evidence of the victim girls inspires the confidence of this Court.

18. Further, the scope of POCSO Act is very clear. For better appreciation, it is appropriate to extract Sections 2(1) (d), 3 (a) and (b), 5 (m) and (n) and 6 of POCSO Act, which read as follows:

' 2. Definitions - (1) In this Act, unless the context otherwise requires, -

(d) 'child' means any person below the age of eighteen years;

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

5. Aggravated penetrative sexual assault -



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(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

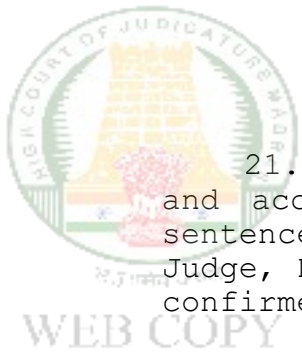
6. Punishment for aggravated penetrative sexual assault -

(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous 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, or with death.

(2) 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.''

19. On a combined reading of Section 3(b) of POCSO Act, the evidence of victim girls/P.W.2 and P.W.3, especially statement of P.W.2 recorded under Section 164 Cr.P.C/Ex.P2, Doctor/P.W.13 this Court finds that the prosecution has proved its case beyond all reasonable doubt that the appellant being a father has committed penetrative sexual assault on her own daughters under Section 3(b) of POCSO Act. Since the victims are below 12 years, it falls under Section 5(m) and (n) which are punishable under Section 6 of POCSO Act.

20. In the light of the above facts and circumstances, this Court being an Appellate Court, gone through the entire materials and applied its own mind and found that the appellant committed the offence under Section 3(b), since the victims are below 12 years the offence falls under Section 5(m) of POCSO Act and the appellant is a relative of the victims the offence falls under Section 5(n) of POCSO Act which are punishable under Section 6 of POCSO Act. Hence, this Court does not find any perversity in the judgment of the trial Court and the appeal is liable to be dismissed. Considering the relationship between the victims and the appellant, this Court does not find any mitigating circumstances to modify or reduce the sentence of the appellant.



21. In fine, this Criminal Appeal deserves to be dismissed and accordingly, the same is dismissed. The conviction and sentence passed in Spl.S,C.No.20 of 2018 by the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court) Erode is confirmed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Magalir Neethi Mandram
(Fast Track Mahila Court)
Erode.
2. The Superintendent,
Central Prison,
Coimbatore.
3. The Inspector of Police,
All Women Police Station,
Erode, Erode District.
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 Hon'ble POCSO Committee,
High Court, Madras-104.

+1cc to Mr.N.Manoharan, Advocate, S.R.No.38926

CRL.A.No.132 of 2020

RLD(CO)
PM/06/01/2022