

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.03.2021

CORAM :

THE HONOURABLE MR. JUSTICE P. VELMURUGAN

Crl.A.No.596 of 2019

Chinnamarimuthu

... Appellant

Vs.

State represented by
The Inspector of Police,
All Women Police Station,
Kangayam. .. Respondent

Prayer: Criminal Appeal filed under Section 374(2) Cr.P.C.,
praying to set aside the judgment of conviction and sentence
dated 22.01.2019, passed by the learned Judge, Fast Track
Mahila Court, Tiruppur in Spl. S.C.No.14 of 2016.

For Appellant : Mr.Durai Kannan
Legal Aid Counsel
For Respondent: Mr.R.Suryaprakash
Government Advocate (Crl. Side)

J U D G M E N T

This Criminal Appeal has been filed against the
conviction and sentence passed by the learned Judge, Fast
Track Mahila Court, Tiruppur in Spl.S.C.No.14 of 2016 dated
22.01.2019.

2. Heard Mr.Durai Kannan, learned Legal Aid Counsel for
the appellant and Mr.R.Suryaprakash, learned Government
Advocate appearing on behalf of the respondent police.

3. The respondent police had registered a case in
Cr.No.12 of 2015 against the accused for the offences under
Sections 365 & 366 (A) IPC. After completing investigation,
the charges were framed for the offences under Section 363
IPC and under Sections 5(1) r/w. 6, 5(n) r/w.6 of the
Protection of Children from Sexual Offences Act, 2012 against
the first accused and under Sections 16 r/w. 17 of the
Protection of Children from Sexual Offences Act, 2012
(hereinafter referred to as "POCSO Act") against the present
appellant/second accused.

4. After completing the investigation, the respondent Police laid a charge-sheet before the Fast Track Mahila Court, Tiruppur. Since the offence falls under POCSO Act, 2012, the learned Judge has taken cognizance of the charge-sheet in Spl.S.C.No.14 of 2016.

5. After completing the formalities, the learned Judge framed charges against the present appellant for the offences punishable under Sections 16 r/w. 17 of the POCSO Act.

6. After trial, the learned Judge, Fast Track Mahila Court, Tiruppur convicted the appellant herein for the offences punishable under Sections 16 r/w. 17 of the POCSO Act and sentenced him to undergo Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.15,000/-, in default of payment of fine to undergo Rigorous Imprisonment for a further period of 2 years.

7. After framing charges and in order to prove the case on the side of the prosecution, 13 witnesses were examined and 21 documents were marked and material object M.O.1 was exhibited.

8. After completing the prosecution evidence, the incriminating circumstances culled out from the prosecution witnesses were put before the appellant. He denied the same as false. However, on the side of the appellant, no oral or documentary evidence was produced.

9. After considering the evidence on record and hearing on either side, the learned Judge, by judgment dated 22.01.2019 in Spl. S.C.No.14 of 2016, convicted the first accused for the offences under Section 363 IPC and under Sections 5(1) r/w. 6 of the POCSO Act and sentenced him to undergo 7 years rigorous imprisonment along with a fine of Rs.5,000/- in default of payment of fine, to undergo a further period of one year for the offence under 363 IPC and sentenced him to undergo 10 years rigorous imprisonment along with fine of Rs.15,000/- in default of payment of fine to undergo rigorous imprisonment for a further period of 2 years for the offence under Section 5(1) r/w. 6 of the POCSO Act and convicted the present appellant/ second accused for the offences under Sections 16 r/w.17 of the POCSO Act and sentenced him to undergo 10 years rigorous imprisonment along with a fine of Rs.15,000/- in default of payment of fine to undergo rigorous imprisonment for a further period of 2 years.

10. Challenging the said conviction and sentence of 10 years rigorous imprisonment with a fine of Rs.15,000/-, in default of payment of fine to undergo 2 years rigorous imprisonment passed by the trial Court, the second accused has filed the present appeal before this Court.

11. The learned counsel for the appellant would submit that the appellant is not a prime accused in this case and the charges framed against him are for the offences under Sections 16 r/w. 17 of the POCSO Act. The appellant has nothing to do with the alleged offences and no witnesses have spoken about the specific overt act against this appellant, except the victim girl in the statement recorded under Section 164 Cr.P.C., has spoken about him. In the 164 Cr.P.C., statement also, she has not stated anything against the appellant but stated that the first accused has introduced the second accused/appellant herein. Whereas during chief examination, she has spoken about the appellant which is only a contradiction. When the victim girl during the statement recorded under 164 Cr.P.C. has not spoken anything wrong about the appellant and subsequently she has spoken about the appellant in the chief examination to the effect that he has facilitated the first accused for commission of the offence and therefore, the same seems to be material contradictions. Based on the sole statement of the victim girl against the appellant which is a material contradictions cannot be considered and also the allegations levelled against the appellant does not falls under Section 16 of the POCSO Act, it may either be under Section 109 IPC or under Section 29 of the POCSO Act. There is no mens-rea and the prosecution has not proved the appellant had mens rea and intended to abet the victim or any inducement to commit the aforesaid offences. Even arrest of the accused is doubtful and the place of arrest has also not been established by the respondent police. Therefore, the prosecution has foisted a false case against the appellant. In support of his contentions, he has placed reliance on the decision of the High Court of Bombay in the case of Asha Patil Vs. The State of Maharashtra reported in 2019 ALLMR (Cri) 4789 and has stated that the appellant has not committed any offences under Sections 16 r/w 17 of the POCSO Act as he has not instigated or committed any offence of abetment. Therefore, the decision referred supra is squarely applicable to the present case on hand and further, he has also relied upon the judgment of the High Court of Uttarakhand at Nainital in the case of Anuradha Dalmia Vs. State of Uttarakhand and others [Manu/UC/0256/2019].

12. Further, the learned counsel for the appellant submitted that the prosecution has failed to prove that the appellant has abetted for the offence committed by the first accused and therefore, the learned Judge has failed to appreciate the evidence and also the legal ingredients of Section 16 of the POCSO Act which has not been made out in the case on hand and wrongly convicted and sentenced the present appellant equally to the prime accused and therefore, the judgment of the trial Court as far as this appellant is concerned, is liable to be set aside and the appellant should be acquitted.

13. The learned Government Advocate (Crl. Side) on the other hand would submit that the age of the victim girl is only 14 years on the date of occurrence. When the victim girl went to the school, the first accused took the victim girl from there with the assistance of the second accused. Thereafter, the second accused facilitated the first accused to stay with the victim girl in his room and left for his work. The first accused had forceful sexual intercourse with the victim girl. Based on the complaint given by the victim's parents, police rescued the victim girl and arrested the accused and the victim girl was produced before the learned Judicial Magistrate, who recorded the statement under 164 Cr.P.C. Even at that time, she had clearly stated that the first accused forcefully had sexual intercourse with her and when she informed the same to the appellant herein and asked him to threatened the first accused and send her back to the house, he refused to do so. Further, during the examination, she has clearly stated that the first accused after taking the victim girl, the present appellant only facilitated them to stay in his room and they stayed there and at that time, inspite of her resistance, the first accused had sexual intercourse with her and when she informed the same to the present appellant and asked him to make arrangements to send her to her parents' house, he refused to do so. Therefore, the specific overt act against the appellant herein falls under Explanation II of Section 16 of the POCSO Act and therefore, the trial Court had rightly convicted the appellant. The decisions referred to by the learned counsel for the appellant are not applicable to the present case on hand. On considering the evidence, it is obvious that she informed about the sexual assault made by the first accused to the appellant but he has not taken any steps to her complaint or questioned the first accused in this case. Even after the victim girl had informed about the sexual assault made by the first accused and requested the appellant to send her back to her parents, he did not make any arrangements for her to return to her home. On receiving the information about the occurrence, the case has been registered by the police, he has not taken any steps either to produce the victim girl before the police or hand over the victim to her parents but he facilitated the first accused to abscond from the scene of occurrence and hence, the decisions cited by the learned counsel for the appellant are not applicable in the case on hand.

14. Heard the learned counsel on either side and perused the materials available on record.

15. 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.

16. Admittedly, the appellant herein is the second accused in this case and the prime accused is the first accused. It is brought to the notice of this Court that the first accused has not filed any appeal. The appellant/second accused has been charged with the offence that he has abetted the first accused to abduct the victim girl and assisted the first accused to commit the offences under Sections 363 IPC and under Section 5(1) r/w. 6 of the POCSO Act and therefore, the charge as against the present appellant is for abetment for which reading of the evidence of P.W1/victim girl clearly reveals that she has gone to school on the date of occurrence on 02.12.2015 at 9.00 a.m. and the first accused along with the appellant herein took the victim girl. Since the victim girl has not returned home, her parents gave complaint. After taking the victim girl along with the first accused, the appellant had only made arrangements for them to stay in the place of occurrence. During their stay, the first accused had sexual intercourse with the victim girl and when she informed the same to the appellant and asked him to threaten the first accused and also to make arrangements to send her back to her parents, the appellant refused to do so. Even after receiving the information from the villager in regard to registration of case by the police and they are tracing them, he facilitated the first accused to escape from the scene of occurrence. Evidence of P.W.1 and also the statement recorded by the learned Judicial Magistrate clearly states that when the appellant abetted the first accused to abduct the victim girl near her school, she was only 14 years old for which the prosecution marked Ex.P8/age certificate to prove her age. From the evidences of P.W.1/victim girl and also the doctor, it is clear that the victim girl has been subjected to sexual assault by the first accused. Independent witnesses cannot be produced in the case of this nature but however the prosecution has established their case through victim girl, doctor and the proof of age certificate which clearly establishes that the age of the victim girl is 14 years when she was removed from the custody of the natural and lawful guardian/parents. As per the evidence of P.W.1, the first accused took the victim girl along with the present appellant. The present appellant has made arrangements for their stay in his place and subsequently, when the victim girl informed him about sexual assault by the first accused and requested to allow her to go home, he failed to do so. Subsequently when he received information about registration of case and search of police to arrest the accused, he also made arrangements to escape the first accused from the scene of occurrence. Therefore, the prosecution has clearly established that the appellant has abetted the first accused to commit the offence under Sections 363 IPC and under Sections 5(1) r/w. 6 of the POCSO Act and therefore, the commission of the offence made by this appellant would falls under Explanation II of Section 16 of the POCSO Act. This Court also affirms the findings of the trial Court that the appellant had committed the offence under Sections 16 r/w.17 of the POCSO Act. Considering the facts

and circumstances of the case, the decisions referred to by the learned counsel for the appellant are not applicable to the present case on hand. The facts and circumstances narrated in the present case is entirely different and there is no question of abetment by illegal omission or intentional aid. In this, the victim girl has clearly stated that the first accused took her near the school and the appellant only facilitated for their stay in his place and left for night shift. Thereafter, on the next day when the victim girl informed him regarding sexual assault made by the first accused and sought his help to send her back to her parents but he failed to do so. Subsequently, after getting information about registration of case, he also facilitated the first accused to escape from the scene of occurrence. Though the learned counsel for the appellant had contended that the appellant has no mens rea, it is clear that if any abetment facilitated intentionally it would fall under Section 16 of the POCSO Act. At the outset, it is necessary to reproduce Explanation II of Section 16 of the POCSO Act, which reads as follows:

"16. Abetment of an offence :- A person abets an offence; or

...

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. ..."

17. In this case, the appellant knew that the first accused brought the victim girl, who was aged only about 14 years and if he has no intention to facilitate the first accused, certainly, he would have warned the first accused and would have not given any accommodation. Even assuming that he innocently allowed them to stay in his room and subsequently when the victim girl had informed him about the sexual assault of the first accused, he would have taken steps to hand over the victim girl to the parents but he failed to do so. After knowing about the complaint given by her parents, he facilitated to escape the first accused from the scene of occurrence. The appellant with an intention facilitated the first accused to commit the sexual assault which falls under Section 5(1) r/w. 6 of the POCSO Act. Therefore, the decisions referred to by the appellant are not applicable so far as Section 29 of the POCSO Act is concerned, which is no doubt rebuttable. But in this case, the appellant has abetted the first accused to commit the offences on the victim girl and also made arrangements to the first accused to escape from the scene of occurrence and the appellant has not rebutted the presumption to commit such offence. Therefore, the trial Court has rightly convicted the appellant for the offence under sections 16 r/w.17 of the POCSO Act for the offence of

abetment. Under these circumstances, this Court can safely come to the conclusion that the appellant has committed the offence under Sections 16 r/w.17 of the POCSO Act and therefore, the prosecution has established its case beyond reasonable doubt. In the light of the above discussion, this Court does not find any merit in this appeal and the appeal is liable to be dismissed.

18. Accordingly, this Criminal Appeal is dismissed and the judgment of conviction and sentence passed by the trial Court is hereby confirmed. State Legal Services Authority is directed to pay the remuneration to Mr.Duraikannan, the learned Legal Aid Counsel as per Legal Aid Services Authority Rules.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

DP
To

1.The Fast Track Mahila Court,
Tiruppur.

2.The Inspector of Police,
All Women Police Station,
Kangayam.

3.The Public Prosecutor,
High Court, Madras.

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

5.The Member Secretary,
State Legal Services Authority, Madras

6.The Superintendent,
Central prison, Coimbatore.

Crl.A.No.596 of 2019

AK(CO)
B.VC(14.07.2021)