

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.02.2021

Delivered on : 19.04.2021

CORAM :

THE HONOURABLE MR. JUSTICE P. VELMURUGAN

Crl.A.No.170 of 2020  
and  
Crl.M.P.No.3125 of 2020

Palanivel ... Appellant/Accused  
S/o.Thavidan

Vs.

State represented by  
Inspector of Police,  
All Women Police Station,  
Neyveli.(Crime No.2/2018) ... Respondent/Complainant

Criminal Appeal filed under Section 378 Cr.P.C.,  
praying to set aside the judgment of conviction and sentence,  
dated 18.02.2020, in Spl.S.C.No.34 of 2019, on the file of the  
Special District and Sessions Judge (under POCSO Act),  
Cuddalore.

For Appellant : Mr.T.Saravanan  
(Legal Aid Counsel)

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

J U D G M E N T

This Criminal Appeal is filed against the judgment of  
conviction and sentence, dated 18.02.2020, in Spl.S.C.No.34 of  
2019 on the file of the Special District and Sessions Court  
(under POCSO Act), Cuddalore.

2.The respondent police originally registered a case  
in Crime No.2 of 2018 against the appellant for the offences  
punishable under Section 4 of the Protection of Children from  
Sexual Offences Act, 2012 ("POCSO Act" for brevity) and  
Section 506(i) IPC. After enquiry, the case was altered to  
Sections 3 r/w. 4 of POCSO Act and Section 506(i) IPC. After  
completing the investigation, the respondent police laid a  
charge-sheet against the appellant, before the Special Court,  
since the offences are against women, particularly child under  
the definition of POCSO Act. The learned Special Judge had  
taken the case on file in Spl.S.C.No.34 of 2019.

3.After completing the formalities, the learned Special Judge framed the charges for the offences under Sections 450 and 506(ii) IPC and for the offence punishable under Section 4 of the POCSO Act, against the appellant.

4.After framing the charges, in order to prove the case of the prosecution, on the side of the prosecution, during trial, as many as 9 witnesses were examined as P.W.1 to P.W.9 and 9 documents were marked as Exs.P1 to P9 and no Material Object was exhibited.

5.After completing the trial and hearing of the arguments advanced on either side and considering the material facts, the trial Court acquitted the appellant for the offence under Section 450 IPC, but found the appellant guilty of the offences punishable under Section 506(ii) IPC and Section 4 of the POCSO Act and convicted and sentenced him as follows :

| Provision under which convicted       | Sentence                                                                                                                  |
|---------------------------------------|---------------------------------------------------------------------------------------------------------------------------|
| Section 506(ii) IPC                   | Rigorous Imprisonment for three years and a fine of Rs.500/-, in default, to undergo Rigorous Imprisonment for one month  |
| Section 4 of POCSO Act                | Rigorous Imprisonment for eight years and a fine of Rs.1,500/-, in default, to undergo Rigorous Imprisonment for one year |
| The sentences shall run concurrently. |                                                                                                                           |

6.Challenging the said conviction and sentence, the appellant/accused has filed the present appeal before this Court.

7.The learned counsel appearing on behalf of the appellant/accused would submit that the alleged occurrence is said to have taken place on 12.02.2018, but the complaint was filed only on 05.07.2018, after an inordinate delay of nearly five months from the date of alleged occurrence, however, the delay has not been properly explained, and after discussion and deliberation, a false complaint was filed against the appellant, and the prosecution has also foisted a false case against the appellant. The trial Court failed to consider the inordinate delay in filing the complaint and wrongly convicted the appellant.

8.The learned counsel appearing for the appellant would further submit that there are material contradictions between the prosecution witnesses, and further, the medical evidence has not supported the case of the prosecution. The evidence of the Doctor, who conducted the medical examination of the victim girl, was examined as P.W.6, and he has stated that there was no external injury found

on the body of the victim girl and that the victim girl was not having any symptom of having sexual intercourse, and at the time of the examination of the victim girl, she was not pregnant and the hymen was intact. The trial Court failed to consider the medical evidence and wrongly convicted the appellant. The evidence of the mother of the victim girl (P.W.1), the father of the victim girl (P.W.3) and the Mediator of the village (P.W.4) are not trustworthy for the reason that they are close relatives to the victim girl and they are only interested witnesses. The evidence of P.W.1 to P.W.4 are only uncorroborated evidence and are also conflicting each other, throwing suspicion on the case of the prosecution. There is no evidence connecting the appellant with the commission of rape on the victim girl. The evidence of the Doctor (P.W.6) also does not prove the case of the prosecution.

9.The learned counsel appearing for the appellant would further submit that, though a statement was recorded under Section 164 Cr.P.C. from the victim girl before the learned Magistrate, the same was not marked before the Court, since the victim girl has not stated anything about the appellant in that statement. Therefore, the prosecution has suppressed the same and withholding of the material documents is fatal to the case of the prosecution.

10.The learned counsel appearing for the appellant would further submit that there is no evidence to show that the appellant had committed penetrative sexual assault on the victim girl. Once the evidence produced by the prosecution not proved the ingredients, no presumption can be drawn under Section 29 of the POCSO Act. The prosecution has not proved the guilt of the appellant beyond reasonable doubt. The trial Court failed to appreciate the oral and documentary evidence, particularly the medical evidence, and wrongly convicted the appellant. Though the trial Court has rightly not believed the case of the prosecution for the offence under Section 450 IPC and acquitted the appellant, it ought to have acquitted the appellant for the other offences also. Therefore, the judgment of conviction and sentence passed by the trial Court warrants interference.

11.The learned Government Advocate (Crl. Side) appearing on behalf of the respondent police, would submit that the victim girl was aged about only 16 years at the time of occurrence. The appellant is a relative of the victim girl and taking advantage of the relationship and with an intent to have sexual intercourse with the victim girl, in the absence of other persons in the house of the victim girl, when the victim girl was alone, he entered into the house of the victim girl and forcibly had sexual intercourse with her and threatened her not to disclose it to anyone else, and if she discloses, he would kill her, and in such a way, he has committed the offence for about nine times, since the parents

of the victim girl were not in the house and they were working as Coolie in the brick kiln at Virudhachalam. Though the occurrence had taken place in the month of February, 2018, the parents of the victim girl came to their house for the Chithirai Festival during April, 2018, and only at that time, the victim girl informed her parents about the occurrence, and in turn, the parents of the victim girl informed the same to the elders of the village, and when they questioned the same, the appellant escaped and absconded from the place. Therefore, left with no other option, the family of the victim girl gave a complaint before the Police.

12.The learned Government Advocate (Crl. Side) would further submit that the victim girl was produced before the Medical Officer, who was examined as P.W.6, and she (P.W.6) has clearly stated that, when the victim girl was brought for medical examination, the victim girl informed her that a known person, for about nine times, had sexual intercourse with her. Though the Doctor (P.W.6) has stated that no injury was found on the body of the victim girl and the hymen was intact, she has admitted in her evidence that, if a minor girl with immature growth is subjected to sexual intercourse, there is a possibility of the hymen being intact. However, the victim girl (P.W.2) has clearly stated that the appellant had sexual intercourse with her, and therefore, even though there was no injury and the hymen was intact as per the opinion of the Doctor (P.W.6), sometimes, it is also possible. Merely because the hymen was intact, one cannot say that there was no sexual intercourse.

13.The learned Government Advocate (Crl. Side) would further submit that P.W.4, who is the Mediator of the village, has clearly deposed that the victim girl's parents informed him about the occurrence, and they went to the house of the appellant and they questioned the appellant, for which, the appellant stated that he does not know anything and he had not done anything. Therefore, subsequently, the elders of the village advised the parents of the victim girl to give a complaint before the Police. The victim girl was examined as P.W.2; the mother of the victim girl was examined as P.W.1; and the father of the victim girl was examined as P.W.3. Therefore, from the evidence of P.W.1 to P.W.4 and P.W.6, the prosecution has proved its case beyond reasonable doubt. Since the victim girl had not completed 18 years of age at the time of occurrence, she was a "child" under Section 2(1)(d) of the POCSO Act. Since the appellant has committed penetrative sexual assault on the victim girl, he has committed an offence under Section 3(a) of the POCSO Act, punishable under Section 4 of the POCSO Act.

14.The learned Government Advocate (Crl. Side) would further submit that, since the appellant threatened the victim girl not to reveal about the occurrence to anyone, the victim girl did not inform her parents immediately, as they were also

not in the house due to their work, and thereafter, after their arrival, she informed them about the incident. Therefore, the delay in filing the complaint has been properly explained and therefore, the prosecution has proved its case beyond reasonable doubt, and the trial Court has properly appreciated the entire oral and documentary evidence, as well as medical evidence, and has rightly convicted the appellant for the offences as stated above, and therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

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

16. The case of the prosecution is that, on 12.02.2018 at about 01.00 p.m., when the victim child, who was a minor born on 13.06.2003, was alone in the house and her parents had gone for their work at a brick kiln situated at Virudhachalam, the appellant went to the house of the victim girl, with a mala fide intention to have sexual intercourse with the minor victim child, and had forcible sexual intercourse with her, and threatened her, if she fails to accede to his demand, he would kill her and he would also die, and by saying so, he had forcible sexual intercourse with the victim child. Hence, the appellant has committed the offences punishable under Sections 450 & 506(ii) IPC and Section 4 of the POCSO Act.

17. After completing the investigation, the respondent police filed a charge-sheet before the Special Court and the learned Special Judge had taken the case on file in Spl.S.C.No.34 of 2019.

18. The trial Court framed the charges against the appellant as stated supra. When questioned, the appellant pleaded "not guilty".

19. In order to prove the case of the prosecution, on the side of the prosecution, 9 witnesses were examined and 9 documents were marked.

20. After completing the examination of the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant and he denied the same as false. On the side of the defence, no oral or documentary evidence was produced.

21. After hearing the arguments advanced on either side and considering the evidence on record, the trial Court, by judgment dated 18.02.2020, in Spl.S.C.No.34 of 2019, acquitted the appellant for the offence under Section 450 IPC, however, convicted and sentenced the appellant for the offences punishable under Sections 506(ii) IPC and Section 4 of the POCSO Act, as stated above.

22. Challenging the conviction and sentence, the

accused/appellant has preferred the appeal before this Court.

23.This Court, being an Appellate Court, is a fact finding Court, and it has to give its finding independently after appreciating the entire evidence. Accordingly, this Court has re-appreciated the entire evidence.

24.The victim was a minor at the time of occurrence and she had not completed 18 years and her Date of Birth is 13.06.2003. In order to prove her age, the certificate obtained from the Head Master of the school, in which the victim girl was studying, was marked as Ex.P7. As per Ex.P7, the Date of Birth of the victim girl is 13.06.2003, and further, in order to substantiate Ex.P7, the prosecution marked a copy of the "Register of Admissions and Withdrawals" and it was marked as Ex.P9, which shows that the victim girl was studying in Government Higher Secondary School, Iruppu, Cuddalore District. Further, the Doctor (P.W.6), who examined the victim girl, has also stated that the age of the victim girl was 16 years, and therefore, the prosecution has proved that, at the time of occurrence, the victim girl had not completed 18 years of age, and therefore, she is a "child" under the definition of Section 2(1)(d) of the POCSO Act.

25.In order to prove the commission of offence, the victim child was examined as P.W.2. On a careful reading of the evidence of the victim child (P.W.2), it is seen that she has clearly narrated the incidents. Further, the evidence of the mother of the victim child (P.W.1) and also the father of the victim child (P.W.3), would clearly establish that the appellant is the brother of the wife of the brother of the victim child, and in the absence of the other family members, on 12.02.2018, when the victim child was alone in the house, at about 01.00 p.m., the appellant entered into the house of the victim child and he tried to have sexual intercourse with the victim child; when she denied, the appellant threatened the victim child and had forcible sexual intercourse with her, and even after that, he threatened her not to reveal it to anyone. The victim child (P.W.2) has stated that the parents of the victim girl were not there and they were working as coolie in a brick kiln situated at Virudhachalam; they came to the house only in the month of April, 2018, and subsequently, she informed her parents about the incident, and the parents, due to close relationship, informed the matter to the elders of the village and they approached the appellant, and when they questioned, the appellant denied the same; hence, they advised her family members to prefer a complaint before the Police, and accordingly, they went and gave a complaint before the Police.

26.Though the date of occurrence is 12.02.2018 and the date of complaint is 05.07.2018, the reason for the delay has been properly explained, since at the relevant point of time, the parents were not in the house and the appellant threatened

the victim child not to reveal it to anybody. Even after coming to know about the occurrence, the parents of the victim child initially informed the same to the villagers and they also tried to pacify the matter due to the close relationship between their family and the appellant. Since the appellant denied the commission of offence and was not ready to accept the words of the elders, the parents of the victim child were advised by the village elders to give a complaint before the Police.

27. Generally, in cases like this, especially in villages, particularly between the relatives, considering the future of the victim girl and also the reputation of the family, the family members would initially try their best to pacify the matter, and only when it is not possible to arrive at a settlement through peaceful talks, then they will go for a complaint before the Police. The case on hand is one like that. In the present case, it is an admitted fact that the appellant is the brother of the wife of the brother of the victim child, and therefore, he is a relative to the family of the victim child and there is every possibility of easy access to the house of the victim child. After the victim child informed her parents about the incident, the parents did not immediately approach the Police, and at the first instance, they tried to pacify the matter with the help of the village elders. But, when the appellant categorically denied the commission of offence, left with no other alternative, the parents of the victim child preferred a complaint before the respondent Police. Therefore, the delay in filing the complaint has been properly explained and the same is convincing, and hence, the delay in filing the complaint, in this case, is not fatal to the case of the prosecution.

28. Further, as far as the penetrative sexual assault is concerned, the victim child (P.W.2) has stated that the appellant entered into the house and at that time, no one was there, and he tried to have sexual intercourse with her, and the victim child refused the same, and she was threatened by the appellant and thereby, the appellant had forcible sexual intercourse with her. Even subsequent to that, the appellant threatened the victim child not to reveal the same to anyone. The evidence of P.W.1 and P.W.3 (parents of the victim child) also shows that they were not present in the house at the time of occurrence, and subsequently, when they came there, their daughter informed them about the occurrence, and she also gave the reason for the belated information. P.W.4, who is an independent witness, who is a Mediator of the Village, has also spoken about the intimation given by the parents of the victim child and thereafter, they approached the appellant and tried to resolve the matter, however, the appellant denied. Therefore, from the evidence of P.W.1 to P.W.4, the prosecution has proved that the appellant has committed penetrative sexual assault on the victim child. Though there are contradictions between the prosecution witnesses, viz., P.W.1 to P.W.4, the contradictions are not material

contradictions which will go to the root of the case of the prosecution.

29. Further, the Doctor (P.W.6), who had conducted the medical examination of the victim girl, in her evidence, has stated that no external injury was seen on the body of the victim child and she was a virgin, however, she has opined that, if a man has sexual intercourse with a not- fully grown up girl, there is a possibility of the hymen was remaining intact and not torn. Further, it is well settled position of law that, when the medical evidence differs from the ocular evidence, the ocular evidence is to be given effect to, and the ocular evidence prevails over the medical evidence. Even the Doctor (P.W.6) has mentioned in her evidence that, when the victim child was admitted for examination, the victim child informed her that she (victim child) was subjected to sexual intercourse by a known person for about nine times. Therefore, merely because the hymen was intact and no external injuries were found, the entire evidence of the victim child (P.W.2) cannot be thrown out.

30. Section 3 of POCSO Act reads as follows :

"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 with such person or any other person."

Mere penetration is sufficient to complete the commission of offence. Length of penetration is immaterial.

31. Therefore, from the evidence of P.W.1 to P.W.6, this Court finds that the appellant has committed the offences punishable under Section 4 of the POCSO Act and Section 506 (ii) IPC. The trial Court, after appreciating the entire oral and documentary evidence, has rightly convicted the appellant for the aforesaid offences, and this Court does not find any merit in the appeal, and therefore, the appeal is liable to be dismissed.

32. Accordingly, this Criminal Appeal is dismissed and the judgment passed by the trial Court, is confirmed.

Consequently, connected miscellaneous petition is closed.

33.The Legal Aid Counsel appearing on behalf of the appellant is entitled for fees as per Rules.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

mkn

To

- 1.The Sessions Judge,  
Special District and Sessions Judge (under POCSO Act),  
Cuddalore.
- 2.The Inspector of Police,  
All Women Police Station,  
Neyveli.
- 3.The Superintendent,  
Central Prison,  
Cuddalore.
- 4.The Public Prosecutor,  
High Court, Madras.
- 5.The Hon'ble POCSO Committee,  
High Court, Madras.
- 6.The Deputy Registrar |with a direction to send back the  
(Criminal Section), |original records to the trial Court,  
High Court, Madras. |if any, immediately

Copy To

The Secretary  
Legal Aid Section,  
High Court, Madras 600 104

+1cc to Mr.T.Saravanan, Legal Aid Counsel, S.R.No. 23467

Cr1.A.No.170 of 2020

EV(CO)  
GN(29/06/2021)