

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.03.2021

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.NO.195 OF 2020

AND

CRL.M.P.NO.3522 OF 2020

Mani

... Appellant

Vs.

State

Represented by Inspector of Police,
W13 - All Women Police Station,
Washermanpet,
Chennai - 14.

.... Respondent

Criminal Appeal filed under Section 374(2) Cr.P.C., praying to set aside the judgment of conviction and sentence passed against the appellant in the judgment dated 23.04.2019 passed in S.C.No.306 of 2017 by the Special Court for cases under POCSO Act, 2012/Mahila Court, Chennai - 600 104 and allow this Criminal Appeal.

For Appellant : Mr.M.Kaveri Selvam
(Counsel on record)
Mr.S.Krishnaprasad
(Legal Aid Counsel)

For Respondent : Mr.R.Suryaprakash
Government Advocate

J U D G M E N T

This Criminal Appeal has been filed against the judgment of conviction and sentence, dated 23.04.2019, passed in S.C.No.306 of 2017 on the file of the Special Court for cases under POCSO Act, 2012/Mahila Court, Chennai - 600 104.

2.The respondent police registered a case against the appellant in Crime No.8 of 2016 for the offence punishable under Section 6 of the Prevention of Children from Sexual Offences Act, 2012 ("POCSO Act" for brevity). After the investigation, the respondent police laid a charge sheet before the Special Court for cases under POCSO Act, 2012/Mahila Court, Chennai.

The learned Special Judge had taken the charge sheet on file in S.C.No.306 of 2017. After completing the formalities, the Special Judge framed a charge against the appellant for the offence punishable under Section 6 of the POCSO Act. After completing the trial and hearing the arguments advanced on either side, the Special Judge considered the materials and found the appellant guilty of the offence under Section 6 of the POCSO Act and convicted him and sentenced to undergo 10 years Rigorous Imprisonment with a fine of Rs.50,000/-, in default, to undergo further one year Rigorous Imprisonment.

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

4.The learned counsel appearing on behalf of the appellant would submit that there is enormous delay in filing the complaint and the prosecution has not given any explanation for the delay and the unexplained delay is fatal to the case of the prosecution. The FIR was registered at the instance of the de facto complainant on 03.07.2016. The statement of the victim child (P.W.1) under Section 164 Cr.P.C., which was marked as Ex.P1, was recorded on 13.07.2016, i.e., after a lapse of 10 days and the said delay has neither been properly explained by the complainant (P.W.2) nor by the Investigating Officer. Surprisingly, even the Magistrate who recorded the statement under Section 164(5) Cr.P.C. did not pose any question to the victim child (P.W.1) about the delay in making the statement. The Judicial Magistrate, who recorded the statement under Section 164(5) Cr.P.C. from the victim child, was not examined as witness before the trial Court. Therefore, there is every possibility of foisting a false case against the appellant.

5.The learned counsel appearing on behalf of the appellant would further submit that the evidence deposed by the victim child (P.W.1) suffers from material contradictions and discrepancies, and the same is highly improbable. On 13.07.2016, the victim child (P.W.1) had stated in her statement recorded under Section 164 Cr.P.C. that, on one day, the appellant had sexual intercourse with her while she was sleeping. Later, while tendering the evidence before the trial Court, the victim child (P.W.1) had deposed that she was subjected to sexual intercourse several times by the appellant. The victim child had never stated anywhere in her statement under Section 164 Cr.P.C. that she was subjected to sexual assault several times and this amounts to material contradiction. The evidence of the victim child (P.W.1) before the trial Court that she was subjected to sexual intercourse on several occasions, amounts to improvement and no explanation was offered by the victim child (P.W.1) for omitting to state the

same before the Magistrate while recording the statement under Section 164 Cr.P.C. During the cross-examination, the victim child (P.W.1) stated that it was the police who informed her that the appellant was the reason for her pregnancy.

6.The learned counsel appearing on behalf of the appellant would further submit that the evidence of the victim child (P.W.1) and the mother of the victim child (P.W.2) suffer from improbability, which raises serious doubt in their evidence. The victim child (P.W.1), who was aged about 15 years during the time of alleged occurrence, would have been intelligent enough to differentiate between right and wrong, and any prudent person will not believe the statement of the victim child that she being 15 years old educated girl did not know even that the alleged act was wrongful and if such an act had been committed by the appellant, she would have informed her mother, and surprisingly, the victim child (P.W.1) had never uttered anything about the alleged act to her mother (P.W.2). This contradiction on the part of the victim child (P.W.1) is highly improbable and unnatural which creates doubt in her evidence. The victim child, aged about 15 years, would have atleast realised if she were pregnant. She has gone to meet her mother on several occasions, and particularly on 02.07.2016, and atleast the mother would have noticed the changes in the physical structure of the victim child (P.W.1) if she was pregnant. However, the evidence of the mother of the victim child (P.W.2) goes to show that she did not know that her daughter was pregnant and the news of delivery was of shock to her. The victim child (P.W.1) had gone to hospital for regular check-up even few months before the date of alleged occurrence and it is equally surprising that the Doctor who treated the victim child (P.W.1) did not inform her that she was pregnant. Even as per the evidence of the victim child (P.W.1), on the date of alleged occurrence, she went to consult the Doctor at 08.00 a.m. due to stomach pain and one Dr.Jayapal, who treated her, did not inform her that she was pregnant. No prudent man will believe the evidence of the victim child (P.W.1) and her mother (P.W.2) that they did not even know that the victim child (P.W.1) was pregnant till she delivered the child. The learned counsel would submit that the trial Court failed to appreciate these aspects and simply convicted the appellant based on the evidence of the victim child (P.W.1) alone.

7.The learned counsel appearing on behalf of the appellant would finally submit that the DNA Test Report, which was marked as Ex.P8, cannot be considered as conclusive proof, and the said report also suffers from infirmities. The prosecution did not examine the aunt of the victim child, who is the wife of the appellant. The entire prosecution is devoid of merits and the

prosecution has failed to prove the case against the appellant by acceptable evidence. The trial Court failed to appreciate the entire oral and documentary evidence and simply convicted the appellant on the ground of sympathy. Therefore, the judgment of conviction and sentence is liable to be set aside.

8. Per contra, the learned Government Advocate appearing on behalf of the respondent Police would submit that the victim child (P.W.1) was only aged about 15 years at the time of occurrence and the appellant is a relative of the victim child (P.W.1). The appellant is the husband of the sister-in-law of the mother of the victim child. The victim child was staying in the appellant's house and studying 10th Std. at the time of occurrence. When the victim child and her mother were staying in the Housing Board quarters, it was demolished, and therefore, the mother of the victim child left the victim child in the appellant's house to continue her studies and she left the place and stayed separately. The victim child was going to school from the house of the appellant. During night hours, the victim child, appellant and his wife used to sleep in the same room and the victim child would sleep at the centre between the appellant and his wife. At that time, the appellant used to put his hands and legs on her. The victim child did not take it serious, and taking advantage of that, the appellant had sexual intercourse with the victim child on several occasions, and due to that, the victim child became pregnant and gave birth to a female baby.

9. The learned Government Advocate would submit that, on 03.07.2016, the victim child complained of stomach ache, when she was in the house of the appellant. The wife of the appellant took the victim child and admitted her in the R.S.R.M. Hospital, Chennai, and the Doctor who examined the victim child informed that the victim child was pregnant and subsequently, she gave birth to a female baby. The wife of the appellant informed the mother of the victim child, and she came to the hospital and after seeing the victim child, she gave complaint to the respondent police. The police, after investigating the matter, found that the appellant was the cause for the pregnancy of the victim child. Subsequently, DNA Test was also conducted and the Test Report was marked as Ex.P8, and the report reveals that the appellant is the biological father of the baby which was born to the victim child. The victim child was also produced before the Judicial Magistrate to record the statement under Section 164 Cr.P.C. and her statement was recorded by the Judicial Magistrate.

10. Therefore, the learned Government Advocate would submit that, from the reading of the evidence of the victim child (P.W.1), the mother of the victim child (P.W.2), the Doctor who

examined the victim child (P.W.3), and the Deputy Director (P.W.5), DNA Division, Forensic Sciences Department, Chennai, and also the statement recorded under Section 164 Cr.P.C. (Ex.P1), DNA Test Report (Ex.P8) and also the Accident Register (Ex.P4) recorded in the hospital, the prosecution has proved its case beyond all reasonable doubt. The appellant had committed repeated penetrative sexual assault on the victim child and the victim child was aged about only 15 years and has not completed 18 years and therefore, she is a child under the definition of Section 2(1)(d) of the POCSO Act, and therefore, the trial Court has rightly held that the appellant had committed offence of aggravated penetrative sexual assault under Section 5(1) of the POCSO Act, punishable under Section 6 of the POCSO Act, and convicted and sentenced him, and hence, there is no merit in the appeal.

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

12. The case of the prosecution is that the victim child was sent by her mother to her sister-in-law's house, who is the wife of the appellant, and since the appellant and her wife had no issues, they had also asked the victim child to stay in their house for her studies. On 03.07.2016, at 08.00 a.m., the victim child called her mother and told her that she had a stomach ache, and there was a bleeding, and subsequently, the sister-in-law of the mother of the victim child told her that the victim child was admitted in R.S.R.M. Hospital, Chennai. When the mother of the victim child went to the hospital, at that time, the sister-in-law of the mother of the victim child informed her that the victim child had delivered a female baby and the mother of the victim child got shocked and when she asked her daughter, she told her that she did not know that she was pregnant and the appellant was the cause for that and the mother of the victim child informed the police.

13. The police registered the case for the offence punishable under Section 6 of the POCSO Act against the appellant. After the investigation, the respondent police laid a charge sheet before the Special Court. The Special Court had taken cognizance of the charge sheet and framed a charge for offence punishable under Section 6 of the POCSO Act against the appellant. When questioned, the appellant pleaded "not guilty".

14. In order to prove the charge framed against the appellant, on the side of the prosecution, totally 8 witnesses were examined as P.W.1 to P.W.8, out of which, the victim child was examined as P.W.1, and 9 documents were marked as Exs.P1 to P9. No Material Object was exhibited.

15. 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 it as false and pleaded not guilty. On the side of the defence, no oral or documentary evidence was produced.

16. After considering the evidence on record and hearing arguments advanced on either side, the learned Special Judge, by judgment dated 23.04.2019 in S.C.No.306 of 2017, found the appellant guilty of the offence punishable under Section 6 of the POCSO Act and convicted and sentenced him as stated supra.

17. Challenging the judgment of conviction and sentence, the present appeal has been filed by the appellant/accused.

18. Since the Appellate Court is a fact finding Court, in order to give a finding independently, it has to re-appreciate the entire evidence.

19. During the deposition before the trial Court, the victim child (P.W.1) has clearly narrated the entire episode. The mother of the victim child was examined as P.W.2, and the Doctor, who admitted the victim child in the hospital during delivery, was examined as P.W.3. She (P.W.3) has deposed that the victim child gave birth to a female baby. P.W.5 is Deputy Director and Assistant Chemical Examiner to Government, Forensic Sciences Department, Chennai, who conducted DNA Test, has deposed that the report Ex.P8 was given by her after conducting the DNA Test. After giving complaint, the victim child was produced before the Judicial Magistrate to record statement under Section 164(5) Cr.P.C. The Judicial Magistrate also recorded her statement. The said statement was marked as Ex.P1. A reading of the said statement clearly shows that the appellant had penetrative sexual assault on the victim child on several occasions. Therefore, she got pregnant and subsequently gave birth to a female baby. The Birth Certificate of the victim child was marked as Ex.P2. As per Ex.P2, the age of the victim child was only 15 years at the time of occurrence, and the DNA Test Report was marked as Ex.P8.

20. Therefore, a combined reading of the evidence of P.W.1 to P.W.5 and Exs.P1 to P9, it is seen that the victim child, while she was studying 10th Std., was staying in the appellant's house, since the appellant is the husband of the sister-in-law of the mother of the victim child and they could not have any issues. Further, prior to the occurrence, both the victim child and her mother stayed in the Housing Board Apartments and since it was demolished, in order to continue the studies of the victim child, the mother of the victim child left the victim child with the appellant and his wife. The victim child was staying with

them. During night hours, the appellant had committed repeated penetrative sexual assault on the victim child, and due to that, the victim child, who is aged about only 15 years, became pregnant, and subsequently, gave birth to a female baby. The DNA Test Report (Ex.P8) and the evidence of P.W.5 clearly shows that the appellant is the biological father of the infant baby who was born to the victim child (P.W.1). As per the copy of the Birth Certificate (Ex.P2), the Date of Birth of the victim child was 29.04.2000 and the date of delivery of the female baby by the victim child is 03.07.2016. Therefore, the age of the victim child is only 15 years. Therefore, the victim is a child under the definition of Section 2(1)(d) of the POCSO Act and since the appellant has committed aggravated penetrative sexual assault on the victim child, he has committed the offence under Section 5 of the POCSO Act, which is punishable under Section 6 of the POCSO Act.

21. Therefore, considering the entire materials on record, this Court also finds that the appellant has committed the offence punishable under Section 6 of the POCSO Act and the trial Court has rightly appreciated the entire evidence and convicted the appellant and passed the sentence to undergo 10 years Rigorous Imprisonment as stated above.

22. This Court does not find any merit in the present appeal and the same is liable to be dismissed, and accordingly, the same is dismissed, and the judgment of conviction and sentence passed by the trial Court is confirmed. Consequently, connected miscellaneous petition is also dismissed.

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

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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Copy to :

1. The Sessions Judge,
Special Court for cases under POCSO Act, 2012
(Mahila Court),
Chennai - 600 104

2. The Inspector of Police,
W13 - All Women Police Station,
Washermanpet,
Chennai - 14.

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 Superintendent,
Central Prison,
Puzhal, Chennai.

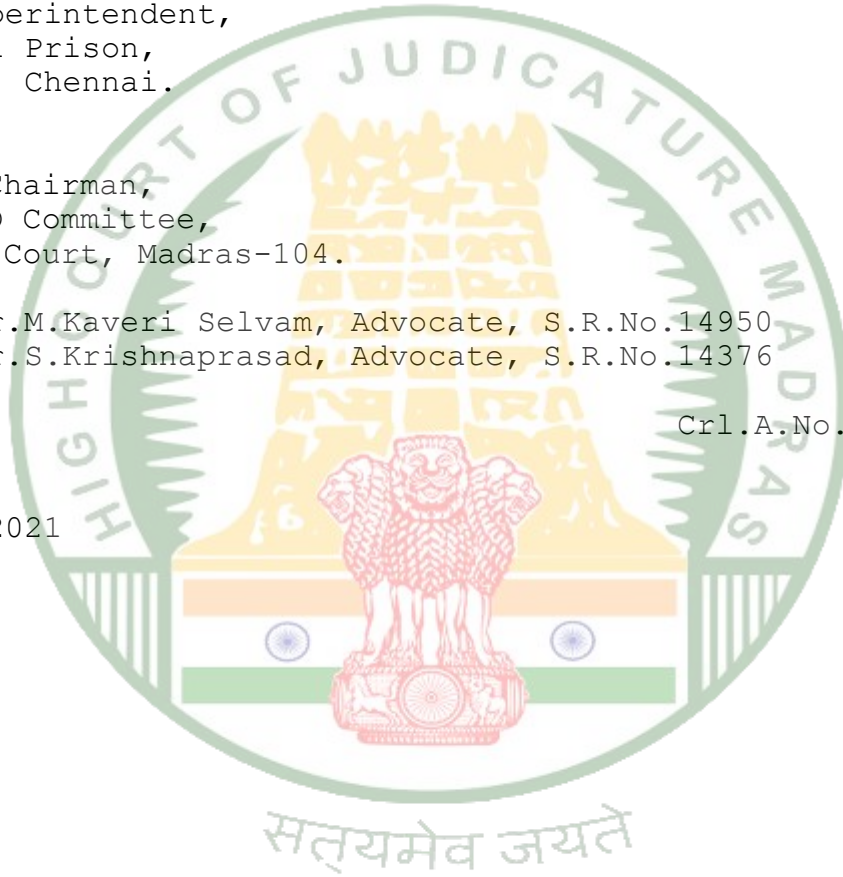
Copy To
The Chairman,
POCSO Committee,
High Court, Madras-104.

+1cc to Mr.M.Kaveri Selvam, Advocate, S.R.No.14950

+1cc to Mr.S.Krishnaprasad, Advocate, S.R.No.14376

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RLD(CO)
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