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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRIMINAL APPEAL NO.163 OF 2021

KADAR BASHA
S/o.Ansar Basha

... Appellant/Accused

.Vs.

The State By:
The Inspector of Police,
W-6, All Women Police Station,
Pulianthope, Chennai.
(Crime No.4 of 2017) ... Respondent/Complainant

PRAYER:-

Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, praying to set aside the Judgment dated 04.03.2021 in S.C.No.84 of 2018 passed by the Court of the learned Sessions Judge, Special Court of Exclusive Trial of Cases under the POCSO Act in so far as convicting the Appellant/Accused under Section 9(n) r/w. 10 of the Protection of Children from Sexual Offences Act and sentencing him to undergo 5 years Rigorous Imprisonment and imposed with a fine of Rs.10,000/- in default to undergo further period of 2 months Rigorous Imprisonment.

For Petitioner : Mr.T.Shanmugaboopathi

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 passed by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under the POCSO Act, Chennai in S.C.No.84 of 2018 dated 04.03.2021.

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2. The respondent police registered the case in Crime No.4 of 2017 against the appellant for the offences punishable under Sections 8 of POCSO Act. After completing the investigation, they laid charge sheet before the learned Sessions Judge, Special Court for Exclusive Trial of Cases under the POCSO Act, Chennai, since the offence is against a child. The learned Special Judge after completing the formalities taken up the charge sheet on file in S.C.No.84 of 2018 and framed charge against the accused for the offence punishable under Section 8 of POCSO Act.

3. After framing charges, in order to prove the case of the prosecution during trial, on the side of the prosecution as many as 8 witnesses were examined as P.W.1 to P.W.8 and 13 documents were marked as Ex.P.1 to P.13 and no material objects were exhibited.

4. After completing the examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant/accused by questioning under Section 313 Cr.P.C. However, the same were denied by the accused as false and he pleaded not guilty. On the side of the defence no oral or documentary evidence was produced.

5. On completion of trial and hearing the arguments advanced on either side and considering the materials available on record, the trial Court found the accused guilty for the offence under Section 9(n) which is punishable under Section 10 of POCSO Act and convicted and sentenced to undergo undergo 5 years Rigorous Imprisonment and to pay fine of Rs.10,000/- in default to undergo a further period of 2 months Rigorous Imprisonment. Challenging the said judgment of conviction and sentence, the accused has filed the present appeal before this Court.

6. The learned Counsel for the appellant submitted that there are contradictions regarding the accusation that the appellant had warned P.W.2, victim girl as the same has not been disclosed in the complaint. Further, he would submit that the evidence of the victim P.W.2 and the mother of the victim P.W.1 would show that there is no good terms between the appellant and his wife P.W.1 and his daughter P.W.2. The victim P.W.2 in her evidence has stated that she did not like her father as he was so strict and used to beat her brother and frequently quarreled with her mother. Therefore, in order to wreck vengeance, the family members of the appellant have foisted the false case against the appellant. Unfortunately, the learned trial Judge failed to appreciate the entire evidence and convicted the appellant.

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6.1 The learned Counsel would further submit that no father would even think of doing such sexual assault on his own daughter. Since, there was a misunderstanding and no good terms between the appellant and his wife P.W.1, the wife of the appellant has gone to the extent of tutoring her daughter P.W.2 to foist a false case against her husband. He would submit that if the case of the prosecution is accepted, no father would have any faith on their own family members.

6.2 The learned Counsel would submit that there are material contradictions between the prosecution witnesses and the learned trial Judge has failed to appreciate the evidence of the prosecution witnesses. Further, there are contradictions in respect of place of occurrence, time of occurrence and in the manner of occurrences that were immediately preceding and succeeding to the occurrence.

6.3 The learned Counsel for the petitioner would further submit that P.W.2 has stated that the appellant had given her two rubber bands whereas, the prosecution has not recovered the said rubber bands and there is no medical evidence to support the case of the prosecution. Though the victim girl has stated that the appellant had bitten her Thigh and when the appellant had pulled her legs, she sustained nail scratch injury on her ankle whereas, the medical evidence does not show any bite marks on the Thigh or scratch injury on the leg of the victim. Thereby, the prosecution has failed to establish its case beyond all reasonable doubt and the trial Court has failed to appreciate the same and without any corroboration, only based on the evidence of the victim, has convicted the appellant.

6.4 The learned Counsel would further contend that there is a delay in filing the complaint and sending the same to the Court. Therefore, there is deliberation in lodging the complaint due to which, the FIR has been belatedly sent to the Court and all these aspects were ignored by the learned trial Judge.

6.5 The learned Counsel would further submit that the trial Court has failed to note that there are contradictions even between the statements of the victim girl given before the police under Section 161 Cr.P.C. and the statement given before the Judicial Magistrate and recorded under Section 164 Cr.P.C. and there are embellishment and exaggeration in her own statement before the trial Court with regard to the alleged occurrence and during cross examination of the victim, she herself admitted that the police officials had shown the complaint and statement, before examining her as evidence, before the trial Court. The oral evidence of the victim girl has not at all corroborated with the medical evidence to prove the alleged injury caused by the appellant. As already stated above,

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there was a family dispute and a strained relationship between the appellant and his wife, which was also elicited during the course examination of P.W.1 by the defence counsel, and therefore a false case has been foisted against the appellant.

6.6 The learned counsel would further contend that there are two theories with regard to the arrest of the appellant which is shaking the root of the prosecution as to when and where the appellant was arrested and as to when and where the occurrence could have actually taken place. The trial Judge has failed to note that the initial burden is upon the prosecution to prove the existence of the facts. Therefore, the presumption under Section 29 of POCSO Act is not at all arising in this case. Further the victim girl in her evidence has not stated anything as to when and where she was enquired by P.W.3 and P.W.4, the Social Welfare Officers.

6.7 The learned Counsel would further reiterate that there are material contradictions in the evidence of the victim girl in every stage. Further, there was no cordial relationship between her father, mother and the victim girl even prior to the occurrence and the victim girl herself has admitted that her father had deserted her mother in the year 2017 itself. However, the same was not at all considered by the learned trial Judge and the learned trial Judge has failed to appreciate the same and wrongly convicted the appellant. Therefore the Judgement of the trial Court is liable to be set aside.

7. The learned Government Advocate (Crl. Side) would submit that the victim is aged only 12 years at the relevant point of time and she was studying 8th std. The appellant is none other than the father of the victim P.W.1. Since, the date of occurrence i.e.07.05.2017 happen to be Sunday, the victim girl did not go to school and she was playing with her brother in the house and the mother of the victim had gone for work. While so, at about 4.30 p.m., the appellant came to the house of the victim and locked the door inside and he gave two rubber bands to the victim and told her to put plait on his hair. While she was doing so, the appellant inserted his face between the legs of the victim and shook his head and bit her left Thigh and he also pressed the breast of the victim and told that it is not big and it is small one. Thereafter, he inserted his hand in the inner wear of the victim and touched her private part and when he pulled her, she sustained scratch injury on her leg. Immediately she pushed him and escaped from him and went outside. Thereafter, when her mother came home after completing her work at about 8.30 p.m., the victim informed the same. Subsequently, they approached and lodged the complaint with the help of Social Welfare Officers. The Investigating Officer after registering the case, sent the victim to hospital for medical

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examination and produced her before the Judicial Magistrate and recorded her statement under Section 164 Cr.P.C. and after completing the investigation, laid charge sheet. The learned Counsel for the appellant contended that there was strained relationship between the appellant and his wife P.W.1 and his daughter P.W.2 did not like him and thereby foisted the false case against the appellant. The learned Government would submit that though there are contradictions and discrepancies in the averments made in the complaint and in the statements of the victim made before police and Magistrate subsequently before the Court, the contradictions pointed out by the learned Counsel are not material contradictions which will not go into the root of the case of the prosecution. Since there is no penetrative sexual assault, the medical evidence is not helpful neither to the prosecution nor to the defence. Further, the learned Counsel for the appellant has pointed out certain contradictions regarding the injuries sustained by the victim and the medical evidence. But the victim has not stated that she sustained injury on her private parts. She had only stated that she sustained scratch injury on her leg. The doctor would not have noted the injuries on the other parts of the body of the victim or she would have thought that it was not necessary to mention the same before the doctor. Therefore non noting of small scratch injuries on the other parts of the victim, may not be a sole ground to disbelieve he evidence of the victim. With regard to the contention of the learned Counsel for the appellant that no father would do such sexual assault on his own daughter, the learned Government Advocate (Criminal Side) would submit that as such no daughter would make such false allegation against her own father. The victim was only aged 12 years and she was a child at the time of occurrence. Further, her evidence is cogent and consistent. Except some immaterial contradictions, there is no other reason to discard the evidence of the victim. The trial Court has rightly appreciated the evidence and convicted the appellant and therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

8. Heard the learned Counsels on either side and perused the materials of either side.

9. The case of the prosecution is that the victim was aged 12 years at the relevant point of time and she was studying 8th std. The appellant is none other than the father of the victim P.W.1. Since the date of occurrence i.e. 07.05.2017 happened to be on sunday, the victim girl did not go to school and she was playing with her brother in the house and the mother of the victim had gone for work. While so, at about 4.30 p.m., the appellant came to the house of the victim and locked the door inside and he gave two rubber bands to the victim and told her to put plait on his hair. While she was doing so, the appellant

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inserted his face between the legs of the victim and shook his head and bit her left Thigh and he also pressed the breast of the victim and told that it is not big and it is small one. Thereafter, he inserted his hand in the inner wear of the victim and touched her private part and when he pulled her, she sustained scratch injury on her leg. Immediately she pushed him and escaped from him and went outside. Thereafter, when her mother came home after completing her work at about 8.30 p.m., the victim informed the same. Subsequently, they approached and lodged the complaint with the help of Social Welfare Officers.

10. In this case, since this Court is the appellate Court and the final Court of fact finding, it has to re-appreciate the evidence and to give its independent findings. Accordingly, this Court pursued the entire materials and Judgment of the trial Court.

11. In this case, the trial Court framed charges against the appellant for the offence punishable under Section 8 of POCSO Act. In order to substantiate the charge framed against the appellant, on the side of the prosecution 8 witnesses were examined and 13 documents were marked.

12. Out of 8 witnesses, the victim was examined as P.W.2. She has clearly narrated the entire incident. At the time of occurrence, there was no other witness except the victim girl. The appellant is the father of the victim girl. In cases of this nature, no other eye witnesses can be expected that too while the appellant is the father of victim and the occurrence place is the house of the appellant and victim, no one would suspect and no eye witness can be expected.

13. Though the victim and the mother of the victim have stated that there was misunderstanding and quarrel between the appellant and the mother of the victim, for which no wife would go to the extent of tutoring her own daughter against her father and no daughter would allow or support her mother to make such sexual allegation against her own father.

14. A reading of the evidence of the victim P.W.2, this Court does not find any reason to disbelieve the victim. Though, the learned Counsel pointed out some discrepancies and contradictions, according to this Court they are not material contradictions which will go to the root of the case of prosecution. P.W.3 and P.W.4, the Social Welfare Officers have clearly stated that the police officials called them for examining the victim in their presence and they have also naratted that the mother of the victim informed the same and the victim also narrated the incident. Thereafter, the victim girl was produced before the Doctor for medical examination. P.W.6 is

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the doctor who had conducted medical examination on the victim and she has clearly stated that the victim had informed her that on 07.05.2017 at about 4.30 p.m. her own father made sexual assault on her and also explained the manner in which, he made the sexual assault. Though the doctor has stated that there is no external injury and the hymen of the victim is intact and there was no penetrative sexual assault on the victim, the victim has stated that her father touched her breast and also touched her private part with his hands. Further, when the victim girl was produced before the Magistrate for recording her statement under Section 164 Cr.P.C., she has clearly narrated the entire incident.

15. P.W.1 the mother of the victim is not an eyewitness to this case, However, soon after the incident, when she came back to home after completing her work, the victim has informed the incident to her mother. Immediately, she has lodged the complaint to the respondent police through P.W.3 and P.W.4, the Social Welfare Officers. Therefore, though P.W.1, P.W.4 and P.W.5 are not eyewitnesses and only hearsay witnesses to this case, soon after the incident the victim has informed them about the incident in turn they have lodged the complaint on the same day. Though the FIR has been registered with little delay and sent to the Court which is beyond the control of the victim. Further it is a settled proposition that the lapse on the part of the prosecution is not a sole ground to disallow or disbelieve the entire case of the prosecution and to discard the evidence of the victim. In the cases of this nature, the evidence of the sole witness is sufficient to convict the accused and if the evidence of the victim is cogent and consistent then there is no need for discarding the evidence of the victim. In this case also, a reading of the evidence of the victim as observed by the trial court, this court finds no reason to disbelieve the evidence of the victim. Though there are some discrepancies and contradictions in the statements of the victim as pointed out by the learned counsel for the appellant, but it is not regarding the commission of offence. The victim has categorically stated that on the date of occurrence at about 4.30 p.m. the father came to home and locked the door inside and misbehaved with her and there is no contradictions in the commission of offence. Therefore, the contradictions are not material contradictions which will go into the root of the case of the prosecution. Though the respondent police registered the case for offence under Section 7 punishable under Section 8 of POCSO Act, the trial Court found the accused guilty for the offence under Section 9 (n) which is punishable under Section 10 of POCSO Act and the relevant Sections of the POCSO Act are extracted hereunder;

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7. Sexual assault;

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other Act with sexual intent which involves physical contract without penetration is said to commit sexual assault.

9. Aggravated sexual assault;

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

16. Upon reading of the above said provisions and the evidence of P.W.2 victim girl, and the evidence of the Doctor and also the statement of the victim recorded under Section 164 Cr.P.C., this Court finds that the appellant has committed sexual assault on the victim girl. Since the appellant is the father of the victim, the offence committed by the appellant falls under Section 9(n) of the POCSO Act. The trial Court has rightly appreciated the evidence and convicted and sentenced and there is no reason to disbelieve the evidence of the victim. There is no merit in the appeal and this courts does not find any reason to interfere with the Judgment of the trial Court.

17. Accordingly, the Criminal Appeal stands dismissed confirming the Judgment dated 04.03.2021 in S.C.No.84 of 2018 passed by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai. The Trial Court is directed to secure the appellant/accused to undergo remaining period of imprisonment, if any.

Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar

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To

1. The Sessions Judge,
   The Special Court for Exclusive Trial
   of Cases under POCSO Act,
   Chennai.

2. The Inspector of Police,
   W-6, All Women Police Station,
   Pulianthope, Chennai.

3. The Superintendent,
   Central Prison,
   Puzhal, Chennai.

4. The Public Prosecutor Officer,
   High Court, Madras.

5. The Section Officer,
   Criminal Section (Records),
   High Court, Madras.

CRIMINAL APPEAL NO.163 OF 2021

MG(CO)
PBS/07/01/2022

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