

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.02.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.365 of 2019

Sabapathy

... Appellant/Accused

Vs.

The State, Rep. by
The Inspector of Police,
All Women Police Station,
Panruti, Cuddalore District
(Crime No.14 of 2018)

.... Respondent/complainant

PRAYER:

Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the Judgment of conviction imposed in S.S.C.No.71 of 2018, on the file of the Sessions Judge, Mahila Court, Cuddalore, dated 07.12.2018.

For Appellant : Mr.Vijaya Raghavan
and Mr.R,Ethirajulu
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 07.12.2018 made in Special S.C.No.71 of 2018, by the learned Judge, Mahila Court, Cuddalore.

2. The respondent-police has registered a case against the appellant for the offence under Section 9(m) r/w 10 of Protection of Children from Sexual Offences Act, 2012 (for brevity "the POCSO Act"). After investigation, laid a charge sheet before the learned Judge, Mahila Court, Cuddalore. The learned Judge, framed charges against the appellant for the offence punishable under Section 10 of POCSO Act and conducted the trial.

3. After considering the evidence on record and hearing on either side, the learned Judge, by Judgment dated 07.12.2018,

convicted the appellant for the offence punishable under Section 10 of POCSO Act and sentenced him to undergo 5 years Rigorous Imprisonment and to pay a fine of Rs.2,000/- in default to undergo one year Simple Imprisonment.

4. Aggrieved against the Judgment of conviction and sentence, dated 07.12.2018, the appellant / accused had preferred the present Criminal Appeal before this Court.

5. Since the learned counsel for the appellant was not present on 25.01.2021, this Court directed the Registry to appoint a Legal-Aid Counsel and however, today, the learned counsel for the appellant as well as Legal-Aid Counsel are appeared and argued the matter, by raising the following contentions:-

6.1. There was a delay in registering the case and also sending the F.I.R into the Court. The date of occurrence is on 15.08.2018 at about 09.30 a.m., and the FIR was registered on 15.08.2018 at 04.00 p.m., and however, it was sent to the Court only on 16.08.2018 at 11.20 a.m., and the said delay has not been properly explained, which is a fatal to the case of the prosecution.

6.2. Before conducting medical examination, P.W.8-doctor has not recorded the statement of the victim girl, and only recorded the statement of the mother of the victim girl, who is admittedly not an eyewitness and only hearsay evidence. Further, the evidence of P.W.8-doctor also not supports the case of the prosecution, and in her Ex.P5 report, she has clearly stated that she did not find any external injuries on the genitalia of the victim girl. Furthermore, the panty of the victim girl was not recovered.

6.3. The alleged occurrence took place on 15.08.2018, however, the statement under Section 164 of Cr.P.C. was recorded by the learned Magistrate, only on 20.08.2018, which is against the position of law. Immediately, within 24 hours, the victim should have been produced before the learned Magistrate, however, in this case, only after statutory period, the victim girl was produced before the learned Magistrate for recording statement under Section 164 of Cr.P.C., and that would also create a doubt about the prosecution case. Therefore, the prosecution has not proved its case beyond all reasonable doubt. Further the statement recorded under Section 164 of Cr.P.C., before the learned Magistrate, has not been marked in Special Sessions Case and no opportunity was given to the appellant to cross-examine the statement recorded by the learned Magistrate, and therefore, which also a fatal to the prosecution.

6.4. There are material contradictions in the prosecution witnesses, except the evidence of P.W.2-victim girl, there was no corroboration in the evidence, which itself shows doubt in the prosecution case.

6.5. There was a pathway dispute between the appellant and the family of the victim girl and in order to take vengeance, they foisted a false case against the appellant.

The learned Judge failed to consider the above aspects and however, simply convicted the appellant on the ground of sympathy, which warrants interference.

7. The learned Government Advocate (Criminal Side) appearing for the respondent-Police would submit that the victim girl was aged about 7 years, at the time of occurrence. The appellant is a neighbour, and he called P.W.2-victim girl and taken her to his house and committed the offence. In order to prove the case of the prosecution, the victim girl was examined as P.W.2, and she had clearly narrated the facts. Further, he would submit that the victim girl informed the mother and mother of the victim girl was examined as P.W.1 and she also supported the case of the prosecution. P.W.5 and P.W.6 are independent witnesses and they have also corroborated the evidence of P.W.1 and P.W.2.

8. The learned Government Advocate would further submit that P.W.8-doctor had recorded the statement of the mother of the victim girl before medical examination of the victim girl is not a fatal to the prosecution, considering the age of the victim girl, the doctor had recorded the statement of the mother of the victim girl, before medical examination of the victim girl. However, in this case, the doctor's evidence itself should not be given much importance, because, it is not the case of the prosecution that aggravated penetrative sexual assault, or the victim girl sustained injury in the private part or any other part of the body. However, all other witnesses have clearly spoken, and especially, the victim girl had clearly narrated the offence, in the case like this, no corroboration is necessary, even though, the evidence of independent witnesses P.W.5 and P.W.6 were corroborated with the evidence of P.W.2, the victim girl and P.W.1, the mother of the victim girl. It is further submitted that though the statement was recorded under Section 164 of Cr.P.C., it was not marked and mere non-marking of statement recorded under Section 164 of Cr.P.C., would not vitiate the prosecution. P.W.2 has narrated the entire facts during her evidence and also identified the appellant, and therefore, the prosecution has proved its case beyond the reasonable doubt, and therefore, prays for dismissal of Appeal.

9. Heard the learned counsel for the appellant and perused the materials available on record.

10. The case of the prosecution is that on 15.08.2018, at about 09.15 a.m., the accused with a sexual intent enticed the victim girl saying that he would lift her to plug guava in a nearby tree and he lifted and after the child plugged guava, he did not let her down and thereafter, the accused took and kept her behind the partially closed door, removed her pant and panties and touched the vagina of the victim child with his penis. When the victim girl started shouting and told that she would tell her mother, for which, the accused said if she revealed, he would not let her to go and when the child assured the accused that she would not tell her mother, then only the accused released her from his clutches. Thereafter, the victim girl informed the occurrence to her mother and her mother gave a complaint. Based on which, the respondent-Police registered a case against the appellant for the offence under Section 9 (m) r/w 10 of POCSO Act. Subsequently, the Investigating Officer, investigated the mater and laid a charge sheet before the learned Judge, Mahila Court, Cuddalore.

11. In order to prove the case of the prosecution, 10 witnesses were examined as P.W.1 to P.W.10 and 9 documents were marked as Exs.P1 to P9 and no Material Objects were exhibited. After completing the examination of the prosecution witnesses, the incriminating circumstances culled out from the prosecution witnesses were put before the accused, the same was denied as false and on the side of the accused, the sister of the accused was examined as D.W.1. The learned Judge, Mahila Court, Cuddalore after hearing the arguments on either side and considering all the materials placed on record, found that the accused/appellant is guilty and awarded punishment, as referred above, which is challenged in this Criminal Appeal.

12. Since this Court is an Appellate Court and also final Court of fact finding, has to re-appreciate the entire evidence and come to the conclusion independently. On appreciation of evidence, this Court has found that the victim girl, was only 7 years old, at the time of occurrence. A reading of the evidence of the victim girl, who was examined as P.W.2, has clearly narrated the act committed by the accused and identified the accused. In cases of this nature, presence of eyewitnesses are mostly improbable, because, culprits take the chance of loneliness of the victims, and they would commit these type of offences. In the case on hand, after the occurrence, when the victim girl informed to her mother and the mother, who was examined as P.W.2 has clearly stated the occurrence during her evidence.

13. Though the learned counsel for the appellant would submit that P.W.8-Doctor has not recorded the statement of the victim girl and recorded the statement of the mother of the victim girl, however, admittedly, the girl was produced before the Doctor and mother was also present at that time, since the age of the victim girl was only 7 years at the time of occurrence, the doctor thought it fit to record the statement of the mother of the victim girl, however, examined the victim girl and filed report Ex.P5. However, merely because, the doctor has not recorded the statement of the victim girl, before conducting medical examination is not fatal to the prosecution case, and therefore, the contention of the learned counsel for the appellant is not acceptable.

14. Insofar as the next contention of the learned counsel for the appellant with regard to delay in sending F.I.R., to the Court is concerned, the mere sending F.I.R. belatedly to the Court may not be a sole ground to disallow or discard the evidence of the prosecution witnesses. Mere wrong done by the prosecution or defect in the investigation, also may not be a ground and the appellant is entitled for acquittal on that ground.

15. The other contention of the learned counsel for the appellant is that the evidence of the doctor, who examined the victim girl has filed report Ex.P5 stating that she did not find any external injuries on the genitalia of the victim girl and as such, the evidence of P.W.8 doctor was also not supported the case of the prosecution. P.W.1 in her evidence, has clearly stated that the accused had removed her pant and panties and touched the vagina of the victim girl with his penis. A combined reading of the evidence of P.W.2, victim girl and also the evidence of the mother of the victim girl, it could be seen that they were corroborates with the evidence adduced by the independent witnesses viz., P.W.5 and P.W.6, and as such, the prosecution has proved that the appellant had committed an offence punishable under Section 10 of POCSO Act. Depth of penetration is immaterial, mere touching of private part would be sufficient so as to constitute the offence.

16. Yet another contention of the learned counsel for the appellant is that there was a motive to foist a false case against the appellant due to pathway dispute. In this case, there is no reason to disbelieve her or disregard the evidence of the victim girl. Further, there was no necessity to foist such a false serious case against the appellant by spoiling the life of the P.W.2-victim girl. It is pertinent to mention here that parent of the victim girl need not say all these things and also the parent of the victim girl will not spoil the life of the victim girl. Therefore, the above contention of the

learned counsel for the appellant is rejected. Further, there was no reason to discard the evidence of victim girls. Normally, corroboration of witness is necessary, whereas, offence under POCSO Act, the evidence of the victim girls are sufficient and the Court cannot expect the eyewitness, since it is not the case of the prosecution that the offense had taken place in the presence of some other eye witness. Further, the defense has not established that for that reason, they foisted a false case against the appellant. Though the appellant had taken the defense of motive behind the complaint, but however, it has not been proved in the manner known to law.

17. The last contention of the learned counsel for the appellant is that the statement recorded under Section 164 of Cr.P.C. by the learned Magistrate was not marked as exhibit by the prosecution and the appellant was not given an opportunity to take his defense.

18. The statement recorded by the learned Magistrate under Section 164 of Cr.P.C. was very much available in the record of the Court, however, neither, the Public Prosecutor has taken steps to mark the document nor the learned Judge, who conducted the trial has taken steps to mark the said document. Even, P.W.10. the Investigating Officer has also not taken any steps to mark the statement recorded under Section 164 of Cr.P.C.,. It is to be noted that at the time of trial, the Investigating Officer, who was examined as P.W.10, could have informed the same to the Public Prosecutor for marking of the document. Since it is a sensitive case, the Public Prosecutor should have taken much attention while marking of documents. Further, the learned Judge, who conducted the trial, if at all he was actively participated in the trial, definitely he could not have failed to mark the said document, or otherwise, he should have guided the Public Prosecutor for marking the said document through the Investigating Officer.

19. But, in this case on hand, all the three stakeholders, viz., the Investigating Officer, the Public prosecutor, who conducted the case or the learned Judge, who conducted the trial, have not acted with due diligent and since the cases like this, under POCSO Act, especially, the victim girl is of 7 years old, the stakeholders should have paid their attention, while performing their duties, but, in this case, all the stakeholders have not taken any care for marking of document, which was recorded under Section 164 of Cr.PC by the learned Magistrate. While deciding the case, the statement of the victim girl, which was recorded under Section 164 of Cr.P.C., is necessary, however, the learned Judge, has not taken any care for marking of the said document. However, no doubt, on appearance of the appellant, the provisions of Section 207 Cr.P.C. were complied

with and at that time, all the documents were served to the appellant and therefore, no prejudice would be caused to the appellant for non-marking of the said statement, which was recorded under Section 164 of Cr.P.C. Further, the statement recorded under Section 164 of Cr.P.C. is not substantive evidence and it has to be corroborated further in accordance with law.

20. Since the statement recorded under Section 164 of Cr.P.C. was not marked as a document, this Court has called for the immaterial papers relating to the present case from the trial Court on 10.02.2021, and on perusal of the same, the statement recorded under Section 164 of Cr.P.C. was very much available in the record, but all the three stakeholders have not taken any steps for marking of the said document. A careful reading of statement recorded under Section 164 of Cr.P.C., this Court finds that the victim girl has clearly narrated all the facts what she has narrated during her examination. Therefore, mere non-marking of statement, which recorded under 164 of Cr.P.C., is also not a fatal to the prosecution.

21. A perusal of the statement recorded under Section 164 of Cr.P.C., and the evidence of P.W.2- victim girl, it could be seen that the accused with a sexual intent enticed the victim girl saying that he would lift her to plug guava in a nearby tree and he lifted and after the child plugged guava, he did not let her down and thereafter, the accused took and kept her behind the partially closed door, removed her pant and panties and touched the vagina of the child with his penis. When the victim child started shouting and she told that she would tell her mother, for which, the accused said if she revealed, he would not let her to go and when the child assured the accused that she would not tell her mother, then only, the accused released her from his clutches.

22. Therefore, this Court finds that there is no reason to discard or disbelieve the evidence of P.W.2 victim girl, and there is no doubt about the trustworthiness of the victim girl and under the circumstances, the victim girl aged about 7 years, and she cannot be tutored by the prosecution for these type of offences. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible. In case of this nature presence of eyewitnesses are mostly improbable.

23. Therefore, under the circumstances, this Court also finds that the prosecution has proved its case beyond the reasonable doubt and there is no reason to interfere with the judgement of the learned Sessions Judge, Mahila Court, Cuddalore. Therefore, this Court does not find any merit in the Appeal and the Appeal is liable to be dismissed.

24. This is not the first case, the statement recorded under Section 164 of Cr.P.C. was not marked and this Court has come across several cases. The Investigating Officers have not paid their due attention to the cases, relating to POCSO Act. P.W.10- Investigating Officer, who investigated the case, has not even recorded the statement from the victim girl immediately, and she has recorded the statement of the victim girl under Section 161(3) of Cr.P.C. only on 21.08.2018, whereas the complaint was given on 15.08.2018 itself. Section 24 of POCSO Act, prescribes recording of a statement of a child by the Investigating Officer, Section 25 of POCSO Act, prescribes, recording of statement of a child by Magistrate and Section 27 of POCSO Act, prescribes, medical examination of a child. However, in the case on hand, the child was examined by P.W.8 doctor on 15.08.2018 itself and the statement of the victim girl under Section 161(3) of Cr.P.C. was recorded by P.W.10- Investigating Officer only on 21.08.2018. In the case on hand, the Investigating Officer has neither sent the F.I.R. immediately to the Court, nor recorded the statement of the victim girl on the date of occurrence, viz., 15.08.2018, however, the Investigating Officer recorded the statement of the victim girl under Section 161 (3) of Cr.P.C. only on 21.08.2018 and further the statement of the victim girl under Section 164 of Cr.P.C. was recorded by the learned Judicial Magistrate only on 20.08.2018. Further, the statement recorded by the learned Magistrate under Section 164 of Cr.P.C. has not been marked as a document during the trial on the side of the prosecution and the Investigating Officer has not properly guided the Public Prosecutor. The victim girl was aged only 7 years at the time of occurrence, and she was not properly treated by the Investigating Officer and the statutory provisions have not been duly complied with by the Investigating Officer and as such, P.W.10-Investigating Officer had failed to discharge her duty with due diligent and this Court is of the opinion that she is not a deserving person to continue as Investigating Officer in All Women Police Station, Panruti, Cuddalore District, especially, cases relating to POCSO Act.

25. Further, this Court is also of the opinion that the Public Prosecutor, who conducted the trial is not a fit person to conduct POCSO Act and he should not be entrusted to any other cases relating to POCSO Act. If necessary, the Collector concerned, remove the name of the Public Prosecutor immediately from the Office of said Court and the District Collector, can recommend a proper Competent Officer as a Special Public Prosecutor to deal with the case relating to POCSO Act.

26. The learned Judge, who dealt with the case, has not actively participated in the trial. If he would have actively participated in the trial, definitely, he should have raised a

question for non marking of statement, which was recorded under Section 164 of Cr.P.C. of the victim girl by the learned Magistrate. No doubt, the learned Judge, while observing paragraph No.19, has stated that the statement of the victim girl was recorded by the learned Magistrate on * 20.08.2018 upon requisition by P.W.10, however, he has not taken any steps to mark the said document, which is very vital to the case on hand, especially, offenses relating to POCSO Act.

27. Therefore, this Court is of the considered view that all the three stakeholders, viz., the Investigating Officer, the Public Prosecutor and the learned Judge have not properly dealt with this case and they have not properly understood the object of the POCSO Act and seriousness of the offence against the children. Since this Court has not satisfied with the active participation of all these three stakeholders, the Respective Departments concerned are directed to take appropriate action against them.

28. The Registry is directed to communicate this Judgment to

- (i) The Superintendent of Police, Kallakurichi; and also
- (ii) The District Collector, Cuddalore for removal of the name of the Public Prosecutor, who dealt with the case in Special Sessions Case No.71 of 2018, on the file of the learned Sessions Judge, Mahila Court, Cuddalore, and to appoint a competent person to hold the said post.

29. The Registry is directed to call for explanation from the concerned learned Sessions Judge, Cuddalore, who dealt with the case in Special S.C.No.71 of 2018.

30. In the result, the Criminal Appeal is dismissed.

Sd/-

Assistant Registrar(CS)

05.07.2021

*** The Year Corrected as per by order
of this Court dated 08.07.2021**

Sd/-

Assistant Registrar(CS IX)

08.07.2021

//True Copy//

Sub Assistant Registrar

Note: The Registry is further directed to return photo copies of Immaterial Records to the concerned Court.

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To

1. The Sessions Judge,
Mahila Court, Cuddalore.
2. The Inspector of Police,
All Women Police Station,
Panruti, Cuddalore District.
3. The Superintendent of Police,
Kallakurichi.
4. The Superintendent,
Central prison, Cuddalore.
5. The District Collector,
Cuddalore.
6. The Director General of Police,
Chennai.
7. The Public Prosecutor,
High Court, Madras - 104.
8. The Section Officer,
B Section, High Court,
Madras
9. The Presiding Officer,
POCSO Committee,
High Court, Madras

**To be Substituted to the
Order already
Despatched on 06.07.2021**

Copy to:

1. The Section Officer,
Criminal Section, High Court, Madras
2. The Secretary,
Legal Cell Service Authority,
High Court, Madras-104.

+1cc to Mr.E.Vijayaragavan, Advocate SR.No.9342
+1cc to Mr.K.Ethirajulu, Advocate SR.No.9039

Cr1.A.No.365 of 2019

A.SK(05.07.2021)
LN(CO)
CS/08/07/2021