



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.08.2021

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CrI.A.No.349 of 2021

Dhanasekaran

... Appellant /
Sole Accused.

Vs.

The State
rep. By Inspector of Police
Panamarathupatti Police Station
Salem District
Cr.No.36/2016

... Respondent

PRAYER : Criminal Appeal filed under Section 374 of Cr.P.C., to call for the records, set aside conviction and sentence made in the judgment in Old Spl.S.C.No.3 of 2017 New Spl.S.C.No.34/2019 on the file of the Special Court for POCSO Cases, Salem. dated 10.02.2021.

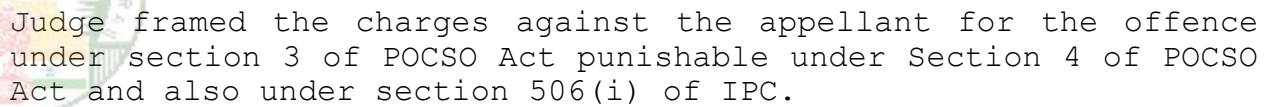
For Appellant : Mr.A.Padmanaban

For Respondent : Mr.S.Sugendran, Govt Advocate

JUDGMENT

This criminal appeal is filed against the judgment passed in Old Spl.S.C.No.3 of 2017 New Spl.S.C.No.34/2019 on the file of the Special Court for POCSO Cases dated 10.02.2021.

2. The respondent police registered the case against the appellant in Crime No.36/2016 for the offence under Section 3 of POCSO Act, which is punishable under Section 4 of POCSO Act. After investigation, laid charge sheet before the Special Court for exclusive trial of POCSO Act cases, Salem for the offence under Section 3 of POCSO Act which is punishable under Section 4 of POCSO Act and also for offence under Section 506(i) of IPC. The learned Special Judge, after completing the formalities, taken the case on file in S.C.No.3 of 2017 (Old.Spl.S.C.). Subsequently, the same was renumbered as Special S.C.No.34 of 2019. After completing the formalities, the learned Special



3. In order to substantiate the case of the prosecution, on the side of the prosecution, during the trial as many as 15 witnesses have been examined as P.W.1 to P.W.15 and 15 documents have been marked as Ex.P.1 to Ex.P.15 and no material object was exhibited.

5. The learned counsel for the appellant would submit that in this case, the appellant is the neighbour and he has not committed any offence under Section 3 of POCSO Act and there is no penetrative sexual assault. None of the witnesses have spoken that there was a penetrative sexual assault. Even P.W.2 victim girl has not stated anything about penetrative sexual assault. P.W.1 is the mother of the victim and she is not the eyewitness. According to her, P.W.3 informed her that in the appellant house, the appellant was lying on the victim and after seeing him, he flew away from the house and thus, the accused was seen coming out of his house and he committed sexual assault on the victim. Based on that, the mother of the victim gave a complaint. Therefore, P.W.1 is not the eyewitness. P.W.3 and 4 also not stated about penetrative sexual assault and they only stated that they saw the victim at the relevant point of time, that the accused was running from the house and the victim was inside the house. The trial court has convicted the appellant



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based on assumption and presumption and also based on sympathy grounds and there is no material to show that the appellant committed penetrative sexual assault. Further he would submit that the appellant was convicted based on Amendment Act 2019 and sentenced to 20 years rigorous imprisonment, whereas the occurrence is said to have taken place on 22.02.2016 before the amendment and the amendment came into force only in the year 2019. Therefore, based on the Amendment Act, a sentence cannot be imposed. There is no retrospective effect for the criminal offence. Therefore, conviction recorded against the appellant and sentence based on the Amendment Act is legally not sustainable. Further there is no material to show that the appellant committed penetrative sexual assault. Therefore, the conviction and sentence passed by the trial court is liable to be set aside. Further, he has submitted that there is no material to show that the appellant threatened the victim with dire consequences. Without any material, the trial court convicted the appellant for the offence under Section 506(i) IPC and also violated the basic principles of criminal law without any evidence and appellant was convicted for the offence under Section 506(i) of IPC. Therefore, the judgment of conviction and sentence passed by the trial court is liable to be set aside.

6. The learned Government Advocate (Crl.Side) has submitted that at the time of occurrence, the age of the victim girl was only 8 years and she was studying 3rd Standard. The appellant is the neighbour and he used to go and play with the victim and on the date of occurrence, the appellant called the victim to his house and he promised to give a candy to her. Thereafter he took the victim to his house and he laid down on her and committed penetrative sexual assault. At that time, P.W.3 and two other persons saw the same. Immediately, the appellant flew away from the place and the victim came out by crying. Therefore, P.W.3 informed to P.W.1 and they asked the victim why she was crying and the victim stated that the appellant committed penetrative sexual assault. Thereafter, P.W.1 went to the police station and the victim was produced before the doctor for medical examination and she was also produced before Judicial Magistrate and recorded the statement of the victim under Section 164 Cr.P.C.

7. The learned Government Advocate (Criminal Side) would further submit that the evidence of the doctor before the Special Court, medical certificate issued by the said doctor marked as Ex.P.4 and the statement recorded by the Judicial Magistrate under Section 164 Cr.P.C., marked as Ex.P.2 would go to show that the victim was subjected to penetrative sexual assault. The evidence of the victim is cogent, consistent and



8. Heard both sides.

12. In this case, out of 15 witnesses, the victim was examined as P.W.2. A reading of the evidence of P.W.2 victim girl would go to show that she narrated that the appellant provided candy and took her to his house and he put his private part on her private part. At that time, P.W.3 noted the same, immediately, the appellant coming to know that somebody noticed him, immediately left the victim and flew away from his house and thereafter victim came out by crying. P.W.3 and 4 asked the



victim about the occurrence. The victim thereafter, informed to her mother about the occurrence. Thereafter, mother of the victim lodged the complaint. Victim was examined by the Judicial Magistrate and she also narrated about the occurrence. The statement recorded under Section 164 Cr.P.C was marked as Ex.P.2. The victim was also produced before the doctor/P.W.8 who medically examined the victim, given opinion that there was no external injury, however, found that hymen was not intact. P.W.10 doctor, after examining her and based on the report of X ray, opined that the victim was aged between 7 and 9 years. The mother of the victim was examined as P.W.1. Though she was not the eyewitness, she has spoken about the complaint lodged before the Police. The complaint is marked as Ex.P.1. P.W.2 victim narrated the occurrence. P.W.3 neighbour also deposed about the presence of the accused in the place of occurrence. Though P.W.3 to P.W.6 are eyewitnesses, they have stated that they have seen at the time of the occurrence, the appellant was running from his house and at that time, the victim girl was crying. They saw at that time the appellant was lying on the victim. After seeing P.W.3 to P.W.6, the appellant immediately left the place. The victim girl came from the house of the appellant. The doctor evidence was also clear. Evidence of P.W.8 and P.W.10 would go to show that there was no external injuries on the body of the victim, however, her hymen was not intact. Therefore, a combined reading of the evidence of the victim along with evidence of P.W.8, P.W.10 and Ex.P.1-complaint, Ex.P.2 previous statement of the victim recorded under Section 164 Cr.P.C., and Ex.P.4, the medical certificate and Ex.P.5- report on the investigation of Sexual Offences form would clearly go to show that the victim girl was subjected to penetrative sexual assault.

13. Even though the learned counsel for the appellant would submit that the victim girl has not stated that the appellant committed penetrative sexual assault, a reading of the evidence of P.W.1 would go to show that she has clearly stated that the appellant is the neighbour and he used to come to their house and play with the child. On the date of occurrence, at night at 9 p.m., the victim girl played with the appellant and thereafter the victim went to her aunt's house. At that time, the appellant called the victim at the guise of giving candy to her. Thereafter, the appellant took her to his house and removed her innerwear and put his private part into her private part and since she had pain, she cried. At that time, P.W.3, 4, 5 and 6 went there immediately. They seen the appellant came out from his house and the victim was lying on the floor. Subsequently, victim informed the occurrence. P.W.3 informed to victim's mother/P.W.1 and P.W.1 gave complaint. The victim girl was examined by the Magistrate and was also produced before the doctor. The history of the medical record shows that known

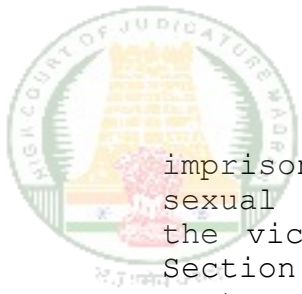


person committed sexual assault. Therefore, the evidence of P.W.2 is cogent, consistent and reliable and also natural which inspires the confidence of the court.

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14. The evidence of P.W.1 corroborates the previous statement of the victim recorded under Section 164 Cr.P.C. by the Magistrate and further the doctor evidence together with medical records would clearly show that the hymen of the victim was not intact. Therefore, the argument of the learned counsel for the appellant that the victim girl has not stated that the appellant committed penetrative sexual assault is not acceptable.

15. The age of the victim girl is only 8 years. She has narrated every action of the appellant. She has stated that the appellant put his private part and inserted it into her private part. Subsequently on medical examination, the evidence of the doctor would go to show that victim's vagina admits finger and she was subjected to penetrative sexual assault. P.W.3, 4 and 5, in their evidence, also stated that on the date of occurrence, they have seen the appellant together with the victim and after hearing cry sound of the victim, they rushed to the place, at that time, they seen the appellant running from the house in order to escape. It is stated that after noticing the witnesses, the appellant flew away from the house. They saw the victim with crying sound and they enquired. P.W.3 also informed the mother of the victim. Victim stated about the occurrence. Therefore, the evidence of victim and other material evidence clearly show that the appellant committed penetrative sexual assault. Since the victim is only 6 years, she is below 12 years and the offence is aggravated penetrative sexual assault. However, the police failed to file charge sheet for the offence under Section 5(m) of POCSO Act, which is punishable under section 6 of the POCSO Act and the trial court also without considering the materials, failed to frame the charge for aggravated penetrative sexual assault under Section 5(m) which is punishable under section 6 of POCSO Act. But the trial court convicted the appellant under the (Amendment) Act, 2019 and sentenced the appellant to undergo 20 years. A reading of Section 3 of the Act make it clear that offence committed under Section 3 of the Act is punishable under section 4 of POCSO Act and the minimum punishment is not less than seven years and the same may extend upto life. Even Section 6 of POCSO Act gives the punishment for the offence committed under Section 5(m) of the Act and the minimum sentence is not less than 10 years which may extend to imprisonment for life. Now as per Amendment Act 2019, for the offence of Penetrative sexual assault, minimum sentence is not less than ten years which may extend to life

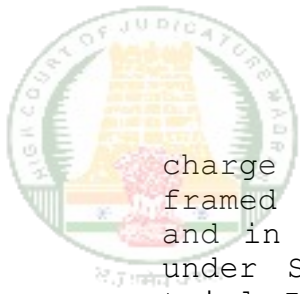


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imprisonment. Even if the offence is aggravated penetrative sexual assault falling under Section 5(m) of POCSO Act, since the victim is below 12 years, the offence is punishable under Section 6 of POCSO Act. As per the Amendment Act, the minimum sentence is not less than twenty years which may extend to life imprisonment. But before amendment, the minimum sentence is not less than ten years which may extend to life. But in this case, the occurrence took place in the year 2016. As on the date of offence, for penetrative sexual assault, the court may impose life imprisonment and for the offence aggravated penetrative sexual assault, the sentence of imprisonment may extend to life. In the case on hand, the trial Judge convicted the appellant for offence under Section 3 which is punishable under Section 4, however, imposed sentence for twenty years as per the Amendment Act 2019. In any event, Section 4 of POCSO Act, even before amendment, gives punishment of imprisonment which may extend for life. In such view of the matter, since the offence committed herein attracts punishment upto life and the sentence imposed by the trial Judge falls within the period of life sentence, no prejudice would be caused to the appellant. Therefore, though the trial Judge wrongly invoked the Amendment Act, 2019 and passed sentence of 20 years imprisonment under Section 4 of the Act, it is transpired that Section 4 of the Act also prescribes imprisonment for life sentence. Hence, under these circumstances, no prejudice would be caused to the appellant. Therefore, this court does not find any perversity in the judgment passed by the trial court.

16. Considering the above factors and the age of the appellant on the one hand and the doctor evidence which would show that hymen was not intact and admitting two fingers, this court is of the view that there is no mitigating circumstances arisen for reducing the sentence. As far as the offence under section 506(1) IPC is concerned, there is no material to show that the appellant threatened the victim or caused any hurt or used any weapons and threatened her with dire consequences. Therefore, the conviction and sentence imposed under Section 506 (i) IPC is set aside. With the above modification, Criminal Appeal is dismissed.

17. It is relevant to observe herein that in the case on hand, though the age of the victim is not in dispute and clearly proved as per Ex.P.7-Age Certificate of the victim, that the victim is only 8 years, as per the POCSO Act, since the victim is below 12 years, the offence falls under aggravated penetrative sexual assault and so the charge would have been framed for the offence under Section 5(m) of POCSO Act, which is punishable under Section 6 of POCSO Act. But while framing the



charge under Section 3 of POCSO Act, the learned trial Judge framed charge under Section 4 r/w. Section 3 of POCSO Act only and in the judgment, while convicting the appellant for offence under Section 3 punishable under Section 4 of POCSO Act, the trial Judge invoked Amendment Act and as per Amendment Act 2019, imposed sentence of 20 years. Therefore, in my considered view, both the stake holders viz., the State and Judicial Academy have to combine together and impart training to the Investigating Officer as well as the trial Judge, regarding investigation, filing of charge sheet to the Investigating Officers and also regarding framing of charge, marking of relevant documents, imposing sentence under the POCSO Act to the trial courts.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

1. The Inspector of Police,
Panamarathupatti Police Station
Salem District.
2. The Sessions Judge,
The Special Court for POCSO Cases,
Salem.
3. The Superintendent,
Central Jail, Coimbatore.
4. The Director General of Police,
Dr.Radhakrishnan Salai Road, Mylapore,
Chennai, Tamil Nadu 600-004.
5. The Director of Prosecution,
Puddupettai Street,
Alandur, Chennai.
6. The Director,
Tamil Nadu Judicial Academy,
Greenways Road,
R.A.Puram, Chennai.



7. The Section Officer,
Criminal Section, High Court,
Madras.

8. The Public Prosecutor,
High Court, Madras - 104.

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