

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.02.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.253 of 2019
and
Crl.M.P.No.6359 of 2019

Chinnadurai

.. Appellant

.Vs.

State Rep. by
Inspector of Police,
All Women Police Station,
Virudhachalam,
Cuddalore District.

.. Respondent

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to set aside the conviction and sentence imposed on the appellant/accused by the learned Sessions Judge (Mahila Court) Cuddalore in Spl.S.C.No.46 of 2018 dated 06.02.2019 and allow the appeal.

For Appellant : Mr.A.Gopinath

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

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 06.02.2019 in Spl.S.C.No.46 of 2018 on the file of the learned Mahila Court, Cuddalore.

2.The case of the prosecution is that at the time of occurrence, the victim girl (P.W.2) was aged about 14 years and the appellant is the neighbour as well as the paternal uncle of the victim girl. Since the appellant is a married man and he had no issues, he gained the sympathy of the victim girl by telling her that even after 8 years of marriage he did not get any child through his wife. Thereafter, he isolated the child from the safety net of her family and often took her to a field near a temple which situates on the backside of their house and sexually assaulted the victim girl from 07.03.2017. Thereafter, the accused threatened the victim girl to maintain secrecy in the name of honour of the family. Afterwards, the accused on every Sunday used to have sexual intercourse with her. Subsequently, when the parents of the

victim girl came to know about the secret and lodged a complaint (Ex.P1) against the appellant on 01.08.2017 to the respondent police.

3.The respondent police registered a case in Crime No.18 of 2017 against the appellant for the offence punishable under Sections 4 and 6 of The Protection of Children from Sexual Offences Act, 2012 [hereafter referred to as the 'POCSO Act' for the sake of convenience], later altered into Section 5(1) r/w Section 6 of POCSO Act and Section 313 IPC. After investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Mahila Court, Cuddalore and the same was taken on file in Spl.S.C.No.46 of 2018 and charges were framed against the appellant for the offences under Sections 366 and 313 IPC and punishable under Section 6 of POCSO Act.

4.In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 9 witnesses were examined as P.W.1 to P.W.9 and also marked Exs.P1 to P11 and no material document was marked. After completion of the prosecution side evidence, the incriminating circumstances were put to the appellant/accused by examining the appellant/accused under Section 313 of Cr.P.C and he has denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

5. The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that the accused/appellant is guilty of the offence and awarded punishments as below:

The appellant was convicted for the offence under Section 366 of IPC and sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.5,000/- and in default, to undergo simple imprisonment for a period of one year; and also convicted for the offence punishable under Section 6 of POCSO Act and sentenced to undergo rigorous imprisonment for a period of fourteen years and to pay a fine of Rs.10,000/- and in default, to undergo simple imprisonment for a period of two years. However, found not guilty for the offences under Section 313 IPC and was acquitted under Section 235(1) Cr.P.C.

6.Being aggrieved by the said judgment of conviction and sentence, the appellant is before this Court.

7. The learned counsel for the appellant would submit that the learned trial Judge failed to consider that the appellant is none other than the paternal uncle of the victim girl and the alleged relationship is prohibited one. The age of the appellant is the doubled the age of the victim girl. Therefore, the appellant could not have committed such an offence. The prosecution has not proved the ingredients of Section 366 IPC and Section 3 of POCSO Act. The prosecution has not followed the procedure under Section 26(1) of POCSO

Act, which is mandatory. Therefore, the statement of the victim girl recorded under Section 164 Cr.P.C is against law. He would further submit that there was no eye witness to the said occurrence. The prosecution, without any substance connected the appellant in this case and the sentence awarded by the learned Sessions Judge is highly excessive and disproportionate. He would further submit that the prosecution has not established their case that the victim girl was pregnant and the appellant administered pills for miscarriage of the fetus. Without any substantive evidence, the trial Court convicted the appellant only on assumption and on sympathy, therefore, the judgment of conviction and sentence passed by the trial Court against the appellant, is liable to be set aside.

8.1 The learned Government Advocate (Crl.Side) would submit that at the time of occurrence, the victim girl (P.W.2) was aged about 14 years. The appellant is the neighbour as well as the paternal uncle of the victim girl, isolated the victim girl from the safety net of her family and often took her to a field near a temple situated on the backside of their house and committed penetrative sexual assault from 07.03.2017. Subsequently, the parents of the victim girl (P.W.2) came to know about the secret and lodged a complaint (Ex.P1) against the appellant on 01.08.2017 to the respondent police.

8.2 The learned Government Advocate (Crl.Side) would further submit that to prove the case of the prosecution, the victim girl was examined as P.W.2, the defacto complainant/ mother of the victim girl was examined as P.W.1, the father of the victim girl was examined as P.W.3 and the Doctor, who examined the victim girl was examined as P.W.8. The victim girl (P.W.2) has clearly deposed that the appellant had sexual intercourse with her. The Doctor (P.W.8) has clearly deposed that the victim girl was subjected to sexual intercourse. Therefore, from the evidence of the victim girl (P.W.2) and Doctor (P.W.8), the prosecution has proved its case beyond reasonable doubt. The victim girl was produced before the learned Judicial Magistrate for recording statement under Section 164 Cr.P.C and before him she has clearly narrated the said occurrence. At the time of occurrence i.e on 07.03.2017 the age of the victim girl is only 14 years, in order to prove the age of the victim girl, the Secondary School Leaving Certificate was marked as Ex.P6, in which, the date of birth of the victim girl is shown as 01.06.2002. Therefore, the prosecution has established their case at the time of occurrence, the victim girl is below the age of 16 years and the appellant committed offence under POCSO Act. The trial Court has rightly convicted the appellant and hence, the appeal is liable to be dismissed.

9. Heard the learned counsel for the appellant and the learned Government Advocate (Crl.Side) for the respondent and

also perused the materials available on record.

10. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.

11. On a careful perusal of the records, it would reveal that at the time of occurrence the victim girl was aged about 14 years, whereas, the appellant was aged about 34 years. The appellant and the victim girl are relatives and taking advantage of closeness of the relationship, the appellant took the victim girl to a field near a temple, which situated on the backside of their house and used to have sexual intercourse with the victim girl for three months. The parents of the victim girl had got doubt and questioned the victim girl, she revealed the said occurrence. The victim girl has also stated that due to penetrative sexual assault, she got pregnancy, subsequently, the appellant administered pills to her for miscarriage of the pregnancy. Further, the Doctor (P.W.8), who examined the victim girl has opined that the victim girl was subjected to penetrative sexual assault and she got pregnancy and she referred the victim girl and the appellant for D.N.A. test, but, the same was not done by the Investigating Officer. It is a lapse on the part of the Investigating Officer and it will not affect the case of the prosecution. It is settled law that defect in investigation is not a sole ground to disbelieve the evidence of the prosecution. It is settled proposition of law that lapses on the part of prosecution should not lead unmerited acquittal, subjected to rider that in such a situation evidence on record should be clinching, so that lapses of prosecution can be condoned.

12. In this case, the victim girl, who was examined as P.W.2, has clearly deposed that the appellant had committed penetrative sexual assault on her, due to which she got pregnancy. Subsequently, it was miscarried by administering pills by the accused. Subsequently, when it came to the knowledge of the parents of the victim girl, the mother of the victim girl (P.W.1) preferred the complaint (Ex.P1) to the respondent police. In cases of this nature, presence of independent eye witness are mostly improbable. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible. After receiving complaint, during the investigation, the victim girl was produced before the Doctor (P.W.8), who has clearly deposed that the hymen of the victim girl was not intact and the last mensuration period was recorded by P.W.8 as 18.08.2017. Further, P.W.6 Doctor, who examined the victim girl has clearly stated that, at the time of clinical examination, the victim girl has stated that she was sexually assaulted by her relative. On verification of the scan report, the Doctor found that the victim was pregnant for 14 weeks. Further the tissues collected at the time of miscarriage of pregnancy were sent for DNA analysis on 09.10.2017, unfortunately, the same were not sent for DNA

test. Therefore, the evidence of Doctors P.W.6, P.W.8, clearly show that the victim girl was subjected to penetrative sexual assault. From the evidence of the victim girl (P.W.2) and the Doctors (P.Ws.6 and 8) the prosecution has proved its case beyond all reasonable doubt. Further, the Secondary School Leaving Certificate (Ex.P6) clearly shows that at the time of the occurrence, the victim girl was aged about 14 years. Therefore, the prosecution has proved that the victim girl was a child under the definition of Section 2(1)(d) of POCSO Act.

13. This Court finds that the appellant has committed the charged offence. Therefore, the trial Court, being a fact finding Court has rightly appreciated the entire evidence and convicted the accused/appellant as stated in the foregoing paragraphs of this order. This Court also finds no perversity in the said judgment of the trial Court.

14. In fine, this Criminal Appeal deserves to be dismissed and accordingly, the same is dismissed. The conviction and sentences passed in Spl.S.C.No.46 of 2018 by the Sessions Judge, Mahalir Court, Cuddalore is confirmed. Consequently, connected miscellaneous petition is closed.

15. From the evidence of P.W.2, P.W.6 and P.W.8, this Court finds that the victim girl got pregnancy and subsequently, the same was miscarried and the tissues were sent for forensic lab for DNA test. The Investigating Officer, should have taken steps to send the blood samples of the victim girl, the appellant for D.N.A.test. However, in this case the Investigating Officer has not done the same and therefore, it is only due to the negligence on the part of the Investigating Officer. The Investigating Officer, who dealt with the case has not understood the scope and object of the POCSO Act. Therefore, it is highly condemned. The Department concerned is directed to take severe action against the Investigating Officer viz., Mrs.Thamarai Selvi/P.W.9 who conducted the investigation in this case and submit action taken report before this Court.

Sd/-

Assistant Registrar (CS-CCC)

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Sub Assistant Registrar

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To

1. The Sessions Judge,
Mahila Court,
Cuddalore.

2.The Superintendent,
Central Prison,
Cuddalore.

3.The Inspector of Police,
All Women Police Station,
Virudhachalam,
Cuddalore District.

4. The Chairman,
POCSO Committee,
High Court, Madras.

5. The Superintendent of Police,
Cuddalore.

6. The Deputy Superintendent of Police,
Cuddalore.

7.The Public Prosecutor,
High Court, Madras.

Copy To

The Deputy Registrar |with a direction to send back the
(Criminal Section), |original records, if any, to the
High Court, Madras. |trial Court

+1cc to Mr.A.Gopinath, Advocate SR.No.12363

CRL.A.No.253 of 2019
and CrI.M.P.No.6359 of 2019

UM(CO)
GMY(13/07/2021)

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