



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.09.2021

CORAM:

THE HON'BLE JUSTICE MR. JUSTICE P.VELMURUGAN

CRL.A.No.229 of 2021

K.V.Ramanujam

...Appellant/Accused

Vs

The State of Tamilnadu,
Rep by the Inspector of Police,
W-22, All Women Police Station,
Mylapore, Chennai- 600 004.

...Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure praying to allow the appeal and set-aside the Judgment of conviction imposed in S.C.No.124 of 2017 dated 16.04.2021 by the learned Sessions Judge, Special Court for Exclusive Trial of cases under POCSO Act, Chennai, against the Appellant/Accused.

For Appellant : Mr.P.Ramesh Kumar

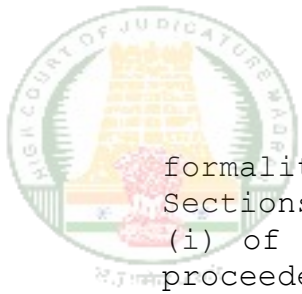
For Respondent : S.Sugendran

Government Advocate (Crl Side)

JUDGMENT

This Criminal Appeal has been filed against the Judgment dated 16.04.2021 passed in S.C.No.124 of 2017 by the learned Sessions Judge, Special Court for Exclusive Trial of cases under POCSO Act, Chennai.

2 The respondent police registered the case against the appellant in Crime No.18 of 2016 for the offence under Section 5(k) and 5(l) punishable under Section 6 and 14(1) of POCSO Act and also Section 506 (ii) of IPC. After completing investigation, laid a charge sheet before the Mahila cum Children Court and the case was taken on file in S.C.No.124 of 2017 and since Special Court has been constituted, the case was transferred to the Special Court for Exclusive Trial of Cases Under POCSO Act. The learned Sessions Judge after completing



formalities framed charges for the offence punishable under Sections 10, 6, 14(3) and 14(5) of the POCSO Act and Section 506 (i) of IPC. The learned Special Judge after framing the charges proceeded with the trial in accordance with law.

WEB COPY

3 During the trial, in order to prove the case of the prosecution, on the side of the prosecution, as many as 7 witnesses were examined as P.Ws.1 to 7 and 11 documents were marked as Ex.P1 to P11 and 3 Material Objects were exhibited as M.O.1 to M.O.3 besides two Court documents as Ex.C1 and C2, the forensic lab reports, since it has been received by the Court directly. On completion of examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C. with reference to the incriminating circumstances, he denied the same as untrue and pleaded not guilty. On the side of the defence, one witness was examined as D.W.1 and no documentary evidence was produced.

4 On completion of trial and hearing of arguments advanced on either side and also after considering the material objects, the learned Sessions Judge found the appellant/accused not guilty for the offence punishable under Sections 6, 14(3), 14(5) of POCSO Act and hence acquitted him, however found guilty for the offence punishable under Section 10 of POCSO Act and also 506 (i) of IPC and sentenced him to undergo rigorous imprisonment for a period of five years and pay to a fine of Rs.25,000/-, in default, to undergo rigorous imprisonment for a further period of three months for the offence punishable under Section 10 of POCSO Act and to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.5,000/- in default, to undergo rigorous imprisonment for a further period of two months for the offence under Section 506 (i) of IPC and out of total fine amount of Rs.30,000/-, Rs.25,000/- was ordered to be paid to P.W.1/victim. The learned Sessions Judge has also awarded a compensation of Rs.2,00,000/- under the scheme of Tamil Nadu Victim Compensation Fund under the POCSO Act, which is to be paid by the controlling authority viz. The Commissioner of Social Defence, Chennai-10.

5 Challenging the said judgment of conviction and sentence passed by the learned Sessions Judge, Special Court for Exclusive trial of Cases under POCSO Act, Chennai, in S.C.No.124 of 2017 dated 16.04.2021 the accused has filed present appeal before this Court.



6 Learned counsel for the appellant would submit that the framing of charge itself vague and there is no specific date mentioned and therefore charge itself defective. There is a delay in filing the complaint and also registering the case. The alleged occurrence is said to have taken place on 13.06.2016 and the prosecutrix informed the same to P.W.4 the grandmother of the victim on 15.06.2016, whereas, the complaint given before the respondent police only on 17.06.2016 and the genesis of the complaint is highly doubtful. Therefore there is delay in filing complaint and the same has not been explained by the prosecution and the un-explained delay is fatal to the case of the prosecution.

6.1 Learned counsel for the appellant would further submit that even though the case was registered on 17.06.2016, the previous statement under Section 164 of Cr.P.C. was recorded only on 02.07.2016 and there was 16 days delay in recording the statement under Section 164 of Cr.P.C. in which, there was more possibility for improving the version of the prosecution. P.W.2 mother of the victim, who is the defacto complainant, had lodged the present complaint against the appellant and it is to be noted that she is not an eye witness and her evidence is only hearsay evidence. Even though the victim girl has stated that for 2 ½ years she went to the house of the appellant for learning flute, but P.W.2 defacto complainant has stated that her daughter has not informed anything about the sexual assault committed by the appellant on an earlier occasion and she informed the same only through P.W.4, who is the grand mother of the victim. If at all for nearly 2½ years the appellant acted differently, the victim, being 17 years old girl, should have informed the same to her parents at the threshold.

6.2 The victim was taken to the Music Class by her father/P.W.3 or sometimes by her grandmother/P.W.4 and while they taking the victim to the Music Class, they were waiting outside the hall, in which the class was conducted and the waiting place is very closer to the hall and hence, if really the appellant misbehaved with the victim as projected by the prosecution, she can very well raise alarm, which can be easily heard by the parents of the victim, who were waiting outside the hall and it can be prevented at the earlier stage and it is not necessary for the victim to bear the act of the appellant, but, the victim did not raise any alarm or any complaint against the appellant and she waited for 2 ½ years to raise complaint against the appellant, which itself clearly shows that there is no truth in the prosecution story. Further, the hall in which the music class conducted is a very small and other students



were also learning music in the same hall and it is highly impossible for the appellant to misbehave with the victim girl. None of the class students or their parents made any allegations of this nature against the appellant and in order to prove the genuine character of the appellant, the appellant has examined D.W.1, who is a father of two children who were learning music from the appellant for more than 10 years, one boy child and one female child and he clearly deposed that out of these years he had never come across the complaint of this nature from any of the parents.

6.3 The character of the appellant is good and the same was proved by the evidence of D.W.1 and as per Section 53 of Indian Evidence Act, in criminal proceedings the fact that the accused person is of a good character is relevant. In the instant case, except the victim, none of the students came to the appellant for learning Musical Instruments, ever made any complaint regarding the sexual harassment or sexual assault alleged to have made by the appellant on the victim. Further he would submit that there are improvements in the evidence of the victim and material contradictions between the statement under Section 161 (3) and 164 Cr.P.C and there are lots of improvements and contradictions stage by stage. It is settled proposition of law that conviction can be recorded solely based on the evidence of the victim provided the same inspires the confidence of the Court and in the instant case it is proved that the evidence of the victim is not consistent, cogent and it seems to be unnatural and the same does not inspire the confidence of the Court.

6.4 Further he would submit that P.W.2 is mother, P.W.3 is father and P.W.4 is grandmother of the victim and they are all only hearsay witnesses and the victim is the only eye witness. It is stated by the victim that the appellant misbehaved with some of the other students also and the prosecution has not examined such students to ascertain as to whether the appellant has committed any offence of this nature with any other students and the same is fatal to the case of the prosecution. Even though the victim was subjected to medical examination, medical evidence does not support the case of the prosecution since from the medical evidence it is clear that there was no external injuries and hymen was intact and therefore medical evidence is not helpful to the case of the prosecution. The appellant was charged for the offence under Section 14(3), 14(5) of the POCSO Act, but, prosecution has failed to prove the charges from the recovered material objects. It is the allegation made by the victim that the appellant used



to record the sexual assault in his cell phone and he used to threaten her that if she reveals to anybody he will upload the same in the Internet and also he would kill her parents and brother. There is no material evidence recovered from the appellant and also produced to prove that appellant mis-behaved with the victim and had committed sexual assault and took the photograph and video graphed the same and hence evidence of the victim is not believable, which is, in fact, highly doubtful. The trial only based on the evidence of victim alone convicted the appellant for the offence under Section 9(1) which is punishable under Section 10 of POCSO Act.

6.5 The learned counsel for the appellant/accused would further submit that there is no material evidence to show that the appellant committed sexual offence on the victim more than once. Therefore charge framed under Section 9(1) for aggravated penetrative sexual assault would not attract. Further the charge itself is not specific and it is vague and without understanding the charge it is difficult for the accused to face the trial and establish his defence and dis-proves the case of the prosecution. The statement recorded under Section 164 (5) of Cr.P.C. is not a substantiative evidence and on reading of the statement recorded under 164 Cr.P.C. there is material contradiction and the trial Court convicted the appellant based on the evidence of the victim girl without any corroborative evidence. At any angle, conviction recorded against the appellant/accused is not sustainable under law, in the absence of any corroborative evidence. The trial court failed to appreciate the evidence and wrongly convicted the appellant. Unless the prosecution established its case that the appellant has committed the sexual assault, presumption under Section 29 and 30 of the POCSO Act would not attract and if the prosecution established the sexual assault then only Section 29 and 30 would come into play, which is a rebuttable presumption. Prosecution has failed to establish its case beyond all reasonable doubt and the trial court failed to appreciate the evidence of the prosecution witnesses.

6.6 The learned counsel further vehemently contended that P.W.1 victim girl during the cross examination has clearly stated that music class was conducted at the room and during that time her father used to wait in the Hall till the class gets over and she sat in the room one feet away from the exit door and she can hear whatever spoke in the waiting hall. When that being the position, the victim girl being a 17 years old at the time of occurrence, it is not necessary for her to bear the sexual assault said to have committed by the appellant for 2½



years and she would have raised alarm and prevented the sexual assault at the threshold. The case of the prosecution is improbable and the evidence of the victim girl does not inspire the confidence of the Court. Unless there was a tutoring of the minor girl, it is absolutely impossible for such a girl to depose against the appellant in a verbatim statement before all authorities using the same words, which is likely creating suspicious in the truth and veracity of the deposition of the victim girl.

6.7 From the evidence of D.W.1 it is proved that the door of waiting hall and the music class are always open and they can always hear music from the waiting hall and the parents are always permitted to have access to the class room without any permission. Thus, the case of the prosecution does not satisfy the foundational fact of the offence to initiate the presumption under Section 29 and 30 of the POCSO Act. The appellant is a senior citizen, permanently disabled and a person of Special Needs. He is also suffering from serious Co-Morbidities such as Low Blood Pressure and Type-2 Diabetes. Such a person cannot do this type of offence and the trial Court failed to appreciate the evidence of the prosecution witnesses and erroneously convicted the appellant, which warrants interference of this Court.

7 The learned Government Advocate (Criminal Side) appearing for the respondent police would submit that the age of the victim was 17 years at the time of occurrence and she went to the house of the appellant for learning flute and at that time, the appellant had committed the sexual assault repeatedly and he threatened her not to reveal the said act committed by the appellant to anybody, if she reveals he would take away the life of her parents and brother and also he would upload the scene along with photos and videos in the Internet and therefore she did not reveal the sexual assault committed by the appellant to anybody. At one stage, since the victim could not tolerate the behavior of the appellant, which exceeds the limit at one point of time, the victim informed her grandmother, whom she trusts and subsequently the parents of the victim questioned him, for which he also admitted the same and said that nothing wrong in it. Therefore with no other option except lodging the complaint, P.W.1 lodged the present complaint.

7.1 To prove the age of the victim, prosecution has marked Birth Certificate and Transfer Certificate of the victim as Ex.P1. As per Ex.P1 the date of birth of the victim is 31.07.1998 and the date of the occurrence is on or before



13.06.2016 and therefore the age of the victim at the time of the occurrence was only 16 to 17 years and hence she is a child under the definition of Section 2(1)(d) of the POCSO Act and the defence has not disputed the age of the victim. The victim went to the appellant for 2 ½ years to learn flute and the appellant mis-behaved with her and committed sexual assault on her sometimes he used to record the same in his cell phone and threatened the victim girl not to reveal the same to anybody, if she reveals, he would kill the family members of the victim and also threatened the victim that he would upload the videos in the Internet. Therefore, on fear, the victim girl did not inform the sexual assault to anybody and since at one point of time, she could not bear the act of the appellant, first time on 15.06.2016 she informed the same to her grandmother, on whom the victim has faith. The victim was produced before the Judicial Magistrate to record statement under Section 164 Cr.P.C and subsequently she was produced before the Doctor/P.W.6 for medical examination and thereafter the victim was also examined as P.W.1. In all the stages, the victim has clearly narrated all incidents of sexual assault committed by the appellant. Therefore in this case, prosecution has proved its case beyond all reasonable doubt by examining the victim P.W.1 and also through previous statement recorded under Section 164 Cr.PC.

7.2 Even though, the victim has not stated or informed the sexual assault committed by the appellant prior to 15.06.2016, but however, P.Ws.2 to 4 have categorically stated that few months prior, the victim behaved differently. In the cases of this nature, no independent witness can be expected other than the victim girl and in this case, the victim girl has clearly stated that the appellant soon after completing the music class when all other students went out from the class and when she was alone, the appellant used to mis-behave with her. Even though she has stated that one of the students noticed the sexual assault committed by the appellant and laughed at her, however non examination of the said witness is not fatal to the case of the prosecution, since he is also a student of the appellant and naturally one could not expect any favorable evidence to the prosecution from those witnesses. Further delay is also not fatal to the prosecution, since the victim has clearly stated that the appellant threatened her not to reveal to anybody, if she reveals, he would upload the scene in the Internet. Therefore, the trial Court has convicted the appellant and sentenced accordingly and there is no merit in the appeal and the same is liable to be dismissed.



WEB COPY

8 Heard the learned counsel appearing for the appellant and the learned Government Advocate (Crl.Side) appearing for the respondent and has carefully perused the materials available on record and the judgment of the trial Court.

9 Case of the prosecution is that on 13.06.2016 and prior to that, while the victim girl aged about 17 years, who has not having the mental maturity of her, attended flute musical instrument class with the accused at his residence at Maarvadi Thottam, Mylapore, the accused, with sexual intent, despite the objection made by the victim girl, touched, rubbed and sucked the breast of the victim girl, kissed on her cheek and also inserted his hands inside her inner garments and penetrated her private parts and further the accused made the victim to kiss on his cheek, suck his chest and made the victim girl to insert her hands inside his inner garments and touch and press his private parts and in the course of such act, the accused took videos of the sexual assault committed by him and also threaten the victim girl that he would post the videos in the Internet.

10 In order to find out the guilt of the accused this court, as final court of fact finding, has re-appreciated the evidence independently. The victim joined music class for learning flute from the appellant, which was conducting at the house of the appellant. According to the prosecution as per the evidence of P.W.1, the appellant rubbed and sucked the breast of the victim like mother feeding and also inserted his hands inside her inner garments and made the victim to insert her hands in his inner garment and also made her to touch his private part and he used to do the same when other students are not in the class. Even though, sometimes, the father of the victim used to drop her and wait for sometime very near to the hall, since the hall is provided by air conditioning, it is clear from the evidence of the victim that the appellant used to lock the hall and sometime he also ask the other students to wait outside and after completing the class, when all the students left, he used to mis-behave with the victim and made sexual assault on her when she refuses, the appellant threatened her and also if she does not cooperate with him and if she reveals the same to anyone, he would take away the life of her. In the statement recorded under Section 164 Cr.P.C, and also while examining as witness before the trial Court, the victim girl has clearly narrated the sexual assault committed by the appellant. As per the evidence of the victim, the offence committed by the appellant falls under Section 3 which is



punishable under Section 4 and since the appellant committed the said offence repeatedly more than once, the same is falls under Section 5(1) which is punishable under Section 6, however the Trial Court not found the appellant guilty for the said offences.

11 As per section 3 of POCSO Act, mere touching of the vagina of a child with sexual intend is an offence comes under the definition of penetrative sexual assault, but, however the trial court failed to understand the provisions of law and convicted the appellant only for the offence punishable under Section 10 of the POCSO Act.

12 Coming to the contention of the learned counsel for the appellant, he contended that there are improvements and contradictions between the evidence of the prosecution witnesses. According to this Court, on a careful reading of the evidence of the prosecution witnesses, the contradictions pointed out by the learned counsel for the appellant are not material contradictions and the same will not go into root of the case of the prosecution. P.W.1 the victim girl has clearly stated that even more than 2 years the appellant had been continued the sexual assault on her and due to the threat made by the appellant, she did not reveal the same to anyone and hence the delay in filing the complaint has been properly explained by the victim and therefore the delay in filing the complaint is not fatal to the case of the prosecution.

13 In the cases of this nature, victim is a child and the culprits used to take advantage of mental status and age of the victim and they used to threaten the victim and sometimes the victim do not have boldness to reveal the sexual assault immediately soon after the occurrence, which depends upon the mental status of the victim and also forces used by the accused. In this case the victim informed the sexual assault committed by the appellant to her grandmother on 15.06.2016 and complaint was lodged on 17.06.2016. In the case of this nature, no parents would rush to the police immediately soon after getting information and naturally they would think about the future of the child and reputation of the family and they also afraid of the society and therefore delay in filing the complaint is not fatal to the case of the prosecution.

14 The learned counsel for the appellant contended that there is no independent witness and all are interested witnesses and the prosecution has failed to examine any independent witness. As already stated, in the cases of this



nature, no independent witness could be expected and mere non examination of the independent witness is not a sole ground to acquit the accused. The cases of this nature, if the child is suffered from sexual assault, conviction can be recorded solely based on the evidence of the victim child, if the evidence of the victim is cogent, consistent and inspires confidence of the court. Even though, learned counsel for the appellant contended that even father of the victim was waiting outside of the hall and sitting very close to the hall and in such circumstances, no person could commit such an offence, but, on reading of the evidence of the victim girl, she had clearly stated that the appellant used to send all the students after completing the class and retain the victim for some time and since the hall is air conditioned, he would close the doors and would commit the sexual assault. The victim girl did not raise any alarm, since the appellant threatened her that he would upload all the obscene through Internet and also threatened that he would take away the life of her family members. Since the victim had not disclosed the sexual assault immediately, it cannot be concluded that she was not subjected to sexual assault and non disclosure of the sexual assault committed by the appellant was properly explained by the victim.

15 The appellant examined D.W.1 father of the one of the students of the appellant and he has deposed that he had never come across such a complaint against the appellant and the appellant is good and genuine person. Since the appellant had not mis-behaved with other students or since the other parents had not made any complaint against the appellant, does not mean that the appellant did not mis-behave with the victim. It is not necessary for him to mis-behave with all the students and he had chosen the victim after observing her physical and mental maturity. It is the contention of the learned counsel for the appellant that the charge is very vague and there is no specific date, time and place, but, however the appellant understood the charges and examined one defence witness and hence the contention of the learned counsel for the appellant is not acceptable. It is contended by the learned counsel for the appellant that the the victim had not resisted the act of the appellant and had accepted the same. Once prosecution has proved the age of the victim that she is a child under the definition of Section 2(1)(d) of POCSO Act, the consent of the victim and non resistant of the act of the appellant are immaterial. The trial Court, from the evidence of the victim girl, found that the appellant has committed the offence under Section 9(1) which is punishable under Section 10 of POCSO Act.



16 Therefore under these circumstances, this court does not find any perversity in the judgment of the trial Court and considering the facts and circumstances of the case, this court also does not find any mitigating circumstances to reduce the sentence and there is no merit in the appeal and it is liable to be dismissed.

17 Accordingly, the criminal appeal stands dismissed. Trial Court is directed to secure the custody of the appellant/accused to serve remaining period of imprisonment, if any.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

cgi/dsn

To

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

Copy to

1. The Superintendent
Central Prison, Puzhal.
2. The Section Officer
Criminal Section
High Court, Madras 104.

CRL.A.No. 229 of 2021

SSD(CO)
SP(20/01/2022)