



Bail Slip in Crl.A.No.228 of 2021

The Appellant / Accused viz., David Chellaiya, S/o.Robert Joseph was directed to be enlarged on bail vide order in Crl.M.P.No.5649 of 2021 in Crl.A.No.228 of 2021, dated 06.05.2021 on the file of the High Court, Madras.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.09.2021

CORAM:

THE HON'BLE MR.JUSTICE P.VELMURUGAN

CRIMINAL APPEAL NO.228 OF 2021

David Chellaiya

...Appellant / Accused

Versus

The State Rep.by
The Inspector of Police,
Mantharakuppam Police Station,
Cuddalore District.
(Crime No.9 of 2020)

...Respondent / Complainant

Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, to set aside the conviction and sentence dated 30.03.2021 imposed in Spl.S.C.No.12 of 2020, by the learned Sessions Judge, Special Court for POCSO Act, Cuddalore.

For Appellant : Mr.R.Sankarasubbu

For Respondent : Mr.S.Sugendran,
Government Advocate (Crl.side)

JUDGMENT

This Criminal Appeal has been filed against the conviction and sentence imposed on the appellant vide Judgment dated 30.03.2021 made in Spl.S.C.No.12 of 2020, on the file of learned Sessions Judge, Special Court for POCSO Act, Cuddalore.

2.The case of the prosecution is that on 10.01.2020 at about 4.00 p.m, the appellant went along with one Raja to meet the victim's father. Due to Aroothara Tharisan holiday, the victim did not go to the School on that day. While the said Raja was talking with the victim's father outside the house, the appellant entered into the room of the victim girl and asked



some water, immediately, she entered into the opposite room to fetch water. All of a sudden, the appellant embraced the victim and kissed her, immediately, the victim girl pushed the appellant and came to the hall, where, the appellant gave his contact number to the victim girl and threatened to call him and also threatened her not to disclose the same to anyone. When her mother returned from the work at 7.00 p.m, the victim girl informed the incident, thereafter, the parents of the victim girl and her grandfather searched the appellant at his house and other places, but they could not find him. On the next day, the parents of the victim girl gave a complaint before the respondent/police and a case has been registered against the appellant.

3.The respondent/police registered a case in Crime No.9 of 2020, for the offence under Section 448,354(A) and 506(i) of IPC., and also for the punishable offence under Section 8 of POCSO, Act, 2012. After completing the investigation, the respondent/police laid a charge sheet before the Trial Court. Subsequently, the charges were altered for the offences under Sections 448, 354(A), 506(i) of IPC., and Section 7 punishable under Section 8 of POCSO Act, before the Special Court, Cuddalore. Thereafter, the charge sheet was taken on file in Spl.S.C.No.12 of 2020. After completing the formalities charges were framed against the appellant herein, for the offence under Sections 451, 506(i) of IPC., r/w Section 7 punishable under Section 8 of the POCSO Act. After framing the charges, during trial, in order to prove the case of the prosecution, on the side of the prosecution, as many as twelve witnesses were examined as PW.1 to PW.12 and ten documents were marked as Ex.P1 to Ex.P10. No material object was produced.

4.On completion of examination of the prosecution witnesses, incriminating circumstances were culled out from the evidence of prosecution witnesses were put to the appellant and questioning under Section 313 of Cr.P.C., the appellant herein denied the same as untrue and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

5.On completion of trial, hearing of arguments advanced on either side and perusal of materials, the learned Special Judge, Cuddalore, found the accused guilty of the offence under Section 451, 506(i) of IPC., and Section 7, which is punishable under Section 8 of the POCSO Act, however, he was convicted and sentenced to undergo two years Rigorous Imprisonment and to pay fine of Rs.1000/- in default to undergo three months Simple Imprisonment. Further, he was convicted and sentenced to undergo five years Rigorous Imprisonment and to pay fine of Rs.2000/-, in default to undergo further period of three years Simple Imprisonment for the offence under Section 7, which is



punishable under Section 8 of the POCSO Act. Challenging the said Judgment of conviction and sentence passed by the Special Court for POCSO Act, Cuddalore, the accused has filed the present appeal before this Court.

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6. The learned counsel for the appellant would submit that the previous enmity between the appellant and the father of the victim girl was not proved by the prosecution beyond all reasonable doubt. There are material contradictions between the prosecution witnesses. The medical evidence does not support the case of the prosecution. The appellant never committed any offence as alleged by the prosecution and no materials to connect the appellant, for the commission of the alleged charges. Further, he submitted that there are contradictions in the evidence of the victim girl, while giving her statement before the Judicial Magistrate and evidence given before the Trial Court. The said contradiction is a material contradiction, which will go to the root of the case of the prosecution. There was delay in filing the First Information Report and there was no sufficient explanation given in the complaint for the delay. The prosecution has miserably failed to prove the case of the prosecution, whereas, the Trial Court failed to appreciate the same and convicted the appellant, only on the assumption and sympathy, hence, the Judgment passed by the Trial Court is liable to be set aside.

7. The learned Government Advocate (crl.side) appearing for the respondent/police would submit that the victim was only 13 years at the time of occurrence. The appellant is a friend of the father of the victim girl. On the date of occurrence, the appellant went along with one Raja to meet the victim's father, while the father of the victim was talking with Raja outside the house, the appellant entered into the house of the victim and asked her to give some water. When the victim girl entered the room to bring water, the appellant also entered into the room, and embraced her. The victim girl immediately pushed the appellant and came out from the room into hall. Thereafter, the appellant gave his phone number to the victim girl, to call him, when she was alone in her house, and also threatened her to talk with him over phone and not to reveal the same to anyone, If she revealed it, she would be killed by him. Thereafter, the appellant left from there along with Raja. The victim did not inform the incident to her father immediately, since she was feeling shy. When her mother came to the house in the evening, she informed her mother. Thereafter, the father, mother and the grandfather of the victim girl searched the appellant, but he was not available in his house and around the place. On the next day, they went to the police station and gave a complaint against the appellant herein. The respondent/police registered a case, conducted investigation and filed charge sheet before the



Trial Court and the same was taken on file in Spl.S.C.No.12 of 2020.

8.heard both sides and perused the materials available on record.

9.The victim girl was examined as PW.1, the mother of the victim girl was examined as PW.2 and the father of the victim girl was examined as PW.3. PW.1 has spoken about the occurrence and PW.2 & PW.3 have spoken about the complaint given to the Police after their daughter informed them about the incident. The victim was also produced before the Judicial Magistrate and her statement recorded under Section 164 Cr.P.C., was marked as Ex.P1, wherein, she also stated about the misbehaviour done by the appellant. The date of birth of the victim girl was confirmed by producing birth certificate of the victim under Ex.P2. Therefore, the prosecution has proved that the victim is a child, she has not completed the age of 18 years on the date of occurrence. The medical officer, who conducted medical examination of the victim girl was examined as PW.7. A reading of the evidence of PW.2, PW.3 & PW.7 and Ex.P1 to Ex.P5 it is clear that the prosecution proved its case beyond all reasonable doubts.

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

11. The Special Court, based on the charge sheet filed by the prosecution, framed the charges as stated above. In order to substantiate the charges, on the side of the prosecution totally twelve witnesses were examined and ten documents were marked. Out of which, the victim was examined as PW.1. Earlier, the victim was produced before the Doctor/PW.7, who conducted medical examination. Subsequently, she was also produced before the Judicial Magistrate for recording statement under 164 Cr.P.C., In this case, though, the victim was in house, the mother was not in the house her father was talking with one Raja, who came along with appellant. At that time, the appellant alone entered into the house, asked the victim to give some water. when, she entered the room to fetch water at that time the appellant also entered into the room and embraced her. When she was produced before the Judicial Magistrate, she stated that the appellant made bad touch. The learned counsel for the appellant pointed out that there are contradictions in the evidence of the victim, at the time when she made statement before the Judicial Magistrate she has not given details regarding sexual assault, however, while examining as a witness before the Trial Court, she has given details of committing the sexual assault made by the appellant, which is nothing but



improvement and also exaggeration, which itself shows that the evidence of the victim is unnatural and after thought. Further, the appellant and the father of the victim was having enmity with regarding to their business, in order to take vengeance, the father of the victim had used the victim as a tool and foisted a false case against the appellant. The prosecution has failed to conduct a fair investigation and simply filed the charge sheet, based on the complaint given by the mother of the victim. The medical evidence is also not supported the case, since there is no penetrative sexual assault and any injury found on the victim.

12.However, a reading of evidence of PW.1/victim, the mother of the victim girl/PW.2, would go to show that when the victim girl was produced before the Doctor, the victim girl stated that a known person had committed the sexual assault by embracing her with bad intention. The victim girl has stated in her statement under Section 164 of Cr.P.C., before the Judicial Magistrate, that the appellant made a bad touch on her. Further, during the trial, in her evidence, she stated that the appellant had embraced her and kissed her. Therefore it cannot be an exaggerated version.

13.The age of the victim girl was only 13 years, at the time of occurrence. In order to prove the same, birth certificate was produced before the Trial Court and the same was marked as Ex.P2. As per Ex.P2, the date of birth of the victim girl is 10.08.2006 and the date of occurrence is 10.01.2020, therefore, on the date of occurrence, she was 13 years old. At the time of occurrence, the father of the victim was standing outside the house and talking with one Raja, but he was not examined. The victim clearly stated that the appellant threatened her not to disclose the incident to anyone. Further, she stated that since she felt so shy, she did not inform it to her father immediately. When her mother returned home in the evening, the victim girl informed the mother. Immediately, the parents of the victim girl and her grandfather searched the appellant, they could not find out the appellant anywhere, only on the next day, they went to the Police Station and filed a complaint against the appellant.

14.In a case of this nature, normally, the parents will hesitate to inform such things to the Police immediately by considering the future of the minor girl. Therefore, the delay in filing the complaint, in cases of this nature is not fatal to the case of the prosecution. Ex.P2, birth certificate clearly shows that age of the victim girl at the time of occurrence was 13 years. Since she was a child, it comes under the definition of Section 2(1)(d) of the POCSO Act. Though no external injury was caused at the time of sexual assault, the

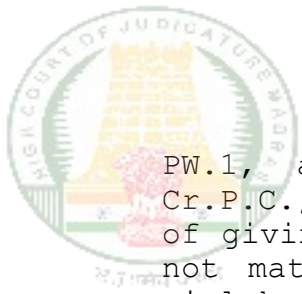


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victim girl has specifically stated that the appellant embraced her with bad intention and immediately she pushed him and entered into the hall and called her father, who was talking with one Raja outside the house. Thereafter, the appellant gave his phone number and threatened her not to inform the same to anybody, in case, if she does so, she will kill her. Therefore, she has not revealed the same to her father immediately. Later, when her mother returned to the house in the evening, she informed the same to her mother. Therefore, the contention that there is no eye witness to the incident cannot be accepted. In cases of this nature, culprits take the chance of aloofness of the children and try to exploit them for sexual acts. Therefore, the parents also reluctant to approach either someone or neighbours in view of the social stigma. Therefore, non availability of independent evidence is not fatal to the case of the prosecution. In the cases of this nature, the Court cannot expect independent witness or eyewitness. The father and the friend of the appellant were talking outside the house of the victim. In this case, there is no penetrative sexual assault alleged to have committed and therefore, the medical evidence cannot be relied on. Further, the victim informed to the Doctor that a known person had sexually assaulted her. The evidence of PW.1/victim before the Trial Court, her statement recorded under Section 164 Cr.P.C., and the entries made in the Accident Register, would make it clear that the accused/appellant has committed the offence under Section 7, which is punishable under Section 8 of the POCSO Act. The evidence of the victim girl is cogent and consistence and there is no reason to discard the evidence of the victim girl. Her evidence is natural and it inspires the confidence of this Court. Therefore, there is no reason to disbelieve the evidence of the victim girl. In the absence of any corroborative evidence, the victim's evidence is enough to convict the appellant.

15.Further, this Court finds that since the appellant himself admitted that he went along with other person to meet the father of the victim girl, it is clear that the commission of offence under Section 451 of IPC., is not made out and it is liable to be set aside. However, the victim has clearly stated that the appellant threatened the victim not to reveal the fact to anyone and she also did not inform the same to her father immediately, due to her shyness. Therefore, this Court is of the opinion that the appellant has committed the offence under Section 506(i) of IPC.,

16.From the reading of evidence of PW.1/victim, Statement recorded under Section 164 Cr.P.C., this Court finds that the appellant has committed the offence under Section 7, which is punishable under Section 8 of the POCSO Act. Though the appellant pointed out some contradictions from the evidence of



PW.1, at the of recording statement under Section 164 of Cr.P.C., before the learned Judicial Magistrate and at the time of giving evidence during the trial, the said contradictions are not material contradictions. The fact remains that the victim girl has clearly stated that on the date of occurrence, i.e., on 10.01.2020, the appellant misbehaved with her. She has stated about the bad touch and that the appellant embraced her. According to the learned counsel for the appellant that the appellant has not committed any offence and he simply asked water, she gave water, at that time unexpectedly his finger touched her. However, the victim girl stated that the appellant had committed bad touch on her. Once a case has been registered for the offence under Section 7 of POCSO Act and the victim girl stated in her evidence that she was subjected to sexual assault, the presumption is that the accused, with an ill intention touched her and committed the offence. It is for the appellant to rebut the presumption. But such presumption has not been rebutted by the appellant in a manner known to law. This Court is of the considered view that the prosecution has proved its case beyond all reasonable doubt that the victim is a child under the definition of 2(1)(d) of POCSO Act and she was subjected to sexual assault by the appellant. Therefore, there is no merit in the appeal. The Trial Court rightly appreciated all the materials and convicted the appellant. However, this Court feels that the prosecution failed to establish the case beyond all reasonable doubt that the appellant, with ill intention, had trespassed into the house of the victim and committed the sexual assault. Therefore, this Court finds that the appellant committed sexual assault, however, does not find with intention he trespassed, therefore, the conviction and sentence for the offence under Section 451 alone is set aside. The conviction and sentence awarded by the trial Court for the other charges remain unaltered.

17. It is reported that pending this Appeal, the substantial portion of sentence alone was suspended by this Court on 06.05.2021. In view of the dismissal of this appeal, the Trial Court is directed to take steps to secure the presence of the appellant/accused and to commit him to prison, so as to undergo the remaining period of sentence.

18. In the result, the Criminal Appeal is dismissed with the modification as indicated above.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

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To

1. The learned Sessions Judge,
Special Court for POCSO Act,
Cuddalore.
2. The Inspector of Police,
Mantharakuppam Police Station,
Cuddalore District.
3. The Superintendent of Prison,
Central Prison,
Cuddalore.
4. The Public Prosecutor,
High Court of Madras.
5. The Section Officer,
Criminal Section,
High Court, Madras.

Crl.A.No.228 of 2021

CP(CO)
RVM(27/01/2022)