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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 14.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.233 of 2021
and
Crl.M.P.No.5671 of 2021

Raja @ Allimuthu Raja ... Appellant/Sole Accused

Vs.

State represented by
The Inspector of Police,
Pudupettai Police Station,
Cuddalore District.
Crime No.117 of 2019

... Respondent/Complainant

PRAYER: This Criminal Appeal is filed under Section 374(2) of the Criminal Procedure Code, to call for the records in Spl. S.C.No.121 of 2019 on the file of the Sessions Judge, Special Court for Exclusive Trial of Cases Under POCSO Act, Cuddalore and set aside the conviction and sentence imposed upon the appellant by a judgment dated 08.01.2021 by allowing this appeal.

For Appellant : Mr.A.M.Rahamath Ali

For Respondent : Mr.S.Sugendran
Govt. Advocate (Crl.Side)

J U D G M E N T

This criminal appeal has been filed to call for the records in Spl. S.C.No.121 of 2019 on the file of the learned Sessions Judge, Special Court for Exclusive Trial of Cases Under POCSO Act, Cuddalore and set aside the conviction and sentence imposed upon the appellant by a judgment dated 08.01.2021 by allowing this appeal.

2. The respondent police registered a case in Crime No.117 of 2019 against the appellant for the offence under Sections 294 (b), 324, 354-C and 354-A IPC and also for the offence under Section 7 punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act' for short).



3. After investigation, the Respondent Police laid a charge sheet before the learned Sessions Judge, Special Court for Exclusive Trial of Cases Under POCSO Act, Cuddalore.

4. After completing the formalities, the learned Sessions Judge framed charges against the accused for the offence under Sections 294(b), 324, 354-A and 354-C IPC and also for the offence under Section 7 punishable under Section 8 of POCSO Act.

5. After framing charges, in order to prove the case of the prosecution during trial, as many as 11 witnesses were examined as PW.1 to PW.11 and 9 documents were marked as Ex.P1 to Ex.P9 on the side of the prosecution. No material object was exhibited. After completing the 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 incriminating circumstances appears against him and he denied the same as false and pleaded not guilty. On the side of the defence, no witness was examined, however, Ex.R1 was marked and the Court document C1 was also marked.

6. On completion of trial, after hearing the arguments advanced on either side and considering the materials, the Special Court found that the appellant/accused was not guilty for the offence under Section 354-C IPC. However, found that the appellant/accused was guilty for the offence under Sections 294 (b), 323 and 354-A IPC and Section 7 which is punishable under Section 8 of POCSO Act and he was convicted and sentenced as follows:-

Offence	Sentence
Under Sections 294(b) and 323 IPC	Imposed a fine of Rs.500/- each in default to undergo one month simple imprisonment for each of the offences.
Under Section 354-A IPC	Convicted and Sentenced to undergo three years rigorous imprisonment and imposed a fine of Rs.1000/- in default to undergo one month simple imprisonment.



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Offence	Sentence
Under Section 7 which is punishable under Section 8 of POCSO Act	Convicted and Sentenced to undergo five years rigorous imprisonment and imposed a fine of Rs.2,000/- in default to undergo further period of three months simple imprisonment.

7. Challenging the said judgment of conviction and sentence passed by the Special Court, the appellant/accused has filed the present criminal appeal before this Court.

8. The learned counsel for the appellant would submit that a false case has been registered against the appellant and the initial complaint given by the mother of the victim girl was suppressed by the prosecution. In order to implicate the POCSO Act, they have subsequently manipulated the complaint and also registered a false case against the appellant. Further, the appellant's sister also gave a counter complaint against the brother of the victim girl in Crime No. 118 of 2019 and that counter case has not been tried along with the above said case, which is also fatal to the case of the prosecution.

9. Further, cellphone has not been recovered from the accused which itself shows that false case has been registered. Even though witnesses have stated that the PW.3/brother of the victim girl was admitted in the hospital on the same day night and the medical officer has deposed that they had intimated it to the local police, the Investigation Officer has not stated as to whether any intimation has been received from the hospital authorities or any complaint has been received either from the complainant or social welfare officer and therefore, the earlier complaint also suppressed.

10. Further, regarding the incident, there are material contradiction between the prosecution witnesses viz., PW.1 to PW.3 and the deposition of PW.4 to PW.6 also do not support the case of the prosecution, they are all interested witnesses. Further, they have said that in the complaint and in the accident register, it is mentioned that four persons are involved in the case. But however, the Investigation Officer stated that only after investigation, he came to know that only one person namely the appellant is involved in the case and he had wrongly stated that 4 persons are involved in the case and therefore, this is also a material contradiction. Even though the victim girl was produced before the learned Judicial Magistrate for recording statement under Section 164 of Cr.P.C., there are several embellishments and also contradictions in the



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statement made before the police officer and also in the statement made before the Judicial Officer and subsequently in the deposition made during the examination as witness before the Trial Court. The Trial Court failed to appreciate the entire materials and therefore, benefit of doubt should have been extended to the appellant.

11. Even assuming that the incident is true, the act alleged to have been committed by the appellant does not attract the POCSO Act. The prosecution has stated that even one year before when the victim girl was studying IX standard and X standard, while she is coming to the class, the appellant committed certain acts and that cannot be clubbed with the present incident and also framing charges under the POCSO Act, which is only inscribed and therefore, the prosecution failed to establish its case beyond reasonable doubt and not explained the delay in filing the complaint and though the appellant's sister gave a complaint earlier to the complaint given by the mother of the victim girl. But whereas, FIR in Crime No. 117 of 2019 is different from the earlier FIR. Whereas, the appellant's sister has given complaint on 21st itself in Crime No. 118 of 2019, which is consequent to the present case, which itself shows that the the respondent police had suppressed the earlier complaint and manipulated the complaint as well as FIR. The prosecution has failed to establish the case beyond reasonable doubt. Therefore, the appellant is entitled to the benefit of doubt. The Trial Court failed to appreciate the materials and wrongly convicted the appellant by presumption and assumption and also on the ground of sympathy, which warrants interference of this Court.

12. Learned Government Advocate (Crl. Side) appearing for the respondent-police would submit that the victim was aged about 15 years and she has not completed the age of 18 years and the victim girl has clearly stated that as and when she was going to the school, the appellant committed certain acts which falls under the POCSO Act. Subsequently, she changed the school and on the date of occurrence, during the village festival, the appellant has also committed the offence and when the brother of the victim questioned the same, the appellant attacked the brother of the victim girl and he sustained injury and he was admitted in the hospital on the same day and the same was recorded in the accident register and the evidence of the Doctor also clearly proves the same. Mere non-recovery of the cellphone is not fatal to the case of the prosecution and the complaint given by the appellant's sister is not a counter complaint which is entirely different in which investigation has been completed and separate charge sheet has also been filed.



13. Even though the appellant has not taken any steps to conduct both the cases simultaneously or for joint trial, the appellant participated in the trial and also made an effective defence and after losing the case, he cannot state that it was a counter case, which should have been tried simultaneously and therefore, the said contention was not accepted. He would further submit that the victim girl has clearly narrated the occurrence and PW.1, who is the mother of the victim girl, and PW.7, who is the brother of the victim girl, are the eyewitnesses and their deposition supports the case of the prosecution. The evidence of the victim was corroborated and the medical evidence also corroborated the same. Therefore, under these circumstances, the Trial Court rightly appreciated the evidence and convicted the appellant and therefore, prays for dismissal of the appeal.

14. Heard both sides and perused the materials available on record.

15. The case of the prosecution is that the appellant was aged about 19 years and the victim girl was aged about 15 years and they were neighbours. When the victim girl was studying IX standard and returning from school in a bus, the appellant used to pull her hands, touch her breasts and pull her inner garment etc., and therefore, the victim was put in a hostel for her X standard. When she came home during holidays, the appellant was pestering her by saying that the appellant loved her and he would marry her only. On 21.04.2019 at about 21.30 hours, when the victim girl and her brother were watching the local temple festival, the appellant recorded video of the victim girl in his cellphone and a pebble was thrown at her, as she bowed her head and when the brother of the victim questioned about the said incident, the appellant abused him using filthy language and assaulted him. Thereafter, the victim girl has informed the said incident to her mother. The mother of the victim girl gave a complaint before the respondent-police. After investigation, the respondent police laid a charge sheet before the learned Sessions Judge and after completing the trial, the learned Sessions Judge convicted and sentenced the appellant for the above said offence. Hence, this appeal.

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

17. In this case, the Trial Court framed charges against the appellant as stated above. In order to substantiate the charges framed against the appellant, on the side of prosecution, totally 11 witnesses were examined and 9 documents were marked,



out of which the victim was examined as PW.1.

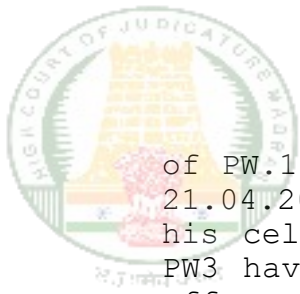
18. A reading of the deposition of PW.1 shows that she has clearly narrated the entire incident that took place on 21.04.2019. The mother of the victim girl was examined as PW.2 and the brother of the victim was examined as PW.3 and both are eyewitness to the incident that had taken place on 21.04.2019. Therefore, a combined reading of the evidence of PW.1 to PW.3, clearly proves that the appellant has misbehaved with the victim girl. Therefore, PW.2/mother, took the victim into her house and PW.3/brother of the victim had questioned the same. However, the appellant attacked him and he sustained injury and he was admitted in the hospital and medical records, which is marked as Ex.P4, clearly shows that the brother of the victim/the injured witness was admitted in the hospital on 21.04.2019 and discharged on 22.04.2019 and also the in-patient number was also mentioned as 15119 and the opinion of the Doctor is that the P.W.3 sustained a tear injury in his right ear.

19. Therefore, a reading of the evidence of PW.3 and Ex.P4, clearly shows that PW.3 is an injured witness and the evidence of PW.1 and PW.2 corroborated the evidence of PW.3. The Doctor, who gave treatment to PW.3 was examined as PW.10, clearly stated that on 21.04.2019 at 11.35 p.m., PW.3 was admitted in the hospital and he sustained injury and Ex.P4 also confirmed that the injury sustained by the PW.3, is simple in nature. Therefore, the prosecution has proved that the incident took place on 21.04.2019 in respect of the charge levelled against the appellant under Section 324 and the Trial Court, considering the nature of the injury, convicted the appellant under Section 323 IPC and not under Section 324 IPC.

20. Further, as far as Section 294(b) IPC is concerned, PW.3 has clearly stated that the injured witness PW.3 has seen the act committed by the appellant against her sister and he was abused with filthy language and therefore, in this case no other eyewitness. However, PW.3 is the injured witness as already stated by PW.10, the Doctor and Ex.P4, the medical records corroborated the evidence of PW.3 regarding the incident and therefore, the Trial Court came to the conclusion that the appellant committed the offence under Section 294(b) IPC and therefore, this Court also finds from the evidence of PW.3 that the appellant has committed offence under Section 294(b) IPC.

21. As far as the acquittal of the appellant for the offence under Section 354(C) IPC is concerned, neither the State nor the victim has filed any appeal against that and therefore, this Court is not inclined to interfere with the acquittal under Section 354(C) IPC.

22. As far as Section 354-A IPC is concerned, the evidence



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of PW.1 to PW3, clearly shows that during the temple festival on 21.04.2019, the appellant took photograph of the victim girl on his cellphone and he committed offence and evidence of PW.2 and PW3 have corroborated the same. Therefore, he has committed the offence under Section 354-A IPC.

23. Though the learned counsel for the appellant submits that there is no independent witnesses and PW.1 to PW.3 are the interested witnesses, their evidence cannot be taken as it is and there are several embellishments regarding the incident and it cannot be considered. But however, in the cases like this, no independent witnesses can be expected, even the interested witnesses are relatives in the same village, there may not be support to any one of the families. Further, in this case, the villagers have not obtained any permission for conducting the festival from the police department and police has also not taken any action against the villagers for not obtaining permission to conduct the festival. Therefore, they are suppressing several things on their part. But however, for which, the evidence of the victim girl/PW.1 cannot be simply ignored. Therefore, this Court does not find any reason to discard the evidence of PW.1, especially when the victim girl has clearly narrated the incident and even though PW.2 and PW.3 are the mother and brother of the victim girl, they are interested witnesses. Therefore, the evidence of the victim is very cogent and consistent regarding the offence committed by the appellant. Therefore, the Trial Court has also appreciated the evidence and convicted the appellant for the offence under Section 354 -A IPC and there is no reason to interfere with the said judgment.

24. As far as the commission of offence under Section 7 which is punishable under Section 8 of POCSO Act is concerned, the victim girl has clearly stated that the appellant had thrown a stone on her and also took her photo through his cellphone. Though, learned counsel for the appellant would submit that the said act of the appellant will not attract the POCSO Act and if he had attacked the victim, the same would fall under Section 354 IPC and does not attract Section 7 of the POCSO Act. Further, there are several embellishments and also material contradictions regarding the incident and in the festival, there will be so many persons of the village, but they have not examined any other persons. Even though PW.4 to PW.6 are the relatives, they have not seen the appellant throwing stone on the victim and also took her photograph. Therefore, their evidence cannot be considered for convicting the appellant under Section 7 of POCSO Act, when the Investigating Officer has not recovered the cellphone and not proved that the appellant took photo of the victim and in the absence of same, he cannot be convicted under Section 7 of POCSO Act.

25. However, the evidence of PW.1/victim girl has clearly



narrated that it is not the first incident and the appellant has committed the same on several times and the learned counsel for the appellant would submit that the other incident cannot be clubbed with this case. Though the said contention raised by the learned counsel for the appellant is accepted, however, the incident is alleged to have taken place on 21.04.2019 itself and the victim girl has clearly stated that the appellant thrown stone on her and which itself is enough to prove that the act of the appellant falls under Section 7 of POCSO Act and for better understanding, Section 7 of POCSO Act, is extracted hereunder:-

"7. Whoever with sexual intent touches the vagina, penis, anus, or breast of the child or makes the child touch the vagina, penis, anus, or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

26. A reading of Section 7 of POCSO Act clearly shows that any of the said acts committed with the sexual intent would fall within the meaning of sexual assault. The victim girl has clearly stated that even prior to the occurrence, the appellant has committed sexual assault several times. But considering the incident, which happened on the date of occurrence on 21.04.2019 that the appellant thrown stone on the victim girl with the sexual intention, he has committed the offence under Section 7 of POCSO Act. Sections 29 and 30 of POCSO Act, clearly shows that the Special Court shall presume that the accused has committed the offence with the culpable mental state, as the case may be unless the contrary is proved. No doubt, it is rebuttable presumption. It is for the appellant to explain the same that he had no sexual intention. In this case, the appellant has not rebutted the presumption in the manner known to law. Therefore, this Court on a combined reading of the evidence of PW.1 to PW.3 and also Ex.P4/the medical record and also statement recorded by the learned Judicial Magistrate under Section 164 of Cr.P.C., and come to the conclusion that the appellant has committed the aforesaid offences and though there are some defect on the part of the prosecution, that may not be a sole ground to discard the evidence of the victim and the case of the prosecution.

27. Therefore, time and again, this Court observed that unfortunately, the State do not have a competent Investigating Officer to deal with the POCSO Act and time and again, this Court has also given several directions that all stakeholders, who deal with the POCSO Act, have to be sensitized and proper training should be imparted. Therefore this is right time to the State to take care of it and also sensitize all the Investigating Officer, those who are dealing with the POCSO Act.



Therefore, this Court does not find any merit in the appeal and the appeal is liable to be dismissed. However, considering the age of the appellant and proven act committed by him, the sentence alone is modified/reduced from five years to three years.

28. With the above modification, the criminal appeal is dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Sessions Judge,
Special Court for Exclusive
Trial of Cases Under POCSO Act,
Cuddalore.

2.The Inspector of Police,
Pudupettai Police Station,
Cuddalore District.

3. The Superintendent,Central Prison,Cuddalore.

4.The Public Prosecutor,
High Court, Madras.

Copy to:
The Section Officer,
Criminal Section,
High Court,Madras

+1 cc to Mr.A.M.Rahamath Ali, Advocate Sr.NO. 33765

Crl.A.No.233 of 2021
and
Crl.M.P.No.5671 of 2021

GPL (CO)
A.SK(24.02.2022)