



Bail Slip

The Appellant / Accused namely Nallakannu, S/O Subbiah, was directed to be released on bail as per the order of this court dated 12.05.2021 made in CrI.M.P.Nos.5775 of 2021 in CrI.A.No.241 of 2021 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :27.08.2021

CORAM:

THE HON'BLE MR.JUSTICE P.VELMURUGAN

CRL.A.No.241 of 2021

Nallakannu
S/o, Subbiah

... Appellant/ Accused

Versus

State rep by
The Inspector of Police,
All Women Police Station,
Perur,
Coimbatore District.

... Respondent/ Complainant

PRAYER:

Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, to set aside the judgment made in Spl.C.C.No.86 of 2019 dated 18.02.2021 on the file of the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Coimbatore.

For Appellant : Mr.S.N.Arunkumar
for M/s.M.N.Balakrishnan

For Respondent : Mr.S.Sugendran
Government Advocate, (Criminal Side)

JUDGMENT

This Criminal Appeal has been filed to set aside the judgment made in Spl.C.C.No.86 of 2019 dated 18.02.2021 on the file of the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Coimbatore.



2. The respondent police registered a case against the appellant for the offence under section 7 of POCSO Act which is punishable under section 8 of POCSO Act. After investigation, the respondent police laid a charge sheet before the Special Court for Exclusive Trial of Cases under POCSO Act, Coimbatore and the Special Court after completing the formalities, framed the charge against the petitioner for the offence under section 7 of POCSO Act which is punishable under section 8 of POCSO Act. After completing the formalities, in order to substantiate the charge, on the side of the prosecution, during trial, as many as 11 witnesses were examined as P.Ws.1 to 11 and 10 documents were marked as Exs.P1 to P10. No material object was produced.

3. After completing the examination of prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses, put before the appellant by questioning under section 313 Cr.P.C., he denied the same as false and pleaded not guilty. On the side of the defence, two witnesses were examined and one document was also marked.

4. On completion of trial and after hearing the arguments advanced on either side and perusing the materials, the trial court found the appellant guilty for the offence under section 7 of POCSO Act which is punishable under section 8 of POCSO Act and sentenced him to undergo three years imprisonment and to pay a fine of Rs.5,000/- in default to undergo six months imprisonment. Challenging the said judgment of conviction and sentence, the appellant/accused has filed the present appeal before this Court.

5. Heard the learned counsel for the appellant and the learned Government Advocate (Criminal Side) appearing for the respondent and perused the materials placed on records.

6. The learned counsel for the appellant would submit that in this case, even the victim P.W.1 turned hostile and she has not supported the case of the prosecution during the examination as witness. The mother of the victim is the complainant, was examined as P.W.2 has also not supported the case of the prosecution and she also turned hostile. Further in this case, there is no medical evidence. Even P.Ws.1 and 2 have stated that on the compulsion of village members only, they had given the complaint. Even, the wife of the appellant gave a complaint against the villagers and the respondent police registered the case against the villagers in Crime No.371 of 2019 on the file of the Soolur Police Station and the same is pending for investigation. Wife and son of the appellant were examined as D.W.1 and D.W.2 respectively and they have also narrated that no such occurrence has taken place as projected by the prosecution and a false case has been foisted against the appellant and due



to previous enmity, the villagers misguided P.W.2, mother of the victim girl and made her to give a false complaint. Since the prime witnesses P.Ws.1 and 2 turned hostile and no other witnesses spoken about the alleged occurrence, the prosecution has failed to prove its case beyond reasonable doubt. However, the learned Special Judge convicted the appellant based on the presumption and assumption without any substance. Therefore, the judgment of the trial court warrants interference.

7. The learned Government Advocate (Criminal Side) appearing for the respondent would submit that the appellant was running a grossery shop. The appellant called the victim girl and touched her private part with his finger. Immediately, the victim girl informed the said act of the appellant to her mother, who in turn, informed the same to the police and on the same day, a case was registered against the appellant on the file of the respondent police. The victim girl was produced before the Magistrate to record the statement under section 164 Cr.P.C. The learned Magistrate recorded the statement of the victim girl and the same was marked as Ex.P.10. In this case, the only allegation against the appellant is that he touched the private part of the victim girl. Therefore, there was no necessity to produce the victim girl for medical examination. Subsequently during the examination as witness as P.W.1, the victim girl has narrated the incident. Therefore, from the complaint and statement recorded under section 164 Cr.P.C. and the chief examination of the victim girl, the prosecution proved its case that the appellant has committed the offence under section 7 which is punishable under section 8 of POCSO Act. The victim girl was cross examined ten months after the chief examination. During that period, she turned hostile. She did not support the case of the prosecution. However, on a reading of the evidence of the victim and also her previous statement recorded by the Judicial Magistrate under section 164 Cr.P.C, amply proved that the appellant has committed the charged offence. Therefore, the trial court rightly appreciated the evidence and convicted him and awarded only minimum sentence and there is no merit in the appeal and the same is liable to be dismissed.

8. Heard the learned counsel for the appellant and the learned Government Advocate (Criminal Side) appearing for the respondent.

9. The case of the prosecution is that on the date of occurrence ie., on 26.04.2019 at 12.00 noon, when the victim girl went to call her brother for lunch, at that time, the appellant waylaid the victim girl and made her to sit on his lap and touched her private part of the body. Hence the complaint.

10. Based on the charge sheet, the trial court framed the



charge against the appellant for the offence under section 7 of POCSO Act and which is punishable under section 8 of POCSO Act. In order to substantiate the case of the prosecution, on his side, totally eleven witnesses were examined. Out of 11 witnesses, victim girl was examined as P.W.1 and the mother of the victim girl was examined as P.W.2. Other witnesses are hearsay witnesses and official witnesses. On the side of the defence, two witnesses have been examined and they are wife and son of the appellant. On a reading of the evidence of P.W.1 in chief examination, she has clearly narrated the incident and even reading of the previous statement of P.W.1, victim girl which was recorded by the Judicial Magistrate under section 164 Cr.P.C., Ex.P.10 also clearly shows that the appellant touched the vagina of the victim girl with his finger. P.W.2 is the mother of the victim girl though she turned hostile, she gave a complaint to the respondent police. The only reason she has stated that the villagers compelled her to give the complaint. However, the case was registered on 29.04.2019. Both the victim and mother of the victim appeared before the Judicial Magistrate together on 29.04.2019 itself and they have given the statement before the Judicial magistrate. The Judicial Magistrate recorded the previous statement of the victim in the presence of mother and the statement under section 164 Cr.P.C was recorded on 03.05.2019. On that day, she has clearly stated that the appellant had committed the offence, but before the Judicial Magistrate, they have not stated that on compulsion of the villagers, they have given the complaint. Only after the investigation, the charge sheet was laid and during the chief examination on 09.12.2019, the victim girl narrated the entire event and she was not cross examined on the same day. Subsequently, nearly 10 months later, the victim girl was called for cross examination. At that time, she has not supported the case of the prosecution.

11. On a combined reading of the complaint given by P.W.2, Ex.P8 and the statement recorded under Section 164 Cr.P.C by the Judicial Magistrate Ex.P10, chief examination of the victim, it clearly shows that the evidence of P.W.1 is cogent, consistent and trustworthy. Immediately after the chief examination, the victim girl was not cross examined. After completing the evidence of all other witnesses, in order to get over the evidence of P.W.1 during the chief examination she was subsequently recalled and during that time for the reason best known to them, P.W.1 has not supported the case of the prosecution. However, the evidence of P.W.1, Ex.P10 previous statement recorded by Judicial Magistrate and Ex.P8 complaint, the trial court found that the appellant has committed the charged offence. The appellate court is the fact finding court, it has to re-appreciate and revisit the entire evidence and give the independent finding for which on seeing Ex.P3, copy of the



birth certificate of the victim girl, the date of birth of the victim is 19.11.2008 and the date of occurrence is 26.04.2019. Therefore, the age of the victim girl on the date of occurrence is 11 years. Therefore, she is a child under the definition of section 2(1)(d) of POCSO Act. Therefore, the offence committed by the appellant falls under the POCSO Act.

12. As stated earlier, the victim was subjected to sexual assault. From the evidence of victim, the appellant is the one who has committed sexual assault. Therefore, the trial court rightly appreciated the evidence, but, however the age of the victim girl is only 11 years and therefore, the charge should have been framed under section 9 of POCSO Act which is punishable under section 10 of POCSO Act. For that minimum sentence to be imposed is 5 years, however the trial court framed the charge only under the section 7 of POCSO Act which is punishable under section 8 of POCSO Act.

Section 7 of POCSO Act reads as follows: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.

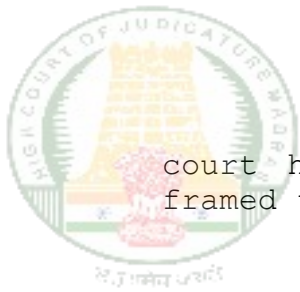
Section 9(m) of POCSO Act reads as follows:

9. Aggravated Sexual assault: (a) Whoever,

(m) whoever commits sexual assault on a child below twelve years;

13. Considering the facts and circumstances, this Court being the appellate court, re-appreciates the entire evidence and found that the victim is aged below 12 years and she was subjected to aggravated sexual assault which was committed by the appellant and though the appellate court failed to frame the charge under section 9 of POCSO Act, which is punishable under section 10 of POCSO Act, however considering the facts and circumstances of the case, this Court does not deem it necessary to interfere with the said punishment as otherwise once again the victim girl has to undergo the rigor of trial, for further consideration of the alteration of the charge. This Court feels that there is no merit in the appeal and the same is liable to be dismissed.

14. Though it is a judicial order, the learned Judge failed to understand the scope and object of the POCSO Act and serious nature of the offence and failed to frame proper charge. The Registry is directed to call for explanation from the concerned Judge who dealt with the case and take departmental action against him, since the victim is below 12 years and the trial



court has not considered the age of the victim girl and not framed the proper charge.

15. Accordingly, the Criminal Appeal is dismissed.

WEB COPY

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

mfa

To

1. The Sessions Judge,
Special Court for Exclusive Trial of Cases under POCSO Act,
Coimbatore.
2. The Judge Mahila Court, Coimbatore.
3. The Inspector of Police,
All Women Police Station,
Perur, Coimbatore District.
4. The Superintendent Central Prison,
Coimbatore.
5. The Public Prosecutor,
High Court,
Madras.
6. The Hon'ble POCSO Committee,
High Court, Madras.

Copy To:

1. The Section Officer,
"B" Section, High Court, Madras.
(With a direction to call for explanation from concern Judge)
2. The Section Officer,
Crl. Section, High Court, Madras.

CRL.A.No.241 of 2021

BR(CO)
SB(23/02/2022)