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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.12.2021

DELIVERED ON : 21.12.2021

CORAM :

THE HONOURABLE MR. JUSTICE P.N.PRAKASH
and
THE HONOURABLE MRS. JUSTICE R.HEMALATHA

CrI.A.No.314 of 2021

Venkatesh

...Appellant/Sole Accused

vs.

State rep by,
The Inspector of Police,
Salem Town All Women Police Station,
Salem District
(Crime No.4 of 2016)

...Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code, 1973 praying to set aside the conviction and sentence passed by the learned Sessions Judge, Special Court for exclusive trial of cases under POCSO Act, Salem, in Special S.C. No.40 of 2016 and in New S.C. No.22 of 2019 dated 28.01.2020.

For Appellant : Mr. V. Parthiban
For Respondent : Mr.M.Babu Muthumeeran
Additional Public Prosecutor.

J U D G M E N T

(Delivered by R.HEMALATHA, J.

The appeal is against the judgment and order dated 28.01.2020 of the learned Sessions Judge in Special S.C.No.22 of 2019 wherein the appellant was convicted for the offence under Section 4 r/w. 3 of POCSO Act and sentenced to undergo life imprisonment and pay a fine of Rs.50,000/- in default, to undergo simple imprisonment for one year.

2. The case of the prosecution in nutshell is as follows:

- i. The defacto complainant Selvaraj (P.W.1), a resident of Muniappankovil Kadu, Pudur Agraharam, Salem, is a daily wager. His wife died on account of ill-health. The victim girl (P.W.2) aged 15 years studied up to IX standard in Government Higher Secondary School, Neikarapatti, Salem.



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She did not continue her studies and was at home.

- ii. The appellant Venkatesh, was a friend of victim's brothers Vignesh, Boopalan and Manikandan (P.W.5). He was also residing in the same locality and he frequently visited the house of the victim.
- iii. On 25.03.2016 at about 08.00 p.m., when the victim (P.W.2) was alone at home, the appellant came over there and gagged her mouth with the dupatta worn by the victim. He also tied both her hands with a rope and carried her upstairs to the terrace and raped her.
- iv. When her father Selvaraj (P.W.1) returned from work he found her daughter missing at home and started searching for her. When the victim got down from the terrace, according to P.W.1, her hair was dishevelled and she was upset. On further enquiry through the neighbours, Thangaponnu (P.W.3) and Geetha (P.W.4), it was revealed that the appellant had all of a sudden gagged her mouth with dupatta and tied her hands with a rope and carried her to the terrace and molested her before having forcible sex with her.
- v. It was also as per the depositions of P.W.3 and P.W.4 that the appellant used to stalk the victim girl and there were earlier occasions when he misbehaved with her talking inappropriately and was reprimanded by both P.W.3 and P.W.4.
- vi. When the appellant was confronted by the father of the victim, the appellant threatened and verbally abused him. Subsequently, P.W.1 along with his son Manikandan (P.W.5), Srinivasan (P.W.6), Sengodan (P.W.7), Murugan (P.W.8) and the victim (P.W.2) went to All Women Police Station, Salem Town, on 26.03.2016 and gave a statement (Ex.P1) before Tmt. Saraswathi (P.W.13), Sub Inspector of Police, All Women Police Station, Salem Town. Tmt. Saraswathi reduced the statement of P.W.1 into writing (Ex.P1) and registered FIR (Ex.P15) in Crime No.4 of 2016 against the accused for the offence under Section 8 r/w. 7 of POCSO Act 2012. She then sent the victim to Mohan Kumaramangalam Government Hospital, Salem, for treatment.
- vii. Tmt. Sahida (P.W.14), Inspector of Police, All Women Police Station, Salem, took up investigation and sent the victim to the Protection Home for girls. She then went to the scene of offence and prepared an Observation Mahazar (Ex.P3) and a rough sketch (Ex.P16) in the presence of the witnesses Srinivasan (P.W.6) and A.Ashokan (not examined). P.W.14 then arrested the accused on 27.03.2016 behind the Government Hospital, Salem, and recorded his police confessional statement in the presence of the witnesses Sengodan (P.W.7) and Murugan (P.W.8) and then



produced the accused before the concerned court for judicial custody.

viii. Dr. R. Sangeetha (P.W.11) examined the victim on 28.03.2016 and certified (Ex.P11) that her age is about 16-18 years. Dr. Priyadharshini (P.W.12) physically examined her on 26.03.2016. She did not find any external injuries on the genitals, lips, cheeks and mammary. The reports on the investigation of sexual offence is marked as (Ex.P12) and (Ex.P13). Dr. Priyadharshini, (P.W.12) took vaginal smears for examination and sent it to Forensic Science Department, Salem. Based on the biological report (Ex.P14), P.W.12 opined that "hymen was not intact and spermatozoa was not detected and sexual intercourse might have occurred".

ix. Dr. Karthick (P.W.9), Assistant Professor, Mohankumaramangalam Government Hospital, Salem, physically examined the accused on 30.03.2016 and gave his reports (Ex.P7 & Ex.P8). In Ex.P7 it is mentioned that there was nothing to suggest that he was impotent and in Ex.P8 his age was assessed as about 27 years.

x. Thiru. Madhavan (P.W.10), Headmaster, Government Higher Secondary School, Neikarappatti, deposed that the date of birth of the victim girl is 12.04.2002 as per school records (Ex.P9 & Ex.P10).

xi. P.W.14 after completing investigation filed a final report before the Mahila Court in S.C.No.4 of 2016 and thereafter, the case was transferred to Special Court under POCSO Act and renumbered as 22/2019.

xii. In order to bring home the guilt of the accused, the prosecution examined 14 Witnesses and marked 19 Exhibits.

xiii. When the appellant was questioned with regard to the circumstances appearing in evidence against him under Section 313 of Cr.PC, he stated when he went to the house of P.W.1 demanding the repayment of the loan, he was framed with these charges.

3. Mr. V. Parthiban, learned counsel for the appellant contended that, as per the age certificate (Ex.P11) of the victim, she was aged between 16 - 18 years on the date of the alleged occurrence and that the sexual act was with the consent of the victim and therefore, does not fall under the purview of POCSO Act.

4. Per contra, Mr. M. Babu Muthu Meeran, learned Additional Public Prosecutor, contended that as per the school records the victim was aged 15 years on the date of occurrence. He also pointed out that all the witnesses were cross examined after a lapse of 1½ to 3 years and the victim being 15 years old, POCSO Act would definitely apply.



5. This is a case in which the appellant has been continuously and consistently stalking the victim girl knowing very well that she is a minor. It was also evident from the deposition of P.W.3 and P.W.4 that they had rebuked him for his ill intended behavior but it had no effect on him. It appears that the locality was such that most of the neighbors of the victim knew about the incident and also consented to depose in the court against the appellant. The manner in which the victim girl was gagged and her hands were tied was cruel. The intentions of the appellant was also clear because he had reportedly expressed his desire to P.W.1 to marry the victim P.W.2. The prosecution had put in all efforts to prove that whatever P.W.2 had alleged against the appellant were true.

6. In order to prove her age, Thiru. Madhavan (P.W.10) the school Headmaster, Government Higher Secondary School, had produced Ex.P9 & Ex.P10 from his school records which stated her date of birth as 12.04.2002. Similarly, Dr. Priyadharshini (P.W.12) who examined the victim girl was also categorical in stating that sexual intercourse might have occurred, though spermatozoa was not found in the vaginal smears. P.W.12 also added that she was informed by the girl of having taken bath after the incident of rape and before the physical examination.

7. Strangely, in the instant case all the witnesses including the complainant P.W.1 to P.W.8 were cross examined only after the lapse of more than 1½ - 3 years from the date of chief examination. It is also shocking to note that all the witnesses from P.W.1 to P.W.8 have uniformly denied whatever they have deposed in the chief examination. In some depositions, the witnesses have gone to the extent of even denying that they know the victim girl or her father as if all of them have been affected by amnesia in one stroke.

8. The very objective of POCSO Act was to protect children from slew of sexual offences and introducing child friendly judicial mechanisms for dealing with such offences. Despite existence of such comprehensive laws the scale of such abuse is staggering and as per a survey conducted in the year 2017 by World Vision India, one in every two children is a victim of sexual abuse in India and in majority of the cases, the perpetrators are known to the victim leading to reluctance on the victim's part to seek redressal.

9. In the instant case, the learned counsel for the appellant, in all his fairness, did not make any attempt to take advantage of the mass denial in the cross examination by the key prosecution witnesses. However, his argument centered around the theory that it was an act of consensual sex and pleaded for reduction of sentence. In order to add credibility to this argument, he went further to dispute the age of the victim by claiming her age as wrong. But the prosecution has come out with more than one documentary evidence to prove the



victim's age which was ably supported by the physical examination of the victim by the Doctor P.W.11 who scientifically assessed her age as between 16-18 years and in her cross examination clarified that the victim cannot be more than 18 years. The school records (Ex.P9 and Ex.P10) also shows the date of birth of the victim as 12.04.2002.

10. Criminal cases under POCSO Act cannot be treated at par with other Acts because the flagship feature of POCSO Act 2012 is the mandatory reporting obligation imposed under Section 19 of the Act and failure to make any reporting would result in punishment under Section 21(1) of the Act. In the instant case, while the prosecution has proved the commission of the offence by the appellant under the Provisions of POCSO Act, the mass denial due to selective amnesia by P.W.1 to P.W.8 is viewed as a mitigating circumstance to reduce the sentence awarded by the trial court from Life Imprisonment to Rigorous Imprisonment for 10 years and a fine of Rs.50,000/-, in default to pay the fine amount, Simple Imprisonment for one year. However, the accused is not entitled for any remission benefits.

11. In the result,

(i) This Criminal Appeal is partly allowed.

(ii) While confirming the conviction passed by the Sessions Judge, Special Court for exclusive trial of cases under POCSO Act, Salem, in Special S.C.No.40 of 2016 and in New S.C. No.22 of 2019, dated 28.01.2020, the sentence is modified as under:

The accused is sentenced to undergo Rigorous Imprisonment for 10 years without any remission benefits and to pay a fine of Rs.50,000/- (Rupees fifty thousand only), in default to pay the fine amount, to undergo Simple Imprisonment for one year.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

bga
To

1. The Sessions Judge,
Special Court for exclusive trial of cases under POCSO
Act, Salem

2.The Sessions Judge, Mahila Court,Salem.

3.The District Collector,Coimbatore.



4.The Director General of Police, Mylapore, Chennai 4.

5. The Superintendent, Central Prison, Coimbatore.

6.The Inspector of Police,
Salem Town All Women Police Station,
Salem District
(Crime No.4 of 2016)

7.The Public Prosecutor, High Court, Madras.

8.The Section Officer, Criminal Section,
High Court, Madras.

+1 cc to Mr.V. Parthiban, Advocate Sr.NO. 68533
Cr1.A.No.314 of 2021
ca(CO)
A.SK(30.12.2021)