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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.08.2021

Coram:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Criminal Appeal No.298 of 2021

K.Kalidoss

.. Petitioner/Appellant/Accused

Vs.

State Inspector of Police  
All Women Police Station  
Chengalpattu  
Crime No.17 of 2015

.. Respondent/Respondent/Complainant

Prayer : Criminal Appeal filed under Section 374(2) of Criminal Procedure Code praying to call for the entire records in connection with in Spl.S.C.No.23 of 2019 on the file of Spl. Sessions Court for Exclusive Trial of Cases under POCSO Act, Chengalpattu (FAC) Chengalpattu District and set aside the Judgment dated 17.12.2020.

For Appellant : Mr.S.Senthilvel

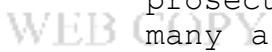
For Respondent : Mr.S.Sugendran  
Government Advocate (Crl.Side)

J U D G M E N T

(The case has been heard through video conference)

This Criminal Appeal has been filed against the Judgment dated 17.12.2020 passed in Spl.S.C.No.23 of 2019 on the file of the Sessions Judge, Special Court for Exclusive Trial of Case under POCSO Act, Chengalpattu (FAC).

2. The respondent police registered the case in Crime No.17 of 2015 initially for the offence punishable under Section 376 IPC and Sections 6, 8 of POCSO Act 2012 and after investigation, laid charge sheet for the offences punishable under Sections 450, 354D, 506(ii) IPC and under Section 6 of POCSO Act before the Mahila Court, Chengalpattu in Spl.CC.No.11 of 2017 and since the offences are against a child, the case was transferred to the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chengalpattu and got renumbered as Spl.SC.No.23 of 2019 and after completing the formalities, the



3. After framing charges, in order to prove the case of the prosecution, on the side of the prosecution during trial, as many as 13 witnesses were examined as P.W.1 to P.W.13 and 13 documents were marked as Exs.P.1 to P.13.

5. On completion of trial, after hearing the arguments advanced on either side and considering the materials available, the trial Court acquitted the appellant for the charges under Sections 450, 354D, 506(ii) IPC however, convicted him for the offence punishable under Section 4 of POCSO Act, 2012 and sentenced him to undergo rigorous imprisonment for 10 years and to pay fine of Rs.25,000/- in default, to undergo a further period of six months simple imprisonment. Challenging, the said Judgment of conviction and sentence, the accused has filed the present appeal before this Court.

<https://hcservices.ecourts.gov.in/hcservices/>



cross examination, the victim herself has admitted that the appellant had not committed any offence and he had not misbehaved with her when they were living together with the appellant in the same share hold house. Even, the mother of the victim has also not specifically stated anything that during such time, the appellant had misbehaved with the victim. He would further submit that there are material contradictions and the prosecution has failed to prove its case beyond reasonable doubt and only due to motive, they have foisted the false case against the appellant. Further, the prosecution has failed to investigate the matter properly and filed the charge sheet wrongly against the appellant and the trial Court has also failed to appreciate the entire evidence. Though, the trial Court accepted the case of the prosecution, however, found the appellant not guilty for the charged offences under Sections 450, 354D and 506(ii) IPC and thereby, acquitted him from the said charges and also found that there was no aggravated penetrative sexual assault to attract Section 6 of POCSO Act. However, the trial Court wrongly convicted the appellant for the offence under Section 4 of POCSO Act which warrants interference.

6.(1)The learned Counsel would further contend that the victim had completed 18 years at the time of alleged occurrence and she was not a child under the definition of POCSO Act and that the prosecution has failed to prove the age of the victim. He would submit that it is the duty of the prosecution to prove the age of the victim and the birth certificate of the victim was not produced. Further, P.W.8/the doctor who conducted the medical examination on the victim to prove her age, has stated that the victim could be between the age group of the 15 to 16 years and if more or less is taken, she might have completed 17 years and probably in the verge of 18 years. Further, the bonafide certificate issued by P.W.10/the Headmistress of the School in which the victim studied, is not based on the original records or the birth certificate of the victim and therefore, the date of birth mentioned in the bonafide certificate/Ex.P.7 is not a genuine one. Further, P.W.10/the Headmistress has deposed that the line in green ink under the date of birth in the bonafide certificate is not drafted by her. Therefore, the said certificate could not be a genuine one and the prosecution has failed to establish that the victim was a child at the time of occurrence and therefore, the offence under POCSO Act would not attract. The learned trial Judge has failed to appreciate the entire evidence and wrongly convicted the appellant for offence under Section 4 of POCSO Act and imposed sentence of 10 years rigorous imprisonment which warrants interference.

7. The learned Government Advocate (Crl. Side) would submit that at the time of offence, the victim was a child and aged



about 17 years and the prosecution has proved the age of the victim through oral and documentary evidence. Even the doctor/P.W.8 who conducted medical test on the victim has stated that the victim is aged between 15 to 16 years. Further, P.W.10 / the Headmistress in which the victim studied has issued Ex.P.7/bonafide certificate, in which the date of birth of the victim is mentioned as 11.03.1999 and the date of offence is during the year 2015 and therefore, the victim girl had not completed 18 years and she was a child at the time of offence which is also corroborated with the evidence of the doctor/P.W.8. Therefore, the prosecution has proved that the victim was a child at the time of offence. He would further submit that the evidence of the victim/P.W.2, the doctor/P.W.9, the statement recorded under Section 164 Cr.P.C., and the medical certificate/Ex.P.6 clearly show that the victim was subjected to penetrative sexual assault. The appellant is the relative and he is the foster father of the victim girl. The victim and her mother were in the custody of the appellant and while they were in his custody, he has committed sexual assault on the victim. Therefore, the offence falls under Section 5(n) of POCSO Act and though the prosecution had proved its case beyond all reasonable doubt for the offence under Section 5 of POCSO Act which is punishable under Section 6 of POCSO Act, the learned trial Judge found that there was penetrative sexual assault only once and therefore, convicted him for the offence punishable under Section 4 of POCSO Act. Further, both P.W.1/the mother of the victim and P.W.2/the victim in their evidence have clearly stated that the appellant is the one who committed the penetrative sexual assault on the victim and therefore, the prosecution has proved its case beyond all reasonable doubt. 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 (Crl. Side) appearing for the respondent.

9. In this case, since this Court is the Appellate Court as a final Court of fact finding, it has to necessarily re-appreciate the evidence independently and to give its findings independently. Accordingly, this Court gone through the entire materials and Judgment of the trial Court and re-appreciated the entire evidence independently and give its finding.

10. Perusal of records show that the trial Court framed charges against the appellant for offence punishable under Sections 450, 354D, 506(ii) IPC and also under Section 6 of POCSO Act. In order to substantiate the charges framed against the appellant, on the side of the prosecution, totally 13 witnesses were examined and 13 documents were marked and out of



the 13 witnesses, the victim girl was examined as P.W.2. Though, the occurrence is stated to have been taken place prior to 3 months from the date of complaint, after receiving the complaint, the respondent police registered the case initially for the offence under Section 376 IPC and Section 6, 8 of POCSO Act, 2012. On completion of investigation, they laid charge sheet for the offence punishable under Sections 450, 354D, 506 (ii) IPC and also under Section 6 of POCSO Act.

11. A reading of evidence of P.W.2, the victim girl has clearly stated that at the time of occurrence she was aged 17 years and she does not remember the date, month and year of occurrence. She has further deposed that one afternoon, the appellant misbehaved with her in an inebriated condition and also criminally intimidated her with knife and had sexual intercourse with her.

12. A reading of the statement of the victim girl recorded under Section 164 (5) Cr.P.C., would disclose that the victim girl has clearly narrated that her mother had left her husband and she was residing with the appellant for some time along with her two daughters. While so, when the victim was alone in the house of the appellant, the appellant came home in the middle of his work and locked the door and compelled her to have sex with him on the pretext of marrying her and would do the needful. When she refused the same, the appellant had criminally intimidated her by showing knife and committed penetrative sexual assault on her. Subsequently, she informed the same to her mother following which, the mother of the victim quarreled with the appellant and subsequently, informed the same to the police and the police registered the case.

13. Perusal of records show that after registering the case, the victim girl was produced before the Medical Officer for medical examination and the doctor/P.W.9 who examined the victim girl has deposed that on 14.09.2015 while she was on duty in Chengalpattu Government Hospital, the victim girl was brought by the head constable and she had examined the victim girl clinically. The medical examination reveals that the victim girl lost her virginity and her hymen was not intact and her private part admits one finger. Further, the doctor has stated that the victim had informed her that a known person had penetrative sexual assault on her. Further, the doctor/P.W.8 who conducted medical test on the victim girl in order to prove the age of the victim, has deposed that the age of the victim is between 15 to 16 years. P.W.10/the Headmistress of the school in which the victim studied has issued a bonafide certificate/Ex.P.7 in which, the date of birth of the victim is mentioned as 11.03.1999.



14. The contention of the learned Counsel for the appellant that the date of birth mentioned in the bonafide certificate / Ex.P.7 is not the actual date of birth of the victim girl and it is not a genuine one for the reason that P.W.10/ the Headmistress who had issued the said certificate has deposed that the line in green ink under the date of birth in the bonafide certificate is not drafted by her, is not countenanced and not acceptable for the simple reason that P.W.10/the Headmistress in her evidence has clearly stated that based on the school records, she had written the date of birth in the said certificate. Even otherwise, the medical certificate/Ex.P.5 and the evidence of the doctor/P.W.8 clearly shows that the victim is between the age group of 15 to 16 years. Further, the victim in her evidence has stated that she is aged 17 years at the time of offence. Therefore, the date of birth mentioned in Ex.P.7/bonafide certificate issued by P.W.10/the Headmistress is a genuine one and it is also corroborated with the medical evidence. Therefore, the prosecution has proved the age of the victim and also proved that she was a minor at the time of alleged occurrence. Once the prosecution proved the date of birth of the victim, it is for the defence to contrary prove that the date of birth given by the prosecution is not that of the victim girl and she had completed 18 years and she was not a minor at the time of occurrence. Even otherwise, there is a presumption under Section 94 of Juvenile Justice Act (Care and Protection of Children), 2015. Therefore, in such circumstances, this Court finds from the evidence of P.Ws.1, 2, 8, and 10 and Exs.P.5 and 7 the prosecution has proved that the victim girl was a child and she was below 17 years and that she had not completed 18 years at the time of alleged occurrence.

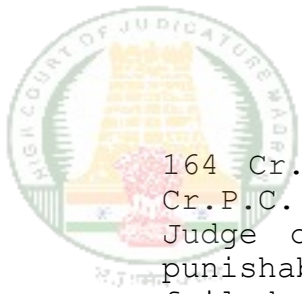
15. As far as penetrative sexual assault on the victim is concerned, the victim was examined as P.W.2 and she was produced before the medical officer / P.W.9 and she was also examined by the learned Judicial Magistrate and her statement was recorded under Section 164 Cr.P.C. A complete reading of the evidence of the victim / P.W.2, the doctor/P.W.9 and the statement recorded under Section 164 Cr.P.C./Ex.P.2, shows that the prosecution has proved that the victim was subjected to penetrative sexual assault. Per contra, there is no evidence on the side of the defence. Therefore, this Court finds that the victim was subjected to penetrative sexual assault. Once, it is found that the victim was a child and she was subjected to penetrative sexual assault, then the next question which arises for consideration is as to who had committed the penetrative sexual assault on the victim for which, P.W.2 in her evidence has clearly stated that the appellant is the one who committed the sexual assault on her. The appellant is a known person to the victim girl. Admittedly, the mother of the victim along with the victim had stayed with the appellant for some time and the



appellant had taken care of the victim and the mother of the victim and also the sister of the victim and they were living under one roof in the same house. While so, one day afternoon, the appellant has committed penetrative sexual assault on the victim and subsequently the same was informed to the mother of the victim. Even before the doctor, the victim has stated that a known person in her house had sexually assaulted her. Therefore, the complete reading of evidence of P.W.2/the victim and the statement recorded under Section 164 Cr.P.C. and also the evidence of the doctor/P.W.9, the prosecution has proved that the appellant is the one who committed penetrative sexual assault on the victim girl. Though during cross examination the victim had stated that while they were residing in the same house along with the appellant, the appellant had not committed the offence whereas, in the statement recorded under Section 164 Cr.P.C. the victim has clearly stated that while they were residing together, her mother and the appellant used to go for work. One day, when the victim was alone in the house, the appellant came back from his work in the middle and he locked the house and committed penetrative sexual assault on the victim girl and he has also insisted her to marry him. But the said fact was not challenged during cross examination. Though, the statement recorded under Section 164 Cr.P.C. is not a substantial evidence, however, it is an admissible evidence and the prosecution could use the said statement for corroboration and the accused can use the same for contradictions. However, the defence side has not challenged the statement recorded under Section 164 Cr.P.C./Ex.P.2. Therefore, from the evidence of the victim, it is clearly proved that the appellant is the one who committed penetrative sexual assault on the victim girl.

16. Though, the appellant was initially charged for the offence punishable under Section 6 of POCSO Act, the trial Judge has stated that only once the appellant had sexually assaulted the victim girl and hence, acquitted him from the charge punishable under Section 6 of POCSO and instead, convicted him for the offence punishable under Section 4 of POCSO Act.

17. A careful reading of the entire evidence and the statement of the victim girl recorded under Section 164 Cr.P.C., shows that the appellant has committed sexual assault on the victim girl repeatedly for several times. Even otherwise, both the victim and the mother of the victim have clearly stated that they were residing with the appellant in a same house for sometime and the victim used to call him as "Appa" (father) since, the victim believed him as her foster father. Thereby, the offence committed by the appellant falls under Section 5(n) of POCSO Act whereas, the learned trial Judge failed to appreciate the evidence and the statement recorded under Section



164 Cr.P.C. Further, the statement recorded under Section 164 Cr.P.C. was not challenged by the defence. Therefore, the trial Judge ought to have convicted the appellant for the offence punishable under Section 6 of POCSO whereas, the trial Judge failed to do so and simply found the appellant not guilty for offence under Section 5(n) which is punishable under Section 6 of POCSO Act and convicted him for the offence under Section 4 of POCSO Act. Neither the State, nor the victim has filed any appeal against the same. This Court independently finds that the victim was a child under the definition of 2(1)(d) of POCSO Act at the time of alleged occurrence and she was subjected to penetrative sexual assault and that the appellant is the one who committed the said offence. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

18. As earlier pointed out in the other Judgments, it is now high time for the State Government and the Judicial Academy to impart training to the stakeholders and sensitize the Act and the State Government should give awareness programme in all the schools and every child should be taught about the good touch and bad touch even own relative, father, grandfather how to deal with the child. Even if father or any close relatives do any kind of bad touch or any sexual assault, the child should inform either to the teachers or to the parents or to the person whom the victim trusts. This education is very important. This Act has not been properly implemented for the purpose for which the Act was enacted. Therefore the State Judicial Academy is directed to give a wide awareness programme to the stakeholders as well as to all the schools and colleges especially to the female students below 18 years, who fall under the definition of 2(1)(d) of POCSO and the Social Welfare Officers and Para Legal Aid Volunteers also should be given wide sensitized programme and awareness programme through District Legal Service Authorities regarding this Act.

19. With the above observations, this Criminal Appeal is dismissed confirming the Judgment dated 17.12.2020 in Spl.S.C.No.23 of 2019 passed by the learned Sessions Judge, Special Court for Exclusive Trial of Case under POCSO Act, Chengalpattu (FAC). The trial Court is directed to secure the appellant/accused to undergo remaining period of sentence, if any.

Sd/-

Assistant Registrar (CS-II)

//True copy//

Sub Assistant Registrar

ksa-2



To

1. The Special Court for Exclusive Trial of Case under POCSO Act, Chengalpattu (FAC).
2. The Inspector of Police,  
All Women Police Station,  
Chengalpattu.
3. The Superintendent,  
Central Prison,  
Puzhal -1, Chennai.
4. The Hon'ble POCSO Committee,  
High Court, Madras.
5. The Public Prosecutor,  
High Court, Madras.
6. The Director,  
State Judicial Academy,  
Chennai.
7. The Director,  
District Legal Services Authorities,  
Chennai.

Copy To

1. The Section Officer,  
Criminal Section,  
High Court, Madras.
2. The Section Officer,  
'F' Section,  
High Court, Madras.

+1cc to Mr.S.Senthilvel, Advocate SR.No.39374

Criminal Appeal No.298 of 2021

PMK (CO)  
GMY (21/02/2022)