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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.09.2021

Coram:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A. No. 318 of 2020

1.Visu @ Natarajan
2.Pandiyan

...Appellants / Accused 1&2

Vs

State rep. by
The Inspector of Police
Nedungadu Police Station,
Nadungadu, Karaikal.
(Crime No.63/2017)

...Respondent / Complainant

prayer: The Criminal Appeal is filed under Section 374 (2) of Code of Criminal Procedure is praying to call for records relating to the sentence and conviction passed by Learned Special Judge (under POSCO Act, 2012) Court, Karaikal in Special S.C. No.15 of 2018 dated 20.03.2020 against the Appellants herein and set aside the same.

For Appellants : Mr.P.G. Perumal Pandian
Legal Aid Counsel

For Respondent : Mr.B.Bala Vijayan
Public Prosecutor (Puducherry)

JUDGMENT

This Criminal Appeal has been filed against the Judgment of conviction and sentence dated 20.03.2020 passed by learned Special Judge (under POSCO Act, 2012), Karaikal, made in Special S.C.No.15 of 2018 passed against the appellants herein and set aside the same.

2. The respondent police registered the case against the appellants in Crime No.63 of 2017 for the offence punishable under Section 6 of POSCO Act. After investigation, they laid charge sheet as against the 1st appellant/A1 for the offence under Section 450 IPC and the offence punishable under Sections 4, 6 and 8 of POSCO Act, 2012 and as against the 2nd appellant / A2 for the offence under Section 450 IPC and also



the offence punishable under Sections 17, 4, 6 of POCSO Act read with 34 IPC before the Special Court (Under POCSO Act, 2012), Karaikal, since the offences are against a child. The learned Special Judge after taking cognizance of the charge sheet on file in Special Sessions Case No.15 of 2018 and after completing the formalities under Section 207 Cr.P.C, framed the charges against the 1st appellant for the offence under Section 450 IPC and the offence punishable under Sections 4, 6 and 8 of POCSO Act, 2012 and as against the 2nd appellant / A2 for the offence under Section 450 IPC and also the offence punishable under Sections 17, 4, 6 of POCSO Act read with 34 IPC.

3. In order to substantiate the charges framed against the appellants, on the side of the prosecution as many as 18 witnesses were examined as P.W.1 to P.W.18 and 22 documents were marked as Exs.P1 to P.22, besides 7 material objects were exhibited.

4. On completion of the examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused by questioning under Section 313 of Cr.P.C. However, he denied the same as untrue and pleaded not guilty. On the side of the defence, no oral or documentary evidence were produced.

5. On completion of trial and conclusion of the arguments advanced on either side and considering the materials on record, the Special Court found guilt of the appellants and the 1st appellant/A1 was convicted for the offence under Section 450 IPC and the offence punishable under Section 4 of POCSO Act and sentenced to undergo period of 7 years rigorous imprisonment with a fine of Rs.10,000/- in default to undergo 6 months simple imprisonment for the offence under Section 450 of IPC and he was also sentenced to undergo 7 years rigorous imprisonment with a fine of Rs.10,000/- in default to undergo 6 months simple imprisonment for the offence punishable under Section 4 of POSCO Act, 2012. However, the 1st appellant/A1 was acquitted for the offence punishable under Sections 6 and 8 of POSCO Act. The 2nd appellant/A2 was convicted for the offence under Section 450 IPC and Section 17 r/w Section 4 of POSCO Act, 2012 and sentenced to undergo rigorous imprisonment for 7 years and to pay fine of Rs.10,000/- in default to undergo 6 months simple imprisonment for the offence under Section 450 of IPC and he was also sentenced to undergo 7 years rigorous imprisonment and to pay fine of Rs.10,000/- in default to undergo 6 months simple imprisonment for the offence punishable under Section 17 r/w Section 4 of POSCO Act, 2012. However, he was acquitted for the offence punishable under Section 4 of POSCO Act r/w Section 34 of IPC and Section 6 of POSCO Act r/w Section 34 of IPC.



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appreciate the evidence properly and ignored the statement given by the victim in the hospital before the doctor and failed to extend the benefit of doubt in favor of the appellants and erroneously convicted them. The learned counsel for the appellants would further submit that the appellants never involved in the alleged offence and they had never gone to the house of the victim. Further, there is no eye witness and independent witness to this case. Under these circumstances, it is unsafe to convict the appellants based on the interested witnesses which is against the proposition of law laid down by the Hon'ble Supreme Court in various decisions. Therefore, the Judgment of the trial Court warrants interference.

7. Mr.B.Bala Vijayan, learned Public Prosecutor (Puducherry) would submit that the victim has given explanation that while producing before the doctor, she has mistakenly stated that 10 days prior to the occurrence, one Arivazhagan also sexually assaulted her. But, subsequently she has stated that the appellants alone committed the offence. He would further submit that the appellants are neighbours of the victim girl and they are residing in the same locality and thereby, the victim knows the appellants very well and therefore, identifying the appellants was not difficult to the victim. The victim girl has clearly stated that on the date of occurrence, while she was sleeping in her house, the appellants trespassed into her house and the 1st appellant committed penetrative sexual assault on the victim girl for which, the 2nd appellant abetted the 1st appellant for the commission of offence and that the prosecution has proved its case beyond all reasonable doubt. Even the doctor who conducted the medical examination, has clearly spoken about the injuries sustained by the victim and she has clearly stated that the victim was subjected to penetrative sexual assault and the hymen was not intact. Therefore, the prosecution has proved its case from the evidence of P.W.1 to P.W.3 and the medical evidence is also corroborated the same. Further, in order to prove the age of the victim, the birth certificate of the victim was marked as Ex.P.11 in which date of birth of the victim is mentioned as 15.08.2004 and the date of the alleged occurrence is on 25.10.2017. Therefore, the age of the victim was only 13 years at the time of occurrence. Since, the victim was below 18 years at the time of occurrence, she was a child under definition of Section 2(1)(d) of POSCO Act and therefore, the offence committed by the appellants falls under POSCO Act. Therefore, the trial Court rightly appreciated the evidence and convicted the appellants. However, the trial Court found that the prosecution failed to substantiate the charge framed against the 1st appellant for the offence punishable under Section 6 and 8 of POSCO Act and thereby, acquitted him from the said charges. Likewise, the trial Court acquitted the 2nd appellant for the offence punishable under Section 4 of POSCO Act.



Act r/w Section 34 IPC and Section 6 of POCSO Act read with Section 34 IPC. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

8. Heard Mr.P.G. Perumal Pandian, Legal Aid Counsel appearing for the appellants and Mr.B.Bala Vijayan, learned Public Prosecutor (Puducherry) appearing for the respondent police and also perused the materials on record.

9. The case of the prosecution is that at the time of alleged occurrence, the age of the victim girl was 13 years and she was studying 9th standard. The appellants were residing in the same street in which the victim girl was residing. While so, on 25.10.2017, the parents and elder brother of the victim who had gone to Farm work had not returned home and the victim girl was sleeping along with her grandmother. At about 1 a.m., two unidentified persons entered into her house and one person caught hold of the hand of the victim and also closed her mouth and the other person had committed sexual intercourse with the victim forcefully. After committing the said offence, the accused threatened the victim not to reveal the same to anybody and thereafter, they both left from her house. The next day morning, her parents and elder brother returned home but, the victim did not inform the same to anyone and after 36 hours, she informed the same to her parents following which, P.W.2/father of the victim lodged the complaint before the respondent police. Thereafter the respondent police registered the case on 27.10.2017 in Crime No.63 of 2017 for the offence punishable under Section 6 of POSCO Act and subsequently the same was altered to Section 450 of IPC and the offence punishable under Sections 17, 4, 8 and 6 of POSCO Act, 2012.

10. This Court is the appellate Court as a final Court of fact finding, it has to re-appreciate the entire evidence and to give its findings independently. Accordingly, this Court re-appreciated the entire evidence independently.

11. In order to substantiate the charges framed against the appellants, on the side of the prosecution totally 18 witness were examined and 22 documents were marked besides, 7 material objects were marked. Out of the 18 witnesses, the victim girl was examined as P.W.1.

12. This Court careful gone through entire materials and the evidence of the witnesses. In the evidence, the victim girl/P.W.1 has clearly deposed that on 25.10.2017 at about 01.00 a.m., while she was sleeping in her house, two unidentified persons entered into her house and one person had caught hold of her hands and also closed her mouth and the other person, committed penetrative sexual assault on her and they



also threatened her with dire consequences. However, the victim girl has clearly identified the accused from their voices. Further, when the accused were leaving from the victim's house, the victim girl has clearly identified that the accused who are the appellants since, they are the neighbours of the victim and residing in the same locality and they are familiar persons. Even in the cross examination, the victim has clearly stated that the appellants are residing in the same street.

13. The learned counsel for the appellants contended that at the time of alleged occurrence, the grandmother of the victim was also said to have been sleeping in the same house along with the victim and if the occurrence had really happened in the said place, the grandmother would have woken up and raised alarm. But the victim girl has clearly stated that she is residing in a Thatched Hut and there is no lock or knob in the door and thereby, they used to simply close the door and on the date of occurrence, while she was sleeping in her house, two persons had entered into the house and one of the accused caught hold of her hands and closed her mouth and the other accused committed penetrative sexual assault. In such circumstances, the contention of the learned counsel of the appellants is not acceptable. Further, the learned counsel contended that presumption under Section 29 of POCSO Act would not come into play since the victim has stated that she had seen the appellants/accused only outside of her house and not while coming into her house and committing the offence and thereby, the identification of the appellants itself is highly doubtful, but, on reading of the evidence of the victim girl, it clearly shows that after the commission of offence, one of the accused had threatened her not to reveal the same to anyone and from his voice she identified the accused, who is the 1st appellant and while they were going out, she followed and saw them and clearly identified both the accused.

14. As far as the age of the victim is concerned, from the evidence of the victim/P.W.1, doctor/P.W.13, the statement recorded from the victim girl under Section 164 Cr.P.C./Ex.P.2, the medical evidence/Ex.P.12 and also the birth certificate of the victim/Ex.P.11, this Court finds that the prosecution has proved that the date of birth of the victim girl is 15.08.2004 and age of the victim was 13 years and she had not completed the age of 18 years and she was a child under definition of POSCO Act at the time of occurrence.

15. As far as the offence punishable under Section 4 of POCSO Act is concerned, the victim girl was examined before the trial Court as P.W.1 and during her evidence, the victim girl has clearly stated that on earlier occasion she was produced before Judicial Magistrate and her statement was recorded



under Section 164 Cr.P.C. and the signature found in statement was marked as Ex.P.2. A reading of statement of the victim girl recorded under Section 164 Cr.P.C./Ex.P.2, the evidence of the doctor/ P.W.13 and also the medical report of the victim/Ex.P.12, show that the victim was subjected to penetrative sexual assault. Further from the evidence of P.W.1 and P.W.13/doctor and the statement of the victim recorded under Section 164 Cr.P.C. and the medical records, clearly show the names of the appellants and the role of the appellants in the commission of offence. Therefore, in this case, the prosecution has proved its case beyond all reasonable doubt that the 1st appellant committed penetrative sexual assault on the victim and the 2nd appellant abetted the same. Therefore, this Court also independently re-appreciated the entire evidence of the prosecution witnesses and comes to the conclusion that the first appellant has committed the offence under Section 450 IPC and also committed the offence punishable under Section 4 of the POCSO Act and the second appellant has committed the offence under Section 450 of IPC and also committed the offence punishable under Section 17 r/w Section 4 of the POSCO Act and this Court does not find any perversity in the appreciation of the evidence by the trial Court.

16. However, from the evidence of the doctor/P.W.13, the medical records and the statement of the victim girl/Ex.P.12, this Court finds that 10 days prior to the date of alleged occurrence, one Arivazhagan has also committed forceful penetrative sexual assault on the victim girl. However, in the subsequent complaint, the name of the said Arivazhagan is not mentioned. Though, it is stated by the prosecution that the victim girl had mistakenly stated the name of the said Arivazhagan, it is not believable and this Court feels that the respondent police, in order to safeguard the said Arivazhagan, have removed his name and obtained a subsequent statement in such a way from the victim girl and not registered a case against the said Arivazhagan for the previous occurrence.

17. Therefore, this Court directs the respondent police to register the case against the said Arivazhagan and investigate the matter and file the charge sheet before the designated Court within a period of three months from the date of receipt of a copy of this order and file a compliance report before this Court.

18. With the above directions, this Criminal Appeal is dismissed. The Judgment of conviction and sentence dated 20.03.2020 passed by learned Special Judge (under POSCO Act,



2012), Karaikal, in Special S.C.No.15 of 2018 is hereby confirmed. The period of incarceration already undergone by the appellants, shall be given set off.

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Sd/-
Assistant Registrar

True Copy//

Sub Assistant Registrar

dsn/ksa-2

To

1. The Special Judge (under POSCO Act, 2012),
Karaikal,
2. The Inspector of Police,
Nedungadu Police Station,
Nadungadu, Karaikal.
3. The Superintendent,
Central Prison,
Puducherry.
4. The Public Prosecutor Officer,
High Court, Madras.

Copy to

1. The Secretary,
High Court,
Legal Aid Services committee,
High Court, Madras-104.
2. The Section Officer,
Criminal Section,
High Court, Madras-104.
3. The Secretary,
High Court,
Legal Services committee,
High Court, Madras - 104.

Cr1.A. No. 318 of 2020

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NSK 05/01/2022