



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	:	01.09.2021
Pronounced on	:	22.10.2021

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A. No.351 of 2021

K.Venkatesh,
S/o. Kannan

... Appellant/Accused

-Vs-

State rep. by
Inspector of Police,
W-6, All Women Police Station,
Ayanavaram,
Chennai.
(Crime No. 3 of 2018)

... Respondent/Complainant

Prayer : Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code, praying to set aside the judgment passed by against the appellant on 22.04.2021 in S.C.No.183 of 2018 on the file of learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Court Division and acquit him from all the charges.

For Appellant : Mr.A.Punithavanan

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

J U D G M E N T

(This case has been heard through video conference)

This Criminal Appeal is filed against the Judgment of conviction and sentence passed by the learned Sessions Judge, Special Court for Exclusive Trial of cases under POCSO Act, Chennai dated 22.04.2021 in S.C.No.183 of 2018.

2. The respondent police registered the case against the appellant in Crime No.3 of 2018 for the offence under Section 6, 8 and 12 of POCSO Act, 2012. After investigation, the respondent police laid the charge sheet before Mahila cum



Children Court, and the same was subsequently transferred to the Sessions Judge, Special Court for Exclusive trial of cases under POCSO Act. The learned Sessions Judge taken the charge sheet on file in S.C.No.183 of 2018 and after completing the formalities under Sec.207 of Cr.P.C. framed charges against the appellant for the offence punishable under Sec.12 and 6 of POCSO Act. After framing of charges, in order to prove the case of prosecution, on the side of prosecution, as many as 6 witnesses were examined as P.W.1 to P.W.6, 12 documents were marked as Ex.P1 to P12, besides, one material object was marked as M.O.1

3. After completing the evidence of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant / accused by questioning under Section 313 Cr.P.C. with reference to the incriminating circumstances appeared on the prosecution witnesses, the same were denied by the accused as false and pleaded not guilty. On the side of the defence, one witness was examined as D.W.1 and no document was marked.

4. On completion of trial, after hearing the arguments advanced on either side, and on perusal of materials placed before the trial court, the Special Court found guilt of accused and convicted him for the offence under Section 9 (m), punishable under Sec.10 of POCSO Act, and sentenced to undergo five years rigorous imprisonment and to pay a fine of Rs.10,000/- in default, to undergo three months rigorous imprisonment. Challenging the said judgment of conviction and sentence, the accused has filed the present appeal before this Court.

5. The learned counsel for the appellant would submit that the defacto complainant had foisted a false case against the appellant due to animosity, since the appellant did not give money demanded by mother of victim girl. Further, he would submit that on the date and at the time of occurrence, the accused was not present at the place of occurrence. The accused was a Store Manager at King's Young (Kay) Textile shop and he attended duty between 9.56 a.m. and 9.34 p.m., with the short break between 11.00 and 11.13 a.m. between 1.00 p.m. and 1.047 p.m. for lunch, between 05.00 and 05.14 for evening break and between 08.27 and 08.40 for night break and then at 9.34 p.m. he left from shop only at 09.34 p.m. In order to substantiate the case, D.W.1 was examined, who was a store manager at the relevant point of time and the bio-metric attendance was also marked as Ex.D1 for the date of occurrence dated 04.04.2018. He would further submit that there is a delay in filing the complaint and the prosecution has not proved the case beyond all reasonable doubt as if the accused has committed penetrative assault and he has also committed the offence of pornography.



Except the victim girl, who was examined as P.W.1, no eye-witness was examined in this case. Though the victim girl has stated that she played with her friends on the date of occurrence, at that time, the appellant took her in a bike and shown the picture in cellphone and touched her private part and also made the victim to touch his private part, none of the eye-witnesses or friends with whom victim girl played at the time of occurrence has stated that A1 called the victim alone and committed the above said offence. Further, the prosecution has not examined any independent witnesses. P.W.1 is the victim girl, aged about 5 years, and she was tutored by her mother P.W.2 in order to wreck vengeance, since when the mother asked money from the appellant, he did not pay the said amount. Therefore, P.W.2 used her minor daughter as a tool for ventilating her vengeance against the accused. The prosecution has failed to prove its case beyond all reasonable doubt, particularly, the appellant taken the plea of alibi and examined the witness D.W.1, who was working as Store Manager at the relevant point of time and bio-metric attendance for the date of occurrence was produced, in which, the appellant attended the office on the said day as stated above. At the time of occurrence, the appellant was attending the office and he would not have come out from the office and there was no possibility to be present at the time of occurrence, and hence, the accused has not committed the offence as projected by the prosecution. The prosecution has failed to prove its case beyond all reasonable doubt and the trial Court has failed to appreciate the same and without any corroboration, only based on the evidence of the victim, has convicted the appellant. The Trial Court though acquitted the appellant for offence under Sec.11, which is punishable under Sec.12 of the POCSO Act and also Sec.5, which is punishable under Sec. 6 of POCSO Act, however, wrongly convicted the appellant without any materials for offence under Sec.9(m), which is punishable under Sec.10 of POCSO Act. Therefore, the judgment of trial court is liable to be set aside.

6. The learned Government Advocate (Criminal Side) would submit that the age of victim at the time of occurrence is only 5 years. The date of birth of victim is 13.06.2012. In order to substantiate her age, the birth certificate of the victim was marked, in which, the date of birth of victim is mentioned as 13.06.2012. The date of alleged occurrence is 04.04.2018. Therefore, at the time of occurrence, the age of victim was only 5 years. Therefore, the victim is a child comes under the definition of Sec.2(1) (d) of the POCSO Act. Further, he would submit that the victim was examined as P.W.1 and she has narrated the entire incident. Before that, the victim was produced before the Doctor, who has conducted the medical examination on the victim was examined as P.W.3 and she has made



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entry in the accident register, which is marked as Ex.P4. The history of the case as mentioned is that a known person committed sexual assault on the victim child. Subsequently, the victim was also produced before the learned Judicial Magistrate and statement under Sec.164 of CrI.P.C. was recorded, in which she has clearly narrated the occurrence stating that the accused only committed sexual assault on her. The prosecution proved its case beyond all reasonable doubt by examining witnesses, victim and also the Doctor, who had conducted medical examination. The statement recorded by learned Judicial Magistrate was marked as Ex.P3, which was corroborated by P.W.1. While examining P.W.1, she was not cross-examined by the defence. Therefore, the evidence of P.W.1 was not challenged and therefore, on considering the circumstances, the prosecution has proved its case beyond all reasonable doubt and plea of alibi taken by the defence was not substantiated by examining witnesses or any admissible documents. The defence has not examined the computer operator, who has taken Ex.D1, the copy of bio-metric attendance register and it is an electronic document, which has got to be certified under Sec.65-B of Evidence Act. Unless it is certified under Sec.65-B of Evidence Act, it is not admissible in evidence. Therefore, unless it is established that the document produced by him is authenticated and admissible in evidence, the defence is not acceptable. The victim girl has clearly identified the appellant and stated that on the date of occurrence, at about 07.30 p.m., the appellant came to the occurrence place and called her, took her on his bike and showed the picture in his cell phone and at the time, he touched private part of the victim and fiddled with it, then he removed his zip and asked the victim girl to touch private part of appellant. Therefore, the prosecution has proved its case beyond all reasonable doubt and the defence taken by the appellant has not been established in the manner known to law. Hence, there is no merit in the appeal and it is liable to be dismissed.

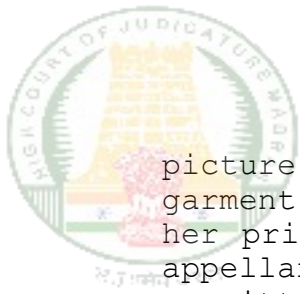
7. Heard the learned counsel for the appellant and the learned Government Advocate (CrI. Side) appearing for the respondent police and perused the materials on record.

8. The case of prosecution is that on the day of easter, P.W.2's daughter was playing outside, came crying and told that the appellant took her in his bike and showed pictures in the cell phone and touched her private part and also made her to touch his private part. P.W.1 further told that he took her to shop and brought banana and then brought her home. The victim child started to vomit and became unwell, hence, P.W.2 took her for treatment in a private hospital. As her daughter become unwell, P.W.2 lodged complaint about the above incident after a week.



9. This Court as an appellate court, final court of fact finding, in order to give an independent finding, it has to re-appreciate the entire evidence, and accordingly, re-appreciated the materials. The Special Court framed charge against the appellant as stated above. In order to substantiate the charges, on the side of prosecution, totally, 6 witnesses were examined and 12 documents were marked. One material object was exhibited. On the side of defence, one defence witness was examined and no document was marked.

10. Out of 6 witnesses, the victim girl was examined as P.W.1. A reading of evidence of P.W.1 shows that she has clearly narrated the incident that on the date of occurrence, when the victim girl playing with other children, the appellant came to that place, lifted and kept her on his bike and showed a ghost movie, then he removed inner garment of the victim and kept his finger on her private part and shaken up and down and also he opened the zip of his pant and he made the victim to touch his private part on her hands and she also touched his private part. Thereafter, he took her to shop and brought banana and thereafter, he left her there itself and went away from the place. Subsequently, she informed the same to her mother and thereafter, her mother gave the complaint. Mother of victim girl was examined as P.W.2 and she has clearly narrated the occurrence, which corroborated with the evidence of P.W.1/the victim girl. Though P.W.2 mother has not identified, but she has spoken about the complaint given and also the victim was examined by the Judicial Magistrate and recorded statement, in which, she had signed. Though P.W.2 mother of victim girl lodged the complaint, narrated the occurrence, which was heard from the minor daughter P.W.1, and nothing was elucidated on the facts. The victim was also produced before the Judicial Magistrate for recording the statement under Sec.164 of Cr.P.C. The learned Judicial Magistrate also recorded the statement in accordance with the provision under Sec.164 of Cr.P.C., which was marked as Ex.P3. Before that, she was also produced before the Doctor P.W.3, who conducted the medical examination and gave certificate Ex.P6 stating that there was no penetrative sexual assault. Therefore, the victim was not subjected to penetrative sexual assault. The cell phone seized from the appellant was marked as M.O.1 and the same was sent for forensic lab and report of forensic lab was marked as Ex.P12. The opinion of expert is that there was a phonographic and abusive pictures found in the cell phone of appellant. Though the trial court found that the said obscene pictures were not shown to the victim, the victim girl has stated that some evil picture was shown and she has not stated that it is obscene pictures. But, the age of victim only five years, she may not understand what she has seen in the cell phone. However, the victim girl has stated that the appellant took her in his bike and shown the



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picture in the cell phone and at that time, he removed her inner garment and touched her private part and inserted his fingers in her private part and also told her to touch the private part of appellant with her hand. Therefore, though the trial court acquitted the appellant for the offence under Sec. 12 of the POCSO Act, no appeal was filed by the victim, however, the appellant was convicted for the offence under Sec.9(m), which is punishable under Sec.10 of POCSO Act. Though the prosecution proved its case beyond all reasonable doubt through the evidence of P.W.1, victim girl and the previous statement recorded by the Judicial Magistrate from the victim, Ex.P3 and also even in the accident register, Ex.P4. Doctor, who made entry recording the history of the case that the victim told that known person committed sexual assault on her. The cell phone also seized from the appellant, which was marked as M.O.1. Ex.P12, in the report of forensic expert, it was also found that there was obscene pictures in the said cell phone recovered from the appellant. Therefore, this Court finds that the prosecution has proved its case beyond all reasonable doubt. Though the plea of alibi is taken as his defence, in order to substantiate his defence of alibi, examined D.W.1, and marked Ex.D1, attendance register of bio-metric, but, the careful reading of records would show that the said bio-metric attendance register taken from the electronic device and it is an electronic record, which has got to be certified under Sec.65-B of Evidence Act. Unless it is certified and proved in the manner known to law, it is not admissible evidence and it cannot be taken as an evidence. Hence, the Trial Court has rightly rejected the same. Further, the person, who had taken the copy of bio-metric attendance was not examined, only one Store Manager was examined and he has simply stated that the appellant attended the office on that day. However, CCTV footage was not produced by the shop owner, in which, appellant was said to have worked as salesman. Since the defence has not substantiated by admissible in evidence and also the manner known to law, neither CCTV footage produced nor the bio-metric attendance certificate produced by the defence was certified under Sec.65-B of Evidence Act. Further, the defence counsel has not taken such a plea of alibi during the cross-examination of prosecution witnesses, particularly, P.W.1 victim was not at all cross-examined and also during the other witnesses examined, he has not put any suggestion regarding plea of alibi. All of sudden, after completing examination of prosecution witnesses, the accused examined D.W.1 and produced Ex.D1 bio-metric attendance register. If any electronic record is produced as evidence, it has got to be certified under Sec.65-B of Evidence Act. But, it was not done by the defence and when CCTV camera was fixed in the shop, footage of CCTV camera was not produced. If it is produced, then it would establish that at what time, the appellant entered in the shop and when he left the shop and at the time of occurrence, whether



the accused was present in the said shop or not. It would be established by the defence by way of material documents. Therefore, in the absence of the same, the trial court rightly rejected the defence taken by the appellant. The case of this nature, mere delay in filing complaint is not fatal to the case of the prosecution. Further, it is settled preposition of law that when evidence of the victim is cogent, consistent, trustworthy, which inspiring the confidence of the court, non-examination of independent witnesses is not fatal to the case of the prosecution.

11. This Court also, as an appellate court, as a fact finding court, independently re-appreciated the evidence and finds that the defence taken by the appellant was not established in the manner known to law. Therefore, the trial court rightly rejected the defence taken by the appellant and this Court does not find any perversity in the finding of the trial court and this Court, as an appellate court, independently comes to the conclusion that from the material evidence, prosecution has proved its case beyond all reasonable doubt and the trial court has also appreciated the same and convicted the appellant. This court does not find any merit in the appeal and the appeal is liable to be dismissed. Accordingly, this Criminal Appeal is dismissed.

Sd/-

Assistant Registrar(CS-IX)

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Sub Assistant Registrar

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To

- 1.The Sessions Judge,
Special Court for Exclusive Trial of
Cases under POCSO Act,
Chennai.
- 2.The Inspector of Polcie,
W-6, All women police station,
Ayanavaram, Chennai.
- 3.The Superintendent,
Central Prison, Puzhal,
Chennai.
- 4.The District Collector,
Chennai.



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

6.The Hon'ble POCSO Committee,
High Court, Madras.

7.The Public Prosecutor,
High Court, Madras.

CC to: The Section Officer,
V.R.Section, High Court, Madras.

Criminal Appeal No. 351 of 2021

GJ(CO)
CB(12/11/2021)