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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.08.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.318 of 2021

Velayudham

.. Appellant/Accused

.Vs.

State by:

The Inspector of Police,
All Women Police Station,
Tiruppur South, Tiruppur,
Crime No.8 of 2019.

.. Respondent/Complainant

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to allow this Criminal Appeal by setting aside the judgment dated 15.04.2021 in Spl.S.C.No.45 of 2019 on the file of the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court) Tiruppur.

For Appellant : Mr.J.Franklin

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

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 15.04.2021 in Spl.S.C.No.45 of 2019 by the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court) Tiruppur.

2.The case of the prosecution is that at the time of occurrence the victim child/P.W.1 was aged about 10 years, residing along with her parents and brother. On the date of occurrence i.e on 09.08.2019, when the victim child went to her grandmother's house, after returning from the school, at that time the accused, who is none other than the second husband of the victim child's grand mother had committed sexual assault on her by rubbing over her breasts and left his hand into her panty, placed his hand over her vagina and thereby, sexually harassed the victim child. Hence, a complaint/Ex.P2 was registered against the appellant.

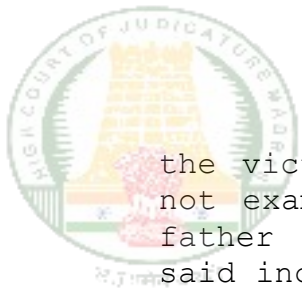


3. The respondent-Police registered a case in Crime No.8 of 2019 against the appellant for the offence under Section 9 (m) which is punishable under Section 10 of The Protection of Children from Sexual Offences Act, 2012 [hereafter referred to as 'POCSO Act' for the sake of convenience]. On completion of the investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court) Tiruppur. The offence is against a child which falls under the definition of Section 2(1) (d) of POCSO Act and the learned Sessions Judge has taken cognizance of the case on file in Spl.S.C.No.45 of 2019. After completing the formalities, the learned Sessions Judge framed charges against the appellant for the offence under Section 9 (m) which is punishable under Section 10 of POCSO Act.

4. In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 12 witnesses were examined as P.W.1 to P.W.12 and marked 11 documents as Exs.P1 to P11 and no material object was marked. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant/accused and questioned under Section 313 of Cr.P.C., wherein he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, no oral and no documentary evidence was produced.

5. The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that the appellant is guilty for the offence under Section 9 (m) which is punishable under Section 10 of POCSO Act and convicted and sentenced him to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.2,000/-, in default, to undergo further a period of one year rigorous imprisonment. Challenging the said conviction and sentences, the appellant is before this Court.

6.1 The learned counsel for the appellant would submit that the appellant is none other than the grandfather of the victim child and he has not committed any offence as alleged by the prosecution. Even prior to the marriage of P.W.2/mother of the victim child that there was an enmity between the appellant and the husband of P.W.2, due to such enmity and in order to take vengeance, the father of the victim child tutored her and foisted a false compliant against the appellant. He would further submit that at the time of occurrence, the grandmother and brother of



the victim child were present in the house, however, they were not examined as witnesses. Further, one Manikandan, who is the father of victim child has stated that soon after hearing the said incident, he contacted Child Help Line and informed the said incident and on their advice, P.W.2/mother of the victim child filed the complaint against the appellant, but, the said Manikandan was not examined as a witness. Therefore, non-examination of father, brother and grandmother of the victim child is fatal to the case of the prosecution. Further, P.W.3/Doctor, one who examined the victim child has deposed that no external injuries were found on the victim child and also chemical examination report shows that no spermatozoa was detected in the vaginal smear sent for chemical examination and hence, medical evidence also not supported the case of the prosecution. Further, P.W.2/mother of the victim girl has deposed that at the time of occurrence, her son, daughter and the appellant lying on the cot and watched television, in such circumstances there is no possibility of committing such offence by the appellant. Hence, the trial Court has failed to appreciate the entire evidence and wrongly convicted and sentenced the appellant only on assumption and sympathy and hence, the judgment of the trial Court against the appellant is liable to be set aside.

7.1 The learned Government Advocate (Crl.Side) for the respondent would submit that the victim child was 10 years old at the time of occurrence and the appellant is none other than the grandfather of the victim child. On 09.08.2019, after returning from the school, the victim child and her brother went to her grand mother's house, since her parents had gone to their regular work. At that time the grandmother of the victim child prepared food and when the victim child was lying on the cot and watching television, the accused sexually harassed the victim child. Soon after the occurrence, initially, the victim child informed the said incident to her brother and subsequently, he informed to her father and thereafter, the complaint was registered against the appellant.

7.2 The learned Government Advocate (Crl.Side) would further submit that after registration of the complaint, the victim child was produced before the Doctor/P.W.3 for medical examination. P.W.3/Doctor has clearly deposed that on her enquiry, the victim child stated that her grandfather misbehaved with her and on her examination she found that no external injuries were found on the victim child and the Doctor issued her final opinion/Ex.P5 stating that the victim has not lost her virginity. Subsequently, the victim child was produced before the



learned Judicial Magistrate for recording her statement under Section 164 Cr.P.C./Ex.P11, in which, she has clearly narrated the said incident. Therefore, from the evidence of victim child during trial as P.W.1, her statement recorded under Section 164 Cr.P.C and her statement before the Doctor, the prosecution established its case that the appellant has committed sexual assault on the victim child. Further, medical evidence also supported the case of the prosecution. Therefore, the trial Court has rightly appreciated the entire evidence and convicted and sentenced the appellant and there is no merit in this appeal and the same is liable to be dismissed.

8. Heard the learned counsel for the appellant and the learned Government Advocate (Crl.Side) for the respondent and also perused the materials available on record.

9. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.

10. Admittedly, the Sessions Judge framed charges against the appellant for the offence under Section 9 (m) which is punishable under Section 10 of POCSO Act. In order to substantiate the same, on the side of the prosecution totally 12 witnesses were examined as P.W.1 to P.W.12, out of which, the victim child was examined as P.W.1.

11. On a reading of the evidence of P.W.1, it reveals that she was 10 years old and studying 5th standard, at the time of occurrence. On 09.8.2019, after returning from the School, the victim child and her brother went to her grandmother's house. At that time her grand mother prepared food and the victim child was lying on the cot and watching television, the appellant who was beside her left his hand into her panty and then touched private part. After the occurrence, she informed the said incident to her father and thereby, the complaint was registered against the appellant. Subsequently, she was produced before P.W.3/ Doctor for medical examination, in which, she has clearly narrated the said incident. Thereafter, she was produced before the Judicial Magistrate for recording her statement under Section 164 Cr.P.C/Ex.P11, in which, she has clearly narrated the said incident.

12. A combined reading of the evidence of the victim child during the trial as P.W.1 and her statement under Section 164 Cr.P.C, clearly show that the appellant has committed aggravated sexual assault on the victim child, who was aged about 10 years.



In order to prove the age of the victim child, the prosecution exhibited the birth certificate of the victim child, which was marked as Ex.P.1. As per Ex.P1 the date of birth of the victim child is 03.02.2010, whereas, the date of occurrence is 09.08.2019. Therefore, at the time of occurrence the age of the victim child is only 9 years and not completed 10 years. Since she is a minor, it falls under definition of 2(1)(d) of POCSO Act.

13. In a case of this nature, if any person touched the private parts of the minor child with sexual intent which involves physical contact without penetration is said to have committed sexual assault, which falls under Section 7 POCSO Act, punishable under Section 8 of POCSO Act. Section 9 (m) of POCSO Act deals with Aggravated Sexual Assault on a child below 12 years. On a combined reading of both Sections, it reveals that the act committed by the accused is chargeable under Section 9(m) of POCSO Act which is punishable under Section 10 of POCSO Act.

14. The defence taken by the learned counsel for the appellant is that the brother and grandmother of the victim child were present in the house on the date of occurrence, but, they were not examined as witnesses by the prosecution. In the present case, the victim girl has clearly stated that no other person has noticed the said incident. Therefore, mere non examination of independent eye witness is not fatal to the case of the prosecution. Though P.W.2/mother of the victim child clearly deposed that she is not an eye witness to the said occurrence, she was only a hearsay witness. Therefore, from the evidence of the victim child, the prosecution proved that the accused has committed aggravated sexual assault on the victim child. In cases of this nature presence of independent eye witnesses are mostly improbable. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible. Therefore, the evidence of the victim child is enough to convict the accused and the Court has to see whether there is any reason to discard the evidence of the victim child. In this case, no doubt arise for the trustworthiness of the evidence of the victim child.

15. The main defence taken by the learned counsel for the appellant is that there was previous enmity between the father of the victim child and the appellant. Due to such enmity, in order to take vengeance, the father of the victim child foisted a false case against the appellant and tutored the victim child and therefore, she has spoken as tutored by her father. Further defence is that non examination of the father of the victim child is fatal to the case of the prosecution. In the present case, the father of the victim child is not an eye witness to the



occurrence and only based on the information given by her daughter, he contacted Child Help Line and registered the complaint. Therefore, mere non examination of the father of the victim child is not fatal to the case of the prosecution. Since the appellant is a known person, who is none other than second husband of the victim child's grand mother, the identification of the appellant is not in dispute and therefore, the only question that has to be decided is, whether the appellant has rebutted the presumption that he has no sexual intention to touch the victim child.

16.The learned counsel for the appellant would submit that at the time of occurrence, the appellant was not present in the house, however, the same was not substantiated by the appellant. In the present case, the evidence of the victim child clearly shows that at the time of occurrence, the victim child went to her grandmother's house, where the appellant also present in the house and she has stated that while watching television, the appellant misbehaved with her. The evidence of the victim girl is corroborated with the evidence of Doctor and the statement of the victim girl recorded under Section 164 Cr.P.C. In cases of this nature, one cannot expect eye witness, since the culprits will take a chance only on the loneliness of the minor children and make use of their innocence and exploit them sexually.

17.Under these circumstances, this Court safely come to the conclusion that the appellant has committed aggravated penetrative sexual assault on the victim child and thus, the prosecution has established its case beyond all reasonable doubt and also substantiated the charged offence under Section 9(m) which is punishable under Section 10 of POCSO Act. In the light of the above discussion, this Court does not find any merit in this appeal and the appeal is liable to be dismissed.

18.In fine, this Criminal Appeal deserves to be dismissed and accordingly, the same is dismissed. The conviction and sentences passed in Spl.C.No.45 of 2019 by the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court) Tiruppur is confirmed.

Sd/-

Assistant Registrar(CS-VII)

// True Copy //

Sub Assistant Registrar



To

WEB COPY

1.The Sessions Judge,
Magalir Neethimandram
(Fast Track Mahila Court)
Tiruppur.

2.The Superintendent,
Central Prison,
Coimbatore.

3.The Inspector of Police,
All Women Police Station,
Tiruppur South, Tiruppur.

4.The Public Prosecutor,
High Court, Madras.

5.The Deputy Registrar | with a direction to send back the
(Criminal Section), | original records, if any, to the
High Court, Madras. | trial Court

+1cc to Mr.J.Franklin, Advocate SR.No.37874

CRL.A.No.318 of 2021

SVI (CO)
CB(24/02/2022)