

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Reserved on : 16.02.2021
Pronounced on : 16.04.2021

CORAM:

THE HON'BLE Mr. JUSTICE P.VELMURUGAN

Criminal Appeal No.251 of 2019
and
Crl.MP.No.1494 of 2020

Syed ... Appellant/Accused

Versus

The State Rep.by
The Inspector of Police,
All Women Police Station,
Panruti. ... Respondent/Complainant

(Crime No.33 of 2015)

Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, to set aside the conviction and sentence vide Judgment dated 12.03.2019 passed in Spl.S.C.No.12 of 2016, by the learned Sessions Judge, Mahila Court, Cuddalore.

For Appellant : Mr.R.Sankarasubbu
For Respondent : Mr.R.Suryaprakash,
Government Advocate (Crl.side)

JUDGMENT

This Criminal Appeal has been filed against the conviction and sentence imposed on the appellant vide Judgment dated 12.03.2019 made in Spl.S.C.No.12 of 2016, by the learned Sessions Judge, Mahila Court, Cuddalore.

2. The case of the prosecution is that the victim girl in this case is aged about 15 years. The appellant/accused developed relationship with the victim and started to live with her separately and continued to have sexual intercourse with her, due to which, the victim become pregnant and gave birth to a girl baby on 27.01.2014. Thereafter, both the victim and the appellant/accused were living together. During the year 2015, the appellant/accused severed the relationship with the victim and married another girl. Hence, the victim preferred the complaint on 17.12.2015 before the respondent police.

3. The respondent-police registered a case against the appellant in Crime No.33 of 2015 for the offence punishable under Sections 3 r/w.4 and 7 r/w.8 of the Protection of Children from Sexual Offence Act, 2012 (in short POCSO Act), on the basis of the complaint given by the victim girl. After

completing the investigation, the respondent-police laid down charge before the Mahila Court, Cuddalore and the same was taken on file in Spl.S.C.No.12 of 2016 for the offences under Section 5(1) r/w.6 of the POCSO Act.

4. After framing charges, during trial, in order to prove the case of the prosecution, as many as eight witnesses were examined as PW1 to PW8, nine documents were exhibited as Exs.P1 to P9.

5. After completing the evidence of prosecution witnesses, when incriminating circumstances were culled out from the evidence of the prosecution were put-forth to the appellant/accused he denied it as false. On the side of the defence, no witness was examined but one document was marked as Ex.D1.

6. During the pendency of JC.No.24 of 2016 before the Juvenile Justice Board, Cuddalore, considering the document Ex.D1/ photocopy of transfer certificate of the appellant, the Juvenile Justice Board passed an order dated 09.11.2016 transferring the case to Mahila Court, Cuddalore which is competent to try the case against the accused. Aggrieved against the said order, the appellant/accused filed CrI.RC.No.839 of 2017 before this Court. This Court after analysing the material placed on record, dismissed the revision by its order dated 31.05.2018 stating that the order of transfer from Juvenile Justice Board, Cuddalore is fully justified.

7. After completing the trial and after hearing of the arguments advanced on either side and also considering the oral and documentary evidence, the Special Court found the appellant/accused guilty of the offence punishable under Section 6 of the Protection of Children from Sexual Offence Act, 2012, convicted and sentenced him to undergo 12 years Rigorous Imprisonment and to pay a fine of Rs.15,000/-, in default, to undergo further period of 2 years Simple Imprisonment. Challenging the said judgment of conviction and sentence, the appellant/accused is before this Court by way of present criminal appeal.

8. The learned counsel for the appellant would submit that the appellant is a juvenile at the time of occurrence. The case was conducted by Juvenile Justice Board for the offence said to have committed by the appellant. Considering the document Ex.D1/photocopy of transfer certificate of the appellant, the Juvenile Justice Board passed an order dated 09.11.2016 transferring the case to Mahila Court which is competent Court to try the case against the accused. There was an inordinate delay in lodging the complaint and registering the First Information Report against the appellant. The complaint was filed as an afterthought with deliberate intention. There is no specific evidence against the appellant to prove the commission of the offence. The appellant was a minor at the time of conviction and he was treated as a minor, therefore, his

conviction under Section 6 of the POCSO Act, is legally not sustainable. In this case, the statement of the victim under Section 164(5) of Cr.P.C., has not been recorded by the prosecution. There is material discrepancy and contradictions between the prosecution witnesses. The owner of the house, where the appellant and the victim were living together, was not examined. The non examination of the house owner, who is a vital witness is fatal to the case of the prosecution. Though, initially the case was registered for the offence under Sections 3 r/w 4, 9, 10 of the POCSO Act, subsequently, after framing the charges, the same were deleted. Therefore, it clearly shows that the prosecution has not proved its case beyond all reasonable doubt. The learned Trial Judge failed to appreciate the oral and documentary evidence and also the appellant is a juvenile at the time of occurrence. Therefore, the Mahila Court has no jurisdiction to try the case and the judgment of conviction and sentence passed by the Mahila court is liable to be set aside.

9. Per contra, the learned Government Advocate (Crl.side) appearing for the respondent-police would submit that at the time of occurrence, initially the offence committed by the appellant was tried under the juvenile justice board. It is evident from the document exhibited under Ex.D1 that the appellant continued to have sexual intercourse with the victim, even after he attained majority. The appellant took the victim girl forcefully to the rental house, married her, lived together and had sexual intercourse. Due to which, the victim girl gave birth to a female baby on 27.01.2014, thereafter also, the appellant continued to live with the victim girl till April 2015. After sometime, the victim girl also attained majority of 18 years on 27.02.2020 itself. After attaining the majority, the appellant as well as the victim girl had continued to have frequent sexual intercourse. After examining the documents, the Juvenile Justice Board transferred the case before the competent Court by an order dated 09.11.2016. Challenging the said order, the appellant filed Crl.RC.No.839 of 2017 before this Court, for withdrawing the proceedings before the Mahila Court and the same was dismissed. After full fledged trial, the Special Court passed the judgment of conviction and sentence. Therefore, it clearly shows that even after attaining majority also, the appellant continued to live with the victim girl till April 2015, when the victim girl was minor and also had frequent sexual intercourse with her. Therefore, he is not entitled to invoke the provisional jurisdiction or benefit of doubt under the Juvenile Justice Act. The victim girl gave birth to the female baby and DNA test was also conducted, which reveals that the appellant is the biological father of the female baby, who born to the victim girl. The DNA test report was marked as Ex.P9. Therefore, the evidence of PW1/victim and Ex.P.9/DNA report are sufficient to prove that the appellant has committed aggravated penetrative sexual intercourse with the victim. Therefore, the non examination of the Judicial Magistrate, who recorded the statement under Section 164(5) Cr.PC and non-marking of the statement under Section 164(5) of Cr.P.C are not fatal to the

case of the prosecution. Based on Ex.P3/complaint given by PW1, investigation was conducted, which reveals that the victim gave birth to a female baby. Samples were taken from victim, appellant and the baby born to the victim through the appellant and sent for DNA test. The DNA test report is marked as Ex.P.9, which reveals that the appellant is the biological father of the female baby born to the victim. Therefore, the prosecution has proved its case beyond reasonable doubt and the trial Court has rightly appreciated all the evidences and documents, hence there is no merit in the appeal filed by the appellant/accused.

10. Heard both sides and perused the materials available on record.

11. This Court being the Appellate Court and the fact finding Court has to give independent finding by re-appreciating the entire evidence. Accordingly, this Court re-appreciated the entire evidence and gives the independent finding.

12. Though the case was originally registered in Crime No.33 of 2015 for the offence under Section 3 r/w 4 and 7 r/w.8 of the POCSO Act and subsequently, after investigation, the offence under Sections 7 r/w.8 of the POCSO Act were deleted, charge sheet was filed against the appellant under Section 3 r/w 4 of the said Act. After completing the formalities, in order to substantiate the charge, on the side of the prosecution, totally 8 witnesses were examined and 9 documents were marked. Out of which, the victim was examined as PW1 and the mother of the victim was examined as PW2 and the younger sister of the victim was examined as PW3. The Doctor, who conducted the medical examination of the accused was examined as PW7.

13. On a reading of evidence of PW.1/victim, it is seen that she had stated that her Date of Birth is 08.06.1998. In order to prove the age, Transfer Certificate of the victim child was marked as Ex.P1 and also a copy of the original birth certificate was marked as Ex.P2. As per Ex.P2, her original date of birth is 08.06.1998. Therefore, as on April 2015, the victim child was aged 16 years and she is a child under the provision of Section 2(1) (d) of the POCSO Act. As per Ex.D1/Transfer Certificate of the appellant, his date of birth is 27.02.1997. Therefore, as on 27.02.2015, he completed 18 years and he has also attained majority but he was continuously committing the offence till August 2015. Therefore, the appellant even after attaining majority on 27.02.2015 till August 2015 continued to commit penetrative sexual assault on the victim, who was below 15 years and child under the definition of POCSO Act. Therefore, the appellant is not a juvenile and he is not entitled to get any benefit under the Juvenile Justice (Care and Protection of child) Act, 1954. Therefore, as per Section 2(1)(d) of the POCSO Act, the victim is a child and as per the Juvenile Justice (Care and Protection of child) Act, the appellant is not a juvenile and he is liable to be punished under the POCSO Act.

14. As far as the commission of offence is concerned, PW1 is a victim and the appellant followed the victim and made a false promise that he would marry her and had sexual intercourse with her repeatedly. Though at that time of starting intimacy both are minors, during the intimacy, the victim child had become pregnant and gave birth to female baby on 27.01.2014. Thereafter also, both of them lived together. Subsequently, the appellant left the victim. According to the victim/PW.1, the appellant had sexual intercourse with her and lived together upto August 2015. Therefore, the appellant continued to live with the victim child till August 2015 and during that period, he had sexual intercourse repeatedly with her. Due to that, the victim/PW.1 gave birth to a female baby on 27.01.2014 and on 27.01.2015, the first birthday of the baby was celebrated and the appellant also participated in the birthday celebration of the said female baby born to the victim and the appellant. According to the evidence of the victim, on 07.04.2013, the appellant married and lived with her as husband for more than 2 years. As per the complaint given by her, the appellant lived with her till April 2015. Though the appellant had gone to the parents house, their parents prepared to send him to abroad, with the help of his parents, he continued to visit the victim. Subsequently, the appellant also ditched the victim and married another girl. Thereafter, PW.1/victim preferred Ex.P3/complaint against the appellant. The evidence of PW1 was corroborated by PW2/mother of the victim and PW3/sister of the victim. PW.7, is the Doctor, who conducted the potency test of the appellant. PW5 is the independent witness, who had spoken about the incident that the appellant and the victim were living together as husband and wife. Thereafter, the victim gave birth to the female baby. Since the parents of the appellant arranged second marriage to the appellant, the victim gave a complaint. PW.4 has also clearly stated that the appellant and the victim child were living together as husband and wife due to which, victim gave birth to the female baby. Subsequently, the parents of the appellants made preparations to conduct second marriage to the appellant with another girl, thereby the victim gave complaint before the police. During investigation, blood samples were collected from the appellant, the victim and the female baby born to the victim through the appellant and sent to the Forensic Lab for DNA test. The DNA test report was marked as Ex.P9 which clearly shows that the appellant is the biological father of the female baby, born to the victim and the appellant. Therefore, by producing oral and documentary evidences, the prosecution has proved its case that the appellant committed aggravated penetrative sexual assault with the victim child, due to which the victim gave birth to the female baby.

15. The aforementioned facts would prove that at the time of commission of offence, the appellant was Juvenile, subsequently, after 27.02.2015, he was not a Juvenile, since he attained 18 years. Even after attaining majority, he continued to have sexual intercourse with the victim child till August 2015. However, the fact remains that even after 27.02.2015, after attaining majority, the appellant committed sexual

assault on the victim child, therefore the Mahila Court framed the charge under Section 6 of the POCSO Act.

16. On a careful perusal of the entire materials, this Court finds that the appellant committed the offence punishable under Section 6 of the POCSO Act and the Trial Court has rightly appreciated all the evidences and convicted the appellant for the offence under Section 6 of the POCSO Act. Therefore, this Court does not find any illegality or infirmity in the judgment of conviction and sentence rendered by the special court, accordingly, the appeal is liable to be dismissed.

17. With the above discussions and for the foregoing reasons, the Criminal appeal is dismissed by confirming the judgment of conviction and sentence rendered by the Sessions Judge, Mahila Court, Cuddalore made in Spl.SC.No.12 of 2016 dated 12.03.2019. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

klr
To

1.The Sessions Judge,
Mahila Court, Cuddalore.

2.The Inspector of Police,
All Women Police Station,
Panruti.

3.The Superintendent of Prison,
Central Prison, Cuddalore.

4.The Public Prosecutor,
High Court of Madras.

5.The Section Officer,
Criminal Section(Records), High Court, Madras.

+1cc to Mr.R.Sankarasubbu , Advocate SR.No. 23454

CrI.A.No.251 of 2019
and

CrI.MP.No.1494 of 2020

A.SK(05.07.2021)

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