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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRIMINAL APPEAL NO.407 OF 2020

Jayabalan

... Appellant/Accused

.Vs.

The State by
The Inspector of Police,
All Women Police Station (North),
Tiruppur District.
(Crime No.5 of 2019)

... Respondent/Complainant

PRAYER:- Criminal Appeal filed under Section 374(2) of Criminal Procedure Code praying to set aside the conviction and sentence imposed on the appellant by the Judgment dated 29.11.2019 passed in Spl.S.C.No.35 of 2019 on the file of the Magalir Neethi Mandram (Fast Track Mahila Court), Tiruppur.

For Appellant : Mr.I.C.Vasudevan

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)

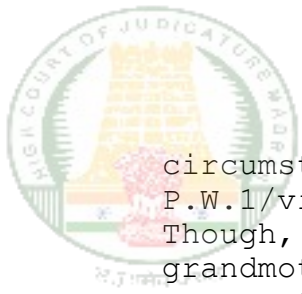
The Criminal Appeal has been filed against the conviction and sentence imposed on the appellant by Judgment dated 29.11.2019 passed in Spl.S.C.No.35 of 2019 on the file of the Magalir Neethi Mandram (Fast Track Mahila Court), Tiruppur.

2. The respondent police registered a case in Crime No.5 of 2019 against the appellant for the offence under Section 3(a), 4, 5(m), 6 of POCSO Act, 2012. After investigation, they laid charge sheet before the Special Court since, the offence is against a woman especially a child under the definition of Section 2(1)(d) of POCSO Act. The learned Special Judge taken the charge sheet on file in Special S.C.No.35 of 2019 and after completing the formalities, framed charges against the appellant



through P.W.1 nor marked through the Magistrate who recorded the statement from the victim girl and it was only marked through the Investigating Officer. The learned Counsel placed reliance on the citations of the Hon'ble Supreme Court and stated that the practice of omnibus marking of the statement of the witness deserves to be deprecated. Therefore no effect can be given to the statement recorded under Section 164 Cr.P.C. which is marked as Ex.P.12. The said statement cannot be used for contradiction or corroboration. Even the mahazar witness has stated that he does not know what is mentioned in the mahazar. Therefore, the prosecution failed to establish the case against the appellant beyond reasonable doubt. Hence, the appeal may be allowed and the Judgment of conviction and sentence passed against the appellant may be set aside.

7. The learned Government Advocate (Crl. Side) would submit that the appellant is the sole accused and he is the neighbour of the victim who is aged about 5 years. On the date of occurrence, the mother of the victim was not in the house. At that time, the appellant took the victim to his house and made an oral sex with her. A reading of Section 3 of POCSO Act and the evidence of P.W.1/victim would go to show that the appellant has committed the offence of penetrative sexual assault on the victim. Since, the victim is below 12 years, the offence committed by the appellant falls under Section 5 (m) of POCSO Act which is termed as aggravated penetrative sexual assault and punishable under Section 6 of POCSO Act. The victim was earlier produced before the Judicial Magistrate for recording statement under Section 164 Cr.P.C. in which, the victim has clearly narrated the entire incident. Further, P.W.3/doctor has also deposed that the mother of the victim brought the victim girl for medical examination and she informed her that a known person committed oral sex on the victim girl and therefore, they lodged the complaint. Though the learned Counsel for the appellant contended that the doctor has given opinion that there was no external injury on the body of the victim girl, the case of the prosecution is that the appellant took the victim girl to his house and inserted his male organ into the mouth of the victim girl and therefore, no injury can be expected and it is not the case of the prosecution that the victim sustained injury. Though the learned Counsel for the appellant contended that the statement of the victim recorded under Section 164 Cr.P.C. was marked only through the Investigating Officer and therefore, the omni-bus marking of the statement recorded under Section 164 Cr.P.C. is not admissible. A reading of the evidence of P.W.1 clearly shows that the victim was earlier brought to the Judicial Magistrate and there also her statement was recorded. While P.W.1 was examined as witness, she has clearly stated that she was earlier produced before the Judicial Magistrate and there also, her statement was recorded. Therefore, under these



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circumstances, the non marking of the document through P.W.1/victim is not fatal to the case of the prosecution. Though, P.W.2/the mother of the victim and P.W.5/great grandmother of the victim not supported the case of the prosecution, the prosecution proved its case beyond all reasonable doubt. Therefore, the evidence of the victim/P.W.1 and her statement recorded under Section 164 Cr.P.C./Ex.P.12 and the evidence of the doctor/P.W.3, are cogent and consistent. Therefore, there is no merit in the appeal and the appeal 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. The case of the prosecution is that on 05.07.2019, the P.W.1/ mother of the victim had gone to the Baniyan company to attend her work and at about 7.45 p.m., her daughters were playing near the house of the accused. Later, the elder daughter returned home and the younger daughter/victim did not return home. Therefore, the great grandmother of the victim/P.W.5 went in search of the victim girl. At that time, she saw the accused in his bedroom keeping his male organ into the mouth of the victim girl and he was shaking. On seeing the same, the great grandmother of the victim/P.W.5 assaulted the accused and brought the victim back to her house and later informed the same to the defacto complainant.

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 pursued the entire materials and the Judgment of the trial Court, and gives its findings independently.

11. In order to substantiate the charges framed against the appellant, on the side of the prosecution, totally 8 witnesses were examined out of which, the victim was examined as P.W.1.

12. Earlier, the victim/P.W.1 was produced before the Judicial Magistrate for recording statement under Section 164 Cr.P.C. and the same was marked as Ex.P.12. A complete reading of the evidence of P.W.1/victim and Ex.P.12/the statement recorded under Section 164 Cr.P.C., shows that the evidence of the victim is cogent and consistent and the evidence of the victim is very natural which inspires the confidence of this Court and there is no reason to disbelieve or discard the same. Therefore, this Court believes that the evidence of the victim is natural and the defence has not proved that the victim was tutored. The contention of the learned Counsel for the appellant is that the prosecution would have threatened to say so whereas,



in this case the P.W.2 and P.W.5 namely the mother and great grandmother of the victim have turned hostile and they have not supported the case of the prosecution. Hence, it is clear that there could not be any tutoring or threatening. Though the contention of the learned counsel for the appellant is that P.W.2 and P.W.5 not supported the case of the prosecution, they were not cross examined by the defence counsel. The learned Counsel for the appellant contended that in the evidence of P.W.2 and P.W.5, they have clearly stated that on the date of occurrence, the victim entered into the house of the appellant for watching T.V. and at that time, she broken the cell phone of the accused due to which, the appellant pushed the victim from his house; on seeing the same, P.W.5/the great grandmother of the victim questioned the appellant for which, the appellant abused P.W.5 in filthy language and so they lodged a complaint before police and the police have foisted the false case against the appellant. However, the learned defence counsel had not cross examined the victim on the above aspect. Further, on the date of occurrence, the presence of the victim in the house of the appellant is not disputed and there was a quarrel between the appellant and the great grand mother of the victim is also not disputed. Under these circumstances, the evidence of P.W.1 / victim and her previous statement made before the Judicial Magistrate corroborated with the evidence of the doctor/P.W.3 wherein, the doctor has clearly stated that P.W.2/the mother of the victim, while bringing the victim for medical examination informed her that the appellant who is her neighbour made oral sex with the victim child and thereby, they lodged the complaint. Subsequently, for the reasons bast known to the mother of the victim, she turned hostile and not supported the case of the prosecution. Since because one of the witnesses turned hostile, it is not a sole ground to acquit the appellant.

13. A complete reading of the entire evidence and materials and considering the age of the victim, this Court does not find any reason to disbelieve or discard the bonafide of the victim girl to take a different view and there is no benefit of doubt to be extended to the appellant. In this case, the prosecution proved its case beyond all reasonable doubt that the appellant has committed the offence under Section 5(m) which is punishable under Section 6 of POCSO Act. Considering the age of the victim and the grave nature of the offence, this Court doses not find any perversity in the Judgment of the trail Court. Since the victim has clearly deposed that she was earlier produced before the Judicial Magistrate and there also her statement was recorded, the citations referenced to by the learned Counsel for the appellant is not applicable to the case on hand.

14. As far as the sentence is concerned, the trial Court considering the age of the appellant has awarded only the



minimum sentence of 10 years and there is no mitigating circumstances to reduce the sentence less than 10 years. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

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15. Accordingly, this Criminal Appeal is dismissed. The Judgment dated 29.11.2019 passed in Spl.S.C.No.35 of 2019 passed by the Magalir Neethi Mandram (Fast Track Mahila Court), Tiruppur, is hereby confirmed. Hence, the trial Court is directed to secure the appellant/accused to undergo the remaining period of sentence, if any. The period of incarceration already undergone, shall be given set off.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Magalir Neethi Mandram
(Fast Track Mahila Court),
Tiruppur.
2. The Inspector of Police,
All Women Police Station (North),
Tiruppur District.
(Crime No.5 of 2009)
3. The Superintendent,
Central Prison,
Coimbatore.
4. The Public Prosecutor Officer,
High Court, Madras.

Copy To:-

The Section Officer,
Criminal Section,
High Court, Madras.

CRIMINAL APPEAL NO.407 OF 2020

GPL(CO)
PBS/28/01/2022