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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.09.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.419 of 2021
and
Crl.M.P.No.9080 of 2021

C.Subban

... Appellant

.Vs.

The state rep. by
Inspector of Police,
Gudimangalam Police Station,
Incharge All Women Police Station,
Udumalpet, Crime No.8 of 2016.

... Respondent

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to call for the records in Spl.S.C.No.10 of 2017 on the file of the Magalirneedimandram, Fast Track Mahila Court, Tiruppur and allow the appeal thereby set aside the conviction and sentence imposed on the appellant.

For Appellant :Mrs.S.Sridevi
Legal Aid Counsel

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 02.02.2018 passed in Spl.S.C.No.10 of 2017 by the learned Sessions Judge, Magalirneedimandram, Fast Track Mahila Court, Tiruppur.

2.The case of the prosecution is that on 30.07.2016 at about 2.00 p.m., when the victim girl went for attending nature's call near the bushes at Elayamuthur, the accused/appellant who was grazing his goats there called the victim girl near the bathroom. When the victim girl went near the bathroom, the accused pulled the victim girl into the bathroom, lifted her skirt, removed her panty and thereby, he has committed aggravated sexual assault on



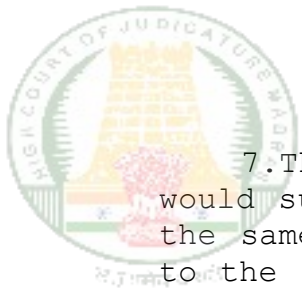
the victim girl. Hence, a complaint/Ex.P1 has been registered against the accused by P.W.1/father of the victim girl.

3.The respondent police registered a case in Crime No.8 of 2016 against the appellant for the offence under Sections 7 and 8 of The Protection of Children from Sexual Offences Act, 2012 [hereafter referred to as 'POCSO Act' for the sake of convenience]. After completing 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, taken cognizance of the case on file in Spl.S.C.No.10 of 2017. On completion of the formalities, the learned Sessions Judge framed charges against the appellant for the offence under Section 9(m) 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 10 witnesses were examined as P.W.1 to P.W.10 and marked 10 documents as Exs.P1 to P10. 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 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 he was convicted and sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for a further period of one year. Challenging the said conviction and sentence, the appellant is before this Court.

6.Since the victim girl was aged about 10 years at the time of occurrence, the offence against the appellant falls under POCSO Act. Today, when the matter is taken up for hearing, the learned Legal Aid Counsel appearing for the appellant produced all the copies of depositions. This Court heard the arguments of the appellant and the learned Government Advocate (Crl.Side) for the respondent extensively and also perused the materials available on record, with consent of both sides, the case on hand is taken up for final disposal, at the admission stage itself.



7.The learned Legal Aid Counsel appearing for the appellant would submit that there was a delay in filing the complaint and the same has not been properly explained, which itself is fatal to the case of the prosecution and it creates a doubt about the case of the prosecution. Further, no such occurrence had taken place as alleged by the prosecution. There was a dispute between the families of the appellant and the victim girl. Due to such personal enmity and in order to take vengeance, the parents of victim girl tutored her and foisted a false complaint against the appellant. He would further submit that there was a material contradiction in the statement of the victim girl recorded under Section 164 Cr.P.C and during trial and also in the statements of prosecution witnesses P.W.1 to P.W.3. The Doctor/P.W.7, who examined the victim girl has deposed that on her medical examination, she found that no external injuries were found on the victim girl and hence, the medical evidence was not supported the case of the prosecution. Even though the prosecution did not examine one Masilamani, who is an eye witness to the said occurrence, there is no independent eye witness to corroborate the statements of P.W.1, P.W.2 and P.W.3. However, the trial Court failed to appreciate the contradictions and discrepancies between the evidence of the prosecution witnesses in a right manner and simply convicted the appellant on the grounds of assumption and sympathy, which warrants interference of this Court.

8.The learned Government Advocate (Crl.Side) for the respondent would submit that the age of the victim girl was only 10 years at the time of occurrence and the victim girl (P.W.2) during her deposition before the trial Court, has clearly narrated that on 30.07.2016 at about 2.00 p.m when she went for attending nature's call near the bushes at Elayamuthur, the accused/appellant who was grazing his goats there called her near the bathroom, she went near the bathroom, the accused pulled her into the bathroom and attempted to commit aggravated sexual assault on her. At that time, when she raised alarm one Masilamani, who came there and shouted, on seeing her, the accused ran away from the scene of occurrence. The evidence of the victim girl/P.W.2 during trial corroborates with the statement of the victim girl recorded under Section 164 Cr.P.C/Ex.P9 and also the evidence of P.W.1 and P.W.3, who are the father and mother of the victim girl. He would further submit that after registration of the complaint the victim girl was produced before the Doctor/P.W.7 for medical examination and she has deposed that no external injuries were found on the victim girl and hymen was found intact. P.W.7 issued Ex.P5/Copy of the Accident Register. Since the medical evidence was not helpful to the case of the prosecution, the victim girl was produced before



the learned Judicial Magistrate for recording her statement under Section 164 Cr.P.C/Ex.P9, in which the victim girl has clearly narrated the said incident. Therefore, from the evidence of P.W.2/victim girl and her statement recorded under Section 164 Cr.P.C/Ex.P9 the prosecution has proved its case beyond all reasonable doubts. Since the victim girl was 10 years at the time of occurrence, she is a child as defined under Section 2(1)(d) of POCSO Act and the appellant has attempted to commit aggravated sexual assault on the victim girl. Therefore, the trial Court has rightly convicted the appellant for the offence under Section 9(m) which is punishable under Section 10 of POCSO Act. Hence, the appeal is liable to be dismissed.

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

10. A reading of the complaint (Ex.P1) clearly indicates that the appellant attempted to commit aggravated penetrative sexual assault on the victim girl. Further, after registration of the F.I.R., the victim girl was produced before the Judicial Magistrate for recording her statement under Section 164 Cr.P.C., in which, she has clearly narrated the said incident and therefore, the only question that has to be decided is, whether the appellant has committed aggravated penetrative sexual assault on the victim girl.

11.The victim girl/P.W.2 in her evidence has clearly deposed that at the time of preferring the complaint before the respondent police, the age of the victim girl was only 10 years and the accused is residing nearby her house. On 30.07.2016 at about 2.00 p.m when she went for attending nature's call near the bushes at Elayamuthur, the accused/appellant who was grazing his goats there called her near the bathroom, she went near the bathroom, the accused pulled her into the bathroom and attempted to commit aggravated penetrative sexual assault on her. At that time, when she raised alarm one Masilamani, who came there and shouted, on seeing her, the accused ran away from the scene of occurrence. The evidence of the victim girl is corroborated with the evidence of P.W.1 and P.W.3. At the time of occurrence the victim girl was only 10 years, to prove the same the prosecution exhibited Ex.P2/Birth certificate of the victim girl, in which, date of birth of the victim girl is shown as 20.01.2007, whereas the date of occurrence is 30.07.2016. Since the victim girl was child, the appellant had attempted to commit aggravated penetrative sexual assault on the victim girl and thereby, the act committed by the appellant comes under Section 9(m) which is punishable under Section 10 of POCSO Act.



12.The defence taken by the learned Legal Aid Counsel for the appellant is that prosecution has not examined one Masilamani, who is an eye witness to the said occurrence and also no independent witnesses were examined, which is fatal to the case of the prosecution. Lapses on the part of the prosecution is not a sole ground to discard the evidence of the victim girl. The victim girl was only 10 years, at the time of occurrence and she has clearly narrated the said incident during trial and also even prior to that, in her statement recorded under Section 164 Cr.P.C. The contradictions pointed out by the learned counsel for the appellant are not material contradictions. The facts remains that the offence committed by the appellant falls under the ingredients of Section 7 of POCSO Act. Since the victim girl is below 12 years, the offence committed by the appellant falls under Section 9(m) which is punishable under Section 10 of POCSO Act.

13.For better appreciation, it is appropriate to extract Sections 7, 9(m) and 10 of POCSO Act, which read as follows:

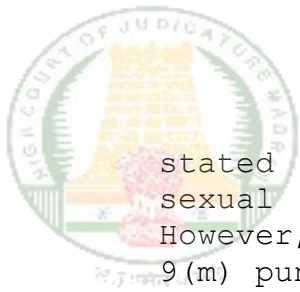
'7.Sexual assault : Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other Act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

'9 Aggravated sexual assault :

(m) whoever commits sexual assault on a child below twelve years, or
.....

10.Punishment for aggravated sexual assault -
Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.'

14.On a combined reading of the evidence of P.W.1 to P.W.3, Ex.P9 and Ex.P2, this Court finds that the act committed by the appellant is aggravated penetrative sexual assault. In cases of this nature, one cannot expect independent witnesses to the occurrence. The evidence of the victim girl is cogent, consistent and trustworthy there is no reason to discard the evidence of the victim girl. In the present case the victim girl has clearly



stated that the appellant has attempted to commit penetrative sexual assault on her but, he failed in the said attempt. However, the act committed by the appellant falls under Section 9(m) punishable under Section 10 of POCSO Act.

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15. Considering the object of the POCSO Act, this Court is of the view that the contradictions pointed out by the learned counsel for the appellant are not material contradictions to disbelieve the case of the prosecution, but the same are only minor contradictions and that will not vitiate the case of the prosecution. Under these circumstances, the offence under POCSO Act is very well established. Hence, this Court has no hesitation in considering the evidence of the victim girl alone, and no other corroborative evidence or eye-witness or independent witness is needed.

16. Under these circumstances, this Court can safely come to the conclusion that the appellant has committed aggravated sexual assault on the victim girl and thus, the prosecution has established its case beyond all reasonable doubts and also substantiated the charges under Section 9(m) which is punishable under Section 10 of POCSO Act and convicted and sentenced the appellant. This Court, being an Appellate Court, is a fact finding Court re-appreciated entire evidence and found that the appellant has committed the charged offence. Further, considering the scope of POCSO Act amended in 2019, this Court is of the view that there is no necessity to call for the records from the Court below.

17. 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. Accordingly, this Criminal Appeal is dismissed and the judgment of conviction and sentence passed by the trial Court is confirmed. Consequently, connected miscellaneous petition is closed.

18. The Legal Aid counsel appointed by this Court is entitled to legal fees as per Rules.

Sd/-

Assistant Registrar(CS-VII)

// True Copy //

Sub Assistant Registrar

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To

1. The Sessions Judge,
Magalirneedimandram,
Fast Track Mahila Court,
Tiruppur.

2. The Superintendent,
Central Prison, Coimbatore.

3. The Inspector of Police,
Gudimangalam Police Station,
Incharge All Women Police Station,
Udumalpet.

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

6. The Assistant Registrar,
POCSO Act Committee,
High Court, Madras.

+1cc to M/s.S.Sridevi, Advocate SR.No.46273

CRL.A.No.419 of 2021
and CrI.M.P.No.9080 of 2021

KSM(CO)
CB(30/11/2021)