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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.03.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CrI.A.No.465 of 2019

R.Raj Kumar

... Appellant

Versus

State represented by its
The Inspector of Police,
Nedungadu Police Station,
Karaikal.

Crime No.78 of 2016

... Respondent

PRAYER: Criminal Appeal is filed under Section 374(2) Cr.P.C seeking to call for the records in Special Sessions Case No.6 of 2017 on the file of the learned Special Judge, Karaikal, and set aside the judgment dated 28.02.2019 and acquit the accused/appellant.

For Appellant : Mr.R.Sunil Kumar
: Ms.D.Sathya
Legal Aid Counsel for the appellant

For Respondent : Mr.D.Bharatha Chakravarthy
Public Prosecutor (Pondicherry)

JUDGMENT

This Criminal Appeal has been filed seeking to call for the records in Special Sessions Case No.6 of 2017 on the file of the learned Special Judge at Karaikal, and set aside the judgment dated 28.02.2019.

2. The respondent police registered the case against the appellant in Crime No.8 of 2016 for the offence punishable under section 8 of POCSO Act. After completing the investigation, laid a charge sheet before the Special Judge, Karaikal. The learned Special Judge taken the case in Spl.S.C.No.6 of 2017. After completing the formalities, the learned Special judge framed a charge against the appellant for the offence under section 8 of POCSO Act. After framing the charge during the trial, on the side of the prosecution, the prosecution examined as many as 10 witnesses as P.W.1 to 10 and 13 documents were marked as Ex.P.1



to 13, besides 8 material objects were exhibited. After completing the examination of the prosecution witnesses,. incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant by questioning under section 313 of Cr.P.C., and he denied it as false and pleaded not guilty. On the side of the defence, no oral evidence was produced and only one exhibit was marked as Ex.D1. After the trial and after hearing the arguments advanced on either side, the Special Judge found guilt of the appellant for the offence punishable under section 8 of POCSO Act and convicted and sentenced him to undergo 3 years R.I and to pay a fine of Rs.1000/- in default S.I for three months. Challenging the said judgment of conviction and sentence, the accused has filed the present appeal before this Court.

3. The learned Legal Aid counsel appearing for the appellant would submit that no such occurrence has taken place. The police has put up the case and the complainant making use of the innocence of the victim girl, tutored the victim girl and foisted a false case against the appellant. The investigating officer has not conducted fair investigation and laid a charge sheet falsely. Therefore, a reading of the evidence of P.W.1 and P.W.2-victim girl itself clearly shows that it is put up case against the appellant. He further submitted that there was a motive between the family of the victim girl and the appellant. P.W.1 and 2 have clearly admitted that there was a put up case filed by the appellant's sister against one Ramesh who is paternal uncle of the victim girl and in order to take vengeance for the case filed against one Ramesh, set up the victim girl and foisted a false case. Further the place of occurrence has not been established without any iota of doubt.

4. The learned counsel further submitted that the case of the prosecution is that the victim girl went to the school along with five other children for playing hide and seek game and at that time, the appellant was sitting on the compound wall and he has committed the offence. However, the prosecution has not examined any of the friends of the victim girl who went along with the victim girl on the date of occurrence and who played with her. Therefore, non examination of the friends of the victim girl is fatal to the case of the prosecution. Since no such occurrence had taken place, the prosecution not examined the friends of the victim girl.

5. Further he would submit that there is no written complaint in this case and P.W.1 has given only oral complaint. Based on the oral complaint, the respondent police registered the case. Even the victim girl has not stated during the statement recorded under section 164 Cr.P.C., that the appellant touched her private parts(Vagina) and pressed breast of the



victim girl with sexual intention and thereby sexually assaulted her. Even during cross examination, she has clearly admitted the same.

6. Further the victim girl has stated that the appellant was only sitting on the compound wall. She has not stated that the appellant entered into the school. Therefore, there are material contradictions in the complaint and also statement recorded under section 164 Cr.P.C. Even in the chief examination and during the cross examination nothing is proved. Further, from the non examination of the friends of the victim girl which is fatal to the case of the prosecution, the victim girl was used for the complaint for the enmity between the maternal uncle and the appellant, and foisted a false case. There are material contradictions from the evidence of P.W.1 and P.W.2 and there are lot of contradictions in the complaint, FIR, statement recorded under section 164 Cr.P.C and chief examination and also cross examination of witnesses.

7. Even the investigating officer has also spoken that there was a case against the family of the relative of the victim girl and also with the appellant and the case was in the initial stage. Further it is also stated that though investigation reveals that the victim girl stated that there are 5 or 6 other friends were playing along with her just prior to the occurrence, they were not examined. However, P.W.1 clearly stated the time of the occurrence. However P.W.3 stated victim girl came by 4 O clock itself. Whereas mother of the victim girl stated that it was 5 O clock. Therefore, the time and place of occurrence is highly doubtful.

8. Therefore, prosecution has failed to establish and substantiate the charge levelled against the appellant. It is only mother of the victim girl viz., P.W.1 set up the victim girl and foisted a false case. Unfortunately the investigating officer failed to conduct fair investigation and file a final report, therefore, it is a false case. The occurrence was said to have taken place on a holiday. The victim girl along with five friends went to the school. There was a compound wall and the victim girl and their age group friends are only 3 ½ feet, but the compound wall is measuring 5 ft., therefore, it was not possible for the victim girl and her friends to jump over the compound wall or the gate to go inside and play. Therefore, it was highly impossible and the prosecution failed to prove its case beyond reasonable doubt.

9. Mr.D.Bharatha Chakravarthy, learned Public Prosecutor (Pondicherry) would submit that the age of the victim girl is 10 years on the date of occurrence. The victim girl along with her friends wanted to play since on the date of occurrence it is a



satursday and it was a holiday. The victim girl along with her friends entered into the school and played hide and seek game. Since the victim girl went and hidden herself, others after searching her subsequently left without intimation. After some time, the victim girl came out from the hidden place. At that time, the appellant called the victim girl and committed the offence. In 161 Cr.P.C., statement, she has clearly narrated the events. Even prior to that, the mother of the victim girl informed the occurrence to the police, who infomed to the child welfare committee and the child line team member and P.W.4 examined the victim girl as per POCSO Act and the victim girl has clearly narrated the entire events. The statement of victim girl was marked as Ex.P.3. Subsequently the victim girl was produced before the Judicial Magistrate for recording the statement under section 164 Cr.P.C. There also the victim girl has clearly stated about the incident. Subsequently when she was examined as P.W.2 before the Court she has clearly narrated the occurrence. Even in the cross examination, nothing she shattered. Subsequently P.W.4 was examined before the Court. She has clearly corroborated the evidence of victim girl and P.W.1 also corroborated the evidence of victim girl P.W.2. Even though there were contradictions, they are only minor contradictions and those contradicitons are not material one which will go to the root of the case of the prosecution. Though it has been admitted that there is some case registered against one Ramesh who is relative of the victim girl but for which no person can sacrifice the future of the victim girl. Further the evidence of the victim girl is very clear and cogent that there is no eye witness and therefore, there may not be any corroboration for the occurrence. Further the victim girl has clearly stated about the occurrence more than once both before the Social Welfare Officer and then before the Magistrate and also before the Trial Court.

10. A reading of the entire evidence of the victim girl shows that the victim girl was subjected to sexual harassment. Even though there is no penetrative sexual assault, the commision of the offence would attract section 7 and 8 of POCSO Act. Therefore, the learned Special Judge rightly appreciated the evidence and convicted the appellant for the above said offence and this appeal is liable to be dismissed.

11. Heard and perused the records.

12. The case of the prosecution is that the victim girl was aged about 10 years and she was studying 5th standard and staying in her mother's sister Megala's house. On 24.12.2016, since it is a holiday at about 3 p.m., she along with her friends went into the school playground and playing hide and seek game. All her friends concealed themselves in some other place. She



concealed herself behind the sarukku maram which is situated in the school playground. As her friends not come forward to find her, she came out from the hiding place, at that time, the accused called her. When she went near to him, he got hold her hand, kissed on her cheek, touched her breast and her private parts. She started crying and so, he released her. She came to her house by jumping out of the school compound gate narrated all events to her elder maternal aunt P.W.1 herein, who informed the same to the victim child's parents. Hence the complaint.

13. The Appellate Court is a fact finding Court. In order to give independent findings, it has to re-appreciate the entire evidence for which this Court also gone through the entire materials and also the judgement of the trial Court and the grounds of the appeal.

14. Based on the registration of complaint as against the appellant, after investigation charge sheet was laid. The trial court framed charge against the appellant under section 8 of the POCSO Act. The prosecution in its charge sheet, specifically stated that the victim girl was subjected to sexual assault and the ingredients of which falls under section 7 of the POCSO Act. In order to substantiate the charge framed against the appellant, the victim girl was examined as P.W.2. During the chief examination, she has clearly narrated the occurrence and also prior to that, she was produced before the Judicial Magistrate for recording the statement under section 164 Cr.P.C. Accordingly the Magistrate also recorded the statement of the victim girl. The said statement was marked as Ex.P.4 and P.W.2 signature along with proceedings was found place. A reading of Ex.P.4 - statement recorded under section 164 Cr.P.C, would go to show that the victim girl has clearly narrated that she went to the school for playing hide and seek game. While the victim girl was hiding herself behind the Sarukku Maram, all the friends of the victim girl searched her and they could not find out the victim girl, so they left the school. Thereafter, she came out from the hiding place. At that time, the accused called her and committed the offence.

15. A reading of the statement recorded under section 164 Cr.P.C makes it clear that the offence committed by the appellant falls under section 7 of the POCSO Act. Prior to the above said recording of statement from the victim girl, she was produced before the child welfare team at 7 O clock viz., P.W.4 Child Line Team Member, who has clearly stated that the victim girl has narrated before her about the events on the said date of occurrence. Further on 24.12.2016 at 7 O clock, the respondent police informed to them and they went to the house of the victim girl. At that time, the mother of the victim girl and also her paternal uncle was there. When she examined the victim



girl she was narrated about the occurrence that at 3 0 clock, she along with her friends went to the school for playing. At that time, the accused called the victim girl and committed the offence. The said statement was recorded from the victim girl. The signature of P.W.2 in the statement of victim girl under section 164 Cr.P.C., was marked as Ex.P.4. Signature of P.W.4 in the 161 Cr.P.C statement was marked as Ex.P.6, but it is not admissible in evidence. It can be used for corroboration and contradiction.

16. A combined reading of the evidence of P.W.1 to 4 and also Ex.Ps.1,3,4,5,6,9 and 13 would go to show that the prosecution has proved its case beyond reasonable doubt. The non examination of the friends of the victim girl and also the parents of the friends of the victim girl is fatal to the case of the prosecution. A reading of the evidence of victim girl, her statement recorded before the Magistrate and also the statement before P.W.4 Child line Team Member makes it very clear that she went to school along with friends to play hide and seek game. While she was hiding herself nearby sarukku maram, the friends of the victim girl could not find her therefore, they left the place. Thereafter she came out of the hidden place, at that time, the appellant called her; when she went near to him as the appellant is known to the victim girl, at that time, he committed the offence and threatened her. Further, the victim girl has not stated that at that time her friends have seen the occurrence. The investigating officer has clearly stated that he has not examined the friends of the victim girl and their parents since it not stated by the victim girl that either at the time of occurrence or at the time of calling the appellant, the friends of the victim girl has seen the same. Therefore, under these circumstances mere non examination of either the friends or their parents may not be fatal to the case of the prosecution. Mere non examination of the friends of the victim girl or their parents may be a defect in investigation and it may not be a sole ground to discard the evidence of the victim girl. Lapse on the part of prosecution should not lead unmerited acquittal, subject to rider that in such a situation evidence on record should be clinching, so that lapses of prosecution can be condoned. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible.

17. The learned Legal aid counsel for the appellant would submit that there was enmity between the relative of the victim girl and also the appellant and therefore the victim girl was set up by the adult members of the family of the victim girl and also in order to take vengeance for the case that was registered by the appellant against one Ramesh who is paternal uncle of the victim girl, made use of the victim girl to take vengeance and



they put up the false case. Even though P.W.1 and P.W.2-victim girl admitted that there was a fight between two families and also case was registered and was pending, no documents filed before this Court in support of the said contention. Ramesh was not the party to that case and further merely some cases are pending against the paternal uncle of the victim girl and it was filed by the appellant's family does not mean that the evidence given by the victim girl is totally false. Unless this Court finds that by way of evidence of victim girl that the victim girl is tutored by the adult members or there is sound reason to disbelieve the evidence of the victim girl, this Court cannot accept the contention the learned counsel for the appellant. On a reading of the evidence of victim girl coupled with the evidence of P.W.4 who attested the statement recorded by P.W.8 from the victim and subsequently the evidence of P.W.2 - victim girl during the examination before the Court, it is seen that she has cogently stated the entire events. The Legal Aid counsel for the appellant would point out that in the cross examination, the victim girl has not specifically stated that he embraced and kissed her on cheek and touched breasts and the Vagina, when she cried, the appellant left her. However, during the statement made before the Judicial Magistrate and also Social Welfare Officer she has categorically stated the offence committed by the appellant. It is to be seen that on the day of chief examination, the victim was not cross examined by defense counsel. After three months, she was recalled and cross examined. Therefore, in such circumstances, the contention of the legal aid counsel for the appellant that due to case registered against one Ramesh, the paternal uncle of the victim girl, the victim girl's family foisted the false case against the appellant and made use of the age of the victim girl and innocence of the victim girl, case was put up which allegation is not at all acceptable.

18. The Legal Aid counsel for the appellant would further submit that the place of occurrence, time of occurrence were not proved. As far as this contention is concerned, the legal aid counsel for the appellant would submit that the victim girl stated that at the time of occurrence, the appellant was sitting in the compound wall and the height of the compound wall is more than 5 ft., the victim girl is only 3 ½ ft., therefore it is not possible that the appellant while sitting in the compound wall, committed the offence. Further he would submit that the school was covered by compound wall and also there is a gate, it was not possible for a 10 years old girl who is only about 3 ½ ft., jumped over the compound wall and went inside the school for playing. For which the learned Public Prosecutor (Pondicherry) submitted that Ex.D1 clearly shows that there was a ground near the school. Therefore, girls aged 10 years old commonly jump over the school gate and play. Normally in the villages,



children climb over either gate or wall and jump into the school and play in the school ground which occurs and it is common. Therefore the contention raised by the learned counsel for the appellant about the place and time of occurrence is doubtful, are not acceptable.

19. The evidence of P.W.2/victim girl and statement recorded under section 164 Cr.P.C., marked as Ex.P.13 are clearly proved the case of the prosecution beyond all reasonable doubt. Since there is no aggravated penetrative sexual assault, this court finds that the prosecution has proved its case beyond all reasonable doubt and the offence of commission of sexual assault on the victim by the appellant, as contemplated under Section 7 of the POCSO Act, which is punishable under Section 8 of the said Act. Therefore the appellant was rightly convicted for the offence punishable under section 8 of the POCSO Act. The trial Court rightly appreciated the evidence which is cogent and there is no reason to disbelieve the said evidence. This Court also finds that there is no specific reason to discard the evidence of victim girl. This Court does not find that this is a put up case against the appellant. Under these circumstances this Court does not find any merit in the appeal and the criminal appeal is accordingly dismissed. If the appellant/accused is not undergoing imprisonment, the trial court is directed to take appropriate steps to secure the presence of the appellant to undergo the remaining period of sentence.

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

21. It is pertinent to mention here that once the offence under section 7 of POCSO Act is proved, if the victim is below 12 years, automatically the offence committed by the accused also falls under section 9 (m) of the POCSO Act, which is aggravated sexual assault which is punishable under section 10 of POCSO Act. Minimum punishment is prescribed as not less than 5 years. The trial Court failed to consider the same. However, neither the State nor victim has filed any appeal. By remanding back the case to trial Court, this Court does not want to drag the victim once again to trial Court. This Court observed in many cases under POCSO Act that the Special Judges are not dealing with the case with utmost care and sensitively. They do not understand the object and scope of the POCSO Act. The Registrar General and Director of State Judicial Academy, Tamil Nadu, are directed to take effective steps to impart training programme to the Judges who are all posted in Special Court



which deal with cases under POCSO Act, after getting necessary approval from my My Lord, the Hon'ble the Chief Justice as Patron-in-Chief and Board of Governors of the State Judicial Academy.

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Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Special Judge, Karaikal.
2. The Inspector of Police,
Nedungadu Police Station,
Karaikal.
3. The Public Prosecutor,
High Court of Madras.
4. The Section Officer,
Criminal Section,
High Court, Madras.

Copy to

5. The Registrar General,
High Court, Madras.
6. The Director, State Judicial Academy,
Greenways Road, Chennai.
7. The Chairman Honourable POSCO committee,
High Court of Madras-600 104.
8. The Secretary,
Legal Aid Services Authority,
Chennai.

+1cc to Mr.R.Sunil Kumar, Advocate, S.R.No.14918

Cr1.A.No.465 of 2019

SR-II(CO)
HS(19/07/2021)