

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.02.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.337 of 2019

Devaraj ... Appellant/ Accused

Vs.

State Rep. by
Inspector of Police,
A.W.P.S.Gingee, ... Respondent/Complainant

(Crime No.11 of 2014)

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the conviction passed by the learned Sessions Judge, Fast Track Mahila Court, Villupuram in Spl.S.C.No.23 of 2015, dated 21.03.2017 and acquit the appellant/accused.

For Appellant : Mr.D.Lakshmi Kalyani

For Respondent : Mr.R.Suryaprakash
Government Advocate

J U D G M E N T

This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 21.03.2017 made in Spl.S.C.No.23 of 2015, on the file of the learned Sessions Judge, Fast Track Mahila Court, Villupuram.

2. The respondent-Police registered a case against the appellant in Crime No.11 of 2014, for the offence punishable under Section 6 of Protection of Children from Sexual Offences Act, 2012 (For brevity "the POCSO Act). After the investigation, laid a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Villupuram. On appearance of the appellant, the provisions of Section 207

of Cr.P.C., were complied with and the trial Court framed charge for the offence punishable under Section 6 of POCSO Act, against the appellant and conducted the trial.

3. After considering the evidence on record and hearing on either side, the learned Judge, by Judgment dated 21.03.2017, convicted the appellant for the offence punishable under Section 6 of POCSO Act and sentenced him to undergo ten years Rigorous Imprisonment and to pay a fine of Rs.1,000/-, in default to undergo one year Simple Imprisonment.

4. Challenging the said Judgment of conviction and sentence, the accused/appellant has preferred the present Appeal.

5. The learned counsel for the appellant would submit that there is a delay in registering the case and also sending the FIR into the Court. Though P.W.1-eyewitness, who is the mother of the victim child, is alleged to have seen the occurrence on 05.08.2014, she made a complaint only on 06.08.2014. Even after the complaint, the FIR was sent to the Court with a delay and there was no proper explanation for the said delay. Further, there are material contradictions between the prosecution witnesses and admittedly, the victim child was not examined in this case and as such non-examination of the victim child is a fatal to the case of the prosecution.

6. The learned counsel would further submit that though statement under Section 164 of Cr.P.C. was recorded and the same was not marked in this case, since there was a discrepancy in the complaint filed by the mother of the victim child and in order to suppress the fact, the statement recorded under Section 164 of Cr.P.C. was not marked, which is also a fatal to the case of the prosecution. The doctor, who examined the victim child was examined as P.W.6, and the medical evidence shows that there was a bleeding from the vaginal part of the victim child after a lapse of 7 days, the alleged offence took place on 05.08.2014, however, the child was produced before the Doctor only on 11.08.2014 by the Police for medical examination and there is no deep injuries in the private part of the victim child as per the doctor evidence and therefore, the medical evidence is not believable. It is further contended that when the mother of the victim child found that there were injuries in the private part of the victim child, and if it is true, the victim child should

have been produced before the Medical Officer, immediately soon after the occurrence, and however, in the case on hand, the victim child was produced before the Medical Officer, only after 7 days. It is further submitted that there was a motive to foist a false case against the appellant due to civil dispute. Therefore, the prosecution has not proved its case beyond reasonable doubt and therefore, the Judgment of conviction and sentence passed by the learned Sessions Judge, Fast Track Mahila Court, Villupuram, is liable to be set aside.

7. The learned Government Advocate for the respondent-Police would submit that the victim child, who is aged about 6 years at the time of occurrence and mother is an eyewitness in this case and the appellant is the known person and he committed the offence and due to non-availability of anyone to help the mother, she filed the complaint on the next day. The statement under Section 164 of Cr.P.C. was also recorded, and however, it was not marked and mere non-marking of the said document, is not a fatal to the case of the prosecution. The doctor's evidence is very clear that the victim child sustained injuries on her private part and therefore, the prosecution has proved its case beyond reasonable doubt. The learned Judge, rightly convicted the appellant and there is no merit in the Appeal and the Appeal is liable to be dismissed.

8. Heard the learned counsel on either side and perused the materials available on record.

9. The case of the prosecution is that when the victim child was returning from school on 05.08.2014, at about 5.10 p.m., the accused Devaraj, who belongs to the same village carried her in his motorcycle, which was noticed by the mother of the victim child. She immediately followed them and saw the motorcycle parked in the occurrence place. When the mother searched her daughter, saw the accused hiding the victim child with his lungi and was lying on her. She heard the murmuring sound of her daughter and went near them. Immediately, the accused raised up and fled away in his motorcycle. When the mother enquired her daughter, she told that the accused Devaraj forcibly took her in his motorcycle to the occurrence place, undressed her and inserted his finger in her private part and laid on her. The mother noticed bleeding from the private part of the child and then lodged Ex.P1 complaint against the accused before the respondent-Police. Based on which, the respondent-Police

registered a case against the appellant for the offence punishable under Sections 6 of POCSO Act. Subsequently, the Investigating Officer, investigated the matter and laid a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Villupuram.

10. On the side of the prosecution, 9 witnesses were examined as P.W.1 to P.W.9 and 18 documents were marked as Exs.P1 to P18 and 7 Material Objects were exhibited as M.O.1 to M.O.7. After completion of the examination of the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant, the same was denied as false and on the side of the defence, no oral and documentary evidence was let in. The learned Sessions Judge, Fast Track Mahila Court, Villupuram, after hearing the arguments on either side and considering all the materials placed on record, found that the appellant is guilty and convicted and sentenced, as referred above, which is challenged in this Criminal Appeal.

11. Since the victim child was only aged about 6 years, at the time of occurrence, she was not examined as a witness. However, the mother of the victim was examined as P.W.1 and in her evidence, she deposed that on 05.08.2014, when she was cow-herding, the accused Devaraj, who belongs to the same village carried the victim child in his motorcycle, and she immediately followed them and saw the motorcycle parked in the occurrence place. When she went near the occurrence place, the accused asked her (P.W.1) why did she come so long and then she (P.W.1) responded that she had come to tie the cow of her brother-in-law and she heard the murmuring sound of her daughter and saw her daughter was very tired and could not walk and coming near to her, by holding her underwear, panty and bag in her hand and when she (P.W.1) asked her daughter, she revealed that the accused Devaraj forcibly took her in his motorcycle to the occurrence place, undressed her and inserted his finger into her private part and laid on her. Immediately, she informed the occurrence to the parents of the accused and who in turn, informed that the accused had gone for his work and thereafter, she took the victim child to the house of the president of the Village and at that time, there was bleeding from the private part of the victim child and it was noticed by the people in the village. Thereafter, she was brought to the Hospital, since it was night, the Hospital Authorities have informed her that if P.W.1 makes a complaint before the Police Station, then only they would

examine the victim child and since it was midnight, she made a complaint on the next day viz., 06.08.2014.

12. Subsequently, after registering F.I.R., the respondent-Police investigated the mater and also produced the victim child before the doctor for medical examination. The doctor, who examined the victim child was examined as P.W.6. In his evidence, the doctor, had clearly stated that the victim child sustained injury in her private part and he had also issued Ex.P6-medical certificate, in the report, it has been stated that there was an injury in the private part of the victim child. Subsequently, the victim child was produced before the learned Judicial Magistrate for recording statement under Section 164 of Cr.P.C. and accordingly, the learned Magistrate has also recorded the statement of the victim child, however the said statement was not marked as a document.

13. According to the learned counsel, the statement recorded under Section 164 of Cr.P.C. was not marked as a document, which is a fatal to the case of the prosecution. While deciding the case, the statement of the victim child, which was recorded under Section 164 of Cr.P.C., is necessary, however, the learned Judge, has not taken any care for marking of the said document. However, no doubt, on appearance of the appellant, the provisions of Section 207 Cr.P.C. were duly complied with and at that time, copies of all the documents were served to the appellant and therefore, no prejudice would be caused to the appellant for non-marking of the said statement, which was recorded under Section 164 of Cr.P.C. Further, statement recorded under Section 164 of Cr.P.C. is not substantive evidence.

14. Since the statement recorded under Section 164 of Cr.P.C. was not marked as a document, this Court has called for the immaterial papers relating to the present case, and on perusal of the same, the statement recorded under Section 164 of Cr.P.C. was very much available in the record, but all the three stakeholders have not taken any care for marking of the said document. A perusal of the statement recorded under Section 164 of Cr.P.C., and the evidence of the mother of the victim child P.W.1, it could be seen that the accused had taken the victim child into secluded place and undressed her and inserted his finger into her private part and laid on her. Therefore, this Court finds that there is no reason to discard or disbelieve the evidence of the mother of the victim child and the statement recorded under

Section 164 of Cr.P.C. and there is no doubt about the trustworthiness of the victim child and under the circumstances, the age of the victim child is only 6 years, and she cannot be tutored by the prosecution for these type of offences.

15. The next contention of the learned counsel for the appellant is with regard to delay in filing complaint and registering the case. However, the delay in filing complaint, mere sending FIR belatedly to the Court may not be a sole ground to believe or discard the evidence of the prosecution witnesses. Mere defect in the investigation also may not be a ground to disallow the case of the victim and the appellant cannot be entitled for acquittal on that ground.

16. The other contention of the learned counsel for the appellant is that the evidence of the doctor, who examined the victim child has given report Ex.P6 and doctor had also stated that there is no deep injuries in the private part, and as such, the evidence of P.W.6 doctor was also not supported the case of the prosecution. P.W.1, the mother of the accused has clearly deposed that she heard the murmuring sound of her daughter and saw her daughter was very tired and could not walk and coming near to her, by holding her inner-wear, panty and bag in her hand and when she (P.W.1) asked her daughter, she revealed that that the accused Devaraj forcibly took her in his motorcycle to the occurrence place, undressed her and inserted his finger into her private part and laid on her, and as such, the prosecution has proved that the appellant has committed an offence punishable under Section 6 of POCSO Act. Depth of penetration is immaterial, mere touching of private part with male organ would be sufficient so as to constitute the offence.

17. At this juncture, it would be useful to refer the Sections 3 (b) and 5 (m) of the POCSO Act:-

"Section 3. Penetrative sexual assault:-

(b) If he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

5. Aggravated Penetrative Sexual Assault:-

(m) whoever commits penetrative sexual assault on a child below twelve years;"

A reading of the evidence of the mother of the victim child P.W.1 and the evidence of the doctor-P.W.6 and report Ex.P6, and Section 3 (b) and 5 (m) of the POCSO Act, it is very clear that the appellant has committed the offence punishable under Section 6 of POCSO Act. It is to be noted that the evidence of interested witnesses, if found to have credit worthiness, conviction could be based on an uncorroborated testimony. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible. In cases of this nature presence of eyewitnesses are mostly improbable.

18. The last contention of the learned counsel for the appellant is that there was a motive to foist a false case against the appellant. In this case, there is no reason to disbelieve or discard the evidence of the mother of the victim child. Further, there was no necessity to foist such a serious offence against the appellant by spoiling the future of the victim child. It is pertinent to mention here that parent of the victim child need not go to that extent by spoiling the future of the victim child. Therefore, the above contention of the learned counsel for the appellant is rejected. Further, there was no reason to discard the evidence of the mother of the victim child. Normally, corroboration of witness is necessary, whereas, offence under POCSO Act, the evidence of the victim girls are sufficient. In this case, since the age of the victim child was only 6 years, therefore, she was not examined as a witness and the Court cannot expect the eyewitness, since it is not the case of the prosecution that the occurrence had taken place in the presence of some other eye witness. However, admittedly, in the case on hand, the mother is an eyewitness and in her evidence, she had clearly deposed that she had seen the victim child with the appellant, when she (P.W.1) asked her daughter, she (victim child) revealed that the accused Devaraj forcibly took her in his motorcycle to the occurrence place, undressed her and inserted his finger into her private part and laid on her. Medical evidence also corroborates the same. Further, the defense has not established that for what reason, they foisted a false case against the appellant. Though the appellant had taken the defense of motive behind the complaint, but however, it has not been established in the manner known to law.

19. Further, under Section 29 of POCSO Act, there is a presumption against the accused, even though it is rebuttable presumption, but the accused has not rebutted the presumption in the manner known to law.

20. Therefore, under the circumstances, this Court also finds that the prosecution has proved its case beyond the reasonable doubt and there is no reason to interfere with the judgement of the learned Sessions Judge, Fast Track Mahila Court, Villupuram. Therefore, this Court does not find any merit in the Appeal and the Appeal is liable to be dismissed. Accordingly, the Criminal Appeal is dismissed.

(i) It is pertinent to make a comment regarding the investigation/trial done in this case. The occurrence has taken place on 05.08.2014, no doubt, the complaint was given only on the next day, viz., 06.08.2014, whereas, the victim child was produced before P.W.6-Doctor, for medical examination only on 11.08.2014, with a delay of 6 days from the date of filing the complaint. Even though the mother of the victim child, in Ex.P1 complaint, dated 06.08.2014 has stated that there was an injury on the private part of the victim child, aged, about 6 years, the Investigating Officer has acted lethargically and has not produced the victim child before the Medical Officer for medical examination immediately, soon after filing the complaint. Further, though the Investigating Officer had produced the victim child before the learned Magistrate for recording statement under Section 164 of Cr.P.C. the same was not marked as document and the Investigating Officer has not properly done the investigation and therefore, failed to comply with the mandatory provisions of POCSO Act viz., Section 24 to 27 of POCSO Act, and also not properly gave instructions to the learned Public Prosecutor.

(ii) The learned Magistrate, who recorded the statement of the victim child, was examined as P.W.8. Though the Investigating Officer has taken steps to record the statement of the victim child, the learned Public Prosecutor has not taken any steps to mark the statement of the victim child, which was recorded by P.W.8, under Section 164 of Cr.P.C. and also not examining the victim child

as a witness.

(iii) Even, the learned Judge, who dealt with the case, has not actively participated in the trial. If she would have actively participated in the trial, definitely, she would have raised a question for non marking of statement, which was recorded under Section 164 of Cr.P.C. of the victim child by the learned Magistrate and the learned Judge has acted only as mute spectator, and she has recorded mechanically whatever the learned Public Prosecutor has stated.

(iv) If at all the Investigating Officer actively participated in the trial, she should have guided the learned Public Prosecutor to bring all facts and marked all the documents before the trial Court. Even though, proceedings of the learned Chief Judicial Magistrate, Villupuram, authorizing the learned Judicial Magistrate No.1, to record the statement of the victim child was marked as Ex.P16, and that the learned Judicial Magistrate, who recorded the statement of the victim child was examined as P.W.8, they have failed to mark the statement recorded under Section Section 164 of Cr.P.C. from the victim child. Further, the victim child has not been produced before the Medical Officer for medical examination immediately soon after the receipt of Ex.P1 complaint. Thus, from the above, it could be seen that all the stakeholders, the Investigating Officer, learned Public Prosecutor and the learned trial Judge, who conducted the trial have not actively participated in the case.

(v) This Court has come across several cases and in most of the cases, with regard to POCSO Act, this Court has found lot of discrepancies in the investigation / trial done by the stakeholders. Since the case is relating to POCSO Act, the stakeholders should be vigilant and due diligent while performing their duties.

(vi) It is to be noted that in some cases, the Investigating Officer, not even registering the FIR immediately, even after receipt of complaint; and also sending the FIR with a delay to the Court; and non-sending the victim child immediately to the Doctor for examination and also

there is a delay in sending the victim child for recording statement under Section 164 of Cr.P.C. before the learned Magistrate. Further, the Investigating Officer, is not taking steps to mark the statement which was recorded under Section 164 of Cr.P.C. as a document, and even, the learned Public Prosecutor is also not taking steps to mark the statement as a document and the learned Judge, who deals with the POCSO Cases, are not taking steps to mark the documents. Even, in some of the cases, this Court has directed the Authorities concerned for taking necessary action against the stakeholders, who did not actively participate in the investigation/trial.

(vii) In view of the above, this Court is of the considered view that a necessary training to be provided to all the stakeholders, who are dealing with POCSO Cases. Therefore, the Director General of Police, Dr.Radhakrishnan Salai Road, Mylapore, Chennai, Tamil Nadu 600-004, is directed to sensitize the matter, and the Director General of Police, the Director of Prosecution, and the Director of State Judicial Academy are directed to impart a training programme to those persons who are dealing with POCSO Cases, forthwith.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

Note: The Registry is further directed to return photo copies of Immaterial Records to the concerned Court.

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To

1. The Sessions Judge,
Fast Track Mahila Court,
Villupuram.
- 2.The Director General of Police,
Dr.Radhakrishnan Salai Road, Mylapore,
Chennai, Tamil Nadu 600-004.

3.The The Superintendent,Central prison, cuddalore.

4. The Director of Prosecution,
Puddupettai Street,
Alandur, Chennai.

5.The Inspector of Police,
A.W.P.S.Gingee,

6.The Director,
Tamil Nadu Judicial Academy,
Greenways Road, R.A.Puram,
Chennai.

7. The Public Prosecutor,
Madras High Court, Chennai.

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

Copy to:
The Chairman,
POCSO ACT Committee
High Court, Madras

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A.SK(05.07.2021)



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