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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.NO.483 OF 2020

AND

CRL.M.P.7526 OF 2020

K.Vinodh Kumar

... Appellant/Accused

.Vs.

The State Rep. By
The Inspector of Police,
All Women Police Station,
Avinashi,
(Of Perumanallur Police Station)
Tiruppur District.
Cr.No.534 of 2018

... Respondent/Complainant

PRAYER:-

This Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code, to set aside the conviction and sentence passed against the appellant/accused in Spl.S.C.No.03 of 2019 dated 30.07.2019 on the file of the Learned Magalir Neethimandram (Fast Track Mahila Court), Tiruppur and acquit from all the charges.

For Appellant : Mr.V.Purushothaman

For Respondent : Mr.S.Sugendran
Government Advocate (Crl. Side)

J U D G M E N T

The present criminal appeal has been filed to set aside the conviction and sentence passed against the appellant/accused in Spl.S.C.No.03 of 2019 dated 30.07.2019 on the file of the Learned Magalir Neethimandram (Fast Track Mahila Court), Tiruppur and acquit from all the charges.



2. The respondent-police registered a case in Crime No.534 of 2018 against the appellant for the offence under Sections 5 (m) and 5(l) which are punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act' for short).

3. On completion of investigation, laid a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Tiruppur. Since the offence is against the child.

4. After taking cognizance of the complaint, the learned Sessions Judge taken the charge sheet on file in Spl.S.C.No.3 of 2019. After completing formalities, framed charges against the appellant for the offence under Sections 5(m) and 5(l) which are punishable under Section 6 of POCSO Act.

5. After framing charges, in order to prove the case of the prosecution, during trial, on the side of the prosecution as many as 9 witnesses were examined as PW.1 to PW.9 and 12 documents were marked as Ex.P1 to Ex.P12. No material object was exhibited.

6. After completing examination of prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant by questioning under Section 313 Cr.P.C., with reference to incriminating circumstances appears in the evidence of the prosecution witnesses and he denied the same as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

7. After completion of trial, hearing the arguments advanced on either side and considering the materials, the Trial Court found guilt of the appellant/accused for the offence under Sections 9(m) and 9(l) which are punishable under Section 10 of POCSO Act and the appellant was convicted and sentenced to undergo seven years rigorous imprisonment along with a fine of Rs.10,000/- for each of the offences, in default to undergo further period of one year rigorous imprisonment for each of the above offences. Challenging the said judgment of conviction and sentence, the appellant/accused has filed the present appeal before this Court.

8. (a) Learned counsel for the appellant would submit that there is a previous enmity between the appellant family and the victim family. In order to take vengeance, they lodged a false complaint against the appellant. The respondent-police registered a false case without ascertaining the genuineness of the complaint. Further, he would submit that no independent witness was examined, no eye witness in this case and all the



private witnesses are relatives and interested witnesses. The medical evidence did not corroborate the evidence of the victim. If it is forcible, there would be a chance of sustaining injury, but the medical evidence and reports show that there is no injury. Though the learned Trial Judge found that there was no penetrative sexual assault, wrongly convicted the appellant for the offence of sexual assault. In the statement recorded under Section 164 of Cr.P.C., also, the victim has not stated that the appellant committed penetrative sexual assault.

(b) Further, the learned counsel for the appellant would submit that the age of the appellant is only 19 years at the time of occurrence. As per the Tamil Nadu Borstal Schools Act, 1925, he cannot be detained in the regular prison and also he cannot be convicted more than three years and the case would have been tried under Juvenile Justice (Care and Protection of Children) Act, 2015. Therefore, the learned Trial Judge failed to consider the facts that the appellant is an adolescent at the time of offence and that he cannot be treated as adult offender.

(c). The learned counsel submits that the prosecution has not proved its case beyond reasonable doubt. He would submit that only due to hormonal change in the adolescent stage, without knowing the consequences, he might have committed the said act and there was no intention to do that. Therefore, under these circumstances, the judgment of the Trial Court is liable to be set aside. In case, if the Court is not convinced, considering the age of the appellant and the mitigating circumstances, the sentence awarded to the appellant may be reduced.

9. Learned Government Advocate would submit that the victim is a boy, who was only aged about 10 years, he was studying VI standard at the time of occurrence. Even prior to that, the victim was studying V Standard, the appellant took him and also committed sexual assault on the victim boy. The parents of the victim gave a complaint and subsequently, the respondent-police registered a case and on completion of investigation, they filed the charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Tiruppur. Since it is the offence against the child, who was aged about only 10 years and the victim is below 12 years, the offence committed by the appellant falls under aggravated penetrative sexual assault. Though the Trial Court framed charges under Sections 5(m) and 5(l) of POCSO Act, after trial, found guilt of the accused for the offences under Sections 9(m) and 9(l) which are punishable under Section 10 of POCSO Act. In this case, the victim has clearly stated that the appellant took him to Maize Garden situated behind the victim's house and removed the dress of the victim and he committed a sexual assault. Though there is no injury, it is not necessary



in all cases of sexual assault, the victim would sustain injury. Since because there is no injury on the part of the victim, it cannot be said that the offence has not been committed. Therefore, the Trial Court considered the evidence of the victim, statement recorded by the learned Judicial Magistrate under Section 164 of Cr.P.C., and other relevant evidence and came to the conclusion that though charge framed against the appellant for the offence under Sections 5(1) and 5(m) of POCSO Act, found that the appellant has committed the offence only under Sections 9(1) and 9(m) which are punishable under Sections 10 of POCSO Act and awarded a sentence of seven years rigorous imprisonment. There is no merit in the appeal.

10. Further, POCSO Act is a Special Act. The Juvenile Justice Act is only a procedural law. Therefore, the Special Act will prevail over the procedural law. Therefore, the citations referred to by the learned counsel for the appellant are not applicable to the present case on hand.

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

12. The case of the prosecution is that the minor victim boy who was aged about 10 years at the time of occurrence was residing along with his parents at Moongilpalayam. The victim was studying in VI Standard and his date of birth is 17.03.2008. The appellant/accused is also a resident of Moongilpalayam. As the accused was residing near the victim boy's house, he got acquainted with the victim and he used to often speak with the victim. On 17.11.2018 at about 5 p.m., when the victim was playing in front of his house, the accused called the victim and tactfully spoken to the victim and thereby took the victim by his hand to the Maize field situated behind the victim's house and removed the dress of the victim. The accused also removed his dress, made the victim boy to lie down, hugged the victim and kissed him. Further, the accused penetrated his male organ into the victim anus and thereby, the accused committed penetrative sexual assault over the minor victim boy. In this regard, the parents of the victim made a complaint against the appellant/accused before the respondent/police. The respondent-police, after investigation, laid a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Tiruppur. After completing trial, the Trial Court found guilt of the appellant/accused for the offence under Sections 9(m) and 9(1) which are punishable under Section 10 of POCSO Act and he was convicted and imposed the above sentence. Hence, this appeal.

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

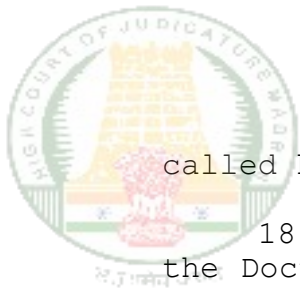


14. In this case, the Trial Court framed charges against the appellant for the offence under Sections 5(m) and 5(1) of POCSO Act. In order to substantiate the charges framed against the appellant, on the side of the prosecution totally 9 witnesses were examined and 12 documents were marked. Out of 9 witnesses, the victim boy was examined as PW.1. Father of the victim, who has given the complaint was examined as PW.2. The Doctor, who had conducted the medical examination of the victim boy was examined as PW.5 and the Doctor, who conducted a potential test on the victim was examined as PW.8. The victim boy has spoken about the occurrence. The father of the victim has spoken about the complaint given before the respondent/police.

15. From the evidence of PW.1/victim boy and also the statement recorded under Section 164 of Cr.P.C., it is seen that the victim has clearly deposed that the appellant is the neighbour and known person and took the victim to the Maize Garden and removed his dress and sexually assaulted. The victim asked the appellant to leave him, but the appellant did not leave him and only when the victim told that he will inform to his parents, the appellant left him. The victim soon after the occurrence, informed to his parents and initially they beat the appellant and subsequently, they have chosen to give a complaint. Therefore, from the evidence of victim, the prosecution has proved its case beyond reasonable doubt.

16. Though there is no eyewitness and independent witnesses, in cases of this nature, one cannot expect independent eye witnesses. The offender who would always waiting for the loneliness of the child, taking advantage of the situation, take the child to the lonely place and they used to commit this type of offence. Therefore, the non-examination of either eyewitness or independent witnesses, will not affect the case of the prosecution. In cases of this nature, the victim is the sole witness who can speak about the occurrence. If the evidence of the sole witness viz., victim is cogent, consistent and trustworthy, it can be safely relied on by the Trial Court to convict the accused.

17. In this case, the evidence of the victim is cogent, consistent and trustworthy and there is no specific reason to discard the evidence of the victim. Further, the appellant has not specifically proved the enmity as projected in his defense by way of cross examination of the prosecution witnesses. The victim boy has clearly stated that the appellant only called him even one year prior to this occurrence and that time, he was studying V Standard and the appellant committed the same but he did not inform the incident to anyone. The very same way, the next year while he was studying VI Standard, the appellant



called him to the Maize Garden and committed the charged offence.

18. Though the victim boy was produced before the Doctor, the Doctor, who examined the victim boy has stated that there is no external injury and there is no symptoms on penetrative sexual assault. However, the victim boy has clearly stated that the appellant removed his dress and rubbed his private part on his back side and therefore, the Trial Court came to the conclusion that though there is no penetrative sexual assault, even a mere sexual assault falls under Section 7 of POCSO Act and since the victim boy is below 12 years it is termed as aggravated sexual assault and in this case, the appellant committed the offence more than once.

19. The Trial Court found that the offence committed by the appellant falls under Sections 9(1) and 9(m) of POCSO Act and so, convicted him for the above said offences, which are punishable under Section 10 of POCSO Act. Therefore, this Court finds that there is no reason to discard the evidence of PW.1/the victim boy and PW.2/the father of the victim boy.

20. It is relevant to note that PW.3, Mahazar witness has spoken about the investigation done by the respondent-police and PW.4 is the witness to the confession statement. In this case, there is no recovery and the confession made before the respondent-police is not admissible in evidence. Though the Doctor has stated that there is no injury either in the private part of the victim or in the private part of the appellant, the victim also has not stated that the appellant forcefully inserted penis to his anus and he sustained pain and sustained injury. Whereas, the victim has only stated that the appellant removed his dress and also removed his dress and made him to touch his penis and also rubbed his penis on his backside. Therefore, even though there is no penetration, the act falls only under the sexual assault. Since the victim boy is below 12 years, the offence committed falls under aggravated sexual assault. Therefore, the Trial Court rightly appreciated the entire evidence and convicted the appellant and this Court does not find any merit in the appeal. The appeal is liable to be dismissed.

21. Since the age of the appellant was only 19 years at the time of occurrence and he is in the adolescent stage, at that time, due to hormonal change and without knowing other consequences, he has committed the above said offence. Therefore, considering the age of the victim and that he has no previous case, there is no antecedents and also considering the mitigating circumstances, the sentence alone has been modified as follows:-



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"The conviction imposed on the appellant/accused for the offence under Sections 9(m) and 9(l) which are punishable under Section 10 of POCSO Act is confirmed. But, the sentence is reduced to the period of sentence already undergone and the fine amount imposed by the learned Trial Court is confirmed."

22. Accordingly, the criminal appeal is dismissed with the above modification. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

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To

1. The Magalir Neethimandram,
(Fast Track Mahila Court),
Tiruppur.
2. The Inspector of Police,
All Women Police Station,
Avinashi,
(Of Perumanallur Police Station)
Tiruppur District.
3. The Superintendent,
Central Prison,
Coimbatore.
4. The Public Prosecutor,
High Court, Madras.

Copy To:-

1. The Hon'ble POCSO Committee,
High Court, Madras.



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

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+2ccs to Mr.V.Purushothaman, Advocate, S.R.No.36847

CRL.A.NO.483 OF 2020 AND
CRL.M.P.7526 OF 2020

PMK (CO)
PBS/24/02/2022