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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.02.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CrI.A.No.326 of 2019 &
CrI.M.P.No.8784 of 2020

Shanmugam

... Appellant

Vs.

State by Inspector of Police,
All Women Police Station,
at Vridhachalam,

... Respondent

(Crime No.261 of 2015)

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set-aside the conviction and sentence passed by Judgment in Spl.S.C.No.64 of 2018, on the file of the learned Sessions Judge, Mahila Court, Cuddalore, by Judgment dated 16.04.2019.

For Appellant : Mr.A.Rajakumar

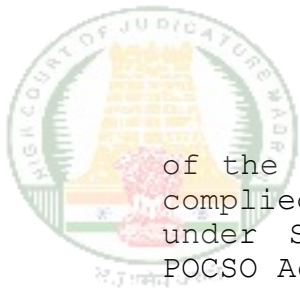
Mr.M.Nallathambi
Legal Aid Counsel

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 16.04.2019 made in Spl.S.C.No.64 of 2018, on the file of the learned Sessions Judge, Mahila Court, Cuddalore.

2. The respondent-Police registered a case against the appellant in Crime No.261 of 2015, for the offences punishable under Sections 366 of IPC and under Section 10 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, Mahila Court, Cuddalore. On appearance



of the appellant, the provisions of Section 207 of Cr.P.C., were complied with and the trial Court framed charges for the offence under Section 366 of IPC and punishable under Section 10 of POCSO Act, against the appellant and conducted the trial.

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3. After considering the evidence on record and hearing on either side, the learned Judge, by Judgment dated 16.04.2019, convicted the appellant for the offence under Section 366 of IPC and sentenced him to undergo Rigorous Imprisonment for a period of ten years and to pay a sum of Rs.5,000/- in default to undergo Simple Imprisonment for two years; and convicted and sentenced to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs.10,000/- in default, to undergo Simple Imprisonment for one year for the offence under Section 10 of POCSO Act.

4. Challenging the said Judgment and Conviction, the accused /appellant has preferred the present Appeal.

5. Since the learned counsel for the appellant was not present on 02.02.2021, this Court directed the Registry to appoint a Legal-Aid Counsel and however, today, the learned counsel for the appellant as well as Legal-Aid Counsel appeared and argued the matter.

6. The learned counsel as well as Legal Aid Counsel for the appellant would submit that the victim girl has stated that the occurrence said to have taken place on 18.12.2015, at 6.30 p.m., however the complaint was given only on 21.12.2015, whereas, P.W.9 Investigating Officer, in her evidence stated that the accused was arrested in the morning itself viz., 21.12.2015, which creates a doubt. No identification parade was conducted and there are material contractions in the complaint and the statement recorded under Section 164 of Cr.P.C, and even in the statement recorded under Section 164 of Cr.P.C., the victim girl has not stated that there was penetrative sexual assault and subsequently, during evidence, she deposed that about penetrative sexual assault by improvisation. There are material contractions in the eyewitness of the prosecution witnesses, and the bike has not been recovered in this case, and also the statement recorder under Section 164 of Cr.P.C. was also not marked as a document. Since the case against the appellant has no merit, the prosecution has wrongly fixed the appellant, as accused. The prosecution has failed to establish his case that the appellant had committed the offence, which warrants interference.

7. The learned Government Advocate would submit that the victim girl has clearly narrated the facts during her evidence. Though the Sub Inspector of Police has wrongly mentioned the



time instead of evening, as morning, the appellant was caught hold by the witnesses, P.W.3 and P.W.4, and when they heard the voice of the victim girl, came into the spot and enquired the victim girl and when she revealed the occurrence, and they had beaten the accused and thereafter, informed the father of the victim girl, who filed Ex.P1-complaint. Therefore, since the appellant was caught-hold by the witnesses, there was no need to conduct identification parade and there is no dispute of identity and therefore, the prosecution has proved its case beyond reasonable doubt. Further, the defect in investigation is not a fatal to the case of the prosecution. The appellant cannot claim innocence on the ground of the defect in investigation. The learned Sessions Judge had rightly appreciated the entire evidence of the prosecution witnesses, convicted the appellant. Therefore, there is no perversity in the Judgment 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 on 18.12.2015, at about 06.30 p.m., while the victim girl was waiting for bus at Vilankattur Bus Stop and since the bus did not come in time, the victim girl requested for lift from the appellant, and however, the accused diverted the route and took her into secluded place and asked the victim girl to remove her dresses and when she refused to do, the accused beaten her and removed her dresses and tried to rape her. When she shouted, the witnesses P.W.3 and P.W.4 came into the spot and rescued her and beaten the accused and informed the occurrence to the father of the victim girl, and who later filed Ex.P1-complaint. Based on which, the respondent-Police registered a case against the appellant. Subsequently, the Investigating Officer, investigated the matter and laid a charge sheet before the learned Sessions Judge, Mahila Court, Cuddalore.

10. On the side of the prosecution, 9 witnesses were examined as P.W.1 to P.W.9 and 9 documents were marked as Exs.P1 to P9. 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, Mahila Court, Cuddalore, 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.

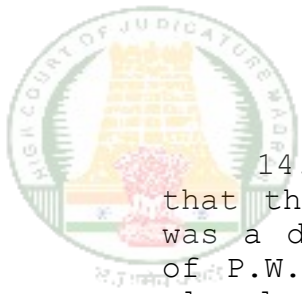
11. Since this Court is an Appellate Court and also final



Court of fact finding, has to re-appreciate the entire evidence and come to the independent conclusion. In this case, the victim girl was examined as P.W.2 and she has clearly deposed that when she was waiting for bus in the bus stop, the appellant was passing through the bus stop and she requested for lift and however, the appellant diverted the route and took her into secluded place and asked her to remove the dresses and when she refused to do so, she was beaten by the accused and removed her dresses and misbehaved with her. After returning from the place of occurrence, P.W.3, who is none other than the uncle of the victim girl and P.W.4, noticed the victim girl along with the accused and when they enquired, she revealed the fact that the accused took her to secluded place and tried to misbehave with her and thereafter, they beaten the accused and informed to the father of the victim girl through phone, and thereafter, he made Ex.P1-complaint before the respondent-Police.

12. The victim was produced before the learned Magistrate for recording statement under Section 164 of Cr.P.C. Even though the statement was not marked, in the immaterial records, the statement recorded under Section 164 of Cr.P.C was available, and however, no doubt, on appearance of the appellant, the provisions of Section 207 Cr.P.C. were complied with and at that time, all the copies of the documents were served to the appellant. A reading of the Ex.P1-complaint made by the father of the victim girl and also statement recorded under Section 164 of Cr.P.C. they have not stated anything about about penetrative sexual assault, and it was stated that though the accused tried to attempt penetrative sexual assault, P.W.3-uncle came and rescued her. The doctor, who examined the victim girl was examined as P.W.7 deposed that there was no marks of violence and the hymen was intact and issued Ex.P5 report stating that the victim girl is a virgin and no evidence of any recent sexual abuse. The statement recorded by the learned Magistrate under Section 164 of Cr.P.C., clearly shows that the victim girl was not subjected to penetrative sexual assault, and therefore, the learned Sessions Judge, convicted appellant for the offence punishable under Section 10 of POCSO Act.

13. Even though the statement recorded under Section 164 of Cr.P.C. is not substantive evidence and it can be used for corroboration, so far as corroboration is concerned, the appellant took the victim girl and tried to misbehave with the victim girl and the intention of sexual assault is proved. Since the appellant was caught hold by P.W.3 and P.W.4-eyewitnesses, and who informed the occurrence to the father of the victim girl over phone and thereafter, he made a Ex.P1-complaint, and subsequently, the accused was arrested and as such, conducting of identification parade does not arise in this case.



14. Though the learned counsel for the appellant submit that the prosecution has wrongly fixed the appellant and there was a delay in filing the complaint, a reading of the evidence of P.W.2-victim girl and P.W.3 and P.W.4-eyewitness, they have clearly stated that the appellant was caught hold by P.W.3 and P.W.4-eyewitnesses and they had also beaten him and subsequently informed to the father of the victim girl through phone and thereafter, the father of the victim girl filed Ex.P1-complaint. However, the delay in filing FIR, may not be a sole ground to disallow or discard the evidence of the prosecution witnesses. Mere wrong done by the prosecution or defect in the investigation, also may not be a ground and the appellant cannot be entitled for acquittal on that ground.

15. Therefore, this Court does not find any reason to discard the evidence of P.W.2, victim girl and evidence of P.W.2 was corroborated by P.W.3 and P.W.4.-eyewitnesss. A perusal of statement recorded under Section 164 of Cr.P.C., it could be seen that the the accused kidnapped the victim girl and tried to misbehave with sexual intention. When the victim girl raised alarm P.W.3 and P.W.4 arrived the spot and rescued the victim girl and otherwise, the appellant could have achieved his intention. Therefore, under the circumstances, as a fact finding Court, this Court re-appreciated the entire evidence and come to the conclusion that the accused has committed the offence punishable under Section 10 of POCSO Act.

16. A reading of the entire materials and the evidence of the prosecution witnesses, it could be seen that the appellant had forcibly took the victim girl into secluded place and seduced to illicit intercourse. Therefore, under the circumstances, this Court finds that the appellant has committed the offence which is punishable under Section 366 of IPC, and therefore, this Court does not find any perversity in the judgment of conviction for the said offence.

17. 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, Mahila Court, Cuddalore.

18. However, the learned Sessions Judge imposed maximum punishment prescribed by Section 10 of the POCSO Act and for the offence under Section 366 of IPC. In the considered view of this Court, the facts and circumstances of the case, if the substantive sentence is reduced to 5 years Rigorous Imprisonment from 7 Years Rigorous Imprisonment for the offence punishable under Section 10 of the POCSO Act and the substantive sentence is reduced to 7 years Rigorous Imprisonment from 10 years Rigorous Imprisonment for the offence under Section 366 of



IPC, will suffice to meet the ends of justice. In respect of punishment in the form of fine, and the default clause, this Court finds no reason to interfere with. The substantive sentence of Rigorous Imprisonment is reduced to 5 years Rigorous Imprisonment for the offence under Section 10 of POCSO Act and the substantive sentence of Rigorous Imprisonment is reduced to 7 years Rigorous Imprisonment for the offence under Section 366 of IPC.

19. With the above modification, this Criminal Appeal is dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge, Mahila Court,
Cuddalore.
2. All Women Police Station,
at Vridhachalam,
3. The Public Prosecutor,
Madras High Court, Chennai.
4. The Superintendent,
Central Prison, Cuddalore.
5. The Secretary
Legal Services Authority
Chennai-104
6. The Chairman,
Hon'ble POCSO Committee
High Court, Madras-104.

+1cc to M/S.A. Rajakumar, Advocate, S.R.No.11366
+1cc to M/S.M. Nallathambi, Advocate, S.R.No.11326

Crl.A.No.326 of 2019 &
Crl.M.P.No.8784 of 2020

BD(CO)
PM(20/07/2021)