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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.02.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CrI.A.No.368 of 2019 &
CrI.M.P.No.8077 of 2019

C.Vijay

... Appellant

Vs.

The State,
Rep. by the Inspector of Police,
W-3, All Women Police Station
Chinthadhripet,
Chennai - 600 002.

... Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. against the Judgment passed in S.C.No.33 of 2018, by the Special Court for cases under POCSO Act, 2012 / Mahila Court, Chennai, dated 06.05.2019.

For Appellant : Mr.M.Palanivel

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 06.05.2019 made in S.C.No.33 of 2018, by the learned Judge, Special Court for cases under POCSO Act, 2012 / Mahila Court, Chennai.

2. The respondent-Police has registered a case against the appellant for the offence under Sections 6 and 12 of Protection of Children from Sexual Offences Act, 2012 (for brevity "the POCSO Act"). After completing the investigation, laid a charge sheet before the learned Judge, Special Court for cases under POCSO Act, 2012 / Mahila Court, Chennai. 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 Sections 6 and 12 of of POCSO Act, against the appellant. When questioned, the appellant pleaded "not guilty".

3. In order to prove the case of the prosecution, 13 witnesses were examined as P.W.1 to P.W.13 and 16 documents were marked as Exs.P1 to P16 and 5 materials objects were produced.



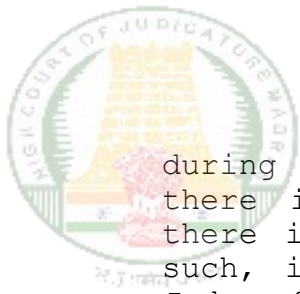
On the side of the defense, the accused was examined as D.W.1.

4. After considering the evidence on record and hearing on either side, the learned Judge, by Judgment dated 26.07.2019, convicted the appellant and sentenced him to undergo Simple Imprisonment of 5 years and imposed a fine of Rs.5,000/- for each count, in default, to undergo further period of six months Simple Imprisonment for the offense punishable under Section 10 of POCSO Act (3 counts); and sentenced him to undergo Simple Imprisonment of 2 years and imposed a fine of Rs.2,000/- for each count, in default, to undergo further period of Simple Imprisonment of three months for the offence punishable under Section 12 of POCSO Act (3 counts).

5. Challenging the above conviction and sentence, the appellant is before this Court.

6. The learned counsel for the appellant would submit that Ex.P1 complaint was preferred by the P.W.1, father of one of the victim girls, viz., P.W.4 and he is not an eyewitness and only hearsay evidence. It is further submitted that P.W.1 had built a house by encumbering 1 1/2 feet space left by the accused for lane and due to that, quarrel arose between himself and P.W.1, and in order to take vengeance, P.W.1 set up these children and foisted a false case against the appellant.

7. It is further submitted that the Investigating Officer has not properly investigated the matter, even the prosecution has not able to locate the place of occurrence and there are material contradictions in the prosecution witnesses regarding the place of occurrence. In the statements recorded under Section 164 of Cr.P.C., P.W.4 and P.W.5 (Victim children) have stated that the occurrence took place at terrace, but during their chief examination and cross-examination, they have deposed that the place of occurrence is inside the house of the accused. During 164 statement P.W.6, other victim girl has stated that the place of occurrence is terrace, but during cross examination, she has stated that the crime did not occur in terrace and it had occurred inside the house of the accused. P.W.7 and P.W.8 are only hearsay evidence and they are no eyewitness in this case and even in their evidence, there are material contradictions with regard to place of occurrence. During chief examination, P.W.7 deposed that the occurrence took place at the third floor of the house and during first cross examination on 16.07.2018, P.W.7 has stated that the occurrence took place at terrace, but during cross-examination on 28.11.2018, P.W.7 admitted that there is no terrace in the place of occurrence. Likewise, P.W.8 during chief examination and cross examination, recorded on 16.07.2018, she has stated that the occurrence took place inside the house of the accused, but



during cross examination, on 28.11.2018, she has stated that there is no terrace in the place of occurrence. Admittedly, there is no open terrace in the alleged occurrence place. As such, it is contended by the learned counsel that the learned Judge failed to note that there are a lot of contradictions between the witness regarding the place of occurrence and there is clear evidence to prove that the place of occurrence referred to as terrace in the police report is false, and hence, the place of occurrence is fallacious and cuts at the root of the prosecution.

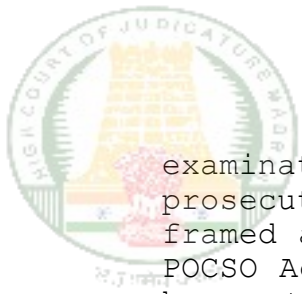
8. The learned counsel would further contend that P.W.12, doctor, who examined the victim girls had stated that there was no external injury in the private part of the victim girls and therefore, medical evidence was also not supported the case of the prosecution. As such, the prosecution has not proved its case beyond reasonable doubt.

9. It is further contended by the learned counsel that P.W.1 during cross examination has admitted that 1 1/2 feet space left by the accused for lane was encumbered by P.W.1 and his family and due to that quarrel arose between the accused and P.W.1, and in order to take vengeance, they had foisted a false case against the appellant, and therefore, benefit of doubt should have been extended to the appellant.

10. The learned counsel would further contend that though the charge was framed against the accused punishable under Sections 6 and 12 of POCSO Act, and the same was not established by the prosecution, however, the learned Judge, convicted the accused under Sections 10 and 12 of the Act. Therefore, the Judgment of the learned Judge, Special Court for cases under POCSO Act, 2012 / Mahila Court, Chennai, is liable to be set-aside. In support of his contentions, the learned counsel has relied upon the following judgments reported in:-

- (i) (2007) 12 SCC 122
- (ii) 1982 Law Weekly (Cr1) 92
- (iii) 1966 CRI L.J. 627
- (iv) AIR 1975 SC 1727
- (v) AIR 1977 SC 2274
- (vi) 2016 (4) MLJ (CRI) 611

11. The learned Government Advocate would submit that during 164 statement, the victim clearly stated that when they were playing, the accused asked them to come to his house and play the game conveniently and when they refused to go there, the accused forcibly took them to his house, and made them to lie on the bed and removed their panties and pinched on their private parts and he also removed his panties and asked them to see his private parts to the children. Subsequently, during the

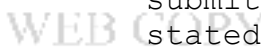


examination of the witnesses and during the trial, the prosecution has established the case. Though the charge was framed against the accused punishable under Sections 6 and 12 of POCSO Act, the learned Judge, had observed, that the penetration has not been proved, however, from the evidence, it is stated that the appellant had removed the panties of the children would prove that the accused had touched the victim children inappropriately with sexual intention and, convicted the accused under Sections 10 and 12 of the Act. The prosecution has established the case beyond the reasonable doubt and there is no merit in the Appeal and therefore, the Appeal is liable to be dismissed.

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

13. The case of the prosecution is that on 08.10.2016, at about 7 p.m, when the victim girls (P.Ws' 4 to 6) were playing Doctor game, in a parked auto, the accused took them to the terrace, switched off the light there and removed their panties and kept his hand on their private parts and inserted his fingers into their private parts and he also removed his panties and showed his private parts to the children and thereby committed sexual assault on them. When all the victim children were talking between themselves, P.W.3- the mother of the yet another victim child (P.W.6), and told about the occurrence, and who in turn, (P.W.3), conveyed the same to P.W.2, who is the mother of P.W.4. Then, she (P.W.4) enquired her daughter about the occurrence and after knowing the details, the parents of the three children, gave the complaint. Based on which, the respondent-Police registered a case against the appellant for the offence punishable under Sections 6 and 12 of POCSO Act. Subsequently, the Investigating Officer, investigated the matter and laid a charge sheet before the learned Judge, Special Court for cases under POCSO Act, 2012 / Mahila Court, Chennai and on completion of trial, the learned Judge, convicted the accused for the offences punishable under Sections 10 and 12 of the Act.

14. According to the learned counsel for the appellant, charges levelled against the appellant were not proved, however, the learned Judge, convicted the accused. Though the victim children 1 to 3 have stated uniformly that the accused had taken them upto his house, removed their panties and removed his panties and asked them to see his private parts, they have not stated uniformly that the accused had kept his hands on their private parts and did any act of penetration as defined under Section 3 of POCSO Act. Since the charge framed against the appellant for the offence punishable under Section 6 of the POCSO Act was not proved by the prosecution, as there was no penetration, however, the learned Judge, rightly convicted the



15. Though the learned counsel for the appellant would submit that P.W.12.doctor, who examined the victim girls have stated that there was no external injuries found on them and no spermatozoa found, a reading of the evidence of the victim girls, it is proved that the accused had taken the victim girls into his house, removed their panties and pinched their private parts and removed his panties and asked them to see his private parts. Admittedly, in the case on hand, from the evidence of the victim girls, it could be seen that no penetration had taken place, however, in their evidence, the intention of the accused for attempting to penetrate into the vagina of the minor victim girls are proved. Depth of penetration is immaterial, mere touching of private part would be sufficient so as to constitute the offence. As per Section 10 of POCSO Act, 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. In the case on hand, a perusal of evidence of the victim girls, it could be seen that when the victim girls refused to go with him, the appellant forcibly took them into his house and when they shouted, he closed their mouth. Though the penetration has not been proved, the victim girls have uniformly stated that the accused had taken them into his house, removed their panties and removed his panties and asked them to see him, and therefore, the learned Judge rightly held that the act of the accused would not constitute the offence punishable under Section 6 of POCSO Act, but his act of removing the panties of the victim children of below 12 years old, as it was proved so by the prosecution would confirm that the offence of aggravated sexual assault (3 counts) which is punishable under Section 10 of POCSO Act, 2012 has been committed by the accused.

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removal of his panties and asked them to see him, distribution of chocolates to the victim girls, are cogent. Any how, the said contractions will not go to the route of the case of the prosecution and the appellant cannot be given the benefit of doubt, as admittedly, other evidences of the victim girls with regard to sexual harassment is clearly proved.

17. Yet another limb of argument of the learned counsel for the appellant is that due to dispute between P.W.1 and the accused with regard to encumbrance of 1 1/2 feet space by P.W.1 and his family members, which was left by the accused for lane and in order to take vengeance, they foisted a false case against the appellant. Admittedly, in the matter on hand, there are three victim girls. P.W.1 is the father of P.W.4. P.W.5 and P.W.6 are other victim girls and there was no dispute over them and they have also stated during statement recorded under Section 164 of Cr.P.C. and also deposed during the evidence given before the trial Court, regarding the sexual assault of the appellant. Therefore, the argument of the learned counsel for the appellant that P.W.1 in order to take vengeance, foisted a false case against the appellant is not acceptable, because, other victim girls and their parents have also stated the act of the appellant in their depositions. Further, it is pertinent to mention here that parents of the victim girls need not say all these things and also the parents will not spoil the life of the victim girls. Therefore, the above contention of the learned counsel for the appellant is rejected. Further, there was no reason to discard the evidence of victim girls. Normally, in criminal cases corroboration of witness is necessary, whereas, offence under POCSO Act, the evidence of the victim girls are sufficient and the Court need not expect the eyewitness, since it is not the case of the prosecution that the offense had taken place in the public place or in the presence of some other eye witness. Further, the defense has not established that for that 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 proved in the manner known to law.

18. The learned counsel for the appellant has cited catena of decisions. There is no quarrel over the principles laid down therein, but in the considered view of this case, the discussions referred supra, the decisions relied on by the learned counsel for the appellant, have no application to the facts of this case, as they are distinguishable on facts, as admittedly, in the case on hand, there are three victim girls and they have clearly deposed the act of the accused regarding sexual assault. 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.



19. 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 conviction and sentence passed by the learned Judge, Special Court for cases under POCSO Act, 2012 / Mahila Court, Chennai. Therefore, this Court does not find any merit in the Appeal and the Appeal is liable to be dismissed, accordingly, it is dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(L.A)

//True Copy//

Sub Assistant Registrar

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To

1. The Special Court for cases under POCSO Act, 2012
Mahila Court, Chennai.
2. The Superintendent of Central Prison,
Puzhal, Chennai.
3. The Inspector of Police,
W-3, All Women Police Station
Chinthadhripet,
Chennai - 600 002.
4. The Public Prosecutor,
Madras High Court, Chennai.

CrI.A.No.368 of 2019 &
CrI.M.P.No.8077 of 2019

RSV(CO)
B.VC(26.07.2021)