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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.09.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.446 of 2020

Sivaji @ Nazeer

... Appellant

Versus

State Rep.by the Inspector of Police,
All Women Police Station,
Thiruppathur,
Vellore District.
(Crime No.17 of 2014)

... Respondent

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to call for the entire records and set aside the Judgment dated 06.10.2020, in connection with Spl.S.C.No.18 of 2014 on the file of the learned Special Court (Under Protection of Children from Sexual Offences Act, 2012), Vellore, Vellore District.

For Appellant : Mr.E.Kannadasan

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

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 06.10.2020, by the learned Special Court (Under Protection of Children from Sexual Offence Act 2012), Vellore, Vellore District.

2.The case of the prosecution is that after the demise of the victim girl's father, her mother married another man. Therefore, she lived with her aunt (P.W.2) in Thirupathur. P.W.2 is the wife of the appellant herein and also aunt of the victim girl. On 21.06.2014 at about 07.00 p.m., P.W.2 went to Coimbatore and the victim girl was alone in the house. At that time, the appellant had sexually harassed the victim girl in the absence of her aunt and caused penetrative sexual assault with her under compulsion. The appellant also threatened the



victim girl not disclose this to anyone. Further, on 18.07.2014 at about 09.00 p.m., when P.W.2 went for shopping on the eve of Ramzan festival, the appellant taken advantage of the aloofness of the victim and committed penetrative sexual assault on her. He also threatened her not to reveal the same to his wife (P.W.2) and if she disclosed it, would spoil the life of the aunt (P.W.2).

3. According to the prosecution, on 14.08.2014, P.W.2 saw the victim with abnormal behaviour and was looking very tired. She did not speak to any one and remained mum. When P.W.2 enquired the victim, she revealed that the appellant had sexually harassed her. Immediately, at the instance of P.W.2, a complaint was given by P.W.1, before the respondent police. Based on the complaint, the respondent/police registered a case in Crime No.17 of 2014, for the offence under Section 4,6,10 of POCSO Act, 2012 and Section 506(i) of IPC., against the accused and also arrested the appellant. After completing the Investigation, the respondent/police laid a charge sheet before the Fast Track Mahila Court, Vellore against the appellant for the offence under Section 354(B), 376 (2)(f)(m) and 506(i) of IPC., and under Section 5(n)(l) which are punishable under Section 6 of POCSO Act. Since the offence is against the child, after completing the formalities, taken the case on file in Spl.S.C.No.18 of 2014 and framed the charges for the offence under Section 354(B), 506(i) (2counts) and under Section 5(n) and under Section 5(l) of POCSO Act against the appellant.

4. Before the trial court, In order to substantiate the charges, on the side of the prosecution as many as eight witnesses were examined as P.W.1 to P.W.8 and also marked Exs.P1 to P11 and one material object was marked as M.O.1. After completion of the examination of the prosecution side witnesses, when the incriminating circumstances were culled out and put against the appellant/accused under Section 313 of Cr.P.C., he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, five witnesses were examined as D.W.1 to D.W.5 and one exhibit was marked as Ex.D1.

5.The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found the accused/appellant is guilty of the charges and he was convicted for the following offences as follows:-

(i) For offence under Section 5 (n) and 5(l) punishable under Section 6 of the POCSO Act, sentence to undergo of ten years imprisonment with fine of Rs.5,000/- failing which to to undergo three months rigorous imprisonment.



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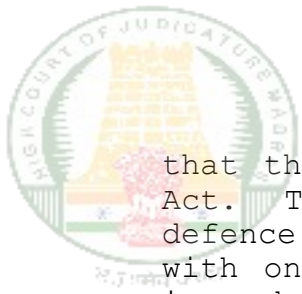
(ii) For offence under Section 354 (B) of IPC, and sentenced to undergo three years rigorous imprisonment, with fine of Rs.1,000/- in default to undergo one month simple imprisonment.

(iii) For offence punishable under Section 506 (ii) of IPC (2 counts) and sentenced to undergo one year rigorous imprisonment for each count.

(iv) However, it was ordered that all the sentences shall run concurrently.

Challenging the said Judgment of conviction and sentence the accused has filed the present appeal before this court.

6. The learned counsel for the appellant would submit that a false case has been foisted against the appellant. There is a delay in filing the complaint and there is no explanation for the said delay. Further he would submit that appellant is the second husband of the P.W.2, who is none other than the aunt of the victim girl. Appellant used to go to the house of first wife, and P.W.2 did not like the same. Therefore, there were quarrel between the appellant and P.W.2. In order to wreak vengeance, P.W.2, who is none other than the wife of the appellant and aunt of the victim. P.W.2/wife of the appellant, has given a false complaint through P.W.1/victim girl. Further, he would submit that P.W.1/victim girl used to talk with one Rajesh and the appellant warned her and advised her not to talk with said Rajesh. Fearing that the appellant would interfere with her affair with Rajesh, P.W.1 gave wrong information to her aunt as if the appellant has committed sexual assault on her and P.W.2 foisted the false complaint against the appellant that he has committed penetrative sexual assault on P.W.1. Further, he would submit that there are contradictions between the prosecution witnesses and it creates a doubt on the genesis of the case projected by the prosecution. P.W.2 was already got married with three persons and also having adultery with one Elumalai, prior to the occurrence. The appellant is the fourth husband of P.W.2. Further in order to disprove the case of the prosecution, on the side of the defence five witnesses were examined. Four out of the five witnesses have deposed about the character of P.W.2/wife of the appellant. D.W.5 is the doctor. After arrest of the appellant, the said Elumalai and P.W.2 were living in the same house as husband and wife, which is established by D.W.1, D.W.2, D.W.3, D.W.4, who were children and neighbours of P.W.2. The prosecution failed to conduct fair investigation and laid charge sheet for the false allegation against the appellant. Further, the victim girl completed 18 years and she is not a child. The prosecution failed to prove



that the prosecutrix was a child under the definition of POCSO Act. The Trial Court has failed to appreciate the evidence and defence taken by the appellant that the victim had love affair with one Rajesh and when that was questioned by the appellant, in order to victimize him, she gave false complaint, which was clearly established by Nazirin Banu, who was none other than the daughter of P.W.2. The medical evidence of P.W.1 was not corroborated with the evidence of the victim girl. The Trial Court failed to appreciate the evidence and erroneously convicted the appellant and it warrants to interference.

7.The learned Government Advocate (crl.side) would submit that the age of the victim at the time of the occurrence is 15 years. In order to prove the age of the victim, the prosecution marked Ex.P.3/Transfer certificate of the victim in which the date of birth of the victim is mentioned as 27.08.1999. At the time of the occurrence i.e., 21.06.2014 and 18.07.2014 age of the victim is 15 years and she is a child at the time of occurrence as defined under Section 2(1)(d) of POCSO Act. Therefore prosecution proved the age of prosecutrix and she is a child under the definition of POCSO Act. P.W.1 was examined before the Trial Court during which she has clearly stated that the appellant committed penetrative sexual assault on her. The appellant is related to the victim. Soon after the occurrence, the appellant threatened the victim not to reveal it to anybody. The appellant committed penetrative sexual assault more than once on her, when nobody was there in the house. After the occurrence for the second time, the aunt of the victim noticed, inconsistent behaviour with the victim and enquired. The victim also reluctantly stated about the acts of the appellant. Immediately, P.W.2 gave a complaint before the respondent/police and they registered the case and investigated the matter. The Doctor clearly stated that victim subjected to penetrative sexual assault and hymen not intact. Further, as per the X-ray report, victim would be aged between 16 to 18 years. Therefore from the evidence of P.W.1, P.W.2 and also P.W.4/Doctor, prosecution has proved its case beyond all reasonable doubt that the victim was subjected to penetrative sexual assault by the appellant. When the victim was produced before the Judicial Magistrate for recording her statement under Section 164 of Cr.P.C, she clearly stated that she was staying with P.W.2 since she lost her parents at the young age. It is also stated that the appellant is husband of the P.W.2, and he has committed the offence when P.W.2 and her daughters were not in the house. Though the appellant has taken a defence that the victim had a love affair with one Rajesh and he warned her not to talk with him and therefore, in order to take victimize him, a false complaint has been given, P.W.1 specifically denied having any love affair with Rajesh. Even though defence witnesses were examined to show that P.W.2 wife of the appellant is not having



good character and she had illegal intimacy with one Elumalai, it has got nothing to do with the penetrative sexual assault committed by the appellant. The deposition of P.W.1/victim girl is sufficient to prove the guilt of the appellant. The prosecution proved its case beyond all reasonable doubt and the defence taken by the appellant is not acceptable and such defence was projected only to escape from the clutches of law. In order to screen the offence committed by the appellant, he has set up the relatives and daughters of the appellant, and examined on the defence side. In any event, the offence committed by the appellant has been clearly proved by the prosecution and based on the same, the trial court rightly convicted the appellant. He therefore prayed for dismissal of this appeal.

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

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

10. As far as delay in filing FIR is concerned victim clearly stated that in absence of her aunt, on two occasions, appellant committed penetrative sexual assault on her and also threatened her not to reveal the same to anyone and if she did so, it would spoil the life of her aunt and also her. Therefore, she did not reveal the same for sometime. On seeing the victim so tired and feeble, P.W.2 enquired about the same at last the victim informed the offence committed by the appellant, after one month. So there was a delay in filing the complaint. The accused was a close relative to the victim as well as P.W.2. Both of them were residing in the same house. The victim was also subjected to threat and in such circumstances the delay in filing the complaint is not vital in a case of this nature. The victim clearly stated that appellant threatened her not to reveal the incident to anyone, if disclosed, it will spoil the life of the aunt, and therefore she did not reveal the same. In any event, the delay itself not fatal to the case of the prosecution.

11. As far as penetrative sexual assault is concerned P.W.1/Victim has clearly stated that appellant is the husband of P.W.2, who is also the aunt of the victim and they are living in the same house. At the time of occurrence, on both the occasion, P.W.2 was not in the house. On both the occasion, it is stated that appellant committed penetrative sexual assault on her and threatened her not to disclose the incident to anyone. After the complaint, victim was produced before the Doctor/medical officer, who has stated that she was subjected to



penetrative sexual assault and her hymen was not intact. Subsequently the victim was produced before the Judicial Magistrate for recording her statement under Section 164 of Cr.P.C., which has been marked as Ex.P.11. On combined reading of the evidence of P.W.1/victim and the evidence of the Doctor/P.W.4, P.W.6 and also Ex.P.5, Ex.P.6, Ex.P.7 and also M.O.1, prosecution has proved that the victim is a child under the definition of POCSO Act and she was subjected to penetrative sexual assault by the appellant. The evidence of P.W.1 corroborates her statement under Section 164 of Cr.P.C. The evidence of P.W.4 and the medical reports proved the case of the prosecution beyond all reasonable doubt. D.W.1 to D.W.4 are the relatives of the appellant and their evidence are not in any manner affected the case of the prosecution. On the other hand, the evidence of the victim is cogent, consistent and natural and it inspires the confidence of this Court. There is nothing to discard the evidence of P.W.1 in any manner. P.W.1 was studying and staying in the house of the appellant and P.W.2. Therefore, the trial court convicted the appellant for two counts for the offences under Section 506 (i) of IPC and also Section 354 (B) of IPC. As per Section 42 of POCSO Act, the appellant need not be convicted separately for the offence under Section 354(B) of IPC, when he was convicted for the offence under Section 5(n), and 5(l) which are punishable under Section 6 of POSCO Act. Therefore, the imprisonment for the offence under Section 354(B) of IPC., alone is set aside and conviction and sentence for the other charges are remain unaltered.

12. In the result, with the above modification, the Criminal Appeal is dismissed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

klt/pbl

To

1. The Special Judge,
The Special Court
(Under Protection of Children from Sexual
Offences Act, 2012),
Vellore , Vellore District.



2. The Inspector of Police,
All Women Police Station,
Thiruppathur, Vellore District,

3. The Public Prosecutor,
High Court, Madras.

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

5. The Superintendent,
Central Prison, Vellore.

+1cc to Mr.E.Kannadasan, Advocate, S.R.No.46448

Crl.A.No.446 of 2020

BR[co]
NSK 25/01/2022