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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:29.09.2021

CORAM

THE HON'BLE JUSTICE JUSTICE P.VELMURUGAN

CRL.A.No.449 of 2020

Viswanathan

...Appellant/Accused

Vs.

The State Rep. by
Inspector of Police
All Women Police Station,
Mettur.
(Cr.No4/2017)

... Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure, praying to call for the records pertaining to the Judgment dated 06.07.2020 in Spl.S.C.No.77/2019 passed by the learned Sessions Judge, Special Court for offence under POCSO Act, Salem and set aside the same.

For Appellant : Ms.Revathy G.Mohan
Legal Aid Counsel

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

J U D G M E N T

The Criminal Appeal has been filed against the Judgment dated 06.07.2020 in Spl.S.C.No.77/2019 passed by the Sessions Judge, Special Court for offence under POCSO Act, Salem

2. The respondent police registered the case against the appellant in Crime No.4 of 2017 for the offence under Section 11 of POCSO Act punishable under Section 12 of POCSO Act. After investigation they laid the charge sheet for the offence punishable under the POCSO Act against the appellant. The learned Sessions Judge, Special Court for offence under POCSO Act, Salem, after taking cognizance of the charge sheet on file in Spl.S.C.No.77 of 2019 and after completing the formalities framed the charges for the offence punishable under Section 12 of POCSO Act.

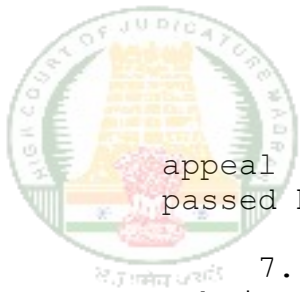


3. After framing the charges and during trial in order to prove the case of the prosecution, on the side of the prosecution 8 witnesses were examined as P.W.1 to 8 and 12 documents were marked as Exs.P1 to P.12 and one material object was exhibited as M.O.1

4. After completing the examination of the prosecution witnesses incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant by questioning under Section 313 of Cr.P.C. However, he denied the same as untrue and pleaded not guilty. On the side of the defence, no witness was examined however, one document was marked as Ex.R1.

5. On completion of trial and hearing of the arguments advanced on either side and perusing the materials, the Special Court found guilt of the appellant for the offence under Section 11 which is punishable under Section 12 of POCSO Act and convicted and sentenced to undergo 2 years rigorous imprisonment and pay fine of Rs.10,000/- in default to undergo 6 months simple imprisonment. Challenging the said Judgment of conviction and sentence the appellant has filed the present appeal before this court.

6. Ms. Revathy G. Mohan, Legal Aid Counsel appearing for the appellant would submit that the occurrence is said to have taken place on 02.06.2017 at about 11.00 a.m. Whereas, the complaint was given only on 03.06.2017 and the inordinate and un-explained delay in filing the complaint is fatal to the case of the prosecution and the trial court failed to consider the same. Therefore the Judgment of the trial Court is perverse. The appellant was only bystander of the incident happened in a TASMACH shop and the police arrested him wrongly and in order to convict him illegally, they have foisted a false case against the appellant. Further he would submit that P.W.1/mother of the victim has stated that one Kavitha had seen the children going on the mud path and if it is true, she should have seen the appellant also along with the children. Whereas, P.W.1 has not stated anything as if, the said Kavitha had seen the children along with the appellant. Further, the said Kavitha was not cited as witness and she was not examined as prosecution witness which is fatal to the case of the prosecution and the place of occurrence is also not established and the prosecution has not examined any independent witness. Further, the appellant is an unknown person to the victim as well as P.W.1. Therefore, the identification of the accused is also doubtful and the prosecution has failed to establish its case beyond reasonable doubt and that the trial court erroneously convicted the appellant without any substantiative evidence. Therefore the



appeal to be allowed and Judgment of conviction and sentence passed by the trial court is liable to be set aside.

7. The learned Government Advocate (Crl. Side) would submit that at the time of occurrence the victim girl was only 7 years. On 02.08.2017 at about 11.45. a.m., when the victim along with her younger brother was playing in the garden, the mother of the victim went for fetching water. At that time, appellant came there and asked the children to come with him under the guise of providing them Candy chocolates. Hence, the children followed the appellant and the appellant took them to the place of occurrence and removed his dress and appeared nude in front of the children and also asked the victim girl to remove her dress. When she refused to do so, the appellant hold his private part and asked the victim girl to see the same for which, the victim girl refused and started to shout. Hence, the appellant threatened the victim girl not to reveal the same to anybody or otherwise, he would kill them. By the time, the mother of the victim returned home and when she found the children missing, she enquired with one Kavitha for which, she said that she had seen the children going on the Mud Path. Hence, the mother of the victim proceeded as per the direction of the said Kavitha and while reaching the place of occurrence, she heard the noise of the victim girl and immediately when she went and saw the place, the appellant was standing nude in front of the children and on seeing the mother of the victim, the appellant flew away from the place. The mother of the victim secured the children and since the father of the victim was not in the station, the next day, after the arrival of the father of the victim lodged the complaint. In the meanwhile the mother of the victim informed the same to the villagers and they caught hold of the appellant. The respondent police registered the case and during the investigation, the victim was produced before Judicial Magistrate to record the statement under Section 164 Cr.P.C. and the same was also recorded wherein, the victim girl has clearly narrated the incident and the act committed by the appellant. Subsequently, the victim was examined as P.W.2 and before the Court also, she clearly narrated the incident. Admittedly there is no eye witness and no independent witness to this case except the mother of the victim. The mother of the victim herself has clearly stated that after fetching water when she came back to the place where she left the children, the children were not found and when she enquired one Kavitha who was available in the distance place about her children, she said that the children were walking through the mud path. Therefore, the mother of the victim, proceeded towards the direction of the said Kavitha and on reaching the place of occurrence, she saw the children were sitting and the appellant was standing nude in front of the children. On seeing the mother of the victim, the appellant escaped from the place. Therefore, the prosecution



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proved its case beyond all reasonable doubt that the appellant committed the offence of sexual assault under Section 11 punishable under Section 12 of POCSO Act. Therefore, the trial Court rightly appreciated the evidence and convicted the appellant and there is no merit in the appeal and the appeal is liable to be dismissed.

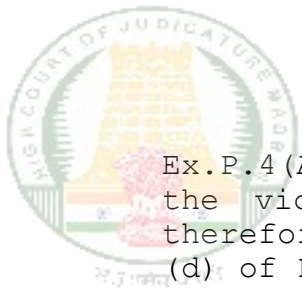
8. Heard Mrs. Revathy, Legal Aid Counsel appearing for the appellant and the Mr. S. Sugendran, Government Advocate (Crl. Side) appearing for the respondent police.

9. The case of the prosecution is that on 02.08.2017 at about 11.45. a.m., the victim along with her younger brother was playing in the garden and the mother of the victim, went for fetching water. At that time, appellant came there and asked the children to come with him under the guise of providing them Candy chocolates. Hence, the children followed the appellant and the appellant took them to the place of occurrence and removed his dress and appeared nude in front of the children and also asked the victim girl to remove her dress. When she refused to do so, the appellant hold his private part and asked the victim girl to see the same for which, the victim girl refused and started to shout. Hence, the appellant threatened the victim girl not to reveal the same to anybody or otherwise, he would kill them. By the time, the mother of the victim had returned home and when she found the children missing, she enquired with one Kavitha and came to know that the children were going through the Mud Path and when she reached the place of occurrence, she saw the appellant was standing nude in front of the children and on seeing the mother of the victim, the appellant flew away from the place. Since, the father of the victim was not in the station, the next day, after the arrival of the father of the victim, they lodged the complaint.

10. In this case, since this Court is the appellate Court as the final Court of fact finding, it has to re-appreciate the evidence and to give its findings independently. Accordingly, this Court pursued the entire materials and Judgment of the trial Court.

11. The Special Court framed the charge against the appellant as stated above and in order to substantiate the charge framed against the appellant, on the side of the prosecution totally 8 witnesses were examined and 12 documents were marked, besides one material object was marked as M.O.1.

12. Out of the 12 documents, Ex.P.7 is the age proof certificate of the victim, Ex.P.4(A) is school certificate of the victim issued by P.W.6 / Head Master of the school in which the victim studied. A combined reading of the evidence P.W.6 and



Ex.P.4(A) shows that the prosecution has proved that the age of the victim was 7 years at the time of the occurrence and therefore, she is a child under the definition of Section 2(1)(d) of POCSO Act.

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13. In order to substantiate the charge punishable under Section 12 of POCSO Act framed against the appellant, the prosecution examined the victim child as P.W.2 and also marked Ex.P.2/the previous statement of the victim child recorded by the learned Judicial Magistrate under Section 164 Cr.P.C. A combined reading of the evidence of P.W.2/victim as well as Ex.P.2/the previous statement recorded from the victim girl by the Judicial Magistrate under Section 164 Cr.P.C. would go to show that on the date of occurrence, the victim girl was playing in the land along with her younger brother and her mother had gone for fetching water. At that time, the appellant approached them and asked them to come with him on the promise of providing them Candy and hence, the children followed the appellant. After reaching the place of occurrence, the appellant removed his dress and stood nude and asked the victim girl to remove her dress and the victim child refused to do so. Subsequently, the appellant caught hold of his private part and asked the victim girl to look at his private part for which also, the victim girl refused and started to shout. By the time, the mother of the victim who was in search of the children, reached the spot and on seeing the mother of the victim girl, the appellant ran away from the place. Since, the father of the victim was not in station, on the next day, they lodged the complaint.

14. The P.W.1/the mother of the victim has deposed that on the date of occurrence i.e. on 02.06.2017, her 1st daughter/victim girl was playing with her 2nd son in the land and at that time, she left for fetching water and when she came back, she found the children missing and when she asked one Kavitha who was available at the distance place, the said Kavitha told her that the children were going through the mud path. Immediately, she proceeded towards the said direction and on reaching the place of occurrence, she saw the appellant standing nude in front of the children and the children were found sitting and on seeing her, the appellant escaped from the place. Therefore, the evidence of P.W.2/victim is corroborated with the evidence of P.W.1/the mother of the victim to the extent that the appellant was with the victim without any dress. After the appellant ran away from the place, when the mother of the victim asked the victim girl as to why she came all the way from the land to the place of occurrence, she informed her that the appellant had promised to provide candy and thereby, she went along with the appellant and after reaching the place, the appellant removed his dress and showed his private part and also asked the victim to remove her dress and by that time, the



mother reached the place and there is no independent witness.

15. Though the learned Counsel for the appellant contended that as per PW.1, one Kavitha had informed her that her children were going through the mud path, however the said Kavitha was not examined which is fatal to the case of the prosecution. He would further contended that P.W.1/the mother of the victim has not stated anything as if, the said Kavitha had informed her that she saw the appellant along with the children or the appellant took the children. It is made clear that mere non examination of the said Kavitha is not fatal to the case of the prosecution and it is not the case of the prosecution that the said Kavitha had seen the occurrence. Even assuming, mere non examination of independent witness is not fatal to the case of the prosecution. Admittedly, in this case there is no eye witness except the victim and the mother of the victim to that extent that the appellant was with the victim girl without dress. Further, cases of this nature, eye witnesses cannot be expected.

16. The evidence of the victim is cogent, consistent, natural and trustworthy which inspires the confidence of this Court. The Court cannot reverse the Judgment of conviction unless the Court dis-believes the evidence of the victim or any reason to discard the evidence of the victim. In this case, this Court does not find any reason to dis-believe or discard the evidence of the victim and the evidence of the victim is quiet natural.

17. Therefore considering the evidence of the P.W1 and P.W.2 and also Ex.P.2, this Court also found that the prosecution has proved its case beyond all reasonable doubt that the appellant has committed the offence under Section 11 which is punishable under Section 12 of POCSO Act and the trial Court rightly appreciated the evidence and convicted the appellant and this Court does not find any perversity in the appreciation of the evidence by the trial Court. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

18. Accordingly, this Criminal Appeal is dismissed confirming the Judgment dated 06.07.2020 in Spl.S.C.No.77/2019 passed by the learned Sessions Judge, Special Court for offence under POCSO Act, Salem. The trial Court is directed to secure the appellant to undergo the remaining period of sentence if any. The period of incarceration already undergone, shall be given set off.



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19. Ms.Revathy G.Mohan, Legal Aid Counsel appearing for the appellant is entitled for remuneration as per rules.

Sd/-
Assistant Registrar (CS-IX)

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Sub Assistant Registrar

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To

1. The Sessions Judge,
The Special Court for offence under POCSO Act, Salem
2. The Inspector of Police,
All Women Police Station, Mettur.
3. The Public Prosecutor Officer,
High Court, Madras.
4. The Section Officer,
Criminal Section, High Court, Madras.
5. The Honourable POCSO committee,
High Court, Madras-104.

+1cc to M/s.Revathi G.Mohan, Advocate, S.R.No.50614

CRL.A.No.449 of 2020

RLD (CO)
SU (06/01/2022)