

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.02.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.405 of 2019

Jaiaapdeen

... Appellant

Vs.

The Inspector of Police,
W-7 All Women Police station,
Anna Nagar,
Chennai - 40.
(Crime No.4 of 2018)

.... Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set-aside the conviction and sentence imposed against the appellant on 14.05.2019, in S.C.No.251 of 2018, on the file of the Mahila Court / Special Court for cases under POCSO Act / Children's Court, Chennai- 600 104 and acquit the appellant.

For Appellant : Mr.P.Pugalenth
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 14.05.2019 made in S.C.No.251 of 2018, on the file of the learned Sessions Judge, Mahila Cort, Chennai.

2. The respondent-Police registered a case against the appellant in Crime No.4 of 2018, for the offence punishable under Section 6 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, 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 charges for the offence punishable under Section 6 of POCSO Act and conducted the trial.

3. During trial, in order to prove the case of the prosecution, on the side of the prosecution, 6 witnesses were examined as P.W.1 to P.W.6 and 14 documents were marked as Exs.P1 to P14. 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. After considering the evidence on record and hearing on either side, the learned Sessions Judge, Mahila Court, Chennai, by Judgment dated 14.05.2019, convicted the appellant for the offence punishable under Section 6 of POCSO Act and sentenced him to undergo ten years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo further period of six months Rigorous Imprisonment.

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

5. The learned counsel for the appellant would submit that the appellant had not committed any offence and there was landlord and tenant dispute and due to which, the mother of the victim child has foisted a false case against the appellant. It is further submitted that in this case, no independent witness was examined and the eyewitness is the mother of the victim child and she is an interested witness. Further, there are material contradictions in the evidence of the victim child and the mother of the victim child. The doctor, who examined the victim girl, has stated that there was an attempt to sexual intercourse and there was no penetrative sexual intercourse, and further, there is no ingredients of Section 5 has been made out and therefore, conviction under Section 6 of POCSO Act, is unwarranted. The learned Special Judge, based on presumption and also on the ground of sympathy, convicted the appellant for the offence punishable under Section 6 of POCSO Act, and awarded maximum punishment, which warrants interference.

6. The learned Government Advocate appearing for the respondent-Police would submit the birth certificate of the victim girl was marked as Ex.P1. As per Ex.P1, the date of birth of the victim child was 02.08.2013 and the date of occurrence was 22.05.2018 and therefore, she was only 5 years at the time of occurrence. It is further submitted that the appellant, aged about 75 years, and he is a neighbor to the victim child, took her and put his private part on the anal of the victim child. The victim girl was produced before the doctor, and the doctor, who examined the victim girl has observed that there was an injury on the anal of the victim child and the victim child has been subjected to sexual harassment and anal intercourse has been attempted and she has also given opinion and certificate,

which were marked as Exs.P5 and P6 respectively. Thereafter, the victim child was produced before the learned Magistrate for recording statement under Section 164 of Cr.PC., and accordingly, the statement was recorded, which was marked as Ex.P3. A combined reading of Ex.P3-statement of the victim child, and also Exs.P6 and P7, the opinion and report of the doctor respectively, the prosecution has proved its case beyond reasonable doubt. Moreover, in this case, the mother of the victim girl, who saw the occurrence and she also clearly deposed that the appellant was pressing his private part on the anus of the victim child and therefore, the prosecution has proved its case beyond the reasonable doubt, through oral and documentary evidence. Therefore, the learned Judge, rightly appreciated the evidence of the prosecution witnesses and convicted the appellant for the offence punishable under Section 6 of POCSO Act and as such, the learned Government Advocate, prays for dismissal of the Appeal.

7. Heard the learned counsel on either side and perused the materials placed on record.

8. Since this Court is an appellate Court and also final Court of fact finding, in order to give an independent finding, it has to re-appreciate the entire evidence. A careful reading of statement recorded under Section 164 of Cr.P.C. of the victim child by the learned Magistrate, it could be seen that the victim child has narrated the entire occurrence that took place on 22.05.2018, which was marked as Ex.P13 and also during evidence, she deposed the entire occurrence. A reading of the evidence of the victim girl, who examined as P.W.1, has clearly deposed that she knew the appellant and when she was in the home of the appellant, the appellant removed her panties and kept his private part on her buttocks. She further deposed that her mother (P.W.2) noticed the same through the window and rescued her (P.W.1) and scolded the accused, and thereafter, gave Ex.P1-complaint before the respondent-Police.

9. The mother of the victim child, was examined as P.W.2, and in her evidence, she deposed that she knew the appellant, who is the owner of the house, where she was residing previously at Chetpet. There are five tenements in the said house, for which, there is one common toilet, which is adjacent to the house of the accused. On 22.05.2018, at about 11.30 a.m., her daughter went to bathroom, but she did not return, however, P.W.2 heard the noise of the victim child from the house of the accused, which is adjacent to her house. As there was only one door between the house of P.W.2 and the house of the accused, she could hear the noise of the child well. On hearing the noise of the child, she (P.W.2) went to the bathroom, but she was not

there. When she (P.W.2) peeped through the window, she saw the accused was pressing his private part on the anus of the victim child by removing her panties. Immediately, P.W.2 rushed into the house of the accused, pushed him away and rescued the victim child and shouted. On hearing her voice, her neighbours also came and thereafter, Ex.P1 complaint was filed. Subsequently, the Police registered a case and the victim child was brought to the Hospital.

10. The Doctor, who examined the victim girl was examined as P.W.4 and in his evidence, he has clearly deposed that she found nail marks on neck of the victim child and the child had imperforate hymen and because of which, her vaginal orifice was closed and on examination of her anus, she noticed abrasions there and opined that the victim child was subjected to sexual harassment and anal intercourse has been attempted. The doctor, who examined the accused was examined as P.W.6, and issued Ex.P9-certificate stating that there is nothing to suggest that the appellant is impotent.

11. A combined reading of the evidence of P.W.1-the victim girl, P.W.2-the mother of the victim girl, P.W.4-doctor, who examined the victim child and her opinion and report, which were marked as Exs.P6 and P7, and also the evidence of P.W.5-doctor, who examined the accused and Ex.P3-statement of the victim girl, which was recorded under Section 164 of Cr.P.C, and Ex.P1-birth certificate of the victim girl, the prosecution has proved that the appellant has committed the offence under Section 5 of the POCSO Act, which is punishable under Section 6 of the POCSO Act.

12. Even though the learned counsel for the appellant has stated that the ingredients of Section 5 of POCSO Act has not been made out and the prosecution has failed to establish the same, on a careful reading of the evidence of P.W.1, the victim girl and also P.W.4 doctor, who had adduced evidence that on examination of victim child, she opined that victim child was subjected to sexual harassment and anal intercourse has been attempted. Depth of penetration is immaterial, mere touching of private part would be sufficient so as to constitute the offence. In this case, on a reading of the evidence of P.W.2, the mother of the victim girl has clearly deposed that when she was peeping through window, she noticed that the accused was pressing his private part on the anus of the victim child, by removing her panties and she immediately rescued the victim child and shouted the accused and otherwise, the accused would have achieved his intention. Therefore, under the circumstances, this Court has found that the appellant had committed the offence under Section 5 of the POCSO Act, which is punishable under Section 6 of the POCSO Act, and the learned Judge rightly

appreciated the evidence of the prosecution witnesses and convicted the appellant.

13. At this juncture, it would be useful to refer the Sections 3(a) and 5 of POCSO Act:-

"Section 3. Penetrative sexual assault:-

(a) If he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

Section 5. Aggravated penetrative sexual assault:-

(m) whoever commits penetrative sexual assault on the child below 12 years;"

A careful reading of the language of the said provisions of law and also the evidence of P.W.1, the victim child, it could be seen that the appellant has committed the offence, which is punishable under Section 6 of POCSO Act.

14. Though the learned counsel for the appellant would contend that there was a motive to foist a false case against the appellant due to landlord and tenant dispute, in this case, there is no reason to disbelieve her or discard the evidence of the victim child and the mother of the victim child and also P.W.4 and P.W.5-doctors. Further, there was no necessity to foist such a false serious case against the appellant by spoiling the future of the victim child. It is pertinent to mention here that parent of the victim girl need not say all these things and also the parent of the victim child will not spoil the future of the victim child. Therefore, the above contention of the learned counsel for the appellant is rejected.

15. Further, there was no reason to discard the evidence of the victim girl. 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 cannot expect the eyewitness, since it is not the case of the prosecution that the offense had taken in the presence of some other eye witness. However, admittedly, in the case on hand, the mother is an eyewitness and in her evidence, she had clearly deposed that when she was peeping through window, she noticed that the accused was pressing his private part on the anus of the victim child, by removing her panties and she immediately rescued the victim child. 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. The evidence of interested witnesses is found to have creditworthiness conviction could be based on a uncorroborated testimony. In cases of this nature, presence of independent eyewitnesses are mostly improbable. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible.

16. 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, Chennai. Considering the age of the victim child, this Court does not find any mitigating circumstances to reduce the sentence. Accordingly, the Criminal Appeal fails and the same is dismissed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

1. The Mahila Court / Special Court for cases under POC SO Act / Children's Court, Chennai- 600 104.
2. The Inspector of Police,
W-7 All Women Police station,
Anna Nagar,
Chennai - 40.
3. The Public Prosecutor,
Madras High Court, Chennai.
4. The Superintendent, Central prison II, Chennai.

Crl.A.No.405 of 2019

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