

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.02.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.457 of 2019

Bernardshaw Rajkumar

.. Appellant/Accused

.Vs.

The State Rep.by
Inspector of Police,
Thiruvallur Taluk Police Station,
Thiruvallur,
Crime No.154 of 2013.

.. Respondent/Complainant

Criminal Appeal filed under Section 374 (1) of Code of Criminal Procedure to call for the records in S.C.No.113 of 2014 on the file of the Mahila Court, Tiruvallur and set aside the conviction and sentence passed against the appellant/accused.

For Appellant : Mr.D.Percivul Pericles
for M/s.Prof.M.Udaya Bhanu

For Respondent : Mr.R.Surya Prakash
Government Advocate (Crl.Side)

Legal Aid Counsel
for the Appellant : Mr.K.Ethirajulu

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 07.06.2019 in S.C.No.113 of 2014 on the file of the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court) Tiruvallur.

2.The respondent police registered a case in Crime No.154 of 2013 against the appellant for the offence punishable under Sections 376 r/w 4 of The Protection of Children from Sexual Offences Act, 2012 [hereafter 'POCSO Act' for the sake of convenience] and 506(i) IPC subsequently, altered into Section 376, 511 IPC r/w 4 of POCSO Act. After completing investigation, the respondent police filed a charge sheet before the learned Judicial Magistrate No.I, Tiruvallur and the same was taken on file in P.R.C.No.4 of 2013.

3. The learned Judicial Magistrate No.I, Tiruvallur, after considering the fact that the offences alleged to have been committed by the accused are triable by the Court of Session, committed the case to the trial Court and the same was taken on file in S.C.No.113 of 2014.

4. After completing formalities, the trial Court framed charges against the appellant for offence under Section 5(m) r/w 6 of POCSO Act and convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.5,000/- and in default, to undergo simple imprisonment for a period of six months. Challenging the said conviction and sentence, the appellant is before this Court.

5.1 The learned counsel for the appellant would submit that there was a delay in preferring the complaint and registering the First Information Report and the delay has not been properly explained by the defacto complainant (P.W.1), who is the father of the victim girl (P.W.3). Further, the prosecution has not explained as to why the defacto complainant did not approach the police immediately soon after the occurrence, but, chosen to enter into a verbal arguments with the accused and his relatives and such conduct does not approve the provisions under Section 8 of the Indian Evidence Act. As per the prosecution, the mother of the victim girl has deposed that the appellant inserted his private part into the private part of the victim girl, whereas, the victim girl has deposed that the appellant inserted his finger in her private part. Thus, there was a contradiction between the evidence of the victim girl (P.W.3) and the mother of the victim girl (P.W.2). Further, there is no eye witness to the said occurrence. Though (P.W.2) mother of the victim girl has deposed that there was a swelling in the private part of her daughter, the Doctor (P.W.11), who examined the victim girl, has opined that there is no injury in the private part of the victim girl. Therefore, the evidence of the Doctor was not supported the case of the prosecution.

5.2 The learned counsel for the appellant would further submit that the witnesses were not produced before the Judicial Magistrate within the stipulated time as contemplated under POCSO Act. Further, the panties of the victim girl was not recovered and was not sent for forensic lab, which is also fatal to the case of the prosecution. The statement of the victim girl (P.W.3) and her mother (P.W.2) were recorded under Section 164 Cr.P.C by the learned Magistrate, in which there is material contradiction regarding insertion of part of the appellant into the private part of the victim girl. Further, the victim girl (P.W.3) while giving statement under Section 164 Cr.P.C, has stated that one Sathik is her friend and the appellant herein, who is the father of Sathik took her inside the house and asked her to remove the panties and inserted his finger into her private part.

Further, the friend of the victim girl was not examined by the prosecution. Therefore, identification of the accused was highly doubtful and hence, the prosecution has failed to establish its case beyond reasonable doubts and the allegations fall under the ingredients of Section 3 of POCSO Act. However, the learned trial Judge failed to consider the material contradictions and erroneously convicted the appellant only on assumption and on sympathy, and therefore, the judgment of conviction and sentence passed by the trial Court against the appellant, is liable to be set aside. In support of his contention, the learned counsel for the appellant relied upon the judgment of the Hon'ble Supreme Court in the case of Parminder Kaur @ P.P.Kaur @ Soni Vs. State of Punjab (Crl.Appeal No.283 of 2011)

6.1 The learned Government Advocate (Crl.Side) would submit that at the time of occurrence, the age of the victim girl is only four years. On 22.04.2013, the parents of the victim girl were not in the house and they had gone for their routine work and her grand mother alone was in her house; the victim girl and children of the appellant were playing outside the house of the appellant. At that time, the appellant took the victim girl alone to his house and made penetrative sexual assault on the victim girl and also threatened the victim girl not to reveal the same to anybody. Thereafter, the victim girl informed the said occurrence to her mother and thereby, the parents of the victim girl went to the house of the appellant and questioned the same, for which, he had rudely answered and hence, they gave a complaint (Ex.P1) to the respondent/police. The respondent/police registered a case and investigated the matter and laid a charge sheet against the appellant.

6.2 The learned Government Advocate (Crl.Side) would further submit that the prosecution has examined as many as 13 witnesses. The father of the victim girl was examined as P.W.1, the mother of the victim girl was examined as P.W.2 and their evidence completely corroborated with the evidence of P.W.3-the victim girl in all material particulars. Further, the Doctor (P.W.11), who examined the victim girl, has made entry in Accident Register Ex.P4 and issued Ex.P5 Sexual Offence Certificate and has opined that there is no external injuries or swelling on the private part of the victim girl. The incident took place on 22.04.2013 and the victim girl was produced before the Doctor only on 30.04.2013 and hence, injury or swelling sustained by the victim girl might be disappeared. Further, the victim girl and her mother were produced before the learned Judicial Magistrate and their statements were recorded under Section 164 Cr.P.C, which were marked as Ex.P.6 and Ex.P11 and both of them had given the statement in a cogent manner. From the evidence of the parents of the victim girl P.Ws.1 and 2, the victim girl (P.W.3) and the evidence of the learned Magistrate (P.W.12), the prosecution has clearly established its case beyond all

reasonable doubt. He would further submit that the evidence of the victim girl is very clear. The victim girl has identified the accused as her friend's father. At the time of occurrence, the victim girl was only 4 years old and the appellant has committed aggravated penetrative sexual assault on the victim girl and therefore, the trial Court has rightly convicted the appellant and hence, the appeal is liable to be dismissed.

7. Heard the learned counsel for the appellant and the learned Government Advocate (CrI.Side) for the respondent and also perused the materials available on record.

8. The case of the prosecution is that the victim girl (P.W.3) was aged about 4 years at the time of occurrence i.e. on 22.04.2013. When the victim girl was playing with the children of the appellant outside the house, at that time the appellant gave her chocolates, took her inside the house and locked the room and also inserted his private part into the private part of the victim girl and later, threatened her not to reveal it to anyone. However, the victim girl informed about the pain in her private part to her mother and she found swelling in the private part. On enquiry, the victim girl revealed the said occurrence to her mother (P.W.2), who in turn, informed the same to her husband (P.W.1) and gave a complaint (Ex.P1) to the respondent Police and the respondent Police filed a case in Crime No.154 of 2013 against the appellant.

9. After completing the investigation, the respondent Police laid a charge sheet before the learned Judicial Magistrate No.I, Tiruvallur and the same was taken on file in P.R.C.No.4 of 2013. The learned Magistrate, after considering the fact that the offences alleged to have been committed by the accused are triable by the Court of Session, committed the case to the Sessions Court and the same was taken on file in S.C.No.113 of 2014 and charges were framed against the appellant as stated above.

10. In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 13 witnesses were examined as P.W.1 to P.W.13 and also marked Exs.P1 to P11 and no material objects were marked. On completion of the evidence on the side of the prosecution, the accused was questioned under Section 313 Cr.P.C and incriminating circumstances found out in the evidence of prosecution witnesses, but, the accused has come with the version of total denial and stated that he has been falsely implicated in this case. On the side of the defence, no oral and documentary evidence were marked.

11. The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that the accused/appellant is guilty and

awarded punishments, as referred to above, which is challenged in this Criminal Appeal.

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

13. The complaint (Ex.P1) has been lodged by P.W.1, who is none other than the father of the victim girl. Though he is not an eye-witness to the occurrence, since the victim girl is a minor as well as a female, the father of the victim girl (P.W.1) has filed the complaint (Ex.P1) before the respondent Police. On appreciation of evidence of P.W.1, who is the father of the victim girl, it is seen that he gave the complaint and has deposed that on 22.04.2013 he and his wife went to job and the victim girl was with her grandmother. At that time, the appellant took her inside his house and sexually assaulted her. When the victim girl complained of pain in her private part and when she was enquired by her mother, the victim girl told the said occurrence. Subsequently, his wife informed about the said occurrence to him and he preferred the complaint to the respondent police. The delay in filing complaint itself is not a ground to doubt the case of the prosecution. The delay in lodging the FIR would put the Court on its ground to search if any plausible explanation has been offered. P.W.1 the defacto complainant has given clear reasons for the delay in filing the complaint.

14. The evidence of the parents of the victim girl (P.Ws.1 and 2) completely corroborated with the evidence of the victim girl P.W.3. Even though, P.Ws.1 and 2 are not eye witnesses to the said occurrence, they have stated that her daughter informed the said incident to her mother, who in turn, informed the same to her husband.

15. Further, the neighbor of the victim girl, who was examined as P.W.4, has clearly deposed that on 22.4.2013, when she went to the shop, she found the victim girl coming out of the house of the accused and while coming out she was weeping. When P.W.2, the mother of the victim girl enquired at the house of the accused, P.W.4 was also accompanied her to seek justice for the victim girl. The mother of the victim girl (P.W.2) in her deposition has deposed that the victim girl was so tired and complained of pain in her private part. On enquiry, the victim girl narrated the said incident to her mother. Further, P.W.2 has stated that there was a swelling in the upper portion of the private part of the victim girl, whereas, the Doctor (P.W.11) has stated that there was no injury or swelling in her private part, since the victim girl was produced before the Doctor nine days after the incident. Hence, there is no reason to discard the evidence of P.Ws.1 to 3. If she was produced immediately soon after the occurrence, the Doctor could have noticed the same.

16. P.W.5 and P.W.6 are the relatives of P.W.1 and they

have deposed that on 22.04.2013 the accused sexually assaulted their brother's daughter and the same was informed by their brother. P.W.8, who is the neighbour of P.W.1, has deposed that he came to know the said incident from the villagers. P.W.10 is the Doctor, who examined the accused and issued Ex.P3 Medical certificate that he is clinically potent. P.W.11 is the Doctor, who examined the victim girl, made entry in the Accident Register Ex.P4 and Ex.P5 Sexual Offence certificate issued by the Doctor.

17.The victim girl and her mother were produced before the learned Judicial Magistrate (P.W.12) for recording the statement under Section 164 Cr.P.C. It is the specific contention of the learned counsel for the appellant that the evidence of P.Ws.2 ad 3 and their statements under Section 164 Cr.P.C are contradictory, since the mother has stated that the appellant inserted his private part in the private part of the victim girl, whereas, the victim girl has stated that the appellant inserted his finger in her private part. However, the evidence of the victim girl is very cogent and clean and there is no reason to discard the evidence of the victim girl. When she was examined by the learned Magistrate, she has clearly narrated the said incident, whereas, during her cross examination she has clearly stated that the appellant sexually assaulted her, which falls under Section 5(m) r/w 6 of POCSO Act.

18. It is relevant to extract here the relevant provisions of POCSO Act :-

''3. Penetrative sexual assault. - A person is said to commit "penetrative sexual assault" if -

(a) 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

5(m) whoever commits penetrative sexual assault on a child below twelve years; or

6.Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.''

19.Even though the learned counsel for the appellant would submit that there are some discrepancies and contradictions in the evidence of P.Ws.2 and 3 and also in the evidence of the Doctor. However, the evidence of the victim girl regarding sexual assault is enough for conviction and it does not require any corroborative evidence, unless there are compelling reasons seeking for corroboration. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible. In cases of this nature presence of eye witnesses are mostly improbable. The defence has not

examined any witnesses. They have also not rebutted the statutory presumption. Even Section 29 and 30 of POCSO Act is very clear that once the prosecution has established their case, it is the duty of the accused to rebut the presumption. From the evidence of the victim girl (P.W.3), the mother of the victim girl (P.W.2), the neighbor of the victim girl (P.W.4) and the statement recorded under Section 164 Cr.P.C (Ex.P11), the prosecution has established their case that the accused committed the charged offence. In a case like this, this Court cannot expect any eye witness or independent witness. These type of accused will always wait for a chance to take advantage of the loneliness of children to commit this type of offence.

20. In the present case, it is the contention of the learned counsel for the appellant that (P.W.2) mother of the victim girl has stated that there was a swelling in the upper portion of the private part of the victim girl, whereas, the Doctor (P.W.11) has stated that there was no injury or swelling in her private part, which is a contradictory statement. Since the victim girl was produced before the Doctor after nine days from the date of occurrence, the swelling might be subsidized gradually. The contradictions and discrepancies pointed out by the learned counsel for the appellant is not material contradictions, it is only minor contradictions and it will not affect the case of the prosecution. The evidence of the victim regarding sexual assault is enough for conviction and it does not require any corroborative evidence unless there are compelling reasons seeking for corroboration. The Court may testify the evidence of the witness, as to whether she was tutored by her parents or adult members for any reason. Further, no parents will sacrifice the future and reputation of a victim girl and go to that extent to file a false case against the appellant. Further, the appellant has not established his case by invoking Section 29 of POCSO Act. Therefore, the prosecution proved its case beyond all reasonable doubt. The trial Court by rightly appreciating the entire evidence, convicted and sentenced the appellant. The contradictions pointed out by the learned counsel for the appellant are not material contradictions and this Court does not find any reason to discard the evidence of the victim girl and therefore, the citations relied upon by the learned counsel for the appellant is not applicable to the present case. Every Criminal case has to be decided on the basis of the facts and evidences available and not on precedence.

21. Under these circumstances, this Court being an Appellate Court, is a fact finding Court, re-appreciated the entire evidence and come to the conclusion from the evidence of P.W.3 the victim girl, the statement recorded under Section 164 Cr.P.C, the prosecution has proved its case beyond all reasonable doubt. Further mere delay in filing these cases may not be fatal to the case of the prosecution. Further, mere

contradictions will not affect the case of the prosecution, unless it will go to the root of the prosecution. The appellant is not entitled for acquittal, since the victim girl is only aged about four year at the time of occurrence, the appellant also having children in the very same age group. Therefore, this Court, as a fact finding Court appreciates the entire evidence independently and arrived at just conclusion that the appellant has committed the offence under Section 5 (m) r/w 6 of POCSO Act.

22. In fine, this Criminal Appeal deserves to be dismissed and accordingly, the same is dismissed. The conviction and sentences passed in S.C.No.113 of 2014 by the Mahila Court, Tiruvallur is confirmed.

Sd/-

Assistant Registrar (CS-VII)

//True copy//

Sub Assistant Registrar

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To

- 1.The Sessions Judge,
Magalir Neethimandram (Fast Track Mahila Court)
Tiruvallur.
- 2.The Superintendent,
Central Prison,
Puzhal, Chennai - 600 066.
- 3.The Inspector of Police,
Thiruvallur Taluk Police Station,
Thiruvallur.
- 4.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.K.Ethirajulu, Advocate SR.No.8364

CRL.A.No.457 of 2019

RK(CO)
GMY(12/07/2021)