

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	22/03/2021
Delivered on	/04/2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CrI.A.No.553 of 2020 &
CrI.M.P.No.8997 of 2020

Iyyar @ Vasudevan Appellant
Vs.

State Rep. by
Inspector of Police,
All Women Police Station (East),
Coimbatore City & District, Respondent

(Crime No.18 of 2015)

PRAYER: Criminal Appeal is filed under Section 374 (3) of Cr.P.C. to set aside the conviction and sentence passed by the learned IV Additional District Sessions Judge, Mahila Court, Coimbatore in Special C.C.No.4 of 2017, dated 28.02.2019.

For Appellant : Mr.R.Ganesh,
Counsel

Mr.C.D.Vivekanandan
Legal Aid Counsel

For Respondent : Ms.T.P.Savitha
Government Advocate (Criminal Side)

J U D G M E N T
सत्यमेव जयते

This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 28.02.2019 made in Spl.S.C.No.4 of 2017, on the file of the learned IV Additional District Sessions Judge, Mahlia Court, Coimbatore.

2. The respondent-Police registered a case against the appellant in Crime No.18 of 2015, for the offences punishable under Sections 5(m) r/w 6 of Protection of Children from Sexual Offences Act, 2012 (For brevity "the POCSO Act) and 506 (i) of IPC. After the investigation, laid a charge sheet before the learned IV Additional District Sessions Judge, Mahlia Court, Coimbatore. 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 under Sections 5(m) r/w 6 of POCSO Act, and 506 (i) of IPC against the appellant and conducted the trial.

3. After considering the evidence on record and hearing on either side, the learned Judge, by Judgment dated 28.02.2019, convicted the appellant for the offence under Sections 5 (m) r/w 6 of POCSO Act and sentenced him to undergo ten years Rigorous Imprisonment and to pay a fine of Rs.20,000/- in default to undergo six months Rigorous Imprisonment; and convicted and sentenced him to undergo Rigorous Imprisonment for two years for the offence under Section 506 (i) of IPC.

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

5. Since the learned counsel for the appellant was not present on 08.03.2021, this Court directed the Registry to appoint a Legal-Aid Counsel and however, today, the learned counsel for the appellant as well as Legal-Aid Counsel are appeared and argued the matter.

6. The learned counsel for the appellant would submit P.W.2-sole eyewitness, who is none other than the brother of the victim child, has turned hostile and P.W.1, the father of the victim child also turned hostile; P.W.3 and P.W.6 are close relatives and they are interested witnesses and there is a previous enmity against the appellant in civil matter and at the time of occurrence, the respondent registered the case and counter. After that the respondent-Police falsely implicated the appellant and he was arrested by the respondent-Police. Originally, the case was registered for the offence under Section 7 r/w 8 of POCSO Act and 506 (i) of IPC, subsequently altered into Section 5(m) r/w 6 of POCSO Act and Section 506 (i) of IPC. The statement of the complainant is contrary to the evidence recorded before the trial Court. Though in the complaint, it was stated that the appellant gave Rs.10/- to Sri Hari, which was taken from the victim's hand and sent Sri Hari to buy some candies and took the victim child inside of the house and rubbed his penis against vagina of the victim child, which was not substantiated by the prosecution witnesses. P.W.2-eyewitness and P.W.1-the father of the victim child have turned hostile and only due to enmity, P.W.3, gave a false complaint against the appellant. The learned counsel for the appellant would submit that there was a delay in preferring the complaint before the respondent police. After deliberation, mother of the victim child filed Ex.P1 complaint and the respondent police without any preliminary enquiry registered the First Information Report. The learned IV Additional District Sessions Judge,

Mahila Court, Coimbatore, wrongly convicted the appellant and there is no cogent evidence and the learned Judge failed to consider the material contradictions and, however convicted the appellant only on conjectures and sympathy, and therefore, the judgment of conviction and sentence passed by the trial Court against the appellant, is liable to be set aside.

7. The learned Government Advocate (Criminal Side) would submit that on the side of the prosecution, totally, 11 documents were marked and 11 witnesses were examined, out of which, the victim child was examined as P.W.4 and she has clearly stated that on the date of occurrence, she did not go to School, as she was not feeling well, and the parents were also gone to work, and at that time, when they were playing, the appellant took her and gave Rs.10/-, to P.W.2, which was taken from her, and sent P.W.2, the brother of the victim child to buy some candies and took her and removed her panty and he had also removed the dresses and pressed his private part into her vagina. By that time, the P.W.2, brother came there and pushed the appellant. The appellant also threatened the children not to disclose anybody, if do so, he would kill them and subsequently, when their mother came from work, they informed the same. Subsequently, the victim child was taken to the Hospital and thereafter, she was sent before the learned Judicial Magistrate for recording statement. The doctor, one who conducted the medical examination of the victim child was examined as P.W.7 and she has deposed that on 13.10.2015, the victim child was brought to the hospital, she examined the victim child and there was no external injury on her body, however, her hymen was not intact and her vagina admits little finger and she also found that there was reddishness in the private part of the victim child and she opined that the victim child might be subjected to sexual assault. From the evidence of the victim child and the medical evidence, the prosecution has proved its case beyond reasonable doubt and hence, there is no merit in the Appeal and the Appeal is liable to be dismissed.

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

9. The case of the prosecution is that on 13.10.2015, the victim child was having temperature she did not go to school, and her mother P.W.3 went to her work place for seeking leave, leaving her husband P.W.1 and three children at home and subsequently, P.W.1 also left home to complete his job of affixing last two postures and when P.W.3, came back home, P.W.4 was crying and when she enquired, she was told that the appellant, who is the neighbour, called P.W.4 near him and then sent P.W.2 Hari for buying some candies by giving Rs.10/- which

was given by P.W.3 to P.W.4, and then, the appellant took P.W.4 into his house, undressed her, and lay her on the bed and he himself took of his vesthi and brief and then pressed his penis into the vagina of P.W.4 and at that time, P.W.4 cried out of pain and when P.W.2 returned home, he saw the appellant lying over P.W.4 and hence, P.W.2 pushed the appellant away from P.W.4, and took her, dressed her up and when P.W.2 said he would tell the incident to his parents, the appellant criminally intimidated P.W.2 and P.W.4 to do away with their lie if they whispered anything with respect to the incident and thereafter, P.W.3 lodged complaint Ex.P1 before the respondent-Police Station. Based on which, the respondent-Police registered a case against the appellant for the offence under Sections 7 r/w 8 of POCSO Act and 506 (i) of IPC, which has been subsequently altered into Sections 5 (m) r/w 6 of POCSO Act and 506 (i) of IPC. Subsequently, the Investigation Officer, investigated the matter and laid a charge sheet before the learned IV Additional District Sessions Judge, Mahlia Court, Coimbatore.

10. In order to prove the case of the prosecution, 11 witnesses were examined as P.W.1 to P.W.11 and 11 documents were marked as Exs.P1 to P11 and no Material Objects were exhibited. 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. The learned IV Additional District Sessions Judge, Mahlia Court, Coimbatore, after hearing the arguments on either side and considering all the materials placed on record, found that the appellant is guilty and convicted and sentenced, as referred above, which is challenged in this Criminal Appeal.

11. Since this Court is an Appellate Court and also final Court of fact finding, has to re-appreciate the entire evidence and come to the independent conclusion.

12. Against the appellant, the learned IV Additional District Sessions Judge, Mahila Court, Coimbatore, framed two charges, viz., under Section 5(m) r/w 6 of POCSO Act and Section 506 (i) of IPC. In order to prove the charges framed against the appellant, on the side of the prosecution, totally, 11 witnesses were examined and 11 documents were marked. Though P.W.1 and P.W.2 turned hostile, not supported the case of the prosecution, however, the victim child was examined as P.W.4 and she has clearly narrated the occurrence. Since the mother of the victim child left her husband-P.W.1 and P.W.1 and P.W.2 are living separately, therefore, P.W.1 and P.W.2 have not supported the case of the prosecution. P.W.3-the mother of the victim child has stated that she is living separately and she has also narrated the incident,

and she came to know about the occurrence through her daughter P.W.4. The victim child was examined as P.W.4, she has narrated the entire occurrence and the evidence of the victim child was corroborated by her mother. Though P.W.3 is not an eyewitness, soon after the occurrence, P.W.4, the victim child informed the same to her mother. Thereafter, the victim child was taken to the Hospital and P.W.7-doctor, one who conducted the medical examination has clearly given a certificate and also opined that the victim child was subjected to sexual assault. Further, the victim child was also produced before the learned Judicial Magistrate for recording the statement under Section 164 of Cr.P.C. Accordingly, the learned Magistrate also recorded the statement of P.W.4-victim child and P.W.2-the brother of the victim child, which was marked as Ex.P3.

13. A reading of Ex.P3, the statement made by the victim child-P.W.3 and the statement of her brother P.W.2, which clearly show that the appellant has committed the offence. Though the statements recorded under Section 164 (5) of Cr.P.C. is not substantive evidence, however, it can be used for corroboration. Though the statement recorded under Section 161 of Cr.P.C. before the Police is not admissible in evidence, however, the statement recorded by the learned Judicial Magistrate under Section 164(5) of Cr.P.C. is admissible in evidence, but however, it is not substantive evidence, it has to be substantiated and the same can be used for corroboration or contradictions.

14. A reading of Ex.P3 statements of the victim child and her brother-P.W.2, which were recorded under Section 164 (5) of Cr.P.C., by the learned Magistrate, corroborate with the evidence of P.W.4-victim child. Further, a reading of the evidence of P.W.7-Doctor has stated that on examination of the victim child, she found that her hymen was not intact, and her vagina admits tip of the victim child finger and also found that reddishness on her vagina and also issued Ex.P5 report. Therefore, a combined reading of the evidence of P.W.4, the victim child and the evidence of P.W.7-doctor, who conducted the medical examination and Ex.P5-accident register, which clearly show that the victim child was sexually assaulted by known person. The statement recorded by the learned Judicial Magistrate under Section 164 (5) of Cr.P.C. also corroborated with the evidence of P.W.4- victim child. P.W.1 and P.W.2 have turned hostile, because of P.W.3 left P.W.1 and living separately along with P.W.4 victim child, and hence, the appellant easily convinced P.W.1 and P.W.2. Though P.W.2 stated to be eyewitness and during statement, which was recorded under Section 164 of Cr.P.C., he supported the case of the prosecution, however, during examination, P.W.2 turned hostile and the reason is already stated above, since P.W.1 left home due to

misunderstanding between P.W.3 and P.W.1, P.W.1 and P.W.2 have not subsequently supported the case, however, P.W.3 and P.W.4 have clearly spoken and the medical evidence also corroborated the same.

15. In the case like this, the Court cannot expect independent witness or witnesses, because, culprits take the chance of loneliness of the victims, and they would commit these type of offences. In the case on hand, after the occurrence, when the victim child informed to her mother and the mother, who was examined as P.W.3 has clearly stated the occurrence during her evidence.

16. The contention of the learned counsel for the appellant is that there was a delay in preferring the complaint and registering the case, and the same was not properly explained by the prosecution. After deliberation, in order to take advantage of the wreak vengeance, they have filed a false case against the appellant.

17. In this case, delay was properly explained by the prosecution. In POCSO Act cases, no parent would take a hasty decision and immediately rush to the police station and file a complaint. It will affect the future of the female child. Therefore, the parents would naturally think about the future of the child and also about the reputation of the family. Normally, they used to take advise of the elders. Therefore, the contention of the learned counsel for the appellant that the delay in filing the complaint is fatal to the case of the prosecution, is not acceptable.

18. The date of birth of the victim girl is 06.08.2010 and the alleged occurrence is said to have occurred on 13.10.2015 and at the time of occurrence, the age of the victim child is 5 years. Ex.P2 is the birth certificate of the victim girl. Section 5 of POCSO Act, prescribes punishment for aggravated penetrative sexual assault, 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. In the case on hand, the victim child was aged about 5 years, at the time of occurrence. P.W.3-mother of the victim girl and P.W.4-victim have clearly deposed the entire occurrence, which was also supported by the evidence of P.W.7-doctor. Therefore, the learned Judge rightly held that the offence committed by the appellant would fall under Section 5(m) r/w 6 of POCSO Act. Further, the victim child has clearly stated that, after the occurrence, the appellant threatened her not to reveal anybody, if reveals, he would take away her life. Therefore, the prosecution has proved for the offence under

Section 506 (i) of IPC.

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 the learned IV Additional District Sessions Judge, Mahila Court, Coimbatore. 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. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

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Sub Assistant Registrar

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To

- 1.The IV Additional District Sessions Judge,
Mahila Court, Coimbatore.
- 2.The Inspector of Police,
All Women Police Station (East),
Coimbatore City & District.
- 3.The Public Prosecutor,
Madras Highcourt, Chennai.
- 4.The Tamilnadu State Legal Services Authority,
Highcourt Campus, Chennai.

+cc to Mr.C.D.Vivekanandan, Advocate Sr.No. 22910
+cc to Mr.R.Ganesh, Advocate Sr.No. 20355

CrI.A.No.553 of 2020 &
CrI.M.P.No.8997 of 2020

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baf 11/05/2021

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