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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.07.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.NO.507 OF 2020

Dhakshinamoorthy

... Appellant/Accused

.Vs.

State by
The Inspector of Police,
W-19 All Women Police Station,
Adyar, Chennai.
(Crime No.1039 of 2016)

...Respondent/Complainant

PRAYER:-

Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the conviction and sentence passed by the learned Special Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai in S.C.No.162 of 2018, by Judgment dated 02.11.2020 and acquit the appellant herein from the charges.

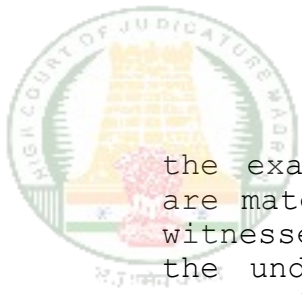
For Appellant : Mr.S.Sasikumar

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

J U D G M E N T

This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 02.11.2020 made in Special S.C.No.162 of 2018 on the file of the learned Sessions Judge, Special Court for Exclusive trial of Cases under POCSO Act, Chennai.

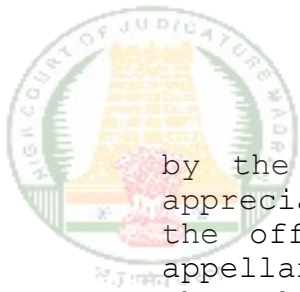
2. The respondent Police have registered a case in Crime No.1039 of 2016, for offence punishable under Section 6 of the Protection of Children from Sexual Offence Act, 2012 (hereinafter called as 'POCSO Act') and 506 (i) of IPC against the appellant on the complaint (Ex.P1) given by PW1. After completing investigation, the respondent police laid a charge



the examination before the trial Court as a witness and there are material contradictions between the evidence the prosecution witnesses. Though P.W.1 has stated that the blood stain, semen, the underwear was referred to the Forensic Department by the prosecution and the report also shows that there was no semen or blood stain collected and therefore, the case of the prosecution is false. Further, the medical report also shows that there was no external injury and her hymen was intact and there is no other injury or abrasions, which clearly shows that there was no penetrative sexual assault and as such, the medical evidence also not supports the case of the prosecution. Even though the victim child not named the P.W.6 during the statement recorded under Section 164(5) of Cr.P.C, and she has narrated one Dharani and Mani, Mani was not examined by the prosecution and the name of P.W.6 [K.Suriyamoorthy] was not at all mentioned in the prosecution and introduced P.W.6, which also suspicious about the case of the prosecution.

7. It is further stated by the learned counsel that the victim child was not immediately sent before the learned Magistrate to record the statement under Section 164 (5) of Cr.P.C. Therefore, the victim child was tutored by the Investigating Officer and recorded statement under Section 164 (5) of Cr.P.C. Even in the statement recorded under Section 164 (5) of Cr.P.C. also, the victim child has not stated anything about the penetrative sexual assault as alleged by the prosecution. Therefore, the trial Court failed to appreciate the oral and documentary evidence and convicted the appellant based on presumption and sympathy, which warrants interference.

8. The learned Government Advocate (Criminal Side) appearing for the respondent-Police would submit that the prosecution has proved its case beyond reasonable doubt. The age of the victim at the time of occurrence is only 7 years and when the victim child was sleeping, the appellant trespassed into the house and at that time the brothers of the victim were playing outside, and taking advantage of the same, the appellant removed his dress and also removed her panty and laid over her and when the victim child made hue and cry and after hearing the noise of the victim child, P.W.4 and P.W.6 entered into the house and assaulted the appellant, however, the appellant escaped from the spot by showing the knife. P.W.4 and P.W.6 have also identified the appellant, one who committed the offence. It is further submitted that though medical evidence not supported the case of the prosecution, however, the evidence of victim child (P.W.3) and the eyewitness (P.W.4 and P.W.6) have categorically stated that the appellant one who has committed the offence. The learned Government Advocate would further submit that the intention of the accused to commit the offence of aggravated penetrative sexual assault on the victim child has been proved



by the prosecution and the learned Special Judge, on proper appreciation of evidence, rightly convicted the appellant for the offence under Section 6 of the POCSO Act. Further, the appellant threatened the accused trespassed into the house and when the victim child attempted to shout, he threatened her that he would kill her and gagged her with cloth and hence, the learned learned Special Judge also convicted the appellant for the offence under Section 450 and 506 (i) of IPC and therefore, prays for dismissal of the Appeal.

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

10. The case of the prosecution is that on 30.05.2016 at about 2.00 p.m., when the sister's daughter of the defacto complainant was sleeping at the house of the defacto complainant, the accused trespassed into her house and locked inside and committed penetrative sexual assault on the victim child forcibly. When the victim child attempted to shout, he threatened her that he would kill her and gagged her with cloth. At that time, the brother of the victim child came there and noticed that the door was locked. When he saw through the hole of the door, the accused who was lying on the victim child. He managed to open the door by giving his hand inside the door gap and rushed inside. He beat the accused and released the victim and the accused ran away from the place of occurrence. At 7.30 p.m, when the defacto complainant returned home work, the brother of the victim child and the victim child told her (P.W.1) about the occurrence and thereafter, P.W.1 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 6 of POCSO Act and 506 (i) of IPC. Subsequently, the Investigating Officer, investigated the matter and laid a charge sheet before the learned Sessions Judge, Special Court for Exclusive trial of Cases under POCSO Act, Chennai.

11. During the trial, on the side of the prosecution, as many as 9 witnesses were examined as P.W.1 to P.W.9 and 11 documents were marked as Exs.P1 to P11 and three material objects were exhibited as M.O.1 to M.O.3. After completing the examination of prosecution witnesses, when incriminating circumstances were culled out from the evidence of prosecution witnesses put before the appellant by questioning under Section 313 Cr.P.C., he denied the same as false and pleaded not guilty. On the side of the defence, one Vinoth was examined as D.W.1 and no document was marked.

12. The learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai 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.

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13. 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 and accordingly, this Court has re-appreciated the entire oral and documentary evidence produced before this Court and come to the independent finding.

14. Against the appellant, the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai, framed three charges, viz., under Sections 448, 506 (ii) IPC and Section 6 of POCSO Act, 2012. In order to prove the charges framed against the appellant, on the side of the prosecution, totally, 9 witnesses were examined, out of which, the victim child was examined as P.W.3. As per the prosecution evidence and also documents produced by the prosecution, the victim child is 7 years at the time of the offence. In order to prove the age of the victim child, the prosecution has marked Ex.P4-birth certificate of the victim. As per Ex.P4, school certificate, the date of birth of the victim child is 11.06.2008 and the occurrence said to have taken place on 30.05.2016, therefore, the victim child was aged only 7 years at that time, and not completed 18 years and therefore, she is a child under the definition u/s.2(1)(d) of POCSO Act and the offence committed by the appellant falls under POCSO Act.

15. As far as the commission of offence under Section 450 of IPC is concerned, victim child (P.W.3) has clearly narrated the entire occurrence that while sleeping, the appellant trespassed into the house and committed the charged offence, which was also corroborated by the eyewitnesses (P.W.4) and (P.W.6). They have also clearly stated that after hearing voice of the victim, they had gone into the house, and the appellant was there in the house, subsequently, he escaped from the place of occurrence. Though the counsel for the appellant pointed out that there are contradictions and inconsistencies regarding the sexual assault made by the appellant, they are not material contradictions, which would go to the root of the case of the prosecution, and a reading of the entire evidence of P.W.3, P.W.4 and P.W.6., this Court finds that the appellant has committed the offence under Section 450 of IPC.

16. As far as commission of offence under Section 506 (ii) of IPC is concerned, the victim child has stated that the appellant trespassed into the house of the victim and removed her dress and when the victim tried to raise alarm, he threatened her by showing knife and told that he would kill her and gagged her



with cloth. P.W.4 and P.W.6 also after hearing the noise of the victim child, came to the house and unlocked the door through the door gap, and immediately, entered into the house and attacked the appellant and he escaped from the spot, by showing knife. Therefore, the prosecution has proved for the offence under Section 506 (ii) of IPC. According to the learned counsel for the appellant, the knife was not recovered by the Investigating Officer. It is to be noted that the victim child is aged about 7 years and the eyewitnesses P.W.4 and P.W.6 have clearly stated about the fact that the appellant was having knife. Further, even cross examination, the victim child has stated that the appellant took the knife from the cupboard of the house of the defacto complainant. However, mere non recovery of knife is not the sole ground to disbelieve the evidence of the victim and therefore, the contention of the learned counsel for the appellant is rejected and the prosecution has proved the case that the appellant has committed the offence under Section 506 (ii) of IPC.

17. The next point to be decided in this Appeal, whether the appellant has committed the offence punishable under Section 6 of POCSO Act, or not. A careful reading of statement recorded under Section 164 (5) 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 30.05.20216, which was marked as Ex.P3 and also during evidence, she deposed the entire occurrence. A reading of the evidence of the victim child, who examined as P.W.3, has clearly deposed that she had gone to her aunt's (defacto complainant) house for a vacation and on the date of occurrence she was watching TV and then slept and her brothers were outside to play goli and at that time, the appellant trespassed into the house and removed her panty and inserted his finger into the private part of the victim child and also laid over her and due to pain, when she cried, the brothers of the victim child came there and noticed that the door was locked and managed to unlock the door from outside and came into the house and assaulted the accused and released her. The brother of the victim child was examined as P.W.4 and the cousin brother of the defato complainant was examined as P.W.6 and they have also corroborated the evidence of the victim child regarding the fact that when the victim child shouted, they rushed to the house and they have seen the accused lying down on the victim child without clothes and they unlocked the door through the door gap and released the victim and assaulted the accused and he escaped from the spot with knife point.

18. According to the learned counsel for the appellant, the victim child (P.W.3) did not identify the appellant on the first time during trial and admitted that the appellant is not the



person, who committed the offence on her and when the trial Court pressurized the victim child (P.W.3) by way of putting leading question to her to identify fit he appellant, the victim child identified the appellant only on the instructions of the trial court. It is to be noted that on a careful reading of the statement of the victim child, which was recorded under Section 164(5) of Cr.P.C., the victim child had clearly narrated the entire occurrence and in the statement it is stated by the victim child that when she was sleeping, the appellant trespassed into the house and when she attempted to shout, the accused threatened her that he would kill her and gagged her with cloth and removed his pant and also removed her panty and inserted his private part into her private part, when she cried out of pain, the brothers, who were playing into the outside of the house, unlocked the door and rescued the victim child and attacked the victim. During the evidence also, victim child has narrated the entire occurrence. It is to be further noted that at the time of occurrence, the victim child was aged about only 7 years and she was examined only after two years and further, the victim child has clearly stated during her evidence that when she was sleeping, the accused trespassed into the house and committed the offence and therefore, mere non-identifying the appellant on the first time through video, during trial is not a fatal to the case of the prosecution, and however, when the accused was shown to her for the second time, he observed him keenly and told that he was the person who came to the house on the date of occurrence. Further, the evidence of the victim child was also corroborated by the P.W.4 and P.W.6 who are eyewitnesses to the occurrence and therefore, the contention of the learned counsel in this aspect is also rejected.

19. Though the learned counsel for the appellant would submit that P.W.5.doctor, who examined the victim child has stated that there was no external injuries found on her and her hymen was intact and there was no symptoms for having sexual intercourse, it could be seen that the victim child had clearly narrated the entire fact during statement recorded under Section 164(5) of Cr.P.C. and also during evidence. Admittedly, in the case on hand, from the evidence of the victim child, it could be seen that the appellant had inserted his private part into the private part of the victim child and due to pain when she cried, P.W.4 and P.W.6 eyewitnesses came to the spot and rescued the victim. Mere penetrates his penis, to any extent, into the vagina of a child is an offence. Depth is immaterial, likewise whether child gets injury or not also immaterial. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible. Therefore, mere doctor has stated that there was no injury, that would not affect the case of the prosecution.



20. Further, it is also to be noted that the victim child was only 7 years at the time of occurrence and not completed 12 years and therefore, she is a child under the definition under Section 2 (1)(d) of POCSO Act. P.W.4 and P.W.6, the eyewitness also clearly deposed that that when they were peeping through window after hearing the noise of the victim child, they noticed that the accused was lying down on the victim child without any dress by removing her panties and they immediately rescued the victim child and attacked 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(m) of the POCSO Act, which is punishable under Section 6 of the POCSO Act, and the learned Sessions Judge rightly appreciated the evidence of the prosecution witnesses and convicted the appellant.

21. At this juncture, it would be useful to refer Section 3, 5(m) and 6 of the 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

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

5. Aggravated penetrative sexual assault:-

5(m) Whoever commits penetrative sexual assault on a child below 12 years,

6. Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than 10 years but



which may extend to imprisonment for life and shall also be liable to fine."

A careful reading of the language of the said provisions of law and also the statement of the victim child (Ex.P3) and the evidence of the victim child (P.W.3), and the evidence of the brothers of the victim child viz., P.W.4 and P.W.6 (eyewitnesses), it could be seen that the appellant has committed the offence under Sections 5 (m) of the POCSO Act, which is punishable under Section 6 of POCSO Act.

22. Yet another contention of the learned counsel for the appellant is that there was a motive to foist a false case against the appellant. In this case, there is no reason to disbelieve or disregard the evidence of the victim child. Further, there was no necessity to foist such a false serious case against the appellant by spoiling the future of the victim child (P.W.3). It is pertinent to mention here that parent of the victim child need not say all these things and also the parent of the victim child will not spoil the future of the victim child for any flimsy reason. Therefore, the above contention of the learned counsel for the appellant is also rejected. Further, there was no reason to discard the evidence of victim girls. Normally, corroboration of witness is necessary, whereas, offence under POCSO Act, the evidence of the victim girls are sufficient and the Court cannot expect any independent eyewitness, since it is not the case of the prosecution that the offense had taken in the presence of some other eye witnesses. Further, the defense has not established that for which specific reason, they foisted a false case against the appellant. 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 the victim child is cogent and consistent, and there is no reason to discard the evidence of the victim child.

23. Hence, this Court can safely come to the conclusion that the appellant has committed the charged offence. In the light of the above discussion, this Court does not find any merit in this appeal and the appeal is liable to be dismissed, accordingly, it is dismissed. The Trial Court is directed to secure the appellant for sufferance of sentence, if he is outside.

Sd/-

Assistant Registrar(CS IX)

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Sub Assistant Registrar

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To

1. The Special Judge,
Special Court for Exclusive Trial of Cases
under POCSO Act,
Chennai.

2. The Inspector of Police,
W-19 All Women Police Station,
Adyar, Chennai.

3. The Superitendent Central Prison,
Puzhal, Chennai.

4. The Public Prosecutor,
High Court of Madras,
Chennai.

5. The Honourabe POCSO Committee,
High Court, Madras.

Copy To:

The Section Officer,
Criminal Section,
High Court, Madras.

CRL.A.NO.507 OF 2020

NMI (CO)
PBS/12/08/2021