

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.03.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.694 of 2019

Arumugam

.. Appellant/Accused

.Vs.

State rep by:-

The Inspector of Police,
All Women Police Station,
East Coimbatore,
Coimbatore District.

.. Respondent/Complainant

Criminal Appeal filed under Section 374 (2) of the Code of Criminal Procedure to set aside the Judgment of Mahila Court, Fast Track, Coimbatore dated 28.12.2017 passed in Spl.C.C.No.2 of 2017 in erroneously convicting the appellant herein under Section 9(m) r/w Section 10 of Protection of Children from Sexual Offences Act 2012 sentencing him to 7 years rigorous imprisonment and fine of Rs.2,500/-.

For Appellant : M/s.Vijayalakshmi
K.Rajaratnam
Legal Aid counsel

For Respondent : Mr.R.Suryaprakash
Government Advocate (Crl.side)

J U D G M E N T

This Criminal Appeal has been filed challenging the conviction and sentence passed in Spl.C.C.No.2 of 2017 dated 28.12.2017 on the file of the learned Sessions Judge, Magalir Court, [Magalir Fast Track Court], Coimbatore.

2. The respondent police registered a case in Crime No.8 of 2015 against the appellant for the offences punishable under Section 9 r/w 10 of Protection of Children from Sexual Offences Act 2012 (in short 'POCSO Act'). After investigation, charge sheet was laid and taken on file before the Sessions Judge, Magalir Court, [Magalir Fast Track Court], Coimbatore.

3. After completing the formalities, the learned Judge framed the charge against the appellant for the offences punishable under Sections 9(m) r/w 10 of POCSO Act.

4. After completing the trial and hearing the arguments advanced on either side and also considering the oral and documentary evidence, the Special Court found the appellant guilty of the offence under Section 9 of the POCSO Act which is punishable under Section 10 of POCSO Act, 2012 and convicted and sentenced the appellant to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.2,500/-, in default, to undergo one month rigorous imprisonment. Aggrieved by the said conviction and sentence, the appellant is before this Court by filing this Appeal.

5. The learned counsel for the appellant would submit that the occurrence is said to have taken place on 21.03.2015 but the complaint had been lodged belatedly only on 25.03.2015 and the said delay in filing the complaint has not been properly explained, which shows that a false case has been foisted against the appellant. He would further submit that though it is the case of the prosecution that at the time of occurrence, the appellant was at Cheranmanagram and that the occurrence had taken place in the house of Kathirvelu, the prosecution having not established the presence of the appellant at the time of occurrence at Cheranmanagaram and at the house of Kathirvelu, the said infirmity is fatal to the case of the prosecution. It is the further contention of the learned counsel for the appellant that though the victim child categorically deposed that Kathirvelu used to take the victim child out and used to touch her inappropriately while playing with her, however, the learned Judge has failed to consider the same and in this backdrop, the delay in filing the complaint is detrimental to the case of the prosecution. It is the further submission of the learned counsel for the appellant that the identification of the appellant by the victim child does not inspire the confidence as she has taken varied stance in her identification during cross examination. Further, the father and mother of the victim having no idea about the appellant and the kids, more particularly, the brother of the victim, being elder, who is said to have been playing along with her at the time of occurrence having not been examined, the theory projected by the prosecution does not deserve acceptance. Further, it is submitted that the investigating officer has not properly investigated the matter to find out the real culprit and the evidence of P.W.10- Doctor, relating to non-existence of any external injury and further the victim having not disclosed the name of the appellant clearly show that the implication of the appellant is by chance without there being any material to connect him with the said offence.

6. It is further submission of the learned counsel for the appellant that there is no corroborating material to the evidence of the victim girl as to the presence of the appellant at the time of occurrence and taking into account the age of the victim at the time of occurrence, relying on her evidence to find the appellant guilty is wholly unsustainable. The learned trial Judge has failed to consider that the prosecution has not established its case beyond reasonable doubt and the victim girl being aged only about 3 years basing conviction on her identification, which has varied both in chief and cross, the conviction rendered by the trial court deserves interference.

7. The learned Government Advocate (Crl. Side) would submit that the deposition of P.W.1 - the mother of the victim clearly reveals that on the date of occurrence, the victim had complained of pain in her private part, which was ignored initially, but the continuous pain had caused the victim to be examined by a doctor, leading to the discovery of the alleged sexual act meted out to the victim by the appellant. It is the further submission of the learned Government Advocate that the victim had clearly identified the appellant even at the first time as the person who had committed the sexual act and the said identification coupled with the evidence of the doctor, P.W.10, and the certificate issued relating to the internal injury suffered by the victim clearly reveal that the victim had been sexually abused by the appellant. Learned Government Advocate further submitted that the delay in lodging the complaint could not be put against the prosecution as even the parents of the victim were not initially aware of the sexual abuse meted out to the victim and only the continuous pain suffered by the victim leading to the doctor certifying that she had suffered sexual abuse had resulted in P.W.1 lodging the complaint with the police. It is the further submission of the learned Government Advocate that the evidence of P.W.s 1, 3, 4 and 5, viz., the mother, father, neighbour and uncle of the victim corroborate each other and the identification of the appellant by the victim along with the corroboration offered by the other witnesses clearly point the finger on the appellant as the person, who had committed the offence and the trial court, on proper application of mind to the evidence placed before it had found the appellant guilty.

8. He would further submit that the non-mentioning of the name of the appellant by the victim to the doctor is not fatal, keeping in mind the age of the victim and the prosecution had proved its case beyond reasonable doubt and the trial court had appreciated all the materials placed before it and had come to the conclusion that it was the appellant, who had committed the offence and the appellant, having not placed any tenable

material to rebut the said evidence, the findings recorded by the trial court does not warrant any interference.

9. Heard both sides and perused the records.

10. The case of the prosecution is that on 21.03.2015 the victim child and her family went to their own house at Cheranmanagram, for doing some renovation work and when the victim girl was playing in portico, the appellant, who had come to the house of P.W.4, who was a lessee under P.W.s 1 and 3, has sexually abused the victim. It is the further case of the prosecution that when the victim came to her house, she had complained of pain while attending nature's call and immediately P.W.1 washed the private part of the victim girl with hot water. Since, the pain persisted for two days, P.W.1 found that there are injuries in the private part of the victim girl thereafter taken her to P.W.10, who found that the victim had been sexually abused as she had internal injury on her private part. Enquiry of the same with the victim led to the identification of the appellant and lodging of the complaint.

11. After completing the investigation, the police laid a charge sheet and the same was taken on file by the Mahila Court, Coimbatore, and charges were framed against the appellant as above.

12. In order to prove the case of the prosecution before the trial Court, the prosecution examined as many as 12 witnesses as P.W.1 to P.W.12 and 12 documents were marked as Exs.P1 to P12. No material object was exhibited.

13. After completing the examination of the prosecution witnesses, all the incriminating circumstances culled out from the evidence of the prosecution witnesses, were put before the appellant and the appellant denied the same false and pleaded not guilty. However on the side of the appellant, neither any witness was examined nor any documentary evidence was marked.

14. After completing trial and after hearing arguments advanced on either side, the trial court, by judgment dated 28.12.2017 in Spl.C.C.No.2 of 2017, convicted and sentenced the appellant as stated supra. Challenging the said conviction and sentence, the present appeal has been preferred by the appellant.

15. 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.

16. The occurrence is said to have taken place on 21.3.2015, while the complaint, Ex.P-1, has been lodged only on 24.3.2015.

It is the submission of the appellant that the delay in lodging the complaint is fatal to the prosecution case. In order to appreciate, whether the delay is fatal to the case of the prosecution, a perusal of the deposition of P.W.s 1 to 5 reveal that on finding the persistent pain suffered by the victim, P.W.1, the mother of the victim, had taken her to the doctor, P.W.10 on the morning hours of 24.3.15 and on coming to know about the sexual abuse suffered by the victim and after conversing with the victim, who was aged only about 3 years at that time and after ascertaining that some person in the household had sexually abused her, the fact finding mission as to who had sexually abused the victim was launched, leading to the victim identifying the appellant at the house of P.W.4, as the person, who perpetrated the offence. Thereafter, the complaint had been lodged with the police on the same day. The delay from the date of occurrence to the lodging of the complaint is sought to be put against the prosecution, but an overall analysis of the entire scenario, it is to be pointed out that the sexual abuse has been given to a girl child and the parents of the child, would definitely be very guarded in giving the complaint, lest the name of the child would be smeared and her life would be ruined. However, in this case, immediately on knowing about the sexual abuse and also identifying the person, the complaint had been lodged and the mere delay from the date of occurrence to the lodging of the complaint could not be taken as delay, more so, when the victim was aged only 3 years and after finding out the facts, the complaint was lodged. Therefore, the contention of the appellant that the delay is fatal to the prosecution does not merit acceptance.

17. It is the submission of the appellant that the evidence of the witnesses does not corroborate with the evidence of the victim and the victim had not been firm in her identification of the appellant and, therefore, the fixing of the appellant as the person, who had caused the sexual abuse, does not stand established and only to shield some other person, the appellant had been roped in as the accused.

18.A perusal of the deposition of P.W.s 1 to 5 clearly reveal that based on the identification made by the victim to the effect that it is the appellant who is the person, who had caused the sexual abuse, the criminal machinery was set in motion. P.W.s 1 and 3, the parents of the victim were not aware of the name of the appellant, as they did not know the appellant, who was a friend of P.W.4. The victim, who was aged only 3 years at the time of occurrence, cannot be expected to know the name of the appellant, however, in a group of persons, the victim had identified the appellant as the person, who had sexually assaulted her. Though in the deposition in chief and cross, there is slight variation as to the identification of the

appellant, however, it is to be pointed out that even during trial, the victim was aged only about 7 years and though the trial court had satisfied itself as to the mind and ability of the victim to give evidence, however, slight variation in the evidence during chief and cross cannot be put against the victim to hold that her entire evidence is unacceptable. A child aged about 7 years would not be able to know the exact nature of the questions and the impact of her answers to the said questions being put to her in chief and cross. The said answers in chief and cross have to be harmoniously considered to render a finding as to whether the said evidence can be accepted or not. Though there is slight ambiguity in the identification of the appellant in court by the victim, yet it can be safely said from the evidence of the victim, both in chief and cross that she had identified the appellant in court, as she had done at the initial point of time. May be, the actual nature of the question framed in cross is trying to defeat the evidence given by the victim in chief, but considering the age of the victim, even at the time of giving evidence, this Court is of the view that the said evidence cannot be said to be self-contradictory and coupled with the evidence of P.W.s 2 to 5, who have corroborated each other on all material particulars, the finding of guilt of the appellant recorded by the trial court does not call for any interference.

19. Further, the evidence of P.W.10, the doctor, who examined the victim coupled with the accident register, Ex.P-11 issued by her relating to the sexual assault suffered by the victim clearly establish that the victim had suffered sexual assault and the other evidence, as pointed out above, point the finger on the appellant as the person who has committed the sexual assault. The minor discrepancies in the statement given by the victim to the Magistrate vis-a-vis her evidence in court cannot be the sole ground to treat the evidence as flawed as the age of the victim has to be borne in mind while appreciating the evidence. It is to be pointed out that neither the victim nor her family members had any axe to grind against the appellant and the case of the appellant that a false case is foisted against him falls short of acceptance, as the appellant has not placed any evidence to the contra to show that there existed any enmity between the appellant and the family of the victim or any of the witnesses/investigating authorities necessitating fabrication of a false case against him. Mere raising a plea that a false case is being foisted against him would not suffice, as charge is made under the POCSO Act and it is the duty of the appellant to rebut the presumption by placing necessary evidence, which the appellant has failed to furnish. In the absence of the same, the finding recorded by the court below is based on proper appreciation of evidence and the conviction does not suffer any infirmity requiring interference

at the hands of this Court.

20. Though this Court confirms the conviction recorded by the Court below, however, it cannot be brushed aside that certain minor infirmities are there in the prosecution evidence, which is not affecting the prosecution case in any way, but yet tend to lean more in favour of the appellant for a modification in sentence. Considering the age of the appellant and all the associated factors connected therewith, as pointed out above, the sentence of of seven years rigorous imprisonment imposed on the appellant is modified to five years.

21. In the result, this appeal is dismissed by confirming the conviction, but modifying the quantum of sentence awarded by the trial court from seven years to five years. The legal aid counsel appointed by this Court is entitled to legal fees.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Mahila Court,
Fast Track Court, Coimbatore

2. Do Thro' The Sessions Judge,
Mahila Court, FTC Coimbatore.

3. The Inspector of Police,
All Women Police Station,
East Coimbatore,
Coimbatore District.

4. The Superintendent,
Central Prison, Coimbatore.

5. The Secretary,
Legal Services Authority
Madras High Court
Chennai.

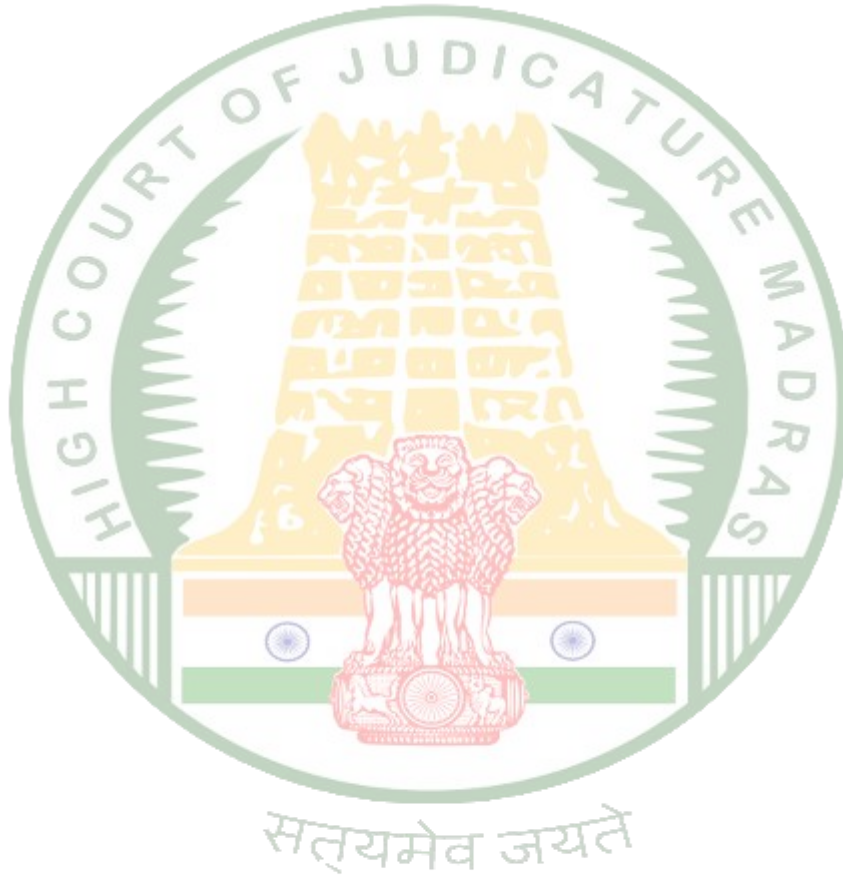
6. The Deputy Registrar
(Criminal Section),
High Court, Madras.

7.The Public Prosecutor,
High Court, Madras.

+lcc to M/s.Vijayalakshmi, Advocate, S.R.No.14899

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MG(CO)
CB(29/06/2021)



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