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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.10.2021

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THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.NO.473 OF 2021

Thangaraj

.. Appellant

.Vs.

State by
The Inspector of Police,
All Woman Police Station.,
Erode.
Crime No.22 of 2018.

.. Respondent

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to set aside the conviction and sentence passed by the Court of Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court) Erode in Spl.S.C.No.13 of 2019 dated 02.09.2021.

For Appellant : Mr.K.M.Subheramaniam
and
Mr.PA.Kadirvel,
Legal Aid Counsel

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

J U D G M E N T

This Criminal Appeal has been filed against the judgment dated 02.09.2021 passed in Spl.S.C.No.13 of 2019 by the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court) Erode.

2.The case of the prosecution is that the victim girl, who is aged about 6 years was residing along with her parents and brother at Erode. The accused who is aged about 50 years is the neighbour of the victim child. On 25.08.2018 at 5.30 p.m the victim child after returning from the school went out for



playing. After some time, the mother of the victim child found her daughter missing and on searching she heard the feeble voice of her daughter from the accused house. When the mother of the victim child entered into the house of the accused her daughter was taken out by the accused at that time she found the victim child was carrying her pant and inner ware on her hand. On enquiry, she came to know from the victim child that the accused has committed penetrative sexual assault on the child. On further enquiry, the victim child revealed that the accused criminally intimidated her that he will repeat the same, if she makes any sound. Hence, P.W.1/mother of victim child filed a complaint/Ex.P1 against the accused.

3.The respondent police registered a case in Crime No.22 of 2018 for the offence under Section 5(m) r/w 6 of The Protection of Children from Sexual Offences Act, 2012 [hereinafter referred to as 'POCSO Act' for the sake of convenience] and Section 506 (i) IPC. On completion of the investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court) Erode. Since the offence is against a girl child, it falls under the definition of 2(1) (d) of POCSO Act. After completing the formalities, the learned Sessions Judge taken the case on file in Spl.S.C.No.13 of 2019 and charges were framed against the accused/appellant for the aforesaid offences.

4.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 marked 18 documents as Ex.P1 to Ex.P18. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused/ appellant and questioned under Section 313 of Cr.P.C and he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

5.The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that the appellant is guilty for the following offences :

(i) Under Section 5(m) which is punishable under Section 6 of POCSO Act, the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for a period of three months;



(ii) Under Section 506(i) IPC, the appellant was convicted and sentenced to undergo simple imprisonment for a period of two years and ordering the sentences to run concurrently. Challenging the said conviction and sentence the appellant is before this Court.

6.1 The learned counsel for the appellant would submit that there was a dispute between the families of the appellant and the victim child. Due to such personal enmity and to take vengeance, the mother of the victim child has foisted a false case by tutoring the child against the appellant. The victim child/P.W.2 herself admitted that since the appellant beaten her brother one Kanesh, there was a quarrel arose between two families and the same was admitted by the prosecution witnesses viz., P.W.1 and P.W.3. He would further submit that while recording the statement of the victim child under Section 164 Cr.P.C/Ex.P9, she has stated that one Chandrasekhar Anna had committed the said alleged offence, whereas, during the trial, she has stated that one Thangaraj Thatha has committed the said offence. Hence, there is a contradiction in the evidence of the victim girl. He would further submit that no identification parade was conducted by the Investigating Officer and without proper enquiry they laid a charge sheet against the appellant.

6.2 The learned counsel for the appellant would further submit that the alleged occurrence is said to have taken place on 25.08.2018 and the complaint was registered on the same day at 20.30 hours. However, there was a delay in sending the F.I.R to the Court and recording the statement of the victim girl under Section 164 Cr.P.C and the same are fatal to the case of the prosecution. He would further submit that the prosecution witnesses viz., P.W.1, P.W.2, P.W.3 and P.W.5 are only interested witnesses and no independent eye witness was examined. There was a contradiction in the evidence of the prosecution witnesses. Further, the Doctor/P.W.12 who examined the victim girl has clearly stated that hymen of the victim girl was intact and no external injuries or scratch marks found on the body of the victim girl and she has given her final opinion/Ex.P15. During trial, the victim girl deposed that the appellant touched her private parts and scratched with his nails, but, the medical evidence does not support the case of the prosecution. The trial Court failed to appreciate the entire oral and documentary evidence and convicted and sentenced the appellant only on assumption, conjectures and sympathy. Therefore, the judgment of conviction and sentence passed by the trial Court against the appellant is liable to be set aside.

7.1 The learned Government Advocate (Crl.Side) would submit that at the time of occurrence i.e. on 25.08.2018, the victim



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child was 6 years and she was studying UKG. In order to prove the age of the victim girl, the prosecution exhibited Ex.P2/Birth Certificate and Ex.P.11/Bona fide certificate of the victim child, in which, the date of birth of the victim child is shown as 04.01.2013. Since the victim is a child, the offence committed by the appellant comes under the definition of aggravated penetrative sexual assault. During the trial, the victim child/P.W.2 has clearly deposed that on 25.08.2018, after returning from school, she went outside for playing and at that time, the accused called her to his home that he will give chocolates and took her into his house. Thereafter, the appellant locked the door and removed her dress and made her lie on cot and rubbed her private parts with his nails. She felt painful due to the long nails in the fingers of the accused and hence she shouted. The appellant criminally intimidated her that he will repeat the same if she makes any sound. At that time, P.W.1/mother of the victim went in search of the child and she heard the feeble noise of the victim from the accused house and on entering into the house of the accused, the victim was taken out by the accused and P.W.1 saw that the victim child holding her inner ware in her hands. Thereafter, on enquiry, the victim child revealed the said incident to her mother/P.W.1, who in turn, informed the same to P.W.3/father of the victim child and P.W.5/Aunt of the victim child and thereafter P.W.1 filed complaint against the appellant. He would further submit that the evidence of the victim child/P.W.2 is corroborated with the evidence of P.W.1, P.W.3 and P.W.5.

7.2 The learned Government Advocate (Crl.Side) would further submit that even though the Doctor/P.W.12 who examined the victim child has stated that there was no external injuries found on the private part of the victim child and hymen was intact, but, before the trial Court, she has clearly deposed that at the time of enquiry, the victim child has stated that she was subjected to sexual assault by a known person. However, during trial, the victim child clearly deposed about the sexual assault committed by the appellant. Hence, the evidence of the victim child is prevail over the medical evidence. He would further submit that even though there was no eye witness to the said occurrence, the victim child who is the prosecutrix has clearly narrated the incident before the learned Judicial Magistrate while recording her statement under Section 164 Cr.P.C. The learned counsel appearing for the appellant pointed out that the victim child has mentioned the name of appellant while recording her statement under Section 164 Cr.P.C as Chandrasekhar Anna, whereas, during trial she has mentioned as Thangaraj Thatha. However, it is seen that during trial, the victim child clearly identified the accused one who called her into his home by promising to give chocolates and she has clearly deposed about the sexual assault committed by the



accused. Moreover, P.W.1/mother of the victim child also stated that her daughter was taken out by the accused and she found her daughter holding her pant and inner wear with her hand. Therefore, soon after the occurrence, P.W.1 saw her daughter came from the house of the appellant. Though P.W.1 and P.W.2 identified the accused, a child of this age will be able to recollect through photographic memory than recollecting the person or things by name. Since the accused is a neighbour, the victim child is able to recollect the face of the accused and during trial she has clearly identified the accused as Thangaraj Thatha, one who had committed the sexual offence. From the evidence of P.Ws.1 to 3 and P.W.5, Ex.P2, Ex.P9 and Ex.P11 the prosecution has proved its case beyond all reasonable doubts. The trial Court has rightly appreciated the entire evidence and convicted and sentenced the appellant and hence, the appeal is liable to be dismissed.

8.Heard Mr.K.M.Subheramaniam, learned counsel appearing on behalf of the appellant; Mr.PA.Kadirvel, learned Legal Aid Counsel appearing on behalf of the appellant and Mr.S.Sugendran, learned Government Advocate (Crl.Side) appearing for the respondent and also perused the materials available on records.

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

10.In order to substantiate the charges framed against the appellant, on the side of the prosecution, the victim girl was examined as P.W.2 and she has clearly stated that on the date of occurrence i.e. on 25.08.2018, after returning from the school, she went outside for playing, at that time, the accused called her to his home that he will give chocolates. When she went to the house of the appellant, the appellant locked the door and asked her to remove her dress and made her lie on cot and rubbed her private parts with his fingers and since his nails were long, she felt pain and hence she shouted. Thereafter, on enquiry, she revealed the said incident to her mother. Further, while recording the statement of the victim child under Section 164 Cr.P.C., she had clearly narrated the said incident.

11.P.W.1/mother of the victim girl has clearly stated that on the date of occurrence when she went in search of her child, she heard the feeble noise of her daughter from the accused house and on entering into the house of the accused she found her daughter was taken out by the accused and the victim child holding her inner ware with her hand. Thereafter, she informed the said incident to her husband/P.W.3 and her husband's sister and thereafter they went to the accused house and asked about



the said incident, for which, he did not reply properly. Hence P.W.1 preferred the complaint/Ex.P1 against the appellant. The evidence of P.W.1 is corroborated with the evidence of P.W.3 and P.W.5.

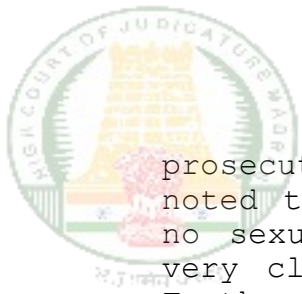
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12. P.W.12/Doctor, who examined the victim girl has clearly deposed that the victim child was not subjected to penetrative sexual assault and there was no external injuries and her hymen was intact, however, on enquiry, the victim child has stated that she was sexually assaulted by a known person and the Doctor has given her final report, which was marked as Ex.P15. Though the medical evidence has not supported the case of the prosecution, the victim girl has clearly narrated the said incident and her evidence is corroborated with the evidence of her parents P.W.1, P.W.3 and P.W.5. The ocular evidence of the victim girl prevail over the medical evidence.

13. The learned counsel for the appellant has taken the defence that the name mentioned by the victim child during trial is differs from her statement recorded under Section 164 Cr.P.C. The investigating officer without proper investigation has laid the charge sheet against the accused. No identification parade was conducted and the identification of the accused before the Court by the victim child is only out of tutoring by her parents P.Ws.1 & 3. There was a discrepancy in mentioning the name of the accused, however, the victim child has clearly identified the appellant in the witness box and also clearly narrated the offence committed by the appellant. It is a lapse on the part of the Investigating Officer and it will not affect the case of the prosecution. It is settled proposition of law that lapses on the part of prosecution should not lead to unmerited acquittal, subjected to rider that in such a situation evidence on record should be clinching, so that lapses of prosecution can be condoned.

14. Further defence taken by the learned counsel for the appellant is that there was a previous enmity between the families of the appellant and the victim and that a false case has been foisted against the appellant. The appellant is none other than the neighbour of the victim child's family, there was certain quarrels between them, for which, no mother or parents would take risk on the reputation of the family by involving their child's life in the tender age. Therefore, defence taken by the learned counsel for the appellant is not sustainable.

15. The learned counsel for the appellant contended that there was no injuries found on the private parts of the victim child and the medical evidence has not supported the case of the prosecution and no independent eye witness was examined by the



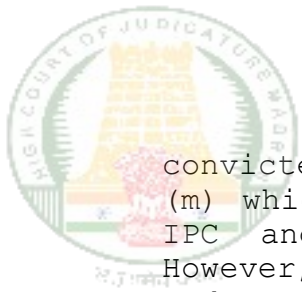
prosecution. Though there is no external injuries or any other noted things, one cannot come to the conclusion that there was no sexual assault, since the evidence of the victim child is very clear about the sexual offence committed by the accused. Further, in cases of this nature, no independent witness or eye witness can be expected and the culprits taking advantage of the loneliness of the innocent female children, committing these type of crimes. It is settled proposition of law that if the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible.

16.The learned counsel for the appellant further contended that there was a delay in sending the papers to the Court and arrest of the accused and the same were not properly explained by the prosecution, which, according to this Court only a lapse on the part of the prosecution, for which, five years child cannot be faulted. Therefore, mere delay is not a fatal to the case of the prosecution and hence defence taken by the learned counsel for the appellant is rejected.

17.This Court held that in cases involving sexual harassment, molestation, etc. the court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim on sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice.

18.On a combined reading of the evidence of P.W.1, P.W.2, P.W.3, P.W.5, Ex.P2, Ex.P9, Ex.P11, this Court finds that the prosecution has proved that at the time of occurrence, the victim child is below 12 years and the appellant has committed aggravated penetrative sexual assault on her and also criminally intimidated her in the course of commission of offence. Hence, presumption under Section 29 of the POCSO Act can very much be attracted against the accused. Since, in this case, the said presumption has not been rebutted by the accused in the manner known to law, there is no reason to interfere with the judgment of conviction passed by the Court below.

19.Therefore, this Court finds that the appellant has committed the charged offence. There is no reason to discard the evidence of the victim child. The prosecution has proved its case beyond all reasonable doubt. The trial Court, as a fact finding Court has rightly appreciated the entire evidence and



convicted the accused/appellant for the offence under Sections 5 (m) which is punishable under Section 6 of POCSO Act and 506(i) IPC and hence, the conviction cannot be interfered with. However, maximum sentence prescribed for the offence punishable under Section 6 of POCSO Act is ten years. This Court finds that the findings of the trial Court is perverse, since amendment Act has come into force with effect from 16.08.2019 and hence, the conviction imposed by the trial Court under Section 5(m) which is punishable under Section 6 of POCSO Act and Section 506(i) IPC are confirmed. However, the sentence of imprisonment is modified from twenty years to ten years, in view of the amendment of Section 6 w.e.f. 16.08.2019.

20. In the result, this Criminal Appeal is dismissed with the above modification. If the appellant/accused is not in duress, the trial Court is directed to take appropriate steps to secure the presence of the appellant to serve the remaining period of sentence of imprisonment.

21. The Legal Aid counsel appointed by this Court is entitled to remuneration as per Rules.

Sd/-

Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

1. The Sessions Judge,
Magalir Neethi Mandram (Fast Track Mahila Court)
Erode.
2. The Inspector of Police,
All Woman Police Station.,
Erode.
3. The Public Prosecutor,
High Court, Madras.
4. The Deputy Registrar | with a direction to send back the
(Criminal Section), | original records, if any, to the
High Court, Madras. | trial Court



5. The Member Secretary,
Tamil Nadu Legal Services Authority,
High Court, Madras.

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PL (CO)
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