

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.02.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CrI.A.No.550 of 2020 &
CrI.M.P.No.8973 of 2020

Karthick

... Appellant

Vs.

State Rep. by
The Inspector of Police,
Valapadi Police Station,
Salem District.

... Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the conviction and sentences made in S.C.No.5 of 2019, dated 30.11.2020 on the Special Court for Protection of Child from Sexual Offences Act 2012, Salem.

For Appellant : Mr.J.Jawahar

For Respondent : Mr.R.Suryaprakash
Government Advocate

J U D G M E N T

This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 30.11.2020 made in S.C.No.5 of 2019, by the learned Judge, Special Court for Protection of Child from Sexual Offences Act 2012, Salem.

2. The respondent-police has registered a case against the appellant for the offences under Section 366 of IPC and 5(m) r/w 6 of Protection of Children from Sexual Offences Act, 2012 (for brevity "the POCSO Act"). After investigation, laid a charge sheet before the learned Judge, Special Court for Protection of Child from Sexual Offences Act 2012, Salem. The learned Judge, framed charges against the appellant for the offences under Sections 366 of IPC and 5(m) r/w 6 of the POCSO Act and conducted the trial.

3. After considering the evidence on record and hearing either side, the learned Judge, by judgment dated 30.11.2020, convicted the appellant for the offence under Section 366 of IPC and sentenced him to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.10,000/- in default to undergo three months Simple Imprisonment and for the offence under Section 5(m) r/w 6 of the POCSO Act, sentenced him to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.15,000/- in default, to undergo 6 months Simple Imprisonment.

4. Aggrieved against the judgment of conviction and sentence, dated 30.11.2020, the appellant / accused had preferred the present Criminal Appeal before this Court.

5. The learned counsel for the appellant would submit that the prosecution has not proved its case beyond reasonable doubt and the doctor, who investigated the victim child, was examined as P.W.7 and in her evidence, she had clearly stated that there is no injury and the hymen was intact and opined that no possibility of sexual intercourse and further submit that there was no eyewitness. P.W.1 is the mother, who has given the Ex.P1-complaint belatedly and that too, only based on the assumption, therefore ingredients of Section 3 of POCSO Act would not be attracted. The learned Sessions Judge failed to consider the fact that P.W.2 (victim) in her deposition had stated that there was no injury on the body or any other place and P.W7 doctor, who examined the victim child, had stated in her evidence that there is no possibility of penetration. Therefore, the benefit of doubt should have been extended to the appellant and however, the learned Judge failed to consider the materials and imposed a maximum punishment, which warrants interference of this Court.

6. The learned Government Advocate (Criminal Side) would submit that the victim child is aged about 8 years at the time of occurrence and she was studying in the 3rd standard and the appellant took the victim child into his house and committed sexual offence. The mother of the victim child was examined as P.W.1 and in her evidence, she has clearly stated that when she was in (P.W.4)'s house, she was asked to bring mud by her uncle, and after a long time, she did not return to home and came later, and she has not stated anything on the said date, and on the next day, she had not gone to the school, as she was not feeling well; and on the subsequent day, when she (P.W.1) enquired with her daughter (P.W.2), she came to know that the accused had committed penetrated sexual harassment of the

victim child. Though the doctor had examined P.W.2-victim child, only after 6 days from the date of occurrence, the doctor's evidence cannot be given much force in this case, as the prosecution has proved its case beyond reasonable doubt.

7. Heard the learned counsel for the appellant and perused the materials available on record.

8 The case of the prosecution is that on 31.01.2014, at about 1.00 p.m., when the victim child, who is aged about 8 years, was residing in her uncle (P.W.4) house and at that time, the appellant took the victim child into his house and had penetrated sexual intercourse with the victim child. Therefore, the mother of the victim child (P.W.1) lodged Ex.P1-complaint against the appellant and the respondent-Police registered a case in Crime No.81 of 2014, on the file of the respondent-Police and investigated the matter and laid a charge sheet before the learned Sessions Judge. Since the offence committed against the child, the learned Sessions Judge taken the case on file initially in S.C.No.26 of 2015, subsequently, it was renumbered as S.C.No.5 of 2019. In order to prove the case of the prosecution, 10 witnesses were examined as P.W.1 to P.W.10 and 18 documents were marked as Ex.P1 to P18. On the side of the defense, neither documents were produced, nor any witnesses were examined.

9. The learned Sessions Judge, after trial, convicted the accused and sentenced above, against which, the appellant is before this Court by way of this Appeal.

10. P.W.1, is the hearsay evidence, and based on the statement given by the victim child, she has preferred Ex.P1-complaint. The victim child was examined as P.W.2 and she has narrated the incidents. A reading of evidence of P.W.2, victim child, in her evidence, she deposed that when she was in the residence of her uncle (P.W.4), on 31.01.2014, at about 1.00 p.m., she was asked to get some mud by P.W.4-uncle and when she came out of the house to bring mud and at that time, the appellant took her to his home forcibly and removed dresses and also inserted his private part in her private part and pressed; and due to pain, when she cried, he left her to go; and accused threatened her not to disclose to her parents, if otherwise, they would be killed. Immediately, she escaped from the scene of occurrence and when her mother P.W.2 came to home, she did not disclose due to fear and on the next day she was very tired, and when P.W.2 enquired, she disclosed the fact and thereafter, P.W.2 called Panchayat and since there was no one to come forward to hear her grievance, she made a complaint before the Valapadi Police Station.

11. Though the learned counsel for the appellant would submit that during the medical examination though the victim child stated that she sustained slight injury, but the doctor (P.W.7), who examined the victim child, has not stated anything about the injury. P.W.2, victim child, in her evidence, she had clearly narrated that when she came out to bring some mud as per the direction of her uncle (P.W.4), the accused had forcibly took her into his house and removed her dress and inserted his private part into her private part and pressed and when she cried, he let her go and threatened her not to disclose to her parents, if otherwise, they would be killed. Evidence of P.W.1 shows that the victim child was examined by the doctor only on 06.01.2014, and therefore, after six days from the date of occurrence i.e, 30.01.2014. It is not the case of the prosecution that due to the penetrative sexual intercourse, P.W.2 sustained injury, loss of blood and immediately, she was referred to Medical Officer for clinical examination, and therefore, the evidence of doctor need not given much force, because the evidence of the prosecution witnesses is only the accused took the victim child (P.W.1) and inserted his private part into her private part and threatened her not to disclose the occurrence, if do so, they would be killed.

12. P.W.4, is the uncle of the P.W.2 victim child. In his evidence, he deposed that P.W.2 is his brother's daughter and on the date of occurrence, P.W.2 was in her house and he asked her to get some mud, and she went to bring some mud, however, came very late with cry, when he enquired, she did not disclose anything and after two days, through P.W.1, she came to know the occurrence. It is settled proposition of law, the ocular witness is to be taken into consideration, when the victim child, was aged about 8 years. Though P.W.7 doctor, in her evidence has stated that there is no injury and the hymen was intact and opined that no possibility of sexual intercourse, a reading of entire materials, when case like this, evidence of the victim child is to be taken into consideration, unless doubt about the trustworthiness of the victim child. In this case, there is no reason to disbelieve her or discard 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 P.W.2-victim child.

13. There is no doubt about the trustworthiness of the victim child, and therefore, considering the alleged act of the appellant, the evidence of victim child can be taken into consideration. P.W.1-mother and P.W.4-uncle, they have clearly stated that on a particular date, the victim child-P.W.2 has not gone to the school and she was helping to P.W.4, that much they have corroborated, which means the victim child was in the occurrence place and rest other things, no corroboration is

required, because, at the time of occurrence, the victim child was aged about 8 years, and at the time of examining as witness, she was just 14 years.

14. It is to be noted that at the time of occurrence, the victim child was aged about 8 years. In order to prove the age of the victim child, the prosecution has marked Ex.P8-school certificate of the victim child and also examined P.W.6, the Headmaster of the School, in which, the victim child was studying and he has also deposed that the victim child was 8 years at the time of occurrence and studying in 3rd standard. As per Ex.P8, school certificate, the date of birth of the victim child is 12.12.2005 and the occurrence said to have taken place on 31.01.2014, therefore, the victim child was aged only 8 years at that time, and not completed 12 years. Therefore, she would fall under the definition of Section 2 1(d) of POCSO Act.

15. The learned counsel for the appellant would submit that as the appellant had not committed penetrative sexual assault, Section 3 of POCSO Act would not be attracted and therefore, the conviction and sentence passed by the learned Judge for the offence under Section 5(m) r/w 6 of the POCSO Act warrants interference. At this juncture, it would be useful to refer the Sections 3, 5 (m) and 6 of POCSO Act:-

"Section 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.

* * *

Section 5. Aggravated penetrative sexual assault:-

(m) whoever commits penetrative sexual assault on the child below 12 years; or

Section 6. Punishment for aggravated penetrative sexual assault:-

Whoever, commits aggravated penetrated 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."

A careful reading of the language of the said provisions of law and also the evidence of P.W.2, the victim child, it could be seen that Section 3 (a) of POCSO Act would attract in this case, and the appellant cannot be given the benefit of doubt. P.W.2, in her evidence, has clearly deposed that the appellant took her to his home and also inserted his private part into her private part and pressed; Section 3(a) of the Act defines that '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.' and as such, Section 3 of POCSO Act would attract in this case. Though the learned counsel for the appellant has taken a stand that P.W.7, doctor, in her evidence has stated that there is no injury and the hymen was intact and opined that no possibility of sexual intercourse, it is to be noted that ocular witness is to be taken into consideration, when the victim child, was aged about 8 years and the medical evidence will not prevail over the ocular evidence. When there is discrepancy between medical evidence and ocular evidence, latter will prevail over the former. P.W.2, victim child, in her evidence has clearly stated that the appellant took her to his home forcibly and removed dresses and also inserted his private part into her private part and pressed; and due to pain, when she cried, he left her to go. P.W.1-mother, P.W.4-uncle have also corroborated the evidence of the victim child. Depth of penetration is immaterial, mere touching of private part would be sufficient so as to constitute the offence under Section 3 (a) of POCSO Act. Section 5 (m) deals with aggravated penetrative sexual assault, whoever commits penetrative sexual assault on the child below 12 years, and in the case on hand, at the time occurrence, the victim child was only 8 years. Section 6 deals with punishment of aggravated penetrative sexual assault. In the case on hand, the victim child is aged about 8 years at the time of occurrence, and hence, the learned Judge rightly imposed the punishment of 10 years Rigorous Imprisonment for the offence under Section 5(m) r/w 6 of the POCSO Act. Since the appellant removed the victim child from the custody of the natural guardian, Section 366 of IPC would attract and as such, the conviction and sentence passed by the learned Judge for the offence under Section 366 of IPC is also confirmed.

16. Considering the nature of the offence and the age of the victim child, the appellant is not deserved to be any sympathy. Therefore, under the circumstances, this Court does not find any merit in the appeal and the Appeal is liable to be dismissed, accordingly, it is dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Special Court for Protection of Child from Sexual Offences Act 2012, Salem.
 - 2.The Inspector of Police, Valapadi Police Station, Salem District.
 - 3.The Public Prosecutor, High Court, Madras-104.
- +lcc to M/s.J.Jawahar, Advocate Sr.5687

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