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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.11.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.No.514 of 2021
and
Crl.M.P.No.11181 of 2021

Venugopal .. Appellant / Accused (Single)
.Vs.

State rep by
The Inspector of Police,
W-18, All Women Police Station,
M.K.B.Nagar, Chennai,
Crime No.9 of 2018. .. Respondent / Complainant

Criminal Appeal filed under Section 374 of Code of Criminal Procedure to call for the entire records and to set aside the order of conviction in S.C.No.420 of 2018, dated 27.09.2021 passed by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai.

For Appellant : Mr.M.Soundar Vijay Arul Ram
for Mr.R.C.Paul Kanagaraj
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 27.09.2021 passed in S.C.No.420 of 2018 by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai.

2.The case of the prosecution is that on 28.07.2018 at about 03.00 p.m when the victim child was playing outside the newly constructed building, which was situated at 1st Street, Salaima Nagar, the accused who was working as a watchman in that building pulled the hands of the victim child, hugged and attempted to kiss on her face. When the victim child tried to evade the same, the accused attempted to put his hand on her private parts. Thereby, he had attempted to commit sexual assault against the victim child, who was aged about 8 years. One neighbour/P.W.3, who witnessed the said incident had rescued



the child and informed the same to P.W.2/mother of the victim child. Thereafter, P.W.2 filed a complaint/Ex.P1 against the accused.

3.The respondent police registered a case in Crime No.9 of 2018 against the appellant for the offence punishable under Section 8 of The Protection of Children from Sexual Offences Act, 2012 [hereinafter referred to as 'POCSO Act' for the sake of convenience]. After investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Special Court For Exclusive Trial of Cases under POCSO Act, Chennai against the appellant for the offence under Section 8 of POCSO Act which was altered into Sections 18 and 6 of POCSO Act. Since the offence is against a child, the learned Sessions Judge taken the case on file in S.C.No.420 of 2018. On completion of the formalities, the trial Court framed charges against the appellant for the offence punishable under Section 10 and altered into Section 18 punishable under Section 10 of POCSO Act.

4.In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 5 witnesses were examined as P.W.1 to P.W.5 and marked 6 documents as Exs.P1 to P6 and no material object was marked. 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 materials available on record, found that the accused/appellant is guilty for the offence under Section 10 of POCSO Act which was altered into Section 18 punishable under Section 10 of POCSO Act and sentenced him to undergo imprisonment for a period of three years and to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for a period of one month. Being aggrieved by the said judgment of conviction and sentence, the appellant is before this Court.

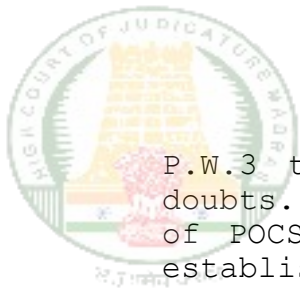
6.Learned counsel for the appellant would submit that the appellant had no bad intention against the victim child. At the time of occurrence, the appellant was aged about 59 years and the victim child was 8 years. As a child, due to love and affection, the appellant touched the victim child and he has not committed any offence as alleged by the prosecution and hence, the offence under Section 10 of POCSO Act would not attract against the appellant. He would further submit that there are material contradictions between the prosecution witnesses and there was improvement in every stage, which is fatal to the case



of the prosecution. As per the prosecution, the alleged occurrence had taken place in a newly constructed building, whereas, P.W.3 has stated that the alleged occurrence said to have been taken place between two Auto Rickshaws and hence, the place of occurrence is highly doubtful and the same was not proved by the prosecution. Therefore, P.W.3, who is said to be an eye witness to the occurrence could not have seen the occurrence. Further, the evidence of P.W.3 is completely contradictory to her statement recorded under Section 164 Cr.P.C. The prosecution does not make out the case and wrongly convicted the appellant under Section 18 of POCSO Act. He would further submit that no opportunity was given to the defence counsel to cross examine P.W.1 and P.W.3, which violates the principles of natural justice. The trial Court failed to appreciate the entire oral and documentary evidence, 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 Learned Government Advocate (Crl.Side) appearing for the respondent would submit that at the time occurrence, the age of the appellant was 59 years and he had committed the offence of sexual assault against the victim child, who was aged about 8 years. In order to prove the age of the victim child, the prosecution exhibited Ex.P1/birth certificate of the victim child. According to Ex.P1, the date of birth of the victim is 23.01.2010. Hence, the victim is a child on the date of occurrence i.e. on 28.07.2018 and the offence committed by the appellant is an aggravated one, which falls under Section 10 of POCSO Act. He would further submit that P.W.1/victim child and P.W.3/neighbour of the victim child are the direct witnesses to the said occurrence. P.W.3, who in turn informed the said incident to P.W.2/mother of the victim child. Thereby, P.W.2 lodged the complaint against the accused/appellant. The trial Judge found prima facie allegations against the appellant and taken cognizance of the charge sheet on file and framed charges against the appellant.

7.2 Learned Government Advocate (Crl.Side) would further submit that while recording the statement of the victim child under Section 164 Cr.P.C before the learned Judicial Magistrate and during trial as P.W.1, she had clearly narrated the said incident. However, the defence counsel has not cross examined P.W.1/victim child. Further, the mother of the victim child was examined as P.W.2 and she had clearly deposed about the complaint lodged against the appellant during her chief and cross examination. P.W.3/neighbour of the victim child as well as an eye witness to the said occurrence also clearly deposed about the said incident. From the evidence of P.W.1, P.W.2 and



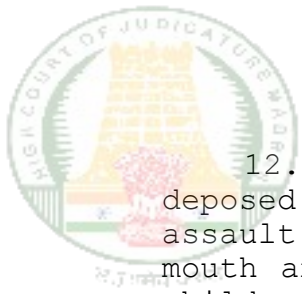
P.W.3 the prosecution proved its case beyond all reasonable doubts. He would further submit that as per Sections 29 and 30 of POCSO Act, it is very clear that once the prosecution has established its case, it is the duty of the accused to rebut the presumption. However, in the present case, the appellant has not rebutted the presumption under Section 29 of POCSO Act. The trial Court has rightly found guilty of the appellant for the charged offences and convicted and sentenced him and there is no perversity in the order of the trial Court. Hence, the appeal is liable to be dismissed.

8.Today, when the matter is taken up for hearing, the learned counsel appearing for the appellant produced all the copies of depositions. This Court heard the arguments of the appellant and the learned Government Advocate (Crl.Side) for the respondent extensively and also perused the materials available on record and with the consent of both sides, the case on hand is taken up for final disposal, at the admission stage itself. Further, considering the scope of POCSO Act amended in 2019, this Court is of the view that there is no necessity to call for the records from the Court below.

9.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.

10.Initially charge sheet has been filed against the appellant for the offence punishable under Sections 8 of POCSO Act altered into 18 and 6 of POCSO Act. However, the trial Court found guilty of the accused/ appellant for the offence punishable under Sections 10 @ 18 punishable under Section 10 of POCSO Act.

11.On a careful reading of the evidence of P.W.1, it would reveal that on the date of occurrence i.e. on 28.07.2018 at about 3.00 p.m the accused way laid her and not allowed her to go for playing. She further deposed that her friend was in the upstairs and while she went to call her for playing, the accused restrained her and attempted to hug her. Thereafter, the accused attempted to put his hand on her private part. At that time, one Rafia/P.W.3 came to that place and shouted the accused and the accused ran away from that place and P.W.3 asked the victim child to go to her house. Subsequently, P.W.3 informed the said incident to her parents and lodged the complaint. After registration of the complaint, the victim child was produced before the learned Judicial Magistrate for recording her statement under Section 164 of Cr.P.C/Ex.P2 wherein, she had stated that appellant/accused pulled her hands and hugged her and tried to kiss on her face and when she resisted the same, the accused put his hand on her private part.



12.P.W.3, who is an eye witness to the occurrence, had deposed that the appellant committed the offence of sexual assault by holding the cheeks of the victim child, kissed on her mouth and also put his hands on the private parts of the victim child. The victim child/P.W.1 had stated that the appellant attempted to hug and kiss on her face and also attempted to touch on her vaginal area. Therefore, from the evidence of P.W.1, the trial Court found that the prosecution has proved its case that the accused had attempted to commit sexual assault on the victim child and thereby, framed the charges for the offence punishable under Sections 10 @ 18 punishable under Section 10 of POCSO Act. Since the appellant attempted to commit sexual assault on the victim child and there is no commission of penetrative sexual assault, the victim child was not produced before the Doctor for getting medical opinion.

13.The defence taken by the learned counsel for the appellant is that no opportunity was given to the defence to cross examine P.W.1 and P.W.3. However, the defence has not challenged the chief examination of P.Ws.1, 2 and 3. Further, the victim girl had clearly deposed the said incident. Therefore, this Court finds that the evidence of the victim is cogent, consistent, natural and trustworthy and also the evidence of the victim child inspires confidence of this Court.

14.According to the case of the prosecution at the time of occurrence, the age of the victim child was 8 years, in order to prove the same, birth certificate of the victim child was marked as Ex.P1. As per Ex.P1 the date of birth of the victim child is 23.01.2010, whereas, date of occurrence is 28.07.2018. The offence is made out under Section 8 of POCSO Act, since the victim is below 12 years. Thereby the offence committed by the appellant is an aggravated one and it falls under Section 9 (m), which is punishable under Section 10 of POCSO Act. As per the prosecution witnesses, especially P.W.1/victim child, this Court finds that the appellant had attempted to commit sexual assault on the victim child, therefore, it falls under Section 9 (m) which is punishable under Section 10 of POCSO Act and also for the offence under Section 18 which is punishable under Section 10 of POCSO Act.

15.On a combined reading of the evidence of P.Ws.1, 2 and 3 and Ex.P1 and Ex.P2 this Court finds that the prosecution has proved that the appellant has committed the offence under Section 18 which is punishable under Section 10 of POCSO Act not under Section 8 which is punishable under Section 18 of POCSO Act and 18 punishable under Section 6 of POCSO Act. Therefore from the evidence of P.W.1, the trial Court rightly convicted the appellant/accused for the offence under Section 18 punishable under Section 10 of POCSO Act.



16. Under these circumstances, this Court being an Appellate Court, is a fact finding Court re-appreciated the entire evidence and come to the conclusion that the appellant has committed the said offence and the prosecution has established its case beyond all reasonable doubts. 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.

17. Accordingly, this Criminal Appeal is dismissed at the admission stage itself and the conviction and sentences passed in S.C.No.420 of 2018 dated 27.09.2021 by the learned Sessions Judge, Special Court for Exclusive Trial of Cases Under POCSO Act, Chennai is confirmed. Consequently, connected miscellaneous petition is closed.

18. If the appellant/accused is not in duress, the trial Court is directed to take appropriate steps to secure the appellant to serve the remaining period of sentence.

Sd/-
Assistant Registrar(CS III)

/True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Special Court for Exclusive Trial of Cases under POCSO Act,
Chennai.
2. The Inspector of Police,
W-18, All Women Police Station,
M.K.B. Nagar, Chennai
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

CRL.A.No.514 of 2021
and
Crl.M.P.No.11181 of 2021

VBM[co]
NSK 30/12/2021