

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.02.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.526 of 2019

Sampath

...

Appellant

Vs.

State Rep. by
The Inspector of Police,
All Women Police Station,
Kangeyam,
Tiruppur District.
(Crime No.12 of 2018)

...

Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the conviction and sentence passed against the appellant by the learned Magalir Neethimandram (Fast Track Mahila Court), Tiruppur, dated 10.07.2019, passed in Spl.S.C.No.6 of 2019.

For Appellant : Mr.M.Maharaja

M/s.C.S.S.Pillai,
R.Maruthu Raj
Legal-Aid Counsel

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 10.07.2019 made in Spl.S.C.No.6 of 2019, on the file of the learned Judge, Fast Track Mahila Court, Tiruppur.

2. The respondent-Police registered a case against the appellant in Crime No.12 of 2018, for the offences punishable under Sections 9(m) r/w 10 of Protection of Children from Sexual Offences Act, 2012 (For brevity "the POCSO Act) and 506 (ii) of IPC. After the investigation, laid a charge sheet before the learned Judge, Fast Track Mahila Court, Tiruppur. On appearance

of the appellant, the provisions of Section 207 of Cr.P.C., were complied with and the trial Court framed charges for the offence under Sections 9(m) r/w 10 of POCSO Act and Section 506 of (ii) IPC, against the appellant and completed the trial.

3. After considering the evidence on record and hearing on either side, the learned Judge, by Judgment dated 10.07.2019, convicted the appellant for the offence under Sections 9 (m) r/w 10 of POCSO Act and sentenced him to undergo seven years Rigorous Imprisonment and to pay a fine of Rs.10,000/-, in default to undergo one year Rigorous Imprisonment; and convicted and sentenced to undergo Rigorous Imprisonment for seven years for the offense under Section 506 (ii) of IPC.

4. Challenging the said Judgment and Conviction, the accused /appellant has preferred the present Appeal.

5. Since the learned counsel for the appellant was not present on 04.02.2021 and on 05.02.2021, this Court directed the Registry to appoint a Legal-Aid Counsel and however, today, the learned counsel for the appellant as well as Legal-Aid Counsel have appeared and argued the matter.

6. The learned counsel for the appellant would submit that there was no penetrative sexual intercourse in this case and the prosecution has not proved the same and though the panty of the victim child recovered, which was marked as M.O.1, however, it was not sent for Forensic Laboratory for chemical analysis and further there was no eyewitness in this case and all the other witnesses were interested witnesses. Even P.W.4 has not supported the case of the prosecution. Further, the friend of the victim child was not examined as witness in this case, as admittedly, it is alleged by the victim child during evidence that her friend only informed that the accused had called her in his house. It is further submitted that there was earlier dispute between the family of P.W.1 and the appellant due to which, there was an enmity between them and therefore, there is a motive for P.W.1 to foist such a false case against the appellant. The prosecution has not established the case, however, the learned Judge based on the assumption and presumption, against the oral and documentary evidence, and on the ground of sympathy, convicted the appellant. Absolutely, there is no material to show that the appellant has committed aggravated sexual assault and the same was not proved by the prosecution beyond reasonable doubt. Therefore, the conviction recorded by the trial Court as against the appellant is improper and without any material evidence, except the solitary evidence P.W.1, there was no eyewitness to prove the alleged offences committed by the appellant and evidence of P.W.3 was not corroborated by any other witnesses. The prosecution has not

proved the offence under Section 9 (m) r/w 10 of POCSO Ac and there is no material to substantiate that the appellant threatened the victim. It is further submitted that the appellant is an aged person and he could not have committed the alleged offence, and however, without any materials, the learned Special Judge, convicted only on the ground of sympathy, which warrants interference of this Court.

7. The learned Government Advocate (Criminal Side) would submit that the victim child was aged only 4 years and the appellant is a neighbour to the victim child. On 28.10.2008, when the victim child was riding her bicycle at about 5.p.m., the appellant called the victim child into his house, and he sat on a chair, made the victim to sit on his lap, removed his jetty, placed his private part over the victim child's panty, rubbed her abdomen. Thereafter, the victim child's panty got wet and she immediately escaped from the appellant and informed to her mother and her mother also questioned the appellant and thereafter, preferred a complaint and the Police has registered a case and recovered the panty from the victim child, which was marked as M.O.1. Thereafter, the victim child was also produced before the learned Magistrate for recording statement under Section 164 of Cr.P.C. and during the statement, the victim child narrated the occurrence and therefore, there is no eyewitness in this case, but the evidence of the victim child is very clear and prosecution has established its case beyond reasonable doubt. Therefore, there is no perversity in the Judgment and there is no merit in the Appeal and the Appeal is liable to be dismissed.

8. Heard the learned counsel on either side and perused the materials available on record.

9. The case of the prosecution is that on 28.10.2018, at about 5 p.m, when the victim child was riding her bicycle, the accused took her into his house, he sat on a chair, made the victim to sit on his lap, removed his underwear, placed his private part over the victim child's panty, rubbed her abdomen, thereby has committed aggravated sexual assault over the victim child. Thereafter, the victim child informed the occurrence to her mother and her mother immediately questioned the accused and gave a complaint. Based on which, the respondent-Police registered a case against the appellant for the offence under Sections 9 (m) r/w 10 of POCSO Act and 506 (ii) of IPC. Subsequently, the Investigating Officer, investigated the matter and laid a charge sheet before the learned Judge, Fast Track Mahila Court, Tirupur.

10. On the side of the prosecution, 7 witnesses were examined as P.W.1 to P.W.7 and 15 documents were marked as

Exs.P1 to P15 and 3 Material Objects were exhibited as M.O.1 to M.O.3. After completion of the examination of the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant, the same was denied as false and on the side of the defence, no oral and documentary evidence was let in. The learned Judge, Fast Track Mahila Court, Tirupur, 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.

11. Since this Court is an Appellate Court and also final Court of fact finding, has to re-appreciate the entire evidence and come to the conclusion independently. A careful reading of statement recorded under Section 164 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 which took place on 28.10.2018, the same was marked as Ex.P12, and also during evidence, she deposed the entire occurrence. In her evidence, the victim child had stated that on the date of occurrence, viz., 28.10.2018, when she was riding her bicycle, the friend of the P.W.1 informed her that grandfather (jhj;jh) is calling her, therefore, the victim child went to the house of the appellant and he made her to sit in a chair, and placed his private part over the panty of the victim child and rubbed her abdomen and later, her panty become wet and thereafter, she informed her mother and her mother also questioned the appellant regarding the act of the appellant and thereafter, made a complaint before the respondent-Police. In cases of this nature, no eyewitnesses can be expected and no corroboration can be made. The culprits are waiting for chance of the loneliness of the children and taking advantage of their loneliness, they used to exploit them. In this case, admittedly, the appellant is a neighbour of the victim and he was residing alone, he lost his wife and called the victim child and committed aggravated sexual assault and therefore, after registering the case, the Investigating Officer made steps to record the statement from the victim child before the learned Magistrate and the learned Magistrate also recorded the statement of the victim child under Section 164 of Cr.P.C., which was marked as Ex.P12.

12. Since there was no penetration had taken place, and the victim child was below 12 years, the learned Judge, rightly sentenced the appellant for the offence under Sections 9 (m) r/w 10 of POCSO Act. A combined reading of the evidence of P.W.1, victim child and also the statement recorded under Section 164 of Cr.P.C., by the learned Magistrate, the prosecution has proved that the appellant has committed an offence under Section 9 (m) r/w 10 of POCSO Act. Depth of

penetration is immaterial, mere touching of private part would be sufficient so as to constitute the offence.

13. According to the learned counsel for the appellant though the victim child stated that the appellant made her panty wet, and the same was also recovered and marked as M.O.1, but the said panty of the victim child was not sent for chemical analysis before the Forensic Department, and further, P.W.3, the doctor evidence was also not supported the case of the prosecution, and therefore, the prosecution has not proved that the appellant has committed aggravative sexual assault and therefore, even assuming that the appellant called the victim child and touched her abdomen and it is only falls under Section 7 r/w 8 of POCSO Act and not under Section 9(m) r/w 10 of POCSO Act. The learned trial Judge failed to consider the same and further there is no threaten from the appellant and without ingredients under Section 506 (ii) of IPC, convicted the appellant.

14. In the case on hand, as stated, there is no eyewitness. However, it is not the case of penetrative sexual assault and there is any injury on the private part or body of the victim child and therefore, the evidence of the doctor will not helpful to the present case. In cases of this nature, evidence of the victim child is to be taken into consideration, unless doubt about the trustworthiness of the evidence of the victim child. In this case, there is no reason to disbelieve or discard the evidence of the victim child. No doubt, the prosecution has failed to send the panty of the victim child for chemical analysis and get an opinion that the panty of the victim child has a substance of release of semen, however, mere non sending of the panty to the Forensic Department, is not a fatal to the prosecution. It is only the panty of the victim child become wet only due to the appellant releasing semen and therefore, it is not the case of the prosecution that it is penetrative sexual assault, and therefore, even the victim child has clearly stated in the statement recorded under Section 164 of Cr.P.C. that the appellant took her to his house and he rubbed his private part on her abdomen, and she has not stated that her panty got wet and therefore, under the circumstances, mere non sending of the panty for chemical analysis, is not a fatal to the prosecution and admittedly, there is no penetrative sexual intercourse has been established in this case. Further, the defect in investigation is also not a ground to acquit the accused. Depth of penetration is immaterial, mere touching of private part with sexual intention would be sufficient so as to constitute the offence. Section 9 (m) of POCSO Act, 2012 deals with aggravated sexual assault on a child below 12 years. In the case on hand, the victim child was aged 4 years and a perusal of evidence of the victim child and the evidence of the mother of

the victim child, viz., P.W.2, the offence committed by the appellant is chargeable under Section 9 (m) of POCSO Act, which is punishable under Section 10 of POCSO Act.

15. At this juncture, it would be useful to refer the Sections 7, and 9 (m) of POCSO Act:-

"Section 7. Sexual assault:-

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

9. Aggravated sexual assault.

(m) whoever commits sexual assault on a child below twelve years"

A careful reading of the language of the said provisions of law and also the evidence of P.W.1, the victim child, it could be seen that the appellant has committed the offence under Sections 9 (m) of POCSO Act, which is punishable under Section 10 of POCSO Act.

16. During the statement recorded under Section 164 of Cr.P.C., the victim child has not stated that the appellant had threatened her and further no witnesses have spoken about the alleged threat. Therefore, under the circumstances, this Court finds that there is no material to convict the appellant under Section 506(i) of IPC, however, the prosecution has proved its case beyond reasonable doubt for the offence under Section 9 (m) and punishable under Section 10 of POCSO Act.

17. However, the learned Sessions Judge imposed maximum punishment prescribed by Section 10 of the POCSO Act. In the considered view of this Court, the facts and mitigating circumstances of the case, if the substantive sentence is reduced to 5 years Rigorous Imprisonment from 7 Years Rigorous Imprisonment, will suffice to meet the ends of justice. In respect of punishment in the form of fine, and the default clause, this Court finds no reason to interfere with. The substantive sentence of Rigorous Imprisonment is reduced to 5 years Rigorous Imprisonment. The conviction and sentence imposed by the learned Judge, for the offence under Section 506 (ii) IPC is set aside.

18. In the result, the Criminal Appeal is partly allowed with the above modification.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Magalir Neethimandram,
(Fast Track Mahila Court),
Tirupur.
- 2.The Inspector of Police,
All Women Police Station,
Kangeyam,
Tiruppur District.
- 3.The Public Prosecutor,
Madras High Court, Chennai.
- 4.The Assistant Registrar,
Juvenile Justice Section,
High Court, Madras.

Copy to:
The Chairman,
POCSO Committee,
High Court, Madras-104.

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SS(CO)
CB(30/06/2021)

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