

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.02.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.519 of 2019

Ilayaraja

... Appellant

Versus

State represented by its
The Inspector of Police,
All Women Police Station,
Ooty Rural.
Crime No.1 of 2017

... Respondent

PRAYER: Criminal Appeal is filed under Section 374(2) Cr.P.C seeking to set aside the Judgment in Special C.C.No.13 of 2017 on the file of the Court of Sessions Judge of Magalir Neethimandram, (FTMC), Udthagamandalam, Nilgiris dated 25.07.2019.

For Appellant : M/s.S.Doraisamy

: M/s.V.Perarasu
Legal Aid Counsel for petitioner

For Respondent : Mr.R.Suryaprakash
Government Advocate

J U D G E M E N T

This Criminal Appeal has been filed seeking to set aside the Judgment in Special C.C.No.13 of 2017 on the file of the Court of Sessions Judge of Magalir Neethimandram, (FTMC), Udthagamandalam, Nilgiris dated 25.07.2019.

2. The respondent police registered the case against the appellant in Crime No.1 of 2017 for the offence u/s.5(m) r/w.6 and also u/s.9(m) read with 10 of POCSO Act. After investigation, laid the charge sheet before the Special Court. Since the offence against women particularly against child, the Special Court taken the charge sheet on file in Special Calendar Case No.13 of 2017 and after completing the formalities framed charge against the appellant for the offence u/s.5(m) read with 6 and 9(m) read with 10 of POCSO Act. After framing charge, during the trial, in order to prove the case of the prosecution, on the side of the prosecution as many as 21 witnesses were examined as P.W.1 to P.W.21 and marked 15 documents as Ex.P.1 to

Ex.P.15 and no material object was exhibited. After completing the prosecution evidence, incriminating circumstances culled out from the evidence of the prosecution witnesses put before the appellant and he denied it as false and pleaded not guilty. No oral and documentary evidence was produced on the side of the defence. After completing trial, after hearing the arguments advanced on either side, convicted the appellant for the offence u/s.5(m) read with 6 of POCSO Act and sentenced to undergo Rigorous Imprisonment for 10 years and to pay fine of R.3000, in default to undergo 3 months simple imprisonment and also awarded compensation of Rs.3 lakhs u/s.23(8) of POCSO Act. Challenging the said judgment of conviction and sentence passed by the learned Special Judge, the appellant has filed the present appeal before this court.

3. Mr.Doraisamy, the learned Senior counsel appearing for the appellant argued the matter in length. This court also appointed a legal aid Counsel and Mr.V.Perarasu who appeared before the court also argued the matter. This court heard the arguments advanced by Senior counsel appearing for the appellant and the Legal Aid Counsel appointed by this court on behalf of the appellant.

4. Mr.Doraisamy, the learned Senior Counsel would submit that there is a delay in filing the complaint. The occurrence is said to have taken place at about 11.30 a.m. on 24.08.2017, whereas the complaint was given only at 10.30 p.m., so there is inordinate delay in filing the complaint. The prosecution has not explained the delay in filing the complaint since the inordinate delay itself shows that the occurrence has not taken place as projected by the prosecution. After deliberation, they have filed false complaint. Actually there is illegal intimacy between the mother of the victim girl and P.W.6. The appellant seen the intimacy. Therefore, there is possibility of informing the same. Therefore, they have foisted a false case against the appellant. Therefore, the mother of the victim girl has not immediately intimated the occurrence to her husband/P.W.1 and not registered the case immediately but after deliberation, lodged the complaint, which creates suspicion. Since the prosecution has not properly explained the delay in filing the complaint that will go to the root of the case of the prosecution. Therefore, delay in filing the complaint is fatal to the case of the prosecution. The learned Sessions Judge, failed to consider the said fact and convicted the appellant. Further he would submit that the doctor one who conducted medical examination of the victim has clearly stated that there was no external injury and there is no other injuries found on the victim. Therefore, it is not possible for a man to have penetrative sexual assault on a 2 ½ years old girl and there cannot be any forcible sexual intercourse. Therefore, some

injury met on the body of the private part of the victim girl cannot be said to have been committed by the appellant. Therefore, it clearly shows that P.W.12 has given wrong information to P.W.1's husband. He also without verifying filed a false case against the appellant. The Investigating agency has not properly conducted the investigation and filed charge sheet. There are material contradictions between the so called eyewitnesses and further the eye witness who has seen the occurrence has not been examined before the trial court, since she is no more. Therefore there is no eye witness. The other witnesses P.W.3, 4 and 5 have stated that they have also seen the white fluid in the private part of the victim girl, whereas they have stated that P.W.1's mother soon after the occurrence she immediately took and gave bath to the victim girl with warm water. Therefore, when the other witnesses seen the child, they would not have seen the white fluid on the private part of the victim girl. Therefore, their evidence cannot be taken into consideration. Those witnesses are not trustworthy witnesses and they could not have seen soon after the occurrence at the place of occurrence and they are all interested witnesses and fixed the appellant and foisted false case and all the witnesses set up and the prosecution filed charge sheet without conducting proper investigation and before the trial court, all the witnesses deposed the prosecution case and the trial court convicted the appellant, which warrants interference.

5. The learned Government Advocate (Criminal Side) would submit that at the time of occurrence, the age of the victim girl was only 2 ½ years old and the appellant is the neighbour of P.W.1. The mother of the victim girl left the victim child in the custody of her mother in law. During the trial, the mother-in-law is no more. Both father and mother of the victim girl went for job. P.W.1 father of the victim girl not in the house at that time. The grand mother of the victim girl has taken care of the victim child. At that time, the appellant came there. The appellant by giving chocolate to the victim child took the victim child from the custody of the grandmother. After some time, since the victim child did not turn up and the child crying sound came from the appellant's house, she went to the house of the appellant and saw the appellant and shouted and she saw white fluid on the private part of the victim child. The appellant ran away and after hearing the alarm raised by the grand mother of the victim girl, neighbours came there and seen the appellant running. Since the parents of the victim were not in the house, grand mother of the victim child gave bath to the victim child. When P.W.2 returned home from her work, grand mother of the victim child informed the occurrence. P.W.2 in turn informed to her husband P.W.1. Therefore, there was a delay. It is also clearly explained by P.W.1 that his mother ie., grandmother of the victim child is the eyewitness. But at

the time of trial, she was no more. Therefore, she could not be present and could not be examined as prosecution witness. However, she was examined by the Investigating Officer and the grand mother of the victim told about the incident to the mother of the victim girl. Later she intimated to her husband P.W.1 and P.W.1 gave complaint and the victim girl was produced before the doctor and the doctor examined the victim girl. Doctor has clearly stated that there was reddishness and that there was no external injury. From the evidence of P.W.1, it is very clear that his mother seen the occurrence and thereafter, P.Ws.3, 4 and 5 who are all neighbours also seen the appellant escaping from the scene of the occurrence with lungi. At the relevant point of time, the child was 2 ½ years old and in order to prove the age of the victim child, Birth Certificate was produced and marked as Ex.P.2 wherein her date of birth was 24.07.2015. Therefore, the offence committed by the appellant falls under POCSO Act. Since the prosecution has proved the case that the appellant committed aggravated penetrative sexual assault on the victim child, the trial court convicted the appellant u/s.5(m) r/w.6 of POCSO Act. There is no merit in the appeal and the appeal is liable to be dismissed.

6. Heard and perused the records.

7. The case of the prosecution is that on 24.08.2017, when P.W.1 left his 2 ½ years old baby girl in the custody of his mother and he and his wife went for their cooly work, at 11.30 a.m., the accused gave chocolate to the victim child and carried her to his house and committed aggravated penetrative sexual assault on the victim child. The grand mother hearing the crying sound of victim girl went and seen the accused and shouted at him and immediately the appellant ran away from the scene of occurrence. The grand mother of victim girl noticed white fluid on the private part of the victim girl. The grand mother of the victim girl informed the same to the mother of victim who in turn informed to father PW.1. P.W.1 narrated the occurrence to PW.10 and P.W.10 advised P.W.1 to lodge a police complaint. Ex.P.1 complaint was given by P.W.1. Mr.Doraisamy

8. The Appellate Court is a fact finding court. In order to give independent finding, it has to reappraise the entire evidence.

9. A reading of the evidence of P.W.1 father of the victim girl shows that he has given the complaint to the jurisdictional Police Station. He has stated that when he had gone for cooly work, he was informed about the incident. Therefore, he came to the house immediately. P.W.2 went immediately and his mother also informed to P.W.2 about the incident and that his mother who narrated the incident is now no more. After intimating the incident to P.W.10, he gave the complaint. The evidence of P.W.2 mother of the victim girl clearly stated that she went for

work. After she returned from work, her mother in law informed about the incident. Later, she informed to her husband P.W.1. Thereafter, they took the victim girl to doctor for examination.

The grand mother of the victim was examined by the Investigating Officer and she has given statement but she has not been examined before the trial court since she died and that fact has not been denied. Though the statement recorded u/s.161 Cr.P.C., is not admissible in evidence, as per Section 32 of the Indian Evidence Act, any previous statement given and subsequently the witness died can be taken into consideration which statement is of relevant fact. Though the statement of the grand mother of the victim girl was not recorded by the Judicial Magistrate u/s.164 Cr.P.C. However, P.W.2 has categorically stated that grand mother of the victim girl is eye witness and she immediately after the occurrence informed P.W.2 and P.W.2 came to the house and grand mother of the victim girl narrated the incident. Since the victim girl was only 2 ½ years, she was neither examined before the trial court nor her statement recorded u/s.164 Cr.P.C., considering the tender age of the victim girl. However, she was produced before the doctor for medical examination. The doctor who examined the child stated that there was no injury, but he has seen that there was reddishness in the private part of the victim girl and he cannot say that there was no penetrative sexual intercourse on the victim girl.

10. The occurrence has taken place on 24.08.2017 at 11.30 a.m., but the victim child was examined by the doctor only on 25.08.2017 at 02.20 hours. Further the evidence of the prosecution is that soon after the occurrence, the grand mother washed the victim girl with warm water and the doctor examined the child only after 24 hours. Therefore, there is no much symptoms since victim girl was given bath by the grand mother. Even though after 24 hours the doctor examined the child, it is opined by the doctor that he finds that "Erythematous changes is a redness of the skin or mucous membranes, caused by hyperemia (increased blood flow) in superficial capillaries and it occurs with any skin injury, infection or inflammation". Therefore, under these circumstances, the prosecution has established its case beyond reasonable doubt. Though in this case, the eye witness died and the victim girl is only 2 1/2 years old, she was not examined as a witness, it is not fatal to the case of the prosecution, since prosecution has established its case from the evidence of doctor.

11. Though it is the contention of the learned counsel for the appellant that there is delay in filing FIR, already it is stated that child was left to the custody of the grand mother and both parents went for job. Only after they returned from their work, the grand mother of the victim informed it and thereafter, the matter was discussed and thereafter, complaint

was given. In cases of this nature, parents of the victim would not take hasty decision, they would not go to police station immediately. They would report to the elders and after taking their views and also considering the future of the minor girl and also considering the social stigma in the society, they will certainly discuss and form opinion and then only give a complaint. When the delay is not inordinate and the version of the victim's father is honest and straightforward, the delay will not be fatal. So only on the compelling circumstances, the parents of the victim approached police and hence delay occurred.

12. As far as other defence taken on the side of appellant is concerned, there was illegal intimacy between P.W.2 and P.W.6 and the appellant seen the illegal relationship between them, therefore, the complaint has been given. But during cross examination, no suggestion is made before P.W.2 or before P.W.6 whether they have any grudge against the appellant and the appellant has not proved and established the said defence. Therefore, this court finds that the defence taken is only for the purpose of this case in order to escape from the clutches of law and that was not established by examining any of the witnesses. Further doctor opinion is concerned, learned Senior counsel would point out that there was no external injury. Therefore, it is not possible to have full penetration or sexual intercourse. However, it depends upon a person. Here the victim girl is admittedly aged 2 ½ years and the child not even knows the situation and consequences but the appellant only knows about it. Even though doctor states that no external injury, he has not ruled out penetrative sexual assault. The doctor found reddishness in the private part of the victim. Further, it is settled proposition of law that depth of the penetration is not the matter to fall under Section 3 of POCSO Act.

13. It is relevant to extract the relevant provisions of POCSO Act :

Section 3. Penetrative Sexual Assault

A person is said to commit "penetrative sexual assault" if-

3(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

Section 5. Aggravated penetrative sexual assault.

5 (m) whoever commits penetrative sexual assault on a child below twelve years; or

14. Therefore, on a reading of the evidence of the prosecution, this court finds that the prosecution has established its case by cogent evidence. There is no contra evidence to disbelieve the evidence of P.W.1 to P.W.6 and also the doctor evidence. There is no doubt about the trustworthiness of the prosecution witnesses also. But the appellant failed to rebut the presumption under Section 29 of the POCSO Act. Therefore, this court also finds that the prosecution has established its case beyond reasonable doubt and there is no reason to interfere with the judgment of the trial court. There is no merit in the appeal and the appeal is liable to be dismissed. Accordingly, this criminal appeal is dismissed. The judgment of conviction and sentence passed in Special C.C.No.13 of 2017 on the file of the Court of Sessions Judge of Magalir Neethimandram, (FTMC), Udhagamandalam, Nilgiris dated 25.07.2019, is confirmed. The Legal Aid Counsel who argued the case on behalf of the appellant is entitled for the legal fees as per Rules.

s/d-
Assistant Registrar(CO)

True Copy

Sub-Assistant Registrar

nvsri

To

1. The Sessions Judge, Magalir Neethimandram, (FTMC), Udhagamandalam, Nilgiris.
2. The Inspector of Police,
All Women Police Station,
Ooty Rural.
- 3.The Superintendent
Central Prison, Coimbatore.
- 4.The Member Secretary
Tamil Nadu Legal Aid Service Authority
High Court, Madras 104.
- 5.The Officer Incharge
District Legal Services Authority
Pondicherry

6.The Section Officer
Criminal Section
High Court, Madras 104.

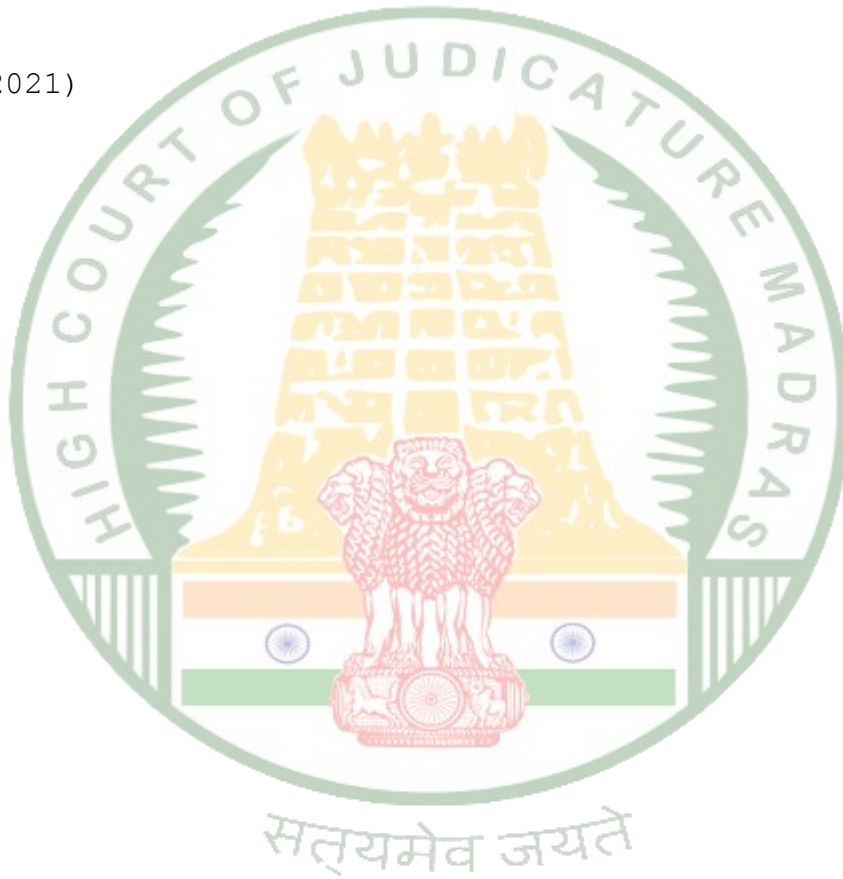
7. The Public Prosecutor,
High Court of Madras.

+1 CC to Mr.S. Doraisamy, Advocate sr 11993.

+1 CC to Mr.V. Perarasu, Advocate sr 11825.

Crl.A.No.519 of 2019

JPL(CO)
SP(02/07/2021)



WEB COPY