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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 21.09.2021

PRONOUNCED ON : 28.10.2021

CORAM:

THE HON'BLE MR.JUSTICE P.VELMURUGAN

CRL.A.No.731 of 2017

and

CrI.M.P.No.5262 of 2017

A.Anthony @ Anthonysamy ... Appellant/Accused No.1

Vs.

The Inspector of Police,
Mangalamedu Police Station,
Perambalur District.
(Crime No.96/2016)

... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, to set aside the Judgment of conviction dated 30.10.2017 made in Special S.C.No.21 of 2016 on the file of the Sessions Judge(Mahila Court), Perambalur.

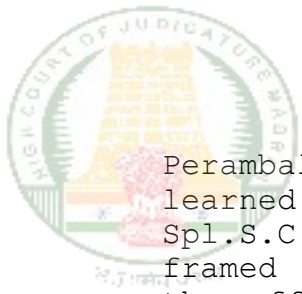
For Appellant : Mr.T.Sedhurajan
for M/s.Mohamed Ismail

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

J U D G M E N T

This Criminal Appeal has been filed against the Judgment of conviction and sentence, dated 30.10.2017 in Spl.S.C.No.21 of 2016 by the learned Sessions Judge (Mahila Court), Perambalur.

2.Based on the complaint given by the Child Welfare Committee, the respondent-police registered a case in Crime No.96 of 2016 against the appellant/A1 and one another/A2 for the offences under Section 5(P) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 [hereafter referred to as 'POCSO Act'] and Section 7 punishable under Section 8 of the POCSO Act r/w Section 17 of the POCSO Act. On completion of investigation, the respondent police filed a charge sheet before the learned Sessions Judge (Mahila Court),



Perambalur. Since the offences were against the children, the learned Sessions Judge taken the charge sheet on file in Spl.S.C.No.21 of 2016 and after completing the formalities, framed charges against the first accused/appellant herein for the offences under Section 5(P) punishable under Section 6 of POCSO Act and Section 7 punishable under Section 8 of the POCSO Act and framed charges against the second accused for the offences under Section 5(P) punishable under Section 6 of POCSO Act and Section 7 punishable under Section 8 of the POCSO Act read with Section 17 of the POCSO Act.

3.After framing of charges, in order to prove the case of prosecution, on the side of prosecution, as many as 28 witnesses were examined as P.Ws.1 to 28 and 39 documents were marked as Exs.P1 to P39, besides one material object exhibited as M.O-1.

4.After completing the evidence of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused by questioning under Section 313 of Cr.P.C. the appellant denied the same as untrue and pleaded not guilty. On the side of the defence, no witness was examined, however, one document was marked as Ex.D1 Series.

5. On completion of trial, after hearing of the arguments advanced on either side and also considered the materials on record, the Trial Court found the second accused not guilty and acquitted him from all the charges framed against him, however, the Trial Court found guilty of the first accused/appellant for the offence under Section 5(P) punishable under Section 6 (4 counts) of POCSO Act, 2012 and not found guilty for the other charges framed against him. The Trial Court convicted and sentenced him to undergo ten years of Rigorous Imprisonment for each count (totally 40 years) and to pay a fine of Rs.5,000/- for each count (totally Rs.20,000/-), in default to undergo three years Simple Imprisonment for each count for the offence under Section 5(P) punishable under Section 6 (4 counts) of POCSO Act, 2012. However, the sentence was ordered to run concurrently and to give set off for the period of imprisonment already undergone by him as per Section 428 of Cr.P.C. Challenging the said Judgment of conviction and sentence imposed on the appellant, the present appeal is filed.

6.1. The learned counsel for the appellant would submit that as per the prosecution case, on the basis of information received about the sexual harassment at Hemar Students Home, the members of the Child Welfare Committee visited the said home on 01.02.2016 at about 2.30 p.m. and on 02.02.2016, at about 5.00



p.m., PW1 lodged a complaint to the respondent police. PW1 has stated in the said complaint that the alleged sexual harassment said to have taken place at Hemar Home, but in the statement given by the PW1, PW2, PW7 and PW8, who are the members of the Child Welfare Committee, have not specifically stated that, when and where and from whom, the so-called information was received by them. However, PW28, who is the investigating officer has deposed in his cross-examination that the sexual harassment took place at Hemar Home, this statement is totally contradictory from the statements given by the PWs.1, 2, 7 and 8. The said contradictions have not been considered by the Trial Court. Further, he would submit that PW1 had deposed in his statement under Section 164(5) of Cr.P.C. that there was an information received from the District Collector, Perambalur for taking appropriate action. This statement given by PW1 is totally contradictory when compared with his earlier statement stated in the complaint and which was admitted by PW28, who is the Investigating Officer, during his cross-examination. Further, he would submit that PW7, who is the Child Welfare Officer, did not depose anything about the alleged occurrence during her chief-examination. But, she gave a statement during the cross-examination that, no such complaint was received from anyone. Further, he would submit that PW7 has deposed during his cross-examination that PW8 states that there was a complaint with regard to the alleged occurrence. But later-on, PW7 deposed that PW8 has told them that there is a complaint and they should go for investigation. In fact, PW8, in his earlier statement stated that he did not receive any complaint. Therefore, the evidence of the members of the Child Welfare Committee and the evidence of PW28-Investigating Officer are contradictory to each other. Since the prosecution has failed to prove the information received with regard to the sexual harassment that took place at Hemar Home, which is very fatal to the case of the prosecution.

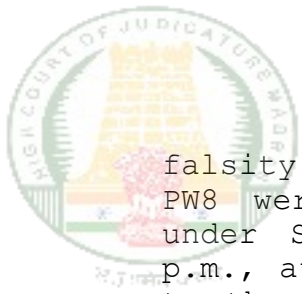
6.2. Further, he would submit that PW1, PW2, PW7 and PW8 had visited the Hemar Home on 01.02.2016 at about 02.30 p.m. But in the complaint given by PW1, he has not stated the names of other officials, who accompanied on the date and time. Therefore, the visit of the said Child Welfare Committee itself is suspicious and there is no occurrence at all. Further, he would submit that PW28-Investigating officer has admitted in the cross-examination that, PW1 did not speak about the accompanied members of the committee and also did not speak about the vehicle through which they went to the Hemar Home for investigation. However, PW2 and PW7 have deposed during his cross-examination stating that they went to the home through a car belonging to one Mohammed Hussain. The said statement is quite contradictory to each other and the same is fatal to the case of the prosecution. The Trial Judge failed to appreciate the said contradiction.



6.3. Further he would submit that the prosecution has not established the number of students, who were enquired by the Child Welfare Committee with regard to the alleged sexual harassment. Further, 11 victim boys had given separate letters to PW1, who is the Chairman of the Child Welfare Committee, alleging that they were sexually abused by the appellant/A1 and the said letters were produced before the respondent police along with the complaint and the same has been marked as Ex.P.1. But PW1 has not specifically stated about the letters given by the above said students in his complaint. PW24 deposed during chief-examination that Ex.P1 at Page Nos.21 and 22 were not at all written by him and the same is not his signature. The said fact has not been considered by the Trial Court.

6.4. Further, he would submit that according to the prosecution, the complaint was given by PW1 and the First Information Report was registered on 02.02.2016. But, the evidence of PW1, PW2, PW7 and PW8 had clearly established that they went to the police station on 01.02.2016 in the night itself and gave the complaint. This clearly proves that the suppression of material facts of the earlier complaint by the respondent police, which is fatal to the case of the prosecution. Further, he would submit that there are 13 students rescued from the Hemar Home and admitted at Government Hospital at Keelapuliyur on 01.02.2016 in the night itself, but PW1 gave a complaint to the respondent police only on 02.02.2016 about 5.00 p.m. Thus, there is an inordinate delay in giving the said complaint. The said delay has not been properly explained. Therefore, the unexplained delay is fatal to the case of the prosecution. The First Information Report was given by PW1, which was registered by PW27, who is the Sub Inspector of Police on 02.02.2016 at 5.00 p.m. After receiving the said FIR, the writer of the station was directed to send the FIR to the Court immediately, but the FIR reached the Court only on 05.02.2016 at 10.30 a.m. Thus, there is an inordinate delay of 2 days and 18 hours, which has not at all been properly explained during the chief-examination of PW27. The delay in sending the FIR to the Court is also fatal to the case of the prosecution. The trial Court failed to consider the same.

6.5. Further, he would submit that the PW28-Investigating officer has rushed to the Hemar Home on 02.02.2016 at 06.00 p.m., and prepared the observation mahazar and rough sketch, which are marked as Ex.P.38 and Ex.P.39 in the presence of PW9 and PW10. But, PW9 and PW10 did not mention the date of recording the said mahazar during the course of statements given under Section 161 of Cr.P.C. The said documents are also sent to the Court only on 08.02.2016, which is also clearly proves the



falsity of the complaint. The statements of PW1, PW2, PW7 and PW8 were recorded by the Investigating Officer and recorded under Section 161(3) of Cr.P.C on 02.02.2016 at about 08.00 p.m., at the police station. The said statements were dispatched to the Court only on 19.02.2016, which also clearly proves the inordinate delay on the part of the prosecution and no proper explanation for the delay was given, which did not comply the provisions of Section 24(2) of POCSO Act and also Sections 26 (1) and 26(4) of POCSO Act also were not duly complied with. Further, he would submit that PW20 and PW21-Doctors, who conducted medical examination on the victim boys and the said medical examination was done on 06.02.2016 without any requisition letter from the Investigating officer, which was deposed by PW28 during his cross- examination. The said medical report also did not speak about the aggravated penetrative sexual assault on the victim boys.

6.6.Further, he would submit that, in order to prove the age of the victim boys, PW28 has recovered the attested xerox copies of school certificates of the boys from PW27-Head Master of the said school, on 09.02.2016. But he deposed during his cross-examination that, the above said documents were recovered by breaking the almirah of the school. Hence, the recovery of school records of the students were not properly obtained by the prosecution. The statements recorded under Section 164(5) of Cr.P.C by PW26, who is the Judicial Magistrate and the same have been marked as Ex.P.27 to Ex.P.36 from Keelapuliyur Hospital on 17.02.2016 and 22.02.2016 in two batches as per requisition letter given to the warden by PW28. The said requisition letter was not at all filed before the Court and therefore, it clearly creates a doubt. Further, he would submit that on 26.02.2016, the appellant was produced before PW18- Doctor for medical examination and issued the Potential Certificate of the appellant, which has been marked as Ex.P.25 and the said certificate sent to the Court on the same day by PW18, but Ex.P.25 was received by the Court only on 29.02.2016 with inordinate delay. The same is fatal to the case of the prosecution. Further, he would submit that, PW1 gave a letter to the Head Master-PW17 to bring 13 students from the Hemar Home along with him on 01.02.2016, but the said letter ie., Ex.P.24 was not explained by the prosecution. Further he would submit that the trial Court failed to consider the evidence of PW1, PW3, PW5, PW6, PW7, PW11 and PW14, who spoke about the visit of the committee to the Hemar Home on 28.01.2016. The said visit was suppressed during their cross-examination and the trial Court failed to appreciate the material contradictions and the evidence of the victim boys were not supported by any other independent witnesses. Hence, the Judgment of the trial Court is perverse and the same is liable to be set aside and therefore,



the learned counsel for the appellant prayed for setting aside the Judgment of conviction and sentence of the Trial Court and the acquittal of the appellant/A1.

7.The learned Government Advocate (Criminal side) would submit that the Child Welfare Committee received the information from the Hemar Home alleging that the warden of the Home torturing the students sexually and he has committing sexual harassment and therefore, they conducted preliminary enquiry and confirmed the activity of the first accused/appellant herein and they also gave a complaint to the respondent police. The respondent police investigated the matter and found that the appellant caused sexual harassment to some of the students, those who are staying in the Hemar Home. Before that, the statements of the victim boys were recorded and they were also produced before the Judicial Magistrate and further, the victim boys also produced before the Doctor for medical examination. After completing the investigation, the respondent police laid charge sheet. The trial Court, after completing the formalities, framed the charges as stated above and the victims, especially, PW3 to PW6 have categorically stated about the commission of offence made by the appellant herein/A1. The entry made in the AR(Accident Register) copy has also proved the same and also the victims were produced before the Judicial Magistrate and PW3 to PW6 have clearly stated before the Judicial Magistrate that the appellant has committed sexual assault on them. Therefore, the prosecution proved its case beyond all reasonable doubts and whatever the contradictions, pointed out by the learned counsel for the appellant, are not material contradictions that do not go to the root of the case of the prosecution. Though, there are contradictions and discrepancies, which are immaterial and therefore, the trial Court, rightly appreciated the evidence. Though, the Trial Court found not guilty of the second accused, since the prosecution failed to prove the charges beyond all reasonable doubt against the second accused and acquitted him. However, the Trial Court found guilty of the appellant/A1 that he committed sexual assault on four children and hence, convicted him for four counts and the prosecution proved its case beyond reasonable doubt and the Trial Court rightly appreciated and convicted him and awarded a suitable sentence. Therefore, there is no merit in the appeal and the same is liable to be dismissed, he contended.

8.The case of the prosecution is that a school was running under the name of St.Mary's R.C.Middle School at Eraiyur Village, Veppanthattai Taluk, Perambalur District. The students, who were studying in the school were staying at Hemar Students Home run by the management of the said school. The said hostel was managed by the Correspondent, viz., Fr.Sahayaraj/A2 and Warden viz., Anthony @ Anthonysamy/Appellant herein/A1. The



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students, who were staying in the Home subjected to sexual assault by the appellant herein. In this regard, there was an anonymous complaint sent to the District Welfare Committee headed by one Mohammed Hussain. On the basis of the said complaint, the members of the said District Child Welfare Committee visited the said Home on 01.02.2016 at 02.30 hours and enquired about the alleged sexual assault committed by the appellant. During such enquiry, it was revealed that 9 children gave statements against the appellant/A1 as if they have sexually abused and they also subjected for sexual intercourse, besides two students also stated that they know that the appellant has committed sexual assault on them. After such enquiry, the committee reported the same to the Father of the said school/A2, who is the Manager of the said school. The Father/A2 advised the members of the Committee that the said facts should not be disclosed to the parents of the students. 11 students had given separate letters to the Child Welfare Committee about the said occurrence and thereafter, they were produced before the Child Welfare Committee and they were shifted to the Government Hospital at Keelapuliyur. Thereafter, on 02.02.2016, the said Mohammed Hussain gave a complaint, along with 11 letters of the victim boys, before the respondent police, which was registered in Crime No.96 of 2016, against the appellant/A1, who is the warden and another/A2, who is the Father of the said school for the offences under Section 5(P) punishable under Section 6(9 counts) and Section 7 punishable under Section 8 (2 counts) r/w Section 17(11 counts) of the POCSO Act, 2012.

9.The respondent police investigated the matter and laid charge sheet and the Trial Court, after completing the trial and found guilty of the appellant/A1 only for the offences punishable under Section 5(P) r/w Section 6 of the POCSO Act, 2012 and acquitted the appellant for the other charges and also found not guilty of the second accused and acquitted the second accused from all charges framed against him. Challenging the said conviction and sentence, the first accused/appellant has filed the present appeal.

10.Heard the learned counsel for the appellant and the learned Government Advocate (Crl.Side) for the respondent and also perused the material available on record.

11.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.

12.This Court has carefully gone through the entire materials, oral and documentary evidence. It is not in dispute that the school, namely, St.Mary's R.C Middle School, which was



run by the Management and they also having student Home in which the victims were staying. In the said hostel, the first accused is the hostel warden and the second accused is the Father, who is the Correspondent-in-Charge of the school. PW1 received an anonymous complaint that in the Hemar Hostel, the students were subjected to sexual harassment by the warden and being a dutiful officer, he along with his committee members made certain enquiry and also received certain letters from some of the students staying in the said hostel alleging that the accused, during night hours, he used to remove the inner wear of the students and he pressed his penis on them and he also threatened the students not to reveal the same and when the same was brought to the knowledge of the second accused, he has not taken any action. The official witnesses, that is, PW1, who is the defacto complainant in this case as well as the Chairman of the Child Welfare Committee and PW2, PW7 and PW8, who are the members of the Child Welfare Committee and they have clearly deposed that they have received the information/complaint stating that some of the students, who were subjected to sexual harassment by the warden/Appellant/A1. After registering the complaint, some of the children were produced before the Judicial Magistrate to record their statements under Section 164 of Cr.P.C.

13. A careful reading of the statements recorded under Section 164 of Cr.P.C, the students have clearly stated about the sexual assault made by the appellant. They were also produced before the Doctor for conducting medical examination, during that time, the entry made in the hospital in the AR copy in which they have also stated that the known person made sexual assault on them. Subsequently, students were examined before the Court, especially PW3 to PW5, who have clearly deposed that the appellant made sexual assault on them. PW6 has stated that though the appellant has not committed sexual assault on him, however, the appellant committed sexual assault on the other students, which he had peeped through the door. From the evidence of PW3 to PW6, the prosecution has clearly proved that the appellant/A1 has committed the sexual assault on them. PW3 to PW6 are children under the definition of Section 2(1)(d) of the POCSO Act. The act committed by the appellant falls under Section 3 of the POCSO Act that is penetrative sexual assault which reads as follows:

"Section 3 - Penetrative sexual assault:

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

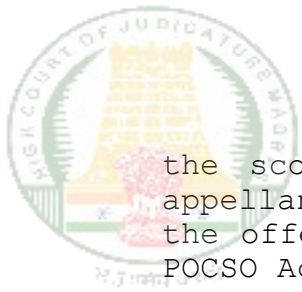
(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or



the offence under Section 5(P) punishable under Section 6 of the POCSO Act, 2012.

16. Though the learned counsel for the appellant pointed out that there are certain contradictions and also delay, the said contradictions and delay of this nature are not fatal to the case of the prosecution. The contradictions pointed out by the learned counsel for the appellant shall not go to the root of the case of the prosecution. The appellant is not entitled to get acquittal based on the ground raised by the learned counsel for the appellant. Further, the delay in filing the case, delay in sending the FIR to the Court and the delay in sending the documents and records to the Court, no doubt, it is a lapse on the part of the prosecution. However, the mere lapse on the part of prosecution may not be a sole ground to get the accused acquitted. The children are only below 18 years. Since they are minors and they are under the care, custody and control of the appellant, if they are harassed by the appellant/Warden, the students may not inform immediately, either to the parents or to someone else. However, as per the evidence of PW1, they received the information about the allegation and they visited the Home and conducted an enquiry and also obtained letters from some of the students and find out prima facie case and later, they also given a complaint to the respondent police. Mere delay in filing the complaint is not a fatal to the case of the prosecution, especially, in the cases of this nature.

17. As stated above, a careful reading of the records, there are certain contradictions, but according to this Court, the said contradictions are not fatal to the case of the prosecution, especially, when PW3 to PW6 have categorically stated before the Magistrate, while recording the statements under Section 164 Cr.P.C., subsequently, when they were examined as witnesses before the Trial Court, they have categorically stated that the appellant/A1, while the students were sleeping at night, he caused sexual assault on some of the students, though some of them revealed and some of them not revealed, naturally, the students are all poor students and staying in the Home away from their house and they were thinking about their future and even as per the evidence of PW1 and the evidence of PW3, they have informed to the second accused/Father and the second accused has not taken any effective steps, and however, the prosecution registered the case against them for the offences under Section 5(P) punishable under Section 6, Section 7 punishable under Section 8 r/w Section 17 of the POCSO Act, 2012. But, the trial Court failed to appreciate the same and acquitted the second accused. Neither the victims nor the prosecution has filed any appeal against the acquittal of the second accused, therefore, this Court does not want to go beyond



the scope of this appeal, since this appeal is filed by the appellant/first accused against the conviction and sentence for the offence under Section 5(P) punishable under Section 6 of the POCSO Act, 2012.

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18. The learned counsel for the appellant would submit that the students sent a complaint to the Child Welfare Committee with regard to the standard of food, hygienic and other treatment, the Child Welfare Committee foisted a false complaint against the accused persons and the respondent police, without conducting the investigation fairly, laid the charge sheet against the appellant and another accused falsely.

19. A careful reading of the evidence, especially PW3 to PW6, who have categorically stated that the appellant used to commit the penetrative sexual assault on them and when the Child Welfare Committee came and enquired, they stated all these things and also regarding the standard of food and also the maintenance of the Home and hygienic and other inconvenience caused to the students. Therefore, a careful reading of evidence of PW3 to PW5 clearly proves that they are the victims and they were suffered with sexual assault and they have categorically stated before the Judicial Magistrate, while recording the previous statement, even before the trial Court while examining as witnesses and even before the Doctor while conducting medical examination. As per Section 3 of the POCSO Act, inserting any object or part of the body into the private part of a child would fall under penetrative sexual assault and the extent of penetration is immaterial. In this case, the appellant pressed his private part into the anus of the victims.

20. Therefore, considering the facts and circumstances of the case, this Court finds that, though there are lapse on the part of the prosecution and though there are delay, which may not be a ground to disbelieve the case of the victims and ignoring the case of the victims, considering the serious nature of offence and this Court does not find any merit and as an appellate Court is a fact finding Court, this Court has independently re-appreciated the entire evidence and found that the appellant/A1 has committed the offence under Section 5(P) punishable under Section 6 of the POCSO Act, and therefore, this Court does not find any merit in the appeal and the appeal is liable to be dismissed

21. In the result, this Criminal Appeal is dismissed. Accordingly, the Judgment and conviction passed in Special



S.C.No.21 of 2016, by the Sessions Judge(Mahila Court), Perambalur, is hereby confirmed. Consequently, connected miscellaneous petition is closed.

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Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

PJL
To

- 1.The Special Sessions Judge(Mahila Court),
Perambalur.
- 2.The Inspector of Police,
Mangalamedu Police Station,
Perambalur District.
- 3.The Public Prosecutor,
High Court, Madras.
- 4.The Superintendent,
Central Prison, Trichy.

CRL.A.No.731 of 2017

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