

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.02.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.660 of 2019

Senthilkumar

... Appellant

Vs.

State Through the Inspector of Police,
All Women Police Station (North),
Tiruppur.
Crime No.1 of 2019)

... Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the Judgment made in Spl.S.C.No.13 of 2019, on the file of Fast Track Mahila Court, Tiruppur, convicting the appellant under Section 9(m) r/w 10 of Protection of Children from Sexual Offences Act, 2012 to undergo rigorous imprisonment for for a period of 7 years and to pay a fine of Rs.10,000/- and in default to undergo rigorous imprisonment for a period of one year.

For Appellant : Mr.M.Arunkumar
for K.S.Karthick Raja

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 26.07.2019 made in Special S.C.No.13 of 2019, by the learned Judge, Mahalir Needhi Mandram, Fast Track Court, Tiruppur.

2. The respondent-Police has registered a case against the appellant for the offence under Section 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, Mahalir Needhi Mandram, Fast Track Court, Tiruppur. On appearance of the appellant, the provisions of Section 207 of Cr.P.C. were complied with and the trial Court framed charge for the offence under Section 5 (m)

r/w 6 of POCSO Act, 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 26.07.2019, convicted the appellant for the offence under Section 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.

4. Challenging the above conviction and sentence, the appellant is before this Court.

5. The learned counsel for the appellant would submit that there are material contradictions from the evidence of the prosecution witnesses. It is submitted that the appellant was residing in the house of the victim child on lease and when he wanted to vacate the house and asked the parents of the victim child to return the lease amount, they failed to pay the lease amount and in order to avoid to repay the lease amount, they foisted a false case against him and the P.W.1-victim child herself in evidence admitted during cross-examination that there was a quarrel between her parents and the appellant regarding the return of lease amount. It is further submitted that the mother of the victim child, viz., P.W.2, used to go to the work in the morning 8.30 a.m. and she will return back to home during night hours i.e., 8.30 to 9.00 p.m. Therefore, she might not have seen the appellant in the house on the occurrence day. However, during cross-examination, P.W.2 deposed that the appellant did not go to his work on the occurrence date and he was in the house only, when she herself used to go to duty 8.30 in the morning and will return at 8.30 to 9.00 p.m., how could she say that the appellant did not go to the work on the occurrence day and that itself shows that a false case has been foisted against the appellant.

6. It is further submitted by the learned counsel that though P.W.1 and P.W.2 have stated the occurrence to the brother of father of the victim child, viz., Manikandan, who came to Police Station, however, the said Manikandan was not examined as a witness in this case, and only the friend of Manikandan was examined. As such, no corroboration and further, the doctor who examined the victim child had stated that there was no external injury either in the private part or any other body of the victim child and also hymen was intact and therefore, even the certificate given by the doctor and accident register also reveals that no injury found in the body of the victim child. Therefore, the medical evidence was also not supported the case of the prosecution. Therefore, the prosecution has not proved its case beyond reasonable doubt.

7. Adding further, the learned counsel would submit that D.W.2, the worker, in his evidence has clearly stated that on the occurrence date, the accused was in the company and during Saturday's, he used to give salary to him and other employees and therefore, on the occurrence date, the appellant was in the Company only. However, the learned Sessions Judge failed to consider the defense taken by the appellant. Further, the prosecution witnesses P.W.1 and P.W.2 have also admitted that the appellant was residing in the house of the victim child only on lease and there is a dispute regarding the vacation and payment of lease amount and therefore, benefit of doubt should have been extended to the appellant. Therefore, the judgment of the learned Judge, Mahalir Needhi Mandram, Fast Track Court, Tiruppur, is liable to be set aside.

8. The learned Government Advocate (Criminal Side) would submit that the victim child, aged about 10 years, when she was playing nearby the room of the appellant, the appellant called her and when she refused to go there, the appellant forcibly took the victim child into his house and lay down on bed and pressed his private part into her private part and the appellant asked the victim child to keep the private part of the accused in her mouth and she refused to do so, subsequently, the accused had kept his mouth in the private part of the victim child and when the appellant was no grip, she escaped from him and informed the occurrence to her parents. After that, a complaint was filed before the Police Station and the victim child was also produced before the learned Magistrate for recording statement under Section 164 of Cr.P.C. During statement under Section 164 of Cr.P.C., the victim child has clearly narrated the facts before the learned Magistrate. Subsequently, by examining as witness, during the trial, the prosecution has established the case beyond the reasonable doubt, and therefore, the learned Judge has rightly convicted the appellant and there is no merit in the appeal, and therefore, the appeal is liable to be dismissed.

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

10. The case of the prosecution is that the victim child, aged about 9 years, on 23.02.2019, when she was playing near her house, the accused who was residing as a lessee in the house of the victim child, called her, when she refused to go, the appellant forcibly took the victim child and committed sexual assault and thereafter, the victim child informed the occurrence to her parents and immediately, her parents gave a complaint. Based on which, the respondent-Police registered a case against the appellant for the offence under Section 5 (m) r/w 6 of POCSO Act. Subsequently, the Investigating Officer,

investigated the matter and laid a charge sheet before the learned Special Judge.

11. On the side of the prosecution, 9 witnesses were examined as P.W.1 to P.W.9 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, two witnesses were examined as D.W.1 and D.W.2. The learned Judge, Mahalir Needhi Mandram, Fast Track 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.

12. 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 before the learned Judicial Magistrate, it could be seen that the victim child has narrated the entire occurrence that took place on 23.02.2019, which was marked as Ex.P15, and also during evidence, she deposed the entire occurrence and therefore, the statement recorded under Section 164 of Cr.P.C. was substantiated by examining the victim child as witness.

13. It is to be noted that at the time of occurrence, the victim child was aged about 10 years. In order to prove the age of the victim child, the prosecution has marked Ex.P1-Birth certificate of the victim child. As per Ex.P1, birth certificate, the date of birth of the victim child is 13.04.2010 and the occurrence said to have taken place on 23.02.2019, therefore, the victim child was aged only 10 years at that time, and not completed 12 years. Therefore, she would fall under the definition of Section 2 1(d) of POCSO Act.

14. Though P.W.6 doctor had stated that there was no external injury, in the present case, it is not the case of the prosecution that due to forcible sexual assault committed by the appellant with the victim child, she sustained injury. Though P.W.6 doctor had deposed that there was no injury, there is no good reason to disbelieve the case of the prosecution. During statement recorded under 164 of Cr.P.C. as well as evidence, the victim child has clearly stated that the appellant had kept his private part into her private part, and also kept his mouth in her private part and asked her to keep her mouth in his private part.

15. At this juncture, it would be useful to refer the Sections 3 (a), 3 (d) and 5 (m) of the POCSO Act:-

"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

(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."

...

5. Aggravated Penetrative Sexual Assault:-

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

16. A bare perusal of evidence of P.W.1 and also statement recorded under Section 164 of Cr.P.C., it could be seen that the appellant has committed an offence Section under 5(m) r/w 6 of POCSO Act. A reading of the evidence of P.W.1 victim child and Section 3 (a) and (d) and also 5 (m) of the POCSO Act, it is very clear that the appellant has committed the offence punishable under Section 6 of POCSO Act.

17. The contention of the learned counsel for the appellant is that there was a motive against the appellant, since he wanted to vacate the house and asked the victim's parents for repayment of the lease amount, they foisted a false case against the appellant. No doubt, P.W.1-victim child and the mother of the victim child, viz., P.W.2 admitted that the appellant was residing in their house as a lessee, however, the defense has not established that for that reason, they foisted a false case against the appellant. Though the appellant had taken the defense of motive behind the complaint, but however, it has not been proved in the manner known to law. Further, the victim child was only 10 years, in her cross examination she admitted that the appellant was residing nearby the portion in the house of the victim child. But, she has clearly narrated the fact during chief examination that had occurred on 23.02.2019.

18. D.W.2, the employee of the accused had stated that he was working under the accused and on the occurrence date, he was in the working place and he gave payment to him and other co-workers, and however, during cross-examination, he as admitted that they have not maintained any register and also not produced any record to show that on the date of occurrence, the accused made payment to D.W.2 and other employees.

19. Further, it is pertinent to mention here that P.W.1 victim child and P.W.2 mother of the victim child need not say all these things and also the parents will not spoil the future of the victim child, in order to repay the lease amount.

Therefore, the defense taken by the learned counsel for the appellant is not acceptable. Further, there was no reason to discard the evidence of P.W.1. Normally, corroboration of witness is necessary, whereas, offence under POCSO Act, the evidence of the victim child is sufficient and the Court cannot expect the eyewitness, since it is not the case of the prosecution that the offense had taken place in the public place or in the presence of some other eye witness.

20. It is also pertinent to mention here that during statement recorded under Section 164 of Cr.P.C., as well as during evidence, the victim child had referred the accused, by calling 'Annna' (Brother). In these type of cases, especially, minor children particularly below 12 years, these types of culprits can approach the child and especially, neighbours and they should have known persons to the victim, and they can easily access with the victims in any hidden place, by giving false promise.

21. In the the case on hand, when the victim child was refused to go with the appellant, the appellant forcibly took her into his house. It is not the case of the prosecution that somebody has seen the victim child when she was taken by the accused to his house and the victim child has not stated that somebody noticed that the victim child was taken by the accused. Therefore, in that absence, this Court cannot except any corroboration or any other independent witness. Only victim child is sole witness and she has narrated the entire occurrence. Immediately, she informed the occurrence to her family members and thereafter, she approached the Police Station by filing a complaint and immediately, within a week, the victim child was produced before the learned Magistrate and statement under Section 164 of Cr.P.C. was recorded and she was also produced before the medical officer for clinical examination. Since the victim child has not stated that there was injury in the private part and the mere doctor has stated that there was no injury, that would not affect the case of the prosecution. Mere penetrates his penis, to any extent, into the vagina of a child is an offence. Depth is immaterial, likewise whether child gets injury or not also immaterial. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible. In cases of this nature, presence of eyewitnesses are mostly improbable.

22. Therefore, this Court finds that there is no reason to discard or disbelieve the evidence of P.W.1 victim child, and there is no doubt about the trustworthiness of the victim child and under the circumstances, the victim child aged about 10 years, and she cannot be tutored by the prosecution for these type of offences.

23. Though the trial Court found that the appellant had not committed the offence under Section 5 (m) of POCSO Act and only committed the offence under Section 9 (m) of the POCSO Act, considering the facts and discussions above, this Court is of the view that the trial Court wrongly convicted the appellant under Section 9 (m) r/w 10 of POCSO Act, instead of 5 (m) r/w 6 of POCSO Act. However, neither the State nor the victim's parents filed any appeal, challenging the conviction and sentence imposed by the trial Court and hence, this Court does not warrant interference of the conviction and sentence passed by the trial Court.

24. Therefore, under the circumstances, this Court also finds that the prosecution has proved its case beyond the reasonable doubt and there is no reason to interfere with the judgement of the learned Sessions Judge. Therefore, this Court does not find any merit in the Appeal and the Appeal is liable to be dismissed, accordingly, it is dismissed.

Sd/-

Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Fast Track Mahila Court,
Tiruppur.
2. The Inspector of Police,
All Women Police Station (North),
Tiruppur.
3. The Superintendent,
Central Prison,
Coimbatore.

4. The Public Prosecutor,
High Court, Madras.

+1cc to Mr.K.S.Karthik Raja, Advocate, S.R.No. 5830

Cr1.A.No.660 of 2019

RGN (CO)
GN(30/06/2021)