

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.01.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.698 of 2019 and
Crl.M.P.No.14698 of 2019

Ibrahim

.. Appellant

.Vs.

State, Rep. by
The Inspector of Police,
Ammapetai Police Station
(Crime No.595/2012)

... Respondent

Criminal Appeal filed under Section 374 and 427 of the Code of Criminal Procedure, to call for the records relating to the Judgment of the Sessions case in Spl.S.C.No.50 of 2015 on the file of the Mahalir Needhimandram, Salem, dated 06.09.2019 and set aside the conviction and sentence passed as against the Appellant/Accused.

For Petitioner : Mr.B.Harikrishnan

For Respondent : Mr.R.Suryaprakash
Government Advocate

J U D G M E N T
सत्यमेव जयते

This Criminal Appeal has been filed against the Judgment in Spl.S.C.No.50 of 2015 dated 06.09.2019 passed by the learned Sessions Judge, Mahalir Neethimandram, Salem, convicting the appellant for the offence under the provisions of the Protection of Children from Sexual Offences Act, 2012 (in short, "the POCSO Act") and also I.P.C.

2. Originally, the respondent police registered a case against the appellant for the offences punishable under Sections 366 (A) and 376 I.P.C. and on investigation laid the charge sheet before the learned Sessions Judge, Mahalir Needhimandram, Salem for the offences punishable under Sections 363, 366 of

I.P.C. and Section 6 r/w Section 5 (1) of the Protection of Children from Sexual Offences Act, 2012. The Sessions Court also taken the case on file in Spl.S.C.No.50 of 2015.

3. In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 10 witnesses were examined as P.W.1 to P.W.10 and 15 documents were marked as Exs.P1 to P15. On the side of the defence, no witnesses were examined and no documents were marked.

4. The learned Sessions Judge, after advertng to the materials placed on record and after hearing both the parties, by judgment dated 06.09.2019 convicted the appellant/accused for the offence punishable under Section 363 of IPC and sentenced him to undergo seven years rigorous imprisonment with a fine of Rs.10,000/- in default to undergo further period of three months simple imprisonment; sentenced him to undergo rigorous imprisonment for ten years with a fine of Rs.20,000/- in default to undergo further period of six months simple imprisonment for the offence punishable under Section 366 I.P.C. and sentenced him to undergo rigorous imprisonment for ten years with a fine of Rs.50,000/- in default to undergo one year simple imprisonment for the offence punishable under Sections 6 r/w 5 (1) and 17 of POCSO Act, 2012.

5. Aggrieved against the said judgment of conviction and sentence, the appellant has preferred the present criminal appeal.

6.The learned counsel for the appellant would submit that there is no conclusive proof with regard to the correct age of the victim and the prosecution has not established the said fact beyond reasonable doubt. The victim herself stated during cross-examination that she completed 19 years. Though she has completed +2, neither birth certificate nor school certificate have been summoned to prove the correct age of the victim. He would further submit that the Doctor who examined victim girl opined that the age of the victim would be above 16 but below 18. He would further submit that if the victim girl is below 18 years, she can be treated as a child and in this case as the age of the victim girl has not been established and further the victim herself admitted that she completed 19 years, the offence under POCSO Act is not attracted. He would further submit that the victim girl and the mother of the victim have not supported the case of the prosecution and therefore the prosecution has not established its version. He would further submit that two important witnesses viz., parental grandmother Attayi, with whom the accused and victim said to have stayed for

two days as well as the friend of the appellant one Iswan in whose place the appellant as well as victim stayed for one night, wherein the appellant committed offence, have not been examined. He would further submit that there is no direct evidence in this case and even the Doctor who examined the appellant has stated that only the accused has committed offence but there is no material evidence with regard to the same.

7. He would further submit that P.W.7-Doctor who examined the victim would admit that though the alleged occurrence took place on 16.11.2012, she had examined the victim only on 17.07.2013, nearly after nine months from the date of occurrence and further she deposed that penetrative sexual intercourse would have taken two weeks prior to examination, which leads to doubt in the case of prosecution. He would further submit that the age of the appellant is 21 years and it is purely love affair and therefore under these circumstances leniency may be shown on the appellant. In support of his contention, the learned counsel for the appellant relied on the Judgment of Delhi High Court in the case of State (GNCT of Delhi) Versus Hargovind.

8. The learned Government Advocate (Crl.side) would submit that P.W.1 and 2 have clearly stated in their evidence that the Date of Birth of the victim is 09.05.1995 and therefore at the time of occurrence she has not even completed +2 and her age was below 17 years and in order to corroborate the same, the Doctor who examined the victim has clearly stated that the age of the victim is between 16 to 18 years and in this case the victim is aged above 16 years and below 18 years and therefore POCSO Act would be attracted. If at all the victim was above 18 years, then the appellant would have summoned the documents and even the appellant admitted that the victim is below 18 years and not disputed her age and therefore the prosecution has not taken any further steps to secure the birth certificate.

9. He would further submit that since the victim herself stated that her Date of Birth is 09.05.1995 and the Doctor also confirmed the same. He would further submit that though P.W.1 and P.W.2 were examined on 06.09.2016, they were cross-examined only on 20.09.2018 nearly after two years, and therefore the contention raised by the learned counsel for the appellant is not acceptable and further the evidence of P.W.1 and P.W.2 has clearly established that the offence has been committed by the appellant therefore no corroboration is necessary and further the victim girl herself has clearly spoken during the chief examination with regard to commission of offence by the accused. He would further submit that the prosecution has established its case beyond reasonable doubt and there is no merit in this appeal and the same is liable to be dismissed.

10. Heard both sides. Perused the records.

11. The case of the prosecution is that the victim girl was aged about 17 years and she is the resident of Salem and she completed her studies in Indira Gandhi Higher Secondary School and the appellant is the auto driver. On 16.11.2012 at about 9.00 A.M., the defacto complainant Mohanapriya was compelled to leave her house and come to Pattai Kovil Auto Stand, Salem where the appellant was waiting and he insisted her to marry him, for which she refused and the accused threatened her that if the victim did not come with him, he will disclose their love affair to everyone and therefore the victim girl went with him. He kidnapped her and took her to his friend Iswan's house at about 9.00 P.M. where he forcibly tied Karugumani on her neck and made her to believe that she is lawfully wedded wife of the accused and thereafter at about 10.30 P.M., the appellant committed rape against her wish by having sexual intercourse with her and thereafter they went to her grandmother house and stayed there for two days wherein also the appellant had sexual intercourse with the victim girl during night hours.

12. After receiving the complaint, the respondent police investigated the matter and laid charge sheet and the learned Trial Judge framed the charges against the appellant.

13. In order to prove the case, the prosecution has examined as many as 10 witnesses and marked 15 documents. No Material Object was exhibited.

14. After completing the prosecution evidence, the incriminating circumstances culled out from the prosecution witnesses were put before the appellant, he denied the same as false and however on the side of the appellant, no oral or documentary evidence was produced.

15. After considering the evidence on record and hearing either side, the learned Sessions Judge, vide judgment dated 06.09.2019 in Spl.S.C.No.50 of 2015, convicted and sentenced the appellant as stated above.

16. Challenging the judgment of conviction and sentence, the present appeal has been preferred by the appellant.

17. 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.

18. The victim girl as P.W.1 was examined in Chief, before the learned Sessions Judge, Mahalir Needhimandram, Salem on

06.09.2016. A reading of the evidence given by the victim girl clearly proves the age of the victim at the relevant point of time and how the appellant had taken her and had sexual intercourse with her several times without her wish. Once the victim is below 18 years, she is a child under Section 2 (1)(d) of POSCO Act. Further, P.W.2 mother of the victim was examined and she has also clearly spoken about the age of the victim girl and also about the incident.

19. Though the learned counsel for the appellant would submit that the grandmother of the victim child as well the appellant's friend in whose house the appellant and the victim child said to have stayed and wherein the offence was said to have been committed, were not examined, the evidence of P.W.1 - Victim child, P.W.2-mother of the victim child, P.W.7-Doctor who examined the victim, clearly show that the victim child was subjected to penetrative sexual intercourse and further Ex.P.9 - Age certificate and Ex.P10-chemical analysis with Doctor's opinion also prove that the victim child was subjected to penetrative sexual intercourse. As far as the age of the victim is concerned, the learned counsel for the appellant would submit that there is no conclusive proof with regard to her age and further the Doctor certificate is not conclusive proof. It is no doubt that the opinion of the Doctor is not conclusive proof, but the victim in her chief examination i.e., on 06.09.2016, has clearly stated that her Date of Birth is 09.05.1995. Further, P.W.7- the Doctor who examined the victim has clearly deposed that the age of victim is between 16 to 18 years. Once it is established that the age of the victim girl is below 18 years and the doctor also opined the same after medical examination, it is clear that the victim is below 18 years and she is a child under the definition of POSCO Act. Therefore, on a thorough reading of the evidence of P.W.1 and P.W.7, this Court comes to the conclusion that the victim girl is a child under the definition of POSCO Act.

20. As far as non-examination of vital witnesses is concerned, the victim girl has clearly stated that the appellant had taken her to his friend's house as well as to her maternal grandmother's house, wherein the appellant had committed the offence. The fact that the offence has been committed with consent or without consent is no matter since the victim is a child. Once the prosecution has established that victim is subjected to sexual intercourse and the victim has stated that appellant has committed penetrative sexual intercourse, as far as POSCO Act is concerned, it is for the appellant to rebut the same and the non-examination of other witnesses for corroboration is not fatal to the case of the prosecution. In the case on hand, the Court below has safely considered the version of victim child and came to the conclusion that the

offence under POCSO Act is made out, charges framed against the appellant were proved beyond reasonable doubt. This Court does not find any reason to doubt the trustworthiness of P.W.1 and P.W.2, who had deposed the same facts at the time of examination.

21. Though the learned counsel for the appellant would submit that the evidence of P.W.1 and P.W.2 has not supported the case of the prosecution and therefore they were declared as hostile for the reason that victim herself stated during cross examination that she completed 19 years, it is settled proposition of law that if the investigation agency recorded the statement from the witnesses under Section 161 Cr.P.C. at the time of investigation, subsequently if the witnesses had not deposed before the Court, as stated in Section 161 Cr.P.C. then they can be declared as hostile, whereas in the case on hand, at the time of Chief examination of P.W.1 and P.W.2, they have clearly narrated the incident as per statement given under Section 161 Cr.P.C. and since the witnesses were cross examined after two years, for the reason best known to the witnesses they have turned hostile, the Court cannot discard the evidence of P.W.1 and P.W.2, though have turned hostile, for the reason that the witnesses, after the chief examination, have to be immediately cross-examined, but that was not done in the present case. Further, the accused was also not in custody at the time of cross examination. Since P.W.1 and 2 were cross examined after two years of chief examination, this Court is inclined to rely on the chief examination of P.W.1 and P.W.2. Moreso over, the medical evidence corroborated the evidence of victim. Further, it is settled proposition of law that the evidence of hostile witness need not be discarded in totality but the portion of evidence, in chief which supports the prosecution can be taken for consideration. The said proposition was held by the Hon'ble Supreme Court in the case of Veersingh Vs. State of U.P. reported in 2014 (2) SCC page 455. The trial Court, on considering the entire facts and circumstances, felt that the prosecution has proved the case beyond reasonable doubt and convicted and sentenced the accused as stated supra. Further, Judgment relied on by the learned counsel for the appellant is not applicable to the case on hand. Mere non-examination of the certain witnesses is not fatal to the case of the prosecution. In the present case, the chief examination of P.W.1, P.W.2 and evidence of P.W.7 clearly prove the case of the prosecution, that the appellant has committed the offences as charged by the prosecution.

22. Considering the overall facts and circumstances of the case and also considering the evidence of P.W.1, P.W.2 and P.W.7, this Court does not find any merit in the Appeal and the same is liable to be dismissed.

23. Accordingly, this Criminal Appeal is dismissed and the judgment of conviction and sentence passed by the trial Court is confirmed. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge, Mahalir Neethimandram, Salem.
2. The Inspector of Police, Ammapetai Police Station, Salem.
3. The Public Prosecutor, High Court, Madras.
4. The Deputy Registrar (Crl.side) High Court, Madras.

+lcc to Mr.B.Harikrishnan, Advocate, S.R.No.3799

CRL.A.No.698 of 2019

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