

Bail Slip

The Petitioner/Accused viz Narendra aged 24 years S/o.Premnath Chand was directed to be released on bail vide order in Crl.M.P. No. 15270/2019 in Crl.A.No.736 of 2019 dated 24.02.2020.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.03.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.736 of 2019

Narendra ... Appellant

-Vs-

The State,
Rep. by the Inspector of Police,
W19 All Women Police Station,
Adyar, Chennai.
(Crime No. 5/2016) ... Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, to call for the records and set aside the judgment sentence imposed upon the appellant/accused by the learned Mahila Court/Spl. Court for Cases Under POCSO Act/Children's Court, at Chennai in S.C.No.30 of 2018 on 21.08.2019.

For Appellant : Mr.L.Baskaran for
Mr.A.Saravanan

For Respondent : Ms.T.P.Savitha,
Government Advocate (Crl. Side)

JUDGMENT

This Criminal Appeal has been filed against the Judgment of conviction and sentence imposed by the learned Sessions Judge, Mahila Court (Mahalir Neethimandram), Chennai in S.C.No.30 of 2018.

2.The respondent Police have registered a case in Crime No.5 of 2016, for offence under Section 8 of Protection of Children from Sexual Offence Act, 2012 (Hereinafter referred to as 'POCSO Act') against the appellant on the complaint given by the mother

(PW1) of the victim girl (PW4). After completing the investigation, the respondent Police laid a charge sheet before the learned Sessions Judge, Mahila Court (Mahalir Neethimandram), Chennai and same was taken on file in S.C.No.30 of 2018.

3.After completing the formalities under Section 207 Cr.P.C., since there was a prima facie material to frame charges against the appellant, the learned Sessions Judge framed charges for offence punishable under Section 6 of POCSO Act.

4.After completing the trial and hearing the arguments advanced on either side and also considering the oral and documentary evidence, the learned Sessions Judge found guilt of the appellant for the offence punishable under Section 10 of POCSO Act and convicted and sentenced to undergo Rigorous Imprisonment for five years and to pay a fine of Rs.5,000/-, in default to undergo six months Simple Imprisonment.

5.Challenging the above said Judgment of conviction and sentence, the appellant has filed the present appeal before this Court.

6.The learned counsel for the appellant would submit that the place of occurrence itself is highly doubtful in this case. The house of the victim child (PW.4) is situated in the residential area, where public movements are normally available, but no independent witness was examined by the prosecution to prove that the appellant entered into the house of the victim girl (PW.4) and committed the offence. The learned counsel would further submit that no witness was examined to prove that the appellant was seen with the victim girl (PW.4) just soon before the occurrence, at the time of occurrence and soon after the occurrence. Further, on the date of occurrence, the appellant was not present in the scene and he had gone along with the family members to attend the house warming ceremony of his relative. Therefore, the appellant was not available in the place of occurrence, at the time of occurrence and he did not commit any offence as alleged by the prosecution.

7.The learned counsel for the appellant would further submit that the appellant was running electrical shop at Thiruvannamur, Chennai and he is a married man. The father (PW.2) of the victim child was also having electrical service shop opposite to the shop of the appellant. Prior to the occurrence, the father (PW.2) of the victim child purchased home theatre from the appellant's shop and for which, he did not make payment. The appellant demanded the money for the same and PW.2 dragged the payment by saying one reason or other and due to which, there was misunderstanding between the appellant and the father (PW.2)

of the victim child. In order to escape from the payment, the father (PW.2) of the victim child tutored the victim girl (PW.4) and foisted the false case against the appellant. Further, the medical evidence (PW.7) has not supported the case of the prosecution. The Doctor (PW.7) who conducted medical examination on the victim child (PW.4) has clearly stated that there was no injury in the private part of the victim girl (PW.4) and the hymen was intact and opined that the victim child (PW.4) was not subjected to penetrative sexual assault.

8.The learned counsel for the appellant would further submit that the presumption under Section 29 and 30 of POCSO Act would not attract in this case, since the prosecution has not proved the alleged sexual assault. Once it is established before the Court that there are materials available on record to draw presumption in favour of the prosecution and the evidence before the Court also confirms the same that the said initial presumption is a reliable one, then the burden would shift upon the accused to rebut the same. But the witnesses produced by the prosecution have not supported the case and the learned trial Judge failed to appreciate the scope of the presumption under Sections 29 and 30 of POCSO Act and wrongly applied the same in this case. Initially, the FIR (Ex.P10) was registered under Section 8 of POCSO Act and after filing of the charge sheet, during trial, the learned trial Judge framed the charges for the offence punishable under Section 6 of POCSO Act and after completion of trial, the learned trial Judge convicted the appellant for offence punishable under Section 10 of POCSO Act, without framing or altering the charge under Section 10 of POCSO Act.

9.The learned counsel for the appellant would further submit that the occurrence alleged to have taken place on 05.12.2016 at about 04.30 p.m., whereas the complaint was given only on 08.12.2016. Hence, there was enormous delay in lodging the complaint (Ex.P1) and the delay was not explained, which would be fatal to the case of the prosecution. The learned trial Judge failed to appreciate the fact that all the allegation stated in the complaint is vague and there is lacuna in the prosecution in proving the case beyond the reasonable doubt. Further, the evidence of the prosecution are not trustworthy and the learned trial Judge failed to appreciate the same and also the defence taken by the appellant and wrongly convicted the appellant for offence punishable under Section 10 of POCSO Act, which warrants interference of this Court.

10.Ms.T.P.Savitha, Government Advocate (Crl. Side) would submit that the victim child was examined as PW4 and she has clearly stated about the occurrence. Though there is no eye witness in this case, the victim child (PW.4) herself has

narrated the occurrence to her mother (PW.1), in turn the mother (PW.1) informed the same to her husband (PW.2) and her husband (PW.2) rushed to the place of occurrence. PW.5, who is the friend of the father (PW.2) of the victim girl, has stated that PW.1 informed the victim child was subjected to sexual assault by the appellant, at that time he was present along with the father of the victim child (PW.2). Though the Doctor (PW.7) has stated that there was no penetrative sexual assault, it is not the case of the prosecution that the victim girl sustained any injury on her body and there was any aggravated penetrative sexual assault.

11.The learned Government Advocate (Crl. Side) would further submit that the victim girl (PW.4) was produced before the learned XVIII Metropolitan Magistrate, Saidapet for recording the statement under Section 164 Cr.P.C., (Ex.P3) and accordingly, the same was recorded at the earliest point of time. Though the statement under Section 164 Cr.P.C., is not a substantiate piece of evidence, it a previous statement made by the witness and it can be used either for corroboration or contradiction. During trial, the victim child was examined as PW4 and she has clearly deposed the sexual assault committed by the appellant. Subsequently, the victim child (PW.4) in her evidence during trial substantiated the statement recorded under Section 164 Cr.P.C., (Ex.P3). In cases of this nature, the presence of eye witnesses are mostly improbable. Therefore, the prosecution has substantiated the case against the appellant. Though after conclusion of trial, the learned trial Judge came to the conclusion that the charges framed for the offence punishable under Section 6 of POCSO Act was not proved, the oral and documentary evidence produced by the prosecution proves that the appellant has committed the offence under Section 9(m) of the POCSO Act. Therefore, the trial Court rightly convicted the appellant for offence under Section 9(m) of POCSO Act and punishable under Section 10 of POCSO Act. There is no merit in the appeal and the appeal is liable to be dismissed.

12.Heard the learned counsel appearing for the appellant and the learned Government Advocate [Crl. Side] appearing for the respondent and also perused the materials available on record.

13.The case of the prosecution is that at the time of occurrence, the victim child (PW4) was only 7 years of age and she was a minor. On 05.12.2016, at about 04.30 p.m., the parents of the victim child (PW1 & PW2) went for their usual work and the victim child (PW4) was alone in the house. After returning to the home from school, the victim child (PW4) was playing ball inside the house, at that time the appellant, who was running electrical shop near the house of the victim child (PW4), came to the bathroom of the victim child's house for

taking water and called her. When she went near him, the appellant removed her dress and sucked her nipples and told her that she should not say this to anyone and also removed her dress and dug her private parts with his fingers and committed the penetrative sexual assault. On 08.12.2016, which was a holiday, PW1 went for her work and after came back to home at about 01.30 p.m., found her daughter was upset and scared and when she enquired her, she informed her about the occurrence happened on 05.12.2016. The mother of the victim girl (PW1) informed the occurrence to his husband (PW2) and both of them went to respondent Police Station and lodged a complaint (Ex.P1).

14. Based on the complaint (Ex.P1) given by the mother of the victim child (PW1), an First Information Report [Ex.P10] in Crime No.5 of 2016 was registered for offence punishable under Section 8 of POCSO Act. After completing investigation, the respondent Police laid a charge sheet before the learned Sessions Judge, Mahila Court (Mahila Neethimandram), Chennai and same was taken on file in S.C.No.30 of 2018.

15. During the trial, on the side of the prosecution, as many as 9 witnesses were examined as PW1 to PW9 and 14 documents were marked as Exs.P1 to P14 and no material object was exhibited. After completing the examination of prosecution witnesses, when incriminating circumstances were culled out from the evidence of prosecution witnesses put before the appellant by questioning under Section 313 Cr.P.C., he denied the same as false and pleaded not guilty. On the side of the defence, 4 witnesses were examined as DW1 to DW4 and no documentary evidence was produced.

16. After completing trial and hearing arguments advanced on either side, the learned Sessions Judge vide judgment, dated 21.08.2019 in S.C.No.30 of 2018 convicted and sentenced the appellant as stated above.

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 and accordingly, this Court has re-appreciated the entire oral and documentary evidence produced before this Court and come to the independent finding.

18. The trial Court framed the charges against the appellant for offence punishable under Section 6 of POCSO Act. In order to substantiate the charge framed against the appellant, during trial, the prosecution has examined totally 9 witnesses, out of which the mother and father of the victim child were examined as PW1 and PW2 and the victim child was examined as PW4 and the independent witness was examined as PW5 and the Doctor who examined the victim child was examined as PW7.

19.A reading of the evidence of the victim child (PW4), she has clearly stated that on 05.12.2016, after returning to the home from school, she was playing ball inside the house, at that time the appellant came to her house for taking water in the bathroom and called her. When she went near him, the appellant removed her dress and sucked her nipples and told her that not to reveal to anyone and also removed her dress and dug her private parts with his fingers and committed the penetrative sexual assault. On 08.12.2016, when her mother (PW1) enquired her why she was upset, she informed her about the occurrence happened on 05.12.2016. PW5, who is an independent witness has stated that the father of the victim child (PW2) received a phone call from his wife (PW1) and she informed about the occurrence. The Doctor (PW6) has stated that he examined the appellant and issued the potency test report and the same was marked as Ex.P7. The Doctor (PW7) has stated that he conducted medical examination on the victim child (PW4) and found that the hymen was intact and there was no injury on body of the victim child and made entries in the Accident Report (Ex.P8) and issued Blood Test Report (Ex.P9).

20.During investigation, the victim child was produced before the learned XVIII Metropolitan Magistrate, Saidapet for recording the statement under Section 164 Cr.P.C., and the same was recorded and during trial, the same was marked as Ex.P3. A reading of Ex.P3, the victim child has clearly narrated the incident happened on 05.12.2016 and during trial, when she was examined as PW4, she reiterated the same as mentioned in the statement under Section 164 Cr.P.C., (Ex.P3). Therefore, the statement under Section 164 Cr.P.C., (Ex.P3) was substantiated by the victim child when she was examined as witness before the trial Court as PW4.

21.Though the learned counsel for the appellant vehemently contended that there was no eye witness to the occurrence and in the absence of the eye witness coming on to depose on any part of the prosecution story, the charge could not be said to be established, the cases like this nature, the culprit will wait for chance for the aloofness of the victim child and then he will commit the offence. No person would commit these type of offences in the presence of others. Therefore, the contention of the learned counsel for the appellant cannot be accepted. From the evidence of the parents of the victim child (PW.1 and PW.2), it could be seen that at the time of occurrence, they were not in the house and taking advantage of loneliness of the victim girl, the appellant who is the neighbour and running an electrical shop, has committed the penetrative sexual assault on the victim child. Though the evidence of PW.1 and PW.2 are hearsay witnesses, PW.1, the mother of the victim child has

stated about what her daughter (PW.2) informed to her and PW.2, the father of the victim child has stated about what her wife (PW.1) informed to him. There was no material contradictions between the evidence of the victim child (PW4), her statement recorded under Section 164 Cr.P.C., (Ex.P3) and the evidence of the parents of the victim child (PW1 & PW2).

22.Though the Doctor (PW7) has opined that there was no penetrative sexual assault on the victim girl, the evidence of the victim child is that the appellant removed her dress and sucked her nipples and also removed her dress and dug her private parts with his fingers and that itself falls under Section 3(b) of POCSO Act. Since at the time of occurrence the victim child was below the age of 12 years, the offence committed by the appellant would fall under Section 5(m) of the POCSO Act and the same is punishable under Section 6 of POCSO Act. Further, before the Doctor (PW7), the victim girl has clearly stated that a known person sexually assaulted her.

23.For better appreciation, Sections 3(b), 5(m) and 6 of POCSO Act are extracted as follows:-

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

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

5. Aggravated penetrative sexual assault.-(a) Whoever, being a police officer, commits penetrative sexual assault on a child -

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

6. Punishment for aggravated penetrative sexual assault.-Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

24.A reading of the evidence of the victim child (PW.4) and the statement recorded under Section 164 Cr.P.C., which clearly proved that the appellant has committed aggravated penetrative sexual assault on the victim child for offence punishable under Section 6 of POCSO Act. But the trial Court has convicted and sentenced the appellant under Section 10 of POCSO Act. However, neither the State, nor the parents of the victim child (aggrieved person) has filed any appeal as against the same.

25.The learned counsel for the appellant vehemently contended with regard to plea of alibi that on the date of occurrence, the appellant was not available in the place of

occurrence and he had gone along with his family members to attend the house warming ceremony of his relative. But in order to prove the same, the appellant has not examined the person, who conducted the house warming ceremony on the date of occurrence and not marked any invitation for house warming ceremony. If at all it is true that the appellant at the time of occurrence was not in the station and he was somewhere else, he should have examined the persons who is the owner of the house who conducted the function. Even he has not mentioned the name of the relative to whose function he went out station. In this case, the appellant has not established the plea of alibi and the same is false. The learned trial Judge rightly rejected the plea of alibi taken by the appellant.

26. Further, as regards previous enmity is concerned, the main defence taken by the appellant is that he was running an electrical shop and the father of the victim child (PW2) purchased home theatre, but he did not pay the amount for the same. Whenever the appellant demanding the amount, the father of the victim child (PW2) dragged the payment by saying one reason or other, due to which there was misunderstanding between them. Though the appellant put a suggestion before PW.2 in cross examination in this regard, he admitted that PW.2 purchased the home theatre from the appellant, but he denied that there was no enmity with regard to non payment of money for purchasing the home theatre. Thus, the appellant has miserably failed to prove the previous enmity between the appellant and the father of the victim child (PW.2) with regard to purchasing the home theatre on loan. Therefore, the contentions raised by the learned counsel for the appellant with regard to plea of alibi and the previous enmity between the appellant and the father of the victim child (PW2) are false.

27. In this case, there was a delay of three days in lodging the complaint (Ex.P1). The mother of the victim girl (PW1) has stated that on 08.12.2016, her daughter (PW4) was scared and she herself locked the house and when she enquired her, she revealed the happenings to her. Since the victim girl was fear due to the act of the appellant, she did not inform the happenings immediately to her parents. Even though the occurrence came into light after three days on 08.12.2016, on the same itself the parents of the victim child lodged the complaint (Ex.P1). Therefore, the delay in lodging the complaint (Ex.P1) would not fatal to the case of the prosecution and on that sole ground, this Court cannot disbelieve the evidence of the victim child (PW4).

28. The learned trial Judge invoked the presumption under Sections 29 and 30 of POCSO Act. It is no doubt that the statutory presumption has to be rebutted by the appellant. In

this case, the prosecution has established the sexual assault on the victim child (PW4) and therefore, drawn the presumption against the appellant and it is for the appellant to rebut the presumption in the manner known to law. A reading of the entire oral and documentary evidence and also the evidence produced by the defence, this Court finds that the appellant has not rebutted the presumption in the manner known to law.

29. Therefore, on a perusal and consideration of the evidence of the victim child (PW4), her parents (PW1 & PW2), and independent witness (PW5), the complaint (Ex.P1), the statement of the victim girl recorded under Section 164 Cr.P.C., (Ex.P3) and the Birth Certificate (Ex.P2) and all other oral and documentary evidence on record, this Court finds that the prosecution has proved its case beyond reasonable doubt that the appellant has committed penetrative sexual assault on the victim girl, who was a minor aged 7 years at the time of the occurrence, and therefore, POCSO Act would attract against the appellant. Even though the prosecution has substantiated the charge for offence punishable under Section 6 of POCSO Act, the material available on records amply proved that the appellant has committed the offence under Section 5(m) of POCSO Act and it is punishable under Section 6 of POCSO Act. The learned trial Judge has convicted and sentenced the appellant for offence punishable under Section 10 of POCSO, but not under Section 6 of POCSO Act. As against which, the State has not filed any appeal and therefore, this Court cannot interfere with the judgment of the trial Court.

30. Hence, this Court can safely come to the conclusion that the appellant has committed penetrative sexual assault on the victim girl and therefore, the prosecution has established its case beyond reasonable doubt. In the light of the above discussion, this Court does not find any merit in this appeal and the appeal is liable to be dismissed.

31. Accordingly, this Criminal Appeal is dismissed and the judgment of conviction and sentence passed by the trial Court is confirmed.

32. With regard to quantum of sentence imposed on the appellant, the learned trial Judge has awarded only minimum sentence of 5 years for offence punishable under Section 10 of POCSO Act. Neither the State nor the victim child filed any appeal for the minimum sentence imposed on the appellant by the trial Court and this Court is not inclined to interfere with the same.

33. The trial Court is directed to secure the accused and commit him to prison to undergo the remaining period of

sentence. The bail bonds executed by the appellant, if any, shall stand canceled.

34.This Court, by order, dated 17.02.2020, directed the appellant to deposit a sum of Rs.2,00,000/- to the credit of S.C.No.30 of 2018 before the trial Court. As per the order of this Court, the appellant has deposited the amount. Therefore, this Court, while granting Suspension of Sentence to the appellant, by order, dated 24.02.2020 in Crl.M.P.No.15270 of 2019 in Crl.A.No.736 of 2019, directed the trial Court to redeposit the amount of Rs.2,00,000/- in a Fixed Deposit Account, in any one of the Nationalized Banks and also made observation that the disbursal of this amount shall be decided at the culmination of the appeal. On considering the facts and circumstances of the case and also the offence committed by the appellant, the victim child is entitled to withdraw the said amount from the Nationalized Bank in which the amount was deposited by way of compensation.

s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

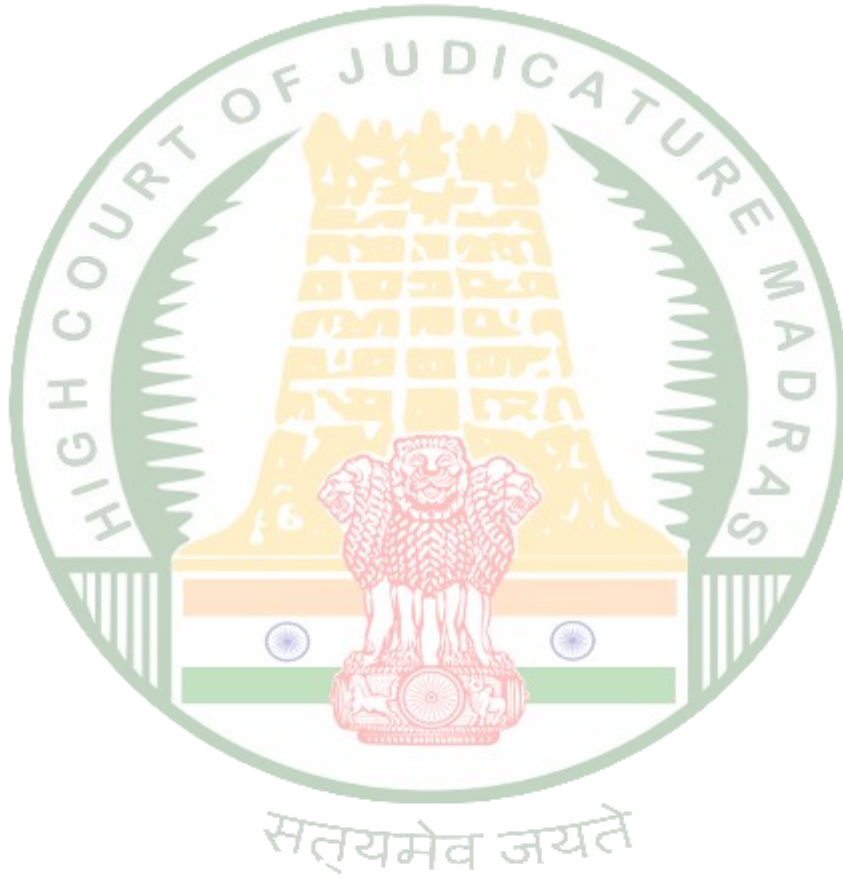
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To

- 1.The Sessions Judge,
Mahila Court (Mahalir Neethimandram),
Special Court for Cases under POCSO Act/Children's Court
Chennai.
- 2.The Inspector of Police,
W19 All Women Police Station,
Adyar, Chennai.
- 3.The Chairman
POCSO Act Committee
High Court, Madras 104.
- 4.The Superintendent
Central Prison, Puzhal,
Chennai
- 5.The Public Prosecutor,
High Court, Madras.

Copy to
The Section Officer
Criminal Section
High Court, Madras 104.

Crl.A.No.736 of 2019

PPA (CO)
SP (05/07/2021)



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