

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.02.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Criminal Appeal No.777 of 2019

Pechimuthu

... Appellant/Single Accused

Vs.

State by

The Inspector of Police,
Madipakkam All Women Police Station,
Madipakkam,
Chennai - 600091.

(Crime No.15 of 2016)

... Respondent/Complainant

Criminal Appeal is filed under Section 374(2) of Cr.P.C., to allow the appeal and set aside the conviction and sentence imposed upon the appellant vide judgment dated 02.11.2019 in Spl.C.No.22 of 2017 on the file of the Sessions Judge Mahila Court, Chengalpattu and acquit the appellant and direct the trial Court to refund the fine amount in the interest of justice.

For Appellant : Mr.G.V.Sridharan

For Respondent : Mr.R.Suryaprakash
Government Advocate

JUDGEMENT

This Criminal Appeal has been filed against the Judgment of conviction and sentence imposed by the learned Sessions Judge, Mahila Court, Chengalpattu in Spl.C.No.22 of 2017 dated 02.11.2019.

2. The respondent-Police have registered a case against the appellant in Crime No.15 of 2016 for the offence under Section 8 of the POCSO Act, 2012. After the investigation, the offence was altered from Section 8 to Section 10 of the POCSO Act, 2012 and a charge sheet was filed before the Sessions Judge Mahila Court, Chengalpattu. Since the offence against the children falls under the POCSO Act, the learned Sessions Judge, after taking a charge sheet on file in Spl.C.No.22 of 2017, completed the formality and framed the

charges. After the completion of trial, the Trial Court convicted the appellant for the offence under Section 10 of the POCSO Act, 2012 and sentenced him to undergo rigorous imprisonment for five years and also to pay fine of Rs.5,000/- in default to undergo simple imprisonment for three months. Challenging the said judgment of conviction and sentence passed by the Sessions Judge, the accused has filed the present appeal before this Court.

3. The learned counsel for the appellant would submit that due to the personal enmity of the mother of the victim girl with the appellant, a false case was foisted against the appellant and even though the prosecution did not prove their case beyond all reasonable doubts, the appellant was simply convicted only on the ground of sympathy. He would further submit that no opportunity was given to the appellant to cross-examine mother of the victim girl (P.W.1) and the victim girl (P.W.2), which was very vital for the appellant. He further stated that at 1.30 pm, the victim girl might have gone to the school and it is not possible for her to go to the appellant's shop and there is no eye witness other than (P.W.2). P.W.3 and P.W.4 are not the eye witnesses, they have seen the mother and the victim girl only at 5.00 clock when the mother of the victim girl went to the appellant's shop. Further, he would submit that the victim girl was subjected to the medical examination and there is no corroborated evidence. As the appellant was not given the opportunity to cross examine, the judgment of the Trial Court has to be set aside on the ground of denial of opportunity.

4. The learned Government Advocate appearing for the respondent would submit that the victim girl was aged only about 10 years, studying in 5th Std and was examined as (P.W.2). She has clearly narrated the occurrence that at the time of the incident, her mother was not in the house as she went out to her job and when she returned to home, the victim girl informed her about the occurrence. Thereafter, the mother of the victim girl made a complaint before the respondent-Police and the Police filed a charge sheet. On the side of the prosecution, 11 witnesses were examined as P.W.1 to P.W.11 and 7 documents were marked as Ex.P1 to Ex.P7 and the charge against the appellant under Section 10 of the POCSO Act was proved beyond all reasonable doubts. On the date of occurrence, there was an annual holiday in the school of the victim girl, therefore, she did not go to the school and when she went to the appellant's shop for buying snacks, the appellant called her into his shop and misbehaved with her. Proper opportunity was given to the appellant but he has not cross-examined the victim girl and her mother. Subsequently, he filed the petition in March, 2019 and the same was dismissed by the Trial Court. Thereafter, he challenged the said order before this Court and this Court has also confirmed the order of the Trial Court. Since sufficient opportunity was given to the appellant and he has not cross-examined P.W.1

& P.W.2, the prosecution has proved their case beyond all reasonable doubts. As there was no penetrative sexual intercourse, the victim girl was not subjected to a medical examination. Therefore, non-producing the victim girl for the medical examination before the medical practitioner is not fatal and the Trial Court has rightly considered the same. Therefore, there is no merit in the case and the same is liable to be dismissed.

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

6. The case of the prosecution is that the victim girl (P.W.2) was aged only about 10 years and the appellant was running a grocery shop. On 01.06.2016, there was an annual holiday for the victim girl and her parents were not in the house. When the victim girl went to the appellant's shop for purchasing snacks, the appellant invited her into his shop and pressed her chest. Immediately, the victim girl pulled down his hand and escaped from there. At about 5.30 pm, when her mother returned to home, she informed the same to her, who in turn, went to the appellant's shop along with the victim girl and shouted at him. On hearing the noise, P.W.3 & P.W.4 have also come. Thereafter, the mother filed a complaint (Ex.P1) against the appellant before the respondent-Police and the Police registered a case in Crime No.15 of 2016 against the appellant and investigated the matter. After investigation, the Police have filed a charge sheet before the Trial Court and the Trial Court has framed charges against the appellant for the offence punishable under Section 10 of the POCSO Act, 2012. On the side of the prosecution, as many as 11 witnesses were examined from P.W.1 to P.W.11 and 7 documents were marked as Ex.P1 to Ex.P7. 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. However, on the side of the appellant, no oral or documentary evidence was produced. After considering the evidence on record and hearing on either side, the learned Sessions Judge, by judgment dated 02.11.2019 in Spl.C.No.22 of 2017, convicted and sentenced the appellant as stated above. Challenging the judgment of conviction and sentence, the present appeal has been preferred by the appellant.

7. 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.

8. On a careful perusal of the entire materials and records placed before this Court, this Court finds that the complaint (Ex.P1) has been lodged by P.W.1, who is none other than the mother of the victim girl. Though she is not an eye-witness to the occurrence, since the victim is a female child, the mother of the victim girl (P.W.1) has filed the complaint (Ex.P1) before the respondent Police. The victim girl (P.W.1)

has clearly narrated the occurrence in her statement given to the Police under Section 161 Cr.P.C. as well as to the learned Judicial Magistrate, Tambaram under Section 164(5) Cr.P.C (Ex.P2). At the time of incident, the victim girl was aged about 10 years and was studying in 5th Std. After the complaint was registered, the respondent-Police has taken steps to record the statement of the victim girl and the litigant was also produced before the Judicial Magistrate for the statement under Section 164 Cr.P.C. of the victim girl.

9. On reading the evidence of the victim girl (P.W.2) and the statement recorded under Section 164 Cr.P.C, it is apparent that the appellant has committed such an offence. In case of this nature, presence of eye witnesses are mostly improbable. Moreover, culprits naturally waiting for the chance of loneliness of the children and they will take advantage of the situation and when nobody sees them, then they indulge in such type of offence. This case is also one amongst it. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible.

10. On the date of occurrence i.e. on 01.06.2016, there was an annual holiday to the victim girl and hence, she was in the house. It is the submission of the learned counsel for the appellant that on the date of occurrence at about 1.30 pm, the victim girl must be in the school and it is not possible for her to come at that time in the shop, but the appellant has not established that on that day, the school was running and the victim girl went to the school. In view of this, the contention of the appellant is not acceptable. As far as the submission regarding the personal enmity is concerned, the records reveals that on the date of chief examination i.e. on 09.01.2018 of mother of the victim girl (P.W.1), the defence counsel has not cross-examined both P.W.1 & P.W.2 and sought time but the Court has rejected the same and subsequently, he has not cross-examined various other witnesses namely P.W.9, P.W.10 and P.W.11. Thereafter, the application filed by him under Section 311 of Cr.P.C., in CrI.M.P.No.152 of 2019 before the Trial Court was dismissed by its order dated 13.03.2019 and the same was challenged by him before this Court in CrI.O.P.No.11601 of 2019. This Court has also confirmed the order passed by the Trial Court and dismissed the petition. Therefore, now it shows that even after giving sufficient opportunity, the appellant has not cross-examined the witnesses. Further, as the case comes under the POCSO Act, the witnesses should be cross-examined on the same day itself in order to protect the victim girl. Even the application for recall of witnesses was filed one year after closing the trial and the same was dismissed. It is relevant to refer Section 35 of POCSO Act, which reads as follows:-

"35.(1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any shall be recorded by the

Special Court.

(2)The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

Therefore, there is no reason to accept the contention of the learned counsel for the appellant. Further, as the allegation against the appellant is that he pressed the breast of the victim girl and as there is no penetrative sexual intercourse, she was not subjected to medical examination and therefore, non-producing the victim girl before the medical practitioner for medical examination was not fatal to the case of the prosecution. Further, the appellant has not meted out any grounds to interfere with the judgment of the Trial Court.

11. The age of the victim girl is only 10 years and she is a child under the POCSO Act. In cases like this, the evidence of the victim alone can be taken into consideration and no corroboration and eye witness is necessary and contradictions pointed by the learned counsel for the appellant are not a material contradictions to go to the root of the prosecution. This Court also finds that the prosecution has proved their case beyond all reasonable doubt by providing cogent and acceptable evidence. Therefore, this Court does not find any reason to interfere with the judgment of the Trial Court and accordingly, the Criminal Appeal stands dismissed.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

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To

1.The Inspector of Police,
Madipakkam All Women Police Station,
Madipakkam,
Chennai - 600091.

2.The Sessions Judge,
Mahila Court, Chengalpattu.

3.The Public Prosecutor,
Madras High Court,
Chennai - 600 104.

+1cc to Mr.G.V.Sridharan, Advocate SR.No.7318

Cr1.A.No.777 of 2019

RK (CO)

<https://hcservices.courts.gov.in/hcservices/>
GMI (30/06/2021)