



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.02.2021

CORAM:

THE HON'BLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.816 of 2019

and

Crl.M.P.No.5681 of 2020 & 17517 of 2019

Kannan

.. Appellant

Versus

State represented by
The Inspector of Police
AWPS, Avinasi,
Tiruppur District.

.. Respondent

PRAYER:Criminal Appeal is filed under Section 374 (2) of Code of Criminal Procedure to set aside the judgment in S.S.C.No.24 of 2019 dated 25.10.2019 on the file of the Magalir Neethimandram (Fast Track Mahila Court), Tiruppur.

For Appellant : Mr.Deepan Uday
For Respondent : Mr.R. Suryaprakash
Government Advocate

J U D G M E N T

The respondent police registered a case against the appellant in Crime No.4 of 2019 for the offence punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO' Act). After completion of investigation, the respondent police laid a charge sheet before the Special Court, Tiruppur. Since the offence falls against the woman as well as child, the learned Special Judge after taking the charge sheet on file and made it over to the file of Magalir Neethimandram, (Fast Track, Mahila Court), Tiruppur, in Spl.S.C.No. 24 of 2019 where charges were framed against the appellant for the offence punishable under Section 10 of the 'POCSO' Act. After conducting trial, the appellant was convicted for the offence under Section 9(m), (n), (i) and punishable under Section 10 of the 'POCSO' Act, and sentenced to undergo rigorous imprisonment for 7 years and fine of Rs.10,000/- in default to undergo one year rigorous imprisonment. Challenging the said judgment of conviction and sentence, the appellant had preferred an appeal before this Court.



2. The learned counsel for the appellant would submit that the entire case of the prosecution depends only on the evidence of PW1 who was the victim girl by herself and PW2-Meenambal, grand mother of the victim girl. Apart from that there is no independent witnesses to support the case of the prosecution. The evidence of these two witnesses have to be rejected on the sole ground that both of them are interested witnesses besides their testimony has not been corroborated by other witnesses or by the documents. Apart from the testimony of PW1 and 2, there is no other document or oral evidence to prove the case of the prosecution. Moreover, there are material contradictions between the FIR, the evidence of PW1 and 2. The deposition of PW1 and 2 prove that their deposition is by way of an after thought. He would further submit that the allegation in the FIR is that the appellant kissed in the cheeks of the victim girl whereas both PW1 and PW2 contradicted the same during the cross examination before the Trial Court. The learned counsel for the appellant placed reliance on the judgment in the case of Karunakaran v. State of Tamil Nadu reported in [AIR 1976 383]. In that case, the Hon'ble Supreme Court held that the material contradictions between the FIR and the evidence will be fatal to the case of the prosecution. There is no independent witnesses was examined, who had witnessed the Commission of Offence by the prosecution. The complaint was given after delay of three days and no proper reason was given for the same. Even though the victim girl stated that she suffered leg injury the same was not attested by the doctor. Therefore, the material contradictions between the evidence of the victim girl and the doctor who examined the victim girl as PW5, goes to the root of the matter. Thus, the prosecution has failed to prove its case beyond reasonable doubt. The learned Special Judge failed to appreciate the entire evidence, but based on the assumption and presumption wrongly convicted the appellant which warrants interference of this Court.

3. The learned Government Advocate (Criminal Side) would submit that at the time of occurrence the age of the victim girl was only 10 years. The appellant is the owner of the building in which the victim girl and her grand mother were residing as tenant. On the date of occurrence the victim girl was playing in the compound lane of her house at about 4.30 pm., The appellant who came there in an inebriated mood assaulted the victim girl repeatedly over both her cheeks and stamped her leg with his leg. He has also threatened the victim girl and asked her to come to his house and the victim girl went inside the house of the appellant. The appellant shut her mouth and kissed her over her lips. The appellant with the intent to sexually assault the victim girl has repeatedly slapped her over both her cheeks, stamped her leg with his leg, shut her mouth and kissed her. Therefore, he is liable to be prosecuted for the offence under



Sections 9(m), (n), (i) r/w Section 10 of the 'POCSO' Act. In this case, the victim girl was only residing with the grand mother and the grand mother was residing in the house of the appellant's father as a tenant. The appellant is the son of the house owner. The grand mother of the victim girl as a tenant was not in the house at the time of occurrence and the victim girl was playing in front of the house. At that time the appellant came with drunken mood and assaulted physically as well as sexually. Thereafter, the grand mother came to the house and the victim girl informed the same to her. Since the grand mother was not feeling well she went to the Hospital for treatment and thereafter, she discussed the matter with the neighbours and gave a complaint before the All Women Police Station, Avinashi. The delay has been properly explained by the prosecution. Further, the doctor who also examined the victim girl stated that she was attacked by known person. Further, the victim girl was also produced before the learned Judicial Magistrate, Avinashi, to record statement under Section 164 (5) of Cr.P.C., and the learned Judicial Magistrate has also recorded the statement from the victim girl and later, it was sent to the Court. Therefore, in a case like this, no eye witness can be expected. Further, the affected persons cannot be expected to immediately report the matter to Police Station. Since the victim girl is a minor girl aged about only 10 years and no one was in the house and the grand mother of the victim girl is an old lady and further the offence was committed by the son of the house owner, certainly, they would think over and discuss with the neighbours for filing complaint. Hence, the reason for delay of three days is not fatal to the case of the prosecution. Further, a reading of the evidence of PW1 and PW2, PW5 - the doctor's evidence, deposition of PW6 and the statement recorded under Section 164 (5) of Cr.P.C., will clearly prove that the appellant has committed the above said offences. The Trial Court has rightly appreciated the evidence adduced and there is no merit in the appeal.

4. Heard both sides and perused the materials available on record.

5. It is the case of the prosecution that the victim girl was aged about 10 years and was residing with her grandmother. The grand mother is residing in the appellant's father house as a tenant. On 22.05.2019 at about 4.00 p.m. the victim girl was playing in the compound lane of her house situated at Door No.2/103, Mariamman Kovil Street, Kanakkampalayam, Perumanallur. The appellant who came to his house in an inebriated mood called the victim girl. When she was refused to go to the appellant's house, the appellant called the victim girl with an intent to sexually assault the victim girl. Accordingly, he has repeatedly slapped her over both her cheeks, stamped her leg



with his leg. When the victim screamed out of pain, the appellant shut her mouth, hugged her and kissed her over her lips. As the victim girl started crying, the appellant left her and went away. Therefore, the appellant with the intent to sexually assault the victim girl has committed an act for which he was prosecuted for the offence under Section 9 (m), (n) (i) which are punishable under Section 10 of the 'POCSO' Act.

6. During trial, on the side of the prosecution as many as 9 witnesses were examined as PW1 to PW9 and 13 documents were marked as Ex.P1 to Ex.P13. No material object was exhibited.

7. After completing the examination of the prosecution witnesses when incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant he denied it as false. On the side of the defence, no oral and documentary evidence was produced. As this Court in this appeal as appellate Court is a fact finding Court, it has to re-appreciate the entire evidence and come to an independent conclusion. A reading of the entire materials would indicate that the case was registered against the appellant for the offence under Section 9(m) (n), (i) punishable under Section 10 of the 'POCSO' Act. In order to prove the case of the prosecution the victim girl was examined as PW1. A reading of the evidence of the victim girl would indicate that she has narrated the entire events. The victim girl stated that the appellant is a known person and he is the son of the house owner in which the victim girl along with her grand mother resides. She has also stated that the appellant came with drunken mood and called her, when she refused to go, the appellant came nearby the victim girl, slapped her repeatedly with an intention to sexually assault the victim girl. He slapped her over both her cheeks, stamped her leg with his leg, shut her mouth and kissed her which falls under Section 7 of the POCSO Act. Since the victim girl is below 12 years the offence falls under Section 9(m), (n), (i) punishable under Section 10 of the 'POCSO' Act. Since the victim girl is a minor girl at the time of occurrence and the grand mother was not in her house, the victim girl later informed to the grandmother about the occurrence. The grand mother was also examined as PW2 before the Trial Court. She has deposed that her son-in-law got remarried and her grand daughter is under her care and custody. The mother of the victim girl also eloped with another person. The appellant is the son of their house owner where they were residing at the time of occurrence. At the time of occurrence, the age of the victim girl is only 10 years and she was studying in IV standard.

8. On 22.05.2019 as it was a holiday the grand children were at home and as the grand mother was not doing well, she



went to the hospital and returned home only at about 7.00 p.m. On seeing her, the victim girl reported that the appellant assaulted her over her cheeks, stamped her leg, shut her mouth and kissed her over her lips. As it was late at night, on the next day morning PW2 went to the house of the appellant in order to question the appellant about the occurrence. Since he was not at home she contacted the mother of the appellant's over phone and informed her about the occurrence. But, the mother of the appellant stated that she can do whatever she wants. Later, the grand mother of the victim girl along with her colleague one Anitha went to the All Women Police Station, Avinashi and lodged the complaint against the appellant.

9. Under these circumstances, delay in filing the complaint is not fatal to the case of the prosecution. The victim is a child. At the time of occurrence, the grand mother of the child was not in the house. The de-facto complainant is the grand mother of the victim girl and in her old age she approached the appellant and since the appellant was not in his house she contacted the mother of the appellant. Since she could not get proper response from them, with the help of the neighbours, she approached the police and gave a complaint. Since the grandmother of the victim girl was illiterate as well as the victim girl is a female aged about only 9 years and school going girl, naturally the grand mother being an old lady, would think about the future of the minor girl and naturally would discuss with the well-wishers and neighbours and it will take some time to take a decision as to whether they can go to the Police Station or not. The appellant is the son of the house owner, therefore, delay in filing the complaint is not a fatal to the case of the prosecution. Further, the victim girl has narrated the entire events and she has not stated that some one has witnessed the same. Therefore, in the absence of the same, it seems that no eye witness in this case could be examined and therefore, non examination of any eye witness or independent witnesses were also not fatal to the case of the prosecution. In a case like this, we cannot expect any eye witness and the culprit will take a chance of aloofness of the children and no prudent man in a case of this nature would commit such offence in public place. Therefore, taking advantage of the loneliness of the victim girl, the appellant has committed the offence. Therefore, the deposition of PW1 and PW2 has not been corroborated by the other witnesses. This Court also has no doubt about the trustworthiness of the evidence of victim girl. Since the grandmother came only in the late at night 7.00 p.m., on the date of the occurrence the victim girl has brought to the hospital and narrated the incident to the Doctor. Even though the doctor has mentioned about the assault made by the appellant he has not stated anything about sexual harassment. The grand mother would have



hesitated to inform the doctor. Considering the future of the minor girl, non mentioning of the entire things before the doctor is also not fatal to the case of the prosecution. However, when the victim girl was produced before the learned Judicial Magistrate, Avinashi, for recording statement under Section 164 (5) of the Cr.P.C, she stated before the learned Judicial Magistrate and the same was marked as Ex.P12. In order to prove the age of the minor girl the Transfer Certificate issued by the Directorate of School Education to the victim girl was marked as Ex.P5 and the School Certificate issued by the Uratchi Ondriya Thuvakkapalli, Kanakkamapalayam, is marked as Ex.P6.

10. A perusal of Ex.P5 and Ex.P6, it is clearly proved that at the time of occurrence the age of the victim girl was only 9 years. In Ex.P6, her date of birth is mentioned as 09.08.2009 and even as per Transfer Certificate Ex.P5 her date of birth is 09.08.2009. This was not questioned or challenged and the date of occurrence is 22.05.2019. Therefore, the victim girl is only 9 years at the time of occurrence and below 12 years. The appellant committed a sexual assault and therefore, his acts falls under Section 9 (m) of the 'POCSO' Act.

11. It is relevant to extract relevant provision of the POCSO Act here:-

Sec.7, Sexual assault.- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other Act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

Sec. 9, Aggravated sexual assault.-

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

(n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or

(i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

A bear reading of above provisions and the evidence of the victim it is very clear that the appellant has committed offence under Section 9 (m) (n) (i) of the POCSO Act.



12. A complete reading of deposition of PW1 and PW2, the school certificate, Ex.P5 and Ex.P6, it is evident that the victim girl was aged about 9 years. The statement recorded under Section 164 of Cr.P.C., clearly shows that the appellant intentionally, sexually assaulted the victim girl which falls under Section 9 (m), (n), (i) r/w Section 10 of the 'POCSO' Act. The victim girl was examined as PW1 before the Trial Court and she has clearly narrated the same. The doctor who examined the victim girl was examined as PW5 and he has stated that in the hospital the grandmother of the victim girl has stated that the victim was assaulted by a known person and he has also kissed her. Therefore, on the date of the occurrence the victim girl was sexually assaulted by the appellant. In cases like this when the evidence of victim girl is clear, it alone can be taken into consideration, which does not require any corroboration or any independent witness is required to be examined. Further, there is no reason to discard the deposition of victim and this Court can rely on the evidence of the victim girl alone to convict the appellant. On a reading of the entire material would go to show that the appellant has committed the offence under Section 9 (m) (n) (i) r/w Section 10 of the 'POCSO' Act, and there is no merit in the appeal and the appeal is liable to be dismissed. Therefore, the conviction imposed by the trial court is confirmed. Considering the facts and circumstances of the case, the sentence alone is reduced from 7 years to 5 years which will meets ends of justice.

13. In fine, the Criminal Appeal is dismissed with the above modification. Consequently, connected Miscellaneous Petitions are closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

msm
To

1. The Inspector of Police
AWPS, Avinasi,
Tiruppur District.
2. The Public Prosecutor,
High Court, Madras.
3. The Magalir Neethimandram
(Fast Track Mahila Court)
Tiruppur



4.The Superintendent
Central Prison, Coimbatore.

5.The Hon'ble POCSO Committee
High Court, Madras 104.

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KV(CO)
SP(16/07/2021)