

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.02.2021
Delivered on : 19.04.2021

CORAM :

THE HONOURABLE MR. JUSTICE P. VELMURUGAN

Crl.A.No.845 of 2019

Marimuthu

...Appellant/Accused

Vs.

The State, represented by
The Inspector of Police,
AWPS, Attur Police Station,
Salem District.

...Respondent/Complainant

Criminal Appeal filed under Section 374(2) Cr.P.C., praying to set aside the judgment of conviction and sentence, dated 14.08.2019, in Spl.S.C.No.46 of 2016, on the file of the Mahila Court, Salem.

For Appellant : Mr.B.Vasudevan

For Respondent : Mr.R.Suryaprakash
Government Advocate (Crl. Side)

J U D G M E N T

This Criminal Appeal is filed against the judgment of conviction and sentence, dated 14.08.2019, in Spl.S.C.No.46 of 2016, on the file of the Mahila Court, Salem.

2.The respondent police originally registered a case in Crime No.24 of 2014 against the appellant for the offences punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act" for brevity) and Section 376 IPC. After enquiry, the case was altered to Sections 12 r/w. 11(iv) and 6 r/w. 5(1) of the POCSO Act and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, 1998.

3.After completing the investigation, the respondent police laid a charge-sheet before the Special Court (Mahila Court), Salem, and the learned Special Judge had taken the case on file in Spl.S.C.No.46 of 2016. After completing the formalities, the learned Special Judge framed the charges for the offences punishable under Sections 12 and 6 of the POCSO Act, against the appellant.

4.After framing the charges, in order to prove the case of the prosecution, on the side of the prosecution, during trial, as many as 16 witnesses were examined as P.W.1 to P.W.16 and 26 documents were marked as Exs.P1 to P26 and 4 Material Objects were exhibited as M.O.1 to M.O.4.

5.After completing the trial and hearing of the arguments advanced on either side, considering the facts and circumstances, the trial Court found the appellant guilty of the offences punishable under Sections 6 and 12 of the POCSO Act and convicted and sentenced him as follows :

Provision under which convicted	Sentence
Section 6 of POCSO Act	Rigorous Imprisonment for ten years and a fine of Rs.1,00,000/-, in default, to undergo Simple Imprisonment for one year
Section 12 of POCSO Act	Rigorous Imprisonment for three years and a fine of Rs.20,000/-, in default, to undergo Simple Imprisonment for six months
The sentences shall run concurrently.	

6.Challenging the said conviction and sentence, the appellant/accused has filed the present appeal before this Court.

7.The learned counsel appearing for the appellant/accused would submit that the prosecution has foisted a false case against the appellant and there is no material to show that the appellant has committed penetrative sexual assault on the victim girl. The evidence of the victim girl (P.W.1) is falsified by the evidence of the Doctor (P.W.11), who examined the victim girl. As per the evidence of the Doctor (P.W.11), there was no external injury and there was no symptom of aggravated penetrative sexual assault on the victim girl (P.W.1). The trial Court has convicted the appellant only based on assumptions and there is no iota of evidence to prove that the appellant has committed aggravated penetrative sexual assault on the victim girl. Though the victim girl (P.W.1) has stated that P.W.6 (aunt of the victim) is an eye-witness, P.W.6 has stated that she has not seen the occurrence, and therefore, there is a material contradiction between the evidence of P.W.1 (victim girl) and P.W.6 (aunt of the victim girl) and there is no corroborative evidence. The learned trial Judge failed to appreciate the evidence of P.W.6 and also the evidence of the

Doctor (P.W.11), and based on assumption and sympathy, convicted and sentenced the appellant, which warrants interference.

8.The learned Government Advocate (Crl. Side) appearing on behalf of the respondent Police would submit that, at the time of occurrence, the age of the victim child was only 15 years. The victim child was studying 10th Std. and the appellant was a neighbour, aged about 55 years. While the victim child was taking bath in the thatched bathroom, taking advantage of the same, the appellant took photo of the victim child in nude position and showed the same to the victim child and threatened her, if she does not accede to his demand, he would show the photo to her parents and also publish the same, and on seeing that, her parents would die. In such a way, he threatened the victim child and called the victim child to his newly constructed building and committed aggravated penetrative sexual assault on the victim child and he also continued to do the same on five occasions. On one such occasion, i.e., on 23.07.2014, P.W.6 (aunt of the victim child) noticed them, and immediately, the appellant escaped from the place, and later, when the victim child was questioned by her parents, she informed them the entire episode, and subsequently, the family of the victim child approached the respondent Police and gave a complaint against the appellant.

9.The learned Government Advocate (Crl. Side) would further submit that the victim child was produced before the learned Judicial Magistrate for recording the statement under Section 164 Cr.P.C. Even before the learned Judicial Magistrate, the victim child has clearly narrated the events. Subsequently, the victim child was produced before the Medical Officer (P.W.11) for medical examination and P.W.11 examined her and gave a certificate (Ex.P8). Though the Doctor (P.W.11) has stated that there was no symptom of recent sexual intercourse or any external injury, she has stated that the hymen was not intact and the vagina admitted two fingers, and therefore, there is a possibility of sexual intercourse. The date of occurrence is on 23.07.2014. The victim child was produced before the Doctor (P.W.11) on 25.07.2014. From the evidence of P.W.1 (victim child), it is clear that the appellant made an attempt to have sexual intercourse on 23.07.2014, however, on seeing P.W.6 (aunt of the victim child), he left the place. Therefore, there was no sexual assault on 23.07.2014. Therefore, either on or between 23.07.2014 and 25.07.2014, there was no sexual intercourse, and therefore, the Doctor has opined that there was no recent sexual intercourse. However, the victim child (P.W.1) has clearly stated that, prior to that, she was subjected to sexual assault by the appellant for five times, and the evidence of the Doctor (P.W.11) also says that the hymen was not intact and the vagina admitted two fingers, and therefore, there is a

possibility of sexual assault on the victim child. Hence, though the Doctor (P.W.11) has opined that there was no recent sexual intercourse as on 25.07.2014, from the evidence of P.W.1 (victim child), it is clear that the accused/appellant has committed the offence punishable under Sections 6 and 12 of the POCSO Act.

10.The learned Government Advocate (Crl. Side) would further submit that, though the victim child has narrated the entire events before the learned Magistrate in her statement under Section 164 Cr.P.C., the statement under Section 164 Cr.P.C. is not a substantive evidence. However, the victim child has subsequently appeared before the trial Court and she was examined as P.W.1, where she has deposed and narrated the entire events. Therefore, the statement recorded from the victim child under Section 164 Cr.P.C. by the learned Judicial Magistrate is completely corroborated by the evidence of the victim child (P.W.1) before the trial Court. Though there are contradictions between the evidence of P.W.1 (victim child) and P.W.6 (aunt of the victim child), they are not material contradictions. Even though P.W.6 cannot be said to be an eye-witness, from the evidence of P.W.1 (victim child), Ex.P2 (statement recorded under Section 164 Cr.P.C.) and the evidence of the Doctor (P.W.11), it is clear that the victim child was subjected to aggravated penetrative sexual intercourse by the appellant, and therefore, the prosecution has proved its case beyond reasonable doubt and the trial Court has rightly appreciated the oral and documentary evidence and has convicted and sentenced the appellant and there is no reason to interfere with the same, and the appeal is liable to be dismissed.

11.This Court gave its anxious consideration to the rival submissions and also perused the materials placed on record.

12.The case of the prosecution is that the houses of the victim child and the appellant are opposite to each other. While the victim child was taking bath in the thatched bathroom without dress, the appellant took a photo in cellphone. Thereafter, the appellant showed the photo in the cellphone to the victim child and threatened her that if she does not accede to his demand, he would show the photo to her parents and on seeing that, out of fear, her parents would commit suicide, and called her to the newly constructed building and committed sexual assault on the victim child. Out of fear and agony, the victim child did not object to the sexual assault made by the appellant. Thereby, the appellant/accused committed aggravated penetrative sexual assault on the victim child on five occasions, and finally, on 23.07.2014 at 08.00 p.m., while the appellant attempted to commit sexual assault on the victim child, P.W.6 (aunt of the victim child) saw the same, and

immediately, on seeing P.W.6, the appellant fled the scene of occurrence. P.W.6 questioned the victim child (P.W.1) and the victim child disclosed the entire incidents to her and P.W.6 informed the same to the parents of the victim child. Thereafter, the parents of the victim child approached the Police and they made a complaint before the respondent Police on 25.07.2014. The respondent Police registered a case in Crime No.24 of 2014 against the appellant.

13.After completing the investigation, the respondent police laid a charge-sheet before the Special Court (Mahila Court), Salem, and the learned Sessions Judge had taken the case on file in Spl.S.C.No.46 of 2016.

14.The trial Court framed the charges against the appellant as stated supra. When questioned, the appellant pleaded "not guilty".

15.In order to prove the case of the prosecution, on the side of the prosecution, 16 witnesses were examined and 26 documents were marked and 4 Material Objects were exhibited.

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

17.After considering the evidence on record and hearing either side, the trial Court, by judgment dated 14.08.2019, in Spl.S.C.No.46 of 2016, convicted and sentenced the appellant for the offences punishable under Sections 6 and 12 of the POCSO Act as above.

18.Challenging the judgment of conviction and sentence, the accused/appellant has preferred the appeal before this Court.

19.This Court, being an Appellate Court, is a fact finding Court, and it has to give its finding independently after appreciating the entire evidence. Accordingly, this Court has re-appreciated the entire evidence.

20.The victim child was only 15 years old at the time of occurrence. In order to prove the age of the victim child, the Age Proof Certificate was marked as Ex.P10, which clearly shows that the age of the victim child is between 14 and 16 years. The Head Master of the school, in which the victim child was studying, was examined as P.W.8, and she has marked the School Certificate issued by her as Ex.P5, in which, the Date of Birth of the victim child is given as 03.07.2000. Moreover, the

appellant has not disproved the age of the victim child. The date of offence is on or before 23.07.2014. Therefore, at the time of occurrence, the age of the victim child was below 18 years and hence, she is a "child" under Section 2(1)(d) of the POCSO Act.

21.The victim child was examined as P.W.1. On a careful reading of the evidence of the victim child (P.W.1), it is seen that she has clearly narrated the entire events. The father of the victim child was examined as P.W.2 and the mother of the victim child was examined as P.W.3. They have spoken about the information given by the victim child and registration of the complaint before the respondent Police. The aunt of the victim child was examined as P.W.6. The victim child (P.W.1) has stated that the appellant committed penetrative sexual assault on her on five occasions, and on 23.07.2014 also, the appellant called her and she went to the place of occurrence and on that day also, the appellant attempted to commit sexual assault and at the time, P.W.6 (aunt of the victim child) saw them and immediately, the appellant left the place, whereas, P.W.6, in her evidence, has stated that her neighbours informed that the victim child was followed by the appellant, and since it was night hours, she questioned the victim child, and thereafter, the victim child narrated the entire events and subsequently, she (P.W.6) informed the same to the parents of the victim child. Though there is a contradiction between the evidence of P.W.1 and P.W.6, the evidence of P.W.1 (victim child) is very clear that the appellant is the one who has committed the offence. Though the Doctor (P.W.11) has clearly stated that there was no symptom of recent sexual intercourse, she has admitted that the hymen was not intact and the vagina admits two fingers, and therefore, there is a possibility of sexual intercourse. Further, Ex.P7 (Accident Register) clearly shows that the appellant is the one who has committed the offence. The victim child was also produced before the learned Judicial Magistrate for recording statement under Section 164 Cr.P.C. Accordingly, the statement was recorded and the same was marked as Ex.P2.

22.Therefore, from a combined reading of the evidence of P.W.1 (victim child), the statement recorded under Section 164 Cr.P.C. (Ex.P2), the evidence of the Doctor (P.W.11), the entry made in the Accident Register (Ex.P7) and the opinion of the Doctor that the victim child was subjected to penetrative sexual intercourse, the commission of offence by the appellant, is proved. In cases like this, no independent witness can be expected. Even though the victim child had not immediately informed her parents, she has stated the reason for that, i.e., the appellant showed her nude photo taken in the cellphone while taking bath and threatened her not to reveal it to anybody and

if she refuses to accept to his demand, he would show the photo to her parents and also publish the photo, and therefore, she remained silent, and out of fear, she yielded to his demand, and subsequently, when the other persons noticed the same and enquired her, she disclosed the entire incidents. Normally, in cases like this, the victims, out of fear and also considering their future and the reputation of the family, do not tend to reveal it to anyone immediately. The victim child in the present case on hand has also done the same thing.

23. In cases like this, the evidence of the victim child alone can be taken into consideration, unless the evidence of the victim girl is not trustworthy. In the present case, there is no reason to discard the evidence of P.W.1 (victim child). The prosecution has proved its case with cogent and reliable evidence and the trial Court has also convicted the appellant by giving cogent reasons for that. While independently appreciating the evidence, from the evidence of P.W.1 to P.W.3, P.W.11 and also Exs.P2, P7, this Court also finds that the appellant has committed the offences punishable under Sections 6 and 12 of the POCSO Act. Since the victim was aged under 18 years at the time of occurrence, the victim is a child under Section 2(1)(d) of the POCSO Act, and the appellant was aged about 55 years at the time of occurrence. Since the appellant has committed aggravated penetrative sexual assault on a child, he has committed the offences punishable under Sections 6 and 12 of the POCSO Act, and the trial Court has rightly appreciated the oral and documentary evidence and has convicted and sentenced the appellant for the offences as stated above. Therefore, this Court does not find any merit in the appeal and the appeal is liable to be dismissed.

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

सत्यमेव जयते
s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Sessions Judge,
Mahila Court,
Salem.

2.The Inspector of Police,
AWPS, Attur Police Station,
Salem District.

3.The Public Prosecutor,
High Court, Madras.

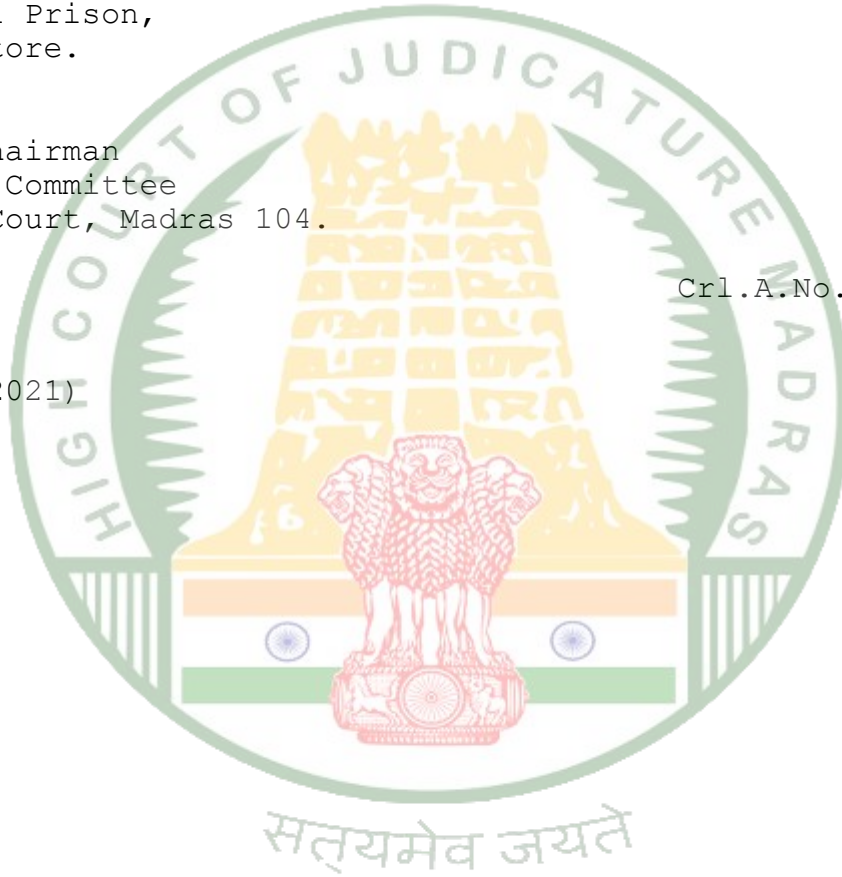
4.The Deputy Registrar (Criminal Section),
High Court, Madras. |with a direction to send back the
|original records to the trial Court,
| if any, immediately

5.The Superintendent,
Central Prison,
Coimbatore.

Copy to
The Chairman
POCSO Committee
High Court, Madras 104.

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CP(CO)
SP(18/06/2021)



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