

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.03.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.905 of 2019

Anandh

... Appellant/Sole Accused

Vs.

State rep. by
Inspector of Police,
All Women Police Station North,
Tirupur,
Tirupur District.
(Crime No.26 of 2015)

... Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the Judgment passed in Spl.S.C.No.7 of 2016, dated 26.10.2018, on the file of the learned Sessions Judge, Fast Track Mahila Court, Tirupur.

For Appellant : Mr.T.Muruganantham
For Respondent : Mr.R.Suryaprakash
Government Advocate

J U D G M E N T

This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 26.10.2018 made in Spl.S.C.No.7 of 2016, on the file of the learned Judge, Fast Track Mahila Court, Tirupur.

2. The respondent-Police registered a case against the appellant in Crime No.26 of 2015, for the offences punishable under Sections 9(m) r/w 10 of Protection of Children from Sexual Offences Act, 2012 (For brevity "the POCSO Act). After completing the investigation, laid a charge sheet before the learned Judge, Fast Track Mahila Court, Tirupur. On appearance of the appellant, the provisions of Section 207 of Cr.P.C., were complied with and the trial Court framed charges for the offence under Sections 9(m) r/w 10 of POCSO Act, against the appellant and conducted the trial.

3. After considering the evidence on record and hearing on either side, the learned Judge, by Judgment dated 26.10.2018, convicted the appellant for the offence under Sections 9 (m) r/w 10 of POCSO Act and sentenced him to undergo seven years Rigorous Imprisonment and to pay a fine of Rs.20,000/-, in default to undergo one year Rigorous Imprisonment.

4. Challenging the said Judgment and Conviction, the accused /appellant has preferred the present Appeal.

5. The learned counsel for the appellant would submit that P.W.3 is the mother of the victim girl, who made Ex.P2-complaint and there are material contradictions in the allegations levelled in the complaint and the evidence adduced by P.W.3. It is further submitted that P.W.6 is said to have eyewitness, however, during cross-examination she has clearly admitted that she has not seen the occurrence. However, according to P.W.3, she received information that the appellant had made sexual assault on the victim child only from P.W.6 and based on the information received from P.W.6, P.W.3-mother of the victim girl, lodged Ex.P2 complaint, whereas during cross examination, both P.W.3 and P.W.6 have admitted that they have not seen the occurrence. Therefore, they are only hearsay evidence and therefore, the trial Court failed to appreciate their evidence and therefore, benefit of doubt should have been extended to the appellant.

6. The learned counsel would further submit that the victim child is only 3 years old and her cousin is 8 years old and they were tutored by the mother of the victim girl. It is further submitted that the doctor, who examined the victim girl was examined as P.W.10, had deposed that there was no external injury and the hymen was intact and issued Ex.P9 certificate to that effect, however, the prosecution has failed to prove that the victim child was subjected to sexual assault. Ten days after the occurrence, the victim girl was produced before the learned Magistrate for recording statement under Section 164 of Cr.P.C. and therefore, it is clear that the victim girl was tutored by the parents and they foisted a false case against the appellant and the appellant is an innocent and the prosecution has failed to prove its case beyond reasonable doubt. The learned Special Judge failed to appreciate the evidence of the prosecution witnesses and there is no medical evidence and there is no eyewitness to prove the occurrence, therefore, the benefit of doubt should have been extended to the accused/appellant, however, the learned Sessions Judge failed to consider the above aspect, convicted the appellant on the ground of sympathy, which warrants interference of this Court.

7. The learned Government Advocate (Criminal Side) for the respondent-Police would submit that P.W.1-victim child is aged about only 3 years and her cousin is 8 years old at the time of occurrence. The evidence of P.W.2, the cousin of the victim child corroborated the evidence of P.W.1-victim child. At the time of occurrence, the mother of the victim girl was feeding to her 8 months old baby and after hearing the noise, she also came into the spot and neighbours are also assembled there and they assaulted the accused. There is no contractions in the evidence of the victim girl and the doctor. P.W.10, had confirmed only the age of the victim child and also gave her opinion. The victim child was also produced before the learned Magistrate for recording statement under Section 164(5) of Cr.P.C and before the learned Magistrate, the victim child and her cousin have narrated the entire occurrence, which was marked as Ex.P11. Since the offence committed by the appellant is highly perverse, and also considering the age of the victim child, the learned Sessions Judge, has awarded maximum sentence, and therefore, prays for dismissal of the Appeal.

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

9. The case of the prosecution is that on 19.10.2015, at about 12.30 hours, when the victim child went to buy chocolate, the accused who was standing in front of the closed cookware shop situated at Sivanandha Colony, Anupparpalayam, Tiruppur, called the victim child and inserted his finger into her panty and rubbed her vagina. As the child started crying, on hearing the cry of the child, the persons who were near the scene of occurrence came to the scene of occurrence and rescued the child and the accused was caught red handed, handed over to the police station. Subsequently, the Investigating Officer investigated the matter and laid a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Tiruppur.

10. On the side of the prosecution, 11 witnesses were examined as P.W.1 to P.W.11 and 11 documents were marked as Exs.P1 to P11 and one Material Object was exhibited as M.O.1 series. After completion of the examination of the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant, the same was denied as false and on the side of the defence, no oral and documentary evidence was let in. The learned Judge, Fast Track Mahila Court, Tiruppur, after hearing the arguments on either side and considering all the materials placed on record, found that the appellant is guilty and convicted and sentenced, as referred above, which is challenged in this Criminal Appeal.

11. Since this Court is an Appellate Court and also final Court of fact finding, has to re-appreciate the entire evidence and come to the independent conclusion.

12. Even though P.W.6, who is said to have an eyewitness, during cross examination she had admitted that she has not seen the occurrence directly. Based on the information received from P.W.6 only, P.W.3-mother of the victim child came to know the occurrence, and immediately, had gone to the scene of occurrence. However, no doubt, after the occurrence, P.W.6, mother of the victim girl and also neighbours were assembled and caught hold the appellant and handed over the appellant to the Police Station. Therefore, there is no difficulty to identify the appellant and now the only question is whether the appellant has committed the sexual assault as alleged by the prosecution and the prosecution has proved the guilty of the accused, beyond reasonable doubt.

13. A careful reading of statement recorded under Section 164 of Cr.P.C., of the victim girl and her cousin before the learned Magistrate, it could be seen that they have narrated the entire occurrence that took place on 19.10.2015, which was marked as Ex.P11 and also during evidence also, they deposed the entire occurrence. A reading of the evidence of the victim girl, who examined as P.W.1, has clearly deposed that when she went along with her brother to buy chocolate, the accused, who was standing near the shop called them, threatened them and made them to sit and the appellant rubbed over her vagina and when she shouted, many persons assembled there and assaulted the appellant. P.W.2-cousin of the victim girl had deposed that when he and his sister went to buy chocolate, the appellant, who came near the cookware shop, caught him and his sister (victim child) and made them to sit there. When P.W.2 stated that they are going to buy chocolate, the accused stated that he would purchase a big chocolate for them, and when P.W.1 started crying and stated that she wants to see her grandmother, the accused sat between P.W.1 and P.W.2, left his hand into P.W.1's panty and rubbed and when P.W.1 started to cry, many persons came to the scene of the occurrence and assaulted the accused.

14. Since there was no penetration had taken place, and the victim child was below 12 years, the learned Judge, rightly sentenced the appellant for the offence under Sections 9 (m) r/w 10 of POCSO Act. A combined reading of the statement of the victim girl and her cousin, which was marked as Ex.P11 series, and the evidence of P.W.1, victim girl and also the evidence of P.W.2, Gopinath, the cousin of the victim child, it could be seen that the appellant has committed the offence under Section 9(m) r/w 10 of POCSO Act, and the prosecution has proved its

case beyond reasonable doubt. Depth of penetration is immaterial, mere touching of private part would be sufficient so as to constitute the offence.

15. According to the learned counsel for the appellant, there is no eyewitness in this case and hence, the prosecution has not proved its case beyond reasonable doubt and therefore, benefit of doubt should have been extended to the appellant. No doubt, in the case on hand, as stated, there is no eyewitness, P.W.6, who is said to have an eyewitness, during cross examination had admitted that she has not seen the occurrence directly. The Court cannot expect witnesses, especially in POCSO Cases, since the culprit will wait for a chance taking advantage of the loneliness of the victim girl, they used to commit these type of offenses, because, there was no eyewitness in this case, the Court cannot come to the conclusion that the prosecution has not proved its case.

16. The next contention of the learned counsel for the appellant is that the doctor who examined the victim girl has stated that there was no external injury and the hymen was intact and issued Ex.P9 certificate to that effect, however, the prosecution has failed to prove that the victim child was subjected to sexual assault. It is not the case of penetrative sexual assault and there is any injury on the private part or body of the victim child and therefore, the evidence of the doctor will not be helpful to the present case. In cases of this nature, evidence of the victim child is to be taken into consideration, unless doubt about the trustworthiness of the evidence of the victim child. In this case, there is no reason to disbelieve her or discard the evidence of the victim child. During evidence P.W.1-victim child has clearly stated that when she went along with her brother to buy chocolate, the accused, who was standing near the shop called them, threatened them and made them to sit and the appellant inserted his finger on her private part and when she shouted, many persons assembled there and assaulted the appellant. Depth of penetration is immaterial, mere touching of private part with sexual intention would be sufficient so as to constitute the offence. Section 9 (m) of POCSO Act, 2012 deals with aggravated sexual assault on a child below 12 years. In the case on hand, the victim child was aged 3 years and a perusal of evidence of the victim child and the evidence of her cousin, P.W.2, the offence committed by the appellant is chargeable under Section 9 (m) of POCSO Act, which is punishable under Section 10 of POCSO Act.

17. Therefore, under the circumstances, this Court also finds that the prosecution has proved its case beyond the reasonable doubt and there is no reason to interfere with the judgement of the learned Sessions Judge, Fast Track Mahila

Court, Tirupur. Considering the age of the victim child, this Court does not find any mitigating circumstances to reduce the sentence. Accordingly, the Criminal Appeal fails and the same is dismissed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Fast Track Mahila Court,
Tirupur.
2. The Inspector of Police,
All Women Police Station North,
Tirupur, Tirupur District.
3. The Chairman,
POCSO committee,
High Court, Madras.
4. The Superintendent, Central prison, Coimbatore.
5. The Public Prosecutor,
Madras High Court, Chennai.

Copy to:
The Section Officer,
Criminal Section,
High Court, Madras

+1cc to Mr.T.Muruganantham, Advocate SR.No. 13407

Cr1.A.No.905 of 2019

VBM(CO)

A.SK(09.07.2021)

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