

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.03.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.910 of 2019

Chandru

... Appellant

-Vs-

The State of Tamilnadu,
Represented by,
The Inspector of Police,
Erode All Women Police Station,
Erode District.
(Cr.No.6 of 2017).

... Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, to allow this appeal and call for records of the judgment of the Court of Sessions, Magalir Neethi Mandram, (Fast Track Mahila Court), Erode in Special Sessions Case No.09 of 2018, dated 18th September 2019 and set aside the said conviction of the Court below.

For Appellant : Mr.K.Thirukkumaran,
Legal Aid Counsel

For Respondent : Mr.R.Suryaprakash,
Government Advocate [Crl. Side]

JUDGMENT

This Criminal Appeal has been filed against the Judgment of conviction and sentence imposed by the learned Sessions Judge, Magalir Neethi Mandram, (Fast Track Mahila Court), Erode in Special S.C.No.9 of 2018, dated 18.09.2019.

2.The respondent Police have registered a case in Crime No.6 of 2017, for offence under Sections 3 r/w 4 of Protection of Children from Sexual Offence Act, 2012 and Sections 3(1)(w)(ii) & 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 against the appellant on the complaint (Ex.P1) given by the victim child (PW2). After completing investigation, the respondent police laid a charge sheet before the learned Sessions Judge, Magalir Neethi Mandram, (Fast Track Mahila Court), Erode and the same was taken on file in Special S.C.No.9 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 under Section 4 of Protection of Children from Sexual Offence Act, 2012 and Section 3(1)(w)(ii) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015.

4.After completing the trial and hearing the arguments advanced on either side and also considering the oral and documentary evidence, the trial Judge found the appellant guilty for offence punishable under Section 4 of Protection of Children from Sexual Offence Act, 2012 and convicted and sentenced him to undergo 8 years Rigorous Imprisonment and to pay a fine of Rs.1,000/-, in default to undergo 3 months Simple Imprisonment for offence punishable under Section 4 of Protection of Children from Sexual Offence Act, 2012 and acquitted from under Section 3 (1)(w)(ii) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015.

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 though the alleged occurrence is said to have taken place on 01.07.2017, the complaint (Ex.P1) was not given immediately. On the next day of occurrence i.e., on 02.07.2017, the grandfather (PW6) of the victim child (PW6) informed the parents of the victim child about the occurrence. On receipt of the information, her parents arrived on 03.07.2017, but the complaint came to be lodged on 06.07.2017 and the delay for five days in lodging the complaint has not been properly explained by the prosecution. After due deliberation and discussion, a false complaint came to be lodged against the appellant. Though the victim child (PW2) in the statement recorded under Section 164 (5) Cr.P.C., (Ex.P2) has stated that when her grandfather was called her at about 11.00 p.m, she was fainted and unconscious and the next day morning only she recovered and went to her house, in the complaint (Ex.P1), she has stated that since it was night hours, she slept there itself and on the next day morning on 02.07.2017 at about 04.30 a.m., she woke up and went to her house. Thus, there are material contradictions in the statement of the victim child and the complaint and it creates strong suspicion and the benefit of doubt is to be extended.

7.The learned counsel for the appellant would further submit that though the trial Court has rightly acquitted the appellant under Section 3(1)(w)(ii) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, without

any sufficient and substantive material convicted the appellant for offence punishable under the 4 of Protection of Children from Sexual Offence Act, 2012. The Doctor (PW4) one, who examined the victim child, has clearly stated that there was no external injury on the body of the victim child and merely because the hymen was not intact, it cannot be said that it is due to sexual intercourse. Further, the victim child has stated that the appellant forcibly had a sexual intercourse with her and also pressed her breast, whereas the Doctor (PW4) has stated that there was no external injury on the body of the victim child. Therefore, the medical evidence (PW4) does not corroborate the evidence of the victim child. The learned counsel would further submit that in this case, no eye witness and no independent witness was examined by the prosecution to support the case. Except the grandfather of the victim child (PW6), no witness was examined to prove the fact that the on the date of occurrence, the victim child had gone to her grandfather's house. In this case, none of the witnesses have stated that the victim child was scene together with the appellant just prior to the occurrence or during the occurrence or soon after the occurrence. Therefore, in the absence of eye witness to the occurrence and non corroboration of the evidence of the victim child, the trial Court should have disbelieved and discarded the evidence of the victim child and should have acquitted the appellant.

8.The learned counsel for the appellant would submit that on 03.07.2017, the victim child along with her parents went to Chennimalai Police Station, where first statement was given by the victim child and they were directed to lodge a complaint to the respondent Police Station. Prior to the occurrence, there was previous enmity between the appellant and the victim's family. In order to take vengeance, they foisted a false case against the appellant. The first statement made by the victim child before the Chennimalai Police Station was suppressed and subsequently, the alleged complaint (Ex.P1) was lodged and a case was registered to suit their convenience. Therefore, in this case, no evidence and material to prove that the appellant has committed the sexual assault on the victim child and the evidence of the Doctor (PW4) does not corroborate the evidence of the victim child and the statement recorded under Section 164 (5) Cr.P.C., (Ex.P2) and the complaint (Ex.P1). The evidence of the victim child does not have trustworthiness and it is, therefore, unsafe to rely upon and convict the appellant. The learned counsel would submit that the trial Court failed to consider the material contradictions and mechanically convicted the appellant only on assumption and on sympathy, and therefore, the judgment of conviction and sentence passed by the trial Court against the appellant, is liable to be set aside.

9.Mr.R.Suryaprakash, learned Government Advocate (Crl. Side) appearing for the respondent Police would submit that at the time of occurrence, the victim child was aged about 14 years. On the date of occurrence, the victim child was suffered illness and she was in her grandfather's house. The victim child while returning back to her grandfather's house after visiting her friends, the appellant questioned the victim child whether she had dinner? and forcibly took her to his power loom factory and committed the penetrative sexual assault full night hours without her consent. Due to the victim child not returning to home, the grandfather of the victim child (PW6) made search her and she could not be found. On the next day i.e., on 02.03.2017 on receipt of information with regard to the presence of the victim child, PW6 reached the place of occurrence and the victim child narrated the events to him, in turn, he informed the same to her parents. Thereafter, the victim child along with her parents went to Chennimalai Police Station to lodge a complaint, where the victim child was directed to give the complaint to the respondent Police. After discussing with the family members and on considering the future of the victim child and the reputation of the family, the complaint came to be lodged on 06.07.2017. Immediately after lodging the complaint, the victim child was produced before the Doctor (PW4) for clinical examination. The Doctor (PW4) has stated that the hymen was not intact and she was subjected to penetrative sexual assault. Subsequently, the victim was also produced before the learned Judicial Magistrate for recording the statement under Section 164(5) Cr.P.C. The learned Judicial Magistrate recorded the statement of the victim child under Section 164(5) Cr.P.C., wherein she clearly narrated the entire incidents and the penetrative sexual assault committed by the appellant.

10.The learned Government Advocate (Crl. Side) would further submit that during trial, the victim child was examined as PW2 and her mother and grandfather were examined PW1 and PW6 respectively. The trial Court based on the evidence of PW1 to PW7 and also the statement recorded under Section 164(5) Cr.P.C., (Ex.P2), the Birth Certificate (Ex.P18), Medical Certificates (Exs.P13 & P17), arrived at a conclusion that the appellant had committed the penetrative sexual assault on the victim child, who is a child and convicted him for offence punishable under Section 4 of the Protection of Children from Sexual Offence Act, 2012.

11.Even though there are contradictions between the statement of the victim child under Section 164(5) Cr.P.C., and in the complaint (Ex.P1), it would not fatal to the case of the prosecution. Since the appellant had forcibly committed the penetrative sexual assault out of night hours, she became unconscious and she could not recover immediately. Therefore,

the contradictions pointed out by the learned counsel for the appellant are only minor contradictions and only on the ground of minor contradictions in the statement of the prosecution witnesses, the entire prosecution case cannot be thrown out and the prosecution has proved the genesis of the occurrence. Thus, the appellant had committed the offence punishable under Section 4 of Protection of Children from Sexual Offence, 2012 on the victim child, who is a child under the definition of 2(1)(d) of Protection of Children from Sexual Offence Act, 2012 and the judgment of trial Court does not warrant interference of this Court and the appeal is 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 on the date of occurrence, the age of the victim child is 14 years and she was studying 11th standard in the Government Higher Secondary School, Kangeyam. Since she was ill on 30.06.2017, she was taken by her grand father (PW6) to his house. On 01.07.2017, after her grandfather leaving from his house for work, she went to meet her friends. After spending time with her friends and while she returning back to Nirmala's house, she met the appellant, who was running a power loom factory and he gave Rs.100/- to her for expense. She went to Vijaya Shop and purchased note book and kept the same at Nirmala's house and went to meet her friend Ananthi. At about 08.30 p.m., when she was passing through the back way of the appellant power loom factory, the appellant called her inside. At that time, the appellant was speaking to one Babu and thereafter, Babu left the place after sometime. The appellant closed the front door and back door of the power loom factory and speaking to the victim child affectionally and when he came to touch her breast, she refused and asked to leave her. Then, the appellant removed her dress and inserted his private part into her private part and she cried due to pain, but he continued to do the same and thereafter, she felt unconscious. At about 11.00 p.m., she heard her grandfather (PW6) voice calling her. After half an hour of having sexual intercourse, the appellant left the victim child behind the power loom and closed the factory and went away. The victim child was lying there full night without food and water. The next day morning on 02.07.2017, at about 04.30 a.m., the house owner of the premises Rani saw her and told her that her grandfather (PW6) was searching her all through the night. She informed her grandfather through one Ramesh about her presence. Her grandfather (PW6) informed her parents and they came on next day and gave a complaint (Ex.P1) to the respondent Police.

14. Based on the complaint (Ex.P1) given by the victim child,

an FIR in Crime No.6 of 2017 was registered for offence under Sections 3 & 4 of Protection of Children from Sexual Offence Act, 2012 and Sections 3(1)(w)(ii) & 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015. After completing investigation, the respondent police laid a charge sheet before the learned Sessions Judge, Magalir Neethi Mandram, (Fast Track Mahila Court), Erode and the same was taken on file in Special S.C.No.9 of 2018.

15. During the trial, on the side of the prosecution, as many as 16 witnesses were examined as PW1 to PW16 and 29 documents were marked as Exs.P1 to P29 and one material object was exhibited. After completing the evidence of prosecution witnesses, when incriminating circumstances were culled out from the prosecution witnesses put before the accused, he denied the same as false. On the side of the defence, one witness was examined and one document was marked.

16. After considering the evidence on record and hearing arguments on either side, the learned Sessions Judge, by judgment dated 18.09.2019 in Special S.C.No.9 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.

18. A reading of the entire evidence and materials show that the victim child was 14 years on the date of occurrence and she was a child, which falls under the definition of 2(1)(d) of the Protection of Children from Sexual Offence Act, 2012. On 01.07.2017 at night hours, the appellant has forcibly committed the penetrative sexual assault on the victim child. Though the trial Court framed the charges for offence under the Protection of Children from Sexual Offence Act, 2012 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, based on the available materials acquitted the appellant for offence under Section 3(1)(w)(ii) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 and convicted him for offence punishable under Section 4 of Protection of Children from Sexual Offence Act, 2012.

19. A reading of the evidence of the victim child (PW2) and her statement recorded under Section 164(5) Cr.P.C., and on perusal of her Birth Certificate (Ex.P18), it is seen that the date of birth of the victim child is 04.02.2002 and the date of occurrence is 01.07.2017. It could be seen from the evidence of the Doctor (PW5), the victim child has not completed the age of 18 years. Therefore, at the time of occurrence, the victim child is a child, aged about 14 years. In order to substantiate

the charge framed against the appellant, on the side of the prosecution, totally 16 witnesses were examined, out of which, the victim child was examined as PW2.

20. A reading of the evidence of the victim child (PW2), she clearly narrated the events and also stated that on the date of occurrence, while she was passing through the back way of the appellant power loom factory, the appellant called her inside. At that time, the appellant was speaking to one Babu and thereafter, Babu left the place after sometime. The appellant closed the front and back door of the power loom factory and speaking to the victim child affectionally and when he came to touch her breast, she refused and asked him to leave her. Then, the appellant had forcibly committed the penetrative sexual assault on her. The occurrence is said to have taken place on 01.07.2017, whereas the complaint was lodged on 06.07.2017, for which, the mother of the victim child has given proper explanation for the same.

21. Normally, the offence like this nature, the parents of the victim child would think about the future of the victim child and also the reputation of the family and would try to pacify the problem and try to conduct marriage in case the victim child is aged above 18 years and the appellant is unmarried. Otherwise, if the appellant is a married or old age person, on considering the age of the victim child and reputation of the family, a complaint would be lodged to the Police Station. It is well settled law that the victim child is a minor child and offence like this nature, the victim child cannot come out immediately for the offences committed by the accused and it would take some time to take decision to lodge the complaint. Therefore, mere delay is not sole ground for disbelieve or discard the evidence of the victim child. The mother of the victim child was examined as PW1 and the incident was informed her by PW6. On receipt of the information regarding the presence of the victim child, PW6 came to the scene of occurrence and the victim child informed the entire incident to PW6, in turn PW6 informed the same to her parents. On the next day i.e., on 03.07.2017, the parents of the victim child came and they had gone to Chennimalai Police Station along with the victim child to lodge a complaint, but they did not give any complaint and informed the Police that after discussion with the family members, they would lodge the complaint. After discussion with the family members and on considering the reputation of the family, on 06.07.2017 a complaint came to be lodged before the respondent Police by the victim child and the same was marked as Ex.P1. After lodging the complaint, the victim child was produced before the Doctor (PW4) for medical examination. The Doctor (PW4) conducted medical examination and stated that the victim child was subjected to penetrative sexual

assault and made entry in Accident Register (Ex.P13) and gave final opinion (Ex.P8). The Doctor (PW4) has stated that there was no external injury on the body of the victim child. Since because there was no external injury, it cannot say that no forcible sexual assault. Even assuming that there was a consent, the same is not valid, since the victim is a child under the definition of Section 2(1)(d) of POCSO Act. Hence, the act committed by the appellant falls under Section 3 of POCSO Act which is an offence punishable under Section 4 of POCSO Act.

22.At the time of occurrence, the age of the victim child is only 14 years and she has not completed 18 years of age. Even assuming that the victim child has given consent for sexual intercourse, at the time of occurrence, the appellant was aged about 41 years and he is a married men and having two children. Hence, the offence committed by the appellant falls under the Protection of Children from Sexual Offence Act, 2012.

23.Even the learned counsel for the appellant pointing out fainting of the victim child during sexual intercourse, the victim child while deposing before the trial Court and while recording the statement under Section 164(5) Cr.P.C., she has stated that soon after the occurrence, she was unconscious and therefore, she could not go to her house immediately. In the complaint (Ex.P1), she has stated that since night hours, she slept there itself and morning only woke up. Though there is a contrary version of the victim child with regard to faint during the sexual intercourse, it will not go to the root of the case of the prosecution.

24.From the evidence of the victim child (PW.2), her mother (PW.1), her grandfather (PW.6) and the Doctor (PW.4) and from the Birth Certificate (Ex.P18), the age of the victim child is below 14 years and she has not completed the age of 18 years at the time of occurrence. Therefore, a combined reading of the evidence of PW1 to PW7 and also the documents Exs.P1, P2, P8, P13 & P18, this Court finds that the appellant has committed the penetrative sexual assault and it falls under Section 3 of Protection of Children from Sexual Offence Act, 2012 and punishable under Section 4 of Protection of Children from Sexual Offence Act, 2012.

25.The contradictions pointed out by the learned counsel for the appellant is not the material contradictions and it will not go to the root of the case of the prosecution and absolutely no reason to disbelieve or discard the evidence of the victim child and reject the case of the prosecution in toto. The offence like this nature, no independent witnesses can be expected and the culprit will always wait for the chances of aloofness.

Therefore, merely because of no eye witness and non corroboration of independent evidence, the Court cannot simply ignore the evidence of the victim child, unless there is any reason to show the evidence of the victim child is unnatural or artificial or tutored by the adult members. From the medical evidence, it is proved that the victim child was subjected to penetrative sexual intercourse. From the evidence of the victim child, it is proved that the appellant one who has committed the penetrative sexual assault.

26.Hence, this Court can safely come to the conclusion that the appellant has committed penetrative sexual assault on the victim child and therefore, the prosecution has proved its case beyond all 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.

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

28.The counsel who argued the appeal for the appellant was appointed by the Legal Services Authority from the legal aid panel, hence he is entitled for fees as per rule.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge, Magalir Neethi Mandram,
(Fast Track Mahila Court),
Erode.
2. The Inspector of Police,
Erode All Women Police Station,
Erode District.
3. The Public Prosecutor,
High Court, Madras.

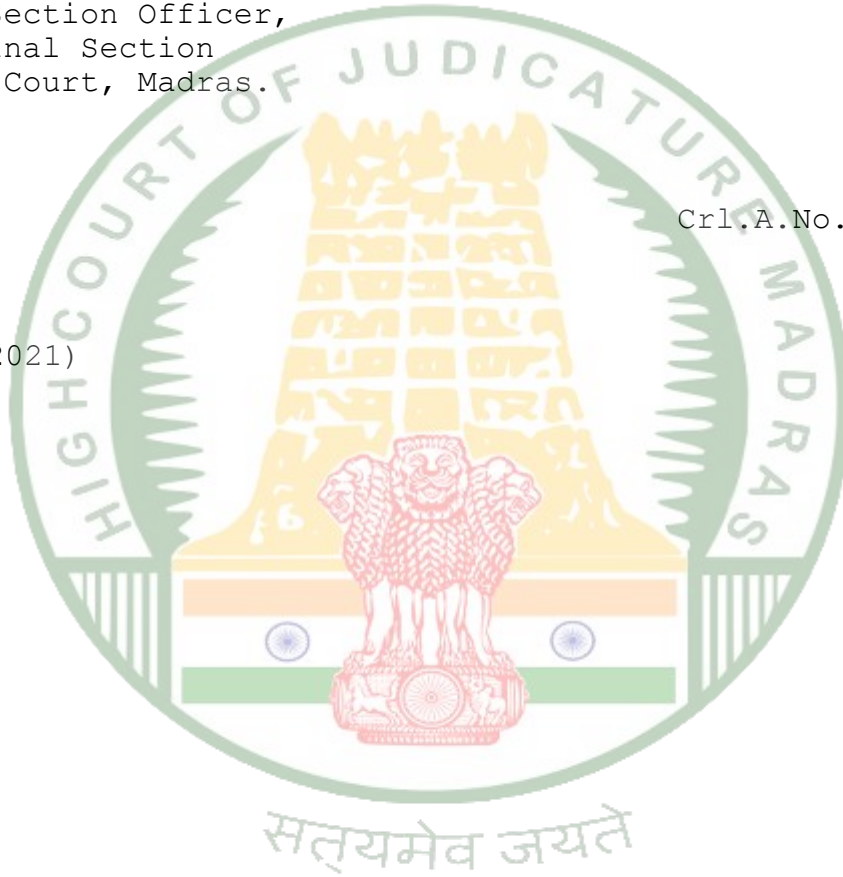
4. The Chairman,
POCSO Act Committee,
High Court, Madras
5. The Superintendent of Police,
Central Prison, Coimbatore.
6. The Member Secretary, High Court Legal Services Authority,
High Court, Madras-104.

Copy TO

1. The Section Officer,
Criminal Section
High Court, Madras.

Crl.A.No.910 of 2019

PPA(CO)
PM(13/07/2021)



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