

THE HON'BLE SMT.JUSTICE LALITHA KANNEGANTI

CRIMINAL APPEAL No.455 of 2018

JUDGMENT:-

This criminal appeal under Section 374(2) of Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') is filed against the conviction and sentence *vide* judgment dated 19.01.2018 in Sessions Case PCS No.109 of 2016 on the file of the I Additional Metropolitan Sessions Judge-cum-Special Judge for trial of Cases under Protection of Children from Sexual Offences Act, 2012, Hyderabad.

2. The appellant is convicted and sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.1,000/- for the offence under Section 12 of Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act") and in default of payment of fine amount to undergo simple imprisonment for a period of two months. He is also sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.1,000/- for the offence under Section 354-D of IPC and in default of payment of fine amount to undergo simple imprisonment for a period of two months. He is also sentenced to undergo simple imprisonment for a period of one month for the offence under Section 341 of IPC. All the sentences are directed to be run concurrently.

3. The case of the prosecution is that on 11.08.2016 at about 8.30 p.m. P.W.1 victim girl has given a report stating that she is aged 14 years and studying X Class at Sri Sai Grammar High School and for the past few days the accused was teasing her while

she was going and coming from school. The accused used to make unnecessary phone calls and text messages to her. Earlier her elders warned him not to repeat such type of nuisance, but the accused did not change his attitude. On 11.08.2016 at about 6.30 p.m. while P.W.1 was coming from school, the accused stopped her and tried to give a letter. Meanwhile, her uncle Raju Das caught hold of accused. Basing on the report given by P.W.1, a case in Crime No.389 of 2016 under Section 12 of POCSO Act and Section 354-D and 341 of IPC was registered. Thereafter after completion of investigation, P.W.5 sheet is filed.

4. The trial Court has taken the case on file under the above Section of law against the appellant and numbered as Sessions Case PCS No.109 of 2016. On appearance of the appellant, charges were framed under Section 12 of POCSO Act and Section 354-D and 341 of IPC, read over and explained to him in Telugu for which he pleaded not guilty and claimed to be tried.

5. In support of its case, the prosecution examined P.Ws.1 to 5 got marked Exs.P-1 to P-4. After completion of the prosecution evidence, the appellant was examined under section 313 Cr.P.C. and he denied the incriminating material appearing against him in the evidence of prosecution witnesses and reported no defence evidence.

6. On a thorough analysis of the evidence available on record, the trial Court convicted the appellant as indicated above. Assailing the same, the appellant is before this Court.

7. Heard Sri A.Prabhakar Rao, learned counsel for appellant and learned Assistant Public Prosecutor appearing on behalf of respondent.

8. Learned counsel for appellant submits that the trial Court erred in convicting the accused in the absence of any reliable evidence on record. He submits that trial Court ought not to have believed the evidence of P.Ws.2 and 3, whose evidence is contradictory to each other and the trial Court also failed to see that appellant did not harass and tease P.W.1 and no cogent evidence is put forth by the prosecution to prove the charges against the appellant. He submits that the trial Court failed to consider that P.W.5 categorically deposed that he visited the scene of offence, but no incriminating material was found. He further submits that trial Court failed to consider the material contradictions in the evidence of prosecution witnesses.

9. *Per contra*, learned Assistant Public Prosecutor appearing for the respondent-State submits that sufficient evidence, both oral and documentary were placed before the trial Court, which on proper appreciation, has accepted the theory placed by the prosecution and convicted the accused. It is the contention of the learned Addl. Public Prosecutor that the evidence of the victim, P.W.1 is cogent and convincing and that the victim has narrated the entire incident that happened on 11.08.2016 and once the evidence of the victim is found to be trustworthy and believable, the same would be sufficient to return a verdict of guilty, which the trial Court has done so and rightly too.

10. The Court below convicted the appellant by observing that the accused followed the victim girl while she was going to school from home as well as while she was returning from school to home and used to tease her by passing vulgar comments and also used to make vulgar signals against the victim girl despite of her clear indication of disinterest and on the date of incident, he wrongfully restrained the victim by stalking her and caught hold the hand of victim girl and tried to put Ex.P-2 letter in her hand, but in the meanwhile, P.W.3 came to the spot and on seeing him, the accused fled away. The acts of the accused squarely attracted the ingredients of Section 11 (i) (iv) of POCSO Act, which is punishable under Section 12 of POCSO Act and under Section 354-D and 341 of IPC and the prosecution proved its case beyond reasonable doubt.

11. Having heard the learned counsel on either side, perused the entire material on record.

12. Coming to the evidence of P.W.1, who is the victim girl, she deposed that the accused used to talk vulgarly with her and making vulgar signals with her. On 11.08.2016 while she was returning to her house, accused caught hold of her hand and tried to put letter in her hand, meanwhile her younger maternal uncle Raju Das tried to catch hold of him, but the accused fled away. Whereas in her cross examination, she deposed that the accused never touched her at any point of time. P.W.2, who is mother of victim deposed that her daughter informed that since six months the accused is following and teasing her and forcing her to talk with him. She deposed that the accused used to visit their house

and create nuisance at their house and also threatened P.W.1 not to inform to anybody. She further deposed that on the fateful day, the accused forcibly caught hold of hand of P.W.1 and tried to give a letter to P.W.1 and her brother Raju Das came and enquired with P.W.1 and he also tried to catch hold of the accused, but he fled away.

13. P.W.3 who is brother of P.W.1 deposed that nobody was present at the time of incident on 11.08.2016. He further deposed that whenever he dropped P.W.1 at her school, there is no scope to accused to tease P.W.1 and so also when she was going by auto. According to him, one person by name Sai warned the accused for teasing P.W.1.

14. As per the evidence of P.W.5, who is the investigating officer he received Ex.P-1 from P.W.1 at 8.30 p.m. on 11.08.2016 and he does not know who drafted Ex.P-1 report. He deposed that Ex.P-1 does not disclose about Ex.P-2 letter.

15. As per the evidence of P.W.1, Ex.P-1 was drafted by one constable of PS Chatrinaka. P.W.2 also deposed that police drafted Ex.P-1 on narration of P.W.1. But P.W.5 investigating officer deposed that he does not know who drafted Ex.P-1 report. P.W.1 deposed that the accused was present when they lodged report, whereas P.W.2 deposed that the accused was not present at the police station when they went to police station to lodge the report. Even though Ex.P-2 letter is handed over to police at the time of giving Ex.P-1 report, it is quite strange to note that P.W.1 does not know the contents of Ex.P-2 letter and she also does not mention the contents of Ex.P-2 in her Ex.P-1 report. P.W.2 deposed that on

the same day, police examined P.W.1 at their house, whereas P.W.5 deposed that he recorded the statements of P.Ws.1 and 2 at their house on 12.08.2016.

16. From the above evidence of P.Ws.1 to 3, it is clear that there are contradictions in their evidence about the presence of P.W.3 at the place of offence as on the date of incident. There is no whisper about the contents of Ex.P-2 letter in Ex.P-1 report. The evidence of P.Ws.1 to 3 is also quite contradictory with regard to presence of accused in police station at the time of giving Ex.P-1 report. The trial Court without any piece of independent evidence rushed to the opinion that the acts of accused clearly amounts to offence under Section 12 of POCSO Act and Section 354-D and 341 of IPC.

17. Section 11 of POCSO Act reads thus:

11. **Sexual harassment:**— A person is said to commit sexual harassment upon a child when such person with sexual intent—

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) shows any object to a child in any form or media for pornographic purposes; or

(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi) entices a child for pornographic purposes or gives gratification therefor.

Section 12 of POCSO Act reads thus:

Punishment for sexual harassment: Whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

18. So far as offence punishable under Section 12 of the POCSO Act is concerned, the offence would be complete if the prosecution succeeds in establishing the essential ingredients of the expression “sexual harassment”, as clarified by Section 11 of the Act. Section 11 clarifies or defines what is a sexual harassment. It has, in all, six clauses, dealing with various acts declared to be the acts of sexual harassment. In the instant case, having regard to the nature of allegations made against the appellant, we would be concerned with those acts, which fall under clause (1) of Section 11, which reads thus:

“11. Sexual harassment- A person is said to commit sexual harassment upon a child when such person with sexual intent,-

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii).....

(iii).....

(iv).....

(v).....

(vi).....

Explanation.- Any question which involves “sexual intent” shall be a question of fact.

19. A bare perusal of the above referred clause of Section 11, together with the explanation, would indicate that it is necessary

that the utterances are made by the accused with “sexual intent”. The expression “sexual intent” has been made a question of fact by the legislature and it would show that the legislature has not confined the meaning of the expression sexual intent, in any predetermined format or structure and has left it to be determined by the Court in the light of the facts and circumstances of each case. But, even for such a determination, plain and ordinary meaning of these two words would have to be considered so that the real intention of the offender can be ascertained from the facts and attendant circumstances.

Bandu Vitthalrao Borwar Vs. State of Maharashtra¹

20. As can be seen from the entire evidence on record, the main ingredient of Sections 11 and 12 of the POCSO Act are not attracted and *prima facie* offence of sexual harassment was not made out against the accused. Even in Ex.P-2, accused has not used any vulgar/intemperate language. Further, the evidence of victim that accused used to talk vulgarly with her and making vulgar signals with her and the same is denied by her in the cross examination. That apart, evidence of P.Ws.1 and 2 with regard to presence of P.W.3 at the time of incident is also quite contradictory. Further, there is no mention about the contents of Ex.P-2 letter in Ex.P-1 report. These patent infirmities in the genesis of the prosecution case strike at its very root and improbabilise the prosecution version as to the commission of the offence by the appellant. The trial Court solely basing on the interested testimony of P.Ws.1 to 3, which is inconsistent has convicted the accused. There are material contradictions in the

¹ 2016 SCC OnLine Bom 16128.

evidence of prosecution witnesses and the prosecution failed to bring home the guilt of the accused beyond reasonable doubt.

21. We must notice at this stage that it is not always the quantity but the quality of the prosecution evidence that weighs with the court in determining the guilt of the accused or otherwise. The prosecution is under the responsibility of bringing its case beyond reasonable doubt and cannot escape that responsibility. In order to prove its case beyond reasonable doubt, the evidence produced by the prosecution has to be qualitative and may not be quantitative in nature.

Yanob Sheikh v. State of W.B.²

22. Coming to the facts of the case, even as per the evidence of the prosecution witnesses, the appellant/accused has any sexual intent or made any sexual harassment. Even as per the contents of Ex.P-2 he has expressed his love for the complainant. Taking into consideration the discrepancies/contradictions in the evidence of P.Ws.1 to 3 and the entire gamut of the facts and circumstances of the present case, in a conspectus manner, which float on the surface draws this Court to an inevitable and irresistible conclusion that the prosecution miserably failed to bring home the guilt of the appellant for the charges leveled against him beyond all reasonable doubt. Hence, with the conviction and sentence imposed by the trial Court deserves to be set aside.

23. Accordingly, the criminal appeal is allowed and the conviction and sentence *vide* judgment dated 29.01.2018 in Spl. Sessions Case No.28 of 2016 on the file of the Special Judge for

² (2013) 6 SCC 428

trial of offences under SC ST (POA) Act-cum-VI Additional Metropolitan Sessions Judge at Secunderabad is set aside. The fine amount paid by the appellant/accused shall be returned to him after expiry of appeal time. Bail bonds of appellant/accused, if any, shall stand cancelled.

As a sequel, pending miscellaneous petitions, if any, shall stand closed.

28th December, 2021

PVD/DA

LALITHA KANNEGANTI, J

THE HON'BLE SMT.JUSTICE LALITHA KANNEGANTI

Allowed

CRIMINAL APPEAL No.455 of 2018

28th December, 2021

PVD/DA