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CRL A No.250 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.11.2022

Coram:

THE HONOURABLE **MR. JUSTICE P.VELMURUGAN**

Criminal Appeal No.250 of 2022

Boobalan

... Appellant

Vs.

State Rep. by
The Inspector of Police
H-5, New Washermenpet Police Station
Chennai

... Respondent

Prayer : Criminal Appeal filed under Sections 374 of Criminal Procedure Code, praying to call for records in S.C.No.310 of 2016 on the file of Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai, set aside the conviction and sentence of the appellant.

For Appellant : Mr.Ramesh Kumar

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been filed seeking to set aside the Judgment of conviction and sentence passed in S.C.No.310 of 2016 dated 17.09.2021, on the file of Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai.

2.The respondent police registered the case in Crime No.1416 of 2013 against the appellant for the offence punishable under Section 8 of POCSO Act, 2012 and after completing the investigation, laid charge sheet before the Mahila cum Children Court, Chennai, and the same was taken on file in S.C.No.310 of 2016 and during pendency of the same, on constitution of the Special Court for Exclusive Trial of Cases under POCSO Act, the case was transferred to the Special Court for further proceedings. The learned Sessions Judge after completing the formalities, framed the charge against the appellant for the offence punishable under Section 10 of POCSO Act.



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3. After framing the charges, in order to prove the case of the prosecution, during trial before the trial Court, totally 7 witnesses were examined as P.W.1 to P.W.7 and 10 documents were marked as Exs.P.1 to P10 and no material object was exhibited.

4. After completing the examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C. However, the accused denied the same as false and pleaded not guilty. On the side of the defence, no oral or documentary evidence was produced.

5. On conclusion of trial after hearing the arguments advanced on either side and also considering the materials, the learned Sessions Judge, found the appellant guilty for the offence punishable under Section 10 of POCSO Act and convicted and sentenced to undergo Imprisonment for five years and to pay fine of Rs.5,000/- in default to undergo simple imprisonment for a further period of one month. Challenging the said



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Judgment of conviction and sentence, the accused has filed this present appeal before this Court.

6. The case of the prosecution is that on 14.12.2013 at about 9.30 p.m., the victim child was not found in the house and hence, the mother of the victim child searched for her in the house. But she was not there in the house. Subsequently, she heard a sound of crying from the bathroom. When she entered into the bathroom which was half closed, the victim child was found nude. At that time, the accused ran away from the bathroom. When she enquired the victim, she told her that the accused after removing her dress, touched her vagina and chest and also pressed on her lips with his mouth.

7. When the matter came up before this Court on 10.11.2022, the learned counsel for the appellant submitted that proper opportunity was not given to the appellant to cross examine the witnesses P.W.1 and P.W.2 and in order to set right the grievance of the appellant, this Court ordered the prosecution to produce P.W.1 and P.W.2 before this Court on



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11.11.2022 for cross examination. Accordingly, today (11.11.2022) the victim and the mother of the victim/P.W.1 and P.W.2 appeared before this Court and they both were cross examined by the counsel for the appellant by in camera mode.

8. The learned counsel for the appellant would submit that a false case has been foisted against the appellant and absolutely there is no materials to establish that the appellant committed sexual assault on the victim girl. P.W.2 who is said to have given the complaint/Ex.P.2, has stated that she does not know to read and write and she does not know what has been written in the complaint but she has admitted her signature in the complaint and not any other allegations or averments in the complaint which itself creates a doubt as to whether the defacto complainant/P.W.2 made any allegation against the appellant much less then the sexual assault alleged to have been committed by the appellant. Further he would submit that even in the previous statement recorded by the Magistrate under Section 164 Cr.P.C., the victim has not stated anything about the sexual assault alleged to have been committed by the



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appellant. Further, the victim/P.W.1 has not stated the specific date and place of occurrence in her chief examination. In the complaint, the mother of the victim/P.W.2 has stated that the occurrence took place on 14.12.2013 but in the evidence, she has stated that the occurrence took place on 04.12.2013. Further, P.W.2 in her evidence has stated that at the time of alleged occurrence, she had gone outside, whereas she has not mentioned the same in the complaint. Per contra, during cross examination, she has stated that all the family members were in house at the time of occurrence. The appellant house is adjacent to the house of the victim and the occurrence place is just opposite to both their houses. The distance between the occurrence place and both of their houses is only about 2 ft. and that the alleged occurrence place is very much visible from both their houses. Further, the appellant was having cordial relationship with the victim and her brothers. When that be the case, he could not have committed such a grave offence of sexual assault. Further the evidence of P.W1 and P.W.2 is not natural and it is an artificial one. He would submit that there was enmity between the appellant and the mother of the victim over money transaction. Further, the father of the



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victim had drinking habit and used to chat with the appellant and therefore, the mother of the victim/P.W.2 got irritated with the appellant and in order to break their relationship, she has lodged a false complaint against the appellant. Even the doctor's evidence does not corroborate the evidence of P.W.1/victim and that the medical evidence are also not helpful to the case of prosecution. From the evidence of the victim/P.W.1, the mother of the victim/P.W.2 and medical evidence, it is clearly seen that the prosecution has not proved the charge framed against the appellant. However, the trial Court without appreciating the prosecution witnesses in a right perspective, wrongly convicted the appellant only based on sympathy. Therefore, the judgment of the trial Court is liable to be set aside and the appeal has to be allowed.

9. The learned Additional Public Prosecutor appearing for the respondent police would submit that the date of birth of the victim is 10.03.2009 and the date of occurrence is on 14.12.2013 and therefore, the age of the victim was only about 4 years at the time of occurrence. In order to prove the age of the victim, the birth certificate of the victim was



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marked as Ex.P.3 and as per Ex.P.3, the victim was a child at the time of occurrence under the definition of POCSO Act. Further, in order to substantiate the charge levelled against the appellant, the victim was examined as P.W.1. Prior to that, the statement of victim was recorded by the Judicial Magistrate under Section 164 Cr.P.C. and the said statement was marked as Ex.P.1. The victim girl in her evidence before the trial Court as P.W.1 as well as in her previous statement given before the Judicial Magistrate, has clearly stated about the offence committed by the appellant. P.W.2 is the mother of the victim who set the law into motion. Though P.W.2 has stated that she does not know to read and write but put signature in the complaint/Ex.P.2, in her evidence, she has clearly stated that whatever she heard from her daughter/the victim, she stated the same before the police official who made the complaint in writing and based on the complaint, the police registered the case and investigated the matter. Though the medical evidence shows that there was no external injury on the private parts of the victim and the hymen of the victim is intact, the charge is not for penetrative sexual assault or aggravated penetrative sexual assault and therefore, mere non suffering of any



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injuries, may not be a sole ground to come to the conclusion that what ever the victim says are not true. Further, the doctor/P.W.4 who conducted medical examination on the victim has mentioned in the medical examination report of the victim/Ex.P.7 as “sexual assault by known person in her home ”. Therefore, the prosecution has proved its case beyond reasonable doubt. The trial Court rightly appreciated the evidence and convicted the appellant as stated above. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

10. Heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the respondent police and perused the materials available on record.

11. Admittedly the respondent police registered the case against the appellant for the offence punishable under Section 8 of POCSO Act. The trial Court after completing the formalities, framed the charge against the appellant for the offence under Section 9 punishable under Section 10 of POCSO Act.



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12. In order to substantiate the charge framed against the appellant, on the side of the prosecution totally 7 witnesses were examined and 10 documents were marked.

13. The date of birth of the victim is 10.03.2009 and the date of occurrence is on 14.12.2013 and therefore, at the time of occurrence, the age of the victim was only about 4 years. In order to prove the age of the victim, the birth certificate of the victim was marked as Ex.P.3. As per Ex.P.3, the date of birth of the victim is 10.03.2009 and as per the prosecution, the occurrence took place on 14.12.2013. Therefore, the age of the victim was about 4 years at the time of occurrence. Hence, the victim was a child at the time of occurrence under the definition of Section 2 (1)(d) of POCSO Act.

14. As far as the commission of offence is concerned, before the trial Court, the victim was examined as P.W.1. Prior to that, the victim was produced before the Judicial Magistrate for recording statement under Section 164 Cr.P.C. and the said statement was marked as Ex.P.1. A



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combined reading of the evidence of P.W.1 and also the previous statement of the victim/Ex.P.1 clearly shows that the appellant has committed sexual assault on the victim.

15. In order to prove the complaint, the mother of the victim was examined as P.W.2 and she has clearly stated that on the date of occurrence at about 9 p.m., she went to a shop by leaving her daughter/victim in their house. When she returned to home, the victim child was not found in the house. Hence, she searched for her in the house. But she was not there in the house. Subsequently, she heard a sound of crying from the bathroom. When she went near the bathroom, it was half closed and the victim child was crying inside the bathroom. When she entered into the bathroom by pushing the door and by asking the victim child as to why she was crying, the victim child was found nude and without dress. At that time, the accused ran away from the bathroom. When she enquired the victim, she told her that the accused after removing her dress, touched on her vagina and chest and also pressed on her lips with his mouth. Subsequently, she informed the same



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to her husband and on the same day, they gave complaint before the respondent police. Immediately, the victim child was produced before the doctor and subsequently, she was produced before the Magistrate for recording statement. She has further stated that the signature found in the complaint is that of her and the complaint was written by some one in the police station as stated by her and that the complaint was also read to her.

16. The contention of the learned counsel for the appellant is that the mother of the victim/P.W.2, during cross examination has admitted that all the family members were in house at the time of occurrence and the occurrence place is just opposite to their house which is only about 2 ft. distance and very much visible from their house and therefore, there is no possibility for commission of offence as alleged by the prosecution. But the occurrence is said to have taken place inside the bath room which is common for both the appellant and the victim's family. On the date of occurrence, when the victim went to the bath room, the appellant has entered into the bath room and inserted his finger in the private part of the victim. Immediately, the victim has raised noise. On hearing the



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same, the mother of the victim, who was in search of the victim, entered into the bath room. At that time, she found the appellant ran away from the bath room. Thereafter, on enquiry, the victim has informed her mother about the act of the appellant. Therefore, the mother of the victim went to the police and lodged the complaint on the same day. Further, the occurrence place is easily accessible to both the parties and at the time of occurrence, the victim was only aged about 4 years. Therefore, the contention of the counsel for the appellant cannot be accepted.

17. Though the learned counsel for the appellant tried to establish certain enmity and motive between the appellant and the defacto complainant, he did not substantiate his defence of motive or enmity. Even the parents of the appellant were also residing in the same house along with the appellant at the time of occurrence. However, none of them were examined by the defence to prove that there was motive or enmity.



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18. Though the medical examination certificate for sexual offence/Ex.P.6 says that there is no external injury and the hymen of the victim was intact, in the Acciden Register/Ex.P.5 and in the medical examination report/ExP.7, the doctor has mentioned as “sexual assault by known person in her home”. Therefore, from the evidence of P.W.1/victim, P.W.2/mother of the victim, P.W.4/doctor and Ex.P.1/statement of the victim recorded under Section 164 Cr.P.C., Ex.P.2/complaint, Exs.P.5 and Ex.P.7/medical evidence, this Court finds that the appellant has committed sexual assault on the victim child.

19.As per the evidence of the victim/P.W.1, the act committed by the appellant falls under Section 3(a) punishable under Section 4 of POCSO Act. However, since the victim was below the age of 12 years, the act of the appellant is termed as aggravated penetrative sexual assault which falls under Section 5(m) punishable under Section 6 of POCSO Act. However, the trial Court framed the charge for the offence under Section 9 punishable under Section 10 of POCSO Act. Neither the victim, nor the prosecution have preferred any appeal for not framing the charge under Section 5(m) punishable under Section 6 of POCSO Act. As



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appellate Court, this Court cannot go beyond the scope of appeal.

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20. A reading of the entire materials shows that the appellant has committed sexual assault on the victim which falls under Section 7 punishable under Section 8 of POCSO Act. However, since the victim girl was below the age of 12 years, it is termed into aggravated sexual assault which falls under Section 9(m) punishable under Section 10 of POCSO Act.

21. In the case of this nature, no independent witnesses can be expected as the culprits take the advantage of the aloofness of the innocent children or take the children to a secluded place and exploit them sexually. If the evidence of the victim is cogent, consistent and natural and inspires the confidence of the Court, the Court can always record the conviction against the accused and the Court need not wait for any corroborative evidence in the nature of these cases.



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22. In this case, P.W.2/the mother of the victim has clearly stated that for 15 years, they were residing as tenant in the house of the appellant's parents' house and they maintained cordial relationship as landlord and tenant till the date of occurrence. As stated above, the defence has not established any tenancy dispute between the family of the victim and the appellant. Therefore, there is no necessity for the mother of the victim child, to foist a false case against the appellant. Under these circumstances, this Court finds that the evidence of the victim/P.W.1 is cogent, consistent and natural. The evidence of the victim also inspires the confidence of this Court.

23. This Court finds no merit in the appeal and there is no reason to discard the evidence of the victim who was only aged about 4 years at the time of occurrence. Further, the appellant is also a known person to the victim from her childhood. Therefore, there is no necessity for the child to state adverse against the appellant, if the occurrence had not taken place.



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24. Therefore, this Court does not find any merit in the appeal and the appeal is liable to be dismissed.

25. Accordingly, this Criminal Appeal is dismissed.

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Index: Yes/No

To

1. The Sessions Judge,
Special Court for Exclusive Trial of Cases
under POCSO Act, Chennai
2. The Inspector of Police
H-5, New Washermenpet Police Station
Chennai
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.



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P.VELMURUGAN, J

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