



Crl.A.No.266 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 02.11.2022

CORAM:

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

Crl.A.No.266 of 2022

Anwar Basha

Vs.

...Appellant

The State represented by
The Inspector of Police,
W16, All Women Police Station,
Puliyanthope, Chennai – 12.
(Cr.No.05/2016)

...Respondent

This Criminal Appeal is filed under Section 374(2) of Cr.P.C. call for the entire records in connection with S.C.No.296/2017 on the file of the Court of Sessions Judge, Special Court for Exclusive Trial of cases under POCSO Act, Chennai, and set aside the conviction and sentence imposed by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai, in S.C.No.296 of 2017, dated 20.03.2020.



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For Appellant : Mr.V.Parthiban

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor

JUDGMENT

The criminal appeal has been filed against the judgment of conviction and sentence dated 20.03.2020 made in S.C.No.296 of 2017 by the learned Sessions Judge, Special Court for Exclusive trial of Cases under the POCSO Act, Chennai.

2 The respondent police registered a case in Cr.No.05 of 2016 against the appellant for the offence punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (in short “POCSO Act”). After completing investigation, the respondent police laid a charge sheet before the learned Sessions Judge, Special Court for Exclusive trial of Cases under the POCSO Act, Chennai, which was taken on file in S.C.No.296 of 2017. The learned Sessions Judge, after hearing both the accused and the prosecution and after perusing the records, since there is



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prima facie case, framed charges against the appellant/accused for the offence punishable under Section 6 of the POCSO Act.

3 Before the trial Court, in order to prove the case of the prosecution, 6 witnesses were examined as P.Ws.1 to 6 and Exs.P1 to P17 were marked. After completing examination of prosecution witnesses, when incriminating circumstances culled out from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C., he denied the same as false and pleaded not guilty. On the side of the defence, no one was examined and no document was marked.

4 The learned Sessions Judge, Special Court for Exclusive trial of Cases under the POCSO Act, Chennai, on completion of trial and hearing arguments advanced on either side, by judgment dated 20.03.2020 convicted the appellant/accused for the offence punishable under Section 6 of the POCSO Act and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.5,000/-, in default, to undergo rigorous imprisonment for a further period of six months and also awarded



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compensation of Rs.6,00,000/-out of which Rs.1.5 Lakhs was ordered to be paid to the victim through her mother and remaining amount of Rs.4.5 Lakhs was ordered to be deposited in any of the Nationalised Bank by Fixed Deposit in the name of victim till she attains majority. Aggrieved against the said judgment of conviction and sentence, the accused has preferred the present criminal appeal before this Court.

5 The learned counsel appearing for the appellant/accused would submit that there is a contradiction in the evidence of P.W.2 mother of the victim child, which itself disprove the case of the prosecution. There was previous enmity regarding vacating the appellant from the rented house. There was no such occurrence taken place as alleged by the prosecution.

5.1 Further Ex.P6 to P8 medical records of P.W.1 shows that there is no external injury present in the private part of the victim and hymen was intact. Therefore medical evidence also does not support the case of the prosecution.



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5.2 There was delay in lodging the complaint and the same was not explained by the prosecution, which also creates reasonable doubt in the case of the prosecution. Further, it was stated by the victim that her grandmother's house door was opened, when she entered into the house of the appellant/accused and hence when the grandmother of the victim child was available, it is not possible for the appellant/accused to commit such offence.

5.3 The trial Court has miserably failed to consider the above facts and erroneously convicted the appellant/accused, which warrants serious interference of this Court and the learned counsel prays to allow the appeal by setting aside the conviction recorded against the appellant.

6 The learned Additional Public Prosecutor appearing for the respondent police would submit that victim's family and the accuse were neighbours residing within the same compound and the toilet was also a common. On the date of occurrence, the victim went to toilet nearby the house of the appellant/accused and when she went to the house of the appellant to see daughter of the appellant, the victim found she was not there



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and when she about to leave the place, the appellant/accused called her and made her to sit on the floor and removed her inner garments and touched her private parts. Thereafter, since the victim child felt pain on her private parts, on enquiry, she revealed the occurrence to her mother P.W.2, who filed the complaint Ex.P1 on 08.08.2016.

6.1 The contradictions pointed out by the learned counsel for the appellant/accused are not material contradictions and the same would not affect the case of the prosecution. The statement of the victim under Section 164 was recorded, in which, the victim has categorically stated about the sexual assault made by the appellant/accused. Subsequently, while examining before the Court also she has clearly stated about the act of the appellant, which falls under the POCSO Act and he also threatened the victim not to reveal the same to anyone. Prosecution has proved its case beyond all reasonable doubt and the trial Court has rightly recorded conviction against the appellant, which does not call for any interference of this Court.

7 Heard the learned counsel for the appellant and the learned



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Additional Public Prosecutor appearing for respondent police and perused the materials available on record.

8 Case of the prosecution is that on 05.08.2016, when it was a School holiday, the victim child was at her house and her mother went to her mother's place by leaving the victim child at home. The accused was residing at the opposite house and at about 2.00 p.m. the victim went to toilet and while returning, she went to house of the accused to see whether his daughter was there since both are friends and when the victim found that she was not there and about to return home, the appellant/accused held her hands, pulled her inside, removed her panties and inserted his index finger into the vagina of the child and due to pain she screamed and the appellant left her and told that she should not reveal the same to anyone. Hence the present case was registered against the appellant.

9 As far as age proof is concerned, copy of Birth certificate of the



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victim child was marked as Ex.P4, in which the date of birth of the child mentioned as 22.02.2007 and the date of occurrence is 05.08.2016 and therefore at the time of occurrence, age of the victim is about 10 years and she is a child under the definition of Section 2 (1) (D) of POCSO Act.

10 Coming to the commission of offence under Section 5(m) punishable under Section 6 of the POCSO Act by the appellant/accused, victim child was examined as P.W.1 and her statement recorded under Section 164 Cr.P.C. was marked as Ex.P3, in which the victim child has stated that on the date of occurrence she went to toilet and while returning, gone to the house of the accused to see his daughter, and since she was not there, when the victim was about to return, the appellant called her and made her to sit on the floor and removed her panty and pressed her private parts and when she screamed, he left her and threatened her by saying she should not reveal to anyone. On the next day, while she was playing with her friend i.e. sister of P.W.2, the victim shared about her pain in the private parts and on hearing the same when P.W.2 enquired, the victim narrated everything. Further, when the victim was examined as P.W.1 before the Court below and



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there also she clearly stated the same what she told before the Magistrate during recording statement under Section 164 of Cr.P.C.

11 The victim child was produced before the Doctor to conduct medical examination and copy of Accident Register was marked as Ex.P6, in which it is stated that known person committed sexual assault on the victim child, however no injury was found on the body of the victim child. Ex.P7 is the medical examination report and Ex.P8 is the report regarding sexual offence, which are all states that there is no external injury on the private part of the victim child and hymen intact.

12 It is contended by the learned counsel for the appellant that due to tenancy dispute, to vacate the appellant from the house, false case has been foisted against the appellant, but the fact remains that he has not substantiated the defence by examining any of the witnesses or himself to prove the previous enmity regarding tenancy dispute. Further as per the defence, the dispute was between the grandmother of the victim and the appellant, but the complaint was filed by the mother of the victim child and she narrated



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everything in the complaint that while the victim playing with her sister, she stated that she got pain in her private parts and stated about the act of the appellant, on hearing the same and when P.W.2 enquired, the victim narrated the incident and thereafter P.W.2 filed the complaint.

13 P.W.1 the victim also in her cross examination has stated that the door of her grandmother's house was opened at the time of occurrence and she did not tell anything to her grandmother and hence the defence taken by the appellant is not acceptable.

14 As far as the offence under Section 5(m) punishable under Section 6 of the POCSO Act is concerned, the victim during recording statement under Section 161 which is the earliest statement, has stated that the appellant kept his hand in her inner garments but subsequently the victim stated that the appellant inserted his fingers into her private parts and the medical evidence also shows otherwise that there was no external injury. The victim child being 10 years old child, if she felt pain definitely she would have raised alarm, which can be easily heard by her grandmother, whose



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house door was opened at the time of occurrence as per the evidence of the victim child. This Court, being an Appellate Court, is a final Court of fact finding, which has to necessarily re-appreciate the entire evidence and give an independent finding and while re-appreciating the entire oral and documentary evidence produced before this Court, finds that prosecution has failed to prove the offence under Section 5(m) penetrative sexual assault. But from the evidence of the victim child and Exs.P6 to P8 it is proved that the appellant called her and made her to sit on the floor and removed her inner garments and touched the private parts and therefore the act of the appellant falls under Section 9(m) aggravated sexual assault which is punishable under Section 10 of the POCSO Act, since the victim was below 12 years at the time of occurrence.

15 The trial Court found the appellant guilty for the offence punishable under Section 6 of the POCSO Act, but from the evidence of the victim P.W.1, and Exs.P3, P6 to P8, this Court finds that the appellant committed the offence under Section 7 punishable under Section 8 of the POCSO Act and since age of the victim child was below 12 years at the time



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of occurrence, the offence falls under Section 9(m) punishable under Section 10 of the POCSO Act, for which minimum sentence is 5 years.

16 In fine, the judgment of conviction and sentence made by the trial Court is modified to the effect that the appellant is convicted for the offence under Section 9(m) punishable under Section 10 of the POCSO Act and sentenced to undergo rigorous imprisonment for a period of five years and the fine amount of Rs.5000/- and direction towards compensation awarded by the trial Court shall remain intact. The criminal appeal is partly allowed to the above extent.

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2. The Inspector of Police, W16, All Women Police Station, Puliyanthope, Chennai – 12.
3. The Public Prosecutor, High Court of Madras.



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P.VELMURUGAN, J.,

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