



Crl. A. No. 598 of 202

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11.10.2022

C O R A M

THE HONOURABLE MR.JUSTICE P. VELMURUGAN

Crl. A. No. 598 of 2021

Kanagaraj

...

Appellant

Vs

State by Inspector of Police
Anaimalai Police Station,
Crime No. 113 of 2019,
Coimbatore District.

...

Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of CrI.PC, to call for the record relating to the judgment dated 23.10.2020 made in Spl.C.C.No. 88 of 2019 on the file of the learned Sessions Judge/Special Court for POCSO cases, Coimbatore and dismiss the sentencing and the same by allowing this Criminal Appeal.

For Appellant

...

Mr. K. Ethirajulu
Legal Aid Counsel

For respondent

...

Mr. S. Sugendran
Additional Public Prosecutor



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JUDGMENT

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The appeal has been filed against the judgment dated 23.10.2020 passed in Spl,C.C.No. 88 of 2019, on the file of the learned Sessions Judge/Special Court for POCSO Cases, Coimbatore.

2. The respondent police has registered a case against the appellant in Crime No. 113 of 2019 for the offences under Section 9 (i) (l) (n) read with 10, 11 (i) read with 12 of the POCSO Act and also under Section 506 (i) of IPC. After investigation, charge sheet was laid before the Special Court, Coimbatore. Since the offence against the appellant, involved a girl child, the learned Special Judge has taken the case in CC No. 96 of 2019 on file and after completing the formalities, framed the charges against the appellant for the offences under Sections 9 (i) (l) (n) read with 10, 11 (i) read with 12 of the POCSO Act and also Section 506 (i) of IPC. In order to substantiate the case, charges were framed against the appellant.



3. During the trial, on the side of the prosecution, totally 21 witnesses were examined as PW1 to PW21 and 27 documents were marked as Exs. P1 to P27. No material object was exhibited.

4. On completion of examination of prosecution witnesses, the incriminating circumstances culled out from the evidence of prosecution witnesses, were put to the appellant, who denied the same as false. On the side of the appellant, no one was examined as witness, no exhibits were marked and no material objects were produced. On completion of trial, arguments were advanced on either side.

5. The trial court, on a perusal of the materials placed by the prosecution, found that the appellant is guilty for the offence under Section 9 (i) (l) (n) read with 10 and under section 11 (i) read with section 12 of the POCSO Act and not guilty under Section 506 (i) of IPC. Thus, the appellant was convicted and sentenced to undergo seven years rigorous imprisonment under section 9(i)(1)(n) read with section 10 of POCSO Act and pay a fine of Rs.2,000/-, in default to undergo one year rigorous imprisonment. For the offence under Section 11(i) read with 12 of POCSO Act, he was also convicted and sentenced



to undergo three years rigorous imprisonment and to pay a fine of Rs.2,000/-, in default to undergo six months rigorous imprisonment; however, not found guilty for the offence under Section 506(i) IPC.

6. Aggrieved over the said conviction and sentence, the accused has filed the present appeal before this Court.

7. The learned counsel for the appellant would submit that there is no offence made out as alleged by the prosecution. The appellant is the father of the victim. The de facto complainant is none other than the own daughter of the appellant. The appellant used to ask her daughter to massage him after coming from his work place and the appellant is so strict towards the victim since her mother was not residing with them. Since the de facto complainant being a girl child, in order to avoid any further comments from the public he was strict towards his daughter, and only in order to escape from the clutches of her father, she made a false complaint against the appellant but later on, she herself realized that she had given a false complaint against her own father and subsequently retracted from the allegation made in the complaint. Examined as PW1, the victim in the chief examination has stated that though she made a



complaint as well as statement before the Judicial Magistrate, there was no incident as stated in the complaint and the statement given under Section 164 Cr.P.C. No other witness corroborate the incident when the complainant herself had retracted from her allegation and thus, the offence under Section 9(i) would not attract and accordingly the prosecution has failed to establish its case beyond reasonable doubt. Only based on the complaint given by PW1, the case was registered, however later on PW1, the victim herself has denied the allegation.

8. It is further submitted that in this case, there is no physical assault, penetrative sexual assault and physical violence and the victim also did not suffer any injuries. There is no medical evidence also. Therefore, the trial court by considering the case only based on the complaint and statement recorded under Section 164 Cr.P.C. found that the prosecution had proved its case beyond reasonable doubt and accordingly convicted the appellant for the offences under Section 9 (i) (l) (n) read with 10, 11 (i) read with 12 of the POCSO Act; however found not guilty under section 506 (i) of IPC. Since there is no corroborative evidence, it is unsafe to convict the accused. It is the duty of the prosecution to prove its case beyond reasonable doubt. The



prosecution has not proved its case. No other independent witness or any other witness except the victim was examined. The victim also, while giving evidence, has not supported the case of the prosecution. Therefore, the victim was cross-examined by the prosecution. Therefore, the conviction made by the trial court is against the principles of law and without any substance or without any corroborative evidence. Therefore, the judgment of the trial court is liable to be set aside and the appeal is to be allowed and appellant is to be acquitted.

9. The learned Additional Public Prosecutor would submit that based on the complaint given by the de facto complainant, the case was registered against the appellant and immediately the victim was also produced before the Judicial Magistrate for recording statement under Section 164 Clause 5 of the Cr.P.C. The said statement is also marked as Ex.P2 and in the said statement, the victim has clearly stated that the appellant used to ask the victim to massage him. On 16.04.2019, he called the victim and when she reached the appellant, the appellant removed his dress and showed his private parts, asking the victim to lay on him. The victim got afraid and fled away from the place and went to her grandmother, who was sleeping outside the house. Later, on 17.04.2019, the victim left the house as she was afraid about the action of his father that he



would sexually assault the victim. Therefore, she made a complaint and statement was also recorded under Section 164 Cr.P.C. From reading of the complaint given by the victim, it is very clear that the appellant has committed the offence as projected by the prosecution. Since the appellant and the victim are father and daughter, at the instigation of the appellant, subsequently during the trial, the victim did not support the case of the prosecution. Therefore, the trial court found that, on the earlier occasion, while giving complaint as well as statement before the Judicial Magistrate, she has clearly narrated the incident, which is an offence as charged against the appellant. However, at a later point of time, due to their relationship, the appellant managed to convince the victim. Therefore, she has not supported the case of the prosecution. As such, the trial court has rightly found that the appellant has committed the offence and in cases of this nature, no corroborative evidence is necessary. Further, the trial court had also given the reason for not counting the evidence of victim while examining her as a witness, considering the relationship of the parties. But however the trial court found that since the victim in her statement under Section 164 of Cr.P.C, before the Magistrate has clearly narrated the actual incident as taken place. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.



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10. Heard and perused the records.

11. The case of the prosecution is that the appellant has made an aggravated sexual assault and also threatened her daughter not to reveal it to anybody. Therefore, the daughter gave a complaint against her own father and investigation also reveals that the appellant has committed the offence. The trial Court convicted the appellant for the offence under section 9(i)(1)(n) punishable under Section 10, 11(i), punishable under Section 12 of the POCSO Act. However, acquitted the appellant for the offence under section 506(i) IPC.

12. This Court, being an appellate Court, is a final court of fact finding. It has to re-appreciate the entire evidence before giving a finding. Accordingly, this Court, re-appreciated the entire evidence. From a bare reading of the complaint given by the victim and the statement recorded by the Judicial Magistrate under Section 164 Cr.P.C, it is seen that the victim has stated that as usual her father called the victim to do the massage and on 16.04.2019 also when she went inside she found that his father was lying without underwear and he asked her daughter to lie on him and she immediately went to her grandmother who was lying outside the house. On the next day, she fled away



from the place. When she was examined as PW1, she has admitted that she made a complaint and also made a statement before the Judicial Magistrate and the police advised her to give such a statement, only to escape from his father's harassment since her mother had already left the house. The victim was studying first year graduation. Her father stopped the victim from college to pursue her studies. Therefore, she made such a complaint and except the victim, no other evidence is available. No doubt, the victim had voluntarily approached the police and she was also brought before the Magistrate for recording evidence under Section 164 Cr.P.C. But, subsequently when she was examined as witness, she admitted the same. However, in the case of this nature, especially when the accused is father or brother or close relative, naturally the relatives would try to convince the victim and later on they would manage to give a retracted statement, from the one given on the earlier occasion. In this case also, the same has happened. However, when the victim herself has admitted that she gave a complaint, the reason stated that because of the advice of the police she made such a statement is not an acceptable one. However, a careful perusal of the allegation in the complaint and also in the statement recorded by the Magistrate, the victim has stated that, on 16.04.2019, all of a sudden his father removed his underwear and shown his private parts



and asked her to lie on him. Except this, there is no other allegation of any physical assault or physical touch with sexual intent, thus the offence false under Sections 7 and 9(i)(l)(n) of the POCSO Act. The definition of section 7 of POCSO Act reads as follows:

Section 7 reads of POCSO Act reads as follows:

"Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

Section 9 (i) (l) (n) reads of POCSO Act reads as follows:

(i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(l) whoever commits sexual assault on the child more than once or repeatedly; or

n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child.

13. Therefore, in order to attract Section 7, there should be a physical



touch with sexual intention. There should be an act of sexual intention, which involves physical contact. In this case, the allegation in the complaint is very clear that the appellant all of a sudden removed his underwear to show his private parts asking the daughter to lie on him. She has not stated that her father forced and pulled her or he has lied on her or she was made to lie on him. She simply says that the appellant asked her to lie on him and she immediately fled away. Therefore, once if section 7 would not attract, it is not sexual assault under section 7, then aggravated sexual assault would not attract under Section 9. Therefore, the trial court has wrongly framed the charge against the appellant for the offence under Section 9 (i) (l) (n) of POCSO Act and convicted under Section 10 of POCSO Act. Therefore, the conviction and sentence passed by the Trial Court under section 9 (i) (l) (n) punishable under Section 10 of the POCSO Act is liable to be set aside. However, a careful perusal of the entire records, including the complaint given by the victim and statement given before the judicial magistrate while recording statement under Section 164 Cr.P.C and in the evidence, since the victim girl has stated that the father of the victim, the appellant removed his underwear and showed his private parts and asked her daughter to lie on him. In that position, no physical touch or any penetration forcibly took place, since she disliked the act of her father, she left the house.



14. From this evidence, this court finds that the appellant has committed an offence under Section 11 of POCSO Act, punishable under Section 12 of the POCSO Act. Therefore, the appellant is found guilty for the offence under Section 11(i) which is punishable under Section 12 of the POCSO Act, which means the appellant has made severe harassment to the victim. Thus, the judgment of conviction and sentence passed by the trial court for the offence under Section 11(i) which is punishable under Section 12 of the POCSO Act is confirmed. Accordingly, the Criminal Appeal is partly allowed.

15. For the above reasons, this Court finds that the prosecution has not proved the charges under Section 9 and the appellant has not committed the offences under section 9 (i) (l) (n) punishable under Section 10 of POCSO Act and therefore the sentence awarded under Section 10 is set aside. However this Court finds that the appellant has committed an offence under Section 11 of the POCSO Act and therefore, the conviction and sentence for the offence under section 11 punishable under section 12 of the POCSO Act, to undergo three years imprisonment and to pay a fine of Rs.2,000/-, in default to undergo rigorous imprisonment for six months, are confirmed.



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16. In the result, the Appeal is partly allowed. The conviction and sentence passed by the Special Court for the offence under section 9(i)(l)(n) punishable under Section 10 of POCSO Act with seven years rigorous imprisonment together with a fine of Rs.2,000/-, in default to undergo rigorous imprisonment for one year are set aside. The conviction and sentence passed by the Special Court for the offence under section 11(i) punishable under section 12 of POCSO Act with three years rigorous imprisonment together with a fine of Rs.2,000/-, in default to undergo rigorous imprisonment for six months, are confirmed.

11.10.2022

Index : Yes / No
Internet: Yes
Speaking/non speaking order

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P. VELMURUGAN, J.

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To

1. The Inspector of Police
Anaimalai Police Station,
Crime No. 113 of 2019,
Coimbatore District.
2. The learned Sessions Judge
/Special Court for POCSO cases,
Coimbatore.
3. The Public Prosecutor
Madras High Court.

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