



CrI.A.No.605 of 2021.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

WEB COPY

DATED: 26.10.2022

CORAM:

THE HON'BLE Mr. JUSTICE P.VELMURUGAN

CrI.A.No.605 of 2021

Rajasekar

... Appellant

Vs.

State represented by
The Inspector of Police,
All Women Police Station,
Omalur,
Salem District.

... Respondent

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C., against the conviction and consequential sentences passed by the learned Special Court for POCSO Act Cases, Salem by a judgment and order dated 25.02.2021 made in Old Spl.S.C.No.139 of 2018 renumbered as New Spl.S.C.No.174 of 2019.

For Appellant : Mr.C.Prabakaran

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



Crl.A.No.605 of 2021.

JUDGEMENT

WEB COPY This Criminal Appeal has been filed against the judgment dated 25.02.2021 passed in Old Spl.S.C.No.139 of 2018 renumbered as New Spl.S.C.No.174 of 2019 on the file of the Special Court for POCSO Act Cases, Salem.

2. The respondent police registered a case in Crime No.7 of 2017 for the offence under Section 506(1) IPC and Sections 5(l) and 5(n) punishable under Sections 6 of POCSO Act. After investigation, laid a charge sheet before the Special Court for POCSO Act cases, since the offence is against child. The learned Special Judge taken the charge sheet on file in S.C.No.139 of 2018 and renumbered as S.C.No.174 of 2019. After completing the formalities, framed the charge against the appellant for the offence under Sections 506(1) IPC and Sections 5(l) and 5(n) punishable under Sections 6 of POCSO Act. During trial, in order to substantiate the charges, on the side of the prosecution, totally 10 witnesses were examined as P.Ws.1 to 10 and 19 documents were marked as Exs.P1 to P19. Besides, one material object was also exhibited as M.O.1. On completion of examination



Crl.A.No.605 of 2021.

of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses put before the accused by questioning under Section 313 Cr.P.C. He denied the same as untrue and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

3. On completion of trial, hearing the arguments advanced on either side and considering the materials placed, the trial court found the appellant guilty for the offences under Section 5(n) and 5(l) of POCSO Act which are punishable under Section 6 of POCSO Act and he was convicted and sentenced to undergo 20 years Rigorous Imprisonment and to pay fine of Rs.1,00,000/- in default to undergo one year Simple Imprisonment and also he was convicted and sentenced to undergo one year Rigorous Imprisonment for the offence under Section 506(i) IPC. Challenging the abovesaid judgment of conviction and sentence, the accused has filed the present Criminal Appeal before this Court.



CrI.A.No.605 of 2021.

4. The specific case of the prosecution is that the appellant is the cousin brother of the victim girl. He used to come to victim girl's house.

Taking advantage of the absence of the elder family members, the appellant had sexual intercourse with her by threatening her on several occasions. Due to the same, she become pregnant and subsequently she gave birth to male child. Hence the complaint.

5. Learned counsel for the appellant would submit that except the victim girl, there is no eye witness in this case and there was a delay in filing the complaint. The inordinate delay was not explained. Therefore, the unexplained delay in filing the complaint is fatal to the case of the prosecution. F.I.R and statement recorded from the victim were sent to the Court belatedly. The trial court failed to consider the entire facts and only on sympathy ground, convicted the appellant. Hence, the judgment of the trial court is liable to be set aside.



CrI.A.No.605 of 2021.

6. Learned Additional Public Prosecutor appearing for the respondent would submit that age of the victim is 12 years and she is a child on the date of occurrence. Appellant is the cousin brother to the victim child. By threatening the victim child, the appellant had penetrative sexual intercourse on her. The victim child was examined as P.W.2. She has clearly narrated the entire incident. Further, even before the Judicial Magistrate, recording the statement under Section 164 Cr.P.C, she has clearly narrated the incident, which was marked as Ex.P3. Evidence of the doctor P.W.8, who conducted the medical examination on the victim girl clearly shows that the victim was subjected to penetrative sexual assault and also she was pregnant. Evidence of the doctor P.W.9, who conducted DNA test and D.N.A report Ex.P16 would clearly shows that the appellant is the biological father of the baby born to the victim child. Therefore, prosecution clearly proved that the appellant has committed aggravated penetrative sexual assault on the victim girl. Therefore, the trial court rightly appreciated the evidence and convicted him and awarded sentence and there is no merit in the appeal and the same is liable to be dismissed.



Crl.A.No.605 of 2021.

WEB COPY

7. Admittedly, case was registered against the appellant for the offence under Section 506(i) IPC and Sections 5(l) and 5(n) punishable under Sections 6 of POCSO Act. In order to substantiate the charges, out of 10 witnesses, the victim girl was examined as P.W.2. On a reading of the deposition of the victim girl as P.W.2 and also Ex.P3, statement recorded under Section 164 Cr.P.C., which clearly shows that the appellant is the one who committed penetrative sexual assault on the victim child, who is aged about 12 years. In order to prove the age of the victim girl, birth certificate of the victim girl was produced and her date of birth is 23.07.2004 and the date of occurrence is 01.10.2016. Therefore, at the time occurrence, the victim was aged about 12 years and she was a child under the definition of Section 2(1)(d) of POCSO Act. Since the victim was subjected to penetrative sexual assault on several occasions, the act committed by the appellant turned into an aggravated penetrative sexual assault, which falls under Section 5(l) of POCSO Act and also the appellant is the close relative of the victim girl, hence the offence committed by the appellant falls under Section 5(n) of POCSO Act. From the evidence of the doctors P.W.8 and 9, it clearly



CrI.A.No.605 of 2021.

shows that the victim was subjected to penetrative sexual assault and she was pregnant and she gave birth to male child. From Ex.P16 DNA report, it is proved that the appellant is biological father of the male baby born to the victim child. Hence, offence committed by the appellant also falls under Section 5(j)(ii) of POCSO Act. The trial court ought to have framed the charge and found the accused guilty for the offence under Section 5(j) of POCSO Act. However, prosecution has not filed any appeal with regard to the same. On a reading of the entire materials, especially evidences of P.W.1, the victim girl, P.W.8 the doctor, P.W.9 the doctor who conducted DNA test, Ex.P3, statement recorded under Section 164 Cr.P.C, Ex.P16-DNA report, it is clearly proved that the the victim girl was subjected to penetrative sexual assault. From the evidence of P.W.2, it clearly proved that the victim girl was subjected to penetrative sexual assault by the appellant more than once. Victim girl clearly stated that the appellant is the close relative, who is none other than the paternal uncle's son. Hence, he has committed the offence under Section 5(n) of POCSO Act. Since the victim child got pregnant, the trial court ought to have framed the charge for the offence under Section (5)(j)(ii) of POCSO Act and convicted him for the said charge also.



Crl.A.No.605 of 2021.

Both the trial court and prosecution failed to frame the said charges, however there is no appeal has been filed either by the victim or by the prosecution.

However, prosecution proved its case beyond all reasonable doubt that the appellant has committed the offence under Section 5(l) and 5(n) which is punishable under Section 6 of POCSO Act. Even prior to the amendment of the POCSO Act, minimum punishment is 10 years imprisonment and the maximum punishment is life sentence. However, the trial court imposed sentence of 20 years Rigorous imprisonment.

8. Since this Court is the appellate court, as a final court of fact finding appreciated the entire evidence in accordance with law. Evidence of the victim inspires the confidence of the Court and there is no reason to discard or disbelieve the evidence of the victim girl. In cases of this nature, no eye witness can be expected to be available and taking advantage of the loneliness of children, persons try to exploit them sexually and in this case, the appellant, who is the close relative, taking advantage of loneliness, had penetrative sexual intercourse with the victim. Parents of both the victim and the appellant were believing the appellant and allowed him to move freely



Crl.A.No.605 of 2021.

with the family members. The appellant misused the trust of the family members of the victim girl and had sexual intercourse with the victim girl.

9. It is well settled proposition of law, the cases in IPC, the prosecution has to prove its case beyond all reasonable doubt, whereas, in the cases of this nature, once the prosecution proved the foundational fact of commission of sexual offence that they need not prove its case beyond reasonable doubt as like IPC cases. The prosecution can prove its case with the preponderance of probabilities. Once foundational fact is established by the prosecution, Section 29 and 30 of the POCSO Act come into play. It is for the appellant has to rebut the presumption. The statutory presumption under Section 29 and 30 of POCSO Act are the rebuttable presumption. It is settled law that the accused need not rebut the presumption by let in direct evidence, but he can rebut the presumption even by preponderance of probabilities.

10. In this case, prosecution has established the foundational fact that the appellant has committed penetrative sexual assault on the victim girl more than once. Therefore under the facts and circumstances of the case, this



Crl.A.No.605 of 2021.

Court does not find any reason to interfere with the judgment of the trial court and there is no merit in the appeal and the same is liable to be dismissed.

Accordingly, Criminal Appeal is dismissed. Consequently, connected miscellaneous petition, if any, is closed. Registrar General is directed to call for explanation from the Officer concerned, since he has not followed the procedure in the serious nature of the offence like under POCSO Act cases, especially when Ex.P.16-DNA test report is available in this case.

26.10.2022

mfa
Index:yes/No
Internet:yes/No

To

1. The Sessions Judge,
Special Court for POCSO Act Cases,

10/12



Crl.A.No.605 of 2021.

Salem.

2. The Inspector of Police,
All Women Police Station,
Omalur,
Salem District.

3. The Public Prosecutor
High Court,
Chennai.



WEB COPY



Crl.A.No.605 of 2021.

P.VELMURUGAN, J.

mfa

Crl.A.No.605 of 2021

26.10.2022