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Crl.A.No.656 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.10.2022

CORAM:

THE HON'BLE Mr. JUSTICE P.VELMURUGAN

Crl.A.No.656 of 2022

Arul @ Gandhi Selvan

... Appellant

Vs.

The State rep by,
The Inspector of Police,
Thalaivasal Police Station,
Salem District.

... Respondent

Prayer:

Criminal Appeal filed under Section 374(2) of Cr.P.C., to set aside the conviction and sentence passed by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under the Protection of Children from sexual offences Act, Salem dated 28.02.2022 in Old Special S.C.No.88 of 2016, New Special S.C.No.33 of 2019 and to acquit the appellant.

For Appellant : Mr.M.G.Udaya Shankar
and
Mr.K.Shivakumar, Legal Aid Counsel

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor

J U D G E M E N T



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This Criminal Appeal has been filed challenging the judgment dated 28.02.2022 passed in Old Special S.C.No.88 of 2016, New Special S.C.No.33 of 2019 on the file of the Special Court for Exclusive Trial of Cases under the Protection of Children from sexual offences Act, Salem.

2. The respondent police registered a case against the appellant for the offence under Section 8 read with 7 of POCSO Act. After investigation, laid a charge sheet before the Special Court for Exclusive Trial of Cases Under the POCSO Act, Salem, since the offence is against the child falls under POCSO Act. The learned Special Judge has taken the charge sheet on file and after completing the formalities framed the charge against the appellant for the offence under Section 7 punishable under Section 8 of POCSO Act and for the offence under Section 9(m) punishable under Section 10 of POCSO Act.



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3. After completing the formalities, during trial, before the trial court, in order to prove the case of the prosecution, on the side of the prosecution, as many as seven witnesses were examined as P.Ws.1 to 7 and eight documents were marked as Exs.P1 to P8. No material object was exhibited.

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

5. On completion of trial, hearing the arguments advanced on either side, considered the material facts, the trial court found the accused guilty for the offence under Section 8 of POCSO Act and convicted and sentenced him to undergo four years Rigorous Imprisonment with fine of Rs.20,000/-, in default to undergo further period of 6 months simple imprisonment. Challenging the said judgment of conviction and sentence, the accused has filed the present appeal before this Court.



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6. The specific case of the prosecution is that on 14.09.2015, while the victim child was coming from the school by bicycle, the appellant followed and intercepted her and took her to nearby thorny bush and he lied over her and touched her breast and attempted to commit penetrative sexual assault. All of a sudden, the victim girl escaped from the appellant. Thereafter, she informed the abovesaid act of the appellant to her parents. Since there was earlier complaint as against the appellant and his brother for the very same offence and also the case is pending before the Court, parents of the victim girl discussed with their family members as to whether they have to inform the offence committed by the accused to the Court or they have to prefer a separate complaint before the police. Subsequently, on deliberation and discussion, they filed a complaint on 17.09.2015 before the respondent police. The respondent police registered the case on 18.09.2015 and proceeded with investigation and subsequently laid a charge sheet before the Special Court, Salem.

7. On earlier occasion, when the matter was taken up for hearing, non appeared on behalf of the appellant. Hence, vakalat of the counsel for the



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appellant on record was cancelled and this Court directed the Registry to appoint a legal aid counsel for arguing the appeal and directed to list the matter for arguments on 31.10.2022. Today, when the matter is taken up for hearing, learned counsel for the appellant made a request to argue the matter. This Court has also given opportunity to the learned counsel for the appellant on record to argue the matter.

8. Learned counsel for the appellant would submit that in this case, the complaint has been given belatedly and the case was registered by the respondent police belatedly. After registering the case, the statement recorded under Section 164 Cr.P.C., F.I.R and other documents were sent to the Special Court very belatedly. Belated registering the F.I.R and sending the documents to the Court are fatal to the case of the prosecution. Further he would submit that there was a dispute between the appellant, his grand father and the father of the victim. Due to which, father of the victim beaten his grandfather and broken his teeth. Hence, he gave a complaint before the very same respondent police. In order to escape from the clutches of law and the complaint given by the grandfather of the appellant, victim girl's



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father foisted a false case against the appellant. The respondent police has suppressed the complaint given by the grandfather of the appellant and has not conducted a fair investigation, which also vitiated the case of the prosecution. Statement of the victim girl shows that she was taken by the appellant nearby thorny bush side, but no medical record shows that she sustained any punch injury or any other injury on her body, which clearly shows that they suppressed the material facts. In the complaint, they have not stated anything about the previous complaint pending between them. Therefore, the defacto complainant has not come to the court with clean hands. The occurrence place is very near to the main road and there is a Veterinary Hospital and there are houses in and around the place of occurrence. Therefore, it is not possible that the appellant has taken the victim girl to the thorny bush and committed the alleged offence. There are material contradictions found in the statement of P.W.1, the mother of the victim girl and P.W.4, the father of the victim girl. The respondent police has not produced the victim girl immediately before the Judicial Magistrate to record statement under Section 164 Cr.P.C., They produced the victim girl only on 17.12.2015, which clearly shows that the prosecution has not



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properly investigated the matter. The respondent police has not explained the delay caused in producing the victim before the Judicial Magistrate to record statement under Section 164 Cr.P.C., The age certificate has not been obtained from the competent authority and the same was not marked by the authorized official. Therefore, Ex.P8 is an inadmissible document. Till the completion of investigation, they have not obtained any age proof certificate to prove that the victim is a child. During trial, they have obtained the document Ex.P8, school certificate and the same was not marked through concerned official. The prosecution has not proved the foundational fact that the appellant has committed sexual assault on the victim girl. The prosecution has not proved its case beyond all reasonable doubt and the Trial Court also failed to consider all the facts and also the defect in investigation. The trial court convicted the appellant, based on the inadmissible document, which warrants interference of this Court.

9. Learned Additional Public Prosecutor would submit that age of the victim girl is only 14 years at the time of occurrence. The victim girl was examined as P.W.2 has clearly narrated all the incident. She was also



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produced before the learned Magistrate, to record statement under Section

164 Cr.P.C., in which, the victim girl clearly stated that the appellant has committed sexual assault on her. Ex.P8 clearly shows that date of birth of the victim girl is 14.12.2001. The date of occurrence is 14.09.2015. Therefore, age of the victim is only 14 years at the time of occurrence and she is a child under the definition of Section 2(1)(d) of POCSO Act. Further, the appellant and his brother already involved in the very same offence on the victim girl. Case was also tried by the Juvenile Justice Board in JC.No.34 of 2015 and the judgement was also delivered on 20.09.2016 in which the appellant was convicted and the sentence was imposed very leniently. The prosecution proved its case beyond all reasonable doubt. The Trial Court also rightly appreciated entire evidence especially the statement recorded from the victim girl under Section 164 Cr.P.C., and the evidence of the victim girl. The Trial Court rightly convicted the appellant and there is no merit in the appeal and the same is liable to be set aside.



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

11. Admittedly, case was registered by the respondent police against the appellant for the offence under Section 8 read with 7 of POCSO Act. The Trial Court convicted the appellant for the offence under Section 8 of POCSO Act and sentenced him to undergo four years rigorous imprisonment and to pay fine of Rs.20,000/- in default to undergo 6 months simple imprisonment.

12. The specific case of the prosecution is that the appellant and the victim are belonging to the same village and they were neighbors. The victim is a school going child. On 14.09.2015, at about 4 pm, while the victim child was returning from school by bicycle, the appellant waylaid her and took her to nearby thorny bush and he lied over her and touched her breast and attempted to commit penetrative sexual assault. All of a sudden, the victim girl escaped from the appellant. The victim girl informed the



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abovesaid sexual act of the appellant to her parents. In this case, the date of occurrence is 14.09.2015 and the complaint was given only on 17.09.2015 and the case was registered on 18.09.2015. Admittedly there was previous case as against the appellant and his brother for the very same offence against the very same victim girl. Since they are villagers and also already similar complaint was pending, they were not aware as to whether separate complaint can be given to the police against the very same person. Reasons for delay has been properly explained. Hence, the delay in filing the complaint and registering the F.I.R are not fatal to the case of the prosecution. In POCSO Act cases, the parents or the neighbors would afraid about the future of the victim girl and they discussed with the elder family members and after deliberation only, they will give complaint. Therefore, delay in giving the complaint and registering the F.I.R may not be the sole ground to disbelieve the evidence of the prosecution. In this case, the victim girl was produced before the learned Judicial Magistrate belatedly, ie., after 90 days from the date of complaint. In the cases of this nature, since the victim girl is innocent and their parents were illiterates, it is the duty of the Investigating Officer to follow the rules and regulations as contemplated in



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the POCSO Act. It is the bounden duty of the Investigating Officer to produce the victim girl before the learned Magistrate to record statement under Section 164 C.P.C., and also produce the victim girl before the doctor for medical examination. The defect in investigation may not be the sole ground to acquit the appellant. This Court again and again observed that in POCSO cases, the Investigating Officers are not following provisions laid down in the POCSO Act. Immediately soon after getting the complaint, the victim has to be sent for medical examination and the prosecution has to collect the materials like cloth etc., Since the prosecution would not be in a position to collect all the materials, the culprits easily will escape from the clutches of law.

13. The victim girl was examined as P.W.2 and she was produced before the Judicial Magistrate who recorded statement under Section 164 Cr.P.C., which clearly shows that the victim was subjected to sexual assault, which falls under Section 7 which is punishable under Section 8 of POCSO Act. In this case, medical evidence has not been produced, since the offence committed by the appellant is not penetrative sexual assault. Therefore, non



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production of medical evidence is not fatal to the case of the prosecution.

Though age proof certificate has been produced belatedly and that was not marked through authorized person. For the very same incident, a complaint was given one year before the present incident and at that time, age of the victim girl was described as 14 years. Hence the police may not have shown any interest to collect the age proof certificate. In this case, the victim girl was described as minor and the age of the victim girl is 14 years, the defence has not put a suggestion either before the victim girl or before the parents of the victim girl that the victim girl is not a child and she has completed the age of 18 years. Though prosecution belatedly produced the school certificate and even assuming that it is not admissible in evidence, and the age of the victim girl was not challenged, on earlier occasion.

14. It is a well settled proposition of law that defect in investigation may not be the sole ground to disbelieve the case of the prosecution. 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



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POCSO Act are rebuttable presumption. The accused need not rebut the presumption by direct evidence, but he can rebut the presumption even by preponderance of probabilities. Since the evidence of the victim inspires the confidence of the Court, there is no reason to discard or disbelieve the evidence of the victim girl. The appellate court is the fact finding court, it has to re-appreciate and revisit the entire evidence and give independent finding. Considering the facts and circumstances of the case, the prosecution has proved its case beyond reasonable doubt. This Court does not find any perversity or any reason to interfere with the judgment of the trial court and there is no merit in the appeal and the appeal is liable to be dismissed. Accordingly the Criminal appeal is dismissed. Judgement of conviction and sentence passed by the Trial Court is confirmed. Consequently, connected miscellaneous petition, if any, is closed. Trial Court is directed to secure the custody of the appellant to undergo the remaining period of sentence. The period of imprisonment already undergone by the accused shall be set off under Section 428 Cr.P.C.,

15. The counsel who argued the appeal for the appellant was



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appointed by the Legal Services Authority from the Legal Aid Panel, hence
he is entitled for the fees as per rule.

31.10.2022

mfa

Index:yes/No

Internet:yes/No

To

1. The Sessions Judge,
Special Court for Exclusive Trial of Cases under the Protection of
Children from sexual offences Act,
Salem.
2. The Inspector of Police,
Thalaivasal Police Station,
Salem District.
3. The Public Prosecutor
High Court,
Chennai.

P.VELMURUGAN, J.

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