



Crl.A.No. 666 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.11.2022

Coram

THE HON'BLE MR. JUSTICE P.VELMURUGAN

Crl.A.No. 666 of 2022

Vaithi @ Vaithilingam

...Appellant

-Vs-

State rep. By
The Inspector of Police,
Villianur Police Station,
Puducherry.
Crime No. 26 of 2020

..Respondent

PRAYER : Criminal Appeal filed under Section 374(2) Cr.P.C., praying to set aside the conviction imposed in judgment dated 06.06.2022 made in Spl.Sessions Case No. 59/2020 on the file of learned Special Judge under POCSO Act, Puducherry.

For Appellant : Mr. S.Saravana Kumar

For Respondent : Mr.V.Balamurugane, PP (Pondy)

ORDER

This Criminal Appeal is filed challenging the judgment dated 06.06.2022 made in Spl.Sessions Case No. 59/2020 on the file of learned Special Judge under POCSO Act, Puducherry.



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2. The respondent police registered a case against the appellant in Crime No.26 of 2020 for the offences punishable under Section 10 of Protection of Children from sexual offences Act, 2012. The respondent police, after investigation, laid the charge sheet before the Special Court since the offences against the Child viz., Special Judge under POCSO Act, Puducherry, the Special Court taken the case on file in Special S.C.No. 59 of 2020 and after completing all formalities framed charges against the appellant for the offences under Section 9 (I) punishable under Section 10 of POCSO Act.

3. After framing charges and completing formalities, during the trial before the trial Court, on the side of the prosecution as many as nine (9) witnesses were examined as PW1 to PW9 and 9 documents were marked as Exhibits P1 to P9, besides one material object MO1 was marked as exhibit.

4. After examining entire prosecution witnesses, when incriminating circumstances culled out from the evidence of prosecution witness were put to appellant by questioning under Section 313 Crpc, wherein the accused denied his complicity in the crime. On the side of defence, no oral or documentary evidence were



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produced.

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5. On completion of trial and hearing of arguments advanced on either side and on considering the materials, the trial Court found the appellant guilty for the offences under Section 9 (I) punishable under Section 10 of POCSO Act and sentenced to under go rigorous imprisonment for five years and to pay a fine of Rs.1000/- and in default to undergo simple imprisonment for three months.

6. Aggrieved over the said judgment of conviction, the appellant/accused has filed the present criminal appeal before this court.

7. It is the specific case of the prosecution that on 15.01.2020 at 6.30 hrs, the appellant called the victim over phone to come to his house, when she went to his house, no one was there in the house except the appellant. At that time the appellant misbehaved with the victim and pressed her breasts and threatened the victim not to tell the same to anybody. On the next day i.e on 16.01.2020 the appellant called the victim over phone to his house and threatened her that if she did not come, he would commit suicide. The victim again went to the appellant's house, again the appellant did the same. Thereafter



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again on 17.01.2020 the appellant called the victim by threatening , hence she went to his house and the appellant tried to do the same, but she managed and came out from his house. On 10.02.2020 when the victim was talking with the appellant over phone and crying, her mother saw and enquired her, she narrated all the incidents. Thereafter four days later i.e. on 14.02.2020, her mother lodged a complaint before the respondent police against the appellant. The respondent police registered a case against the appellant.

8. The learned counsel for the appellant would submit that there was money transaction between the mother of the victim and the wife of the appellant, due to dispute in the money transaction and to take vengeance against him, a false complaint was registered against the appellant by the mother of the victim. Further there is contradiction in the statement of victim and the mother of the victim /PW1. During cross examination the victim has stated that after returning from school in the evening, she went to the appellant's house, whereas the mother of victim has stated that the appellant called victim at the morning , therefore the time of occurrence was not proved by the prosecution. The prosecution has not explained the material contradictions regarding time of the occurrence and the place of the



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occurrence was also not established by the prosecution. The investigating officer /PW4 in the mahazar has clearly stated that the investigating officer inspected the victim's house and drew the mahazar, but he has not proved the said fact.

9. Further, he would submit that the main contention of the prosecution is that the appellant had contacted the victim over phone and asked the victim to come to his house, the Investigating officer has not collected either call details of both the appellant and the victim or seized the cellphone of them as to whether any phone conversation was held between the appellant and the victim on the particular date and time as to establish the physical contact between the appellant and the victim on 15.01.2020. Therefore, the prosecution has failed to substantiate the charges framed against the appellant.

10. The learned counsel would further submit that in the charges also there is no specific date and place of the occurrence was mentioned and also not contemplated under Section 212 Crpc, therefore, the charges framed are defect in nature, it vitiates the case of the prosecution. The prosecution has failed to prove its case beyond reasonable doubt as alleged by the prosecution and failed to frame



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proper charges and failed to appreciate the entire prosecution case and failed to appreciate the fact that there was contact between the appellant and the victim. Further no independent witnesses has been examined to prove the fact that victim went to the house of the appellant to take class to the appellant's son. The trial Court without any valid reason and without any substance convicted the appellant, therefore the judgment of the trial Court is liable to be set aside and the appeal to be allowed.

11. Per contra, the learned Additional Public Prosecution would submit that the age of the victim is 17 years and she is a child under the definition of POCSO Act. In order to prove the age of the victim, birth certificate was marked as Exhibit P6. As per Ex.P6, the date of birth of the victim is 14.11.2003 and the date of the occurrence is from 15.01.2020 to 17.01.2020, therefore the victim has not completed the age of 18 years, therefore she is a child under the definition of the POCSO Act. On the date of occurrence, the appellant called the victim over phone and asked her to come to his house and threatened to commit suicide if she did not come to his house. Due to the threat, the victim went to the appellant's house, at the time none was there in the appellant's house, therefore taking advantage of the



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loneliness, the appellant had committed sexual assault on the victim.

The victim was examined as PW2 and she has clearly stated about the incident. Previously the victim was examined before the Judicial Court under Section 164 Crpc. The said statement of the victim clearly revealed the fact that the appellant had committed sexual assault on 15.01.2020. The mother of the victim was examined as PW1, though there is no eyewitness of the occurrence, the mother of the victim/PW2 has stated that after the date of occurrence i.e on 10.02.2020, the mother of the victim saw the victim was talking to some body over phone and on enquiry she came to know that the victim was talking to the appellant due to threat by the appellant, therefore the evidence of PW2 corroborate the evidence of PW1.

12. This is not the case of penetrative sexual intercourse or sexual assault, hence the victim was not subjected to medical examination. Though there is contradiction between the evidences of PW1 and PW2, the same is not material contradiction. The prosecution was able to substantiate the charges that on 15.01.2020 the victim went to the house of the appellant at that time in the absence of the any other person, the appellant had committed sexual assault on the



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victim. In the statement recorded under Section 164 Crpc, the victim has clearly stated the time and date of the occurrence, therefore the prosecution has proved its case beyond reasonable doubt. Once the prosecution proved the foundational fact that the appellant had committed sexual assault, it is for the appellant to prove that he was not present in his house and he was on duty on the alleged date as per cross examination, therefore the appellant failed to rebut the presumption u/s 29 of the Act and failed to prove either in cross examination or by direct witnesses or by preponderance of probability. Even the victim was not cross examined on the same day, when she was examined in chief. The victim was examined as PW2 on 23.02.2021 subsequently, after eight months, she was recalled and cross examined. During cross examination, she has clearly narrated the date and time of the occurrence and also the sexual assault committed by the appellant. The victim was recalled after seven months and examined, therefore the contradictions of statements given by the victim pointed out by the learned counsel for the appellant cannot vitiate the case of the victim. Therefore, the prosecution proved its case beyond reasonable doubt and the trial Court has rightly convicted the appellant and imposed sentence, therefore there is no merits in the present appeal and the same is



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liable to be dismissed.

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13. Heard Mr.S.Saravana Kumar, learned counsel for the appellant and Mr.V.Balamurugane, learned Public Prosecutor (Pondicherry) appearing for the respondent and perused the materials available on record.

14. Admittedly, the respondent police registered a case against the appellant for the offences under Section 9 (I) punishable under Section 10 of POCSO Act. In order to substantiate the charges levelled against the appellant, on the side of the prosecution totally 9 witnesses were examined and 9 documents were marked as Ex.P1 to Ex.P9. Out of which, the victim was examined as PW2 and to prove the age of the victim, birth certificate of the victim was marked as Ex.P6. As per the birth certificate, the date of birth of the victim is 14.04.2003, the date of occurrence was on 15.01.2020, therefore it is clear that the age of the victim girl on the date of occurrence is 17 years and not completed 18 years, therefore she is a child under the definition of Section 2 (1)(d) of POCSO Act and it is a clear case falls under POCSO Act.

15. The victim was examined as PW2. A careful reading of deposition of PW2 clearly shows that on 15.01.2020 the victim was



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called by the appellant over phone, when she went to the appellant's house, except the appellant, none was there in the house at that time.

The appellant misbehaved with the victim and pressed her breasts, immediately the victim escaped from the place. During investigation, the statement under Section 164 Crpc was recorded before the Special Judge, Puducherry and the same was marked as Ex.P3 before the trial Court. In the said statement, the victim clearly narrated the incident took place in the appellant's house on the date of occurrence. The cases of this nature, no independent witnesses can be expected. The witness has also stated that except the appellant and the victim, no one was there at the time of the occurrence, therefore, no corroborative evidence can be expected. Normally the culprit who committed the offence of this nature will take advantage of loneliness of the children and take the children to the lonely place and exploit their innocence by causing sexual assault. In the present case also, the appellant called the victim to his house and committed the sexual assault. Further as per the evidence, it is proved that none was there in the appellant's house at that time. The appellant knowing the fact well, intentionally called the victim to his house when no one was there in the house and committed the sexual assault on the victim by threatening her. Therefore, no one independent witness was available



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and hence mere non examination of independent witnesses cannot be fatal to the case of the prosecution.

16. Though the learned counsel for the appellant vehemently contended that the charges are defective in nature and which was not framed as contemplated under Section 212 Crpc, the charges itself clearly stated that on 15.01.2020 at 6.30 hrs to 17.01.2020 at 6.30 hrs the appellant called the victim to come to his house over phone and pressed her breasts with sexual intent repeatedly and thereby committed the offence of aggravated sexual assault. The appellant understands the charges and faced ordeal of trial. However, it is the specific case of the prosecution that on 15.01.2020 at about 6.30 a.m the appellant called the victim over phone and committed sexual assault on the victim. It is seen from the previous statement of the victim before Judicial Magistrate, she has clearly stated that on 15.01.2020 at 6.30 a.m the appellant called over phone and the victim also went to the appellant's house and except the appellant none was there in the appellant's house and the appellant sexually assaulted the victim. In view of the said statement of the victim, there is a probability of occurrence at 6.30 am on 15.01.2020.



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17. Though PW1 is mother of the victim, her evidence is only hearsay evidence. Admittedly, there is a delay in filing complaint against the appellant, the same cannot be taken as ground to vitiate the case of prosecution. The victim being a child and brought up with Indian culture, we cannot expect her to say about the unusual and sexual assaults suffered by her immediately to her neighbours or family members. Definitely there will be a time gap to get over the impact and share the incidents/assault made against her, especially in the case of sexual assault. In the present case, as per the evidence of the PW1/ mother of the victim, she saw the victim was talking over phone and started crying when the mother asked for the reason, thereafter she narrated about the incident had taken place to her mother and the complaint came to be lodged against the appellant. Therefore the cases of this nature, mere delay in lodging complaint may not be a sole ground to discard the evidence of the victim and disbelieve the evidence of the prosecution.

18. No doubt, the investigating officer has not fairly conducted the investigation, not properly visited the scene of the occurrence and he has not made any attempt to get call details of the appellant and



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the victim, which is purely improper on the part of the investigating officer. Mere defect in investigation may not be a sole ground to reject the case of the victim.

19. The Investigating Officers who are dealing with POCSO Act cases are not scrupulously followed the procedures as contemplated under the Provisions of POCSO Act as to how to deal the victim and how the statement to be recorded and how the victim to be treated and how to record the medical evidences. Unfortunately, in the present case also, the investigating officer has not followed any of the provisions as contemplated under POCSO Act, this is how the investigating officers are being engaged in Tamil Nadu and Puducherry to deal with the POCSO Act cases.

20. This Court being an appellate court as fact finding court, has to be necessarily re-appreciate the entire evidence. When the victim was 17 years and the sexual offence has been committed by the appellant by giving threat to the victim on 15.01.2020 at 6.30. am, but subsequently for next two days, nothing had happened, therefore the offence of this kind would fall under Section 7 punishable under Section 8 of POCSO Act and there are no ingredients to attract Section 9 of the POCSO Act in the present case. The trial Court wrongly



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framed charges under Section 9 (I) punishable under Section 10 of POCSO Act.

21. Considering the earlier statement of the victim and also the evidence of the victim during cross examination of PW1, this Court has come to the conclusion that the appellant had committed offence under Section 7 punishable under Section 8 of POCSO Act.

22. In the light of the above reasoning and considering the nature of the offence as discussed supra, the quantum of sentence alone is modified from five (5) years to three (3) years. Thus, the conviction imposed by the trial court against the appellant is confirmed. However, quantum of sentence imposed under the said section is alone modified as stated supra, which will meet the ends of justice. The appellant is entitled to set off the period of imprisonment which he had already undergone.

23. In the result, the criminal appeal is partly allowed with the above modification.

24. Before parting with the judgment, this Court time and again made several observations and issued directions with regard to the genuineness and capability of investigating officers, but still the prosecution agency has not raised its standards and indulging in



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corruption activities and not conducting the investigation in proper manner. The investigating officers do not understand the purpose of enactment of POCSO Act and what circumstances the POCSO Act came to our hands. Without understanding the scope of the Act and with the lethargic attitude on the part of the investigating officers, the investigations are being done in the cases of offences registered under POCSO Act in which the victims are children between the age group of 8 and 18. Therefore, considering the seriousness and importance on the part of the investigating officers dealing with POCSO Act cases, this Court directs the government of Tamil Nadu and Puducherry to consider the efficiency and integrity of the prosecution agency and its officers and appoint qualified and capable investigating officers to deal with the offences registered under POCSO Act and submit a report at the earliest.

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Index:Yes/No
Speaking order/Non-speaking order
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P.VELMURUGAN, J

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To

1. The Inspector of Police,
Villianur Police Station,
Puducherry.
2. The Special Judge
Special Court under POCSO Act,
Puducherry.

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