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Crl.A.No.732 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.11.2022

CORAM

THE HONOURABLE Mr. JUSTICE **P.VELMURUGAN**

CRL.A.No.732 of 2022

Raja

... Appellant

- Vs -

The State Rep by
Inspector of Police,
All Women Police Station,
Ranipet.
(Crime No.24 of 2020).

.. Respondent

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure to set aside the conviction and sentence imposed on the appellant in Spl.S.C.No.45 of 2021 on the file of the Special Judge for Exclusive trial of Cases under POCSO Act-2012, Vellore District, by judgment dated 01.07.2022, and allow the appeal.

For Appellant : Mr.Adithya Varadarajan

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



Crl.A.No.732 of 2022

WEB COPY

J U D G M E N T

This Criminal Appeal has been filed against the judgment dated 01.07.2022 passed in Spl.S.C.No.45 of 2021 by the learned Sessions Judge, Special Court for Exclusive trial of Cases under POCSO Act, Vellore District.

2. The case of the prosecution is that on 20.12.2020, when the victim was playing outside the house, the accused took her to his house and closed the doors and windows. Then he made the victim to lie down on the bed, removed her dress and kissed all over her body. Thereafter, he forcibly inserted his penis into the victim's mouth and vagina and had sexual intercourse with her. At that time, the parents of victim came there in search of the victim and on knowing that, the accused opened the doors and set free the victim to go out of his house. On seeing the victim crying outside the house of the accused, PW-1/mother of the victim enquired the victim girl and she informed about the incident. Subsequently, PW1-mother of the victim preferred a complaint before the respondent police.

3. The respondent police registered a case against the appellant in Crime No.24 of 2020 for offences under Sections 5(m), 6 of 'Protection of Children from Sexual Offences Act, 2012' [hereinafter referred to as 'POCSO Act' for the sake of convenience] and Section 341 IPC and later, the same was altered into



Crl.A.No.732 of 2022

Sections 5(m), 6 of POCSO Act, Sections 342 & 376A & 376B IPC. After completing the investigation, the respondent police filed a final report before the learned Sessions Judge, Special Court for Exclusive trial of Cases under POCSO Act, Vellore for the offences under Sections 5(m), 6 of POCSO Act, Section 342 & 376A & 376B IPC and the same was taken on file in Spl.S.C.No.45 of 2021. The trial Court, after completing the formalities, framed charges against the appellant for the offences under Sections 5(m) r/w 6 of POCSO Act and Section 342 IPC.

4. In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 9 witnesses were examined as P.W.1 to P.W.9 and 10 documents were marked as Exs.P1 to P10.

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

6. On completion of trial, hearing the arguments advanced on either side and considering the material facts, the trial Court found guilt of the accused for



Crl.A.No.732 of 2022

the offences under Section 5(m) r/w 6 of POCSO Act and convicted and sentenced the accused to undergo 20 years Rigorous Imprisonment and to pay a fine of Rs.5,000/- in default to undergo further period of three months simple imprisonment and also he was found guilty for the offence under Section 342 IPC and convicted and sentenced to undergo one year simple imprisonment and to pay a fine of Rs.1,000/- in default to undergo one month simple imprisonment.

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

8. The learned counsel for the appellant would submit that there is a previous enmity between the uncle of the victim and the appellant and in order to take vengeance, he used the victim as a tool. Further, he would submit that the Doctor/PW7, who conducted the medical examination on the victim, has clearly stated that there was no internal or external injury found on the body of the victim and hymen was intact and also there was no penetrative sexual assault. There is a contradiction between the evidence of the victim and the medical evidence, which would go to the root of the case of the prosecution. The prosecution has not proved that the victim was subjected to penetrative sexual assault or aggravated sexual assault. Further, he would submit that no



Crl.A.No.732 of 2022

independent witness was examined. The father of the victim was also not examined. PW-3 is not an eye-witness, she is only hearsay witness and there is a contradiction between the evidence of PW-1-mother of the victim & PW-3-neighbour of the victim. Further, there is a contradiction in the statement recorded under Section 164 Cr.P.C. During the cross examination victim had not stated anything about the allegations. Further, from the oral evidence or from the medical evidence, the prosecution has not proved beyond reasonable doubts that the victim was subjected to penetrative sexual assault by the appellant. Even assuming that if the appellant had committed some offences, they were not come under Section 5(m) punishable under Section 6 of POCSO Act, it only falls under Section 7 of POCSO Act. The medical evidence has not supported the case of the prosecution and not corroborated with the evidence of the victim. Therefore, the appreciation of the evidence by the trial Court is perverse and the judgment of the trial Court is liable to be set aside and the appeal has to be allowed.

9. The learned Additional Public Prosecutor appearing for the respondent would submit that as per Ex.P7-School certificate, the date of birth of the victim is 21.10.2012 and the date of occurrence is 20.12.2020 and hence, the age of the victim at the time of the occurrence is only 8 years is confirmed.



Crl.A.No.732 of 2022

WEB COPY

The defence has not cross examined the witness, who produced Ex.P5-School Certificate. Therefore, the age of the victim was not disputed by the appellant and therefore, at the time of the occurrence, the age of the victim was only 8 years. Therefore, she is a child under the definition of POCSO Act. As far as the commission of the offence is concerned, PW2-the victim has clearly narrated the incident. The statement recorded by the learned Magistrate under Section 164 Cr.P.C was also marked as Ex.P2. The evidence of PW2-victim, PWs-7 & 8 Doctors, Ex.P2-statement recorded under Section 164 Cr.P.C and Ex.P6-Medical Certificate would clearly show that the victim was subjected to penetrative sexual assault. PW-7/Doctor had clearly stated that her hymen was intact and the reason may be in case of tough hymen, the hymen may or may not tear. As the hymen is deeply situated, it is impossible for the penetration of the adult organ. Since the hymen was intact, it cannot be stated that there was no penetrative sexual assault at all. The PW-2/victim had clearly stated that the appellant committed penetrative sexual assault on her. There was no eye witness for the occurrence. PWs1 & 3 are only the hearsay witnesses. Soon after the occurrence, they enquired the victim and the victim narrated the incident. Therefore, the evidence of PW2 is corroborated by the evidence of PWs1 & 3. As far as the offence under Section 342 IPC is concerned, the



Crl.A.No.732 of 2022

WEB COPY

evidence of the victim is clear that the appellant took the victim from the lawful custody of the lawful guardians and had aggravated penetrative sexual assault on her. The prosecution proved its charges beyond reasonable doubts. Once the prosecution has proved the sexual assault, which is more so aggravated penetrative sexual assault, it is for the appellant to rebut the presumption under Sections 29 & 30 of POCSO Act. Therefore, the trial Court has rightly appreciated the prosecution witnesses and found that the appellant has committed the aggravated penetrative sexual assault. There is no perversity in the appreciation of the evidence. Since there is no merit in the appeal, the same is liable to be dismissed.

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

11. As already stated, the respondent police registered the case against the appellant for the offence under Section 5(m) read with 6 of POCSO Act and 342 IPC. The alteration report shows that the appellant was also charge sheeted for the offence under Section 376 A & B IPC, however, the trial Court has not framed any charges against the accused for the offence under Section 376 A & B IPC. The prosecution has not raised a question before the trial Court to frame



Crl.A.No.732 of 2022

specific separate charge. Neither the State nor the victim has filed an appeal for non framing of charge and non giving the finding for the offence under Section 376 A & B IPC. This Court as the final Court of fact finding, has to re-appreciate the entire evidence and give an independent finding. This Court also has carefully gone through the entire evidence and re-appreciated the same.

12. In this case, the age of the victim is 8 years. In order to prove the age of the victim, Headmistress of the school, in which the victim was studying, was examined as PW-6 and School Certificate was also marked as Ex.P5. As per Ex.P5, the date of birth of the victim is 21.10.2012 and as per the complaint and the evidence of PW-1, the date of occurrence is 20.12.2020. Therefore, the age of the victim is only 8 years. The age of the victim was not challenged by the defence. Therefore, it is proved that the victim is a child under the definition of Section 2(1)(d) of POCSO Act.

13. As far as the commission of the offence under Section 5(m) punishable under Section 6 of POCSO Act is concerned, the victim was aged about 8 years and the appellant is a neighbour to the victim. Since the date of occurrence i.e., 20.12.2020 is happened to be a holiday, she was playing near the house. At that time, the appellant took the victim to his house and committed penetrative sexual assault as well as oral.



Crl.A.No.732 of 2022

WEB COPY

14. In order to substantiate the said charge, the prosecution examined 9 witnesses, out of which, the victim was examined as PW-2 and her statement recorded under Section 164 Cr.P.C was marked as Ex.P2. The evidence of the victim/PW-2 and the statement recorded under Section 164 Cr.P.C (Ex.P2) would clearly show that the appellant committed the penetrative sexual assault on the victim. Since the appellant committed the offence in a secluded place, there is no eye witness in this case. PW1-mother of the victim deposed that soon after the occurrence, the victim came out of the house of the appellant crying and when she enquired the victim, she narrated the entire incident, which was happened to her. One of the neighbours, who is the owner of the house, was also examined as PW-3. PW-3 had deposed that PW1 searched her daughter and also enquired with PW-3, Subsequently, PW1 brought the victim from the appellant's house and she informed to PW3 that the victim was with the appellant. Therefore, the evidence of PWs1 & 3 show that on the date of occurrence i.e., on 20.12.2020 the victim was sometime with the appellant. Further, in order to substantiate the penetrative sexual assault on the side of the prosecution, the Doctors were examined as PW7 & PW8. The Accident Register was marked as Ex.P7 and the medical certificate of the victim was marked as Ex.P6. The combined reading of the evidence of PW-5, PW-7, PW-8



Crl.A.No.732 of 2022

and Exs.P4, P5, P6 & P7 would show that the prosecution has proved that the victim was subjected to penetrative sexual assault.

15. Even though the learned counsel for the appellant vehemently contended that the medical evidence and certificate are not corroborated with the evidence of the victim, a careful reading of the evidence of the victim shows that there was an injury on her private part and also she suffered pain. Further, the victim had clearly stated that the appellant kept his private part into the victim's private part. Thereafter, the appellant kept his private part into her mouth. Therefore, a reading of Section 3(a) of POCSO Act reveals that the act committed by the appellant is a penetrative sexual assault. For better understanding, Section 3(a) is extracted hereunder:-

“3. Penetrative sexual assault -

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or”

16. Since the victim is aged about 8 years, the offence committed against the child, who is below 12 years, turned into an aggravated penetrative sexual assault. For better understanding, Section 5(m) of POCSO Act is extracted hereunder:-



Crl.A.No.732 of 2022

“5. Aggravated penetrative sexual assault -

(m) whoever commits penetrative sexual assault on a child below twelve years; or”

17. Section 6 of POCSO Act is extracted hereunder:-

“6. Punishment for aggravated penetrative sexual assault-

(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

18. Therefore, the evidence of PW1 and a combined reading of the evidence of PW7 & PW8 and Exs.P2, P5 to P8 clearly show that the appellant has committed the offence under Section 5(m), which is punishable under Section 6 of POCSO Act. This Court, while re-appreciating the entire evidence, finds that the appellant has committed the offence under Section 5(m) punishable under Section 6 of POCSO Act. As far as Section 342 IPC is concerned, the victim has clearly stated that the appellant took the victim to a



Crl.A.No.732 of 2022

secluded place and removed her cloths and committed penetrative sexual assault, which comes under the definition of Section 3(a) of POCSO Act. Once the prosecution proved that the appellant wrongfully confines the victim child, Section 342 IPC would attract. This Court, while re-appreciating the entire evidence finds that even though there is a discrepancy or contradiction as pointed out by the learned counsel for the appellant from the prosecution evidence, according to this Court, the contradictions and discrepancies pointed out by the learned counsel for the appellant are not material contradictions, which would affect the case of the prosecution. Further, though the learned counsel for the appellant vehemently contended that there is no independent witness, all are interested witnesses, in a case of this nature, no independent witness would be expected. Further, the culprits are always taking advantage of the innocent children and also taking to the secluded place and committed the offence. Therefore, no independent witness could be expected. This is also one such case. This Court finds that the evidence of the victim is cogent, consistence and natural and there is no reason to discard the evidence of the prosecution witnesses.

19. Under these circumstances, this Court, being an Appellate Court as a fact finding Court re-appreciated the entire evidence independently and arrived



Crl.A.No.732 of 2022

at independent conclusion that the evidence of the victim child inspires the confidence of this Court and the appellant has committed aggravated penetrative sexual assault on the victim child and the trial Court has rightly convicted the appellant and imposed minimum sentence. This Court does not find any mitigating circumstances to interfere with the judgment of the trial Court.

20. In the light of the above discussion, this Court does not find any merit in this appeal and the appeal is liable to be dismissed. Accordingly, this Criminal Appeal is dismissed and the judgment of conviction and sentence passed in Spl.S.C.No.45 of 2021 by the learned Sessions Judge, Special Court for Exclusive trial of Cases under POCSO Act, Vellore is confirmed.

09.11.2022

Index: Yes/No

Speaking Order/Non-Speaking Order
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Crl.A.No.732 of 2022

P.VELMURUGAN, J.

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To

- 1.The Sessions Judge,
Special Court for Exclusive trial of
Cases under POCSO Act,
Vellore District.
- 2.The Inspector of Police,
All Women Police Station,
Ranipet.
- 3.The Superintendent,
Central Prison,
Vellore.
- 4.The Public Prosecutor,
High Court, Madras.
- 5.The Deputy Registrar | with a direction to send back the
(Criminal Section), | original records, if any, to the
High Court, Madras. | trial Court

CRL.A.No.732 of 2022

09.11.2022