



WEB COPY



Crl.A.No.918 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.11.2022

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.918 of 2022

M.Thiyagarajan ... Appellant

Vs.

The State Rep. by
The Inspector of Police,
All Women Police Station,
Attur, Salem District. ... Respondent

PRAYER: Criminal Appeal is filed under Section 378 of Cr.P.C. to set aside the conviction passed by the learned Special Sessions Judge, (POCSO Act) at Salem in Old Special Sessions Case No.77 of 2018, New Special Sessions Case No.120 of 2019 dated 09.06.2022.

For Appellant : Mr.B.Balavijayan for
M/s.C.S.Associates

For Respondent : Mr.S.Sugendran APP



Crl.A.No.918 of 2022

J U D G M E N T

WEB COPY

This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 09.06.2022 made in Spl.S.C.No.77 of 2018, New Special Sessions Case No.120 of 2019, on the file of the learned Special Sessions Judge, (POCSO Act), at Salem.

2. The specific case of the prosecution is that on 06.08.2017 at about 6.30.pm, the appellant/accused took the victim into the top of the house, undressed her and he also removed his dress and was lying on her on the floor, after hearing the voice of the victim, the mother of the victim rushed to the spot and she pushed the appellant/accused aside and rescued the victim. Later she informed to her brother in law, who is paternal uncle of the victim and subsequently registered the case against the appellant/accused. Based on which, the respondent-Police registered a case against the appellant for the offence under Section 7, which is punishable under Section 8 of POCSO Act. Subsequently, the Investigating Officer, investigated the matter and laid a charge sheet before the learned Special Sessions Court, Salem, since the offence against the child.



Crl.A.No.918 of 2022

WEB COPY

3. The respondent-Police registered a case against the appellant in Crime No.16 of 2017, for the offence under Section 7 and 8 of Protection of Children from Sexual Offences Act, 2012 (For brevity "the POCSO Act). After the investigation, laid a charge sheet before the learned Special Sessions Court, Salem, since the offence against the child.

4. The learned Special Sessions Judge taken the charge sheet against the appellant for the offence under Section 10 of POCSO Act. After completing the formalities, in order to substantiate the charges levelled against the appellant before the Trial Court on the side of the prosecution as many as 9 witnesses were examined as PW-1 to PW-9 and 19 documents were marked as Exs.P.1 to Exs.P.19 and one material object was exhibited as MO-1. After completing the examination of the entire prosecution witnesses, when incriminating circumstances culled out from the evidence of prosecution witnesses were put to the appellant by questioning under Section 313 Cr.P.C., he has denied the same as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.



Crl.A.No.918 of 2022

WEB COPY

5. After considering the evidence on record and hearing on either side, the learned Special Judge, by Judgment dated 09.06.2022, convicted the appellant for the offence under Section 9(m), which is punishable under Section 10 of POCSO Act and sentenced him to undergo five years Rigorous Imprisonment and to pay a fine of Rs.15,000/-, in default to undergo Six months Simple Imprisonment. Challenging the said Judgment of conviction and sentence, the accused /appellant has preferred the present Appeal.

6. The learned counsel for the appellant would submit that the prosecution has not established its case as projected by it and there is a delay in registering the case and also sending the FIR to the Court. Though P.W.1-eyewitness, who is the mother of the victim child, is alleged to have seen the occurrence on 06.08.2017, she made a complaint only on 07.08.2017. Even after the complaint, FIR was sent to the Court with a delay and there was no proper explanation for the said delay. Further, the learned counsel would submit that there are material contradictions between the statement recorded under Section 164 Cr.P.C., and the Preliminary examination of the victim. It



WEB COPY

is submitted that the prosecution ought to have examined the Judicial Magistrate, as the contents of two documents are contradictory to her deposition found during trial. Therefore, the failure on the part of the prosecution to examine the Judicial Magistrate is fatal to the case of the prosecution. Further the learned counsel would submit that the prosecution has failed to prove its case by independent witness, as PW-1, mother of the victim in her deposition stated that at the time of incident, the neighbours came to the spot and attacked the appellant, whereas, the said neighbours were not examined and therefore, non examination of the said neighbours is also fatal to the case of the prosecution.

7. The learned counsel would further submit that the appellant/accused is a known person and there was a motive to foist a false case against the appellant in order to restrain his marriage due to illegal intimacy between the mother of the victim and the appellant. Further, the learned counsel would submit that the medical evidence does not corroborate with the prosecution witnesses as the Doctor's evidence which would clearly show that there is no



WEB COPY

injury in the internal or external private part of the victim and the evidence of the prosecution is totally false. Further, the learned counsel would submit that the victim girl has not identified the appellant and therefore, wrongly registered the case against the appellant and hence, the prosecution has not proved its case beyond reasonable doubt. The Trial Court failed to appreciate the oral and documentary evidence and erroneously convicted the appellant and hence, judgment of conviction and sentence passed by the learned Special Judge is liable to be set aside.

8. The learned Additional Public Prosecutor for the respondent-Police would submit that the victim child, who is aged about 8 years at the time of occurrence and in order to prove the age of the victim marked Ex.P.8/Educational certificate and as per the Ex.P.8, date of birth of the victim is 25.06.2009, since the age of the victim girl is below 12 years and the offence falls under Section 9(m) of the POCSO Act, which is punishable under Section 10 of the POCSO Act. Further the learned Additional Public Prosecutor would submit that the mother is an eyewitness in this case and



Crl.A.No.918 of 2022

WEB COPY

the appellant is the known person and he committed the offence and due to non-availability of anyone to help the mother, she filed the complaint on the next day. Further, the learned Additional Public Prosecutor would submit that the Doctor's evidence is very clear that there is no internal or external injury in the private part of the victim child and the medical evidence does not help to the prosecution and it is not the case of the prosecution, but however, the evidence of PW-1, mother of the victim, who is only eyewitness, saw the occurrence after hearing the voice from the victim, she rushed to the place and she pushed the appellant/accused and therefore, the prosecution has proved its case beyond reasonable doubt. The learned Additional Public Prosecutor further would submit that except PW-1, mother of the victim, none of the witnesses have been cross examined by the defence and the evidence of the witnesses especially the evidence of the victim has not been challenged by the defence and therefore, the Trial Court rightly appreciated the evidence and framed the charges for the offence under Section 7 punishable under Section 8 of POCSO Act, since the victim is aged below 12 years and the offence falls under Section 9(m), which is punishable



Crl.A.No.918 of 2022

under Section 10 of POCSO Act. Therefore, the Trial Court rightly appreciated the oral and documentary evidence, convicted the appellant and there is no merit in the Appeal and the same is liable to be dismissed.

9. Heard the learned counsel on either side and perused the materials available on record.

10. On a perusal of the statement recorded under Section 164 of Cr.P.C., and the evidence of the mother of the victim P.W.1, it could be seen that admittedly, the accused had taken the victim child into the top of the house and undressed her and he also removed his dress and laid on her. Therefore, this Court finds that there is no reason to discard or disbelieve the evidence of the mother of the victim child and the statement recorded under Section 164 of Cr.P.C., and there is no doubt about the trustworthiness of the victim child and under the circumstances, the age of the victim child is only 8 years, and she cannot be tutored by the prosecution for these type of offences.

11. The next contention of the learned counsel for the appellant is



Crl.A.No.918 of 2022

with regard to delay in filing complaint and registering the case. However, the delay in filing complaint, mere sending FIR belatedly to the Court may not be a sole ground to disbelieve or discard the evidence of the prosecution witnesses. Mere defect in the investigation also may not be a ground to disallow the case of the victim and the appellant cannot be entitled for acquittal on that ground.

12. The other contention of the learned counsel for the appellant is that the evidence of the Doctor, who examined the victim child has given a report /Ex.P12 and the Doctor had also stated that there is no internal or external injury in the private part of the victim and as such, the evidence of P.W.7 Doctor was also not supported the case of the prosecution. However, P.W.1, the mother of the accused has clearly deposed that she heard the voice of the victim and she rushed to the occurrence place and saw that the appellant/accused and the victim are in nude and he laid on her and as such, the prosecution has proved that the appellant has committed an offence punishable under Section 7 which is punishable under Section 8 of POCSO



Act. Penetration is immaterial, mere touching of private part or any of the part of the victim with sexual intent would be sufficient so as to constitute the offence. At this juncture, it would be useful to refer the Sections 7 & 9(m) of the POCSO Act:-

7.Sexual assault

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.

9. Aggravated Penetrative Sexual Assault:-

(m) whoever commits sexual assault on a child below twelve years;"

On a reading of the evidence of the mother of the victim child P.W.1 and Sections 7 & 9 (m) of the POCSO Act, it is very clear that the appellant has committed the offence under Sections 7, since victim is below 12 years



Crl.A.No.918 of 2022

which falls under Section 9(m) which is punishable under Section 10 of POCSO Act.

13. The last contention of the learned counsel for the appellant is that there was a motive to foist a false case against the appellant. In this case, there is no reason to disbelieve or discard the evidence of the mother of the victim child. Further, there was no necessity to foist such a serious offence against the appellant by spoiling the future of the victim child. It is pertinent to mention that the parent of the victim child need not go to that extent by spoiling the future of the victim child. Therefore, the above contention of the learned counsel for the appellant is rejected. Further, there was no reason to discard the evidence of the mother of the victim child. Normally, corroboration of witness is necessary, whereas, for the offence under POCSO Act, the evidence of the victim girl is sufficient. In this case, since the age of the victim child was only 8 years and the Court cannot expect the eyewitness, since it is not the case of the prosecution that the occurrence had taken place in the presence of some other eye witness. However, admittedly, in the case on hand, the mother is an eyewitness and in her evidence, she had clearly



Crl.A.No.918 of 2022

deposed that she had seen both the victim and the appellant without dress in the occurrence place and the appellant was laying on her. Further, the defence has not established that for what reason, they foisted a false case against the appellant. Though the appellant had taken the defense of motive behind the complaint, but however, it has not been established in the manner known to law.

14. Since this Court is an Appellate Court and also final Court of fact finding, it has to re-appreciate the entire evidence and come to the conclusion independently. On a reading of the entire materials and the evidence of the mother of the victim child P.W.1 and the evidence of the doctor-P.W.7 and report Ex.P.12, and Section 9(m) of the POCSO Act, it is very clear that the appellant has committed the offence punishable under Section 7, which is punishable under Section 8 of POCSO Act, since the age of the victim is below 12 years, the accused has committed the offence falls under Section 9(m), which is punishable under Section 10 of POCSO Act, which is aggravated sexual assault. Therefore, this Court does not find any perversity



Crl.A.No.918 of 2022

or any good reason or good ground to interfere with the judgment of the trial Court.

15. Therefore, under the circumstances, this Court also finds that the prosecution has proved its case beyond any reasonable doubt and there is no reason to interfere with the judgement of the learned Special Sessions Judge, (POCSO Act), Salem. Since the Trial Court imposed a minimum sentence of five years and this Court does not find any mitigating circumstances to reduce the sentence and therefore, there is no merit in the Appeal and the same is liable to be dismissed. Accordingly, the Criminal Appeal is dismissed.

07.11.2022

Speaking Order / Non-speaking order

Index : Yes / No.

Internet : Yes/No

pbn

To

1. The Special Sessions Court, (POCSO Act) at Salem

2. The Public Prosecutor,
Madras High Court, Chennai.

13/15



Crl.A.No.918 of 2022

3. The Inspector of Police,
All Women Police Station,
Attur, Salem District.



WEB COPY



Crl.A.No.918 of 2022

P.VELMURUGAN, J.

pbn

Crl.A.No.918 of 2022

07.11.2022