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Crl.A.No.924 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.11.2022

CORAM:

THE HON'BLE Mr. JUSTICE P.VELMURUGAN

Crl.A.No.924 of 2022

B.Sundar

... Appellant

Vs.

State by
The Inspector of Police,
W-5, All Women Police Station,
Vepery,
Chennai.

... Respondent

Prayer:

Criminal Appeal filed under Section 374(2) of Cr.P.C., to set aside the judgment dated 30.06.2021 in Spl.S.C.No.82 of 2020 passed by the Court of the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai, convicting the appellant/accused under Sections 10 r/w 9(m) and 12 r/w 11(i) altered to 18 r/w 12 r/w 11(i) of POCSO Act and sentencing him to undergo 5 years Rigorous Imprisonment and imposed with a fine of Rs.500/- in default to undergo simple



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imprisonment for one month for the charge under Section 10 r/w 9(m) of POCSO Act, 2012 and sentenced to one year rigorous imprisonment with a fine of Rs.500/- in default to undergo one month simple imprisonment.

For Appellant : Mr.R.Maran

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor

JUDGEMENT

This Criminal Appeal has been filed against the judgment dated 30.06.2021 passed in Spl.S.C.No.82 of 2020 on the file of the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai.

2. The respondent police registered a case in Crime No.5 of 2020 against the appellant for the offence under Sections 10 and 12 of POCSO Act. After investigation, laid a charge sheet before the Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai,

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since the offence is against child. The learned Special Judge taken the charge sheet on file in Spl.S.C.No.82 of 2020. After completing the formalities, framed the charge against the appellant for the offence under Section 10 read with 9(m) and under Section 12 read with 11(i) of POCSO Act altered to 18 read with 12 read with 11(i) of POCSO Act. During trial, in order to substantiate the charge, on the side of the prosecution, totally six witnesses were examined as P.Ws.1 to 6 and seven documents were marked as Exs.P1 to P7. On completion of examination 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 and hearing the arguments advanced on either side and considering the materials placed, the trial court found the appellant guilty for the offence under Section 10 read with 9(m) and 12 read with 11(i) altered to 18 read with 12 read with 11(i) of POCSO Act. The appellant was convicted and sentenced to undergo five years rigorous



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imprisonment with a fine of Rs.500/- in default to undergo simple imprisonment for one month for the charge under Section 10 read with 9(m) of POCSO Act and sentenced him to undergo one year rigorous imprisonment with a fine of Rs.500/- in default to undergo one month simple imprisonment.

4. Specific case of the prosecution is that on 30.08.2020 at about 11.30 hours, the defacto complainant was standing along with her daughter/victim child in front of her house, the appellant came by bicycle and asked idly flour and when the complainant went inside the house to take idly flour. Meanwhile, when the victim girl went to rest room situated at the outside of the house, the appellant asked her name then he pulled her and kissed her on her mouth and he lifted his waist. All of a sudden the victim girl pushed him away and ran inside the house and cried. On hearing the crying sound of the victim, the complainant/mother enquired her. The victim girl narrated the entire incident to her mother. Immediately when the defacto complainant rushed outside of her house and she has seen that the accused was escaping from the place by riding the bicycle. Immediately the



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defacto complainant raised an alarm to chase the appellant and neighbors of defacto complainant asked the details and chased the appellant. Then, she preferred the complaint before the respondent police and the respondent police registered the case and investigated the matter and laid a charge sheet.

5. Learned counsel for the appellant would submit that there is no eye witness in this case and the defacto complainant is the mother of the victim girl has not seen the alleged occurrence. The victim girl went inside the house and informed the incident to her mother and thereafter the defacto complainant came outside and she has seen the accused is highly improbable. Learned counsel for the appellant would submit that the alleged occurrence is said to have taken place on 30.08.2020 at about 11.30 hours whereas, the complaint was given at 14 hours. F.I.R was reached the court only on 31.08.2020 at about 4.45 pm. There is a delay in sending the F.I.R to the court and there is no occurrence said to have taken place as projected by the prosecution. Further, he would submit that the victim girl was not subjected to medical examination and no independent witnesses have been examined. P.W.1 is the mother of the victim girl, who is the



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defacto complainant. P.W.2 is the victim girl. P.W.3 is the father the victim girl. They are all interested witnesses. Though the defacto complainant has stated that after hearing the crying sound of the victim, she came outside the house and she saw that the appellant was trying to escape from the place of occurrence by bicycle and she raised an alarm and asked the neighbors to chase the appellant and they chased him, but no witness has been examined by the prosecution with regard to the same. In this case, except the victim girl, no other eye witnesses and independent witnesses have been examined. The occurrence was said to have taken place in the open place. P.W.1 has stated that after sending the appellant from the shop, she was inside the house. When the victim girl went to rest room, he called her and asked her name and at the time, he committed offence. It is not the case of the prosecution that the appellant took the victim to the secluded place and committed the alleged offence. It is highly improbable that in front of the house of the victim and that too in the open place, the appellant committed sexual assault. P.Ws.1 to 3 are interested witnesses and no other independent witness especially neighbors who chased the appellant are not seen the occurrence. Prosecution failed to prove the case beyond



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reasonable doubt and there is no independent witness in this case. The trial court also failed to appreciate the evidence. Therefore, judgment of the trial court is liable to be set aside and the appeal may be allowed.

6. Learned Additional Public Prosecutor appearing for the respondent would submit that in this case, age of the victim is only 10 years and in order to prove the age of the victim girl, birth certificate of the victim girl was marked as Ex.P1. As per Ex.P1, the date of birth of the victim is 03.08.2011. Date of occurrence is 03.08.2020. Therefore, age of the victim is 10 years at the time of occurrence. Therefore, victim is a child under the definition of POCSO Act. From the evidence of P.W.2, Ex.P3-previous statement of the victim girl recorded by the Judicial Magistrate under Section 164 Cr.P.C., it is proved that the appellant has committed the charged offence. P.W.1 and P.W.3 who are parents of the victim girl has clearly stated that while they were inside the house, the victim girl informed about the sexual act of the appellant to them and at the time they came outside the house and they have seen that the appellant was proceeding from the occurrence place. The victim also identified the accused.



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Therefore, prosecution has proved its case beyond reasonable doubt. Since there is no penetrative sexual assault and the victim has not sustained any injury, no need to send the victim for medical examination. Therefore, prosecution proved its charges and the trial court also rightly appreciated entire evidence.

7. Heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the respondent and perused the materials.

8. The case of the prosecution is that the appellant committed sexual assault on the victim punishable under Section 9(m) which is punishable under Section 10 of POCSO Act and also the appellant tried to lift his lungi towards the victim girl. Therefore, charges were framed against the appellant for the offence under Section 11 punishable under Section 12 of POCSO Act. Considering the fact that the appellant made an attempt to commit offence under Section 11(m) and punishable under Section 12 of POCSO Act, the Trial Court convicted the accused for the offence under



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Section 18 read with 12 read with 11 of POCSO Act, however, the Trial court has not imposed any sentence for the offence under Section 18 read with 12 read with 11 of POCSO Act. This Court is the appellate court, as a final court of fact finding appreciated the entire evidence in accordance with law. The trial court framed the charges against the appellant for the offence under Section 10 r/w 9(m) and 12 r/w 11(i) altered to 18 r/w 12 r/w 11(i) of POCSO Act.

9. In order to substantiate the charge, on the side of the prosecution totally 6 witnesses were examined and 7 documents were marked. Out of 6 witnesses, victim was examined as P.W.2. In order to prove the age of the victim girl, birth certificate of the victim was marked as Ex.P1. As per Ex.P1, age of the victim is only 9 years. Date of birth of the victim is 03.08.2011. Date of occurrence is 30.08.2020. She is a child under the definition of POCSO Act. Moreso, age of the victim is below 12 years. In order to prove the case of the prosecution, the victim was examined as P.W.2. Earlier, victim was also produced before the Judicial Magistrate to record statement under Section 164 Cr.P.C., and the same was marked as



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Ex.P4. The victim girl clearly narrated the entire incident that the appellant called her when she was in front of her house, and asked her name. When she was replied, all of a sudden, the appellant hugged her and kissed on her mouth and also lifted his lungi and immediately she escaped from the appellant and ran into her house and informed the same to her parent. P.W.2 is the mother of the victim girl deposed that on the said date, when she was selling idly flour, the appellant came to the place initially asked idly flour and P.W.1 went inside and at the time the victim came inside the house and informed the sexual act committed by the appellant. P.W.3, father of the victim has also stated that while he was sleeping in the house, the victim came into the house and she informed the abovesaid act of the appellant. When they try to chase the appellant, he is escaping from the place by riding bicycle. No independent witnesses were examined by the prosecution with regard to the same. It is the defect in investigation. Complaint was prepared on the date of occurrence and the same was registered on the same date. There is no motive or enmity was attributed by the appellant against P.Ws.1 to 3. Nothing has been chattered during cross examination. There is no reason to disbelieve the evidence of P.Ws.1 to 3.



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Especially P.W.2 is the victim girl. Since the victim is child below 12 years, act committed by the appellant falls under Section 7 of POCSO Act, which is punishable under Section 8 of POCSO Act. Since the victim is aged below 12 years, offence committed by the appellant falls under Section 9(m) which is punishable under Section 10 of POCSO Act. There is no necessity to subject the victim girl for medical examination.

10. Combined reading of evidence of P.Ws.1 to 3, there is no reason to discard the evidence of P.Ws.1 to 3. Evidence of victim is cogent, natural and consistent and there is no motive has been putforth by the appellant to substantiate his case. In this case, the victim girl has clearly identified the appellant and cases of this nature, no independent witness can be expected. In this case, there is no independent witnesses stated to have seen the occurrence. Non-examination of the independent witness is not fatal to the case of the prosecution. Cases of this nature, no independent eye witness can be expected except the victim and therefore under these circumstances, conviction can be recorded based on the evidence of the prosecutrix, if the evidence of the prosecutrix inspires the confidence of this Court. The



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victim girl's evidence is natural, cogent and consistent and no reason to discard the evidence of the victim girl and it inspires the confidence of this Court. Cases of this nature, no corroborative evidence can be expected. Since the victim girl has not stated that any other independent witnesses have seen the occurrence, non-examination of the independent witness is not fatal to the case of the prosecution.

11. This Court finds that the prosecution proved the foundational fact that the appellant has committed offence under Section 9(m) which is punishable under Section 10 of POCSO Act. 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 for the accused has to rebut the presumption even not by direct evidence, but he can rebut the presumption even by preponderance of probabilities. Though the trial court framed charge for the offence under Section 11 punishable under Section 12 of POCSO Act, evidence of the victim girl also that in addition to the act committed by the appellant that he



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hugged and kissed her, he tried to lift his lungi, therefore, the trial court altered the charge under Section 11 read with 12 of POCSO Act into Section 18 read with 12 read with 11(i) of POCSO Act, which means the appellant try to made an attempt to commit sexual assault under section 11 punishable under Section 12 of POCSO Act. But, no separate sentence has been imposed.

12. Since this Court is the Appellate Court, final court of fact finding and when the materials are available, it can arrive at an independent conclusion. From the evidence of P.W.2, this Court finds that prosecution has proved the charges framed against the appellant. Minimum sentence for the offence under Section 11 which is punishable under Section 12 is three years. However, the trial court has not imposed any sentence for the abovesaid charge. Either prosecution or the victim has not filed any appeal.

13. Considering the facts and circumstances of the case and from the date of arrest till date, the appellant is in custody and considering the nature of offence said to have been committed by the appellant in this case,



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sentence of three years rigorous imprisonment would meet the ends of justice. Hence, sentence of five years rigorous imprisonment imposed by the trial court is reduced into three years rigorous imprisonment. With the abovesaid modification, the Criminal Appeal is dismissed. Consequently, connected miscellaneous petition is closed.

08.11.2022

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Index:yes/No
Internet:yes/No

To

1. The Sessions Judge,
Special Court for Exclusive Trial of Cases under POCSO Act,
Chennai.
2. The Inspector of Police,
W-5, All Women Police Station,
Vepery,
Chennai.

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P.VELMURUGAN, J.

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