



CRL A No.520 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	:	29.09.2022
Pronounced on	:	18.10.2022

Coram:

THE HONOURABLE **MR. JUSTICE P.VELMURUGAN**

Criminal Appeal No.520 of 2021

Pachiappan

... Appellant

Vs.

State by

Inspector of Police

Mettur All Women Police Station

Mettur Dam

Salem District

(Crime No.5 of 2018)

... Respondent

Prayer : Criminal Appeal filed under Sections 374(2) of Criminal Procedure Code, praying to set aside the conviction and sentence passed by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Salem in Special S.C.No.103 of 2019 by Judgment dated 20.09.2021 and acquit the appellant herein from the charges.

For Petitioner : Mr.M.R.Jothimanian

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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J U D G M E N T

This Criminal Appeal has been filed seeking to set aside the Judgment of conviction and sentence passed by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Salem in Special S.C.No.103 of 2019 dated 20.09.2021 and acquit the appellant herein.

2.The respondent police registered the case against the appellant in Crime No.5 of 2018 for offence punishable under Sections 7 and 8 of Protection of Children from Sexual Offences Act, 2012. After completing the investigation, the respondent police laid charge sheet before the Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Salem, and the learned Special Judge after completing the formalities, taken up the charge sheet on file in Spl.S.C.No.103 of 2019 and framed charges against the the appellant for offence under Section 7 read with 8 of Protection of Children from Sexual Offences Act, 2012.

3. After framing the charges, in order to prove the case of the



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prosecution during trial, totally 12 witnesses were examined as P.W.1 to P.W.12 and 15 documentary evidences were marked as Exs.P.1 to P15 and no material object was exhibited.

4. After completing the examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C. However, the accused denied the same as false and pleaded not guilty. On the side of the defence, one document was marked as Ex.D1.

5. On conclusion of trial after hearing the arguments advanced on either side and also considering the materials, the Special Court convicted the appellant for offence punishable under Section 8 of Protection of Children from Sexual Offences Act, 2012 and sentenced to undergo 4 years rigorous imprisonment and fine of Rs.20,000/- to be paid to the victim girl after the appeal period, in default to undergo a further period of six months simple imprisonment. Challenging the Judgment of conviction and sentence, the appellant has filed this present appeal before



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this Court.

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6. The case of the prosecution is that on 26.04.2018 at about 8.30 a.m., one Sundari, the neighbour of the victim girl, had asked the victim girl who was aged about 13 years at the time of occurrence, to get Betel Leaf and Supari. Accordingly, the victim girl bought the same from Pachiappan's shop and gave it to her. However, since the same were not afresh, again she asked the victim girl to get the same from some other shop. Hence, the victim girl went to Nachimuthu's shop and after buying the same, while she was returning home, the said Pachiappan who was having breakfast, called her from his shop and asked her to take Jujube Fruit Vada (Elandha Vadai). Accordingly, when she took the same and gave it to him, the said Pachiappan expressed his willingness to touch her breast and subsequently, he touched her breast. Immediately, the victim girl ran out from the shop and informed the same to her mother.

7. The learned counsel for the appellant would submit that the prosecution has failed to prove its case against the appellant beyond all reasonable doubts. He would submit that P.W.1 and P.W.3 are the parents of the victim girl/P.W.2. The main witness/P.W.4 who is alleged to



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have sent the victim girl/P.W.2 to the shop of the appellant to buy Betel Leaf and Supari, has turned hostile and denied that she never sent the victim girl/P.W.2 to buy Betel Leaf and Supari. Further, P.W.10 from whom the victim/P.W.2 alleged to have bought the Betel Leaf and Supari for the 2nd time, has also turned hostile and he has not supported the case of the prosecution. Even the other independent witnesses viz. P.W.5 and P.W.6 have also turned hostiles. Therefore, the conviction imposed on the appellant based on the interested witnesses viz., P.W.1 and P.W.3, is illegal and unsustainable in law. He would further submit that there are contradictions in the averments made in the complaint/Ex.P.1 and the statement of the victim girl/P.W.2 recorded under Section 164 Cr.P.C./Ex.P.2. In the complaint, it has been stated that the appellant touched the breast of the victim girl, whereas in the statement made before the Magistrate under Section 164 Cr.P.C., the victim girl has not stated anything about the physical touch of the appellant. Further, there is a contradiction between the complaint/Ex.P.1 and the F.I.R./Ex.P.11 in respect of time of receiving the complaint from P.W.1. In the complaint, the time is mentioned as 10 a.m., whereas in the F.I.R., it is mentioned as 11.45 a.m. and the same was not properly explained by the prosecution



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which is fatal to the case of the prosecution. Further, P.W.1/the father of the victim girl has stated that the complaint was written by his daughter/P.W.2, whereas the victim girl/P.W.2 denied the same during her cross examination. Therefore, the complaint itself is a false one and it has been made with a malafide intention with regard to personal dispute between them. He would submit that the father of the victim girl had a quarrel with the appellant and also damaged his petty shop for which, the appellant had lodged a police complaint before the Kolathur Police Station and in order to escape from the said complaint only, this false complaint has been made against the appellant. He would further submit that the shop of the appellant is very small and one cannot freely enter into the shop. Therefore, the story of the prosecution is not believable and it is not supported by any independent witnesses. The trial Court failed to consider the material facts and only on assumption, convicted the appellant which, warrants interference.

8. The learned Additional Public Prosecutor appearing for the respondent police would submit that the age of the victim was only 12 years at the time of occurrence. The appellant is running a petty shop



nearby the locality. On 26.04.2018, at about 8.30 a.m., the neighbour of the victim girl namely Sundari/P.W.4, had asked the victim girl to get Betel Leaf and Supari and hence, the victim girl initially went to the Pachiappan's shop/the appellant herein and bought the same. However, since they were not afresh, the said Sundari/P.W.4 again sent the victim girl to buy the same from some other shop. Hence, the victim girl went to one Nachimuthu's shop and after buying the same, returned home by crying. When her mother enquired, the victim girl told her that one Pachiappan/the appellant, who is having a petty shop near Gandhi Nagar bus stop, had called her from his shop and when she went to his shop, he had abused the victim girl by touching her breast. Thereafter, the same was informed to the father of victim girl who lodged the complaint on the same day. He would submit that after registering the complaint, the victim girl/P.W.2 was produced before the doctor for medical examination and the Doctor/P.W.7 who conducted the medical examination on the victim girl/P.W.2, has clearly stated that the victim girl was accompanied by her mother and during enquiry, the victim girl/P.W.2 had informed her that one Pachiappan, in his shop touched her breast. Therefore, the evidence of P.W.1 and P.W.3 are corroborated with the evidence of P.W.7/Doctor.



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Though, the learned counsel for the appellant has taken a stand that there is a contradiction between the complaint and the statement of the victim girl/P.W.2 recorded under Section 164 Cr.P.C., the learned Magistrate has clearly made an observation in this regard that the statement was recorded by the Magistrate who happens to be a Male and that the place was also new to the victim girl/P.W.2 and therefore, the victim girl/P.W.2 might not have felt comfortable and therefore, she might have hesitated to speak out exactly what had happened to her. Therefore, the contradiction is not fatal to the case of the prosecution. Further, the victim girl/P.W.2, in her chief examination has clearly narrated about the physical abuse made by the appellant. Though the prosecution witnesses namely P.W.4, P.W.5 P.W.6 and P.W.10 have turned hostiles, the evidence of P.W.1 and P.W.3 are corroborated with the evidence of the Doctor/P.W.7. Therefore, the prosecution proved its case beyond all reasonable doubts. Further, the other contradictions pointed out by the learned counsel for the appellant are minor contradictions which will not go into the root of the case of the prosecution. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.



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9. Heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the State and perused the materials available on record.

10. Since, the Appellate Court is the final Court of fact finding, it has to re-appreciate the entire evidence independently and to give its findings independently. Accordingly, this Court perused the entire materials and the Judgment of the trial Court.

11. In order to substantiate the charges, on the side of the prosecution as many as 12 witnesses were examined and 15 documents were marked as Exs.P.1 to P15 and no material object was exhibited.

12. A reading of the evidence of P.W.1 shows that he is the father of the victim girl/P.W.2 and he is the one who gave the complaint before the respondent police. He has deposed that on the date of occurrence he had gone to work and he was informed about the occurrence through his wife/P.W.3 and immediately, he questioned the appellant about his act, the appellant has told him that he would do like that and also attempted



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to attack P.W.2. When P.W.2 informed the same to others, they have told P.W.2 that the appellant has also behaved like this with some other children. Thereafter, initially he lodged the complaint before the Kolathur Police Station wherein, he was asked to give complaint before the All Women Police Station, Mettur and subsequently, he lodged the complaint before the All Women Police Station, Mettur. Further, he has deposed that the relatives of the appellant threatened him to withdraw the complaint.

13. P.W.3 is the mother of the victim girl/P.W.2. She has clearly deposed that on the date of occurrence, one Sundari who is her neighbour had sent the victim girl to Nachimuthu's shop to buy Betel Leaf and Supari and she returned home by crying. When she enquired the victim girl, she has told her that one Pachiappan who is having a petty shop near Gandhi Nagar Bus Stop, had called to his shop and asked her to take Jujube Fruit Vada (Elandha Vadai) from his shop and when she took the same and gave it to him, he abused her by touching her breast. She has also deposed about informing the incident to her husband/P.W.1 and lodging the complaint initially before the Kolathur Police Station and



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subsequently, lodging the complaint before the All Women Police Station, Mettur.

14. The victim girl was examined as P.W.2. During chief examination, she has clearly stated that on the date of occurrence one Sundari Sister had asked her to get Betel Leaf and Supari and accordingly, she bought the same from Pachiappan's shop/the appellant herein and gave it to her. However, since the same were not afresh, again she asked the victim girl to get the same from some other shop. Hence, the victim girl went to Nachimuthu's shop and after buying the same, while she was returning home, the said Pachiappan/the appellant, who was having breakfast, called her from his shop and asked her to take Jujube Fruit Vada (Elandha Vadai) from his shop and when she took the same and gave it to him, the said Pachiappan/the appellant, expressed his willingness to touch her breast and subsequently, he touched her breast. Immediately, the victim girl/P.W.2 ran to her mother and informed the same.



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15. The Educational Certificate of the victim girl/P.W.2 issued by the Headmistress of the School in which the victim girl/P.W.2 studied, was marked as Ex.P.10 which clearly shows that the date of birth of the victim girl is 15.05.2005 and hence, the victim girl/P.W.2 was aged about 12 years at the time of occurrence. Therefore, the victim girl/P.W.2 was a child at the time of occurrence under the definition of Section 2(1)(d) of POCSO Act. Further, the victim girl/P.W.2 has clearly stated that the appellant had sexually abused her. Therefore, the offence committed by the appellant falls under the Protection of Children from Sexual Offences Act.

16. A perusal of the records shows that the victim girl/P.W.2 informed about the occurrence on the same day to her mother/P.W.3 and the complaint was also lodged on the same day. After registration of F.I.R., the victim girl/P.W.2 was produced before the doctor/ P.W.7 on the same day. The Doctor/P.W.7 who examined the victim girl /P.W.2, has deposed that the victim girl clearly informed her about the sexual assault made by the appellant on her, whereas when the victim girl/P.W.2 was produced before the Magistrate after two months from the date of



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occurrence, she has only stated that the appellant expressed his willingness to touch her breast and attempted to touch her breast. As pointed out by the learned Additional Public Prosecutor, the trial Court has made an observation in this regard that since the statement was recorded by the Magistrate who happens to be a Male and that the place was also new to the victim girl/P.W.2, the victim girl might not have felt comfortable and therefore, she might have hesitated to speak out exactly what had happened to her. But, the evidence of P.W.1 and P.W.3 who are the father and mother of the victim girl are corroborated with the evidence of the doctor/P.W.7. Therefore, there is no reason to discard the evidence of P.W.1 and P.W.3.

17. In cases of this nature, the children especially female children, would not express their grievance to every one and they would express the same only with whom they feel comfortable and secured. In this case, the victim girl has clearly stated about the physical touch made by the appellant on the same day to her mother/P.W.2, father/P.W.1 and the doctor/P.W.7 who examined her. Since because she has not stated about the physical touch of the appellant before the Magistrate while recording



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her statement under Section 164 Cr.P.C., which took place after two months of the occurrence, it may not be a sole ground to discard the evidence of the victim girl/P.W.2. All the children will not be comfortable with all the persons. It varies from person to person. Some times, some children would not reveal everything to their parents because they would afraid that if they disclose anything to their parents, they would not allow them to play outside or allow them to mingle with others. Therefore, the minor discrepancies cannot be taken advantage. In cases of this nature, no independent witnesses can be expected as the culprits wait for the chance of loneliness and taking advantage of the innocence of the children, by making promise of giving likely things, exploit them sexually and also threaten them not to inform to anybody either danger to the life of the victim or to the kith and kin of the victim. Therefore under this circumstances, the victims do not intimate the same either to known persons or to their kith and kin and only in certain circumstances, it comes out.

18. The learned counsel for the appellant contended that the victim girl has not stated anything about the physical touch of the appellant in



her statement recorded under Section 164 Cr.P.C. and therefore, Section 7 of POCSO Act would not attract whereas, in the last portion, Section 7 of POCSO Act says that *any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault*". Therefore, the contention of the learned counsel for the appellant is not acceptable and as such, the offence committed by the appellant falls under Section 7 of POCSO Act which is punishable under Section 8 of POCSO Act. While re-appreciating the entire evidence independently, this Court does not find any perversity, infirmity or illegality in the appreciation of evidence by the trial Court. The prosecution has proved its case beyond reasonable doubts and the trial Court has rightly appreciated the evidence and convicted the appellant.

19. In a case of this nature, eyewitness cannot be expected and if the evidence of sole witness is cogent, credible, trustworthy, the conviction is permissible. Though, in this case there is no eye witness, the evidence of the victim girl is credible, trustworthy and there is no reason to discord the evidence of the victim girl.



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20. In this case, from the evidence of P.W.1/father of the victim girl, P.W.2/victim girl, P.W.3/mother of the victim girl and P.W.7/Doctor, and from Ex.P.1/complaint, Ex.P.10/Educational certificate of the victim girl and Ex.P.11/F.I.R., the prosecution has proved that the victim was a child under the definition of Section 2 (1) (d) of POCSO Act at the time of occurrence and that the appellant has committed the offence punishable under Section 8 of POCSO Act. Therefore, the trial Court has rightly convicted the appellant and there is no merit in the appeal and the appeal is liable to be dismissed.

21. At this juncture, the learned counsel for the appellant would submit that the appellant is aged about 70 years and he has been hospitalized and if the Court is not satisfied, atleast considering his age, the sentence may be reduced. Therefore, this while confirming the conviction recorded by the trial Court, modifies the sentence of imprisonment alone as 3 years Rigorous Imprisonment instead of 4 years Rigorous Imprisonment which would meet the ends of justice. The respondent police is directed to secure the appellant to undergo the remaining period of sentence if any.



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22. With the above modification, this Criminal Appeal is dismissed.

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Index:Yes/No



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To

1. The Sessions Judge, Special Court for Exclusive Trial of Cases
under POCSO Act, Salem
2. Inspector of Police
Mettur All Women Police Station
Mettur Dam
Salem District
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.



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P.VELMURUGAN, J

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**Pre-Deliver Order in
Criminal Appeal No.520 of 2021**

18.10.2022