



CRL A No.562 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	:	18.11.2022
Pronounced on	:	01.12.2022

Coram:

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

Criminal Appeal No.562 of 2021
and
Criminal M.P.No.17505 of 2022

G.Ganesan

... Appellant

Vs.

The State, represented by
The Inspector of Police,
W-15, All Women Police Station,
Royapuram, Chennai.
(Crime No.02 of 2020)

... Respondent

Prayer : Criminal Appeal filed under Sections 374(2) of Criminal Procedure Code, praying to call for the records in Spl.S.C.No.65 of 2020 on the file of the learned Special Court for Exclusive Trial of Cases under POCSO Act, Chennai set aside the Judgment and order of conviction dated 23.09.2021 against the appellant/accused and thereby allow the appeal.

For Appellant : Mr.S.Conscious Ilango

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



CRL A No.562 of 2021

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JUDGMENT

This Criminal Appeal has been filed to set aside the conviction and sentence passed by the learned Special Court for Exclusive Trial of Cases under POCSO Act, Chennai in Spl.S.C.No.65 of 2020, dated 23.09.2021.

2. The respondent police registered the case in Crime No.02 of 2020 for the offence under Section 9(m) which is punishable under Section 10 of Protection of Children from Sexual Offences Act, 2012. After completing the investigation filed the charge sheet before learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, since the offence is against a child.

3. The learned Sessions Judge after completing the formalities framed the charge against the appellant for the offence punishable under Section 10 of POCSO Act, 2012.

4. After framing the charge, in order to substantiate the charge framed against the appellant, during the trial, on the side of the



CRL A No.562 of 2021

prosecution as many as 7 witnesses were examined as PW 1 to PW 7 and 7 documents were marked as Ex. P1 to P7. No material object was marked on the side of the prosecution.

5. After completing the examination of prosecution witnesses, when the incriminating circumstances culled out from the evidence of prosecution witnesses were put to the appellant by questioning under Section 313 of CrPc, he denied the same as false and pleaded not guilty. On the side of the defense, 16 documents were marked as Ex.D1 to D16.

6. On completion of trial, hearing the arguments advanced on either side and considering the materials, the trial court found guilt of the accused for the offence punishable under Section 10 of POCSO Act, 2012 and the accused was convicted and sentenced to undergo 5 years of imprisonment and pay fine of Rs.5,000/-in default to undergo further period of 1 month simple imprisonment.

7. Challenging the said judgment of conviction and sentence passed by the trial court, the accused has filed the present appeal.



CRL A No.562 of 2021

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8. The case of the prosecution is that the parents of the victim were separated each other due to difference of opinion between themselves. Thereafter, they decided to get a divorce by mutual consent. At the time of lockdown, the mother of the victim left her daughter to the father. Since, the parents of the victim were working, the father of the victim used to leave his daughter in his sister's house. The appellant who is a close relative and by relation grandfather to the victim and maternal uncle to the father of the victim was also in the house. When the victim was studying LKG, the son of the appellant and the victim were playing hide and seek, the appellant showed his private part in the bathroom and he made the victim girl to touch it. Again on another occasion, when the victim girl was studying 3rd standard, the appellant hugged the victim from the back and touched her vagina. Thereafter, the victim informed the same to her mother who is PW1 herein. PW1 lodged a complaint before the respondent police. The respondent registered the case in Crime No.02 of 2020 for the offence punishable under Section 10 of Protection of Children from Sexual Offences Act, 2012.



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9. The learned counsel for the appellant would vehemently contend that PW1 who is the mother of the victim had an illegal intimacy with some other person and she did not like the father of the victim. There was a frequent quarrel between them. Thereafter, she left the matrimonial house and she was living with the other person. PW1 suppressed the fact that she already got married with the father of the victim and she got a child, the victim. She made the other person to believe that she is a spinster and therefore marriage was arranged between her and the other person. However at one point of time, the boy came to know that she already got married and he refused to marry her. Therefore, the mother of the victim got enmity with the father of the victim and appellant's family and she foisted a false case against the appellant. He would further submit that the mother of the victim is not an eye witness and there were material contradictions from the evidence of the prosecution witnesses and in order to take vengeance she created a scene. The learned counsel for the appellant also filed a petition under Section 391 of CrPC to examine the father of the victim as additional evidence. The appellant



CRL A No.562 of 2021

WEB COPY

marked totally 16 documents and photos were marked as D3 to D14. The photos clearly show that PW1, mother of the victim was with another person. Since the mother of the victim want to marry some other person, she wanted to get divorce from the father of the victim, therefore, she left the matrimonial home and even she left the custody of the child with her husband, it is clear that the mother of the victim is not a sterling character. In order to achieve her goal, she went to the extent of filing this complaint by using the victim as a tool to ventilate her enmity with the appellant and his family. Therefore, if the father of the victim is examined as defence witness, the result of the Judgment would be changed otherwise.

10. The learned counsel for the appellant vehemently contented that the delay in lodging the complaint and non-examination of the appellant's son, who was stated to be the only eye witness is fatal to the case of the prosecution. Therefore, the Judgment of conviction and sentence passed by the trial Court is liable to be set aside and the appellant to be acquitted.



CRL A No.562 of 2021

WEB COPY

11. The learned Additional Public Prosecutor would submit that when the victim was studying LKG, the son of the appellant and the victim were playing hide and seek, at that time, the appellant showed his private part to the victim in the bathroom and he made the victim girl to touch it. Again on another occasion, when the victim girl was studying 3rd standard, the appellant hugged the victim from the back and touched her vagina. Thereafter, the victim informed the same to her mother who was examined as PW1, one who lodged a complaint before the respondent police. When the victim girl was produced before the learned Judicial Magistrate to record statement under Section 164 CrPC, she narrated the whole occurrence and therefore, the evidence of the victim/PW2 corroborated with the evidence of the PW1. In order to substantiate the case of the prosecution totally 7 witnesses were examined as PW 1 to PW 7 and 7 documents were marked as Ex. P1 to P7. Since, victim is a minor child under the definition of POCSO Act and she was subjected to sexual assault committed by the appellant, the prosecution has proved its case beyond reasonable doubt. Therefore, there is no merit in this appeal and the same is liable to be dismissed.



CRL A No.562 of 2021

WEB COPY

12. Heard the learned counsel for both sides and perused the materials placed on record.

13. Even though sufficient opportunity was given to the appellant, he did not examine any witness. The appellant did not examine the father of the victim during the trial in this case. It is evident that the father of the victim was custody of child and he knew the incident soon after the occurrence and also he knew about the complaint given by PW1. If at all, the case was false, the father of the victim would have taken some steps to file a petition in favour of the appellant. Even, he has not come into the witness box during the trial. In this case, the victim has clearly stated about the occurrence, and at the time of the occurrence, admittedly the victim was in the house of the appellant, the father of the victim is the one who left the victim in the house of the appellant, therefore, this Court considers entire facts and circumstances, even at this stage examination of the father of the victim would not change the result of the case. The victim also stated that the father of the victim used to leave her in the



CRL A No.562 of 2021

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house of the appellant. The wife of the appellant is none other than the sister of the father of the victim, along with the appellant she was living there. For one reason or other, the mother of the victim left the custody of the victim with her father and since the father of the victim is working, he left his daughter in the appellant's house. During that time, the appellant had committed the offence under POCSO Act.

14. The learned counsel for the appellant stated that the delay in lodging a complaint and non-examination of the appellant's son, who was said to be the only eye witness is fatal to the prosecution. It is quite natural that the appellant will not allow his son to give evidence in favour of the prosecution. If at all, the case is falsely foisted against the appellant, the father of the victim who is a close relative to the appellant should have definitely supported the appellant by coming into the witness box and giving evidence in favour of the appellant. Even otherwise, he would have come forward to give a statement in favour of the appellant either during investigation or trial. However, in this case, the appellant had not chosen to examine any witnesses, even at the time



CRL A No.562 of 2021

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of the questioning under Section 313 of CrPC, he has not filed any list of witnesses. The defence taken by the appellant is that due to enmity between the mother of the victim and father of the victim, she tutored her daughter to give such a statement. If that be the case, no child, who is only 9 years old would give such a lengthy statement against close relative of her father to help her mother, that too who left the victim with the custody of her father and also no mother would make her daughter who was aged only 9 years to give such a statement which may spoil her future. The father of the child also would not have allowed to mark such a statement against his sister's husband. Further, since both the parents of the victim are employees, most of the days the victim was in the house of the appellant along with his son.

15. The main defence in this case is that the mother of the victim wanted to marry some other person, suppressing her marriage and gave birth to the victim. Due to that she got enmity with the father of the victim. In order to take revenge, she foisted the false case against the appellant, who is a close relative to the father of the victim. If that be so,



CRL A No.562 of 2021

WEB COPY

she could have given complaint straight away against the father of the victim and not against the appellant. Therefore the contention of the learned counsel for the appellant is not acceptable. In order to prove the age of the victim, birth certificate was marked as Ex.P1. As per Ex.P1, the victim was born on 11.06.2011. The occurrence was said to have taken place on April 2020 and also, prior to that, when she was studying LKG. Therefore, the age of the victim at the time of occurrence is only 9 years, and she is a child under the definition of POCSO Act. The victim was examined as PW2 and previous statement was recorded under Section 164 of CrPC by the learned Judicial Magistrate was marked as Ex.P3.

16. A combined reading of the evidence of the PW2 and the previous statement recorded from her by the learned Judicial Magistrate Ex.P3 show that the appellant committed sexual assault which punishable under Section 10 of POCSO Act, since the appellant is a close relative and the victim is only 9 years old, the act committed by the appellant is offence falls under Section 9(m) and (n) of POCSO Act. The



CRL A No.562 of 2021

WEB COPY

victim has not stated that any other person saw the occurrence, except at one occasion, the son of the appellant saw the occurrence. However, as a interested witness and as a son of the appellant, one cannot expect the son to come forward and give evidence against his own father. Therefore, from the evidence of the victim, it is seen that it is not an aggravated penetrative sexual assault and it is only an aggravated sexual assault and the act committed by the appellant falls under Section 9(n) and (m) of POCSO Act and punishable under Section 10 of the POCSO Act.

17. Even though, the learned counsel for the appellant pointed out certain discrepancies and contradictions, the same will not go to the root of the case of the prosecution and will not affect the case of the prosecution. Those contradictions are not material contradictions. Merely stating that the character of the mother of the victim is not a sterling character, which does not mean that she would go to the extent of saying that the appellant misbehaved with her daughter who was aged about 4 to 9. If she had any enmity against her husband for not giving mutual consent for divorce and he was the reason for the failure of her subsequent marriage with other man, then she would have taken



CRL A No.562 of 2021

vengeance against her husband and not against the appellant alone and there is no need to make such an allegation against the appellant, who is only a relative of her husband. Therefore, the defence taken by the appellant is not acceptable. Even though, the character of the mother is not good, the defence side has not produced any materials to prove that the mother made the victim as a tool for taking vengeance against the father, she filed a false case against his close relative and the victim was tutored by her mother.

18. It is the duty of the prosecution to prove the foundational fact of sexual assault and there is no presumption for foundational fact. Like any other criminal case for the offence under POCSO Act also the prosecution has to prove the foundational fact that the victim was subjected to sexual assault. Once the prosecution proved the foundational fact, then it is for the appellant to rebut the presumption in the manner known to law that he has no sexual intent. In this case, the evidence of the victim is very clear and there is no reason to discard the evidence of the victim.



CRL A No.562 of 2021

WEB COPY

19. The trial court and the learned Magistrate had an advantage to notice the demeanour of the witness, if the child appears to be tutored then definitely the learned Magistrate or the learned trial Judge would have mentioned about the same. A combined reading of the statement recorded under Section 164 of CrPC from the victim and the evidence of the PW2, it is clear that the evidence of the victim is natural. While re-appreciating the entire evidence, if the Court finds that the evidence of the victim is cogent, natural and consistent and there is no reason to discard, then conviction can be recorded solely based on the evidence of the victim and no corroborative evidence is necessary. In the case on hand, the evidence of the victim/PW2 is cogent, natural and consistent and there is no reason to discard the evidence of the victim/PW2 and it also inspires the confidence of the Court. In the absence of any independent witnesses, the prosecutrix evidence can be solely relied on, if the Court do not find any reason to discard or disbelieve the evidence of the prosecution. In this case, the reading of the entire materials, this Court finds that the prosecution has proved its case beyond reasonable doubt and the defence taken by the appellant is only to escape from the



CRL A No.562 of 2021

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clutches of law and there is no substance in the application filed by the appellant under Section 391 of CrPC. Therefore, the application filed by the appellant is not taken on file and rejected. While this Court applying its mind finds that the application under Section 391 of CrPC is filed in order to protract the case and to escape from the clutches of law and to fill up the lacunae. It is only after thought and in order to escape from the decision of the trial court and to get away from the offence committed by the appellant. This Court finds that the trial Court has rightly appreciated the entire evidence and convicted the appellant and this Court do not find any merit in the appeal.

20. Therefore, this Court do not find any perversity in the Judgment of conviction and sentence passed by the Special Court for Exclusive Trial of Cases under POCSO Act, Chennai and there is no merit in the appeal and therefore, the appeal is liable to be dismissed. Accordingly, this Criminal Appeal is dismissed and the petition filed by the appellant under Section 391 of CrPC is rejected.

01.12.2022

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Index: Yes/No



CRL A No.562 of 2021

P.VELMURUGAN, J

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To

1. The Special Court for Exclusive Trial of Cases under POCSO Act,
Chennai
2. The Inspector of Police,
W-15, All Women Police Station,
Royapuram, Chennai.
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.

**Pre-Deliver Order in
Criminal Appeal No.562 of 2021**

01.12.2022