



Crl.A.No.666 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED: 01.11.2022

CORAM:

THE HON'BLE Mr. JUSTICE P.VELMURUGAN

Crl.A.No.666 of 2021

and

Crl.M.P.No.13544 of 2021

A.Jahir

... Appellant

Vs.

State rep. By
The Inspector of Police,
R-8, Vadapalani Police Station,
Vadapalani,
Chennai – 600 026.
Respondent

...

Prayer: Criminal Appeal filed under Section 374(2) Cr.P.C., to set aside the order of conviction and sentence dated 01.09.2021 imposed against the appellant by the learned Sessions Judge, Special Court for Exclusive trial of cases under POCSO Act at Chennai in S.C.No.277 of 2018.

For Appellant : Mr.R.Naresh Kumar
and

Mr. V.Perarasu
Legal Aid Counsel

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGEMENT

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This Criminal Appeal has been filed challenging the judgment dated 01.09.2021 passed in S.C.No.277 of 2018 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 against the appellant in Crime No.2095 of 2015 for the offence under section 3 read with 4 of the POCSO Act. After investigation, laid a charge sheet before the Special Court for Exclusive Trial of Cases under POCSO Act, Chennai, since the offence is against child. The learned Special Judge taken the charge sheet on file in S.C.No.277 of 2018 and after completing all the formalities, framed the charge for the offence under Sections 12 and 6 of POCSO Act.

3. In order to substantiate the charges framed against the appellant, on the side of the prosecution, totally 12 witnesses were examined as P.Ws.1 to 12 and 13 documents were marked as Exs.P1 to P13. No material object was exhibited. After completing the examination of the prosecution witnesses, an incriminating circumstances were culled out from the prosecution witnesses, put before the accused, by questioning under Section



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313 Cr.P.C., and the same was denied by the accused as false and pleaded not guilty. On the side of the defence, one witness was examined as D.W.1 and five documents were marked as Exs.D1 to D5. No materials object was exhibited. On conclusion of trial and hearing the arguments advanced on either side and perused the materials on record, the trial judge though found the appellant not guilty for the offence under Section 12 of POCSO Act, and acquitted him for the abovesaid offence, found the appellant guilty for the offence under Section 6 of POCSO Act and he was convicted and sentenced to undergo Rigorous Imprisonment for 10 years with a fine of Rs.10,000/- in default to undergo Simple Imprisonment for 6 months. Challenging the said judgment of conviction and sentence, the accused has filed the present appeal before this Court.

4.The specific case of the prosecution is that the victim was taken by one of his friend to the appellant's house, wherein the appellant has committed anal and oral sexual intercourse with the victim boy. Hence the complaint.



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5. Learned counsel for the appellant would submit that there are materials contradictions between the evidence of prosecution witnesses. The boy who took the victim to the appellant's house was not examined by the prosecution. Since there is an enmity between P.W.5 and the appellant and in order to take vengeance, P.W.5 used the victim boy as a tool, foisted a false case against him. P.W.9-Investigating Officer stated that based on the secret information, he went to the victim's house and got the complaint, whereas, P.W.10-Investigating Officer has stated that based on the complaint given by the victim, he registered the case against the appellant. P.W.8- doctor who conducted medical examination of the victim boy has stated that there is no injury found on the private parts of the victim boy. Hence the doctor evidence has not corroborated the evidence of the prosecution. Further, as per the prosecution, the victim has stated that the occurrence took place in the house of P.W.7, whereas, no material document was produced with regard to that the appellant was residing in the house of P.W.7. From the documents Exs.D1 to D5, it is found that the appellant was not residing in the house or place as projected by the prosecution. The prosecution has not proved that the appellant has committed the alleged



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offence. The prosecution foisted a false case against the appellant and not conducted a fair investigation. The prosecution has not proved its case as projected by them. The trial court also failed to appreciate the evidence and wrongly convicted the appellant, which warrants interference of this Court.

6. Learned Additional Public Prosecutor would submit that at the time of occurrence, the victim was studying third standard and he was aged below 12 years. In the statement given by the victim before the respondent police, has stated that one of his friend brought him to the appellant's house and wherein the appellant committed anal and oral sexual intercourse with him. P.W.5 is doing social services and also educated the children regarding the sexual offence and also giving general counselling to the children. On the information given by one boy about the act of the appellant misusing the children and also the victim boy suffered with very same sexual act of the appellant, he informed the abovesaid act of the appellant to the Social Welfare Department and also to the police. Evidence of P.W.1 and the statement recorded by the Judicial Magistrate from the victim child, Ex.P3 clearly shows that the appellant has committed penetrative sexual assault on



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the victim boy. Due to the nature of offence, the medical evidence has not corroborated with the prosecution evidence. P.W.7 has clearly spoken that he heard the news about the offence committed by the appellant and he asked the appellant to vacate the house. From the evidence of P.W.1-the victim boy, Ex.P3 statement recorded under Section 164 Cr.P.C., and the evidences of P.Ws.5 and 7, the prosecution proved its case beyond all reasonable doubt. The trial court rightly appreciated the entire evidence and convicted the appellant for the abovesaid offence and there is no merit in the appeal and the same is liable to be dismissed.

7. Heard the learned counsel on record and the legal aid counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the respondent.

8. Admittedly, case was registered against the appellant for the offence under Section 3 read with 4 of POCSO Act. The trial court framed the charges for the offence under Sections 6 and 12 of POCSO Act. In order to substantiate the charges framed against the appellant, on the side of



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the prosecution, totally, as many as 12 witnesses were examined as P.W.1 to P.W.12 and 13 documents were marked as Ex.P1 to P13. Out of 12 witnesses, the victim boy was examined as P.W.1. On a reading of the evidence of P.W.1, he has clearly narrated the entire incident. The defence has not cross examined P.W.1. The evidence of P.W.1, the victim boy was not challenged by the defence. Prosecution has examined P.Ws.2 and 3, who are father and mother of the victim boy respectively and they are not aware of the incident. P.W.5 who is social worker, has clearly stated that on getting information from other children while giving general counselling to the adolescent boys in particular at Housing Board, in which the victim boy was residing, that victim boy was suffering with sexual assault made by the appellant. When he educated the victim boy regarding the sexual offence, the victim boy clearly narrated the occurrence as the accused committed the offence of anal and oral sexual intercourse with him. Hence, he passed the information of sexual exploitation of victim child to the Deputy Commissioner of Police. One of the main defence is that the prosecution foisted a false case based on the false complaint given by P.W.5 due to personal enmity. But, P.W.5 was not cross examined by the defence counsel.



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On a reading of the statement recorded under Section 164 Cr.P.C., clearly shows that the victim was subjected to penetrative sexual assault. From the evidence of P.W.1, Ex.P3-statement recorded under Section 164 Cr.P.C, it is clear that the appellant has committed penetrative sexual assault as defined under Section 3 of POCSO Act. The defence counsel has stated that the person one who has taken the victim boy to the appellant's house was not examined. The said person is also a minor and he was aged about 13 years, therefore, mere non-examination of the minor boy may not be the sole ground to disbelieve the case of the prosecution. In this case, there is no eye witness except the minor boy who took the victim to the appellant's house. Since the minor boy also committed the same offence as done by the appellant, in order to safeguard his future, the police might not have examined as witness and also not brought to him in the picture. In cases of this nature, no eye witness can be expected to be available and taking advantage of loneliness of children, persons try to exploit them sexually by providing things which they like. The appellant has shown video games to the victim and subsequently he has committed penetrative sexual assault on him. Therefore, mere non-examination of independent witnesses may not be



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the sole ground to disbelieve or discard the evidence of the victim. In the cases of this nature, corroborative evidence may not get through the medical records.

9. Considering the facts and circumstances, it is found that the appellant has committed offence under Section 3 which is punishable under Section 4 of POCSO Act. Since the age of the victim boy is below 12 years, offence termed into aggravated penetrative sexual assault, which falls under Section 5(m) punishable under Section 6 of POCSO Act.

10. Though the defence counsel has stated that as per the defence side evidence and also from Exs.D1 to D5, the appellant was not residing in the said address as stated by the prosecution and he was staying in some other place, but the same was not proved by the defence. Though he has filed some written communication, pass book and receipts, he has not examined any of the witnesses to prove that the appellant was residing in the address which is mentioned in Exs.D1 to D5. Proof of address itself is not sufficient, unless by examining any one of the witness to prove that the appellant was



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actually residing in the address mentioned as in Exs.D1 to D5. In order to prove the age of the victim, birth certificate of the victim boy was marked as Ex.P.2, in which date of birth of the victim is mentioned as 31.05.2003. The date of occurrence is 05.07.2015. Hence, age of the victim at the time of occurrence is below 12 years. The offence committed by the appellant is termed into an aggravated penetrative sexual assault which falls under Section 5(m) which is punishable under Section 6 of POCSO Act. A reading of the entire materials, this Court finds that the prosecution has substantiated the charges based on the cogent evidence of victim boy and there is no reason to discard the evidence of P.W.1.

11. The appellate court is the fact finding court, it has to re-appreciate and revisit the entire evidence and give independent finding. Considering the facts and circumstances of the case, the prosecution has proved its case beyond reasonable doubt.

12. This Court finds that the prosecution proved the foundational fact



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appointed by the Legal Services Authority from the Legal Aid Panel, hence
he is entitled for the fees as per rule.

01.11.2022

mfa
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,
R-8, Vadapalani Police Station,
Vadapalani,
Chennai – 600 026.
3. The Public Prosecutor,
High Court,
Chennai.

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P.VELMURUGAN, J.

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