



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.01.2021

Pronounced on : 25.01.2022

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CORAM :

THE HONOURABLE Ms. JUSTICE R.N.MANJULA

Crl.A.No.790 of 2018

Senthilkumar

.. Appellant

Vs.

State rep.by
The Sub Inspector of Police,
A.Pallipatty Police Station,
Dharmapuri District.
Crime No.112 of 2016

.. Respondent

PRAYER : Criminal Appeal has been filed under section 374(2) of Criminal Procedure Code to set aside the Judgment passed against the appellant in Special Sessions Case No.11 of 2017 dated 30.10.2018 on the file of the Sessions Judge, Fast Track, Mahila Court at Dharmapuri.

For Appellant : Mr.K.Sakthivel

For Respondent : Mr.A.Gopinath
Government Advocate (Crl.side)

JUDGMENT

This criminal appeal has been preferred challenging the judgment of the learned Sessions Judge, Fast Track, Mahila Court, Dharmapuri, dated 30.10.2018 made in S.C.No.11 of 2017.

2. The case of the prosecution is that the accused was working as a school teacher in rural area school where the victim children / PW.3 to PW.5 were also studying. Even two years prior to the date of complaint, the accused was in the habit of causing sexual assault on the victim children by touching their shoulders, breasts and hips. On 29.06.2016, during lunch time, he sexually assaulted PW.4 by touching her on



the left breast. On 30.06.2016 at about 3.20 p.m., to 3.30 p.m., when PW.2 was going to attend nature call, the accused followed her and pulled her shawl with sexual intention and thus committed sexual assault on her. On 30.06.2016 at about 9.30 a.m., he assaulted PW.3 by slapping on her left cheek and back and committed the offence under Section 10 of the POCSO Act and 323 IPC.

3. On the complaint given by PW.1 / Suresh, who is the father of PW.2, a case was registered under Section 323 IPC and Section 8 of the POCSO Act, by PW.16-Ramamurthy / the Sub Inspector of Police. PW.17-Amudhavalli / the Inspector of police took up the case for investigation and went to the place of occurrence and prepared the observation mahazar and rough sketch in the presence of the witnesses. She has also recorded the statement of the witnesses and sent the victim child/PW.3 for medical examination. Then she arrested the accused on 01.07.2016 and recorded the confession statement and then he was remanded to judicial custody. She also took steps to record 161 statement of the victim girl before the Magistrate. After medical examination, she obtained medical certificate from the doctor. She also obtained the proof of date of birth for the victim children by examining the Head Master of the School and got the relevant certificate and thereafter filed a charge sheet against the accused for the offences under Sections 323 and Section 10 of the POCSO Act.

4. After the case was taken on file and on being satisfied with the materials available, the charges were framed against the accused under Section 10 of the POCSO Act and 323 IPC. When the accused was questioned, he pleaded innocence and claimed to be tried.

5. During the course of trial, on the side of the prosecution Seventeen (17) witnesses were examined as PW.1 to PW.17 and twenty five (25) documents were marked as Ex.P1. to Ex.P25. When the incriminating evidence available on record was put to the accused and he was questioned under Section 313 Cr.P.C., he denied the same. On the side of the accused no witness was examined and no documents was marked.

6. After the conclusion of the trial and on consideration of the materials available on record, the learned trial Judge found the accused guilty for the offence under Section 323 IPC and Section 10 of the POCSO Act and convicted and sentenced the accused as follows:-



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Rank of the accused	Charges	Findings	Punishment
Sole accused	U/s. 10 r/w.9(f) (1) of the POCSO Act	Found guilty	Convicted and sentenced to undergo 5 years Rigorous Imprisonment and to pay a fine of Rs.5,000/- for each count; in default to undergo 6 months R.I. (Total fine amt. Rs.20,000/-)
	U/s. 323 IPC	Found guilty	Convicted and sentenced to undergo 3 months Rigorous Imprisonment

The Trial Court ordered the sentences to run concurrently and also granted set-off under section 428 Cr.P.C.

7. Aggrieved over the same, the accused has preferred this criminal appeal.

8. Heard the learned counsel for the appellant/accused and the learned Government Advocate (Crl.side) for the State.

9. The learned counsel for the appellant submitted that the accused was not given due opportunity to let in evidence from his side; there are material contradictions in the evidence of the victim children and their guardians; the trial Court did not appreciate the same before finding the accused guilty; the Courts should not act on the untrustworthy and fanciful evidence of the prosecution; the delay in giving the first information report would make the case of the prosecution doubtful; if the evidence of the victim is not reliable, the Court has to seek for corroborative evidence; especially the evidence of the eye witnesses should be evaluated carefully because of the fact that the children are easy pray for tutoring. The negligence and failure on the part of the counsel for the accused should not be allowed to go detrimental to the interest of the accused and the Court has a bounden duty to engage a counsel atleast through legal aid to defend the accused. In these context, the learned counsel for the petitioner cited the following decisions of the Hon'ble Supreme Court:



S.No.	Citation	Cause title
1	(1974) 3 SCC 277.	State of Punjab Vs. Jagir Singh, Baljit Singh and Karam Singh
2	(2001) 6 SCC 71	State of H.P. Vs. Gian Chand
3	(2008) 15 SCC 133	Raju and Ors Vs. State of Madhya Pradesh
4	(2011) 4 SCC 729	Mohd. Sukur Ali Vs. State of Assam
5	(2012) 8 SCC 21	Rai Snadeep alias Deepu Vs. State (NCT of Delhi)
6	(2019) 4 SCC 522	Digamber Vaishnav and another Vs. State of Chhattisgarh

10. The learned Government Advocate (Crl.side) for the State submitted that the victim children were sexually assaulted by the accused for a long time and the children were reluctant to share about it with their parents; only because of that the delay is caused in registering the FIR; in sexual offences the delay in registering the FIR cannot be viewed seriously; the evidence of the victim children are cogent and clear and hence the learned trial Judge rightly relied on their evidence to record the guilt of the accused; the evidence of the victim does not require corroboration as it is found to be trustworthy and reliable; the above position of law has been once again confirmed in the latest decision of the Hon'ble Supreme Court reported in the case of Ganesan Vs. State represented by its Inspector of Police [(2020) 10 SCC 573]. Since the trial Court has properly appreciated the evidence on record, there is no reason for interference.

11. Points for consideration:

Whether the sentence and judgment of the trial Court suffer from any factual or legal infirmity so as to warrant my interference?

12. Ex.P21 to Ex.P24 would show that two of the victim children /PW.2 and PW.3 were born in the year 2004 and one victim child / PW.5 was born in the year 2003. The occurrence is said to have taken place before two years from the date of complaint. The complaint / Ex.P.1 was given by PW.1 on 01.07.2016. So the victim children would be below 18 years of age at the time of the complaint. Since the occurrence is said to have been continuing for two years, the victim children would be less than 12 years at the time when the abuse started. Hence the victim children fall under the definition of 'child' under the POCSO Act.

13. The accused was working as a teacher and the



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30. Presumption of culpable mental state.—(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

17. The above provision of the special Act would show that if a person is prosecuted for the offence under Section 10 of the POCSO Act, the initial presumption would be in favour of the prosecution that the said person has committed the offence. It is the accused who has to rebut the initial presumption by adducing the contrary evidence. Since the offence against the children should be dealt seriously in view of their young age and vulnerability, the legislation has given the best protection to the children by throwing the reverse burden on the shoulder of the accused. So the burden of proof contemplated under the POCSO Act in the above provision is in complete deviation from the usual Criminal Jurisprudence. Hence the accused will lose the benefit of presumption of innocence and he has to prove his innocence by disproving the case of the prosecution.

18. However for producing such rebuttal proof, it is not always necessary that the accused should come to the box and give materials to disprove the case of the prosecution. Even if the improbabilities and the weakness in the case of the prosecution are exposed satisfactorily before the Court that itself would prove the contrary.

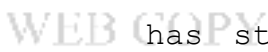
19. The learned counsel for the accused submitted that the accused was not given due opportunity during the trial proceedings. He has also produced the daily case status and submitted that the daily case status would show that the prosecution side evidence was closed as early as on 29.09.2018 and the accused was questioned under Section 313 Cr.P.C., on



04.09.2018. At the request of the accused for producing his side evidence, the case was adjourned to 11.09.2018 and 18.09.2018; since on 18.09.2018 also no evidence from the side of the defence is produced; the case was reserved for judgment. However the parties are given with liberty to submit their arguments either oral or written on or before 25.09.2018. Thereafter also four more adjournments were given. It is seen that alteration of charges was made on 29.08.2018 by framing of charges under Section 10 of the POCSO Act. On the same day itself arguments were made and thereafter, the case was posted for judgment on 30.10.2018.

20. It is seen from the judgment of the learned trial Judge that initially the charges were framed for the offence under Section 8 of the POCSO Act and thereafter the charges have been altered to Section 10 of the POCSO Act. It has been stated already that the accused was working as a teacher in the school where the victim children were studying and hence the charges ought to have been framed against him for the offence under Section 10 of the POCSO Act. The charges have been altered from Section 8 to 10 of the POCSO Act, for technical reason and not on the basis of any additional facts or circumstances unfolded during the course of trial. Hence no further opportunity for further evidence on this aspect need to be given to the accused. Neither the prosecution intended to give additional evidence due to alteration of charges. So no prejudice would have been caused to the accused due to alteration of charges, especially when he did not deny the fact that he was working as a teacher during the relevant point of time at the school where the victim children were also studying. The records show that the accused was given with due opportunity right from the inception of the trial. Hence I could not countenance the arguments of the learned counsel for the defence that the trial Court did not give fair hearing or proper opportunity to the accused.

21. Now coming to the evidence part, it is seen that the case itself has been registered on the basis of the complaint given by PW.1 who is the father of PW.2. His complaint which is marked as Ex.P1 would read that he came to know from his daughter PW.2 and her class mates/friends PW.3 to PW.5 in the evening of 30.06.2016 that the accused, who was a teacher in their school, was in the habit of assaulting them sexually on daily basis; on 30.06.2016 at about 11.00 a.m., when the children went to the rest room, the accused was throwing small stones on them and when PW.3 questioned him, he kicked her and threatened her. Victim child/PW.2 is the daughter of PW.1. She has stated in her evidence that on 30.06.2016 at about 3.15 to 3.30 p.m., while she went to the toilet, the accused pulled away her shawl and was throwing small stones on her. Apart from the above, PW.2 has not stated anything about the sexual abuse



22. The other victim child, who was examined as PW.3, has stated that the accused was in the habit of putting his hands on the shoulder of the children, pinching them on their hips and breasts. She has further stated that on 30.06.2016, during the class hours she was discussing with her friends and at that time the accused called her and slapped her on her cheek and back and because of that she got fainted. Her evidence does not state that the accused was sexually abusing the children for nearly two years even prior to the date of occurrence. Even about the act of pinching on the hips and breasts of the children no particular date, time and place of occurrence is mentioned. The evidence of PW.3 is a generalised manner with regard to the allegations of the sexual assault.

24. Another victim girl, who was examined as PW.5, has stated that on 30.06.2016, the accused put his hands on her shoulder and pinched her breast. Even her evidence does not reveal where exactly the said occurrence was taken place. It is to be noted that when PW.4 has stated that the occurrence had taken place on 29.06.2016, PW.5 has stated that it had happened on 30.06.2016. She has further stated on 30.06.2016 when the children were discussing in the class room, the accused called PW.3 and slapped on her cheek and back. PW.3 has also stated that on the said day when she was talking to her class mates, the accused beat on her cheeks and back and because of that she felt suffocated.

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assault committed by the accused, the evidence of PW.4 and PW.5 is contradictory with regard to the very date and time of the occurrence. PW.3 has not stated any specific occurrence of sexual assault and her evidence is very shallow and too general on this aspect.

26. As submitted by the learned Government Advocate (Crl.side) the Courts need not look for any corroboration in the cases of sexual offence, when the victim herself has given clear evidence as to the occurrence. But such reliance can be made only if the evidence is found to be consistent and cogent and it does not suffer from any major contradictions. While appreciating the evidence of the child witnesses the Court should be more cautious in order to rule out the possibility of tutoring the child.

27. In this context it is relevant to cite the judgment of the Hon'ble Supreme Court held in the case of Digamber Vaishnav v. State of Chhattisgarh [2019 (4) SCC 522]. In the said judgment it is held as under:

"21. The case of the prosecution is mainly dependent on the testimony of Chandni, the child witness, who was examined as PW 8. Section 118 of the Evidence Act governs competence of the persons to testify which also includes a child witness. Evidence of the child witness and its credibility could depend upon the facts and circumstances of each case. There is no rule of practice that in every case the evidence of a child witness has to be corroborated by other evidence before a conviction can be allowed to stand but as a prudence, the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that witness must be a reliable one.

22. This Court has consistently held that evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. Therefore, the evidence of a child witness must find adequate corroboration before it can be relied upon. It is more a rule of practical wisdom than law. [See Panchhi v. State of U.P. [Panchhi v. State of U.P., (1998) 7 SCC



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177 : 1998 SCC (Cri) 1561] , State of U.P. v. Ashok Dixit [State of U.P. v. Ashok Dixit, (2000) 3 SCC 70 : 2000 SCC (Cri) 579] and State of Rajasthan v. Om Prakash [State of Rajasthan v. Om Prakash, (2002) 5 SCC 745 : 2002 SCC (Cri) 1210] .]

23. In Alagupandi v. State of T.N. [Alagupandi v. State of T.N., (2012) 10 SCC 451 : (2013) 1 SCC (Cri) 1027] , this Court has emphasised the need to accept the testimony of a child with caution after substantial corroboration before acting upon it. It was held that : (SCC p. 463, para 36)

"36. It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and that there exists no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable."

28. In the case on hand, the father of PW.2 has given the complaint after hearing from his own daughter PW.2 and other children /PW.3 to PW.5 about the sexual assault caused by the accused. But PW.2 herself has not stated anything in her evidence about the sexual assault caused by the accused and the evidence of other victim children/PW.3 to PW.5 is bereft of any



material particulars like time, place etc.. In fact, there are material contradictions with regard to the date of occurrence itself between the evidence of PW.3 to PW.5.

29. When the offence against the children have to be viewed seriously, the Court should also be cautious of the fact that the offender has got a huge responsibility for proving his innocence. Because of the draconian nature of the Special Act, the punishment is very grave. Hence due consideration should be given to the improbabilities or other material weaknesses found in the evidence of the prosecution. There are patent contradictions even between the evidence of the complainant/PW.1 and his daughter PW.2. If these material contradictions and lack of clarity in the evidence of the prosecution is over looked and not given due weight as rebuttal proof, that might defeat the ends of justice. Due to the above stated reason I feel that the judgment of the learned trial Judge warrants interference.

30. In the result, this Criminal Appeal is allowed and the judgment of the learned Sessions Judge, Fast Track, Mahila Court, Dharmapuri, dated 30.10.2018 passed in S.C.No.11 of 2017 is set aside.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge, Fast Track, Mahila Court, Dharmapuri.
- 2.The Sub Inspector of Police,
A.Pallipatty Police Station,
Dharmapuri District.
- 3.The Superintendent of Prison,
Central Prison, Vellore.
- 4.The Public Prosecutor,
High Court, Madras.

Copy To:

The Section Officer,
Criminal Section, High Court, Madras.

+1CC to M/s.K.Sakthivel, Advocate Sr.No.4414(22/02/2022)

Crl.A.No.790 of 2018

PMK (CO)
SB(16/02/2022)