



Crl.A.No.869 of 2018

IN THE HIGH Court OF JUDICATURE AT MADRAS

DATED : 28.07.2023

CORAM :

The Hon'ble MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Criminal Appeal No. 869 of 2018

Padmanaban

.. Appellant

Versus

State rep by
The Inspector of Police,
W-5, Vepery (All Women) Police Station,
Chennai.
Crime No.5 of 2017.

.. Respondent

Criminal Appeal filed under Section 374(2) of Cr.P.C, to set aside the judgment made in S.C.No.57 of 2018 on the file of the Sessions Judge, Special Court for Cases under POCSO Act 2012/Mahila Court, Chennai dated 20.12.2018 and acquit the Accused.

For Appellant : Mr. V. Murugesan
for Mr. P. Raja

For Respondent : Mr. V. Meganathan,
Government Advocate (Crl.Side)

JUDGMENT

This appeal is filed by the Appellant/first Accused, challenging the judgment dated 20.12.2018 made in Sessions Case No.57 of 2018 on the file of the learned Sessions Judge, Special Court for Cases under POCSO Act 2012/Mahila Court, Chennai whereby he was convicted for the offence under



CrI.A.No.869 of 2018

Section 8 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to undergo imprisonment for three years and a fine of Rs.5,000/-, in default, to undergo Simple Imprisonment for six months.

2. The case of the Prosecution as unfolded from the complaint given by P.W-1/father of the victim is that on 25.06.2017 around 4.00 p.m, the victim was on a walk along with her pet dog. At that time, the Accused 1 and 2 came in the two wheeler. The person riding the vehicle slowed down and the person on the pillion rider namely the Appellant/first Accused touched her left breast. The victim girl screamed and on hearing the same, her father/P.W-1 came to the occurrence spot. According to P.W-1, he caught hold of the second Accused, however, the first Accused/Appellant fled from the scene of occurrence. It is also stated that the two wheeler driven by the second Accused was handed over to the police officials, who came to the spot. Thus, on the basis of the complaint given by P.W-1/father, Prosecution came to be launched against the Accused 1 and 2.

3. During the course of trial, the Prosecution had examined four witnesses. P.W-1 is the Complainant/father of the victim. P.W-2 is the victim. P.W-3 is the elder brother of the victim and P.W-4 is the Investigating Officer. The Prosecution had marked seven documents. Ex.P-1 is the birth



CrI.A.No.869 of 2018

certificate of the victim. Ex.P-2 is the complaint given by P.W-1. Ex.P-3 is the statement of the victim recorded under Section 164 Cr.P.C., before the learned Metropolitan Magistrate. Ex.P-4 is the First Information Report. Ex.P-5 is the Rough Sketch. Ex.P-6 is the Observation Mahazar and Ex.P-7 is the Requisition given by the Police to record 164 statement. The trial Court, on analysis of the oral and documentary evidence, passed the judgment of conviction against the Appellant/first Accused, while acquitting the second Accused.

4. The learned Counsel for the Appellant invited the attention of this Court to the contents of the FIR and to the statement under Section 164 statement recorded by the learned IXX Metropolitan Magistrate, Chennai and also to the evidence of P.W-1 to P.W-3. According to the learned Counsel, there was no test identification parade conducted by the Investigating Officer and therefore, the identification of the Accused, on the occurrence spot, has not been established. Even though the occurrence alleged to have occurred during day time, no independent witness was examined by the Prosecution. The witnesses examined on behalf of the Prosecution are interested witness and therefore, based on such testimony, the trial Court ought not to have convicted the Appellant. Further, even though P.W-1 said to have handed over the two wheeler to the Police officials, during trial, it was not projected



CrI.A.No.869 of 2018

as a Material Object. The fact remains that the alleged two wheeler used in the commission of offence has not been detained by the Investigation Officer for the purpose of investigation. According to the learned Counsel for the Appellant, the Accused 1 and 2 were in an inebriated condition at the time of occurrence. While so, an accident case was given a different colour and projected as if the Appellant pressed the breast of the victim girl. The trial Court convicted the Appellant only on the basis of surmises and the Prosecution has not proved its case beyond reasonable doubt.

5. The learned Counsel for the Appellant also invited the attention of this Court to the inconsistency in the testimony of P.W-1 and P.W-2. According to P.W-2/victim girl, soon after the occurrence, she informed the incident to her mother and her mother informed it to P.W-1. On the other hand, P.W-1 has stated that P.W-2 informed him about the occurrence. This inconsistency in the statement has been omitted to be considered by the trial Court. Above all, there was a motive between P.W-1 and the Appellant which resulted in a false complaint. The learned Counsel for the Appellant submitted that the Appellant was earlier an employee of the printing press where the father of the victim was also employed as a Manager. There had been enmity between them and due to such enmity, P.W-1 had given the false complaint implicating the Appellant. This was also admitted by P.W-1



Crl.A.No.869 of 2018

in his evidence, while so, the trial Court ought to have doubted the case projected by the Prosecution. In any event, when it is the definite case of the Prosecution that both the Accused came in a two wheeler, non-production of the two wheeler as a Material Object is fatal to the case of the Prosecution. Further, even in the statement under Section 164 of Cr.P.C. also, the name of the Accused has not been mentioned. Further, the learned Counsel for the Appellant invited the attention of this Court to the cross examination of the father of the victim/P.W-1 and the brother of the victim/P.W-3. From their cross examinations, there are materials available to show that the Accused are known to them. However, the learned Judge had failed to appreciate the evidence before the Trial Court and convicted the Accused. Thus, the judgment of conviction dated 20.12.2018 in SC.No.57 of 2018 on the file of the learned Sessions Judge, Special Court for Cases under POCSO Act 2012, has to be set aside. The learned Counsel for the Appellant also invited the attention of this Court to the Judgment of this Court dated 31.03.2023 passed in Crl. A. Nos.668 of 2015 and 356 of 2016 particularly in para – 15 it was observed as follows:-

“PW-15 is the investigation officer in this case. It is quite unfortunate that the investigation officer did not resort to Test Identification Parade in spite of the fact that the Accused persons in this case are unknown to the victim. In his entire evidence, PW-15 does not say as to how he came to know that A1 to A3 had committed the crime. The investigation officer merely



states that he heard that the Accused persons were roaming around and thereafter, he arrested them and they were remanded to judicial custody. The investigation officer probably thought that mere recovery of the material object was enough to convict any person, who is shown as Accused person before the Court. The Accused persons were neither identified during the course of investigation nor they were identified by any of the witnesses in the Court”.

6. In this case also, there was no test identification parade conducted to identify the Accused. Under those circumstances, the trial Court ought to have acquitted the Appellant, instead of convicting him.

7. Opposing the above submission of the Counsel for the Appellant, the learned Government Advocate (Crl.Side) submitted that immediately after the occurrence, the patrol Police have apprehended the second Accused and he was taken to the Police Station. The complaint was given on the same day based on which the First Information Report was registered. The statement of the victim girl/P.W-2 is clear and cogent, both in the 164 Statement recorded before the learned Magistrate as well as during trial. There is nothing to discredit the testimony of the victim girl. In fact, the trial Court, having been satisfied with the statement of the victim girl has accepted the manner in which the incident had occurred and rightly convicted the Appellant for the offence complained of. According to the learned Government Advocate (Crl.Side), this is a case where the victim cried loudly, upon hearing his



Crl.A.No.869 of 2018

daughter's cry, the father of the victim rushed to the spot and the occurrence took place nearby the residence. In this context, the learned Government Advocate (Crl.Side) invited the attention of this Court to the evidence of the victim as well as 164 statement of the P.W-2, wherein it is clearly stated that immediately the father of the victim rushed to the place at that time, the rider of the vehicle was attempting to start vehicle and the pillion rider ran away. Therefore, the father of the victim/P.W-1 had taken out the key of the vehicle and caught got hold of the second Accused and the matter has been reported to the Police by mobile, immediately within 5 minutes, the Police came to the residence. Therefore, it is the contention of the learned Government Advocate (Crl.Side) that within five minutes of the occurrence, the Accused was caught hold by the father of the victim/P.W-1. Further, the learned Government Advocate (Crl.Side) submitted that the evidence of P.W-1/father of the victim and P.W-3/brother of the victim supports the Prosecution case. He further submits that as per the provisions of Protection of Children from Sexual Offences Act, 2012, the Prosecution evidence is closed, the Accused was given the right to let in evidence as defence witness. The Accused had neither cross examined the victim/P.W-2 or let in evidence. Therefore, the judgment of the learned Sessions Judge, Special Court for cases under POCSO Act 2012, is well reasoned judgment and it does not warrant any interference. This Appeal lacks merits.



Crl.A.No.869 of 2018

WEB COPY

8. Heard the learned Counsel for the Appellant and the learned Government Advocate (Crl.side) for the Respondent. This is a case where the victim girl, who was 15 years old by then, was subjected to sexual assault by the Appellant/second Accused. The trial Court acquitted the second Accused of the charge under Section 8 of the Protection of Children from Sexual Offences Act, 2012. However, finding adequate evidence as against the Appellant herein for the offence under Section 8 of the Protection of Children from Sexual Offences Act, 2012, he was convicted under Section 8 of the Act and sentenced to undergo 3 years of simple imprisonment with a fine of Rs.5,000/-, in default, to undergo further period of six months simple imprisonment.

9. As against the acquittal of the second Accused, the Prosecution has not filed any separate appeal.

10. Assailing the judgment of the trial Court, on behalf of the Appellant/first Accused, it is vehemently contended that there was no independent witness examined by the Prosecution. The case projected by the Prosecution is highly doubtful when the two wheeler allegedly used by the Accused in the commission of offence has not been detained and produced



before the Court. Even the registration number of the two wheeler has not been brought on record. While so, the very foundation of the case projected by the Prosecution is doubtful.

11. On perusal of the evidence of the Prosecution Witnesses P.W-1/ father of the victim, P.W-2 Victim, P.W-3/elder brother of the victim, P.W-4/ Investigating Officer, it is evident that there are inconsistency in the testimony of the P.W-1 and P.W-2. First of all, P.W-1 has deposed that his daughter P.W-2 informed about the mischief committed by the Appellant. On the other hand, P.W-2 stated that she first informed her mother about the misdemeanor of the Appellant, who in turn informed it to her husband (P.W-1). Further, the Prosecution has not chosen to examine the wife of P.W-1 and mother of P.W-2. It is also true that the Prosecution has not examined any independent witness. However, the inconsistencies pointed out are not such that it would affect the credibility of the case of the Prosecution. The Prosecution, in order to cement it's case, placed heavy reliance on the evidence of the victim girl. I had gone through the testimony of P.W-2/ victim girl, both in her statement under Section 164 of the Code of Criminal Procedure as well as during trial. The testimony of the victim girl is cogent and convincing. It inspires the confidence of this Court. The trial Court also placed reliance on the testimony of P.W-2 and satisfied that her version



supports the case projected by the Prosecution. The testimony of P.W-2 is as follows:-

"I live at Choolai. I am studying in 11th Standard. I know the Accused shown in the video. I do not know their name. I have been sexually harassed by them. Only then I know them. Before that I did not know them. On 25.06.2017, Sunday, around 4 pm I was walking on the street along with my dog. Suddenly the Accused came in a bike and the man who was sitting at the back told something, to the man who was riding the bike. Then they came near me. From the bike itself, the man who was sitting at the back pressed my left breast. I screamed. On hearing my noise my father came out of the house. I ran to my home. I told my father that they harassed me and then my father went and called them. They hurried to cross. But the bag they had fallen in front of my home. When they slowed down to pick up the bag my father went and caught hold of them. They seemed to have drunk....."

12. Before the trial Court, inspite of opportunity given, the Accused did not cross-examine the minor victim girl/P.W-2. Therefore also, the testimony of the minor victim girl is reliable and credible. Even otherwise, there is nothing to suggest that the minor girl would falsely testify against the Appellant, for any reason. Therefore, this Court is of the view that the testimony of the minor girl is sufficient to base a conviction as against the Appellant and the offence committed by the Appellant stands established.



CrI.A.No.869 of 2018

13. One of the arguments advanced on behalf of the Appellant is that the Investigation Officer has not detained the two wheeler in this case. I had gone through the records and satisfied that there is a clear lapse on the part of the Investigation Officer. In the cross examination of the Investigation Officer, he fairly concedes that the two wheeler was not detained. This is a serious lapse committed by the Investigation Officer for which the higher official of the Police Department has to initiate action against the Investigation Officer concerned. There is evidence before the Trial Court in the form of statement under Section 164 Cr.P.C given by the victim as well as evidence of P.W-1, P.W-2, and P.W-3 to show that the vehicle driven by the second Accused, in which the Appellant was riding pillion, was seized soon after the occurrence. The vehicle, along with the vehicle rider/Accused No.2 was produced by the Complainant/P.W-1, Under those circumstances, when the vehicle was handed over along with the rider by the Complainant, the Investigation Officer in this case ought to have detained the vehicle and drawn a seizure mahazar to that effect. However, for reasons unknown, the Investigation Officer had committed such a serious flaw. When P.W-1 had caught hold of the second Accused immediately after the occurrence and handed over him to the Police Officials along with the vehicle used in the commission of offence, the Investigation Officer ought to have taken steps to produce the vehicle before the trial Court by following due process of law. In



fact, P.W-3/brother of the victim states that the pillion rider was drunk and he ran behind the pillion rider/Appellant. P.W-1, father of the victim and P.W-3 thus clearly stated about the use of the two wheeler for commission of the offence, however, the non-detention of the two wheeler had caused a dent in the case projected by the Prosecution. In any event, as mentioned above, for non-detention of the vehicle used in the commission of the offence, the credibility of the Prosecution case is not shaken. As mentioned above, the testimony of the victim girl/P.W-2 is sufficient for the Prosecution to prove its case against the Appellant. It is high time that Investigation Officers dealing with a case of this nature has to be sensitised by imparting sufficient training programme.

14. Yet another argument is that no independent witness was examined by the Prosecution. In this context, the testimony of P.W-2, victim girl, requires a careful scrutiny. P.W-2 in her deposition has stated that on the date of occurrence, no one was on the road. P.W-3, brother of P.W-2, also states that as the date of occurrence is Sunday, the road was deserted without any onlookers. In fact, this has emboldened the Appellant to commit the offence, taking advantage of the fact that there was no one around the road. Be that as it may, judicial notice can be taken that on Sunday, in the evening around 4.00 pm, there are chances for the road to be deserted by passers-by. It was



Crl.A.No.869 of 2018

for this reason that the Prosecution could not have examined any independent witness. Even otherwise, the testimony of P.W-1 itself is sufficient to hold that the Prosecution has proved its case beyond reasonable doubt. Merely because no independent witness was examined, that too in a case of this nature involving offence under the Protection of Children from Sexual Offences Act, 2012, the Accused cannot be let go scot free. The burden is on the Accused to prove his innocence but the Accused did not enter into the witness box to disprove the case of the Prosecution. Therefore also, the argument of the learned Counsel for the Appellant cannot be accepted by this Court. Further, as rightly pointed out by the learned Government Advocate (Crl.Side) the victim had identified the Accused in the Court through Video conference.

15. Another argument of the Counsel for the Appellant is that the Appellant/Accused No.1 was not present in the scene of occurrence at all and they were falsely implicated him due to previous enmity between him and P.W-1/father of the victim. If it is so, the burden is on the Appellant to establish the same either by stepping into the witness box or by examining any other witness. In this case, the Accused did not even cross-examine the victim girl/P.W-2 and therefore, at this stage, such an argument raised on behalf of the Appellant cannot be countenanced. In a case of this nature, the



CrI.A.No.869 of 2018

burden is on the Accused to prove his innocence, otherwise, the evidence of the victim has to be accepted by them. The Trial in Protection of Children from Sexual Offences Act, 2012 cases is different from the cases involving other criminal offences. In a case of this nature, the testimony of the victim requires a closer scrutiny. On such scrutiny, this Court is of the definite view that the Prosecution, through P.W-2/victim girl, has established the guilt of the Appellant beyond reasonable doubt.

16. In the light of the above observations, the judgment dated 20.12.2018 made in S.C. No. 57 of 2018 on the file of the learned Sessions Judge, Special Court for Cases under POCSO Act 2012/Mahila Court, Chennai is confirmed. **The Criminal Appeal is dismissed.**

The Appellant is present before this Court. In view of the confirmation of the judgment of conviction passed by the trial Court, by dismissing the Criminal appeal filed by the Appellant, the Respondent police is directed to take custody of the Accused after obtaining warrant from the Court concerned so as to undergo the remaining period of sentence.

28.07.2023

drl

Index : Yes/No

Speaking/Non-speaking order

To
<https://www.mhc.tn.gov.in/judis>



CrI.A.No.869 of 2018

The Sessions Judge,
Special Court for Cases under POCSO Act 2012,
/Mahila Court, Chennai.



WEB COPY



CrI.A.No.869 of 2018

SATHI KUMAR SUKUMARA KURUP, J.,

drl

CrI.A. No. 869 of 2018

28.07.2023