IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.08.2021
PRONOUNCED ON : 22.10.2021

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.253 of 2021 and
Crl.M.P.No.5839 of 2021

K.Ruban ...Appellant

Vs.

State Represented by
All Women Police Station,
Pollachi, Coimbatore District.
(Crime No.08 of 2019) ...Respondent

The Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure seeking to call for the records relating to the judgment of conviction dated 23.04.2021 passed in Spl.C.C.No.96 of 2019 on the file of the learned Sessions Judge, Special Court for Exclusive trial of Cases under the POCSO Act, Coimbatore, (transferred Spl.C.C.No.104 of 2019, learned Mahila Court, Coimbatore) and set aside the same by allowing this criminal appeal.

For Appellant : Mr.N.Manoharan

For Respondent : Mr.S.Sugendran
Govt. Advocate (Crl.Side)

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JUDGMENT

This criminal appeal has been filed against the judgment of conviction dated 23.04.2021 passed in Spl.C.C.No.96 of 2019 on the file of the learned Sessions Judge, Special Court for Exclusive Trial of Cases Under POCSO Act, Coimbatore.

2 The respondent police registered a case in Cr.No.08 of 2019 against the appellant for the offence under Sections 9(m), 9(n) r/w 10, 11(i) r/w 12 of Protection of Children from Sexual Offences Act, 2012 (in short "the POCSO Act). After completing investigation, the respondent police laid a charge sheet before the Magalir Neethimandram (Mahila Court), Coimbatore, which was taken on file in Spl.C.C.No.104 of 2049 and subsequently the case was transferred to the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Coimbatore. The learned Sessions Judge taken the case on file in Spl.C.C.No.96 of 2019 and after hearing both the accused and the prosecution and after perusing the records, since there is *prima facie* case, framed charges against the

appellant/accused for the offence under Section 9(m), 9(n) punishable under Section 10 and 11(i) punishable under Section 12 of the POCSO Act.

3 Before the trial Court, in order to substantiate the charges, prosecution has examined as many as 13 witnesses as P.Ws.1 to 15 and Exs.P1 to P11 were marked and no material object was exhibited. After completing examination of prosecution witnesses, when incriminating circumstances culled out from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C., he denied the same as false and pleaded not guilty. On the side of the defence, D.Ws.1 to 5 were examined and Exs.D1 to D7 were marked besides one Court document as Ex.C1.

4 The learned Sessions Judge, on completion of trial and hearing arguments advanced on either side, by judgment dated 23.04.2021 convicted the appellant/accused and sentenced him to undergo rigorous imprisonment for a period of seven years with fine of Rs.5,000/-, in default, to undergo rigorous imprisonment for a period of one year for the offence under

Section 9(m), 9(n) punishable under Section 10 of the POCSO Act and sentenced him to undergo rigorous imprisonment for a period of three years with fine of Rs.5,000/-, in default to undergo rigorous imprisonment for a period of one year for the offence under Section 11(i) punishable under Section 12 of POCSO Act and further ordered compensation of Rs.2,00,000/- for the victim girl. Aggrieved against the said judgment of conviction and sentence, the accused has preferred this criminal appeal.

5 The learned counsel appearing for the appellant/accused would submit that there are many contradictions in the evidence of P.W.2 the victim girl and there is inordinate delay in filing the complaint and the same has not been explained by the prosecution and hence unexplained delay is fatal to the case of the prosecution. The victim girl has not stated any specific dates while recording statement under Section 164 of Cr.P.C. but during examination as witness before the Court, she has mentioned the occurrence date as 23.05.2019 to 25.05.2019 and therefore there are material contradictions and improvements, which would affect the case of the prosecution. There is no independent witness to corroborate the alleged

occurrence as projected by the prosecution. Even though, the place, where the occurrence is said to have taken place is a very busy area, prosecution has failed to examine any independent witness and all the witnesses are interested witnesses. The victim girl in her evidence stated that she used the call the appellant as “Appa”, whereas both the victim girl and the appellant are not belongs to the same community, which creates doubt and the medical evidence also does not support the case of the prosecution.

5.1 The learned counsel further vehemently contended that the appellant was not in the place of occurrence on the dates, on which the alleged occurrence said to have taken place. The appellant is a Driver and having own vehicle and through the same he used to carry persons to one place to another place like wise one Murugan, who was examined as D.W.1 approached the appellant to carry him and his relatives from Valparai to Palani to see his father, who was in serious condition. Therefore, on 23.05.2019, the appellant took D.W.1 and 10 others to Palani and they all stayed there on the next day also i.e. 24.05.2019, since the said Murugan's father died. After attending the funeral ceremony, the appellant returned to

Valparai in the afternoon of 25.05.2019. In order to prove the defence of plea of *alibi*, D.Ws.1 to 5 were examined and the witnesses have categorically stated that on 23.05.2019 the appellant took them to Palani to see the father of D.W.1 and they attended the funeral ceremony also and returned only in the afternoon of 25.05.2019. Therefore, the alleged occurrence could not have taken place as projected by the prosecution. Therefore, the appellant has clearly established his plea of *alibi* and the trial Court without appreciating the same, has erroneously convicted the appellant by drawing presumption under Section 29 of the POCSO Act.

5.2 The learned counsel further contended that the trial Court erred in not appreciating the fact that the prosecution has miserably failed to prove the allegation of the sexual assault on the victim child. It is settled proposition of law that prosecution should prove its case beyond all reasonable doubts and there is presumption under Section 29 of POCSO Act, which is rebuttable. When prosecution has proved its case beyond all reasonable doubt thereafter only the onus will shift on the accused and the accused can establish his defence through preponderance of probabilities. In

this case, the prosecution has failed to prove its case beyond all reasonable doubts and the appellant/accused has examined D.Ws.1 to 5 to establish his defence. The trial Court has failed to appreciate the evidence let in by the appellant and defence taken by him and erroneously convicted the appellant based on the presumption under Section 29 of the POCSO Act and sympathy. Hence the judgment of conviction and sentence passed by the trial Court warrants interference of this Court.

6 The learned Government Advocate (Crl.Side) appearing for the respondent police would submit that during the relevant point of time in the year 2019, the victim girl was studying 5th standard and in the month of May, during summer holidays, the parents of the victim went outside for job and the victim was alone in the house. At that time, the appellant went there and called the victim child and the victim child refused to go with him and thereafter on the next day also the appellant went there in nude and called the victim child and when the victim child shouted the appellant ran away. Thereafter on 25.05.2019 the appellant entered into the house of the victim child called the victim child by pulling her hand by showing his private

parts and when the victim raised alarm by shouting, the appellant/accused ran away from the house. Thereafter, when P.W.1 the mother of the victim child came, P.W.2 the victim narrated the entire incidents and P.W.1 informed the same to P.W.3 father of the victim child. On hearing the same P.W.3 along with P.W.1 and P.W.2 went to the house of the appellant and enquired, for which the appellant behaved rudely and hence thereafter only complaint was lodged against the appellant.

6.1 Even though, the appellant took a plea of *alibi*, it has not been substantiated through any documentary proof and the witnesses examined by the appellant on his side are all very close to him and in order to safeguard the appellant, they all deposed before the Court supporting the appellant in a parrot version. The victim girl, who was aged about 11 years at the time of occurrence, was examined as P.W.2 and she has clearly narrated the incident and the sexual assault committed by the appellant on her, which offence comes under Section 9(m), 9(n) punishable under Section 10 of the POCSO Act and also Section 11(i) punishable under Section 12 of the POCSO Act.

6.2 Further, it is not the case of prosecution that the appellant had committed aggravated penetrative sexual assault and the victim had sustained injuries and hence it is not necessary for the prosecution to prove its case with the support of the medical evidence. Prosecution has proved its case beyond all reasonable doubt by examining the witnesses P.W.1 to P.W.15 and once prosecution established its initial burden, presumption under Section 29 and 30 of the POCSO Act would come into play and it is for the appellant/accused to rebut the same. In this case the appellant/accused has failed to rebut the same by producing a valid documentary proof. Hence trial Court has rightly framed the charges and convicted the appellant, which does not call for any interference of this Court.

7 Heard the learned counsel for the appellant and the learned Government Advocate (Crl.Side) appearing for respondent police and perused the materials available on record.

8 Case of the prosecution is that the victim girl P.W.2, who was aged about 11 years and was studying 5th standard and she was residing with her parents P.Ws.1 & 3. P.W.2. The appellant/accused was residing near the victim girl's house and was running a Travels and also owned a vehicle namely Tavera Car and he used to drive the same for rent. The victim girl used to call him as "Appa". On 23.05.2019 at 11.00 a.m. when the victim girl was alone in her house, the appellant/accused with an devil intend to commit sexual offence on her, called the victim child to come to a vacant place near her house and since the victim shouted, the appellant ran away from the place. Thereafter on 25.05.2019, when the victim girl was alone in her house, the appellant entered into the house and called her by pulling her hand forcibly and by showing his private parts and since the victim child raised alarm, the appellant ran away from the place. Therefore the present case was registered against the appellant for the offence under the POCSO Act.

9 This Court, being an Appellate Court, is a final Court of fact finding, which has to necessarily re-appreciate the entire evidence and give an independent finding. Accordingly, this Court has re-appreciated the entire oral and documentary evidence produced before this Court.

10 The victim girl, who was examined as P.W.2 has clearly spoken about the offence committed by the appellant, which corroborated with the evidence of P.Ws.1 and 3, who are mother and father of the victim child. The victim girl, while producing before the Magistrate for recording statement under Section 164 of Cr.P.C. has clearly narrated the entire incident as stated in the complaint and the statement is marked as Ex.P.3. Ex.P2 is the Birth Certificate of the victim child and as per Ex.P2 age of the victim child at the time of occurrence is 11 years and hence the victim is a child comes under the definition of 2(1)(d) of the POCSO Act. The victim child, while recording the statement under Section 164 of Cr.P.C. even though has not stated any dates, has stated the chain of occurrence clearly that one day when she was alone in the house, the appellant came and called

her and due to fear she refused to go and next day also he came in nude and called her and thereafter again he came in nude and pulled her hand. Further, when the victim girl was produced before the Doctor/P.W.10, she has clearly stated that one known person sexually assaulted her and the Doctor also clearly mentioned the same in the Accident Register/Ex.P10 and while examining before the Court also the victim girl reiterated the same. Therefore, in all the stages the victim girl has clearly narrated the entire events and the offence committed by the appellant.

11 It is seen that prosecution has proved the fact that the appellant is a neighbour of the victim child and also very close to the family of the victim child. P.Ws.1 to 3 have categorically deposed before the Court below that the accused has committed the sexual offence as stated by the victim child and when P.Ws.1 and 3 questioned the same, the appellant/accused behaved in a rude manner and hence complaint has been lodged against the appellant.

12 The main defence taken by the appellant/accused is plea of *alibi* and he also examined D.Ws.1 to 5 to substantiate his plea of *alibi.* But, it is seen that the appellant has failed to produce any valid documentary proof to prove his defence. Even though he has stated that on 23.05.2019 he went to Palani and on 25.05.2019 only he returned to Valparai, the appellant has failed to produce any valid trip sheet or any entry in Check Post, located between Valparai and Palani. Therefore, if at all the appellant/accused was not in Valparai at the relevant point of time, he should have produced any valid documentary proof to sustain his defence, since he took a specific defence of plea of *alibi* and he failed to do the same. Therefore, the defence of plea of *alibi* taken by the appellant/accused is not acceptable, since the same is not proved in the manner known to law.

13 The learned counsel also contended that no independent witness has been examined to corroborate the evidence of the victim child and also medical evidence does not support the case of the prosecution. In a cases of this nature, we cannot expect any eye witness or independent witness. The culprit will take a chance of the loneliness of the child and will

commit the offence by trying to exploit the innocence of age of the children. It is settled proposition of law that when the evidence of prosecutrix is cogent, consistent and trust worthy and inspires confidence of the Court, conviction can be recorded solely based on the evidence of the victim, unless there is a reason to discord or disbelieve the evidence of the sole witness. The contention of the learned counsel for the appellant that the victim stated that she used to call the appellant as "Appa", but both are not belongs to the same community is not acceptable, since normally in the Village, people used to call all the known persons by some relation. Therefore it is not necessary that the victim and the appellant should belongs to the same community.

14 In the present case on hand, there is no eye witness except the victim child, who was 11 years at the time of occurrence and she has clearly spoken about the incident and the manner in which the offence committed by the appellant, which is cogent, consistent and trustworthy and this Court does not finds any reason to disbelieve or discord the evidence of the victim child. In the absence of any compelled circumstances to disbelieve the

evidence of the victim, this Court finds that the evidence of the victim child inspires the confidence of the Court. On a careful reading of the evidence of the victim child, this Court finds no reason to disbelieve the same. On reading of the entire materials, this Court is of the view that the prosecution has proved its case beyond all reasonable doubt. Further there is no injury on the body of the victim child and no penetrative sexual assault and therefore the contention that the medical evidence does not support the case of the prosecution is not acceptable.

15 On a combined reading of evidence of P.Ws.1 to 10 and Exs.P1 to P3 and P10, this Court is of the considered view that prosecution has proved its case beyond all reasonable doubt and the accused has failed to rebut the presumption under Section 29 and 30 of the POCSO Act. Trial Court has rightly appreciated the evidence of prosecution and come to the conclusion that the appellant/accused committed offence under Section 9(m), 9(n) punishable under Section 10 and Section 11(i) punishable under Section 12 of the POCSO Act.

16 In fine, this Court come to the conclusion that there is no merit in the appeal and there is no sound reason to interfere with the judgment of conviction and sentence. Accordingly, this criminal appeal is dismissed. The trial Court is directed to secure the appellant/accused to serve remaining period of imprisonment, if any. Consequently connected miscellaneous petition is closed.

22.10.2021

Index : Yes/No
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To

1. The Sessions Judge, Special Court for Exclusive trial of Cases under the POCSO Act, Coimbatore.

2. The Station House Officer, All Women Police Station, Pollachi, Coimbatore District.
3. The Public Prosecutor, High Court of Madras.

P.VELMURUGAN, J.,

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Pre-Delivery Judgment in Crl.A.No.253 of 2021

22.10.2021