

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.04.2021

PRONOUNCED ON : 12.07.2021

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.321 of 2019

S.Jayaseelan

...Appellant

Vs.

The State represented by
The Inspector of Police,
Hasthampatti Police Station,
Salem.

...Respondent

This Criminal Appeal is filed under Section 374 of Cr.P.C. to call for records and set aside the judgment of conviction and sentence made in Spl.S.C.No.42 of 2016 on the file of the learned Sessions Judge, Mahila Court, Salem, dated 08.03.2019.

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For Appellant : Mr.S.Samuel Raja Pandian for
M/s.M.K.Selvakumar

For Respondent : Mrs.T.P.Savitha
Government Advocate (Crl.Side)

JUDGMENT

The criminal appeal has been filed against the judgment of conviction and consequential sentence passed by the learned Sessions Judge, Mahila Court, Salem, in S.C.No.42 of 2016, dated 08.03.2019.

2 The respondent police registered a case in Cr.No.396 of 2013 against the appellant for the offence under Sections 9(f) punishable under Section 10 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 learned Sessions Judge, Mahila Court, Salem, which was taken on file in Spl.S.C.No.42 of 2016. The learned Sessions Judge, 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(f) punishable under Section 10 of the POCSO Act.

3 Before the trial Court, in order to prove the case of the prosecution, as many as 13 witnesses were examined as P.Ws.1 to 13 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.W.1 and D.W.2 were examined and no document was marked.

4 The learned Sessions Judge, Mahila Court, Salem, after trial and hearing arguments advanced on either side, by judgment dated 08.03.2019 convicted the appellant/accused and sentenced him to undergo rigorous imprisonment for a period of five years with fine of Rs.25,000/-, in default, to undergo simple imprisonment for a period of six months and the

fine amount of Rs.25,000/- was ordered to be compensation 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 is no substantial material to convict the appellant for the offence under Section 9(f) punishable under Section 10 of the POCSO Act. The appellant, being a paster of the CSI Church, is nothing to do with the management of the C.S.I. Hobert Girls Higher Secondary School, where the victim girl was studied. At the time of alleged occurrence, the appellant was not in the residence, where the alleged occurrence said to have taken place and to prove the same, he examined his wife as D.W.1 and son as D.W.2, who have clearly stated that they were not in Salem on the date of alleged occurrence and they have also clearly spoken about enmity with regard to the Church Election. Therefore, the alleged occurrence could not have taken place as projected by the prosecution.

5.1 The learned counsel further contended that the victim girl was not subjected to medical examination and the same is fatal to the case of the prosecution and the prosecution has failed to comply with the Section 24 to 27 of the POCSO Act. The trial Court erred in not appreciating the fact that the prosecution has miserably failed to comply with Sections 24 to 27 of the POCSO Act. 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 by 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.W.1 and D.W.2 to establish his defence. Further, the accused, in the proceedings under Section 313 of Cr.P.C. has clearly denied the allegations and stated about the enmity with regard to the Church Election. 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 2013, the victim girl was studying 8th standard in CSI Hobert Girls Higher Secondary School situated within the campus of the CSI Church, where the accused stayed in the house provided by the Church. The victim girl was residing in her Grandmother's home and at the time of occurrence her date of birth is 14.07.2001 and her age is 12 years. The victim girl 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(f) punishable under Section 10 of the POCSO Act.

6.1 The victim girl soon after the occurrence went to the Class room and intimated about the sexual assault to her friend Priyanka, who was examined as P.W.7 and she has clearly spoken about the

occurrence and both of them informed the same to P.W.6, the Class Teacher. After class was over, the victim girl reached her Grandmother's home and she narrated entire incident to P.W.4, the Grandmother of the victim girl and she informed the same to parents of the victim girl, who were examined as P.W.3 and P.W.1 and immediately P.W.1 lodged complaint before the respondent police. Further, it is not the case of prosecution mthat the appellant had committed aggravated penetrative sexual assault and the victim had injuries and hence it is not necessary to produce the victim girl before the Doctor for medical examination and the same is not fatal to the case of the prosecution.

6.2 The appellant took a plea of *alibi* and to establish the same he examined his wife as D.W.1 and his son as D.W.2. Further his main defence is the enmity regarding the Church election, but the appellant/accused failed to examine any of the independent witness to prove his defence of *alibi* and the enmity. Prosecution has proved its case beyond all reasonable doubt by examining the witnesses P.W.1 to P.W.13 and once prosecution established its initial burden and 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 examining any independent witnesses. Further, prosecution established that the School, in which the victim girl studied, is under the control of the administration of the Church, where the appellant/accused was a paster. Hence trial Court has rightly framed charge for the offence under Section 9(f) punishable under Section 10 of the Act against the appellant/accused and convicted him, 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 on the date of occurrence, when P.W.2, the victim girl was going to attend her School crossing the residence of the appellant, the appellant/accused invited her to his house and with an intent to assault her sexually saying that he will tell the story of Jesus and

committed sexual assault on her, by touching all over the body, removed the bottom of the Churidar, embarrassed her and kissed her in her right cheek with sexual intent, which involves physical contact without penetration and further the accused threatened the victim girl to come to his house with an intention to repeat the same on her. Hence the present case was registered against the appellant.

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 stated that on the date of occurrence, when she was going to attend School, which is situated within the campus of the Church, where the appellant/accused was a paster, the appellant invited her to his house and committed sexual assault on her as narrated in the complaint Ex.P.1. Immediately soon after the occurrence, the victim girl went to Class room and intimated the same to her

friend one Priyanka, who was examined as P.W.7 and she has clearly spoken about the offence committed by the appellant, which corroborated with the evidence of P.W.2. P.W.3 is mother, P.W.2 is father and P.W.4 is grandmother of the victim girl. The victim girl, while producing before the Magistrate for recording statement under Section 164 of Cr.P.C. has clearly narrated the incident as stated in the complaint and the statement is marked as Ex.P.2. As per Ex.P3 and Ex.P4, age of the victim girl at the time of occurrence is 12 years and hence the victim is a child comes under the definition of Section 2 (1)(d) of the POCSO Act, and the same is not disputed by the appellant/accused.

11 The two main defences taken by the appellant/accused are that one is plea of alibi and second one is enmity regarding the Church election. In order to prove the same, he examined his wife as D.W.1 and his son as D.W.2. On reading of the entire materials, this Court is of the view that the prosecution has proved its case beyond all reasonable doubt. But, the appellant/accused neither examined any independent witness nor produced any contra evidence to prove his defence. The learned counsel contended

that Section 24 to 27 of the POCSO Act has not been complied with by the prosecution, but, on reading of the evidence of P.Ws.1 to 7 and Ex.P1 and P2, it is clear that prosecution has proved its case beyond all reasonable doubt. Even otherwise, as contended by the learned counsel for the petitioner that there are defects in investigation, it is made clear that mere lapse on the part of prosecution should not lead unmerited acquittal, subject to rider that in such a situation evidence on record should be clinching, so that lapses of prosecution can be condoned. In this case, evidence of victim is cogent and consistent. Even though there is no eye witness, however, P.W.7 & P.W.8 corroborated the same to the extend that victim was present on that day and she informed the alleged offence to them and they informed to the Head Mistress of the School.

12 The appellant, being a head of the Religious Institution, has committed the sexual assault on the victim child, who was aged about 12 years at the time of occurrence. Therefore, the act of the appellant comes under Section 9(f) punishable under Section 10 of the POCSO Act.

13 There is no injury on the body of the victim and no penetrative sexual assault and therefore mere medical examination having not been conducted on the victim by a lady doctor, is not fatal to the case of the prosecution.

14 On a combined reading of evidence of P.Ws.1 to 7 and Exs.P1 and P2, 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(f) punishable under Section 10 of the POCSO Act.

15 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.

16 Further, this Court is of the opinion that normally female students would get fear in lodging complaint against the Teacher or Management of the School regarding sexual offences, considering their future of their studies. They will not reveal easily anything about the sexual assault to anyone in the Management of the School. Hence, this Court recommends the Government of Tamilnadu to form a committee at every School, consisting of the Social Welfare Officer, the Secretary of District Legal Services Authorities, female Police Official not below the rank of District Superintendent of Police, District Educational Officer, female Psychiatrist and Physician from the Government Hospital. The District Educational Officer may inspect the School once in a month to get grievance of the female students with regard to sexual assault and give confidence to the female children to come forward to make complaint against the sexual offenders, who may be a teaching or non teaching staff and also the members of the Management of the School.

17 Further, it is directed to keep a Complaint Box at every School to make the victims to complain about the sexual assault freely and keys of the same should be under the control of the Secretary District Legal Services Authority. The Secretary, District Legal Services Authorities are directed to inspect the complaint box along with the District Social Welfare Officer once in a week and enquire into the same, if *prima facie* reveals any sexual offence, forward the same to the Station House Officers concerned to proceed further.

12.07.2021

Index : Yes/No
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To

1. The Sessions Judge, Mahila Court, Salem.
2. The Inspector of Police, Hasthampatti Police Station, Salem.
3. The Public Prosecutor, High Court of Madras.
4. All the Secretary, District Legal Service Authorities.
5. All the District Social Welfare Officers.
6. All the District Educational Officers (to forward to the concerned officials)

Crl.A.No321 of 2019

P.VELMURUGAN, J.,

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Pre-Delivery Judgment
in
Crl.A.No.321 of 2019

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