

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.07.2016

(Judgment reserved on 05.07.2016)

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH

Crl.A.No.611 of 2015

Rajivgandhi

.. Appellant

Vs.

The State

Rep. by the Inspector of Police,

A.W.P.S., Jayankondam,

Ariyalur District.

(Crime No.13 of 2015)

... Respondent

Criminal Appeal filed under Section 374 Cr.P.C., against the judgment dated 18.09.2015 passed in Spl. Sessions Case No.15 of 2015 on the file of the Sessions Judge, Fast Track Mahila Court, Ariyalur.

For appellant : Mr.N.Rajan

For respondent : Mr.P.Govindarajan, Addl.P.P.

JUDGMENT

This appeal is filed against the judgment dated 18.09.2015 passed in Spl.Sessions Case No.15 of 2015 on the file of the Sessions Judge, Fast Track Mahila Court, Ariyalur. By the said judgment, the appellant/accused was convicted for the offence under Section 354 IPC and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,000/-, in default to undergo two months' simple imprisonment; he was also convicted for the offence under Section 450 IPC and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.2,000/-, in default to undergo six months' simple imprisonment and he was also convicted for the offence under Section 6 of the Protection of Children from Sexual Offences Act (for short, 'the POCSO Act') and sentenced to undergo imprisonment for ten years and to pay a fine of Rs.5,000/-, in default to undergo one year rigorous imprisonment. The trial Court ordered the sentences imposed on the appellant/accused to run concurrently.

2. The case of the prosecution is as follows:

(a) On 03.08.2015, the victim girl/P.W.1-Anitha, aged about 14 years, lodged a complaint with All Women Police Station, Jayankondam. According to her complaint, she was studying IX Std. in Government

High School at Chinnavalaiyam and her father and mother were doing coolie work. She is having two elder sisters and two elder brothers. The junior paternal uncle Rajendran was residing near her house and Rajivgandhi, the appellant/accused is his son.

(b) About eight months earlier, the appellant attempted to misbehave with P.W.1 Anitha. At that time, the appellant/accused was warned by the elder brother of P.W.1. On 01.08.2015 Saturday at about 2.30 p.m., the brother of P.W.1, namely Balamurugan came home for lunch. After finishing lunch, he went out of the house leaving P.W.1 in the home. P.W.1 went to the house of Renuka Devi, who is a neighbour and came back home after few minutes. When P.W.1 was in Renuka Devi's house, the appellant/accused intruded into the house of P.W.1. When P.W.1 returned home, the appellant/accused emerged and told P.W.1 that he has taken obscene photograph of P.W.1's elder sister while she was taking bath and also showed her photo to P.W.1. By showing her photo, the appellant/accused threatened P.W.1 that if she does not yield to his desire, he would show the said photograph of her sister to others. When P.W.1 refused, the appellant/accused slapped her. P.W.1 was unable to shout and she fell down. The appellant/accused removed her dress and committed penetrative sexual assault on her. After satisfying his lust, the appellant/accused further threatened P.W.1 that if she revealed it to anybody, he would upload the obscene photo of her sister in the Internet and thereafter he left the place.

(c) Fearing that the appellant would upload the obscene photo of her sister, P.W.1 did not reveal the incident to anyone. However, the accused did not keep quiet. He told his friend P.W.8 Kodiyaaran that he had "finished-off" P.W.1. P.W.8 in turn passed the said information to his sister-in-law Renuka Devi. The neighbour Renuka Devi told the incident to P.W.1's mother, namely P.W.2 on 02.08.2015 afternoon. P.W.2 enquired with her daughter P.W.1 and P.W.1 informed her mother about the occurrence that had taken place on 01.08.2015. However, fearing for the honour and reputation of the family, they cried and kept quiet for a day. Thereafter, on the next day, i.e. on 03.08.2015, they decided to lodge a complaint.

(d) P.W.18 Inspector of Police received the said complaint at about 15 hours on 03.08.2015 and registered the F.I.R. for the offences under Sections 354 and 450 IPC and Section 5 read with 6 of the POCSO Act. Ex.P-12 is the F.I.R. Thereafter, P.W.18 sent the victim for medical examination and proceeded to the place of occurrence and prepared Ex.P-5 rough sketch and Ex.P-6 observation mahazar at about 03.45 p.m. on the same day in the presence of the witnesses. She enquired the witnesses including the victim and recorded their statements. On the same day at about 7 p.m., the accused was arrested. The medical examination of the accused was done following due process. The statement of the victim was recorded under Section 164 Cr.P.C. The Police Officer recovered the cell phone M.O.1 along with two SIM cards belonging to the accused under a cover of mahazar. However, no photo was recovered from the memory card, as the same was missing from the cell phone. On 06.08.2015, the Police obtained School Certificate for proof of the age of the victim.

Thereafter, P.W.18 recorded the statements of the other witnesses including the Doctors, under Section 161 Cr.P.C. After completion of investigation, final report was filed against the appellant/accused for the offences stated supra.

3. During the course of trial, the prosecution has examined 18 witnesses, marked 14 documents and produced three material objects.

4. When the appellant/accused was questioned under Section 313 Cr.P.C., he denied his complicity in the crime. He neither examined any witnesses, nor produced any document.

5. Upon hearing the submissions made on either side and considering the oral and documentary evidence available on record, the trial Court convicted and sentenced the appellant/accused as stated above. Challenging the said judgment of conviction and sentence, the appellant/accused has filed this appeal.

6. Learned counsel for the appellant/accused submitted that the case of the prosecution is not based on any material evidence, but only on an artificial allegation with a motive of wreaking vengeance on the appellant for the condemnation of the alleged earlier act of the appellant that he caught hold of the complainant and pulled her. Learned counsel further submitted that P.W.1/victim girl gave two different versions in respect of the alleged act of penetrative sexual assault by the appellant/accused. Firstly, in Ex.P-1 complaint and in her evidence in chief examination, P.W.1 victim girl had stated that on 01.08.2015, while she went to neighbour Renuka Devi's house, the appellant intruded into the house of the P.W.1 / complainant / victim girl and when she came back to her house, the appellant/accused emerged and told P.W.1 that he has taken obscene photograph of her sister while she was taking bath and the appellant has also shown her photo to P.W.1. By showing her photo, the appellant/accused threatened P.W.1 that if she does not yield to his desire, he would show the said photograph of her sister to others. When P.W.1 refused, the appellant slapped her and she was unable to shout and fell down. The appellant removed her dress and committed penetrative sexual assault on her. Secondly, in Section 164 Cr.P.C. statement, P.W.1/victim girl stated that while she was returning from shop after buying mustard, the appellant/accused was inside the house and when she entered into the house, suddenly he closed her mouth and showed the photograph of her sister which was taken by him while her sister was taking bath. Thus, learned counsel for the appellant/accused submitted that in chief examination as well as in the complaint Ex.P-1, the victim girl P.W.1 stated that she was coming back from Renuka Devi's house, whereas in her statement recorded under Section 164 Cr.P.C., she has stated that she was coming from shop. Therefore, according to the learned counsel, the evidence of P.W.1 cannot be believed in view of her above said two versions and this contradictory version of P.W.1 disproves the case of the prosecution.

7. Learned counsel for the appellant/accused further submitted that according to the prosecution case, the entire occurrence was said to have taken place by showing the photograph of P.W.1's sister, which was said to have been taken by the appellant while her sister

was taking bath. But the said photograph was not recovered, and therefore, the entire prosecution case will have to be disbelieved.

8. Learned counsel for the appellant invited the attention of this Court to Ex.P-5 rough sketch with regard to the scene of occurrence and submitted that the wall of the bathroom situated behind the house of the victim girl, could hide the body of P.W.1's sister upto her shoulder and therefore, it is next to impossible that the appellant took her photograph while she was taking bath, and therefore, the falsity of the allegation could be very easily exposed by reason of the fact that the said photograph is not available in M.O.1 cell phone, except the bald allegation of the victim girl / complainant / P.W.1 that she saw the photograph of her sister on the cell phone at the time of occurrence while the appellant showed the same to P.W.1.

9. Learned counsel for the appellant/accused further submitted that had there been any forcible sexual assault on P.W.1, there will be definitely injuries both inside and outside her genitals. He further contended that from the certificate given by the Doctor who examined the victim girl / P.W.1, it is clear that no nail mark was found on the body of the victim girl. P.W.1 victim girl in her cross-examination has stated that while the appellant was committing the penetrative sexual assault on her, he caused injuries on her thigh with the nails, whereas, the Doctor's evidence clearly shows that there is no such injury, which would falsify the case of the prosecution that the appellant had committed penetrative sexual assault on her. By pointing out the above contradictions in the prosecution case, learned counsel for the appellant/accused submitted that the prosecution has not proved it's case beyond all reasonable doubt and thus, he prayed for acquitting the appellant/accused.

10. Countering the above submissions, learned Additional Public Prosecutor appearing for the respondent-Police submitted that it is incorrect to state that there is contradiction in the statement of P.W.1 in chief examination/Ex.P-1 complaint and her statement recorded under Section 164 Cr.P.C. Further, with regard to the non-recovery of obscene photograph of the elder sister of P.W.1, learned Additional Public Prosecutor submitted that the memory card in M.O.1 cell phone was destroyed by the appellant/accused, which is evident from the evidence of P.W.6, who is one of the sisters of P.W.1 and the photograph of P.W.6 was taken by the appellant while P.W.6 was taking bath, but P.W.6 has stated that the accused has broken/destroyed the memory card. However, only M.O.1 cell phone was recovered. The two SIM cards were marked as M.Os.2 and 3. Learned Additional Public Prosecutor further submitted that the evidence of P.W.1 / victim girl itself is sufficient to convict the appellant/accused by coming to the conclusion that he alone has committed the crime and hence, he submitted that the conviction and sentence imposed on the appellant are justified and prayed that the same may not be interfered with by this Court and to dismiss this appeal.

11. I have given my anxious consideration to the submissions made on either side and perused the materials available on record.

12. The main contention of the learned counsel for the appellant is that there are contradictions in the version of P.W.1 in her complaint Ex.P-1 / in her chief examination and in her statement recorded under Sections 164 Cr.P.C., and therefore, the case projected by the prosecution that the appellant has committed penetrative sexual assault, has not been established by the prosecution. In support of his contentions, learned counsel for the appellant has also pointed out that P.W.1 has stated in her chief examination and also in her complaint Ex.P-1 that at the time of occurrence, she was coming from her neighbour Renuka Devi's house, while in the statement recorded under Section 164 Cr.P.C., she has stated that she came to her house from the shop after buying mustard. Therefore, learned counsel submitted that the evidence of P.W.1 cannot be believed. But, in my considered opinion, above contradictory versions pointed out are very minor and they are not material contradictions. So, much credence cannot be attached to the said contradictions. The fact remains that there is no contradiction in the evidence of P.W.1 with regard to the presence of the appellant/accused in the house of P.W.1 at the time of commission of crime. Therefore, the said minor contradiction in the evidence of P.W.1, at the best can be said to be only an insignificant error, unless the contrary raises suspicion in the mind of the Court with regard to the presence of accused in the house of P.W.1 and his commission of offence. Hence, the above said minor contradiction will not affect the genesis of the case of the prosecution.

13. It is the further submission of learned counsel for the appellant that the case of prosecution is that appellant had shown the obscene photograph of P.W.1's elder sister to P.W.1, thereby, appellant threatened P.W.1/victim girl to yield to his desire. The said photograph was not recovered by prosecution. But, P.W.6 is none else whose photograph was taken by the appellant and she is none other than the sister of P.W.1. P.W.6 has categorically stated in her evidence that appellant has destroyed the memory card of cell phone. Therefore, there is proper explanation on the side of prosecution for non-recovery of the photograph of sister of P.W.1. In this context, decision of the Himachal Pradesh High Court reported in 2014 Cri.L.J. 295 (Kamaljit Vs. State of Himachal Pradesh), relied on by learned counsel for appellant, is not relevant to the facts of this case, as non-recovery of photograph from the memory card of M.O.1 cell phone, will not affect the substratum of the case of prosecution herein, since P.W.1's evidence with regard to alleged occurrence itself is cogent and consistent, who had stated that appellant/accused has shown the obscene photograph of P.W.1's sister and slapped P.W.1 and thus made her yield to his desire. P.W.1's sister, i.e. P.W.6, in her evidence has stated that when she came to know about the photo taken by the accused through cell phone, she questioned the accused, but she was informed by accused that he has destroyed the memory card. Therefore, the evidence of P.Ws.1 and 6 undoubtedly proves the case of prosecution that on the date of occurrence, photo of P.W.6 was shown to P.W.1. Moreover, cell phone was also recovered and marked as M.O.1.

14. Learned counsel for the appellant further contended that P.W.1 has stated in her cross-examination that at the time of committing the penetrative sexual assault, appellant/accused caused injury with his nail on her thigh. But, the Doctor in her Certificate has stated that there is no injury on P.W.1/victim girl. Therefore, according to the learned counsel for the appellant, the evidence of P.W.1 cannot be believed. But the evidence on record would show that the Doctor has examined P.W.1 only after 50 hours from the time of occurrence. Therefore, no significance could be attached to the certificate of Doctor, as the same does not show that there is nail mark on the thigh of P.W.1. However, I am of the opinion that so far as the offence under the POCSO Act is concerned, this Court cannot give much importance to the minor contradictions, as the evidence of P.W.1 who was minor at the time of occurrence, inspires the confidence of the Court. In the instant case, with regard to the offence committed by the appellant, absolutely there is no material contradiction in the evidence of P.W.1 who has categorically stated in her evidence that on 01.08.2015, when she entered into her house, she was threatened by the appellant by showing the obscene photograph of her sister and when P.W.1 refused to yield to the desire of the appellant, she was slapped by the appellant and as she was unable to shout, she fell down, and thereby, the appellant committed penetrative sexual assault on her. With regard to that portion of the evidence of P.W.1, no favourable reply to the case of the defence was brought from the cross-examination of P.W.1. Further, P.W.8 who is close friend of the appellant, in his evidence had stated that on the date of occurrence at about 9 p.m. in the night, the appellant informed him that he had finished-off P.W.1. In this context, it is to be seen that there is no motive for P.W.8 to speak against the appellant.

15. Further, the contention of the appellant/accused that taking of photograph by the appellant/accused is improbable as the height of the wall of the bathroom hides the body of the sister of P.W.1, will not affect the case of the prosecution, as the factum of commission of the offence by threatening P.W.1 with the alleged photograph, is clearly spoken to by P.W.1, whose evidence inspires the confidence of this Court.

16. Furthermore, the contention of the learned counsel for the appellant/accused that the case of the prosecution is not based on any material evidence, but only on an artificial allegation with a motive of wreaking vengeance on the appellant for the condemnation of the alleged earlier act of the appellant that he caught hold of the complainant / victim girl / P.W.1 and pulled her, will only strengthen the case of the prosecution, inasmuch as the earlier act of the appellant only proves that he was in the habit of misbehaving with P.W.1.

17. Moreover, under Section 29 of the POCSO Act, where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is

proved. In the instant case, the presumption under Section 29 of the POCSO was not rebutted either by bringing out any favourable reply from the evidence of the prosecution witnesses or by examining any witness or producing documentary evidence on the side of the defence. On the other hand, in this case, the evidence of P.W.1, who was minor and aged about 14 years at the time of occurrence, is crystal clear without giving any room of doubt to test the veracity of the crime committed by the appellant.

18. Hence, for the foregoing reasonings, the Criminal Appeal is dismissed, confirming the conviction and sentence imposed on the appellant/accused.

Sd/-
Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

Copy to

1. The Sessions Judge, Fast Track Mahila Court, Ariyalur.
2. The Public Prosecutor, High Court, Madras.
3. The Inspector of Police,
All Women Police Station, Jayankondam,
Ariyalur District. (Crime No.13 of 2015)
- 4.The Officer Incharge,
Sub-Jail, Pudukottai.
5. The Record Keeper, Criminal Section, High Court, Madras.
- 6.The Superintendent of Prison, Pudukottai.

+2 cc's to M/s.N.Rajan, Advocate,sr.39422.

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krd 3/8

Judgment in
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