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Court : Chennai

Decided On : Jun-16-2016

Judge : R. Subbiah

Appeal No. : Crl.A.No. 708 of 2015

Appellant : S. Velan

Respondent : State represented by the Inspector of Police, Chennai

Judgement :

(Prayer: Criminal Appeal filed under Section 374(2) Cr.P.C., against the judgment dated 08.10.2015 passed in Special Case No.3 of 2015 on the file of the Mahila Court, Chengalpattu.)

1. This Criminal Appeal is filed against the judgment dated 08.10.2015 passed in Special Case No.3 of 2015 on the file of the Mahila Court, Chengalpattu. By the said judgment, the appellant/accused was convicted for the offence under Section 10 of the Protection of Children from Sexual Offences Act (hereinafter referred to as 'POCSO Act') and sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs.1,000/-, in default, to undergo six months rigorous imprisonment.

2. Before going into the details of the evidence, the brief case of the prosecution is stated hereunder:

(a) P.W.1 lodged a complaint Ex.P-1 stating that her husband P.W.2 is working as Driver and she is having a son by name Sivalingam (P.W.4), aged about 12 years and a minor daughter--P.W.3 victim girl Gayathri alias Murugeswari, aged about 8 years.

(b) In the said complaint, P.W.1 alleged that on 31.07.2014 at about 8 p.m., P.W.2 Selvam (husband of P.W.1) and P.W.5 Selvam (sound service man) were conversing with each other near Kolachi Ammal Temple; P.W.1's son and daughter were playing near the said Temple; P.W.1 was doing household work in her house. At that time, the appellant/accused came in a motor-cycle and took P.W.1's son and daughter, namely P.W.3 and P.W.4.

(c) In the complaint, she further stated that P.W.3 alone came to the house, crying; on enquiry, she stated that the appellant/accused took her to a dark place near Oorapakkam VGP Ground and removed her dresses and rubbed her body including private parts, thereby committed sexual assault on her. P.W.3 told that she escaped from the appellant/accused. The said complaint Ex.P-1 was lodged by P.W.1 on 01.08.2014 and P.W.12 Inspector of Police registered the complaint at about 8 a.m. on the same day in Crime No.753 of 2014 against the appellant/accused for the offence punishable under Section 8 of the POCSO Act.

(d) Thereafter, P.W.12 took up the investigation; he went to the scene of occurrence at about 9.15 a.m. on the same day and prepared Exs.P-3 and P-4 observation mahazars in the presence of P.W.6 and P.W.7 respectively and drew Ex.P-7 rough sketch. Subsequently, P.W.12 recorded the statements of P.Ws.1, 2, 4, 10 and 11 and one Ramachandran. He made arrangements to record the statement of P.W.3 victim girl by a Women Police, which was accordingly recorded by one Lakshmi, Sub-Inspector of Police, Otteri Police Station. On the same day, i.e. on 01.08.2014 at about 12 noon, P.W.12 arrested the appellant/accused and remanded him to judicial custody.

(e) On 10.09.2014, P.W.12 went to the School where P.W.3 victim girl studied and made enquiry with the Headmaster and obtained Certificate Ex.P-5 showing the proof of the age of P.W.3 victim girl. Subsequently, since the victim girl P.W.3 is aged below 12 years, P.W.12 altered the offence from Section 8 to Section 10 of

the POCSO Act and sent Ex.P-8 offence alteration report to concerned Court. After completion of the detailed investigation and based on the materials available on record, P.W.12 filed charge sheet/final report on 11.09.2014 before the concerned Court, against the appellant/accused. The charge-sheet/final report was taken on file by the trial Court and after framing charge under the above said Section against the appellant/accused, the trial was conducted by the trial Court in Special Case No.3 of 2015.

3. During the course of trial, the prosecution examined 12 witnesses and exhibited eight documents.

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

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

6. Learned counsel for the appellant/accused submitted that initially, the case was registered for the offence under Section 8 of the POCSO Act in respect of the offence for sexual assault; since the victim girl is aged less than 12 years, subsequently the offence was altered into one under Section 10 of the POCSO Act for the aggravated sexual assault. Learned counsel invited the attention of this Court to Section 7 of the POCSO Act and submitted that whoever, with sexual intent, touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration, is said to have committed sexual assault. He further stated that it is the case of the prosecution that the appellant/accused, on the date of occurrence, took the victim girl P.W.3 to a dark place and asked her to remove her dress and rubbed her body and private parts with sexual intention. Though P.W.1, the mother of the victim girl-P.W.3 had stated that in the statement given to P.W.15/investigating officer under Section 161 Cr.P.C. that her daughter P.W.3

informed her about the sexual assault made by the appellant/accused, but in her chief examination before the Court, she has not spoken about the physical contact alleged to have been made by the appellant/accused on P.W.3. As per Section 7 of the POCSO Act, if a person commits sexual assault and if with intention, he makes physical contact, then the said act would attract the offence under Section 10 of the POCSO Act.

7. While driving the attention of this Court to the evidence of P.W.1, the mother of the victim girl, learned counsel for the appellant/accused submitted that P.W1, in her chief examination, stated that the accused took her daughter P.W.3 to a lonely place and asked her to remove her dress and P.W.3 victim girl came running to the house crying. Hence, the above evidence of P.W.1 will not attract the offence under Section 7 of the POCSO Act, as there is no evidence with regard to the alleged physical contact made by the appellant/accused.

8. Learned counsel for the appellant/accused brought to the notice of this Court Section 29 of the POCSO Act and stated that 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. He also pointed out Section 30(1) of the POCSO Act and stated that in any prosecution for any offence under the 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. Learned counsel stated that the said presumption under Sections 29 and 30 is rebuttable. Learned counsel therefore submitted that in the instant case, there is no evidence available on record to show that any physical contact has been made by the accused as enunciated under Section 7 of the POCSO Act. If and only if there is physical contact, that too with sexual intention, the offence would attract the provisions of Section 10 of the POCSO Act. Since the trial Court convicted and sentenced the accused, without considering the evidence available on record and without properly applying the principles laid down under the provisions of the POCSO Act, the conviction and sentence

imposed on the appellant/accused are not sustainable in law.

9. Apart from pointing out the above aspects, learned counsel for the appellant/accused submitted that P.W.12 investigating officer stated in his evidence that P.W.1 mother, has brought a written complaint to the Police Station, whereas P.W.1 during the course of cross-examination, stated that the compliant was written in the Police Station. This shows that Ex.P-1 complaint would have been written in an exaggerated version in the Police Station to bring the complaint under the ambit and scope of Section 9 of the POCSO Act for "aggravated sexual assault". Therefore, for the above reasons, learned counsel for the appellant/accused prayed that the impugned judgment of conviction and sentence may be set aside and the appellant/accused may be acquitted of the charge levelled against him.

10. Countering the above submissions, learned Additional Public Prosecutor appearing for the respondent-Police relied on Section 9 of the POCSO Act, more particularly to Section 9(u), which states that, whoever commits sexual assault on a child and makes the child to strip or parade naked in public, is said to have committed aggravated sexual assault. In the instant case, even as per the evidence of P.W.1, the mother of the victim girl, it was informed to her that when her daughter P.W.3 was asked by the appellant/accused to remove her dress, she came running without removing dress. No doubt, though P.W.1 did not speak about the physical contact made by the accused in her chief examination and she was treated as hostile witness on that aspect of her evidence, however, in cross-examination, it was elicited from her that during the course of investigation to the investigating officer, she has stated that her daughter P.W.3 informed her that the accused removed her dress and rubbed her body and private parts. She admits that such statement was made by her to the investigating officer. Apart from the evidence of P.W.2, the victim girl P.W.3 has categorically stated in her evidence in chief examination that she was taken by the appellant/accused to VGP Ground and asked to remove her dress and the accused put his hand inside her dress. Even in her cross-examination, when a suggestion was put to P.W.3 to the effect that her dress was not removed and the accused has not rubbed her body, she denied the said suggestion. Hence, learned Additional Public Prosecutor

submitted that the evidence of P.W.3 victim girl itself is sufficient to convict the accused by coming to the conclusion that he committed the crime and therefore, the conviction and sentence imposed on him are justified under Section 10 of the POCSO Act. Hence, for the above reasons, learned Additional Public Prosecutor prayed for confirming the judgment of conviction and sentence passed by the trial Court, and thereby 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/accused is that absolutely there is no evidence to attract the offence of 'aggravated sexual assault' made by the accused. If and only if there is any involvement of physical contact with sexual intention, such an act would attract the offence under Section 10 of the POCSO Act. In support of this contention, learned counsel for the appellant/accused stated that though P.W.1 has stated in her statement made to P.W.15 investigating officer that her daughter came running and informed her about the sexual assault made by the appellant/accused, in her chief examination, P.W.1 has not spoken about the involvement of the accused or his physical contact made on P.W.3, P.W.1 was treated hostile witness and during the course of cross-examination, it was elicited from her that she had given a statement to the Police that she was informed by her daughter P.W.3 that she was taken to a dark place by the appellant/accused and her dress was removed and the appellant/accused rubbed her body and private parts. P.W.3 in chief examination has stated that she was taken by the appellant/accused separately and when the appellant/accused asked her to remove her dress, she pushed him and came running to her house. In cross-examination, when a suggestion was put to P.W.3 to the effect that the accused has not touched her, she denied the said suggestion. Therefore, P.W.3 minor victim girl, aged about 8 years at the time of commission of the offence, categorically asserted that she was asked to remove her dress and the accused rubbed her body and private parts, and the evidence of P.W.3 drives the Court to come to the conclusion that the appellant/accused, with sexual intention, committed the offence. Therefore, it is incorrect to state that the evidence on record did not reveal any physical contact alleged to have been made

by accused or his involvement in the crime. In fact, the evidence of P.W.3 inspires the confidence of this Court and her solitary evidence is sufficient to convict the accused for the alleged offence under Section 10 of the POCSO Act.

13. Further, P.W.1, after having been treated hostile during examination, stated that Police enquired her and in that police enquiry, P.W.1 stated P.W.3 informed her that the accused removed her dress and rubbed her body including the private parts. Therefore, there is ample evidence to come to the conclusion that the appellant/accused committed the offence of aggravated sexual assault. Moreover, it is pertinent to note that the accused did not produce any evidence to show that he did not take the minor victim girl P.W.3 and made sexual assault on her. Therefore, there is cogent and clinching evidence to show that P.W.3 came to her house crying. Thus, the evidence gathered in this case undoubtedly shows that the appellant has committed the crime, thereby, he is liable to be convicted for the offence under Section 10 of the POCSO Act. Though learned counsel for the appellant/accused submitted that the 'presumption' under Sections 29 and 30 of the POCSO Act with regard to the culpable mental state of the accused is rebuttable, I am of the view that the same could be rebutted by adducing contra evidence. Further, the accused neither brought reply in favour of his defence during the course of cross-examination of prosecution witnesses, nor examined any witness or produced evidence to rebut the abovesaid presumption.

14. Though learned counsel for the appellant argued that there is a doubt with regard to Ex.P-1 compliant alleged to have been brought written by P.W.1 to the Police Station and that it is an exaggerated version made in the Police Station, this Court need not probe into the veracity of the complaint, as the fact remains that the appellant/accused has committed the offence, which is proved by the prosecution through the evidence of P.W.3 victim girl, which itself proves the case of the prosecution forming the basis for convicting the accused.

15. Thus, it has to be concluded that the prosecution has proved the guilt of the appellant/accused beyond reasonable doubt. Hence, I find no infirmity or illegality in the impugned judgment passed by the trial Court. For the foregoing observations and discussion, there being no merit and as there is no scope for

interference by this Court in the impugned judgment, the appeal is dismissed, confirming the impugned judgment of conviction and sentence passed by the trial Court. The period of imprisonment already undergone by the appellant/accused shall be set-off under Section 428 Cr.P.C.

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