

MANU/TN/4056/2016

Equivalent Citation: 2017(1)MLJ(Cr)718

IN THE HIGH COURT OF MADRAS

CrI. A. No. 483 of 2016

Decided On: 23.12.2016

Appellants: **Rajendran**

Vs.

Respondent: **State**

Hon'ble Judges/Coram:

S. Nagamuthu and V. Bharathidasan, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: C. Prabhakaran, Advocate

For Respondents/Defendant: P. Govindarajan, Additional Public Prosecutor

JUDGMENT

S. Nagamuthu, J.

1. This is a case of aggravated penetrative sexual assault on a young and mentally ill-developed girl aged 13 years. The Appellant, the sole accused in Spl. S.C. No. 7 of 2015 on the file of the learned Sessions Judge, Fast Track Mahila Sessions Judge, Ariyalur, stood charged for offence under Section 6 of The Protection of Children from Sexual Offence Act, 2012 [in short "the POCSO Act"]. The trial court, by judgment dated 07.10.2015, convicted the appellant/accused under Section 6 of the POCSO Act and sentenced him to undergo imprisonment for life and to pay a fine of Rs. 2,00,000/- in default to suffer rigorous imprisonment for two years. The entire fine amount has been ordered to be paid to the victim as compensation. Challenging the above said conviction and sentence, the appellant/accused is, now, before this court with the present criminal appeal. The case of the prosecution in brief is as follows:- P.W. 1, a poor illiterate village woman, is a resident of Chinnavalayam Village in Ariyalur District and she is a masonry worker by profession. The accused in this case is a Mason by profession. He hails from a different village. But, both the accused and P.W. 1 used to work together in the construction site. In such a way, the accused had close acquaintance with P.W. 1.

2. P.W. 1 was residing at her own house with her two female children. The elder daughter of the deceased is P.W. 2 and she is the victim in this case. She was hardly 14 years old at the time of occurrence. Her date of birth is 09.10.2001. Few months prior to 01.12.2014, P.W. 6 a neighbour of P.W. 1 informed her that when P.W. 1 was not at her home and P.W. 2 alone was available, one person visited her house. On the same day, P.W. 1 inquired P.W. 2 about the same. P.W. 2, in turn, informed that it was the accused who visited the house. She further told that the accused took her outside to a shop and bought bangles and other wearing apparels for her. P.W. 2 also informed P.W. 1 that the accused misbehaved with her. P.W. 1, thereafter, sent P.W. 2 for coolie work in a cotton mill in Palladam. P.W. 2 was staying in the quarters along with other women co-workers. While she was alone there, P.W. 2 fell ill. The Supervisor of the mill took her with the help of other women coworkers to a local hospital. The doctor, after having examined P.W. 2, informed him that P.W. 2 was pregnant by five months. Therefore, the Supervisor brought P. W. 2 to Ariyalur

and let her in the custody of P.W. 1. When P.W. 1 inquired, P.W. 2 told that the accused was responsible for her pregnancy. Therefore, P.W. 1 went in search of the accused. When P.W. 1 saw the accused taking his child in a motor cycle from the school and stopped him by waving her hands, the accused did not respond to her and left the place. Thereafter, P.W. 1 went to the police on 01.12.2014 and made a complaint [Ex. P1]. On the said complaint, P.W. 17, the then Inspector of Police, registered a case in Crime No. 15 of 2014 under Sections 5(f)(ii) r/w 6 of the POCSO Act, 2012. Ex. P.27 is the FIR.

3. Taking up the case for investigation, P. W. 17, visited the village of P.W. 1, examined P.Ws. 1, 2 and other witnesses and recorded their statements. Then, he prepared an observation mahazar and a rough sketch at the house of P.W. 1 in the presence of the witnesses. Then, she forwarded P.W. 2 for medical examination.

4 . P.W. 11, Dr. Banumathi, examined P.W. 2 at the Government Hospital, Jayangondam on 28.11.2014. On such examination, she found that P. W. 2 was pregnant by 24 - 28 weeks. Her vagina allowed two fingers to move freely. Ex. P.10 is the certificate issued by P.W. 11. The learned Magistrate recorded the statement of P.W. 2, on being produced before her, under Section 164 of Cr.P.C.

5. During the course of investigation, P.W. 17 altered the case into one under Section 5(j)(ii) r/w 6 of the POCSO Act. She arrested the accused and forwarded him to court for judicial remand. The accused was also subjected to medical examination.

6. P.W. 12, Dr. Elavarasan, examined the accused on 26.11.2014 and certified that he was sexually potential to perform sexual intercourse with a woman. He extracted semen samples from the accused and the same was also sent for examination. Ex. P.12 is the analysis report.

7. When the investigation was in progress, on 01.12.2014, P.W. 2 delivered a dead male fetus and in respect of the same, a case was registered in Crime No. 416 of 2014 under Section 174 of Cr.P.C. The fetus was sent for examination for postmortem. On 04.12.2014, the femur bone of the fetus was collected and the same was sent to the Forensic Science Laboratory [DNA Division] for examination. The DNA extracted from the blood samples of the accused, the DNA extracted from P.W. 2 and the DNA extracted from the femur of the fetus were examined and on such scientific examination, it was found that the accused was the biological father of the fetus. P.W. 17, collected the analysis report and other records, examined the other witnesses and recorded their statements. On completing the investigation, she laid charge sheet against the accused.

8. Based on the above materials, the trial court framed a lone charge as detailed in the first paragraph of this judgement. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 17 witnesses were examined and 29 documents were marked. No material object was marked. One Dr. Hemamalini, was examined as Court Witness and through her the Dental Certificate issued by her has been proved as Ex. C.1.

9. Out of the said witnesses, P.W. 1, the mother of the deceased has stated that the accused is a mason and she worked along with him in construction sites. She has further stated that some time before the occurrence, when she was not at home, the accused had come to her house, took the deceased outside and bought bangles and other things for her. She has further stated that she came to know from P.W. 6 about the same and then, she also came to know that the accused had misbehaved with P.W. 2. She has further stated that out of fear for the accused, she put P.W. 2 in a private cotton mill at Palladam. She has further stated that while P.W. 2 was in

Palladam, she fell ill and when the Supervisor of the Mill took her to the doctor, it came to light that P.W. 2 was pregnant. She has further stated that the supervisor of the Mill brought her to the village and let her in the custody of P.W. 1. At that time, when P.W. 1 inquired P.W. 2, she told that the accused was responsible for her pregnancy. She has further stated that she made a complaint to the police. P.W. 2, the victim girl has stated that at the time of occurrence she was hardly 14 years old. She has further stated that when she was at home, the accused came and misbehaved with her. However, she has not stated specifically that the accused had sexual intercourse with her. She has further stated that when she was working in the mill at Palladam, it came to light that she was pregnant. Then, she told about the incident to her mother (P.W. 1). P.W. 3 is a co-worker of P.W. 1. He has stated that he had seen the accused visiting the house of P.W. 1 on few occasions. He later came to know that P.W. 2 was pregnant. P.W. 4 is also a resident of the same village and a neighbour of P.W. 1. He has also stated that she had seen the accused visiting the house of P.W. 1 on few occasions. P.W. 5, the Head Master of the School where P.W. 2 was studying, has stated that as per the school records, the date of birth of P.W. 2 is 09.10.2001. Ex. P.3 is the certificate issued by her and Ex. P.4 is the admission slip. P.W. 6, yet another neighbour of P.W. 1, has stated that she had seen the accused visiting the house of P.W. 1 and at that time P.W. 2 alone was in the house.

10. P.W. 7 has spoken about the preparation of the mahazar and the rough sketch. P.W. 8 was examined to speak about the arrest of the accused. But, he has turned hostile and has not supported the case of the prosecution in any manner. P.W. 9 has also turned hostile. P.W. 10 was examined to speak about the preparation of the observation mahazar. She has also turned hostile.

11. P.W. 11, Dr. Banumathi, has stated that she examined P.W. 2 on 28.11.2014. At that time, she found that P.W. 2 was pregnant by 24 - 28 weeks. P.W. 12, Dr. Elavarasan, has stated that he examined the accused on 26.11.2014 and he found that the accused was sexually potential and capable of performing sexual intercourse with a woman.

12. P.W. 13, Assistant Professor in the Department of Forensic Medicine, K.A.P.V.G. Medical College, Tiruchirappalli, has stated that on 06.12.2014, the dead fetus delivered by P.W. 2 was examined by him for postmortem in connection with the case in Crime No. 416 of 2014 on the file of respondent police. It was a male fetus. For the purpose of DNA examination, he collected femur of the fetus. The same was sent to the Forensic Science Laboratory for examination. According to him, the fetus was five months old. P.W. 14, a Police Constable, has stated that he carried the femur of the fetus and handed over the same to the Forensic Science Lab at Chennai for DNA examination as directed. P.W. 15 has spoken about the registration of the other case in Crime No. 416 of 2014 on the complaint of P.W. 1 under Section 174 of Cr.P.C. P.W. 16 is the Scientific Officer at the Government Forensic Lab [DNA Division] at Chennai. She has stated that the DNA extracted from the femur of the fetus delivered by P.W. 2 was examined with the DNA extracted from the blood samples of the accused and P.W. 2. The result proved that the accused was the biological father of the dead fetus. P.W. 17 has spoken about the registration of the present case and the investigation done by him and also the filing of charge sheet against the accused.

13. C.W. 1 has stated that during the year 2014 she was working as Dental Surgeon at the Government Hospital, Jayankondam. On 28.11.2014, she examined P.W. 2. From out of the maturity of the teeth, she assessed the age of P.W. 2, at the time of examination, as less than 18 years. Ex. C.1 is the Dental Certificate issued by her.

14. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C. he denied the same as false. However, he did not choose to examine any witness nor did he mark any document on his side. His defence was a total denial.

15. Having considered all the above, the trial court convicted the appellant/accused as detailed in the first paragraph of this judgment. Challenging the above said conviction and sentences, the accused is now before this Court with the present criminal appeal.

16. We have heard the learned counsel appearing for the appellant/accused and the learned Additional Public Prosecutor appearing for the respondent/State and we have also perused the records carefully.

17. It is the evidence of P.W. 1 during the course of cross examination, that P.W. 2 did not have full mental development. According to her, when she had gone out for masonry work, she used to leave P.W. 2 alone at the house. From the evidence of this witness, it is crystal clear that the accused had acquaintance with P.W. 1, as he used to work with her as mason. P.Ws. 3, 4 and 6, who are neighbours, have stated that on few occasions, they had seen the accused visiting the house of P.W. 2. P.W. 6 had informed P.W. 1 about the same. When P.W. 1 inquired P.W. 2, she told that the accused took her outside, bought bangles and other things for her. Though P.W. 2 told P.W. 1 that at that time the accused misbehaved with her, she had not stated that the accused had sexual intercourse with her against her wish.

18. From out of these circumstances, the learned counsel for the appellant would submit that had it been true that the accused had sexual intercourse with P.W. 2, she would have told the same to P.W. 1. But, we are not at all persuaded by this argument because, as we have already pointed out, P.W. 2 was not fully mentally developed and, therefore, she would not have realized that she was sexually exploited by the accused. That was the reason why, she did not tell P.W. 1 that she had been sexually exploited by the accused. However, she had told P.W. 1 that the accused misbehaved with her.

19. As we have already pointed out, according to the evidence of P.W. 1, P.W. 2 was let in a Cotton Mill for work in Palladam. Since she fell ill, the Supervisor of the Mill took her to the doctor and the doctor found that she was pregnant. It was only at that time, for the first time, she told P.W. 1 that the accused was responsible for her pregnancy. After the complaint was made, P.W. 2 was examined by P.W. 11 on 28.11.2014. P.W. 11 found P.W. 2 pregnant by 24 - 28 weeks. P.W. 2's vagina allowed two fingers to move freely. From the evidence of P.W. 11 it is crystal clear that P.W. 2 had been subjected to sexual intercourse which resulted in pregnancy.

20. Now, the question is as to who had sexual intercourse with P.W. 2 and made her pregnant. P.W. 13, Dr. Saravanan, has stated that P.W. 2 delivered a dead fetus. He examined the fetus on 06.12.2014 and found that the fetus was five months old. It was a male fetus. He collected the femur of the fetus and forwarded the same for DNA examination. The DNA extracted from the femur of the fetus was examined with the blood samples of P.W. 2 and the accused. The result revealed that the accused was the biological father of the fetus. The said opinion of the expert (P.W. 16) cannot be doubted and there is no reason stated by the learned counsel for the appellant/accused to create any doubt. From the un-controverted evidence of P.W. 16, it is crystal clear that the appellant/accused was the father of the fetus in the womb of P.W. 2 and thus, the prosecution has clearly established beyond any doubt that the accused had sexual intercourse with P.W. 2 and made her pregnant. Though

in her evidence, P.W. 2 has admitted that she was not aware as to what was sexual intercourse, from the DNA result, it is crystal clear that the accused had sexual intercourse with P.W. 2. It is not the case of the accused that P.W. 2 had become pregnant due to artificial insemination. The accused has got no explanation as to how his sperm reached P.W. 2 and impregnated her. From the above, the only inference which could be drawn by this court is that the accused had sexual intercourse with P.W. 2 which resulted in her pregnancy.

21. Let us, now, examine as to what was the age of P.W. 2 at the time of occurrence. In this regard, the prosecution relies on the evidence of P.W. 5, the Head Master of the School, where P.W. 2 studied for some time. According to her, as per the school records the date of birth of P.W. 2 is 09.10.2001. Thus, as on the date of occurrence, she was hardly aged 13 years and she was a child as defined in the POCSO Act. Apart from that, C.W. 1, Dr. Hemamalini, has also assessed the age of P.W. 2 as less than 18 years. As per Section 34 of POCSO Act, the age of the victim shall be determined by the court. As indicated in sub-section (1) of Section 34 of POCSO Act, the age of the victim could be determined by following the procedure contemplated in Section 94 of the Juvenile Justice [Care and Protection of Children] Act, 2015. As per sub-section (2) of Section 94, the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; shall be the evidence to determine the age of the child. In the absence thereof; the birth certificate given by a corporation or a municipal authority or a panchayat shall be the evidence for determination of the age of the child. In the absence of either certificate from the school or certificate from the corporation or municipal authority or panchayat authority, the age shall be determined by an ossification test or any other latest medical age determination test. 'Here in the instant case, since the certificate issued by the school authority itself is available, that by itself is sufficient to determine the age of P.W. 2. As per the evidence of P.W. 5 and the certificate issued by her, the date of birth of P.W. 2 is 09.10.2001 and thus, P.W. 2 was a child at the time of occurrence.

22. At this juncture, we may refer to section 29 of the POCSO Act which speaks of presumption as to certain offences which reads as follows:-

"29. Presumption as to certain offence: Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this 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."

23. This presumption, arising under Section 29 of the POCSO Act based on the fact that the accused was the biological father of the fetus in the womb of P.W. 2, would go to prove that the accused had penetrative sexual assault on P.W. 2. Sub-section (k) of Section 5 which defines aggravated sexual assault states that whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child, such sexual assault shall be aggravated sexual assault for which he can be punished under Section 6 of the POCSO Act. Here in the instant case, it is in the evidence of P.W. 1 that P.W. 2 was suffering from mental disability as she was not fully mentally developed. From the fact that P.W. 2 was not able to understand that the accused had sexual intercourse with her would go to show that she was suffering from mental disability. Thus, the act of the accused in making P.W. 2 pregnant is a clear offence of aggravated penetrative sexual assault and thus, he is liable to be punished under Section 6 of the POCSO Act. The trial court was, thus, right in holding him guilty under Section 6 of the POCSO Act.

24. Now, turning to the quantum of punishment, at the time of occurrence, the accused was hardly 35 years old. He is already married and he has got wife and children to take care of. He has no other bad antecedent. Having regard to all these mitigating as well as the aggravating circumstances, we are of the view that sentencing him to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 2,00,000/- would meet the ends of justice. We hold that the sentence of imprisonment for life imposed by the trial court is disproportionate to the mitigating and aggravating circumstances. In the result, the criminal appeal is partly allowed. The conviction of the appellant under Section 6 of the POCSO Act passed by the trial court is confirmed, however, the substantive sentence of imprisonment is modified and it is directed that instead of imprisonment for life, the appellant/accused shall undergo rigorous imprisonment for ten years and pay a fine of Rs. 2,00,000/- in default, he shall suffer rigorous imprisonment for two months. On realization of such fine, the trial court shall pay the entire amount as compensation to P.W. 2 through P.W. 1. It is further directed that the period of detention already undergone by the appellant/accused shall be given set off under Section 428 of Cr.P.C.

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