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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.09.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.No.40 of 2020

Ashwin @ Ali Ashen

...Appellant

.Vs.

The State represented by
Inspector of Police,
Namakkal Police Station,
Namakkal,
Crime No.729 of 2015.

...Respondent

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure to set aside the conviction and sentence against the appellant imposed in judgment dated 18.11.2019 made in Spl.C.C.No.42 of 2016 on the file of the learned Sessions Judge (Fast Track Mahila Court), Namakkal.

For Appellant : Mr.D.Ashok Kumar

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

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 18.11.2019 passed in Spl.C.C.No.42 of 2016 by the learned Sessions Judge, Fast Track Mahila Court, Namakkal.

2.The case of the prosecution is that at the time of occurrence, the victim girl was a minor aged about 17 years. The appellant/A1 is the friend of victim girl's brother and he often visit her house. The appellant proposed his love affair and the same was refused by the victim girl, at the beginning, but, the appellant threatened her that he would commit suicide, if she does not love him, thereafter, they developed love affair and the same was continued for one year. On coming to know about the same, the victim girl's family warned her not to talk with the appellant. The appellant induced the victim girl to come along with him, so that he would marry her. The other accused A2 to A5, who are the friends of the appellant/A1 also induced the victim girl to go along with the appellant. On 10.10.2015 at



about 4.00 a.m the accused 1 to 4 forcibly kidnapped the victim girl from the lawful guardianship of her parents knowing that she is a minor and took her in a TATA car bearing registration No.TN28AB8439 to Trichy. Thereafter, the appellant alone took the victim girl to Aragalur and kept her in the house of A5 and stayed along with her in that house and had committed repeated sexual intercourse with her several times. Hence, P.W.1/father of the victim girl filed a complaint/Ex.P1 on 12.10.2015 against the appellant and other accused.

3.The respondent police registered a case in Crime No.729 of 2015 against the appellant/A1 and four other accused for the offence under Section 366 IPC and altered into Section 366(A), 376 IPC and Section 3 r/w 4 of The Protection of Children from Sexual Offences Act, 2012 [hereinafter referred to as 'POCSO Act' for the sake of convenience]. Subsequently altered into Section 366 (A) and 366 (A) r/w 114 of IPC and Section 6 r/w 5 (1) and 6 r/w 5(1) r/w 17 of POCSO Act. After completing the investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Namakkal and the learned Sessions Judge, taken cognizance of the case in Spl.C.C.No.42 of 2016. The case was split up as against the accused A3 and A5. After completing the formalities, the Sessions Judge framed charges against the appellant/A1 for the offence under Section 366(A) IPC and Section 5(1) r/w 6 of POCSO Act and charges were framed against A2 and A4 under Section 366 (A) r/w 114 IPC.

4.In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 16 witnesses were examined as P.W.1 to P.W.16 and marked 18 documents as Exs.P1 to P18. Besides that one material object was marked as M.O.1. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused/A1, A2 and A4 and questioned under Section 313 of Cr.P.C., wherein they denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, no oral and no documentary evidence was produced.

5. The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that the appellant/A1 is guilty for the following offences:

(i)Under Section 366 (A) IPC, and the appellant/A1 was convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,000/-, in default, to undergo simple imprisonment for a period of six months;

(ii) Under Section 5(1), which is punishable under Section 6 of POCSO Act, the appellant/A1 was convicted and sentenced to



undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,000/-, in default, to undergo simple imprisonment for a period of six months and ordering the sentences to run concurrently.

(iii) However, the Court below found that A2 and A4 not guilty for the offence under Section 366(A) r/w 114 IPC and acquitted them under Section 235(1) Cr.P.C.

6.Challenging the said judgment of conviction and sentence, the appellant/A1 is before this Court.

7.1 The learned counsel for the appellant would submit that on the date of occurrence i.e. on 10.10.2015, the victim girl/ P.W.2 completed 18 years and hence, she is not a child under Section 2(1) (d) of POCSO Act. The age of the victim girl was verified only by marking School Certificate/Ex.P10, but, no birth certificate has been marked by the prosecution. Further, P.W.14/Headmistress of the school, in which, the victim girl studied, has stated that the parents of the victim girl might have given tentative date of birth and they have not produced any age proof certificate, at the time of admission. Hence, the prosecution has not proved that the victim girl is a child and she has not completed 18 years. He would further submit that the parents of the victim girl decided to perform marriage between the victim girl and her maternal uncle. Since the victim girl did not like the said marriage, she voluntarily went along with the appellant. Therefore, the appellant has not committed the offence under Section 366(A) IPC and the trial Court has wrongly convicted the appellant for the said offence. Further, the trial Court failed to appreciate that the victim girl on her own wish went along with the appellant and with consent of the victim girl he had intercourse with her. Therefore, the appellant has not committed the offence under Section 5(1) punishable under Section 6 of POCSO Act. He would further submit that after attaining majority, the victim girl married the appellant and both are living together as husband and wife. However, the learned Sessions Judge failed to consider the entire oral and documentary evidence, convicted and sentenced the appellant only on assumption, conjectures and sympathy. Therefore, the judgment of conviction and sentence passed by the trial Court against the appellant is liable to be set aside.

7.2 The learned counsel for the appellant would further submit that at the time of occurrence, the victim girl was 18 years and the appellant was 24 years and they had developed love affair. Due to love affair, the victim girl eloped with the appellant. Thereafter, they married and the appellant had intimacy with her. He would further submit that sexual intercourse or sexual acts by a man with his own wife, who is not under 18 years of age, is not rape. In support of his



contention, he relied upon the judgment of the Hon'ble Supreme Court in Independent Thought Vs. Union of India and Anr. reported in [2017(10) SCC 800]. Therefore, as per the decision of the Hon'ble Supreme Court the appellant may be acquitted from the charged offences.

8.The learned Government Advocate (Crl.Side) for the respondent would submit that the date of birth of the victim girl is 30.06.1998, whereas, the date of occurrence is 10.10.2015 and thus, she has not completed 18 years and it comes under the definition of Section 2(1)(d) of POCSO Act. He would further submit that the victim girl was produced before the learned Judicial Magistrate for recording her statement under Section 164 Cr.P.C, in which, she clearly stated that on 10.10.2015, the appellant and other accused forcibly took her from her house, thereafter, the appellant married her and had sexual intercourse with her. The statement of the victim girl was corroborated with her evidence during the trial as P.W.2. He would further submit that Doctor/P.W.12 who examined the victim girl has clearly deposed that the victim girl was subjected to sexual assault and her hymen was not intact. From the evidence of P.W.2/victim girl, P.W.12/Doctor, P.W.14/Headmistress and Ex.P10/School Certificate of the victim girl, the prosecution has established its case that at the time of occurrence, the victim girl was below 18 years and she was subjected to penetrative sexual assault. Therefore, the trial Court has rightly convicted and sentenced the appellant and there is no merits in this appeal and the same is liable to be dismissed.

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

10.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.

11.It is a specific case of the prosecution that on 10.10.2015, the appellant forcibly took the victim girl from the lawful custody of her parents without their consent and married her and had sexual intercourse with her and that charges were framed against the appellant as stated above. In order to substantiate the said charges, on the side of the prosecution as many as 16 witnesses were examined, out of which, the victim girl was examined as P.W.2 and she has clearly deposed that her date of birth is 30.06.1998 and also stated that on 10.10.2015, the appellant forcibly took her from the house and had sexual intercourse with her. In order to substantiate the date of birth of the victim girl, the prosecution exhibited Ex.P10/School Certificate of the victim girl.



12.No doubt, age of the prosecutrix has to be proved by the prosecution. Regarding proof of age, there is a presumption under Section 94 (2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 and unless the contrary is proved, the Court can presume age of the victim as mentioned in the Certificate given by any of the Authority as stated in Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015. In this case, prosecution has produced a School Certificate from the School, where the victim studied, and the same was marked as Ex.P10. As per Ex.P10, date of birth of the victim girl is 30.06.1998, which shows that the victim has not completed 18 years at the time of occurrence and she is a child under the definition of Section 2(1)(d) of the POCSO Act. It is relevant to refer Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015, and as per the Act, there is presumption and determination of age, which reads as follows:

'94.(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining – (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof; (ii) the birth certificate given by a corporation or a municipal authority or a panchayat; (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.'

13.The defence taken by the learned counsel for the appellant is that at the time of occurrence, the victim girl completed 18 years and with her consent the appellant married her and had sexual intercourse with her. As per the evidence of P.W.2, P.W.14 and Ex.P10 the prosecution has proved that the date of birth of the victim girl is 30.06.1998. However, the same was not disproved by the defence counsel. On a combined reading of evidence of P.W.2, P.W.14 and Ex.P10, this Court finds that at the time of occurrence, the victim girl was only 17 years and has not completed 18 years. Since she is a child, the offence committed by the appellant comes under the



definition of 2(1)(d) of POCSO Act. Therefore, the contention raised by the learned counsel for the appellant is not acceptable.

14.As far as penetrative sexual assault is concerned, P.W.2/victim girl has clearly deposed before the trial Court as well as before the learned Judicial Magistrate while recording her statement under Section 164 Cr.P.C/ Ex.P15 that on 10.10.2015, the appellant forcibly took her from the lawful custody of her parents with out their consent to various places and had sexual intercourse with her. However, the main defence taken by the learned counsel for the appellant is that the victim girl and the appellant developed love affair, due to which, the victim girl voluntarily left with the appellant and subsequently they married and both of them living together as husband and wife.

15.It is a settled proposition of law, love is not an offence. However, from the evidence of victim girl/P.W.2, this Court finds that at the time of occurrence, the victim girl has not completed 18 years, and she was a minor. The appellant forcibly took her from the lawful custody of her parents without their consent and married her and had committed sexual intercourse on her. Therefore, the offence committed by the appellant falls under the definition of Section 361 IPC which is punishable under Section 366(A) IPC.

16.Further, Doctor/P.W.12 has clearly stated that there were no external injuries found on the victim girl, but, her hymen was not intact and the vagina admitted one finger and she has opined that the victim girl would have had sexual intercourse. She has given Ex.P7/medical certificate. The medical evidence also supported the case of the prosecution.

17.On a combined reading of evidence of P.W.2/victim girl, P.W.12/Doctor and Ex.P7/medical certificate, this Court find that the victim girl was subjected to penetrative sexual assault, which was made by the appellant. Therefore, the act committed by the appellant falls under POCSO Act.

18.As far as aggravated penetrative sexual assault, which falls under Section 5(1) which is punishable under Section 6 of POCSO Act is concerned, the victim girl during her statement recorded under Section 164 Cr.P.C before the learned Judicial Magistrate has stated that the appellant forcibly took her to his friend's house and had committed penetrative sexual assault on her on 10.10.2015. However, during trial, the victim girl has stated that on 10.10.2015, the appellant forcibly took her to Trichy, thereafter, they went to several places and had committed sexual assault on her for more than once. Therefore,



in the absence of any specific evidence, this Court cannot come to the conclusion that appellant had committed aggravated penetrative sexual assault on the victim girl. The trial Court failed to appreciate the evidence of P.W.2/victim girl during trial as well as her statement recorded under Section 164 Cr.P.C/Ex.P15 and had given a finding that the appellant has committed the offence under Section 5(1) punishable under Section 6 of POCSO Act. On a combined reading of evidence P.W.2/victim girl and Ex.P15/statement under Section 164 Cr.P.C this Court finds that offence committed by the appellant falls under Section 3(a) of POCSO Act which is punishable under Section 4 of POCSO Act. Further, minimum sentence prescribed under Section 4 of POCSO Act is seven years.

19.Considering the facts and circumstances of the case, this Court is of the considered view that the appellant has committed penetrative sexual assault on the victim girl once i.e. on 10.10.2015, which falls under Section 3(a) which is punishable under Section 4 of POCSO Act.

20.At this juncture, the learned counsel for the appellant would submit that now the appellant married the victim girl and both are living together as husband and wife and the same may be taken into the credit of this case. This Court is of the view that subsequent marriage will not take away the offence committed by the appellant. Considering the scope of POCSO Act, no sympathy shall be considered.

21. A entire reading of evidence of P.W.2/victim girl, this Court finds that the victim girl was forcibly taken by the appellant and also committed sexual assault, but, the victim girl did not resist the same. At the time of occurrence the victim girl was 17 years, since consent is immaterial. This Court appreciate the efforts taken by the learned counsel for the appellant in arguing the matter. Unfortunately, the offence committed by the appellant falls under POCSO Act. This Court finds that the victim girl is a minor, therefore, the defence taken by the learned counsel for the appellant cannot be credited to this case.

22.The trial Court convicted and sentenced the appellant for the offence under Section 366 (A) IPC and Section 5(1) which is punishable under Section 6 of POCSO Act. However, from the evidence of victim girl/P.W.2, Doctor/P.W.12 and Ex.P7/medical report of the victim girl, this Court finds that the offence committed by the appellant falls under Section 3(a) which is punishable under Section 4 of POCSO Act. Now the appellant married the victim girl and both are living together as husband and wife.



23.Considering relationship between the appellant and victim girl and also considering the mitigating circumstances, this Court is of the opinion that the conviction and sentence imposed on the appellant under Section 5(1) which is punishable under Section 6 of POCSO Act is modified to under Section 3(a) which is punishable under Section 4 of POCSO Act and also the sentence is reduced from ten years to seven years and also for the offence under Section 366 (A) IPC the sentence is reduced from ten years to seven years.

24.With the above modifications, this Criminal appeal deserved to be dismissed and accordingly, dismissed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Fast Track Mahila Court,
Namakkal.
2. The Superintendent,
Central Prison,
Coimbatore.
3. The Inspector of Police,
Namakkal Police Station,
Namakkal.
(Cr.No.729 of 2015)
4. The Public Prosecutor,
High Court, Madras.
5. The Deputy Registrar | with a direction to send back the
(Criminal Section), | original records, if any, to the
High Court, Madras. | trial Court

CRL.A.No.40 of 2020

SS(CO)
RGA(03/03/2022)