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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.02.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.165 of 2020

Rajesh

...Appellant/Accused

Versus

State represented by
The Inspector of Police,
Thirukkanur Police Station,
Puducherry State.
Crime No.44 of 2016

...Respondent/Complainant

PRAYER: Criminal Appeal is filed under Section 374(2) Cr.P.C., against the judgment of the learned Special Judge under the POCSO Act 2012 and Principal Sessions Judge, Puducherry convicting the appellant for the offences

(1) under section 365 IPC and sentencing him to undergo 7 years Rigorous Imprisonment and also imposed a fine of Rs.1000/- in default to undergo 3 months Rigorous Imprisonment.

(2) under section 6 of the Protection of Children from Sexual offences Act 2012 and sentencing him to undergo 10 years Rigorous Imprisonment and also imposed a fine of Rs.1,000/- in default to undergo 3 months Rigorous imprisonment vide a judgment dated 30.01.2020 in Spl.S.C.No.14 of 2016.

For Appellant : Mr.Pa.Kadirvel
Legal Aid Counsel

For Respondent : Mr.V.Balamurugane
Additional Public Prosecutor (Pondy)

J U D G M E N T

This Criminal Appeal has been filed against the judgment of the learned Special Judge under the POCSO Act 2012 and Principal Sessions Judge, Puducherry convicting the appellant dated 30.01.2020 in Spl.S.C.No.14 of 2016.



2. The respondent police registered the case against the appellant in Crime No.44 of 2016 for the offence under section 365 IPC. Subsequently during the investigation the offence has been altered into section 365 IPC and section 6 of POCSO Act 2012. After the investigation, laid charge sheet before the learned Special Judge, Puducherry. Since the offence is against child, the learned Special Judge after completing the formalities, taken the case on file in Spl.S.C.No.14 of 2016. After the trial, the learned Special Judge convicted the appellant for the offence under section 365 IPC, sentenced him to undergo 7 years R.I and pay a fine of Rs.1000/- in default to undergo R.I for three months. For the offence under section 6 of POCSO Act, the accused is sentenced to undergo R.I for 10 years and to pay a fine of Rs.1,000/- in default to undergo R.I for 3 months. Challenging the said judgment of conviction and sentence, the accused has filed the present appeal before this Court.

3. The learned counsel for the appellant would submit that according to the appellant, the occurrence is said to have taken place on 09.06.2016 whereas the complaint was given on 10.06.2016 and the delay in filing the complaint has not been properly explained and even the victim girl soon after securing, she has not stated anything against the appellant. Subsequently after counselling, the victim girl has narrated the incident. Then only, the police obtained statement against the appellant. There is material contradiction between the evidence of victim girl and parents of the victim girl and brother of the victim girl. The doctor has clearly deposed in her statement that there is no possibility of recent sexual intercourse and also there is no external injuries. He further submitted that in the statement recorded under section 164 Cr.P.C also, it is stated that she has not stated anything before the respondent police and also the girl has clearly stated that the appellant has not forcibly taken her and also has not stated that the appellant had forcibly had sexual intercourse with her. So the prosecution has not proved the case and they have not stated how they traced out the appellant and the victim girl. Even the victim girl has stated that she only voluntarily went with the appellant since the parents assaulted the victim girl and restricted her. As per the instructions of victim girl, the appellant has taken the victim girl. Therefore, the appellant no way connected with the case. There are material contradictions between prosecution witnesses and the medical evidence is also against the prosecution case it does not support the case of the prosecution. Call details were collected by the prosecution and the said phone number does not tally with Murugesan phone number and prosecution has not stated how they traced out the appellant



4.Mr.V.Balamurugane, learned Additional Public Prosecutor (Pondicherry) would submit that at the time of occurrence, the victim girl was only aged about 14 years and she was studying 9th standard. The appellant is the relative and is a married man and he used to visit the house of the victim girl in the absence of her parents and develop love with her. Even though he is aged about 35 years and already a married man, he induced the victim girl and made a false promise to the victim girl who is only aged about 14 years and had sexual intercourse with her several times and also provided cell phone. The parents came to know about the same, they warned the victim girl and the victim girl eloped with the appellant and the appellant also without reason, kept the victim girl, who is only 14 years taken away the victim girl without the knowledge and consent of the lawful guardian. He has removed the custody of the victim girl from the custody of the lawful guardian and went to Earvadi and made her to stay with him and had sexual intercourse at several times repeatedly. Subsequently when the parents of the victim girl found that the victim girl not returned to the house, they gave the complaint to the police. The respondent police during the investigation traced out the location of the appellant and the victim girl and went to Earvadi and also from the call details they were able to trace out the appellant and the victim girl. At that time, the mother of the victim girl viz., P.W.2 and P.W.7 were present. Thereafter the police secured the victim girl. Initially when Police asked about the incident, the victim girl has not stated anything. Subsequently after returning to home, respondent police made arrangement to give her counseling. After counseling, the victim girl narrated the incident and thereafter, the respondent police altered the case for offence punishable under section 6 of POCSO Act. After due medical examination, she was produced before the Judicial Magistrate for recording statement under section 164(4) Cr.P.C. After completing the investigation, the respondent police laid the charge sheet. In order to prove the case of the prosecution, 25 prosecution witnesses were examined and 23 exhibits were marked during the trial and the prosecution established its case beyond all reasonable doubt. The trial court after analysing the evidence on record both oral and documentary, convicted the appellant for offence punishable under section 365 IPC and also for offence punishable under Section 6 of POCSO Act and there is no merit in the appeal and it is liable to be dismissed.



5. Heard and perused the records.

6. Admittedly the victim girl is aged about 14 years at the time of occurrence. The victim girl was found missing from 09.06.2016. Therefore, the parents of the victim girl, after searching the girl in and around the place and also relatives house, thereafter, gave complaint before the respondent police on 10.06.2016. Thereafter the respondent police traced out the appellant along with the victim girl nearby Earvadi. Subsequently after investigation, laid the charge sheet. In order to substantiate the charges framed against the appellant, the victim girl was examined as P.W.3 and she has clearly narrated that on 09.06.2016 when she went to the school, she did not return to her house. But she went along with appellant and she has narrated that more than once, the appellant had sexual intercourse repeatedly with her. Further she has stated that whenever she went with the appellant, the appellant had forcible sexual intercourse with her and he had done several times for 8 days on alternative days. Thereafter he also provided phone to the victim girl. When it came to the knowledge of the parents of the victim girl, they warned her. The victim girl informed the same to the appellant. Therefore, the appellant removed the custody of the victim girl without consent of the parents as well as lawful guardian of the victim girl. The appellant also taken the victim girl to Earvadi and one Murugesan was examined as P.W.19. He has deposed that on 10.06.2010 at about 10 O clock, when he was in tea shop, met the appellant along with victim girl and thereafter he only arranged for their stay and taken the house for rent. On 14.06.2016, the police came and asked about the whereabouts of the appellant and he identified the appellant and secured the victim girl with the appellant. Therefore, the evidence of P.W.3 and also P.W.19 clearly prove the occurrence. The parents of the victim girl examined as P.W.1 and 2 and also brother of the victim girl was also examined as P.W.7. On 09.06.2016, the victim girl left the house to the school. Thereafter she did not return from the school and they gave the complaint especially suspected that the appellant could have kidnapped the victim girl. Thereafter P.W.19 has stated that the victim girl was seen along with appellant. Thereafter, the victim girl was secured along with the appellant. Subsequently, the victim girl was produced before the Social Welfare Officer and they provided counselling. After the counselling, she made the statement. The appellant also produced before the doctor. The doctor was examined as P.W.15. He has clearly opined that the appellant is potent. P.W.14 doctor who examined the victim girl opined that there is no recent sexual intercourse but opined that Hymen was not intact. Even though there is no external injury, they had sexual intercourse lastly on 09.06.2016 and secured on 14.06.2016. Subsequently she was examined on 17.07.2019. Therefore it has



been mentioned by the doctor who examined the victim girl that there is possibility of no recent injuries. The opinion of the doctor is that victim girl was objected to sexual intercourse, but not found any new injuries.

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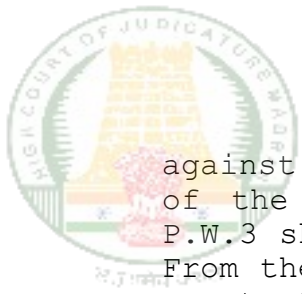
7. The case of the prosecution is that since the age of the victim is only 14 years and appellant has removed the custody of the victim girl without the consent of the lawful guardian, therefore, he has committed the offence under section 365 IPC and also during that period he also had sexual intercourse with the girl repeatedly therefore, he has committed the offence punishable under section 6 of the POCSO Act. Therefore, there is no merits in the Criminal Appeal.

8. The case of the prosecution is that the victim girl (P.W.3) is the daughter of P.W.1 and 2 and was studying IX standard in the year 2016. It is the further case of the prosecution that on 09.06.2016, the appellant allegedly kidnapped P.W.3 and took her to Earvadi at Ramanathapuram District in his motorcycle and kept her in a house at Earvadi till 13.06.2016 and allegedly had sexual intercourse with P.W.3. Hence the complaint.

9. After investigation, respondent police laid charge sheet. After filing charge sheet, the case was taken on file by the Special Judge. The Special Judge after completing formalities framed the charges as above. On the side of the prosecution, in order to prove the case of the prosecution, as many as 25 witnesses were examined as P.W.1 to 25 and 23 documents were marked as Ex.P.1 to 23 besides 5 material objects were marked as M.O.1 to M.O.5. After completing the examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant and he denied it as false and pleaded not guilty. On the side of the defence, neither witness nor document was produced.

10. The appellate Court is a fact finding court. It has to re appreciate the entire evidence to give independent findings for which it re appreciate the entire materials on record.

11. The specific case of the prosecution is that the victim girl is aged about 14 years and the appellant is 35 years and he removed the custody of the victim child from the parents as well as lawful guardian without their consent and therefore, he has committed the offence under Section 365 IPC and had forceful sexual intercourse repeatedly and committed the offence under Section 5(1) which is punishable under section 6 of POCSO Act. In order to prove the case and substantiate the charges framed



against the appellant, the victim girl was examined on the side of the prosecution as P.W.3. A reading of the deposition of P.W.3 shows that she has clearly narrated the entire occurrence. From the evidence of P.W.3, it is seen that she was subjected to penetrative sexual assault by the appellant. P.W.1 and 2 are parents and they have spoken about missing of their daughter and gave complaint before the police as girl missing and they suspected that the appellant might have kidnapped the girl. P.W.7 who is one of the brothers of the victim child has deposed about the acquaintance of the appellant with the victim girl. Subsequently P.W.18 doctor has clearly deposed that she examined the victim girl. P.W.14 who examined the victim girl has clearly stated that though there is no external injury, she was subjected to sexual assault. Even the medical report also clearly shows that there was no external injury. But Hymen was not intact and she was subjected to sexual intercourse though there is no recent intercourse. The doctor examined the victim girl on 15.06.2016. The girl herself told that the appellant had sexual intercourse on 10.06.2016, whereas the victim girl was examined only on 15.06.2016. The victim girl stated that she had mensus thereafter, and the appellant did not had sexual intercourse with the victim girl. The evidence of the prosecution witnesses namely P.W.19 one Murugesan deposed that the police enquired him. However, he only identified them. He only made arrangement to the appellant and victim girl for their stay. Thereafter, respondent police through the said P.W.19, identified the victim girl along with appellant. Therefore, from the reading of the evidence of P.W.1, 2, 7, 14, 19 and also the victim girl PW3 and the victim girl's statement recorded under section 164 Cr.P.C, the prosecution has proved its case. Even though statement recorded under section 164 Cr.P.C is not substantitive evidence, it can be used for the purpose of corroboration on the side of the prosecution and contradiction on the side of the defence. Therefore, on a reading of Ex.P.2/statement of P.W.3 recorded under section 164 Cr.P.C before the learned Judicial Magistrate, it is clear that the victim girl narrated the said events during investigation itself. Therefore, a reading of the complaint/Ex.P.1, evidence of P.W.3/victim girl and Ex.P.11/medical examination report, the Court can draw the presumption that the appellant has committed the charged offences and it is for the appellant to rebut the statutory presumption. In this case, the appellant has not rebutted the said presumption in the manner known to law.

12. The prosecution has proved its case beyond all reasonable doubt. The appellant removed the victim girl from custody of the lawful guardian without their consent and had sexual intercourse with her, therefore, committed offence punishable under section 6 of POCSO Act. Even though under section 29 of the POCSO Act, there is presumption but which is



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rebuttable presumption. But once the victim girl stated that the victim girl went along with the appellant and also had sexual intercourse, medical evidence also support the same, there is presumption and it is for the appellant to rebut presumption in the manner known to law. The appellant stated that with her consent, he had sexual intercourse, however, the age of the victim girl is only 15 years. Ex.P14 is Birth certificate of the victim girl wherein, date of birth of the victim girl is mentioned as 21.09.2001. The occurrence had taken place on 09.06.2016 therefore, at the time of occurrence she was completed only 14 years. Therefore, her consent is immaterial and the prosecution proved its case beyond all reasonable doubt. The victim girl is a child under definition of Section 2(1)(d) of POCSO Act. She has also suffered with aggravated penetrative sexual assault. Since she was minor and her custody was removed from the lawful guardian without their consent, the appellant has committed offence under Section 365 IPC and also committed an offence punishable under section 6 of POCSO Act. The trial Court rightly appreciated the entire evidence and also convicted the appellant and there is no merit in the appeal and the same is liable to be dismissed. Accordingly, the criminal appeal is dismissed. The trial court is directed to take steps to secure the presence of the appellant to serve the remaining period of sentence.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The Inspector of Police,
Thirukkanur Police Station,
Puducherry.
2. The Special Judge (POCSO Act)
Puducherry.
3. The Principal Sessions Judge,
Puducherry.
4. The Superintendent,
Central Prison,
Puducherry.



5. The Public Prosecutor,
High Court of Madras.

6. The Section Officer,
Criminal Section, High Court,
Madras-104.

+lcc to Mr.Pa.Kadirvel, Advocate Sr.10970

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srg 19/07/2021