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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.09.2021

Pronounced on : 27.10.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.332 of 2020

Elango @ Elangovan

... Appellant/Sole Accused

Vs.

State by

The Inspector of Police,

Idapaddi Police Station,

Salem District.

(In Crime No.419 of 2015)

... Respondent

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C, to set aside the judgment and conviction passed in Spl.S.C.No.70 of 2015 dated 06.12.2019 on the file of the Sessions Judge, Mahila Court, Salem and allow the appeal throughout by acquitting the appellant.

For Appellant : Mr.Duraikannan,
Legal Aid Counsel.

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

J U D G M E N T

This appeal has been filed seeking to set aside the judgment and conviction passed in Spl.S.C.No.70 of 2015, dated 06.12.2019, by the file of the learned Sessions Judge, Mahila Court, Salem.

2.The respondent Police originally registered a case against the appellant for the offences under Sections 363 and 366 of I.P.C. After investigation, the Investigating Officer laid a charge sheet altering the offence under Sections 363 and 366 of I.P.C., and section 5(1) punishable under Section 6 of the Protection of Children from Sexual Offences Act before the Mahila Court, Salem. The learned Special Judge had taken the same on file in Spl.S.C.No.70 of 2015 and after completing the formalities, framed the charges against the appellant for the



offences under Sections 363 and 366 of I.P.C., Section 9 of Prohibition of Child Marriage Act and section 5(1) punishable under Section 6 of the Protection of Children from Sexual Offences Act.

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3. On the side of the prosecution, 11 witnesses were examined as PW.1 to PW.11, 18 documents were marked as Ex.P.1 to Ex.P.18 and 1 material object was exhibited as MO.1.

4. After examining the prosecution side witnesses, the incriminating circumstances culled out from evidence of the prosecution witnesses were put before the appellant/accused by questioning under Section 313 of Cr.P.C. and the same was denied as false and he pleaded not guilty. On the side of the appellant/accused, 1 witness was examined as DW.1 and no document was marked.

5. On conclusion of trial and after hearing the arguments advanced on either side, the learned Trial Judge found the appellant/accused guilty for the offences under Sections 363 and 366 of I.P.C., Section 9 of Prohibition of Child Marriage Act and section 5(1) punishable under Section 6 of the Protection of Children from Sexual Offences Act. The appellant was convicted and sentenced by the Trial Court as follows:-

Penal Provisions	Punishment
363 IPC	To undergo three years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default to undergo three months simple imprisonment.
366 IPC	To undergo seven years rigorous imprisonment and to pay a fine of Rs.10,000/-, in default to undergo six months simple imprisonment.
9 of Prohibition of Child Marriage Act	To undergo two years rigorous imprisonment and to pay a fine of Rs.10,000/-, in default to undergo six months simple imprisonment.
5(1) punishable under Section 6 of Protection of Children from Sexual Offences Act	To undergo ten years rigorous imprisonment and to pay a fine of Rs.50,000/-, in default to undergo six months simple imprisonment.

6. Aggrieved against the said judgment of conviction and sentence, the appellant has preferred the present appeal.



7. The learned Legal Aid counsel appearing for the appellant submitted that the appellant has not committed any offence as charged against him and the appellant is running a Tata Ace vehicle. The father of the victim girl used to transport goats in the vehicle of the appellant from his place to Market and the father of the victim girl did not pay the transportation charges for several times. Since the appellant demanded the transportation charges from the father of the victim girl, he foisted a false case against the appellant in order to escape from the payment of transport charges. The learned counsel further submitted that there is no independent witness to prove the fact that the appellant kidnapped the victim girl for the purpose of marrying her. There is also no evidence to show that the appellant had sexual intercourse with the victim girl without her consent. The evidence of PW.5 and PW.6 did not even support the case of the prosecution. The prosecution did not examine any independent witnesses despite the fact that the alleged occurrence took place in a public view to prove the charged offences. The prosecution also failed to prove the initial burden and shifted the burden of proof on the accused. The evidence of PW.1 to PW.4 are unreliable and they are not cogent. The learned counsel would further submit that the Investigating Officer failed to examine any independent witnesses from the public to prove the allegations. The non-examination of the independent witness is fatal to the case of the prosecution. P.W.1 and 2 are interested witnesses and their evidences are cryptic and the same does not inspire confidence of the Court and hence their evidence has to be rejected.

8. The learned counsel further submitted that the counter case was suppressed before the Trial Court. The evidence of PW.1 did not disclose the ingredients of Section 5(1) of Protection of Children from Sexual Offences Act. The evidence of the Investigating Officer would itself prove the fact that the present case is foisted for a personal motive and would disprove the documentary evidences. Therefore, the Trial Court failed to appreciate the evidence and wrongly invoked the presumption under Section 29 of the Protection of Children from Sexual Offences Act and the prosecution has also failed to prove the case beyond all reasonable doubt against the appellant. The learned Trial Judge failed to appreciate the evidence on record and wrongly convicted the appellant. In this case prosecution has miserably failed to prove its case and hence benefits of doubt has to be extended to the appellant/accused and the appellant is entitled for acquittal.

9. The learned Government Advocate (Cr1. Side) appearing for the respondent would submit that the age of the victim is 14 years at time of the occurrence. The victim girl while studying



10th standard, the appellant used to follow her and compelled her to marry him. The appellant along with his parents went to the house of the victim girl and asked her parents to give their daughter into marriage with the appellant. Since the victim girl's parents refused to accept the proposal of the appellant and his parents, the appellant kidnapped the victim girl when she came to attend the nature call on 26.08.2015 at about 11.00 pm and took her to Chennimalai Murugan Temple and married her on 27.08.2015 at about 09.00 am. After marriage, the appellant and the victim girl went to the appellant's friend's house and stayed there and the appellant had sexual intercourse with her forcibly without her consent. When the appellant came to know that Idapaddi Police were searching them, they went to the President of the Village and there, the victim girl removed the thali and handed over the same to the President of the village and the President gave the thali to the appellant and the respondent police arrested the appellant. The victim girl was examined as PW.2 and she has narrated the incident. The victim girl was also produced before the Judicial Magistrate and recorded statement under Section 164 of Cr.P.C., and the same was marked as Ex.P2. She was also sent for medical examination. PW5, who is Doctor, conducted medical examination and submitted his report, which were marked as Ex.P6 and Ex.P7. Ex.P6 is the accident register and Ex.P7 is the medical report of the victim. Ex.P8 is the forensic report. PW.1, the father of the victim girl had spoken about the complaint given before the respondent police. The victim girl is aged about only 14 years at the time of occurrence. To prove the age of the victim prosecution has marked Ex.P14, the school certificate of the victim girl. PW.10 is the Headmistress of the school, where the victim girl studied. Hence the victim girl is a child under the definition of Section 2(1)(d) of Protection of Children from Sexual Offences Act. The learned Government Advocate (Crl. Side) submitted that the prosecution has proved the case beyond all reasonable doubt and the Trial Court rightly appreciated the evidence and convicted the accused and there is no merit in the appeal and the same is liable to be dismissed.

10. Heard the learned Legal Aid counsel for the appellant and the learned Government Advocate (Crl. Side) for the respondent police and perused the materials placed on record.

11. The case of the prosecution is that the appellant is running Tata Ace. The appellant used to follow the victim girl while she studying 10th standard and compel her to marry him. The appellant's parents asked the parents of the victim girl to marry with the appellant. Since, the same was denied by the parents of the victim girl, the appellant kidnapped the victim girl on 26.08.2015 at about 11.00 p.m., and took her to



Cheenimalai Murugan Temple and married her on 27.08.2015 at about 09.00 a.m. Thereafter, the appellant had sexual intercourse with the victim girl without her consent in his friend's house. When the appellant came to know that Idapaddi Police were searching them, they went to the President of the Village and there, the victim girl removed the thali and handed over the same to the President of the village and the President gave the thali to the appellant and the respondent police arrested the appellant based on the complaint lodged by P.W.1 father of the victim girl.

12.This Court as the Appellate Court, final Court of fact finding, it has to re-appreciate the entire evidence and give its findings independently. Accordingly, this Court also re-appreciated the entire evidence and giving its findings as stated below.

13.In order to substantiate the charges framed against the appellant, the prosecution totally examined 11 witnesses and marked 18 documents. Out of 11 witnesses, PW.1, the father of the victim girl spoken about the complaint given against the appellant regarding kidnapping of the victim girl. The victim girl was examined as PW.2 and she has narrated the entire incident. PW.3 is the mother of the victim girl and she had spoken about the missing of the victim girl and stated that the appellant had kidnapped her daughter. PW.5 is the Doctor, who conducted the medical examination on the victim girl. PW.6 is also the Doctor, who conducted potency test on the appellant. PW.8 is the forensic officer. PW.10 is the Headmistress of the school, where the victim girl studied and she had spoken about the age of the victim girl and study certificate of the victim girl issued by her.

Valiance.

14.A reading of the evidence of P.Ws.1 to 3, clearly show that the appellant followed the victim girl and the parents of the appellant approached the parents of the victim girl with a marriage proposal to give their daughter into marriage with the appellant. Since they refused for the same, the appellant kidnapped the victim girl on 26.08.2015 at about 11.00 pm., when she came out to attend the nature call.

15. Therefore it is proved that the appellant used to follow the victim girl while she going to the school and also he expressed his proposal to marry her and also compelled her to marry him. Subsequently, he along with his parents went to the house of the victim girl and asked her parents to give their daughter into marriage with the appellant. Since they refused the proposal, the appellant kidnapped the victim, when she went



to attend the nature call on 26.08.2015 at about 11.00 p.m., and also took her to Chennimalai Temple and on 27.08.2015 married her. Subsequently, the appellant took the victim girl to his friend's house and stayed there and at that time, the appellant had sexual intercourse with her forcibly, without her consent.

16.PW.5 is the Doctor, who conducted the medical examination on the victim girl. P.W.5 has clearly stated that at the time of examination, the victim told her that known person committed sexual assault and found reddishness in the private part of the victim and vagina admits one finger and hymen was not intact. She also made entry in the accident register and issued medical report, which were marked as Ex.P6 and Ex.P7.

17.In order to prove the age of the victim girl, the prosecution examined PW.10, the Headmistress of the school, where the victim girl studied and P.W.10 issued the study certificate to the victim girl, which was marked as Ex.P14. As per Ex.P14, the date of birth of the victim is 01.05.2001 and the victim girl is about 14 years at the time of occurrence. Therefore, it is proved that the victim is a minor and she has not attained the age of 18 years at the time of occurrence and hence she is a child under the definition of 2(1)(d) of the POCSO Act. The victim girl was also produced before the Judicial Magistrate and her statement was recorded under Section 164 Cr.P.C., which was marked as Ex.P2.

18.A combined reading of evidence of PW.2, PW.5, PW.6 and PW.7, clearly prove that the victim was subjected to penetrative sexual assault committed by the appellant. Even assuming that with consent of the victim girl only the appellant had committed penetrative sexual intercourse with her, the consent is immaterial, since the victim girl is about 14 years, she is a minor and she is a child under the definition of Section 2(1)(d) of Protection of Children from Sexual Offences Act. The appellant removed the victim girl from the lawful custody of her parents on 26.08.2015 without their consent. Since the custody of the minor is removed by the appellant without the consent of lawful guardian of the victim girl, which is punishable under Section 363 of IPC. The appellant had the intention to marry the victim and had sexual intercourse. Therefore, the appellant had committed the offence under Section 366 of IPC.

19.As far as offence under Section 9 of Prohibition of Child Marriage Act is concerned, the appellant married the victim girl by knotting thali at Chennimalai Temple and after having sexual intercourse with the victim girl, the said thali was subsequently removed. The prosecution has not examined any of the witness in the village and the appellant's friend to prove



that the appellant married the victim girl. The thali was not recovered and produced before the Court below. Hence, this Court finds that the prosecution has failed to prove the marriage took place between the appellant and the victim girl. Therefore, it is found that the appellant has not committed the offence punishable under Section 9 of Prohibition of Child Marriage Act.

20.As far as the offence under Section 5 (1) of the Protection of Child from Sexual Offences Act is concerned, from the evidence of PW.2, the victim, PW.5, the Doctor and the previous statement of victim/Ex.P2 and entry made in the accident register in the hospital Ex.P6 and the medical report/Ex.P7 given by the Doctor, it is clearly proved that the victim was subjected to penetrative sexual assault by the appellant. Therefore, the appellant has committed the offence under Section 5 (1) which is punishable under Section 6 of the Protection of Child from Sexual Offences Act.

21.Though, the learned Legal Aid counsel for the appellant would submit that the appellant took the victim and married her and with her with her consent only had sexual intercourse with her and a false case was registered against the appellant, it is seen that as per Ex.P14, the victim girl was a child at the time of occurrence and hence the consent is immaterial. Even though the appellant took the victim with her consent, it is punishable under Section 363 of IPC, because the victim was a minor and he took the victim without the consent of her lawful guardian. The victim girl in her statement stated that the appellant had sexual intercourse with her consent first time, subsequently on the same day, when again he tried to have intercourse, the victim denied for the same, in spite of the denial, the appellant forcibly had intercourse with her. Since the appellant had sexual intercourse with the victim girl more than once, the appellant has committed the offence under Section 5 (1) which is punishable under Section 6 of Protection of Children from Sexual Offence Act.

22. This Court finds the appellant guilty for the offences under Sections 363 and 366 of IPC and Section 5(1) punishable under Section 6 of Protection of Child from Sexual Offence Act and the appellant has not committed the offence under Section 9 of Prohibition of Child Marriage Act.

23. Therefore, the judgment of conviction and sentence of the Trial Court is confirmed with regard to the offences under Sections 363 and 366 of IPC and Section 5 (1) punishable under Section 6 of Protection of Children from Sexual Offence Act and set aside as far as the offence under Section 9 of Prohibition



of Child Marriage Act.

24. In the result, the appeal is partly allowed as stated above. The Court below shall take steps to secure the appellant to undergo remaining period of sentence of imprisonment. The Legal Aid counsel is entitled for his remuneration as per rules.

Sd/-

Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

1. The Sessions Judge,
Mahila Court,
Salem District.
2. The Inspector of Police,
Idapaddi Police Station,
Salem District.
3. The Superintendent,
Central Prison,
Salem.
4. The Public Prosecutor,
High Court of Madras.
5. The POCSO Committee,
High Court,
Madras.
6. The Secretary,
High Court Legal Services Authority,
High Court,
Madras.
7. The Section Officer,
Criminal Section,
High Court,
Madras.

Pre-Delivery Judgment in
Crl.A.No.332 of 2020

GJ (CO)

K.RK. (29.11.2021)