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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.08.2021

CORAM:

THE HON'BLE MR.JUSTICE P.VELMURUGAN

CRL.A.NO.329 OF 2020

Jeevanandham @ Jeeva
S/o, Madheswaran

... Appellant

Versus

The State represented by
The Inspector of Police,
Sendamangalam Police Station,
Namakkal District.
(Cr.No.445/2016)

... Respondent

PRAYER:

Criminal Appeal filed under Section 374 of the Code of Criminal Procedure, to set aside the conviction and sentence of the order passed by the Sessions (Fast Track Mahila) Court, Namakkal, in Spl.C.C.No.6 of 2018 dated 19.02.2020 by allowing the appeal and set the accused free under law.

For Appellant : Mr.P.Veeraraghavan
For Respondent : Mr.S.Sugendran
Government Advocate, (Criminal Side)

JUDGMENT

This Criminal Appeal has been filed to set aside order dated 19.02.2020 passed in Spl.C.C.No.6 of 2018 on the file of the Sessions (Fast Track Mahila) Court, Namakkal.

2. The respondent police registered a case against the petitioner for the offence under Section 376 IPC and Sections 3 and 4 of POCSO Act in Crime No.445 of 2016. After investigation, laid a charge sheet before the Sessions (Fast Track Mahila) Court, Namakkal. The learned Sessions Judge, after completing the formalities, framed the charge for the offence under Section 363 I.P.C and also under Section 5(1) r/w 6 of POCSO Act.



3. In order to substantiate the charges framed against the appellant, on the side of the prosecution, totally 20 witnesses were examined and 14 documents were marked. No material object was produced. After completing the examination of the prosecution witnesses, incriminating circumstances were culled out from the prosecution witnesses, put before the accused, by questioning under Section 313 Cr.P.C., and the same was denied by the accused as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced. On conclusion of trial and hearing the arguments advanced on either side and perused the materials on record, the trial judge found the appellant guilty for the offence under Section 363 I.P.C and also under Section 5(1) of POCSO Act, which is punishable under Section 6 of POCSO Act, and he was convicted and sentenced to undergo seven years rigorous imprisonment and to pay fine of Rs.1,000/- in default to undergo one year simple imprisonment for the offence under Section 363 I.P.C and ten years rigorous imprisonment and to pay fine of Rs.1,000/- in default to undergo one year simple imprisonment for the offence under Section 5(1) r/w 6 of POCSO Act. Challenging the said judgment of conviction and sentence, the accused has filed the present appeal before this Court.

4. The learned counsel for the appellant would submit that the age of the victim is 18 years and she is not a child on the date of occurrence and it is the duty of the prosecution to prove the age of victim/prosecutrix. In this case, the prosecution has not proved the age of the victim/prosecutrix that the victim is a minor and not completed 18 years. Though, in order to prove the age of the victim, Ex.P7 has been marked which is not admissible in evidence but the same was marked subjected to objection made by the appellant, though the Headmistress of the School in which the victim girl studied was examined as P.W.13, since she is not the author of Ex.P.7. Further, father and mother of the victim girl were admitted that birth certificate of the victim girl is available with them. The I.O also admitted that he collected the birth certificate, where as the same has not been produced before the Court. Hence, the age of the victim girl was not proved. Since the victim is not a child, offence under POCSO Act would not attract. The trial court failed to appreciate the validity of Ex.P7 and the evidence P.W.13, she herself stated that she had not issued Ex.P7. The prosecution miserably failed to prove the age of the victim. Ex.P7 is not the proof of the age of the victim. The trial Judge failed to appreciate that the prosecution miserably failed to prove the age of the victim girl.

5. Further, the learned counsel for the appellant would submit that there are material contradictions regarding the



date of occurrence, that the victim girl stated that the second occurrence took place on 22.12.2016 in one place and 23.12.2016 in another place. Therefore, the date of occurrence itself doubtful. Other persons who are connected with the offence are not examined as witnesses, which has also fatal to the case of the prosecution. Complaint has not been filed soon after the occurrence. The first occurrence took place on 19.12.2016, but she has not given any complaint either before the police or informed the incident to her parents. Therefore, the complaint itself very doubtful. Veeramani, who is the person alleged to have taken the victim and left her in the appellant's house and standing outside the bathroom, is also examined as witness P.W.9. The other person who alleged to have taken the victim girl along with Veeramani was neither examined as witness nor implicated as accused. There are materials contradictions between the witnesses of P.Ws.1,2, and 3. P.W.1 is the victim girl, she herself stated that the birth certificate is available with them. There is also a contradiction between the evidence given by the victim girl before the Court and also the statement under 164 Cr.P.C before the learned Judge. There are materials contradictions between the evidence of P.Ws.1 to 3, regarding the date of occurrence and the place of occurrence. No material object like D.N.A profile was collected. The prosecution has not proved its case beyond reasonable doubt that the appellant one who committed the penetrative sexual assault on the victim girl. Therefore, even in the statement recorded under Section 164 Cr.P.C, there are some contradictions. The medical evidence also not corroborated with the evidence of the victim. No eye witness has been examined in this case. P.Ws.2 and 3 are the mother and father of the victim girl. P.Ws.1 to 3 are the interested witnesses and they are exaggerated the incident, due to previous motive, they foisted a false case against the appellant. I.O has also not investigated the matter properly and wrongly framed the charges against the appellant. Even the complaint itself very doubtful. The complaint has not filed immediately soon after the occurrence. The first occurrence took place on 19.12.2016 and she has not given any complaint either before the police or informed to her parents. Subsequently, the second incident itself doubtful, it is took place either on 22.12.2016 or 23.12.2016. Therefore, the evidence of the victim girl is not trustworthy. Therefore the trial court miserably failed to appreciate the evidence. Therefore, under these circumstances, the order of conviction and sentenced passed by the trial court is liable to be set aside.

6. The learned Government Advocate (Criminal Side) would submit that at the time of occurrence, the age of the victim girl is only 17 years. She is a child under the definition of Section 2(1)(d) of POCSO Act. Even at the time of giving the complaint itself she has stated her age is only 17 years. In



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the entry in the Accident Register also, the age of the victim girl is mentioned as 17 years. The doctor one who examined the victim girl also mentioned the age of the victim girl as 17 years in her medical records. During evidence, the victim girl has stated that at the time of occurrence she was only 17 years and at the time of giving evidence, she was 19 years, since the occurrence took place two years prior to the recording of evidence of the victim girl before the trial court. Further, even before the Judicial Magistrate, recording the statement under Section 164 Cr.P.C, she has mentioned the age as 17 years. In order to substantiate the same, Ex.P7 was marked which was obtained from the School in which the victim girl was studied. In order to substantiate the same, the Headmistress of the School was examined as P.W.13. Therefore, from the evidence of P.W.13 and Ex.P7 and the evidence of P.Ws.1 to 3 and the statement recorded under Section 164 Cr.P.C, the prosecution proved the age of the victim girl is below 18 years and she is a child under the definition of POCSO Act.

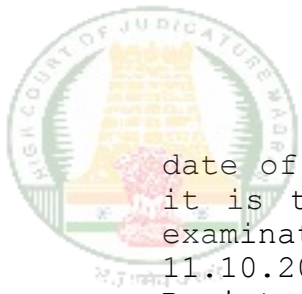
7. As far as the occurrence is concerned, the victim is the complainant one who gave the complaint before the respondent police, while she was admitted in the hospital. Subsequently, the respondent police registered a case against the appellant for the offence under Section 376 IPC and Sections 3 and 4 of POCSO Act in Crime No.445 of 2016. Subsequently, the victim girl was produced before the Judicial Magistrate for recording the statement under Section 164 Cr.P.C and the same was also recorded. The victim girl was examined as P.W.1 before the Court and she has narrated the entire incident and the parents of the victim girl were examined as P.Ws.2 and 3, they have also categorically stated the age of the victim and also the incident which was informed by the victim girl. Subsequently, she was admitted in the hospital. Further the doctors who admitted the victim girl were examined as P.W.14 and also P.W.15. The medical records Ex.P8 , Accident register copy, Ex.P9, Medical report of the victim girl and Ex.P5 Accident Register clearly proved the injury and the victim girl was subjected to penetrative sexual assault and the doctor mentioned that one known person assaulted the victim girl sexually. Therefore, from the evidence, it clearly shows that the the appellant is the one who committed the offence under Section 363 I.P.C and Section 6 of POCSO Act. The evidence of the victim girl is cogent, and also trustworthy and there is no reason to discard the evidence of P.W.1, the victim girl. Therefore, the contradictions pointed out by the learned counsel for the appellant are not material contradictions which would go into the root of the case of the prosecution. From the oral and documentary evidence, the prosecution proved its case beyond reasonable doubt that the victim girl is a child and she was subjected to penetrative sexual assault, which was committed by



8. Heard the learned counsel for the appellant and the learned counsel for the learned Government Advocate (Criminal Side) appearing for the respondent.

10. Admittedly, charges framed against the appellant are offence under section 363 I.P.C and offence Section 5(1) of POCSO Act, which is punishable under Section 6 of POCSO Act. In order to substantiate the charges framed against the appellant, on the side of the prosecution, totally, as many as 20 witnesses were examined as P.W.1 to P.W.20 and 14 documents were marked as Ex.P1 to P14. No material object was marked. Out of 20 witnesses, the victim girl was examined as P.W.1. On a reading of the evidence of P.W.1, she has clearly narrated the incident that, on 19.12.2016, the appellant has committed penetrative sexual assault and again on 22.12.2016, she was subjected to penetrative sexual assault by the appellant. Father and mother of the victim girl were examined as P.Ws.2 and 3. Though, the learned counsel for the appellant vehemently contended that the prosecution has not proved the age of the victim girl, from the evidence of P.Ws.1 to 3 and P.W.13 and also from Ex.P7, the prosecution proved the age of the victim girl is below 18 years and she is a child. In order to prove the age of the victim girl, the prosecution produced the document marked as Ex.P7 through P.W.13. Therefore, on a perusal of Ex.P7, it is a school certificate issued by the Headmistress of the School in which the victim girl was studied, the date of birth of the victim girl marked as 07.06.2000. The date of occurrence is 19.12.2016. Therefore, the age of the victim is only 17 years and she is a child at the time of occurrence. The learned counsel for the appellant contended that Ex.P7 has not been proved in the manner known to law, both the victim and the parents of the victim admitted that the birth certificate is available with them, but the prosecution has not produced the birth certificate collected from the family, which creates suspicion. But, P.W.13 clearly stated that Ex.P7 is the certificate issued from the School after verifying the School records.

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date of offence as to whether it is on 21.12.2016 or 22.12.2016, it is to be noted that date of offence is 19.12.2016, date of examination of victim as witness before the Court is on 11.10.2018. From the evidence of P.W.2, P.W.3 and the Accident Register Ex.P5, the date of second occurrence is only on 21.12.2016 and not on 22.12.2016. On a reading of the statement recorded under 164 Cr.P.C., clearly shows that on 19.12.2016, the victim was subjected to penetrative sexual assault. Since the victim was subjected to penetrative sexual assault more than once, which is an offence of aggravated penetrative sexual assault under Section 5(1) of POCSO Act, which is punishable under section 6 of POCSO Act. Therefore, from the evidence of P.W.1 and the complaint Ex.P1, the statement under Section 164 Cr.P.C Ex.P2, and also the doctors evidences Ex.P8 and Ex.P9, the prosecution proved that the appellant one who committed the penetrative sexual assault on the victim girl. Further, from the evidence of P.W.1, victim girl, P.Ws.2 and 3, parents of the victim girl, the complaint Ex.P1 and the statement recorded under Section 164 Cr.P.C, Ex.P2, and the evidences of the doctors P.W.14 and P.W.15, Exs.P7, P8 and P9, the prosecution proved that the appellant is the one who committed penetrative sexual assault on victim girl more than once. The prosecution also proved that the victim is a child under the definition of Section 2(1)(d) of POCSO Act and she was subjected to penetrative sexual assault by the appellant. There is a presumption under section 29 of POCSO Act, it is for the appellant to rebut the presumption in the manner known to law. Therefore, in this case, on reading of the entire materials on record, this Court also finds that the victim is a child and she was subjected to penetrative sexual assault by the appellant. The trial court also rightly appreciated the evidence, convicted the appellant. Since the appellant removed the custody of the victim child without the consent of the lawful guardian and also committed sexual assault on the victim girl, the appellant has committed the offence under section 361 I.P.C which is punishable under section 363 I.P.C. Therefore, this Court finds that the appellant has committed the offence both punishable under Section 363 I.P.C and also under Section 6 of POCSO Act. There is no merit in the appeal and the same is liable to be dismissed. Accordingly, the Criminal Appeal is dismissed.

Sd/-

Assistant Registrar(CS VII)

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Sub Assistant Registrar

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To

1. The Sessions Judge,
Sessions (Fast Track Mahila) Court,
Namakkal.
2. The Inspector of Police,
Sendamangalam Police Station,
Namakkal District.
3. The Public Prosecutor,
High Court,
Madras.
4. The Superintendent,
Central Prison, Coimbatore.
5. The Section Officer,
Criminal Section, High Court,
Madras.

+1cc to Mr.P.Veeraraghavan, Advocate, S.R.No.42716

CRL.A.No.329 of 2020

KSM(CO)
PM/12/01/2022