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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.07.2021

Coram:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Criminal Appeal No.303 of 2021

Nehru
S/o.Karuppiah

.. Petitioner/Appellant / Sole Accused

Now he is in Central Prison
Trichy and his C.P.No. is 23657

Vs.

The State rep by
The Inspector of Police
Ariyalur Police Station
Ariyalur District
(Crime No.414 of 2018)

...Respondent/Respondent/Complainant

Prayer : Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, praying to set aside the conviction passed by the learned Sessions Judge Fast Track Mahila Court, Ariyalur in Special S.C.No.38 of 2018 dated 29.01.2021 and acquit the Appellant of the charge(s).

For Petitioner : Mr.Sivasubramanian.S.

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

J U D G M E N T

This Criminal Appeal has been filed to set aside the conviction passed by the learned Sessions Judge Fast Track Mahila Court, Ariyalur in Special S.C.No.38 of 2018 dated 29.01.2021.

2. The respondent police initially registered the case in Crime No.414 of 2018 under Section "Girl Missing" and after enquiry the case was altered into Sections 363, 366(A) IPC, 5(1) read with 6 of POCSO Act and the appellant was implicated as an accused. After completing the investigation, the respondent police laid charge sheet for the offences punishable under Section 366 IPC and Section 6 of POCSO Act before the Fast Track Mahila Court, Ariyalur, since the offences were against a woman particularly against a child under the definition of Section 2 (1) (d) of POCSO Act. The learned Magistrate after completing the



formalities taken up the case in Spl.S.C.No.38 of 2018 and subsequently, framed charges against the appellant for the offences punishable under Sections 366 IPC, Section 6 of POCSO Act and Section 376(2) (n) of IPC.

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3. After framing charges, in order to prove the case of the prosecution during trial, on the side of the prosecution as many as 14 witnesses were examined as P.W.1 to P.W.14 and 12 documents were marked as Ex.P.1 to P.12 and no material objects were exhibited.

4. After completing the evidence of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant / accused by questioning under Section 313 Cr.P.C. with reference to the incriminating circumstances appear on the prosecution witness. However, the same were denied by the accused as false and pleaded not guilty. On the side of the defence no oral or documentary evidence was produced.

5. On completion of trial and hearing the arguments advanced on either side and considering the records, the trial Court found guilty of the accused for offence punishable under Section 6 of POCSO Act and convicted and sentenced to undergo 10 years rigorous imprisonment and to pay fine of Rs.10,000/- in default to undergo a further period of 1 year simple imprisonment and also convicted and sentenced him to undergo 10 years rigorous imprisonment and to pay fine of Rs.10,000/- in default to undergo a further period of six months simple imprisonment for the offence punishable under Section 366 IPC besides, a sum of Rs.7 lakhs was awarded as compensation. Challenging the said judgment of conviction and sentence, the accused has filed the present appeal before this Court.

6. The learned Counsel for the appellant would submit that it is the duty of the prosecution to prove that the victim was not completed 18 years and she was a child at the time of occurrence under the definition of Section 2(1)(d) of POCSO Act whereas, in this case, the prosecution has not proved the age of the victim girl. As per the decisions of the Hon'ble Supreme Court as well as this Court in various decisions, the age of the prosecutrix should be proved by the prosecution. In this case, the victim herself has stated in the first instance that her age is 18 years. Whereas, the Investigating Officer has not collected any material or document to show that the victim was a child and without ascertaining the age of the victim, the Investigating Officer proceeded with the case which itself shows that the respondent police have investigated the matter in a wrong direction. In one place the victim herself has stated that her age is 18 years however, in other place, she has stated 17



years. In order to prove that the victim had not completed 18 years and she was a child at the time of occurrence, the only document relied on by the prosecution is Ex.P.8 which is the ITI Educational Certificate of the victim in which, the date of birth of the victim is mentioned as 15.06.2001 and in order to prove Ex.P.8, they examined P.W.10, the Principal of the ITI in which, the victim was studying and she has stated that from the 10th std. school certificate of the victim, they have mentioned the date of birth of the victim as 15.06.2001. However, the said 10th std. certificate was neither produced by the witness, nor collected by the prosecution. Further, the Dentist P.W.9 who conducted the test on the victim girl has stated that the victim may be in the age group between 16 to 18 years. Though the evidence of P.W.9 Dentist is not a conclusive one, she has stated that the age of the victim may be between 16 to 18 years. Therefore, there could be a chance that the victim might have completed 18 years and might have been in the age of 19 years. In the absence of any specific proof to show that the victim had not completed 18 years at the time of occurrence, the benefit of the doubt is in favour of the appellant. Therefore, the charged offence punishable under Section 6 of POCSO Act is not attracted.

6.1 The learned Counsel for the appellant would further submit that there are material contradictions between the prosecution witnesses and also the documentary evidences. When the victim P.W.1 was produced before the learned Judicial Magistrate for recording her statement under Section 164 (5) Cr.P.C., she has not stated anywhere that she was subjected to penetrative sexual assault and subsequently, during evidence, she has stated that she was subjected to penetrative sexual assault for 4 times by the appellant. Therefore, there are material contradictions regarding commission of offence even in the evidence of the victim itself and there is no independent witness regarding the commission of offence. He would further submit that as stated above the victim has completed 18 years and from her evidence, it is clear that she had voluntarily left from her house and went along with the appellant. Further, during the statement before the learned Judicial Magistrate, the victim has not stated anything about the appellant having intercourse with her at the relevant point of time. Further, the Judicial Magistrate was also not examined before the Trial Court as a witness. Even the statement recorded under Section 164 Cr.P.C. was not substantiated by the prosecution before the trial Court. He would further submit that even assuming that the appellant had committed penetrative sexual assault on the victim, however the medical record shows that the hymen of the victim was not intact and there was no external injuries which itself shows that there was no forcible sexual intercourse and it was only with the consent of the victim.

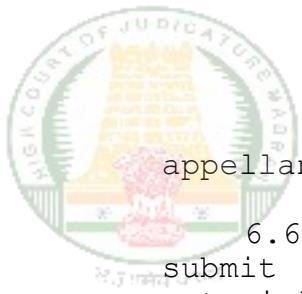


6.2 The learned Counsel for the appellant would further submit that the date of lodging of the complaint is creating a doubt. According to P.W.2 the father of the victim, her daughter was missing from 22.10.2018 and he gave the complaint on 23.10.2018 whereas, the victim P.W.1 has stated that her father P.W.2 had given the complaint on 25.10.2018 and the Police Officer who registered the case has stated that the complaint was given on 24.10.2018. He would further submit that the delay in lodging the complaint has not been properly explained and even after registering the FIR, it has been sent to the Court 2 days belatedly for which, no reason has been given.

6.3 The learned Counsel for the appellant would further submit that even after securing the victim on 25.10.2018, she was not produced before the Judicial Magistrate immediately for recording her statement under Section 164 Cr.P.C. and she was produced only after 10 days which is also fatal to the case of the prosecution.

6.4 The learned Counsel would further submit that there are material contradictions between the evidence of P.W.1 and the Doctors who conducted medical examination on the victim. The evidence of the Doctors not supported the case of the prosecution regarding the age and forceful penetrative sexual assault on the victim. Further, the Investigating Officer has not properly conducted the investigation and a false case has been foisted against the appellant. He would further submit that the date of occurrence and the place of occurrence are also not specific. Further, there are contradictions in the time of apprehension of the victim along with the appellant. P.W.1 in her cross examination has stated that they reached the Ariyalur Bus Stand on 25.10.2018 at 7 p.m. and subsequently, went to Ariyalur Police Station in the night and the police officials intimated the same to her parents P.W.2 and P.W.3. Whereas, P.W.4 the uncle of the victim has stated that on 25.10.2018 evening at about 4.30 p.m., when he had gone to Ariyalur tea shop, he had seen P.W.1 along with a boy and immediately intimated the same to P.W.12 Head Constable who in turn come and apprehended them. Therefore, the time of securing the victim along with the appellant is also doubtful.

6.5 The learned counsel for the appellant would further contend that none of the independent witnesses have been examined in this case. Even, the friends and other college mates of the victim should have been examined to prove the same. If at all P.W.4, the uncle of the victim had seen the victim with the appellant on 25.10.2018 as stated by him, he could have secured her or intimated her parents immediately. Therefore, the prosecution has failed to prove the case beyond all reasonable doubt. Therefore, the benefit of doubt is in favour of the



appellant.

6.6 The learned Counsel for the appellant would further submit that the trial Court has failed to appreciate the materials on record. Even though the victim stated that she had voluntarily left home and went along with the appellant, the trial Court has wrongly convicted the appellant for the offence punishable under Section 366 which warrants interference. Further, the age of the victim is not proved and forcible sexual intercourse is also not proved. Therefore, the conviction under Section 6 of POCSO is also held to be set aside. Nowhere the prosecution has proved the case beyond all reasonable doubt. Even assuming that the victim was a major at the time of occurrence, only on her consent, they had physical relationship and therefore, the offences laid down in this case would not attract. The learned Magistrate has failed to appreciate the evidence of the prosecution witnesses and wrongly convicted the appellant which warrants interference.

7. The learned Government Advocate (Crl. Side) would submit that the age of the victim has been proved by the prosecution. The girl herself has stated that she is 17 years old and her date of birth is 15.06.2001. Further, in order to prove the age of the victim, the Principal of the ITI where the victim was studying, was examined and she produced Ex.P.8 - the ITI Educational Certificate of the victim which clearly shows that the date of birth of the victim is 15.06.2001 and therefore there is no need to prove her age any further. Since the date of birth of the victim is dated 15.06.2001 and the date of missing is on 22.10.2018, the victim had not completed 18 years and she was a child at the time of offence under the definition of Section 2(1)(d) of POCSO Act. As far as consent is concerned, as stated above since the victim had not completed the age of 18 years and was a minor at the time of occurrence, her consent is immaterial and it cannot be accepted for penetrative sexual assault. The Doctor who conducted medical examination on the victim girl has clearly stated that the victim was subjected to penetrative sexual assault and her hymen was not intact and she is not a virgin. Though there was no external injury at the time of medical examination, the Doctor as clearly deposed that at the time of examination, the victim had informed her that the appellant had sexual intercourse with her for four times. As far as the date of complaint is concerned, P.W.2 the father of the victim has clearly stated that his daughter was not returning home on 22.10.2018 and they searched for her daughter everywhere and thereafter, since they could not find her, he gave the complaint thereafter. Therefore, there is no delay in lodging the complaint and the delay is properly explained. As far as the contradictions pointed out by the learned Counsel for the appellant is concerned, they are not material contradictions and



it will not go to the root of the case of the prosecution. Therefore, the prosecution has proved its case that the victim was a child at the time of occurrence under POCSO Act and the appellant has removed the custody of the victim girl from her guardians/parents without their consent. Therefore, the appellant has committed the offence punishable under Section 366 IPC. As far as Section 6 of POCSO Act is concerned, the victim as clearly stated before the Doctor that she was subjected to penetrative sexual assault by the appellant and before the Court also she has stated in her evidence that she was subjected to penetrative sexual assault. Even assuming it was a consensual sexual intercourse, but once the prosecution proved that the victim not completed 18 years at the time of occurrence, her consent becomes immaterial. Therefore, the appellant has committed the offence under Section 5(1) of POCSO Act which is punishable under Section 6 of POCSO Act. Therefore, the trial Court has rightly appreciated the evidences and convicted the accused and there is no reason for interference and there is no merit in this appeal. The appeal is liable to be dismissed.

8. Heard the learned Counsel for the appellant and the learned Government Advocate (Crl. Side) appearing for the respondent police and perused the materials on record.

9. In this case, since this Court is the Appellate Court of final Court of fact finding, it has to re-appreciate the evidence independently and to give its findings. Accordingly, this Court gone through the entire materials and Judgment of the trial Court and appreciated the entire evidence independently and give its finding.

10. In this case the trial Court framed charges against the appellant for the offences punishable under Sections 366 IPC, Section 6 of POCSO Act and Section 376 of IPC. In order to substantiate the charges framed against the appellant, on the side of the prosecution 14 witnesses were examined and 12 documents were marked. Out of 14 witnesses, the victim was examined as P.W.1.

11. A reading of the evidence of the victim child would reveal that she has clearly narrated the entire incident about her friendship with the appellant and he had sexual intercourse with her. In one place, she has stated that the appellant forcibly had sexual intercourse with her. Whether the victim had given consent or not; whether it was a forcible sexual intercourse or not; the same has to be decided depends upon the age of the victim girl. If the victim had completed 18 years, then the consent can be considered and if she had not completed the age of 18 years, then she was a child under the definition of 2(1)(d) of POCSO Act and her consent is immaterial. As far



the age is concerned, the victim herself has stated that her date of birth is 15.06.2001. In order to prove the age of the victim, the Principal of the college in which the victim studied was examined as P.W.10 and through her Ex.P.8- ITI Educational Certificate was marked and she has clearly stated that as per the 10th std. school certificate produced by the victim at the time of admission, her date of birth was mentioned as 15.06.2001. Therefore, the prosecution has proved its case. Further the Dentist who had examined the victim has given opinion that the age of the victim may be between the age group of 16 to 18 years. Though it is not a conclusive proof, one year can be taken as gross. Then the age of victim would be 17 years. Even, as per the school records, the date of birth of the victim is 15.06.2001. The learned Counsel for the appellant has stated that it is the duty of the prosecution to prove the age of the prosecutrix and there is no quarrel with regard to the contention raised by the learned counsel for the appellant. Admittedly, the Hon'ble Supreme Court in various decisions has stated that it is the duty of the prosecution to prove the age of the prosecutrix. Accordingly, in this case, from the evidence of the victim-P.W.1, P.W.10-the Principal, Ex.P7-Dentist report and Ex.P.8- ITI Educational Certificate, the prosecution has proved that the age of the victim was only 17 years at the time of occurrence and not completed 18 years. Therefore, the contention of the learned counsel for the appellant is rejected and this Court comes to the conclusion that the age of the victim was 17 years and not completed 18 years and she was a child at the time of occurrence under the definition of 2(1)(d) of POCSO Act. As far as consent is concerned, this Court decides that since the victim was only 17 years and she was a child at the time of occurrence as stated above, the alleged consent is immaterial. Even if the victim had given consent, the appellant had no right to have such sexual intercourse with a child under the POCSO Act.

12. The further contention of the learned Counsel for the appellant is that the date of lodging of complaint and date of securing the accused. Though there are contradictions between the prosecution witnesses, they are not material contradictions and it will not affect the case of the prosecution.

13. The crux of the matter is that whether the victim was a child under the definition of 2(1)(d) of POCSO Act at the time of the alleged incident. Whether the appellant had sexual intercourse with the victim or not.

14. The learned counsel for the appellant contended that in the statement recorded by the Judicial Magistrate under Section 164 Cr.P.C., the victim has not stated about the penetrative



sexual assault made by the appellant. However, the Doctor P.W.8 who conducted medical examination on the victim girl has clearly stated that the victim had informed her that she was subjected to penetrative sexual assault for 4 times by the appellant. Further, the Doctor has given opinion that the hymen of the victim is not intact and she was subject to penetrative sexual assault. Therefore the evidence of the Doctor P.W.8 corroborated with the evidence of the victim girl P.W.1.

15. The further contention of the learned Counsel for the appellant is that even as per the medical report, there was no external injury on the victim girl which itself shows that the victim did not resist the appellant and she has given consent to the appellant and there was no forcible intercourse. As already stated above, since the victim was a child at the time of occurrence, her consent is immaterial. Therefore, the prosecution has proved its case. The Court comes to the conclusion that the appellant has committed the offence.

16. The victim has informed to the Doctor who conducted the medical examination that she was subjected to penetrative sexual assault for 4 times by the appellant and the doctor has also deposed the same. Therefore the evidence of P.W.1 victim corroborated with the Doctor P.W.8. Therefore, once the prosecution proved its case that the victim was a child and she was subjected to penetrative sexual assault and the custody of the child was removed by the appellant from her lawful guardians/parents without their consent with an intention to have sexual intercourse and accordingly, he also had sexual intercourse with her. Even assuming that the the victim on her own volition went along with the appellant, since she has not completed 18 years, her consent is immaterial and therefore, the appellant has committed the offence punishable under Section 366 IPC.

17. A combined reading of the evidence of the entire witnesses show that appellant has committed the offences of both the charges and the trial Court has rightly appreciated the materials on record. The contradictions pointed out by the learned Counsel for the appellant are not material contradictions which would affect the case of the prosecution and they are immaterial as far as this case is concerned.

18. It is a settled proposition of law that the lapse on the part of the prosecution is not a sole ground to disallow the entire case of the prosecution and to discard the evidence of the victim.

19. From the evidence of the victim girl and medical records, this Court finds that the victim was a child at the time of occurrence and she was subjected to penetrative sexual



assault made by the appellant. Therefore, this Court independently comes to the conclusion that the prosecution has proved its case beyond all reasonable doubt and there is no merit in this appeal.

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20. Accordingly, the Criminal Appeal stands dismissed confirming the Judgment passed in S.C.No.38 of 2018 on the file of the learned Sessions Judge, Fast Track Mahila Court, Ariyalur, dated 29.01.2021.

Sd/-

Assistant Registrar(CS II)

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Sub Assistant Registrar

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To

1. The Sessions Judge Fast Track Mahila Court, Ariyalur.
2. -do- The Principal Session Judge, Ariyalur.
3. The Inspector of Police, Ariyalur Police Station
Ariyalur District
4. The Superintendent, Central Prison, Trichy.
5. The Public Prosecutor Officer, High Court, Madras.

Copy to

The Section Officer, Criminal Section, High Court, Madras.

+1CC to Mr. E.Somasundram, Advocate SR 33855.

Criminal Appeal No.303 of 2021

SPD (CO)

B.VC (16.08.2021)