



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	:	31.08.2021
PRONOUNCED ON	:	22.10.2021

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRIMINAL APPEAL NO.299 OF 2021

Manivasagan

...Appellant

Vs.

The State by Inspector of Police,
Sirubakkam Police Station,
Cuddalore District.
Crime No.78 of 2014

...Respondent

Prayer :

Criminal Appeal filed under Section 374(2) of Criminal Procedure Code praying to set aside conviction and sentence imposed in Spl.S.C.No 45 of 2019 dated 12.02.2021 on the file of the POCSO Cases Court/Sessions Court, Cuddalore.

For Appellant : Mr.R.Sankarasubbu

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

J U D G M E N T

(The case has been heard through video conference)

This Criminal Appeal has been filed against the Judgment dated 12.02.2021 in Spl.S.C.No.45 of 2019 passed by the learned Sessions Judge, Special Court (POCSO Cases) Cuddalore.

2. The respondent police registered the case in Crime No.78 of 2014 against the appellant and three others for the offence under Sections 363, 365 IPC. After completing the investigation, the respondent police laid the charge sheet before the Mahila Court, Cuddalore, as against the appellant/A1 for the offence under Section 366 IPC and Section 5(1) punishable under Section 6 of POCSO Act and Section 9 of Prohibition of Child Marriage Act and as against the accused 2 to 4 for the offence under Section 17 punishable under Section 6 of POCSO Act and the learned Sessions Judge, taken the charge sheet on file in



Spl.S.C.No.4 of 2019. Subsequently, after establishment of the POCSO Court, the case was transferred to the Special Court (POCSO Cases) Cuddalore, and re-numbered as Spl.S.C.No.45 of 2019 and the learned Special Judge, after completing the formalities, framed the charges against the appellant/A1 for the offence under Section 366 IPC and Section 5(1) punishable under Section 6 of POCSO and Section 9 of Prohibition of Child Marriage Act and as against the accused 2 to 4 framed charges for the offence under section 17 read with 6 of POCSO Act.

3. After framing the charges, in order to prove the case of the prosecution during trial, on the side of the prosecution as many as 9 witnesses were examined as P.W.1 to P.W.9 and 11 documents were marked as Exs.P.1 to P.11 and no material object was exhibited.

4. After examining the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant by questioning under Section 313 Cr.P.C. However, the appellant denied the same as untrue 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 materials, the trial Court acquitted A2 to A4 for the offence under Section 17 read with 6 of POCSO Act and A1/the present appellant was acquitted for the offence punishable under Section 9 of Prohibition of Child Marriage Act, however, he was convicted for the offence under Section 366 IPC and also Section 5(1) punishable under Section 6 of POCSO and sentenced to undergo 10 years rigorous imprisonment and to pay fine of Rs.2,000/- in default to undergo 3 months simple imprisonment for the offence under Section 366 IPC and also sentenced to undergo 10 years rigorous imprisonment and pay fine of Rs.2,000/- in default to undergo 3 months simple imprisonment for the offence 5 (1) which is punishable under Section 6 of POCSO Act. Challenging the said Judgment of conviction and sentence, the appellant has filed the present appeal before this Court.

6. Mr.R.Sankarasubbu, learned counsel for the appellant would submit that though the respondent police had issued C.S.R No.53 of 2014 dated 31.10.2014 based on the earlier complaint of the defacto complainant, neither the complaint nor the copy of C.S.R. was produced before the Court by the prosecution which is nothing but suppression of earlier happenings by the prosecution. Further, the learned Judicial Magistrate erred in ignoring the statement given by the victim/P.W.2 before the learned Magistrate under Section 164 Cr.P.C. in which, the victim/P.W.2 herself has clearly stated that she was in love



with the appellant and she had voluntarily left home and requested the appellant to take her to somewhere else since a marriage proposal with one Prakash was going on. Further, the evidence of P.W.2 would clearly show that the appellant never compelled or seduced the victim/P.W.2 to come along with him. Therefore, the offence under Section 366 IPC would not attract and the conviction for the offence under Section 366 IPC is not sustainable and there is no iota of evidence by the prosecution to convict the appellant under Section 366 IPC. However, without any legal evidence, the appellant has been convicted. The learned Counsel would further submit that there was a previous enmity between the family of the defacto complainant and the appellant and taking advantage of the same, the appellant has been prosecuted in order to wreak vengeance. The trial Court misread the evidence and the statement of the victim as if, the accused kidnapped the victim/P.W.2. But the evidence and statement of the victim would clearly show that the victim had left her house on her own volition and requested the appellant to take her to somewhere else and subsequently, the appellant took the victim and married her and there is no sufficient evidence to prove the culpability of the appellant to convict under Section 5 (1) which is punishable under Section 6 of the POCSO Act and that the sentence imposed on the appellant is excessive. Since, the victim herself had voluntarily left home and requested the appellant to take her to somewhere else, no offence would be made out against the appellant and the trial Court failed to appreciate the evidence properly and erroneously convicted the appellant even though from the very same evidence acquitted the other accused. Further, there is no material to show that the appellant married the victim under compulsion. Therefore, the Judgment of the trial Court is liable to be set aside and the appeal may be allowed.

7. Mr.S.Sugendran, learned Government Advocate (Crl. Side) appearing for the respondent would submit that though the earlier complaint given by the father of the victim was registered under "girl missing", later on verification it was found that the appellant kidnapped the victim and subsequently, they lodged another complaint and prosecution has not suppressed the earlier complaint. Even otherwise, there is no bar in Criminal Procedure Code to give a second complaint. While giving the 1st complaint, there was no information regarding who had kidnapped the victim and subsequently when they came to know that the appellant with the help of his family members had taken the victim, they lodged another complaint and the same was taken on file and the respondent police started to investigate the matter. The case of the defence itself admitted that the victim voluntarily left home and requested the appellant to take her somewhere else and subsequently, she left along with the appellant. It is not the case of the defence that the appellant



WEB COPY

does not know about the victim and he never took the victim and there is no access between the appellant and the victim. According to the defence, the victim had voluntarily left her home and made a request to the appellant to take her to somewhere else and therefore, the appellant took the victim girl and she voluntarily went along with the appellant. The trial Court acquitted the appellant for the offence under Section 9 of Prohibition of Child Marriage Act, since the trial Court comes to the conclusion that the marriage was not proved. It is seen that while recording statement by the Judicial Magistrate under Section 164 Cr.P.C., the victim has stated that she had voluntarily left along with the appellant and stayed in the house of A.4 for about one month, during which time, they had sexual intercourse. The case of the defence itself shows that the victim had voluntarily left her home and requested the appellant to take her to somewhere else and thereby, the appellant took the victim and subsequently, had sexual intercourse with her. From Ex.P2, the Birth Certificate of the victim, it is seen that the date of birth of the victim is 07.07.1998 and the date of the occurrence is on 25.10.2014 and therefore, at the time of the occurrence, the age of the victim was only 16 years. Therefore the consent stated to have been given by the victim is immaterial and the act committed by the appellant is an offence since the appellant taken the victim who is a minor from the custody of the lawful guardian without their prior consent for marriage and had sexual intercourse. Therefore, the offence committed by the appellant falls under Section 366 IPC and the trial Court rightly appreciated the evidence convicted the appellant under Section 366 IPC and also 5(1) punishable under Section 6 of POCSO Act. Therefore, there is no merit in the appeal and it is liable to be dismissed.

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

9. This Court being an Appellate Court of fact finding, it has to necessarily re-appreciate the entire evidence and to give its findings independently. Accordingly, this Court re-appreciated the entire evidence and gives its findings independently.

10. The case of the prosecution is that the appellant knowing fully well that the victim is a minor, who was not completed the age of 18 years, with an intend to commit sexual offence, on 25.10.2014 at about 7.30 taken the victim to his house stating that he would marry her. Since A2 and A3 the parents of the appellant instructed the appellant to take the victim to some other place, the appellant on 26.10.2014 took the victim girl to Tiruppur and married her on the same day he took a room for rent



WEB GARY

and had intercourse with the victim girl against her will and thereafter took the victim girl to the house of the A4 and thereby A1 committed offence under Section 366 of IPC, Section 5(1) punishable under Section 6 of POCSO Act and also Section 9 of Prohibition of Child Marriage Act, and A2 to A4 committed offence under Section 17 of POCSO Act.

11. Totally there are 4 accused in this case. The appellant is arrayed as A1 and the other accused are parents and relative of A1. According to the prosecution, the other accused abetted the appellant to commit the offence. However, the trial Court found that the prosecution failed to prove the knowledge and abetment and therefore, acquitted them from the charged offences. However, against the acquittal, neither the victim nor the prosecution has filed any appeal. Therefore, this Court only deal with the conviction against A1 for the offence under Section 366 IPC and also Section 5(1) punishable under Section 6 of POCSO Act.

12. In order to substantiate the charges framed against the accused, the trial Court totally examined 9 witnesses and marked 11 documents and out of 9 witnesses, the victim was examined as P.W.2.

13. P.W.1 is the father of the victim who has spoken about the complaint given before the respondent police regarding his missing daughter/P.W.2 and also spoken about the appellant who said to have kidnapped his daughter and forcefully married her and committed sexual assault on her.

14. P.W.3 is the doctor who conducted the medical examination on the victim. P.W.4 is mother of the victim. P.W.5 is witness to observation mahazar. P.W.8 is the doctor who conducted the medical examination on the appellant for finding out potency. The other witnesses P.W.7 to P.W.9 are police officials and they have spoken about the receipt of the compliant and registration of the FIR and the subsequent investigation and filing of charge sheet.

15. Earlier, the victim was produced before the learned Magistrate to record statement under Section 164 Cr.P.C. and the learned Magistrate also recorded the statement which was marked as Ex.P.11. A reading of the Ex.P.11 would go to show that the parents of the victim were arranging marriage of the victim with one Prakash and therefore, the victim had left her home on her own volition and requested the appellant to take her to somewhere else since she had fell in love with the appellant. Therefore, the appellant took her to the place of occurrence and also married her and subsequently, they stayed in different places and during that period, they both had sexual intercourse.



16. Further, the victim was also produced before the doctor / P.W.3 for medical examination and the medical report was marked as Ex.P.3. As per Ex.P.3 the doctor has recorded the history of case as stated by the victim that the victim had sexual intercourse with the known person i.e. the appellant herein for the past one month and the last sexual contact was 6 days ago with her consent and the doctor also opined that no external injury on the victim but the hymen was not intact and there is no symptoms of recent sexual intercourse.

17. Therefore a combined reading of evidence of P.W.2/victim, P.W.3/doctor and Ex.P.3/ the medical records and Ex.P.11/the previous statement of the victim recorded under Section 164 Cr.P.C., would go to show that the appellant and the victim left from their house and stayed far away for about one month and during that period, the appellant had sexual intercourse with the victim with her consent. Now the only question is whether the act of the appellant is an offence punishable under Section 366 IPC and under Section 6 of POCSO Act. In this regard it is useful to mention the age of the victim. As far as the age of the victim is concerned, the date of birth of the victim is on 07.07.1998 and the date of alleged elopement is on 25.10.2014 and therefore, according to the prosecution, the age of the victim is only 16 at the time of the occurrence. In order to substantiate the age of the victim, the Ex.P.2/ the birth certificate of the victim was marked and the entry made in the birth certificate is genuine unless it is proved contradictory. Since, the defence has not disproved the date mentioned in the birth certificate and the same is not genuine and also considering the fact that the victim has stated that her date of birth is on 07.07.1998, therefore this Court concludes that the date of birth mentioned in Ex.P.2 is genuine. Therefore, at the time of the occurrence, the victim was only 16 years and she had not completed the age of 18 years and hence, she was a child under the definition of 2(1)d of POCSO Act. Once if the Court comes to the conclusion that the victim is a child under the definition of POCSO Act and she is a minor, even assuming that the victim had left her home voluntarily and the appellant took the victim to somewhere else on the request and consent given by the victim, the consent is immaterial since the victim is a child and she cannot give consent and even if she had given consent, legally it is not sustainable. However, according to this Court, Section 366 IPC would not attract, since the marriage was not proved and the appellant kidnapped the child for the purpose of marriage. The act of the appellant would fall under Section 361 IPC, which says that if the custody of the minor girl is removed from the lawful guardian without their consent, then the ingredients of offence under Section 361 would attract, which is punishable under Section 363 IPC.

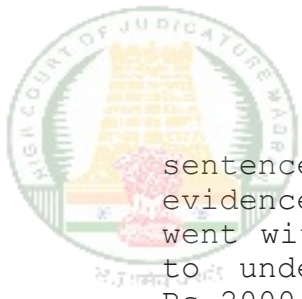


18. In this case the appellant knowing fully well that the victim is a minor and without the consent of the lawful guardian, the appellant has removed the custody of the minor victim girl from the natural/legal guardian and therefore, the offence committed by the appellant falls under Section 361 punishable under Section 363 IPC. However, as per the records and evidence, the appellant had not forcefully kidnapped or taken the victim from the lawful guardian and forcefully married or had sexual intercourse. Hence, this Court is of the view that the appellant has not committed offence under Section 366 IPC, however, it is found that he has committed offence punishable under Section 363 IPC and modified the commission of offence and sentence accordingly.

19. As far as commission of offence under POCSO Act is concerned this Court also come to the conclusion that as stated above, the victim was a child at the time of occurrence. Though the appellant has stated that he had sexual intercourse with the victim with her consent and even the victim has stated in her evidence and also before the Magistrate and doctor that with her consent only the appellant had sexual intercourse with her, as already stated, since the victim was a child under the definition of POCSO Act and therefore, she cannot give consent and even if she had given consent, the consent is immaterial, same is not valid in the eye of law. The child has no legal right to give any consent. Therefore, the consent cannot be a legal one. Once it is admitted by the victim that the appellant had committed penetrative sexual assault which was also proved by opinion of the doctor that the hymen of the victim was not intact and the victim was subjected to penetrative sexual assault and the appellant is the one who committed the offence, therefore this Court as a final Court of fact finding, has come to the conclusion that the appellant has committed the offence and since, the appellant has committed penetrative sexual assault on the victim more than once, the offence falls under Section 5(1) which is punishable under Section 6 of POCSO Act. Therefore, there is no merit in the appeal against the said charge.

20. Therefore, considering the facts and circumstances of the case this Court does not find any perversity in appreciation of the evidence by the trial Court.

21. As far as the conviction and sentence imposed for the offence under Section 5(1) punishable under Section 6 of POCSO Act is concerned, there is no perversity in the judgment of the trial Court. As far as the sentence imposed on the appellant for the offence under Section 366 IPC is concerned, it is modified into Section 363 IPC and this Court is inclined to convict and



sentence for the same, since the victim girl throughout the evidence has clearly reiterated that on her own volition she went with the appellant. Accordingly, the appellant is sentenced to undergo 7 years rigorous imprisonment and pay fine of Rs.2000/- [Rupees Two thousand only], in default, to undergo 3 months simple imprisonment for the offence under Section 363 of IPC.

22. With the above modification, this Criminal appeal is dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

ksa-2/dsn

To

1. The Sessions Judge, Special Court (POCSO Cases) Cuddalore.
2. The Inspector of Police, Sirubakkam Police Station, Cuddalore District.
3. Judicial Magistrate-I, Virudhachalam.
4. The Superintendent Central Prison, Trichy
5. The Public Prosecutor Officer, High Court, Madras.
6. The Section Officer, Criminal Section (Records) High Court, Madras.

Criminal Appeal No.299 of 2021

GP (CO)
PM/10/11/2021