

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 09.03.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.343 of 2020

Sudhakar

.. Appellant
/Accused No.1

.Vs.

State Rep.by
The Inspector of Police,
All Women Police Station,
Denkanikottai
Krishnagiri District
(Crime No.14/2017)

.. Respondent
/Complainant.

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to call for the entire records in connection with Spl.S.C.No.15 of 2018 on the file of the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District and set aside the Judgment dated 29.01.2020.

For Appellant : Mr.E.Kannadasan
Ms.V.Alamelu, Legal Aid counsel

For Respondent : Mr.R.Suryaprakash,
Govt. Advocate (Crl. Side)

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 29.01.2020 made in Spl.S.C.No.15 of 2018 on the file of the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District.

2. The respondent police registered the case against the appellant (A-1) in Crime No.14 of 2017 for the offence under Section 366 (A) IPC and under Section 5(1), 5(n) read with 6 of POCSO Act, 2012. After investigation, respondent police laid the charge sheet before the Special Court/Fast Track Court, Krishnagiri. Since the offence against women particularly child and coming under the POCSO Act, learned Special Judge, after completing formalities, framed charges against the appellant/A-1 u/s.5(1) read with 6 of POCSO Act,

2012 and under Section 366 IPC. Yet another charge was framed against the 2nd accused for the offence u/s.366 A IPC. After framing charges, during the trial, in order to prove the case of the prosecution, on the side of prosecution, as many as 16 witnesses were examined as P.Ws.1 to 16 and 27 documents were marked as Ex.P.1 to Ex.P.27 besides one material object has been marked. After completing the examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses was put before the appellant and he denied as false and pleaded not guilty. There is no oral and documentary evidence produced on the side of the appellant.

3. After completing the trial and hearing the argument advanced on either side, the learned Special Judge acquitted the 2nd accused for the offence u/s.366 (A) IPC. However, the appellant was found guilty of offence u/s.366 IPC and convicted and sentenced him to undergo 5 years rigorous imprisonment and fine of Rs.5000/- in default to undergo 6 months rigorous imprisonment. Further the appellant was found guilty of the offence u/s.5(1) read with 6 of POCSO Act, convicted and sentenced him to undergo 10 years rigorous imprisonment and fine Rs.5000/- in default to undergo 6 months rigorous imprisonment and the appellant was found guilty u/s.5 (n) read with 6 of POCSO Act 2012 and convicted and sentenced him to undergo 10 years rigorous imprisonment and fine of Rs.5000/- in default to undergo 6 months rigorous imprisonment.

4. Challenging the said conviction and sentence, the appellant has filed the present appeal. Even though the 2nd accused was acquitted, the prosecution has not filed any appeal.

5. Mr.E.Kannadasan, learned counsel appearing for the appellant argued the matter in length. This court also appointed a legal aid Counsel and Ms.V.Alamelu, who appeared before the court also argued the matter. This court heard the arguments advanced by learned counsel appearing for the appellant and the Legal Aid Counsel appointed by this court on behalf of the appellant.

6. The learned counsel appearing for the petitioner would submit that there are material contradictions between the prosecution witnesses. Victim girl has stated that she voluntarily went to Harish and the said Harish took the victim girl to the appellant and thereafter the appellant taken the victim girl and stayed with her somewhere else and in such circumstances, Harish was already acquitted and on the basis of the confession statement of Harish, this appellant and the

victim girl was secured. Once the said Harish - A2 was acquitted, the appellant cannot be convicted for the offence u/s.366 IPC since the victim girl has not stated that the appellant has forcefully kidnapped her. Therefore, the prosecution failed to establish the commission of offence against the appellant u/s.366 IPC. Therefore, the conviction rendered by the learned Special Judge requires interference.

7. The learned Legal Aid counsel argued that the victim girl has stated that she loved the appellant and the appellant had penetrative sexual intercourse. The victim girl has not stated that she was forcefully sexually assaulted by the appellant. Therefore, section 5(1) of POCSO Act will not attract. Only on the consent given by the victim girl, the appellant had sexual intercourse. The doctor who examined the victim girl stated that there was no external injury and no forceful sexual assault. The opinion of the doctor is that there is possibility of victim girl having sexual intercourse. P.W.15 is not the eyewitness. Based on the opinion given by the doctor, the appellant cannot be convicted. The victim girl has stated that the appellant had sexual intercourse with her in her grand mother's house. But in the statement recorded u/s.164 Cr.P.C., by Judicial Magistrate, the place of occurrence stated is not clear and it creates doubt. Further as per the evidence of P.W.12 doctor, the victim girl was brought by her mother at 5.15 p.m., and that she was subjected to sexual assault and so she referred the victim girl to Gynaecologist. P.W.15 has stated that the victim girl was brought to her on 14.09.2017 at 6.00 pm., that is within 45 minutes. The victim girl was taken to Gynaecologist who also examined her on the same day and it creates doubt. The prosecution has not collected any call details. The victim girl has stated that she had love affair with the appellant and both used to talk in telephone. The appellant used to call through phone and so the call details not collected by the prosecution and as such the prosecution failed to prove the case beyond reasonable doubt.

8. The learned Government Advocate (Criminal Side) would submit that the victim girl is aged about 15 years at the time of occurrence. She was studying in the appellant's house and the appellant had sexual intercourse with her. The father of the appellant came to know the occurrence. So the victim girl left their house. Subsequently the appellant not loved the victim girl and continued to talk over phone and even after that as and when he wants to have penetrative sexual assault with the victim girl, called her over phone and used to have sexual intercourse. On the day of occurrence, the victim girl was taken by the appellant and he had sexual intercourse. The victim girl has stated that on 05.09.2017 the appellant came to the house of the victim girl and promised to marry her and also took away her in his two wheeler. He took her to nearby

Dharmapuri. After knowing that the parents of the victim girl are searching the victim girl, left her in her parents house. Then the parents of the victim given complaint before the police. Subsequently the victim girl was produced before the doctor P.W.12 who also examined the victim girl. P.W.15 also spoken about the medical examination of the victim girl. P.W.15 has clearly stated that hymen was not intact. There is possibility of sexual intercourse. P.W.2 and P.W.3, mother and father of the victim girl were examined. They have stated that the appellant took the victim girl without their consent. Subsequently they made the police complaint. The appellant knowing that the parents of the victim girl are searching her, left her and thereafter police complaint was given. The victim girl was produced before the Judicial Magistrate to record the statement u/s.164 Cr.P.C. The statement recorded before the Magistrate was marked as Ex.P.2. A reading of Exhibits P.1 to P.3 and also the statement recorded from P.W.1 viz., Ex.P.2 and also Ex.P.5-birth certificate of the victim girl and also medical certificate of doctor in respect of the medical examination of the victim, proved the case beyond all reasonable doubt. Though the prosecution failed to prove that Harish knowingly taken the victim girl to the appellant to a sexual assault, Section 366 A IPC not proved. However, the prosecution has proved its case against the appellant. The trial court rightly convicted the appellant. There is no merit in the appeal and is liable to be dismissed.

9. Heard and perused the records.

10. The case of the prosecution is that the victim girl is aged about 15 years at the time of occurrence. She was studying in the appellant's house and at that time, the appellant had sexual intercourse with her. The father of the appellant came to know the occurrence. So the appellant and victim girl left their house. Subsequently the appellant continued to talk over phone and used to have sexual intercourse. On the date of occurrence, the victim girl was taken by the appellant and he had sexual intercourse. The victim girl has stated that on 05.09.2017, the appellant came to the house of the victim girl and promised to marry her and also took away her in his two wheeler to nearby place in Dharmapuri. After knowing that the parents of the victim girl are searching the victim girl, left her in her parents house. Then the parents of the victim given complaint before the police, subsequently case was registered in crime No.14 of 2017. After investigation, the police laid charge sheet. The Special Court on completion of formalities, taken the case on file and framed charges against the appellant (A-1) and other accused (A-2).

11. The Appellate court is a fact finding court. It has to re-appreciate the entire evidence and give an independent finding, for which this court also gone through the entire material evidence.

12. The Special Court framed charges against the appellant as stated above. In order to prove the charges framed against the appellant, the prosecution has examined 16 witnesses out of which victim girl was examined as P.W.1 and she has clearly narrated the events. P.W.1 victim girl was produced before Judicial Magistrate during the investigation and the Magistrate also recorded her statement u/s.164(5) Cr.P.C. The said statement was marked as Ex.P.2.

13. A reading of Ex.P.2 statement recorded by the Judicial Magistrate would go to show that the victim girl has clearly narrated the events. It is stated that the appellant and the victim girl was staying in the appellant's house. The appellant is brother's son of the paternal uncle. However, the appellant forced to have sexual intercourse. The appellant also proposed love to victim girl. Initially she refused the proposal of love. The appellant apprehended the victim by saying that he would cut his hand and die. So she also loved the appellant. Both the appellant and victim girl used to have sexual intercourse several times. Thereafter, the appellant went to his friend's house. Thereafter, the appellant took the victim girl to several places and subsequently they came to know that the parents of the victim girl gave the complaint and police is searching and so he surrendered before the Police. Though the statement recorded u/s.164 Cr.P.C. is not substantive evidence, it can be used for corroboration by the prosecution or for contradiction by the accused. The evidence of the victim girl stated before the trial court has to be taken into consideration. Evidence of P.W.1 clearly shows that there is no eye witness. It is seen that the victim girl was staying in the house of appellant when she was studying 7th to 9th standard. So the appellant had easy access with the victim girl. The victim girl also stated that the appellant forced her to love him and he threatened her to have forcible sexual intercourse with him. When the father of the victim girl came to know the events, the victim girl was sent to her parents house. At that time, the appellant continued to talk over phone and on the date of occurrence, ie., on 05.09.2017, friend of the appellant contacted the victim girl and the victim girl was asked to come out of her house and thereafter, the appellant took the victim girl and committed sexual assault. At the time of occurrence, the age of the victim girl was aged 15 years and custody of the victim girl was removed by the appellant from her lawful guardian without the

consent and thereby he committed offence u/s,366 IPC.

14. The evidence of victim girl shows that she has spoken about the entire occurrence. She has spoken that she was subjected to sexual assault. The evidence of P.W.1 victim girl was corroborated by P.W.,15 doctor evidence. The evidence of mother of the victim girl is also very clear. She has spoken that victim girl was minor at the time of occurrence. The father of the victim girl also spoken about the occurrence. P.W.5 is Vice President of the Panchayat and spoke about missing of the victim girl and that subsequently parents gave complaint to All Women Police Station. Subsequently the victim girl was produced. P.W.12 doctor has clearly stated about the history of the case. She has stated that mother of the victim girl brought her stating that she was subjected to sexual assault. She referred the victim girl to Gynecologist. Subsequently victim girl was examined clinically by P.W.14 doctor. After examination, victim girl given the certificate and opinion.

15. Therefore, from the evidence of P.W.1 victim girl and the evidence of PW.2 and P.W.3 parents and the evidence of doctors P.W.12 and 15 and Ex.P.2 statement recorded by the Judicial Magistrate, the trial court has convicted the appellant for all the charges framed against him. Since the date of birth of the victim girl is 14.06.2002 as per her birth certificate, she is a child under the definition 2(1)(d) of POCSO Act since she was not completed age of 18 years. So the appellant taking away her custody from her lawful as well as natural guardian without their consent is an offence u/s.366 IPC. Further, the victim child is below 18 years and since she was subjected to sexual assault made by the appellant is an offence u/s.5(1) read with 6 of POCSO Act. The said charge is proved by the prosecution from the evidence of the victim girl which was also corroborated by the medical evidence. The medical evidence is very clear that the victim girl was subjected to sexual assault. Therefore, the appellant is found guilty for the offence under section 5(n) read with Section 6 of POCSO Act. Therefore, the trial court has rightly convicted the appellant. This court is of the view that the prosecution has proved its case beyond all reasonable doubt by way of evidence of P.W.1 and also Exhibits P.1-complaint, Ex.P.2 - statement recorded u/s.164 Cr.P.C., Ex.P.4 - Age Proof certificate, Ex.P.15 - Accident Register of the victim girl and also Ex.P.16 Medical certificate.

15. This court does not find any merit in the appeal and the appeal is liable to be dismissed. Accordingly, the criminal appeal is dismissed. The Judgment of conviction and sentence dated 29.01.2020 made in Spl.S.C.No.15 of 2018 on the

file of the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District, is confirmed.

16. The Legal Aid Counsel who argued the case on behalf of the appellant is entitled for the legal fees as per Rules.

Sd/-
Assistant Registrar (CS-VII)

//True copy//

Sub Assistant Registrar

nvsri

To

- 1.The Inspector of Police,
All Women Police Station, Denkanikottai
Krishnagiri District
- 2.The Sessions Judge, Fast Track Mahila Court,
Krishnagiri, Krishnagiri District.
- 3.The Section Officer, Criminal Section, High Court, Madras
- 4.The Public Prosecutor Office, High Court, Madras.
5. The Superintendent,
Central Prison, Vellore.
6. The Member Secretary,
Tamil Nadu Legal Aid
Services Authority,
High Court, Madras.

+1cc to Ms.V.Alamelu, Advocate SR.No.15112

+1cc to Mr.E.Kannadasan, Advocate SR.No.14931

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RK(CO)
GMY(12/07/2021)