

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.03.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.302 of 2019

Sakthivel

.. Appellant

.Vs.

State by the Inspector of Police,
All Women Police Station,
Krishnagiri, Krishnagiri District,
Crime No.8 of 2018.

.. Respondent

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.36 of 2018 on the file of the learned Sessions Judge, Fast Track Magalir Neethi Mandram, Krishnagiri, Krishnagiri District and set aside the judgment dated 16.04.2019.

For Appellant : Mr.E.Kannadasan

For Respondent : Mr.R.Surya Prakash
Government Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 16.04.2019 in Spl.S.C.No.36 of 2018 on the file of the learned Fast Track Magalir Neethi Mandram, Krishnagiri, Krishnagiri District.

2.The case of the prosecution is that on 08.04.2018 at about 4.30 p.m the appellant abducted the victim girl (P.W.2) from her house to Tirupathi for the purpose of committing sexual assault. On the same day itself, he married the victim girl at Kiltirupathi. Thereafter, on 11.04.2018, the appellant took the victim girl to his friend's house situated at Avadanapatti Colony, Krishnagiri District and forcibly committed sexual assault with her. Subsequently, a complaint has been filed by (P.W.1), who is the mother of the victim girl before the respondent police. Based on the complaint given by P.W.1, the respondent police arrested the appellant and secured the victim girl.

3.The respondent police registered a case in Crime No.8 of 2018 for the offence punishable under Section 366(A) IPC later altered into Section 5(1) r/w 6 of The Protection of Children

from Sexual Offences Act, 2012 [hereafter 'POCSO Act' for the sake of convenience]. After investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Fast Track Magalir Neethi Mandram, Krishnagiri, Krishnagiri District. Since the offence is against a girl child, it falls under the definition of POCSO Act, 2012 and the learned Sessions Judge taken cognizance of the charge sheet in Spl.S.C.No.36 of 2018. After completing formalities, the trial Court framed the charges against the appellant for the offence under Section 366 IPC, Section 9 of Prohibition of Child Marriage Act, 2006 and Section 5(1) r/w 6 of POCSO Act.

4. In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 17 witnesses were examined as P.W.1 to P.W.17 and also marked Exs.P1 to P26 and no material object was marked. After completion of the prosecution side evidences, the incriminating circumstances were put against the appellant/accused under Section 313 of Cr.P.C and he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

5. The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that the accused/appellant is guilty and convicted and sentenced him as follows:-

- For offence punishable under Section 366 IPC, the appellant has to undergo Rigorous Imprisonment for a period of five years and to pay a fine of Rs.5,000/- and in default to undergo rigorous imprisonment for a period of six months.
- For offence punishable under Section 9 of Prohibition of Child Marriage Act, 2006, the appellant has to undergo Rigorous Imprisonment for a period of one year and to pay a fine of Rs.5,000/- and in default, to undergo rigorous imprisonment for a period of two months.
- For offence punishable under Section 5(1) r/w 6 of POCSO Act the appellant has to undergo Rigorous Imprisonment for a period of ten years and to pay a fine of Rs.5,000/- and in default, to undergo Rigorous Imprisonment for a period of one year and ordering the sentences to run concurrently.

6. Being aggrieved by the said judgment of conviction and sentence, the appellant is before this Court.

7.1 The learned counsel for the appellant would submit that the de facto complainant (P.W.1) / the mother of the victim girl has not supported the case of the prosecution. In the complaint (Ex.P18) she has stated that on 08.04.2018 at

about 4.30 p.m her daughter went to the shop, did not return and on suspicion, she gave a complaint to the respondent police as her daughter was kidnapped by the appellant. However, she has not named the appellant in her chief examination. Whereas, the victim girl (P.W.2) in her chief examination has deposed that since she did not study well, her father scolded her and hence, she left the home and went to her grand mother's house. After one week, her grandmother brought back to her home and she has also not named the appellant in her chief examination. Therefore, the evidence of P.W.1 and P.W.2 are not supported the case of the prosecution. He would further submit that the prosecution witnesses namely P.Ws.1 to 8 turned hostile and they have not supported the case of the prosecution. The Doctor (P.W.14), who examined the victim girl has also not supported the case of the prosecution and she has opined that there was no external injury and the victim girl was not subjected to sexual intercourse. When the victim girl was produced before the learned Judicial Magistrate for recording statement under Section 164 Cr.P.C., (Ex.P2), she clearly stated that she was not subjected to penetrative sexual assault by the appellant. However, the trial Court failed to consider that none of the witnesses had spoken about the ingredients of said offence. Therefore, under Section 5(1) r/w 6 POCSO Act was not made out and the conviction and sentence against the appellant for the said offence is unwarranted.

7.2. The learned counsel for the appellant would further submit that none of the prosecution witnesses have stated that the appellant had kidnapped the victim girl and forcibly married and committed penetrative sexual assault with her and that there was no eye witnesses to the said occurrence. Further, the 'Thali' of the victim girl was not recovered by the Investigating Officer. Therefore, the prosecution has not established the child marriage under Section 9 of Prohibition of Child Marriage Act and also for the offence under Section 366 IPC. The trial Court erroneously convicted and sentenced the appellant for the offence under Section 9 of Prohibition of Child Marriage Act and also for the offences under Section 366 IPC and Section 5(1) r/w 6 of POCSO Act.

7.3 The learned counsel for the appellant would further submit that while recording the statement under Section 164 Cr.P.C the victim girl (P.W.2) had not made any statement that she was forcibly subjected to sexual intercourse with the appellant. Therefore, the statement of the victim girl under Section 164 Cr.P.C., not substantiated the case of the prosecution. During the trial, the victim girl (P.W.2) clearly deposed that she went to her grand mother's house and stayed there and after one week she was brought back to her home by her grandmother and she has not stated that the appellant kidnapped her and forcibly married and committed sexual assault with her. Therefore, the prosecution has not established its case that the appellant kidnapped the victim

girl. Further, there was no eye witness to the said occurrence. He would further submit that there are material contradictions in the evidence of the victim girl during trial and the statement under Section 164 Cr.P.C. However, the trial Court failed to consider all these facts and legal positions and only based on the assumptions, simply convicted the appellant, which is against the criminal jurisprudence.

7.4 The learned counsel for the appellant would finally submit that the victim girl has not stated that she was subjected to penetrative sexual assault by the appellant, therefore, the presumption under Section 29 and 30 of POCSO Act, does not arise in this case. Therefore, the prosecution failed to prove its case beyond all reasonable doubt. The learned Special Judge failed to appreciate the prosecution evidence in the right manner and simply convicted the appellant on the ground of sympathy, which warrants interference of this Court.

8. The learned Government Advocate (Crl.Side) would submit that P.W.1 the mother of the victim girl had preferred the complaint before the respondent police and she also admitted her signature in the complaint (Ex.P18). However, the reason best known to her that she has not supported the case of the prosecution. During the trial, she has stated that her daughter was missing and she searched in and around her house and was not found anywhere then she realized that her daughter was kidnapped by the appellant and gave the complaint. She admitted the complaint gave to the respondent police. Further, the victim girl was produced before the learned Judicial Magistrate for recording statement under Section 164 Cr.P.C, which was marked as Ex.P2, wherein, the victim girl has stated that she was not subjected to penetrative sexual assault by the appellant, however, she has stated that the appellant taken her to Tirupathi and married her and thereafter, they came back to their native. However, in her cross examination she admitted that the appellant kidnapped her and married and she was subjected to penetrative sexual assault. Therefore, the prosecution has proved its case beyond reasonable doubt. The evidence of the Doctor (P.W.14) and also the Medical Report of the victim girl indicate that there are possibilities of sexual assault and the hymen of the victim girl was also not intact. Therefore, the evidence of the Doctor (P.W.14), coupled with the Medical Report confirms that the victim girl was subjected to penetrative sexual assault. Therefore, under these circumstances, the offence under POCSO Act is very well established and hence, this Court has no hesitation to consider the evidence of the victim girl alone, and it cannot expect any corroborative evidence or eye-witness or any other independent witness. From the evidence of the mother of the victim girl (P.W.1), victim girl (P.W.2), the Doctor (P.W.14) the prosecution has clearly established their case beyond reasonable doubt that the victim girl, at the time of occurrence, was only 17 years old, and the

appellant kidnapped her and married her and has committed penetrative sexual assault on the victim girl. Therefore, the trial Court has rightly convicted the appellant and the appeal is liable to be dismissed.

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

10. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.

11. The complaint (Ex.P18) has been lodged by P.W.1, who is none other than the mother of the victim girl. Though she was not an eye witness to the occurrence, as the victim girl was missing and it was found that the appellant had kidnapped the victim girl, she filed the complaint before the respondent police. She has also admitted her signature found in the complaint. A reading of the complaint (Ex.P18) clearly indicates that on the date of occurrence, when the victim girl went to the shop and did not return to home, on suspicious that the appellant kidnapped her daughter, a complaint was lodged. During the trial, she has not supported the case of the prosecution, however, she admitted that her daughter has gone to shop and she did not return to home. Subsequently, she came to know that her daughter was in her mother's house. Whereas, the victim girl, who was examined as P.W.2 has clearly deposed that on 08.04.2018, she left the home with out informing the same to her parents. Based on the complaint given by the mother of the victim girl, the appellant and the victim girl were secured by the respondent police. Subsequently, the victim girl has given a letter to the respondent police narrating the said incident. However, the same was not marked.

12. The defence taken by the learned counsel for the appellant is that there is a contradiction in the evidence of the victim girl during trial and the statement recorded under Section 164 Cr.P.C by the learned Magistrate. It is a well settled law that the statement of the witnesses recorded under Section 164 Cr.P.C is not a substantive piece of evidence, it can be used by prosecution to corroborate the evidence given in the Court and defence can be used for contradiction. While recording the statement of the victim girl under Section 164 Cr.P.C. she clearly stated that she was in love affair with the appellant. After arrival from the college on 27.03.2018, the appellant asked her to elope and that they went to Tirupathi and the marriage was performed between them. Thereafter, they came to her native and surrendered before the All Women Police Station, Krishnagiri and she refused to go with her parents. Hence, she was kept in the home. From the statement recorded under Section 164 Cr.P.C, clearly shows that the victim girl went to Tirupathi along with the appellant and not to her grand mother's house. Therefore, the

statement of the victim girl recorded under Section 164 Cr.P.C was corroborated with the evidence given before the trial Court by the victim girl to the extent that on 08.04.2018 the appellant took the victim girl and also married her.

13. During the chief examination of the victim girl, has deposed that she narrated the entire facts and the same was corroborated with the statement recorded under Section 164 Cr.P.C by the learned Judicial Magistrate. However, in her cross examination she deposed that she was kidnapped by the appellant, thereafter, he married her and she was subjected to sexual intercourse. The statement recorded under Section 164 Cr.P.C is not a substantive evidence, it can be used for corroboration or for contradictions. The victim girl herself admitted the said facts during the cross examination before the Court as P.W.2.

14. As far as the marriage is concerned, the prosecution has failed to prove its case beyond reasonable doubt. Even though, the victim girl stated that the appellant tied 'Thali'. The victim girl did not show 'Thali' neither at the time of recording statement under Section 164 Cr.P.C before the learned Judicial Magistrate nor during examining as a witness before the Court. The Investigation Officer also failed to recover and mark 'Thali' as a material object. Therefore, no proper investigation was done by the Investigating Officer. Hence, this Court finds that the prosecution miserably failed to establish the case for the offence under Section 9 of Prohibition of Child Marriage Act in the manner known to law and the same is liable to be set aside.

15. As far as the commission of offence under Sections 5(1) r/w 6 of POCSO Act is concerned, in the first instance the victim girl was produced before the learned Magistrate for recording statement under Section 164 Cr.P.C., she has stated that she was not subjected to sexual assault by the appellant. Subsequently, she was produced before the Doctor for clinical examination, wherein she stated that she was subjected to sexual assault. Further, it was not cogent to the evidence of the victim girl and the Doctor. Though the Doctor, has opined that the victim was subjected to sexual assault and her hymen was not intact, unless the victim girl stated that the appellant, was the one who committed sexual assault, it is unsafe to convict the appellant based on the evidence of the Doctor, under Section 5(1) r/w Section 6 of POCSO Act.

16. Under these circumstances, this Court finds that the prosecution failed to establish its case beyond reasonable doubt for the offence under Section 5(1) r/w 6 of POCSO Act, therefore, giving benefit of doubt in favour of the appellant. The victim girl herself denied that she was not subjected to sexual assault before the learned Judicial Magistrate while recording statement under Section 164 Cr.P.C. However, during

the cross examination, she has denied the above statement. There are material contradictions in the evidence of the victim girl, while recording statement under Section 164 Cr.P.C and the evidence during the trial regarding penetrative sexual assault. In the statements of witnesses there were contradictions. Hence, prosecution failed to establish the case. Therefore, it is unsafe to convict the appellant under Section 5(1) r/w 6 of POCSO Act, since the age of the victim girl is above 17 years and below 18 years. Hence, the conviction and sentence under Section 5(1) r/w 6 of POCSO Act is set aside.

17. As far as conviction under Section 366 IPC is concerned, the mother of the victim girl has filed the complaint before the respondent police that her daughter (P.W.2), aged about 17 years went to shop on 08.04.2018 and thereafter, she was missing. Hence, it is found that the appellant had kidnapped the victim girl. The victim girl was produced before the learned Judicial Magistrate for recording statement under Section 164 Cr.P.C, wherein she has clearly stated that she was in love affair with the appellant and after arrival from the college on 27.03.2018, the appellant asked her to elope and that they went to Tirupathi and the marriage was performed between them. Thereafter, they came to her native and surrendered before the All Women Police Station, Krishnagiri since she refused to go with her parents she was sent to Home. Therefore, the victim girl herself has stated that the appellant took her to Tirupathi and married her. Since the age of the victim girl was only 17 years at the time of occurrence and her date of birth is 30.09.2000 and the date of occurrence is 08.04.2018, hence, the victim girl falls within the definition of child as defined under Section 2(1) (d) of POCSO Act and she is below 18 years. The victim girl has clearly deposed that the appellant took her to Tirupathi for the purpose of marriage. However, this Court finds that the appellant committed the offence under Section 366 IPC was not proved in the manner known to law. For better appreciation, it is appropriate to extract Section 366 of Indian Penal Code which reads as follows:

''366. Kidnapping, abducting or inducing woman to compel her marriage, etc. Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go

from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.''

Therefore, on a reading of Section 366 IPC, in order to constitute an offence under Section 366 IPC there should be a compulsion. In this case the victim has not stated that she was compelled by the appellant. Therefore, Section 366 IPC was not made out. However, this Court can safely come to the conclusion that on the date of occurrence the victim girl was not completed the age of 18 years and the appellant took the victim girl without consent of the lawful guardian and therefore, the prosecution has established its case beyond reasonable doubt for the offence under Section 361 IPC. For better appreciation, it is appropriate to extract Section 361 of Indian Penal Code which reads as follows:

361. Kidnapping from lawful guardianship –
Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

18. Hence, this Court finds that the appellant is liable to be convicted and sentenced for the offence punishable under Section 363 IPC. However, the conviction and sentence imposed against the appellant for the offence under Sections 9 of Prohibition of Child Marriage Act, 2006 and Section 5(1) r/w 6 of POCSO Act and Section 366 IPC are hereby set aside.

19. In fine, this Criminal Appeal is partly allowed. The conviction and sentence imposed on the appellant for the offence under Section 366 IPC passed in Spl.S.C.No.36 of 2018 on the file of the Sessions Judge, Fast Track Magalir Neethi Mandram, Krishnagiri, Krishnagiri District is modified into Section 361 IPC which is punishable under Section 363 IPC.

20. It is seen from the records that the appellant/accused is at large and therefore, the trial Court is directed to take appropriate steps so as to immure him in prison to serve out the remaining period of sentence.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Fast Track Magalir Neethi Mandram,
Krishnagiri, Krishnagiri District.

2.The Inspector of Police,
All Women Police Station,
Krishnagiri, Krishnagiri District,

3.The Public Prosecutor,
High Court, Madras.

4.The Deputy Registrar | with a direction to send back the
(Criminal Section), | original records, if any, to the
High Court, Madras. | trial Court

5. The Superintendent, Central Prison, Vellore

+1CC to Mr.E.Kannadasan, Advocate, Sr.No.14932

CRL.A.No.302 of 2019

GMS (CO)
R.K. (14.07.2021)



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