

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.02.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.456 of 2020

Pasuvvaraj @ Kallaiya
S/o.Kubendiran

...Appellant/Accused

Vs.

State rep.by
The Inspector of Police,
All Women Police Station,
Hosur,
Krishnagiri District.
(Crime No.6/2018)

...Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 (2) Cr.P.C., to call for the entire records in connection with the Spl.S.C.No.54/2018 on the file of the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District and set aside the judgment dated 16.03.2020.

For Appellant : Ms.Revathy G.Mohan
Legal Aid Counsel
Mr.E.Kannadasan

For Respondent : Mr.C.Raghavan
Government Advocate (Crl.Side)

J U D G M E N T

The Criminal Appeal has been filed against the conviction and sentence imposed by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District in Spl.S.C.NO.54/2018, dated 16.03.2020.

2. The respondent police registered a case against the appellant in Crime.No.6 of 2018 for offence under Section 366, 342 IPC and under Section 5(1) r/w. 6 of the POCSO Act. After investigation, a charge sheet was filed before the Special Judge, Mahila Court, Namakkal. The learned Special Judge taken the charge sheet on file in Special S.C.No.54 of 2018 and after trial, convicted the appellant for the offence under Section 366, 342 IPC and under Section 5(1) r/w. 6 of the POCSO Act. Challenging the said conviction and sentence, the appellant has filed the present appeal before this Court.

3. Learned counsel for the appellant would submit that there are material contradictions between the evidence of the Doctor, P.W.2 and the victim girl, P.W.1. regarding the place of occurrence and manner of occurrence and sexual assault made by two unknown persons repeatedly. The Trial Court convicted the appellant based on the evidence of P.W.1. The victim girl was examined as P.W.1 and she deposed regarding the place of occurrence, involvement of the persons who had committed forceful sexual assault on her. Further he would submit that there was an inordinate delay in filing the complaint. There was no explanation on the side of the prosecution. The unexplained inordinate delay is fatal to the case of the prosecution. The prosecution failed to seize the mobile phone of the appellant and victim girl and sent the same for analysis to find out the communication and conversation between the appellant and the victim girl, since both were strangers and they contacted through their mobile phone and they never met each other.

4. The learned Special Judge failed to note that the contradiction between the evidence of the victim girl and the prosecution witness P.W.15 regarding the shelter given by him and he has not supported the case of the victim girl and denied the relationship since he is a stranger and no way connected with her which was also confirmed by P.W.2, who is none other than brother of P.W.1, victim girl. According to the victim girl, she was kidnapped by two unknown persons, who beaten her and had sexual intercourse repeatedly, whereas the prosecution projected new story that the appellant had taken the victim from Dharmapuri Railway Station and had sexual intercourse and the friend of the victim girl one poojasri has not supported the case of the prosecution. There are more contradictions in the evidence of the Investigating Officer and therefore, the prosecution failed to establish its case and substantiate the charges framed against the appellant/accused and the trial Court wrongly convicted the appellant. Even the ingredients of Sections 366 and 342 IPC are not made out, the Sub-Court convicted the appellant by assumption, surmises and conjunctures and on sympathy ground and not on the material substance. Therefore, the appeal is liable to be allowed and the judgment of conviction is liable to be set aside.

5. Learned Government Advocate (Crl.Side) would submit that initially the case was registered for offence under Sections 366, 346 and 5(1) r/w. 6 of POCSO Act. After investigation, the charge sheet was filed before the Special Court and the Special Court also taken the case on file and framed the charges against the appellant. In order to prove their case, they examined totally 19 witnesses and marked 21 documents. Though P.W.5, P.W.6 and P.W.9 turned hostile and not

supported the case of the prosecution, the victim girl was examined as P.W.1, she has clearly narrated the occurrence. P.W.2 and P.W.3 - brothers, have spoken about the missing of her sister and later upon receiving a call from the victim girl, they met the victim girl and subsequently they made the complaint. P.W.4 is the mother of the victim girl. The victim girl was produced before the Doctor, who examined the victim girl and conducted the medical examination and he has clearly stated that the victim girl was subjected to sexual assault. P.W.5, who was said to have stayed along with the victim girl in the hostel, informed that the victim girl was not in the hostel. The victim girl was staying in the hostel and doing work and for certain period she was missing from the hostel. The evidence of P.W.1 and P.W.3 corroborates each other that during the relevant period of time, Mahalakshmi was not in the hostel. P.W.6 also spoken that during the relevant period Mahalakshmi neither stayed in the hostel nor come for work. P.W.7 is the watchman who was working in the mill where the victim girl was working and he has stated that the victim girl did not come to the mill for work. The specific case is that due to the wrong call both were introduced each other and subsequently, the appellant called the victim girl to meet him, both met each other and that time the appellant beaten the victim girl and forced to have sexual intercourse. P.W.1 to P.W.8 stated that during the relevant period she was neither in the hostel nor in the working place or went to her house.

6. The Doctor, one who examined the victim girl has stated that there is no external injury and hymen was not intact and vagina admitted one finger. She was in menses period and she was subjected to sexual assault. The Head Master of the School in which the victim girl was studying was examined as P.W.13 and had stated that he produced the birth certificate of the victim girl and the date of birth of the victim girl is 15.06.2000. At the time of the occurrence, the age of the victim girl was only about 17 years and she was not completed 18 years and therefore, she is a child under Section 2 (1)(d) of POCSO Act, since she was subjected to sexual intercourse. Therefore, the prosecution has proved the case beyond reasonable doubt. Therefore, the appeal is liable to be dismissed.

7. Heard and perused the materials on record.

8. The case of the prosecution is that P.W.1 was aged about 17 years working in the Arunothayam Company, Ammapalayam, Paaladam, and P.W.5 Poojasri who is the relative of P.W.1, also working along with her and P.W.5 was possessed her cell phone for the purpose to contact with her family members. While so, she received a wrong call from one mobile and P.W.1 attended the phone call, during their conversation the appellant expressed

his love affair. After sometimes, the appellant had given a false promise that he would marry her and directed her to come to Dharmapuri Railway Station. On receipt of intimation on 22.02.2018 she went to Dharmapuri Railway Station, from there she was taken to Hosur and had sexual intercourse. On next day she found that he was not there and try to contact his cell phone found switched off, while she was on the way and approached P.W.15 and he took the victim and there she stayed about 10 days and thereafter, she came to Dharmapuri and informed her brother P.W.2 about her arrival, on receipt of intimation he came and took her to their home and thereafter she lodged the complaint and thereby, the appellant committed offence punishable under Sections 366, 342 IPC and Section 5(1) r/w. 6 of the POCSO Act.

9. 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.

10. In order to prove the case of the prosecution, on the side of the prosecution 19 witnesses were examined as P.W.1 to P.W.19 and 21 documents were marked as Exs.P.1 to P.21. No material object was marked. After completing the examination of prosecution witnesses and incriminating circumstances culled out from the prosecution witnesses were put before the appellant, he denied the same as false. On the side of the defence, no oral and documentary evidence was produced.

11. On appreciation of materials and evidence, the trial Court rendered a finding of conviction and sentenced the appellant/accused for the offence punishable under Section 366 IPC and sentenced to undergo Rigorous Imprisonment for 5 years and to pay a fine of Rs.1,000/-, in default, to undergo Rigorous Imprisonment for 6 months and convicted for the offence punishable under Section 342 IPC and sentenced to undergo Rigorous Imprisonment for 10 months and to pay a fine of Rs.1,000/-, in default, to undergo Rigorous Imprisonment for one month and convicting him for the offence under Section 5(1) r/w. 6 of the POCSO Act and sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs.1,000/-, in default to undergo Rigorous Imprisonment for one year and sentences are ordered run concurrently.

12. In order to prove the case of the prosecution, the victim girl was examined as P.W.1. A reading of the evidence of P.W.1 she has clearly narrated the incident. Though the appellant is not a known person, but from the wrong phone call both introduced themselves each other and subsequently, at one point of time they met each other and the appellant took her to some where else and beaten her and had penetrative sexual

intercourse with her and the evidence of P.W.1 to P.W.6 supported the case of the prosecution to the extent that during the relevant period, the victim girl was neither in the hostel nor in the working place or in her native. After registering the case, the victim girl was produced before the Doctor, P.W.12, who examined the victim girl has stated that she was subjected to penetrative sexual intercourse and hymen was not intact. Though the learned counsel for the appellant would submit that the victim girl has stated that unknown two persons kidnapped her and the case was registered against one person and left out the other person, a reading of the materials show that the victim girl has mentioned the name of the appellant as the person, who kidnapped her and had sexual intercourse. The evidence of PW-12, Doctor, also supported the case of victim girl that she was subjected to penetrative sexual assault. Subsequently, she was also produced before the Magistrate to record the statement under Section 164 Cr.P.C., and the Magistrate also recorded the statement and it also clearly proves that the appellant taken her to unknown place and had a penetrative sexual intercourse with her. P.W.2's statement recorded under Section 164 Cr.P.C., which clearly proves that the appellant took the victim girl to Hosur and there he raped her and left her. Thereafter, she stayed with PW-15 and subsequently, informed to her brother. PW-2, brother of the victim girl deposed that P.W.15 is an unknown person. It is the evidence of PW-1, victim, that the appellant after having sexual intercourse, left her and since she was not in a position to go to her home in that situation, she stayed with PW-15 for sometime and informed her brother. Along with Ex.P.2, the birth certificate the Aadhar also annexed in that the date of birth of the victim girl mentioned as 15.06.2020. The date of occurrence is on 22.02.2018, at the time of occurrence the age of the victim girl is only 17 years and therefore, she is a child and hence, the offence committed falls under the POCSO Act. The evidence of the Doctor, who examined the victim girl, was also to the effect that she was subjected to penetrative sexual intercourse. Though the statement recorded under Section 164 Cr.P.C., is not a substantive evidence and it has to be corroborated. The statement of the victim recorded under Section 164 Cr.P.C., has been substantiated by the evidence of PW-1. Other witnesses have also spoken about the missing of the girl.

13. In cases of this nature, there can be no eye-witness. Taking advantage of the age of the victim girl, the appellant took her to a lonely place and had sexual intercourse. Normally, the family of the victim would not disclose the same to others and they would very much worry about the reputation. Hence, there would be delay in filing the complaint. The fact remains that the victim girl not completed the age of 18 years, but there is no evidence to prove that the appellant forcibly taken

the victim girl from the custody of the lawful guardian and wrongfully restrained her. The victim has clearly stated that the appellant called her to meet, she only went there and he took her to Hosur and in lonely place had sexual intercourse and he left her. Therefore, the conviction and sentence imposed for the offence under Sections 366 and 342 IPC are set aside. However, the prosecution has established its case for the offence under Section 5(1) r/w. 6 of the POCSO Act and hence, the conviction made by the Trial Court for the said offence is confirmed.

14. Accordingly, the appeal is partly allowed. The conviction and sentence for the offence punishable under Sections 366 and 342 IPC are set aside. The conviction made by the Trial Court for offence under Section 5(1) r/w. 6 of the POCSO Act is confirmed and modified the sentence from 10 years to 7 years which will meet the ends of justice. The legal aid counsel is entitled for fees as per the rules.

s/d-

Assistant Registrar (CCC)

True Copy

Sub-Assistant Registrar

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To

1. The Inspector of Police,
All Women Police Station,
Hosur, Krishnagiri District.

2. The Sessions Judge,
Fast Track Mahila Court,
Krishnagiri, Krishnagiri District.

3. The Public Prosecutor,
High Court, Madras.

4. The Superintendent of Police
Central Prison, Vellore.

Copy to

The Section Officer
Criminal Section
High Court, Madras 104.

+1 CC to Mr.E.Kannadasan, Advocate sr 10561

Cr1.A.No.456 of 2020

JP11(CO)
SP(02/07/2021)