



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.499 of 2020

Suresh

... Appellant/Accused

Vs.

State By:

Inspector of Police

W-21, All Woman Police Station

Guindy, Chennai - 600 032.

[Crime No.1/2017].

... Respondent/Complainant

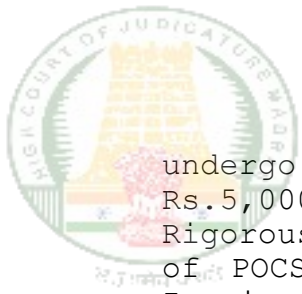
PRAYER: This Criminal Appeal is filed under Section 374 of Criminal Procedure Code, to set aside the Judgement in S.C. No.31 of 2018 dated 03.11.2020 passed by the learned Sessions Judge, Special Court of exclusive trial of cases in so far as convicting the Appellant/Accused under 366 IPC and sentencing him to undergo 5 years Rigorous Imprisonment and imposed with a fine of Rs. 5,000/- in default to undergo further period of 6 months Rigorous Imprisonment and convicting the Appellant/Accused under section 6 of the Protection of Children from Sexual Offences Act 2012 and sentencing him to undergo 10 years Rigorous Imprisonment and imposed with a find of Rs.5,000/- in default to undergo further period of 6 months Rigorous Imprisonment and the sentence ordered to run concurrently.

For Appellant : Mr.C.S.S.Pillai
H.Maruthiraj,
Legal Aid Counsels and
M/s.T.Shanmuga Boopathi, for Petitioner

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

J U D G M E N T

The present criminal appeal has been filed to set aside the Judgment in S.C. No.31 of 2018 dated 03.11.2020 passed by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai, in so far as convicting the Appellant/Accused under Section 366 IPC and sentencing him to



undergo 5 years Rigorous Imprisonment and imposed with a fine of Rs.5,000/- in default to undergo further period of 6 months Rigorous Imprisonment and he was also convicted under Section 6 of POCSO Act and sentenced him to undergo 10 years Rigorous Imprisonment and imposed with a fine of Rs.5,000/- in default to undergo further period of 6 months Rigorous Imprisonment and the sentences were ordered to run concurrently.

2. The appellant is the accused and the respondent is the State. The respondent/police registered a case in Crime No.1 of 2017 against the appellant/accused for the offence under Section 366 IPC and also offence punishable under Section 6 of POCSO Act. After completing the investigation, the respondent/police laid a charge sheet before the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai. Since the offence against child.

3. After completing formalities, the learned Sessions Judge taken the charge sheet on file in S.C.No.31 of 2018 and after completing formalities, the learned Sessions Judge framed charge against the appellant for the offence under Section 366 IPC and also offence punishable under Section 6 of POCSO Act.

4. After framing charges, in order to prove the case of the prosecution on the side of the prosecution, during trial, as many as 9 witnesses were examined as PW.1 to PW.9 and 11 documents were marked as Ex.P1 to Ex.P11. Besides, 1 material object was marked as M.O.1.

5. After completing the examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant by questioning under Section 313 of Cr.P.C. He denied the same as false and pleaded not guilty. On the side of the defence no oral and documentary evidence was produced.

6. On completion of trial, hearing the arguments advanced on either side and considered the materials, the learned Sessions Judge found guilt of the appellant for the offence under Section 366 IPC and for the offence punishable under Section 6 of POCSO Act and convicted and sentenced him to undergo 5 years Rigorous Imprisonment and imposed with a fine of Rs.5,000/- in default to undergo further period of 6 months Rigorous Imprisonment for the offence under Section 366 IPC and he was also convicted and sentenced to undergo 10 years Rigorous Imprisonment and imposed with a fine of Rs.5,000/- in default to undergo further period of 6 months Rigorous Imprisonment for the offence punishable under Section 6 of POCSO Act. The Trial Court has also awarded a compensation of Rs.6,00,000/-, which would be paid by the State Government to the victim.



11. He would further submit that initially the complaint was given by the father of the victim on 30.10.2016 for girl missing, whereas, in the statement recorded under Section 164



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CrI.P.C., the victim girl has stated that she left the house on 29.10.2016 itself. Therefore, the date of missing and date of commission of offence itself is in doubtful. There is no seizure of her cell phone. Though they stated that the telephone and the call details have not been produced and the document/Ex.P11 produced by the prosecution is not related to the alleged call details of the victim and the appellant and the same also not certified under Section 65B of the Indian Evidence Act, 1872. Though the victim girl/PW.2 stated in her chief examination, during trial, she had a sexual intimacy with the appellant at Velangani. However, in the statement recorded by the learned Magistrate under Section 164 of Cr.P.C., the victim girl stated that she had a sexual intercourse at Coimbatore and however, she had given an information before PW.6/Dr.Indumathi that she had a sexual intercourse at Puducherry till the arrest of appellant, which is a serious contradiction regarding the place of occurrence, where the appellant had a sexual intercourse with the victim, which clearly shows that the present case is false and foisted against the appellant.

12. The Trial Court failed to appreciate all the contradictions which are materials and simply based on assumption and on the ground of sympathy, convicted the appellant. There was no DNA test and there was no other materials to show that the victim was pregnant and therefore, the prosecution has not proved the case beyond all reasonable doubt. Therefore, the judgment of the Trial Court is liable to be dismissed.

13. Learned Government Advocate (CrI. Side) would submit that at the time of occurrence the victim girl was only minor and she was taking tuition from the accused and his wife. At that time, the appellant convinced the victim and developed the intimacy and took the victim to various places and had a sexual intercourse. After came to know that there was a case and the police traced the call details of the appellant and initially the case was registered for girl missing.

14. Subsequently, the case was registered against the appellant for the offence under Section 366 IPC and also offence punishable under Section 6 of POCSO Act. The victim child has clearly narrated that the appellant took the victim to various places and stayed there and had a sexual intercourse with her and she was also produced before the Judicial Magistrate for recording statement under Section 164 Cr.P.C., and before whom also she has narrated the same. Further, she was produced before the Doctor/PW.6 for medical examination. The Doctor has also given opinion that the victim girl was subjected to sexual intercourse. Though initially they have stated that there was a pregnancy and she was under impression that since the menses



period is postponed, but subsequently, they came to know that she was not pregnant.

15. However, the contradictions pointed out by the learned counsel for the appellant not a material contradictions, which would go to the root of the case of the prosecution. The facts remains that the victim is a minor, not completed the age of 18 years. The appellant took the victim child at various places and had a sexual intercourse.

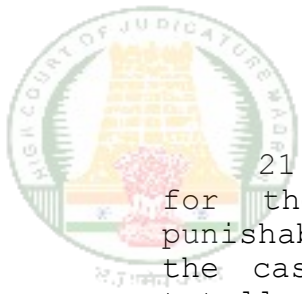
16. Though the learned counsel for the appellant pointed out that the victim girl herself has stated that she voluntarily left from the house, since her father has stated that she was not studying well and therefore, she left voluntarily from the house and go to some places and return back, but she did not go with the appellant and therefore, which facts were not considered by the Trial Court. Once, the victim girl herself has stated that she has not gone with the appellant, hence, Section 366 would not attract. The Trial Judge failed to appreciate the evidence of the victim girl and the ingredients of Section 366 IPC, wrongly convicted.

17. But the learned Government Advocate (Crl.Side) would submit that the victim left along with the appellant and stayed in various places and he had a sexual intercourse with her. Therefore, the Trial Court rightly appreciated the evidence and convicted the appellant and there is no reasonable doubt.

18. Heard both sides and perused the materials available on records.

19. The case of the prosecution is that the victim was a tuition student of the accused and his wife. By making use of the said acquaintance the accused started to groom the victim suiting to his sexual intentions. Since the victim was losing her concentration in studies, the defacto complainant went and enquired the wife of the accused. Later he came to know that the victim was moving close with the accused. Thereafter, the appellant took the victim in various places and had a sexual intercourse with her. In this regard, the parents of the victim girl made a complaint before the respondent/police for girl missing. Thereafter, the respondent/police registered a case against the appellant and after completing investigation laid a charge sheet before the learned Special Court. After trial, the learned Special Judge convicted the appellant. As against the same, the appellant has filed the present criminal appeal.

20. The Appellate Court, is a final Court of fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.



21. The Trial Court framed charges against the appellant for the offence under Section 366 IPC and also offence punishable under Section 6 of the POCSO Act. In order to prove the case of the prosecution on the side of the prosecution totally 9 witnesses were examined and 11 documents were marked. Out of which, the victim girl was examined as PW.2. She has narrated the entire events and the birth certificate of the victim girl was marked as Ex.P2 and as per Ex.P2, the date of birth of the victim girl is 03.03.2000. The date of the occurrence is 30.10.2016, therefore, at the time of occurrence, the victim was only 17 years. She has not completed 18 years. Therefore, she is a child under the definition of Section 2(i) (d) of POCSO Act. Though during the chief examination, the victim has stated that the appellant and his wife were taking tuition and when she went to tuition on 30.10.2016 and she did not come to house and therefore, father of the victim girl gave a complaint for girl missing and she has stated in her chief examination that she went with the appellant. The appellant took her to various places and had a sexual intercourse and PW.1 was examined in chief on 04.06.2018 and the same day, the prosecution witnesses were not cross examined and the victim was cross examined only on 18.11.2019, after one year.

22. But during cross examination, she has stated that she went voluntarily and the learned counsel for the appellant would contend that the victim voluntarily went with the appellant to somewhere else and came back. But however, entire reading of the evidence of the victim, it clearly shows that she is a minor, not completed the age of 18 years. Therefore, once it is proved that the victim is child and not completed the age of 18 years. The appellant took the custody of the victim girl from the lawful guardian without their consent, it is an offence punishable under Section 363 IPC.

23. Though the Trial Court convicted the appellant for the offence under Section 366 IPC, the offence committed by the appellant not falls under Section 366 IPC and the offence falls under Section 363 IPC. Therefore, the conviction under Section 366 modified into conviction for the offence punishable under Section 363 IPC.

24. The next point for consideration is as to whether the appellant is committed a sexual intercourse with the victim girl/PW.2. In the evidence of PW.2, the victim girl has clearly stated that she was subjected to sexual assault made by the appellant and PW.6 is the Doctor conducted a medical examination on the victim girl, she has clearly stated that on 30.10.2016, the victim went along with a known person and was in sexual contract with him till 03.12.2016 and that she become a pregnant and the same was known to the victim on 01.12.2016. Therefore,



she was brought by the parents and gave bills for abortion on 07.12.2016. The medical examination reveals that the hymen of the victim girl was not intact and there was no internal or external injuries.

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25. Though in the cross examination, the defence counsel put a suggestion that the hymen can be turned, if the victim ride a cycle, but that has not been established. Further, the victim girl was produced before the Judicial Magistrate to record statement under Section 164 of Cr.P.C., and before the Judicial Magistrate also she has clearly stated the above. Though the learned counsel for the appellant pointed out the contradiction regarding the place of occurrence, where exactly both had a sexual intercourse. But facts remains that on 30.12.2016 she left from the house. On the day, she was a child, not completed the age of 18 years.

26. In cases of this nature normally the child would reluctant to say entire things and each and every minute wise events. From the evidence of PW.2/the victim and the evidence of the Doctor/PW.6 and the medical report and also the statement recorded under Section 164 of Cr.P.C, which clearly shows that the victim was subjected to penetrative sexual assault, which was committed by the appellant. Therefore, the cases of this nature, the other contradictions are immaterial and it is only from the evidence of her parents on 30.10.2016, victim left from the house and till she was secured and she was not in the house.

27. The evidence of victim girl clearly proves that she went along with appellant and from evidence of the Doctor she was subjected to penetrative sexual assault. As stated by the learned counsel for the appellant that she voluntarily left and without any force has given a consent for sexual intercourse. Even then, it is an offence, since at the time of occurrence, victim was not completed the age of 18 years and the age of the appellant is 36 years and therefore, the act committed by the appellant is an offence and he cannot take advantage of the evidence of the victim that she never resisted and she went voluntarily and there was no external injury. Whatever the contradictions, lapse, delay pointed out by the learned counsel for the appellant are immaterial to the cases of this nature. Since it is proved that the victim is a child under the definition of Section 2(1)(d) of the POCSO Act, and she was subjected to penetrative sexual assault. Therefore, this Court finds that the appellant has committed the offence under Section 361 of IPC punishable under Section 363 of IPC and he also has committed offence under Section 5(1) which is punishable under Section 6 of POCSO Act.

28. Though the learned counsel for the appellant would



point out that during cross examination the prosecution witnesses were not supported the case of the prosecution, but whereas during the chief examination, the victim girl has clearly stated that she went along with the appellant and stayed with him for some times, during that period the appellant had sexual intercourse with her several times. The same day she was not cross examined and she was cross examined after one year from the date of chief examination.

29. However, it is well settled proposition of law that the evidence of hostile witness would not be totally rejected, but the portion of evidence in chief which support the prosecution case can be taken for consideration. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible. Further, a mere lapse on the part of prosecution should not lead unmerited acquittal, subjected to rider that, in such a situation evidence on record should be clinching, so that lapse of prosecution can be condoned.

30. Whereas in this case, during chief examination she has clearly stated that she went along with the appellant and he had sexual intercourse with her. Though in the cross examination she did not fully supported to the case of prosecution. The entire evidence of the victim has to be taken into consideration, not in the peace meal. Further, the chief examination of the victim is further strengthened the statement recorded by the Judicial Magistrate under Section 164 of Cr.P.C., and also the medical evidence, therefore, the birth certificate of the victim girl shows that she was only 17 years, not completed the age of 18 years and she is a child at the time of occurrence and she was subjected to penetrative sexual assault. At this juncture, it is relevant to state that the evidence of hostile witness would not be totally rejected. If spoken in favour of the prosecution or the accused are required to be subjected to close scrutiny and portion of the evidence which is consistent with the case of the prosecution or defence can be relied on.

31. Since there was a repeated sexual intercourse, which is falls under Section 5(1) of POCSO Act which is aggravated penetrative sexual assault and from the evidence of victim and medical evidence, it is clearly proved that the appellant has committed aggravated penetrative sexual assault with the victim child and therefore, he has committed the offence punishable under Section 6 of POCSO Act. Further, the case of this nature mere delay in filing the complaint is not fatal to the case of the prosecution. Further, in this case the parents of the victim immediately filed the case for girl missing.

32. Subsequently, the way of investigation they found that the appellant one who had removed the custody of the victim from her lawful guardian without their consent and had a penetrative sexual intercourse with her. Subsequently, after investigation



laid a charge. The Trial Court framed charge under Section 366 IPC and convicted the appellant and this Court finds that the ingredients of Section 366 IPC not made out and the offence committed by the appellant is falls under Section 361 IPC which is punishable under Section 363 of IPC and therefore, the section of conviction is modified under Section 363 of IPC and offence punishable under Section 6 of POCSO Act. As far as the quantum of sentence is considered, this Court does not find any mitigating circumstances to reduce the sentence. Therefore, with the above modification regarding Section from 366 to 363 IPC, no other modification.

33. With the above modification, the criminal appeal is dismissed.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

Dm

To

1. The Sessions Judge,
Special Court for Exclusive Trial of Cases under POCSO Act,
Chennai.
- 2.The Mahila Court,
Sessions Judge, Chennai.
- 3.The Inspector of Police
W-21, All Woman Police Station
Guindy, Chennai - 600 032.
- 4.The Superintendent, Central Prison, Puzhal,
Chennai.
- 5.The Public Prosecutor,
High Court, Madras.
- 6.The Secretary,
Tamilnadu Legal Aid Services Authority,
High Court, Chennai 600 104.

+1cc to Mr.T.Shanmugha Boopathi, Advocate, S.R.No. 31153

Cr1.A.No.499 of 2020

VSN II(CO)
GN(10/08/2021)