

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.02.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.675 of 2019 &
Crl.M.P.No.14361 of 2019

Sakthivel

... Appellant

Vs.

The State rep. by
The Inspector of Police,
All Women Police Station,
Krishnagiri District.
(Crime No.20 of 2016)

... Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the judgment of conviction and sentence passed by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri in Special S.C.No.09 of 2017, dated 28.01.2019.

For Appellant : Mr.C.D.Johnson

For Respondent : Mr.R.Suryaprakash
Government Advocate

J U D G M E N T

This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 28.01.2019, made in S.C.No.09 of 2017, on the file of the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri.

2. The respondent-police has registered a case in Crime No.09 of 2017 against the appellant for the offences under Section 366 of IPC, and Section 5 r/w 6 of Protection of Children from Sexual Offences Act, 2012 (for brevity "the POCSO Act"), and Section 9 of Prohibition of Child Marriage Act, 2006. After completing the investigation, laid a charge sheet. Since the offence committed against the minor, the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, taken the case on file in Special S.C.No.09 of 2017. After completing the formalities, framed the charges against the appellant for the offence under Section 366 of IPC, and Section 5 r/w 6 of the

POCSO Act, and Section 9 of Prohibition of Child Marriage Act, 2006 and conducted the trial.

3. After considering the evidence on record and hearing on either side, the learned Sessions Judge, by judgment dated 28.01.2019, convicted the appellant and sentenced him to undergo Rigorous Imprisonment of 7 years and imposed a fine of Rs.1,000/-, in default, to undergo further period of six months Rigorous Imprisonment for the offence under Section 366 of IPC; and sentenced him to undergo Rigorous Imprisonment of 10 years and imposed a fine of Rs.1,000/-, in default, to undergo further period of one year Rigorous Imprisonment for the offence under Section 5 r/w 6 of POCSO Act; and sentenced him to undergo Rigorous Imprisonment of one year and imposed a fine of Rs.3,000/-, in default, to undergo further period of three months Rigorous Imprisonment for the offence under Section 9 of Prohibition of Child Marriage Act.

4. Aggrieved against the judgment of conviction dated 28.01.2019, the appellant / accused had preferred the present Criminal Appeal before this Court.

5. The learned counsel for the appellant would submit that there was no kidnapping, and the appellant and the victim child are close relative and they loved each other and eloped and therefore, the ingredients of Section 366 of IPC has not been made out in this case. It is further submitted that on 03.12.2016, the appellant went to the house of P.W.1 and requested P.W.1, father of the victim child to send P.W.13-victim child to his home, because, she is his legally wedded wife and, however P.W.1 preferred a complaint as if the appellant tried to kidnap P.W.13 from his house. The above fact would show that P.W.13 has volunteered to come along with the appellant and there is no question of alleged to have kidnapping P.W.13-victim child in this case. The victim child and the mother of the victim child were interested in giving in marriage of P.W.13 to the appellant, however, only because of P.W.1, father of the victim child, the marriage was converted into kidnapping and sexual abuse. The learned Judge, failed to consider this aspect and wrongly convicted the appellant for the offence under Section 366 of IPC.

6. The alleged occurrence has taken place on 02.11.2016 and the complaint was given only on 02.12.2016 with an inordinate delay of 30 days and the above fact would show that the complaint was given after much discussion and deliberation and the delay has not been properly explained and the unexplained delay is fatal to the case of the prosecution.

7. It is further submitted that there is no eyewitness in

this case and all the others witnesses were interested witnesses. The victim child was 18 years at the time of occurrence and the doctor, who conducted the Radiology Test, has given a report stating that the victim child has completed the age of 18 years. Since the victim child voluntarily came along with the appellant and married him, Section 9 of Prohibition of Child Marriage Act and also Section 5 r/w 6 of POCSO Act would not attract. If the appellant is charged under Section 9 of Prohibition of Child Marriage Act, he cannot be charged under Section 5 r/w 6 of POCSO Act. The learned Sessions Judge failed to appreciate the evidence of the victim child and the mother of the victim child and wrongly convicted the appellant, which warrants interference. In support of his contention, the learned counsel for the appellant has cited a Judgment of this Court in Crl.A.No.490 of 2018, dated 26.04.2019, wherein the learned Single Judge of this Court, in similar case, has set-aside the judgment of the trial Court, and acquitted the appellant therein. Therefore, the learned counsel for the appellant prays for the conviction and sentence recorded by the learned Judge, is to be set aside.

8. The learned Government Advocate would submit that at the time of occurrence, the victim child was only 17 years and she was forcibly taken from the custody of her lawful guardian, by the appellant and, without their consent married her. Subsequently, the victim child came to her house and at that time, the appellant came to the house of the victim child and scolded her family members and also tried to take the victim child from the custody of the lawful guardian and therefore, the appellant has committed the offence under Section 366 of IPC for kidnapping the minor child. Since the victim child was only about 17 years and not completed the age of 18 years, and the appellant himself has stated that he married the victim child and as such, Section 9 of Prohibition of Child Marriage Act, would attract. The doctor, has also opined that the victim child lost her virginity and her hymen was not intact and her vagina admitted two fingers and as such, the learned Sessions Judge rightly convicted the appellant for the offence under Section 5 r/w 6 of the POCSO Act. Therefore, the prosecution has proved its case beyond reasonable doubt and the learned Sessions Judge, rightly convicted the appellant on the above said three charges and hence prays for dismissal of the Appeal.

9. Heard the learned counsel on either side and perused the materials placed on record.

10. The case of the prosecution is that on 02.11.2016, at around 8 a.m., when the victim child had gone to answer to the natural call, she had not returned back to home and after that P.W.1, the father of the victim child got information that the

victim child was kidnapped and raped by the appellant and thereafter, the appellant took her to Ponmalai Temple and married her. Thereafter, the victim child returned to her home and when her father enquired, she informed that she was raped by the appellant and he tied thali at Ponmalai Temple, without her consent and however, her father found that there was no thali in her neck and thereafter, the appellant came to the residence of the victim child and shouted that he tied thali and he would take her along with him, since she married the victim child, and thereafter, P.W.1, the father of the victim child filed Ex.P1 complaint before the respondent-Police against the appellant stating that at the time of occurrence, the age of the victim child was only 17 years and she has not completed 18 years. Based on which, the respondent-Police, registered a case against the appellant for the offence under Section 366 of IPC, and Section 5 r/w 6 of the POCSO Act, and Section 9 of Prohibition of Child Marriage Act, 2006. Subsequently, the Investigating Officer, investigated the matter and laid a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri.

11. In order to prove the case of the prosecution, 14 witnesses were examined as P.W.1 to P.W.14 and 20 documents were marked as Exs.P1 to P20. After completion of the examination of the prosecution witnesses, the incriminating circumstances culled out from the prosecution witnesses were put before the appellant, the same was denied as false and on the side of the defence, neither witness was examined, nor document was produced. The learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, after hearing the arguments on either side and considering all the materials placed on record, found that the accused/appellant is guilty and awarded punishment, as referred above, which is challenged in this Criminal Appeal.

12. Since this Court is an appellate Court and also fact finding Court and in order come to the independent conclusion, it has to re-appreciate the entire evidence.

13. A careful reading of statement recorded under Section 164 of Cr.P.C. of the victim child before the learned Magistrate, it could be seen that the victim child has narrated the entire occurrence that took place on 02.11.2016, which was marked as Ex.P15. In the statement, she has stated that when she went to response to the natural call, the appellant forced her to marry him and took her to Ponmalai temple and tied thali forcibly and thereafter, he took her to Bangalore. While so, the appellant received a call stating that a case has been registered against the appellant and subsequently, both appeared before the respondent-Police and at that time, she has not disclosed anything about the marriage and after returning home,

she informed that marriage took place at Ponmalai Temple forcibly and subsequently, on 02.12.2016, the appellant came to her residence and shouted her father to send back the victim child to his house. She further stated that two months prior, the appellant took her to mango thope and had forcible sexual intercourse with her.

14. During evidence, P.W.13, victim child, deposed that now she married a person and a child was born to them and at present they are living at Karikuttanur. She further deposed that she was born on 25.07.1999 and on 02.11.2016, at about 6.30 a.m., the appellant took her to Ponmalai Temple and tied thali forcibly.

15. P.W.1, who is none other than the father of the victim child had deposed that when her daughter went to attend the natural call, she was kidnapped by the appellant and had undergone forcible sexual intercourse with her and subsequently, married her at Ponmalai Temple. After that, when she returned home, she informed that the appellant took her to Ponmalai Temple and forcibly tied thali. Subsequently, one day, the appellant came to his residence and shouted him to send back the victim child to his house. Thereafter, he made Ex.P1 complaint before the respondent-Police and subsequently, the victim child was referred to Hospital for medical examination.

16. The doctor, who registered the Accident Register of the victim child was examined as P.W.8 and she has stated that there is no external injury and she referred the victim child to the gynecologist and subsequently, P.W.6-doctor examined the victim child. P.W.6, doctor, who examined the victim child had deposed that on examination of the victim child, she found that there was no external injury and her hymen was not intact and also her vagina admitted two fingers and there is possibility of sexual intercourse and issued Ex.P4 Certificate. The doctor, who examined the accused was examined as P.W.7, and issued Ex.P8-certificate stating that there is nothing to suggest that the appellant is impotent and incapable of performing sexual intercourse. P.W.11-doctor, deposed that he was received a letter from the Inspector of Police with regard to determine the age of the victim child and on her request, he took ultra scan and issued Ex.P13 certificate stating that the victim child is aged between 18 and 20 years.

17. A combined reading of the evidence of P.W.13-the victim child, P.W.1-the father of the victim child, P.W.6-doctor, who examined the victim child and the report-Ex.P4, and also the evidence of P.W.7-doctor, who examined the accused and Ex.P15-statement of the victim child, which was recorded under Section 164 of Cr.P.C, and Ex.P2-birth certificate of the victim

child, the prosecution has proved that the appellant has committed the offence under Section 5 r/w 6 of the POCSO Act.

18. The occurrence is said to have occurred on 02.11.2016. At the time of the occurrence, as per the evidence of P.W.1 and P.W.13, the date of birth of the victim child is 25.07.1999, and the date of occurrence is 02.11.2016, therefore, on the date of occurrence, her age is only 17 years. P.W.11-Radiologist conducted the test only on 16.05.2017, i.e., after 7 months from the date of occurrence. Therefore, the learned Sessions Judge did not take into consideration the evidence of P.W.11 and his report Ex.P13 stating that the victim child is between 18 and 20 years and it is not conclusive proof, one year more or less can be taken into consideration, when particularly in this case Ex.P3 age proof certificate is marked, and rightly held that at the time of occurrence, the victim child was 17 years. Therefore, this Court is also of the considered view that the age of the victim child is only 17 years and not completed 18 years at the time of occurrence, and therefore, victim is a child under Section 2 (1)(d) of POCSO Act, and the appellant forcibly taken the victim child under compulsion and also took to Bangalore and other places. Since the appellant removed the custody of the minor child from her lawful guardian, without their consent, he has committed offence under Section 361 of IPC and as such, the conviction and sentence modified from Section 366 of IPC to 361 of IPC, which is punishable under Section 363 of IPC. However, the sentence of 7 years Rigorous Imprisonment is confirmed.

19. As far as offence relating to Section 9 of the Prohibition of Child Marriage Act is concerned, there is no evidence to show that the appellant married the victim child and except the evidence of the victim child and the father of the victim child, no witness has been spoken and the prosecution has not established that the appellant tied thali, even the respondent-Police has not recovered the thali. Even, none of the witnesses have spoken about that they married together. In the absence of the same, the benefit of doubt should have extended to the appellant and therefore, under the circumstances, this Court finds that the prosecution has not proved for the offence under Section 9 of the Prohibition of Child Marriage Act, beyond reasonable doubt, and therefore, the conviction and sentence under this offence is liable to be set aside, and accordingly, it is set aside.

20. In this case delay was properly explained by the prosecution. In POCSO Act cases, no parent would take a hasty decision and immediately rush to the police station and file a complaint. It will affect the future of the female child. Therefore, the parents would naturally think about the future of

the child and also about the reputation of the family. Normally, they used to take advice of the elders in the village. The main contention of the learned counsel for the appellant that the delay in filing the complaint is fatal to the case of the prosecution and the same is not acceptable. Mere delay in filing these type of cases may not be fatal to the case of the prosecution. Further, minor contradictions will not affect the case of the prosecution.

21. On a reading of the entire evidence of the victim child and also the statement of the victim child, which was recorded under Section 164 of Cr.P.C., the victim child has not stated anything that she fall in love with the appellant and therefore, the citation referred to by the learned counsel for the appellant is not applicable to the present case on hand.

22. Therefore, this Court finds that the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, rightly appreciated the entire facts and discussed in detail and convicted the appellant. However, since this Court finds that the prosecution has not established the marriage between the appellant and the victim child in the manner known to law that the appellant has committed the offence under Section 9 of Prohibition of Child Marriage Act, 2006, the conviction and sentence imposed against the appellant under Section 9 of Prohibition of Child Marriage Act, 2006 is alone hereby set-aside. The conviction and sentence imposed by the learned Sessions Judge for the offence under Section 366 of IPC is modified into Section 361 of IPC, which is punishable under Section 363 of IPC, however, the quantum of 7 years of Rigorous Imprisonment is confirmed. The conviction and sentence imposed by the learned Sessions Judge for the offence under Section 5 r/w 6 of POCSO Act, is also confirmed.

23. With the above modification, the Criminal Appeal is partly allowed. Consequently, connected miscellaneous petition is closed.

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Sd/-

Assistant Registrar (CO)

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Sub Assistant Registrar

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To

1.The Sessions Judge,
Fast Track Mahila Court,
Krishnagiri.

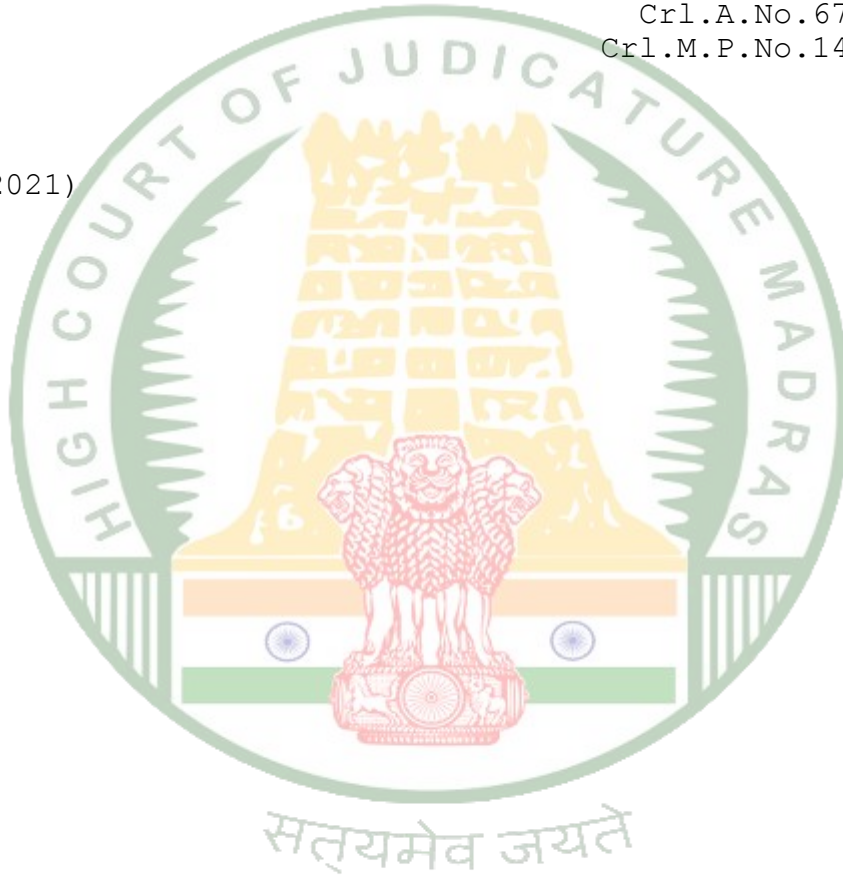
2.The Inspector of Police,
All Women Police Station,
Krishnagiri District.

3.The Superintendent,
Central Prison,
Vellore.

4.The Public Prosecutor,
High Court, Madras.

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