



Crl.A.No.362 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :14.10.2022

Pronounced on : 27.10.2022

Coram:

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Crl.A.No.362 of 2015

Paramasivam

... Appellant

/versus/

The Inspector of Police,
Mettupalayam Police Station,
Puducherry.

... Respondent

Prayer: Criminal Appeal has been filed under Section 374 (2) of Cr.P.C., to set aside the order of the Special Judge, under the Protection of Children from Sexual offences Act 2012, Puducherry, in Special Sessions Case No.6 of 2014, dated 20.04.2015.

For Appellant : Mr.Prakash Adiadam,

For Respondent : Mr.V.Balamurugane
Public Prosecutor (Pondy)



Crl.A.No.362 of 2015

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J U D G M E N T

On 28/06/2014, a child aged about 16 years was admitted in the Government Hospital Puducherry complaining lower abdominal pain. The medical examination of the child, turned out to be a case of self abortion consuming medicine purchased from a pharmacy without prescription. Being a minor girl, the matter was reported to the Child Welfare Committee by the Hospital Authorities. On enquiry, the cause of pregnancy was attributed to a 51 years old man who is the appellant herein .

2. On receiving the complaint given by the minor girl, a case in Crime No.252/2014 under Section 6 of POCSO Act was registered on 01/07/2014 and taken up for investigation. During the course of investigation, the statement of the minor girl was recorded by the Judicial Magistrate. The accused was arrested and based on his confession, his cell phone containing obscene pictures to allure the girl were recovered. On completion of investigation final report filed against the appellant/accused and taken cognizance by the Sessions Court.



Crl.A.No.362 of 2015

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3. The trial Court framed charges under Section 5(1)(ii) r/w Section 6 of POCSO Act 2012 and Section 376 of I.P.C and tried the accused.

4. To prove these charges the prosecution examined 16 witnesses, marked 25 exhibits and 4 material objects. In defence, 3 witnesses were examined, two witnesses were examined as Court Witnesses. The trial Court held the accused guilty of both charges. He was sentenced to undergo 10 years R.I and to pay fine of Rs.1,000/- in default 6 months S.I for the offence under Section 376 IPC. For the offence under Section 5(1)(ii) r/w 6 of POCSO he was sentenced to undergo 10 years R.I and to pay a fine of Rs.1,00,000/- in default to undergo one year S.I. The period of substantive sentence was ordered to run concurrently and the period of imprisonment already undergone was ordered to be set off under Section 428 of Cr.P.C.

5. Being aggrieved by the judgment of conviction and sentence, the present appeal is filed.



Crl.A.No.362 of 2015

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6.(i) The Learned Counsel for the appellant submitted that the trial Court has failed to consider that the case of prosecution bristles with contradictions and falsehood. The complaint generated from the Child Welfare Committee office on the dictate of the Welfare Officer is figment of imagination and abuse of law. The allegation that P.W-1 was a minor at the alleged time of occurrence was not proved with conclusive evidence. The opinion of the doctor about the age of the girl and the birth certificate creates doubt about the minority of the girl. The accused was specifically charged for impregnating P.W-1. However, the prosecution has not conducted potency test or sperm count test. At the time of complaint, medical evidence indicates that P.W-1 was carrying 2 months old foetus. Whereas, P.W-1 has deposed she had been subjected to intercourse by the accused a month before the complaint. Thus, it is clear that, for the 2 months old foetus, which got aborted on 28/06/2014 the accused is not responsible. Therefore, charge under section 5(j)(ii) of POCSO Act is unsustainable.

6.(ii) According to P.W-1, she used to voluntarily visit the house of



Crl.A.No.362 of 2015

the appellant/accused on Sundays and the accused used to have sexual intercourse with her and she used to receive financial assistance from him. If so, the said act is by consent and will not attract Section 376 of I.P.C. Even otherwise, for one and the same Act, charge for aggravated sexual offence under POCSO Act and charge for rape under I.P.C were framed separately and convicted for each charges. This amounts to double jeopardy and against the constitution. The trial Court also failed to consider the evidence of defence witnesses that P.W-1 had acquaintance with several male friends and admittedly taken tablets earlier to terminate pregnancy.

7. The Public Prosecutor representing the Government of Puducherry, in defence of the trial Court verdict, submitted that the date of birth of the P.W.1 is 06/02/1999 and same was proved through her birth certificate issued by Oulgaret Municipality marked as Ex.P-3. The charge of aggravated penetrative sexual offence is proved through the victim girl P.W-1 and the result of the offence has lead to pregnancy and same is proved through the Accident Register marked as Ex.P-10. The plea of the defence Counsel that potency test of the accused not



Crl.A.No.362 of 2015

properly done is incorrect. Ex.P-14, is the potency test report of the accused which opines that there is nothing to suggest that the accused is incapable of sexual intercourse. The minor discrepancy regarding the date of the offence or the failure to prove the paternity does not take away the element of crime committed by the accused when the victim P.W-1 has consistently stated about the repeated penetrative offence committed by the accused when P.W-1 visited his house. The victim (P.W-1) and her mother (P.W- 2) had narrated the events without any contradictions and their reluctance to report about the crime immediately due to ignorance and poverty cannot be taken advantage or doubt their case.

8. The Learned Public Prosecutor further submitted that, the testimony of P.W-1 and P.W-2 is corroborated by the medical evidence as spoken by P.W-8 Dr.M.V.Gladial Jenifer and P.W-9 Dr.Shobana Aarthi, who medically examined the victim girl. Thus, the prosecution case is proved beyond doubt through the ocular and medical evidence. The crime of sexual intercourse committed against a 16 years old girl satisfy the required ingredient of the aggravated penetrative sexual offence and rape. Therefore, the absence of proof



CrI.A.No.362 of 2015

regarding the paternity cannot be a reason to suspect the case of the prosecution.

9. In cases of these nature, the testimony of the victim is very crucial and the test is whether the evidence of the victim girl is reliable or being motivated by any ulterior reason.

10. Ex.P-3 is the Birth Certificate of the victim girl. As per Ex.P-3 her date of birth is 06/02/1999. The birth was registered on 18/02/1999. Being the contemporaneous document possible to prove the date of birth, the prosecution has placed the best evidence available to prove the age of the victim girl P.W-1. The frequent visit of P.W-1 to the shop of the accused is an undisputed fact. The wife of the accused, who was summoned by the Court and examined as CW-1 admits that P.W-1 used to come to her shop. This is corroborated by CW-2, the aunty of P.W-1, who is residing near the house of the accused.

11. P.W-1 along with her mother P.W-2 had gone to the Govt.



Crl.A.No.362 of 2015

Hospital, Puducherry at about 9.45 pm, on 28/06/2014 when their attempt to abort the foetus taking pills purchased from the local pharmacy without doctor's prescription lead to severe blood loss and lower abdominal pain. P.W-8 is the doctor, who admitted P.W-1 in the hospital. The Accident Register is marked as Ex.P-10. In her report, she has recorded that the patient vagina found with profuse discharge of blood. In the cross examination, she has stated that from the discharged blood DNA test for paternity cannot be conducted. For paternity test, at least the foetus must be above 5 months old. In this context Ex.P-14, the positive potency test report of the accused gains relevancy.

12. The prosecution witnesses P.W-2 as well as C.W-1 had deposed that they were reluctant to give criminal complaint since it involves the reputation of the family. The crime has come to light only when the mother of the victim failed in her attempt to abort the foetus secretly. Her futile attempt has lead to serious danger to the life of the minor girl and to save her life the victim was admitted in the hospital. To avoid ignominy, P.W-1 has not disclosed the name of the offender to the doctors. But then, before the Judicial Magistrate, the victim has



Crl.A.No.362 of 2015

reveal the entire fact and the name of the accused. Ex.P-2, the content of the prior statement given to the Judicial Magistrate is used for corroborating the testimony of P.W-1 recorded during the trial.

13. The evidence of the prosecution beyond doubt has proved that P.W-1 was below 16 years old and she was subjected to intercourse leading to pregnancy. P.W-1 has implicated the accused as the person who committed the aggravated penetrative offence. The burden of discharge the presumption is on the accused. He, through D.W-1 to D.W-3 has attempted to prove that the girl was of immoral character and used to be in the Company of male friends. Even assuming that the girl had male friends, when it is proved that she was below 16 years old and was subjected to penetrative sexual offence repeatedly, the ingredient of Section 5(l) of the POCSO Act gets satisfied, though not 5(j)(ii). The penal provision for aggravated penetrative sexual offence of any form is under Section 6 of the Act. Therefore, charge for one form but proof for another form not a material irregularity to vitiate the trial since the nature of the offence proved falls within the definition of aggravated form of penetrative sexual offence and the substance of the



Crl.A.No.362 of 2015

offence is mentioned in the charge framed and read over to the accused, quoting the wrong provision of law of a cognitive offence not prejudiced the accused who had been put to answer the incriminating part of evidence against him. Besides offence under Section 5 of POCSO Act the accused also tried for offence under Section 376 I.P.C. Though for both charges the accused is sentenced, the period of sentence ordered to run concurrently. The superfluous charge under Section 376 I.P.C and sentence for the offence under Section 376 I.P.C therefore to be taken as charge in alternate.

14. In the result, this *Criminal Appeal is partly allowed*. The conviction and sentence for offence under Section 5 r/w 6 of POCSO is confirmed. The conviction and sentence under section 376 I.P.C is set aside. The appellant/accused shall undergo 10 years R.I and to pay fine of Rs.1,00,000/- in default to undergo one year S.I for offence under Section 5 (1) r/w 6 of POCSO Act. The fine amount shall be paid as compensation to the victim PW-1. The period of sentence already undergone shall be set off under Section 428 of Cr.P.C. The trial Court shall secure the accused/appellant and commit him to prison to



Crl.A.No.362 of 2015

undergo the remaining period of sentence.

27.10.2022

Index :Yes/no
Speaking order/Non-speaking order

To:

1. The Special Judge, Puducherry.
2. The Inspector of Police, Mettupalayam Police Station, Puducherry.
3. The Public Prosecutor, High Court, Madras.



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Crl.A.No.362 of 2015

DR.G.JAYACHANDRAN,J.

bsm

Pre-delivery Judgment made in
Crl.A.No.362 of 2015

27.10.2022