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CRL A No.210 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.09.2022

Coram:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Criminal Appeal No.210 of 2022

S.Udayakumar

... Appellant

Vs.

The Inspector of Police
Virudhachalam Police Station
Cuddalore District
(Crime No.431 of 2008)

... Respondent

Prayer : Criminal Appeal filed under Sections 374 of Criminal Procedure Code, praying to set aside the Judgment passed by the learned Sessions Judge, Special Court (POCSO Act Cases) in S.C.No.28 of 2019 dated 23.11.2020 for the offences under Section 450 and 360 of IPC and under Section 5(1) read with 6 of (POCSO Act, 2012).

For Petitioner : Mr.T.Saravanan

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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J U D G M E N T

This Criminal Appeal has been filed seeking to set aside the Judgment passed by the learned Sessions Judge, Special Court (POCSO Act Cases), Cuddalore, in Spl.S.C.No.28 of 2019 dated 23.11.2020

2.The respondent police registered the case in Crime No.431 of 2018 against the appellant for the offences punishable under Sections 366(A) IPC @ Section 3 and 4 of POCSO Act, 2012 and after completing the investigation, laid charge sheet before the Mahila Court, Cuddalore in Spl.SC.No.82 of 2018 for the offences under Sections 451, 366 of IPC and Section 5(l) read with 6 of POCSO Act. Thereafter, since the offence is against a child under the definition of POSCO Act, after establishment of the Special Court, the case was transferred to Special Court (POCSO Act Cases), Cuddalore, and re-numbered as Spl.S.C.No.28 of 2019. The learned Special Judge after completing the formalities, framed the charges against the appellant for offences under Sections 450, 366 of IPC and Section 5(l) read with 6 of POCSO Act.



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3. After framing the charges, in order to prove the case of the prosecution, during trial, totally 12 witnesses were examined as P.W.1 to P.W.12 and 12 documents were marked as Exs.P.1 to P12 and no material object was exhibited.

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

5. On conclusion of trial and after hearing the arguments advanced on either side and also considering the materials, the Special Court convicted the appellant for offence under Sections 450 and 366 of IPC and under Section 5(1) read with 6 of (POCSO Act, 2012) and sentenced to undergo 10 years rigorous imprisonment and fine of Rs.5,000/- in default to undergo simple imprisonment for further period of 3 months



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for the offence under Section 450 IPC; to undergo 10 years rigorous imprisonment and fine of Rs.5,000/- in default to undergo simple imprisonment for further period of 3 months for the offence under Section 366 IPC; to undergo 10 years rigorous imprisonment and fine of Rs.5,000/- in default to undergo simple imprisonment for further period of 3 months for the offence under Section 5(l) read with 6 of POCSO Act 2012. Challenging the Judgment of conviction and sentence, the appellant has filed this present appeal before this Court.

6. The case of the prosecution is that on 07.07.2018, the daughter of the defacto complainant was found missing. On enquiry, it was found that the appellant induced the victim girl under guise of marrying her and taken her away from her house and also had sexual intercourse with her several times against her will. Hence, the case.

7. The learned counsel for the appellant would submit that the prosecution has not proved its case for the charged offences under Sections 450 and 366 IPC and Section 5(l) read with 6 of POCSO Act.



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He would submit that the victim was produced before the Magistrate for recording statement under Section 164 Cr.P.C., and in the said statement, she has not whispered anything about the forcible penetrative sexual assault alleged to have been made by the appellant. Subsequently, she was produced before the Doctor for medical examination and the Doctor/P.W.5 who examined the victim girl has clearly stated that the victim girl had informed her that the one Udhayakumar, the lover of the victim girl had sexual intercourse with her several times for the past one month and on 10.07.2018, they went to Senji and stayed there for two days and thereafter, went to the police station. Further, the doctor has not opined about any forcible sexual assault on the victim girl and that the doctor has opined that due to cycling also, there is possibility of tearing hymen. Therefore, it is clear that there is no forcible sexual assault as alleged by the prosecution. The mother of the victim girl/P.W.1 is only a hearsay witness. Though the victim girl has stated that they gone to Trichy, Tiruppur etc., and stayed as husband and wife for more than a week, none of the independent witnesses were examined to prove that the victim was seen with the appellant. The victim girl herself has stated that



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she married the appellant at Trichy and they were living as husband and wife. Since the victim girl and the appellant belong to different community and in order to wreck vengeance, they have foisted a false case against the appellant and the appellant has not committed any offence as charged by the prosecution. He would further submit that the date and time in the complaint are tampered by using whitener and that there was 4 days delay in lodging the complaint for which, there is no proper explanation. Since the alleged house trespass and kidnap have not been substantiated and the alleged forcible penetrative sexual assault is also not proved, the prosecution failed to prove its case beyond all reasonable doubts. The trial Court failed to appreciate the same and wrongly convicted the appellant. Therefore, this Criminal Appeal has to be allowed and the Judgement of the trial Court has to be set aside.

8. The learned Additional Public Prosecutor appearing for the respondent police would submit that as per the birth certificate, the date of birth of the victim child is 10.03.2004 and the occurrence took place in July 2018 and therefore, the age of the victim child was only about 15



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years at the time of alleged occurrence. P.W.1 is the mother of the victim child and she has clearly stated that her father had informed her husband that the victim girl was found missing from his house and subsequently, when they searched for the victim child, they came to know that the appellant under the guise of marrying the victim child, had taken her from the house and therefore, she preferred the complaint. Subsequently, the victim child was secured and she was examined as P.W.2 and in her statement, she has clearly stated that during June 2018, one Sunday, when no one was there in her house, the appellant came to her house and told her that he would marry her and when she refused, the appellant had sexual intercourse with her. Further she has stated that when she was in her grandfather's house, the appellant without knowing his grandfather, used to come there and talk to her. Therefore, it is clear that when the victim minor child was alone in the house, the appellant used to enter into her house and forcibly had sexual intercourse without her consent. Therefore, the appellant has committed the offence of criminal trespass which falls under Section 450 IPC. Since, the appellant had sexual intercourse with the victim who is a minor, without her consent, the



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offence falls under the POCSO Act. Further, the appellant has taken the victim minor child away from the custody of her legal and natural guardian under the guise of marrying her and also lived together for more than a week as husband and wife. Therefore, it is clear that the appellant has removed custody of the victim minor child from her natural as well as legal guardian and also had sexual intercourse with her for more than once. Therefore, the offences fall under Sections 366 IPC and Section 5(l) read with 6 of POCSO Act. Though the victim minor child has not stated anything about the penetrative sexual assault made by the appellant before the Magistrate while recording statement under Section 164 Cr.P.C., when she was produced before the doctor for medical examination, she has clearly informed the doctor/P.W.5 that her lover Udhayakumar, had penetrative sexual intercourse with her for several times. The doctor/P.W.5 has also given opinion that the hymen was not intact and there is possibility of penetrative sexual intercourse. Therefore, the prosecution proved its case beyond reasonable doubt and the trial Court rightly appreciated the material evidence and convicted the appellant. Therefore, there is no merit in the appeal and appeal is liable to



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be dismissed.

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9. Heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the State and perused the materials available on record.

10. Since this Court is the Appellate Court of fact finding, it has to re-appreciate the evidence independently and to give its findings. Accordingly, this Court gone through the entire materials and the Judgment of the trial Court and re-appreciated the entire evidence independently and give its findings.

11. In order to substantiate the charges, on the side of the prosecution as many as 12 witnesses were examined and 12 documents were marked as Exs.P.1 to P12 and no material object was exhibited.

12. The birth certificate of the victim child/Ex.P.10 shows that her date of birth is 10.03.2004 and the occurrence has taken place on



06.07.2018. Therefore, the age of the victim was only about 15 years at the time of occurrence. Further, the Radiology Test report /Ex.P.4, says that the victim has completed 16 years and not completed the age of 18 years. Therefore, it is proved that the victim was a child at the time of occurrence. Further, the doctor who conducted medical examination on the victim child has given opinion/Ex.P.5 that the victim is aged about 15 years and there are possibilities for the victim being subjected to sexual intercourse. Therefore, from the evidence of Exs.P.4, P.5 and P.10, it is proved that the victim was aged only about 15 years and she was a child under the definition of 2(1)(d) of POCSO Act at the time of occurrence and she had not completed the age of 18 years.

13. The victim child was examined as P.W.2 and in her statement, she has clearly stated that during June 2018, one Sunday when no one was there in her house, the appellant came to her house and told her that he would marry her and when she refused, the appellant had sexual intercourse with her. Further she has stated that when she was in her grandfather's house, the appellant without knowing his grandfather, used



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to come there and talk to her. Subsequently the appellant has induced the victim child and under the guise of marrying her, took her to different place and married her and also had sexual intercourse with her. Though, before the Magistrate, the victim child has not stated anything about the penetrative sexual assault made by the appellant while recording statement under Section 164 Cr.P.C., when she was produced before the doctor for medical examination, she has clearly narrated that her lover Udhayakumar, had penetrative sexual intercourse with her for several times. Further, the doctor/P.W.5 has also given opinion that the hymen was not intact and there are possibilities of the victim being subjected to penetrative sexual intercourse.

14. From the evidence of P.W.2/victim child, it is clear that the appellant has committed penetrative sexual assault on the victim who is a minor, for more than once and the same was also corroborated with the evidence of P.W.5/doctor who examined the victim child, Ex.P.4/Radiology Test Report, Ex.P.5/Doctor's Opinion, Ex.P.10/birth Certificate of the victim child.



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15. As far as Section 450 IPC is concerned, the victim child/P.W.2 herself has clearly stated that when she was alone in her house as well as in her grandfather's house, the appellant used to come there without the knowledge and consent of her guardians and talk to her. Therefore, it is clear that when the victim minor child was alone in the house, the appellant has trespassed into her house. Therefore, the offence falls under Section 450 IPC.

16. From the evidence of P.W.5/doctor, Ex.P.4/Radiology Test Report, Ex.P.5/Doctor's Opinion, Ex.P.10/birth Certificate of the victim child, it is clear that the victim was aged about 15 years at the time of occurrence. Further, from the evidence of P.W.1/mother of the victim child, P.W.2/victim child, P.W.3/father of the victim child and Ex.P.1/complaint, Ex.P.7/FIR, it is clear that the appellant has taken the victim minor child away from the custody of the natural and legal guardian under the guise of marrying her and also had sexual intercourse



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with her for more than once. Therefore, the offences fall under Sections 366 IPC and Section 5(1) read with 6 of POCSO Act.

17. Though the learned counsel for the appellant contended that no independent witnesses were examined to prove that the victim girl was seen with the appellant during the alleged missing period, in the cases of this nature, normally independent witnesses cannot be expected. When P.W.2 / the victim child has clearly narrated the entire incident and the same was also corroborated with the medical evidences, there is no reason to discard the evidence of P.W.2/victim child.

18. The further contention of the learned counsel for the appellant is that there was delay in lodging the complaint. In the complaint itself it is stated that they searched the victim girl in several places and in the house of the appellant as well as in his relatives' house and since they could not find her, thereafter they lodged the complaint. Even otherwise, in the cases of this nature, sometimes due to frustration and considering the future of the girl child, they would reluctant to lodge complaint.



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Therefore, the delay in lodging the complaint is not fatal to the case of the prosecution.

19. Once the prosecution has proved the foundational facts of penetrative sexual assault on the victim girl who is a minor, it is for the appellant to rebut the presumption. But the appellant has not rebutted the presumption. In this case, the prosecution proved its case beyond all reasonable doubts that the appellant trespassed into the house and removed the custody of the victim girl who is a child, from the custody of the natural and legal guardians and subsequently had penetrative sexual intercourse with her for more than once. Therefore, the charges framed against the appellant are proved and the trial Court rightly appreciated the evidence and convicted the appellant.

20. Admittedly, in the statement recorded by the learned Magistrate under Section 164 Cr.P.C., the victim child has not specifically stated about the penetrative sexual assault. In the cases of this nature, girls in our country normally reluctant to speak out immediately, especially



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before the strangers. Therefore, the delay in lodging the complaint and non mentioning of penetrative sexual assault before the Magistrate, may not be fatal to the case of the prosecution.

21. It is settled proposition that in the cases of this nature, the prosecution has to prove the fundamental facts of the offence charged against the accused, not based on proof beyond reasonable doubt, but based on the basis of preponderance of probability. If the prosecution is able to prove the fundamental facts of the offence based on preponderance of probability, the presumption under Section 29 of the Act can be invoked against the accused, then it is for the accused to rebut the presumption either by discrediting the prosecution witnesses through cross examination or by adducing his own evidence to demonstrate that the prosecution case is improbable based on the principle of preponderance of probability.

22. The evidence of P.W.2/victim child is cogent and corroborated with medical evidence. If any lapse on the part of the investigation, it



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may not be a sole ground to discard the evidence of the victim and there is no reason to disbelieve the evidence of the victim child. Even if the appellant had sexual intercourse with the consent of the victim girl, since she was a child at the time of alleged occurrence, her consent is immaterial. Therefore, this Court does not find any perversity, illegality or infirmity in the Judgment of the trial Court. The appellant deserves for conviction and sentence. There is no good reason or ground to interfere with the judgment of the trial court.

23. Accordingly, this Criminal Appeal is dismissed.

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Index: Yes/No



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To

1. The Sessions Judge,
Special Court (POCSO Act Cases), Cuddalore
2. The Inspector of Police
Virudhachalam Police Station
Cuddalore District
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.



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P.VELMURUGAN, J

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