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Crl.A.No.553 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.09.2022

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.553 of 2021

Srinivasulu

... Appellant

Vs.

State by
The Inspector of Police,
All Women Police Station,
Erode.
(Crime No.10 of 2018)

... Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the conviction and sentence under Section 6 of the POCSO ACT alone passed by the Court of Sessions, Magalir Neethi Mandram, (Fast Track Mahila Court), Erode in Special S.C.No.1 of 2019, dated 07.01.2021.

For Appellant	:	Mr.M.Subramaniam
For Respondent	:	Mr.S.Sugendran Additional Public Prosecutor



Crl.A.No.553 of 2021

WEB COPY

J U D G M E N T

This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 07.01.2021 made in S.C.No.1 of 2019, by the learned Sessions Judge, Magalir Neethi Mandram, (Fast Track Mahila Court), Erode.

2. The respondent-police has registered a case against the first accused / appellant for the offences under Section 366 (A) IPC and Sections 6 and 9 of Protection of Children from Sexual Offences Act, 2012 (for brevity “the POCSO Act”), and against the second accused for the offence under Section 366 (A) IPC. After investigation, laid a charge sheet before the learned Sessions Judge, Magalir Neethimandram (Fast Track Court), Erode. The learned Judge, framed charges against the appellant/first accused for the offences under Sections 366 (A) IPC and Sections 6 and 9 of the POCSO Act, and framed charges against the second accused for the offence under Section 366 (A) IPC, and conducted the trial.

3. After considering the evidence on record and hearing either side, the learned Sessions Judge, by judgment dated 07.01.2021, acquitted the



Crl.A.No.553 of 2021

appellant/first accused for the offence under Section 366 (A) IPC and Section 9 of POCSO Act, and convicted him for the offence under Section 6 of the POCSO Act and sentenced him to undergo 20 years Rigorous Imprisonment and to pay a fine of Rs.10,000/- in default to undergo three months Simple Imprisonment. The second accused was convicted for the offence under Section 366 (A) IPC and sentenced her to undergo Rigorous Imprisonment for three years and to pay a fine of Rs.5,000/- in default to undergo three months simple imprisonment.

4. Challenging the conviction and sentence under Section 6 of the POCSO Act passed by the learned Sessions Judge, the appellant/first accused alone has come up with this appeal. The second accused has not made any appeal.

5. The learned counsel for the appellant has made the following contentions:-

(i) During cross-examination and the statement recorded under Section 164 Cr.P.C., the victim herself admitted that she has completed the age of 18 years. The doctor who examined the victim girl to ascertain the age of the victim girl also stated that she had completed 18 years.



Crl.A.No.553 of 2021

WEB COPY

(ii) Victim girl during her evidence has clearly stated that because of the torture given by their parents and in order to escape from their harassment, she voluntarily left from her home. During 164 statement, she had stated that she married the first accused with the help of his friends and both lived as husband and wife, and nowhere in the statement she mentioned that the first accused / appellant had forced her to have sexual relationship. Before the Medical examiner, she had stated that she had consensual intercourse only once with the first accused, and therefore, there are material contradictions with regard to physical relationship, as the victim girl had taken three different versions.

(iii) If any doubt arises regarding age, physical relationship, the benefit of doubt should be extended in favour of the appellant and however, the trial Court failed to appreciate the evidence. The victim girl in her evidence has clearly has stated that she has completed 18 years and before the learned Magistrate while recording statement under Section 164 of Cr.P.C., stated that she lived with the appellant as husband and wife and therefore, the prosecution has not established that the victim is the child under the definition of Section 2 (d) of the POCSO Act and the appellant had sexual intercourse with the victim child,



Crl.A.No.553 of 2021

therefore, the commission of offence has not been established and the appeal is to be allowed and the conviction and sentence passed by the trial Court has to be set aside.

6. The learned Additional Public Prosecutor appearing for the respondent-Police would submit that the victim girl has clearly spoken in her evidence that the appellant had forcible sexual intercourse with her, which clearly falls under Section 5(l) of the POCSO Act, which is punishable under Section 6 of the POCSO Act. With regard to age of the victim, P.W.4, who is the headmaster of the school, in which, the victim was studying has produced the school certificate Ex.P5 and P.W.4-Sanitary Inspector, who issued Ex.P4 birth certificate, which show that the victim girl was born on 27.07.2002 and she is a child under the definition of Section 2(1)(d) of the POCSO Act. The victim girl was advised for radiological examination for determination of her bone age. P.W.6 Radiologist also found that age of the victim girl to be in between 16 and 18 years, except iliac crest bone, as it show that the age of the victim girl is below 20 years at the time of occurrence. P.W.10-doctor, who examined the victim girl has clearly adduced in her evidence that the hymen of the victim girl was not intact and she has opined that the victim girl was subjected to sexual intercourse and also



Crl.A.No.553 of 2021

issued Ex.P11 certificate to that effect. It is further contended that the evidence of the doctor, who conducted examination and the evidence of the victim girl would show that she was subjected to sexual intercourse. The evidence of the headmaster, where the victim girl studied and the Sanitary Inspector, who issued Birth Certificate have also stated that the victim child was born on 27.07.2002 and therefore, the victim girl would fall under the definition of Section 2 (1)(d) of the POCSO Act and therefore, the trial Court rightly appreciated the evidence and convicted the appellants both the accused. Since the second accused committed the offence under Section 366(A), she was convicted for the said offence, and she has not filed any appeal. However, the first accused has challenged the conviction and sentence passed under Section 6 of the POCSO Act, and there is no merit in the appeal therefore, the appeal has to be dismissed.

7. Heard the learned counsel for the appellant and perused the materials available on record.

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



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9. The case of the prosecution is that the mother of the victim child viz., Krishnaveni (P.W.1) made a complaint before the Police Station, stating that her daughter (P.W.2) was found missing, and thereafter, the victim child (P.W.2) was found by the Police and brought them to police station and when she (P.W.1) enquired her daughter (P.W.2), she replied that the first accused/ appellant compelled her and married and had continuous intercourse with her.

10. In order to prove the charges levelled against the appellants, the prosecution examined 11 witnesses as P.W.1 to P.W.11 and marked 20 documents as Exs.P1 to P20, besides, besides M.O.1 was marked. On completion of the evidence of the prosecution, incriminating circumstances culled out from the evidence of the prosecution witnesses put before the appellants, they have denied as false and on the side of the evidence, no oral and documentary evidence was recorded.

11. The mother of the victim girl (P.W.1) in her evidence has stated that at the time of occurrence, her daughter was 16 years and she was found missing and hence, she gave (Ex.P1) complaint before the Investigating Officer (P.W.11). The victim girl (P.W.2) in her evidence has stated that she left from her house



Crl.A.No.553 of 2021

with the help of the second accused and the appellant (first accused) took her on several places and they got married and went to the house of the appellant / first accused and his parents scolded them. She further adduced that she told the first accused (appellant) not to have sexual intercourse, however, the appellant forcibly had sexual intercourse with her on several times. The doctor (P.W.10) who examined the victim girl (P.W.2) has clearly deposed that the victim girl was subjected to sexual assault and her hymen was not intact and medical evidence also supported the case of the prosecution. Therefore, the appellant / first accused had sexual intercourse with the victim girl has been rightly established.

12. The main core issue is to be decided in this Appeal whether the victim girl would come under the definition of 2(1)(d) of the POCSO Act, or not. According to the learned counsel for the appellant, the victim girl herself in her evidence has stated that she completed 18 years and the doctor (P.W.6), who conducted Radiologist has also suggested that the age of the victim child would be 18 to 20 years, and therefore, the victim is not a minor and she would not come under the definition of 2(1)(d) of the POCSO Act. No doubt, age of the prosecutrix has to be proved by the prosecution. Regarding proof of age, there is



Crl.A.No.553 of 2021

a presumption under Section 94 (2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 and unless the contrary is proved, the Court can presume age of the victim as mentioned in the Certificate given by any of the Authority as stated in Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015. The best person to speak about the age of the victim girl is the mother. She (P.W.1) has clearly stated that at the time of occurrence, her daughter is a minor, aged about 16 years. Further, in this case, prosecution has produced a School Certificate from the School where the victim studied and the Birth Certificate of the victim child, and the same were marked through Headmaster (P.W.4) and the Sanitary Inspector (P.W.5) as Exs.P4 and P5. As per Exs.P4 and P5, date of birth of the victim girl is 27.07.2002, which show that the victim has not completed 18 years at the time of occurrence and she is a child under the definition of Section 2(1)(d) of the POCSO Act. It is relevant to refer Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015, and as per the Act, there is presumption and determination of age, which reads as follows:

"94. (2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it



Crl.A.No.553 of 2021

WEB COPY

is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining ?

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order."

The defence taken by the learned counsel for the appellant is that at the time of occurrence, the victim girl completed the age of 18 years and with her consent the appellant married her and had sexual intercourse with her. As per the evidence of P.W.1, P.W.4, P.W.5 and Ex.P4 and Ex.P5 the prosecution has proved that the date of birth of the victim girl is 29.07.2002. However, the same was not disproved by the defence counsel. On a combined reading of evidence of P.W.1, P.W.4, P.W.5 and Ex.P4 and Ex.P5, this Court finds that at the time of



Crl.A.No.553 of 2021

occurrence, the victim girl was only 16 years and she has not completed the age of 18 years. Since she is a child, the offence committed by the appellant comes under the definition of 2(1)(d) of POCSO Act and therefore, the contention raised by the learned counsel for the appellant is not acceptable.

13. Though the victim girl (P.W.2) had stated before the Investigating Officer that the appellant had forcible sexual intercourse on several times, whereas before the doctor (P.W.10) she had stated that one known person had sexual intercourse with one time, whereas before the learned Magistrate she has not stated anything about the specific expression about the sexual intercourse and only stated that she lived with the appellant has husband and wife. Therefore, it is not clear that the appellant had sexual intercourse with the victim girl on one time or on many times. Since no other witnesses have spoken about the physical relationship between the parties, except the victim girl, and even she had also taken different versions on different occasions, the offence under Section 5(l) of the POCSO Act, which is punishable under Section 6 of the POCSO Act is not proved beyond reasonable doubt. At this juncture, it is relevant to extract Section 3 of the POCSO Act, which reads as follows:-



Crl.A.No.553 of 2021

"3. A person is said to commit "penetrative sexual assault"

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(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

The above provision would clearly shows that the appellant had committed the offence under Section 3 of the POCSO Act, which is punishable under Section



Crl.A.No.553 of 2021

4 of the POCSO Act, and as per Section 4 of the POCSO Act, minimum sentence is 10 years and the maximum sentence is 20 years. As this Court finds that the prosecution has not established that the commission of offence against the appellant/first accused for the offence under Section 5(l) of the Act, which is punishable under Section 6 of the Act, the conviction passed by the learned Special Judge is set aside, however, this Court finds that the appellant has committed the offence under Section 3 of the POCSO Act, which is punishable under Section 4(1) of the Act. However, there is no interference with the quantum of sentence of 20 years.

14. With the above modifications, this Criminal appeal deserved to be dismissed and accordingly, dismissed.

20.09.2022

Speaking Order / Non-speaking order

Index : Yes / No.

Internet : Yes.

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Crl.A.No.553 of 2021

WEB COPY

To

- 1.The Special Court for Protection of Child from Sexual Offences Act 2012,
Salem.
- 2.The Inspector of Police,
Valapadi Police Station,
Salem District.



WEB COPY



Crl.A.No.553 of 2021

P.VELMURUGAN, J.

r n s

Crl.A.No.553 of 2021

20.09.2022