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Crl.A.No.550 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2022

Coram:

THE HONOURABLE **MR. JUSTICE P.VELMURUGAN**

Crl.A.No.550 of 2022

S.Selvakumar

... Appellant

Vs.

State By:

The Inspector of Police

Chidambaram Town Police Station

Cuddalore District

(Crime No.288 of 2019)

... Respondent

Prayer: Criminal Appeal is filed under Section 374 of Criminal Procedure Code, praying to call for the records and set aside the conviction and sentence imposed against the appellant on 19.01.2021 in Spl.S.C.No.128 of 2019, on the file of the Special Court (POCSO Cases), Cuddalore District and acquit the appellant.

For Appellant :Mr.Pa.Kadirvel
Legal Aid Counsel

For respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been filed seeking to set aside the conviction and sentence imposed against the appellant on 19.01.2021 in Spl.S.C.No.128 of 2019, on the file of the Special Court (POCSO Cases), Cuddalore District and acquit the appellant.

2. The respondent police registered the case in Crime No.288 of 2019 against the accused initially for offence under Sections 366 and subsequently, altered into Section 366 IPC read with Section 5(l) punishable under Section 6 POCSO Act, 2012 and again altered into Sections 366, 376(3) IPC and 5(l) punishable under Section 6 of POCSO Act, 2012 and after completing the investigation, laid the charge sheet before the Mahila Court, Cuddalore and the same was taken on file in Spl.S.C.No.94 of 2019. Subsequently, after establishment of the Special Court (POCSO Cases), the case was sent to the Special Court (POCSO Cases), Cuddalore, which was taken on file in Spl.S.C.No.128 of 2019. The learned Special Judge, after completing the formalities, framed the charges against the accused for the offence under Sections 366, 376(3) IPC and 5(l) punishable under Section 6 of POCSO Act, 2012.



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3. After framing the charges, in order to prove the case of the prosecution during trial, totally 17 witnesses were examined as P.W.1 to P.W.17 and 14 documents were marked as Exs.P.1 to P.14 and no material objects were 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 accused by questioning under Section 313 Cr.P.C. However, the 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 after hearing the arguments advanced on either side and also considering the materials, the Special Court convicted the appellant for the offences under Sections 366 and 376(3) IPC and Section 5(l) punishable under Section 6 of POCSO Act and sentenced to undergo 10 years rigorous imprisonment and to pay fine of Rs.2,000/- in default to undergo simple imprisonment for a further period of 3 months for the offence under Section 366 IPC; to undergo 20 years



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rigorous imprisonment and to pay fine of Rs.2,000/- in default to undergo simple imprisonment for further period of 3 months for the offence under Section 5(l) punishable under Section 6 of POCSO Act 2012 and Section 376(3) IPC. Challenging the said Judgment of conviction and sentence, the accused has filed this present appeal before this Court.

6. The case of the prosecution is that the victim girl was aged about 14 years and was studying 9th std. On 13.09.2019 about 5.30 p.m., when the victim girl was standing in the Chidambaram Bus Stand, Cuddalore District after her examination, the appellant approached the victim girl and on a false promise of taking care of her very well, took her to many places till 19.09.2019 and during such period, committed penetrative sexual assault on her.

7. The learned Legal Aid Counsel appearing for the appellant would submit that the victim has not clearly stated about the date of occurrence and the place of occurrence. Further, there are contradictions even between



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the statement of the victim recorded by the Judicial Magistrate under Section 164 Cr.P.C. and the evidence of the victim while examining before the Court as P.W.2. The victim in her statement recorded by the Judicial Magistrate under Section 164 Cr.P.C. has not stated anything about the sexual assault, whereas in her evidence before the Court, she has stated that on 13.09.2019, the appellant took her to a dilapidated building near Chidambaram Bus stand and committed penetrative sexual assault on her. However, during cross examination, the victim has stated that she could not identify the place of occurrence and she does not know how to go to the said dilapidated building at Chidambaram Bus stand which itself creates doubt. Further, the victim in her evidence has stated that she was semi conscious after consuming cool drink in the bus stand. But, the same was also not disclosed by the victim in her previous statement recorded by the Judicial Magistrate. The contradictions between the statement of the victim recorded under Section 164 Cr.P.C. and the evidence of the victim given before the trial Court, are material contradictions which would vitiate the case of the prosecution. Even the doctor who conducted medical examination on the victim, has stated that the victim had informed her that



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she had sexual intercourse with a known person namely Selvakumar on 16.09.2019, whereas in the entry made in the Accident Register, the name of the accused was not mentioned and it is only mentioned as sexual assault by a known person and that it is not known how the doctor mentioned the name Selvakumar while giving evidence before the Court. Further, originally the case was registered under Section 366 IPC alone and even after the victim was secured, she had not spoken anything about the sexual assault made by the appellant, either before the Investigating Officer or before Judicial Magistrate and it is also not known how the Investigating Officer, altered the offence and charged the appellant for the offence under the POCSO Act which also creates doubt. He would further submit that when the place of occurrence was not clearly identified either by the victim or by the accused, it is not known how the Investigating Officer drew the observation mahazar without any clear identification of the place of occurrence which also creates doubt. Except the victim/P.W.2, there is no other eyewitness to the occurrence and the other witnesses are only hearsay witnesses. Even the evidence of the victim is not cogent and consistent and her statements are contradictory in each and every stage. She has stated one



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thing before the Judicial Magistrate while recording statement under Section 164 Cr.P.C. and she has stated another thing before the doctor during medical examination and subsequently, she has stated different version of allegation before the trial Court while examining as P.W.2. Though the victim has stated that the appellant took her to several places, no one was examined to prove that the victim was seen with the appellant during the alleged period. The non examination of those eyewitnesses is also fatal to the case of the prosecution. Further, the birth certificate of the victim was not produced to prove the age of the victim and that the age mentioned in the dental and radiological test report is not an accurate one and the extent of margin of two years plus or minus can be considered. Therefore, the prosecution failed to prove its case beyond reasonable doubt either for the offence under the Indian Penal Code or under the POCSO Act. The trial Court also failed to properly appreciate the evidence and the contradictory statements of the victim developed by her at each and every stage. Even as per the medical report, there was no forceful sexual intercourse. Therefore, in the absence of any corroboration with medical evidence, it is unsafe to convict the appellant, which warrants interference.



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8. The learned Additional Public Prosecutor appearing for the respondent police would submit that the age of the victim was only 14 years at the time of occurrence and she was studying 9th std. The appellant is a known person to the victim. On 13.09.2019, the appellant took the victim forcefully to a dilapidated building and committed penetrative sexual assault on her. Further, he also took the victim to various places and committed sexual assault on the victim. Since the appellant removed the custody of the victim who was a child, from her lawful guardian without their consent, the act of the appellant is termed as kidnapping under Section 366 IPC. Further the appellant has committed penetrative sexual assault on the victim who was only aged about 14 years, for more than once and therefore, the offence committed by the appellant falls under Section 376(3) IPC and also Section 5(l) of POCSO Act. He would further submit that when the victim was examined as P.W.2, she has clearly stated about the sexual assault made by the appellant. Though she had not disclosed about the sexual assault committed by the appellant in her previous statement recorded by the Judicial Magistrate under Section 164 Cr.P.C., during cross examination, when the Court had put a question before the victim as to why she did not



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speak about the sexual assault committed by the appellant in her previous statement made before the Judicial Magistrate, she explained that due to fear, she did not reveal the same before the Judicial Magistrate. Further, the doctor who conducted medical examination on the victim was examined as P.W.13 and she has clearly stated that the victim informed her that she had sexual intercourse with a known person namely Selvakumar and the doctor has given opinion that the hymen of the victim was not intact and there is a possibility of having had sexual intercourse. Further, based on the dental and Radiological report/Ex.P.12, Age Certificate has been issued by a doctor which was marked as Ex.P.13 in which it is stated that the age of the victim was between the 14 to 16 years. Therefore, from the oral and documentary evidence, the prosecution proved its case that the appellant removed the custody of the victim who was a child under the definition of POCSO Act at the time of occurrence, from her lawful guardian without their consent and committed penetrative sexual assault on her. The evidence of the victim was also corroborated with the medical evidence. Mere non mentioning of the penetrative sexual assault before the Judicial Magistrate, cannot be a sole ground to disbelieve the evidence of the victim. Even



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otherwise, the victim girl, during her cross examination clearly explained as to why she did not reveal about the sexual assault made by the appellant, before the Judicial Magistrate. Therefore, the prosecution proved its case with oral and documentary evidence and the medical evidence were also supported the same. The trial Court rightly appreciated the evidence of the prosecution witnesses and convicted the appellant for the charged offences and there is no merit in the appeal and the appeal is liable to be dismissed.

9. Heard the learned Legal Aid Counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the respondent Police and also perused the materials available on record.

10. Admittedly the trial Court framed the charges against the appellant for the offences under Sections 366 and 376(3) IPC and 5(1) punishable under Section 6 of POCSO Act. In order to substantiate the said charges, as stated above, on the side of the prosecution, totally 17 witnesses were examined and 14 documents were marked. Out of the 17 witnesses, the victim was examined as P.W.2.

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11. A reading of the evidence of the victim/P.W.2 shows that on 13.09.2019 at about 5.30 p.m., when the victim was standing in the Chidambaram Bus Stand, Cuddalore District after completing her examination, the appellant approached her and asked her to come along with him on the false promise of taking care of her very well. When she refused the same, the appellant forcefully took her to a dilapidated building near Chidambaram Bus Stand and had sexual intercourse with her forcefully. Thereafter, the appellant took the victim to many places till 19.09.2019.

12. At the time of occurrence, the victim was aged about 14 years. In order to prove the age of the victim, the school certificate of the victim was marked as Ex.P.4 which was issued by P.W.6/Head Mistress of the school in which the victim studied and that the Head Mistress has clearly stated that based on the school records, she issued the School Certificate/Ex.P.4. As per the School Certificate/Ex.P.4 and the evidence of the victim/P.W.2 and P.W.6/Head Mistress, the date of birth of the victim is 08.06.2006 and as per the prosecution, the date of occurrence is between 13.09.2019 to

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19.09.2019. Therefore, the age of the victim was only about 14 years at the time of occurrence.

13. Further, the victim was subjected to Dental and Radiological test and the test report was marked as Ex.P.12 in which, it is stated that the victim was aged 13 to 15 years. Even in the Age Certificate/Ex.P.13, issued by the doctor based on the dental and radiological test report/Ex.P.12, the age of the victim is mentioned as above 14 years and below 16 years. Even if two years is added to the age mentioned in the radiological test report as contended by the learned counsel for the appellant, still the age of the victim comes below 18 years.

14. As per Section 94 of Juvenile Justice (Care and Protection of Children) Act if any document is produced by the school authority or the report obtained based on the ossification test, it can be presumed that the age mentioned in the said certificate is genuine one. No doubt the presumption under Section 94(2) of Juvenile Justice Act is a rebuttable presumption. However, on the side of the defence, they did not rebutted the

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presumption that the age of the victim was above 18 years and she was not a child at the time of occurrence. Therefore, this Court presumes from the evidence of P.W.6/Head Mistress, School Certificate/Ex.P.4, Dental and Radiological test report/Ex.P.12, Ex.P.13/Age Certificate issued based on Ex.P.12, that the victim was a child under the definition of Section 2(1)(d) of POCSO Act and she had not completed the age of 18 years at the time of occurrence.

15. As far as the commission of offence under Section 366 IPC is concerned, the victim/ P.W.2 clearly stated that the appellant by stating that he would take care of her very well, took her forcefully to various places from 13.09.2019 to 19.09.2019. Even the FIR/Ex.P.1 was initially registered for the offence under Section 366 IPC based on the complaint given by the parents of the victim. Therefore, the prosecution has proved the charge under Section 366 IPC.

16. As far as sexual assault is concerned, the victim/P.W.2 in her evidence has clearly stated that on 13.09.2019, the appellant forcefully took



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her to a building which was in a dilapidated condition and committed penetrative sexual assault on her. Further, the doctor/P.W.12 who conducted clinical examination on the victim has stated that the victim had informed her that 6 days before, she had left along with a known person namely Selvakumar, and had sexual intercourse with him on 16.09.2019 at 8 p.m. Further, the doctor has given opinion/Ex.P.6 that the hymen of the victim was not intact and there is a possibility of having had sexual intercourse. Even in the Accident Register/Ex.P.7, it is mentioned as sexual assault by a known person on 16.09.2019. Therefore, from the evidence of the victim/P.W.2, doctor/P.W.12 and medical evidence viz., opinion of the doctor/Ex.P.6, Accident Register/Ex.P.7, it is proved that the victim was subjected to penetrative sexual assault by the appellant for more than once. Further, as stated above, since the victim was a child under the definition of Section 2(1)(d) of POCSO Act and aged about 14 years at the time of occurrence, the offence committed by the appellant falls under Section 376(3) IPC and also Section 5(l) punishable under Section 6 of POCSO Act.



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17. Though the learned counsel for the appellant contended that even as per the medical evidence, there was no internal or external injuries on the body of the victim and therefore, there was no possibility for forceful sexual intercourse, the alleged occurrence took place between 13.09.2019 to 16.09.2019 and the victim was produced before the doctor for medical examination only on 20.09.2019 and there was a gap between date of occurrence and the date of medical examination. Therefore, there are lesser chances to find injuries on the body of the victim. Even assuming that the victim did not resisted the act of the appellant or given consent for the sexual intercourse, since the victim was only aged about 14 years and had not completed the age of 18 years at the time of occurrence, the consent is immaterial and the non resistance is also immaterial.

18. The learned counsel for the appellant further contended that there are discrepancies and contradictions between the statement of the victim recorded by the Judicial Magistrate under Section 164 Cr.P.C. and the evidence of the victim given before the trial Court as P.W.2 as the victim did not stated anything about the sexual assault made by the appellant before

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the Judicial Magistrate, whereas before the trial Court, the victim while examining as P.W.2, has stated that the appellant took her to a dilapidated building near Chidambaram Bus Stand and forcefully committed penetrative sexual intercourse on her. However, during the cross examination, the victim has given explanation that due to fear, she did not disclose about the sexual assault made by the appellant, before the Judicial Magistrate which is also probable because, in the cases of this nature, when a girl child loses her virginity, naturally she would not reveal the same to others especially to strangers for so many reasons. They may feel it as a shameful one or because of the fear on the parents or the comments of the society or the threat made by the accused, they may not reveal everything to everyone immediately. Therefore, the non mentioning of a shameful act of the appellant to a stranger like the Judicial Magistrate, may not be a sole ground to throw away the evidence of the victim/P.W.2. However, subsequently, when the victim was produced before the doctor/P.W.12, the victim has stated that she had left along with a known person and had sexual intercourse with him. Even in the Accident Register/Ex.P.7, it is mentioned as sexual assault by a known person on 16.09.2019. Further the medical



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evidence clearly shows that the victim was subjected to penetrative sexual assault and the hymen of the victim was not intact.

19. The further contention of the learned counsel for the appellant is that as per the prosecution, the victim was taken by the appellant to so many places but, no independent witnesses were examined to prove that the victim was seen with the appellant at the relevant point of time. The victim child has clearly stated that she was taken by the appellant to so many places. There is no reason to discard the evidence of the victim child. Even otherwise, mere non examination of independent witnesses, is not a sole ground to disbelieve the evidence of the victim.

20. This Court while re-appreciating the entire evidence independently, finds that the appellant has committed the charged offences and the trial Court has rightly appreciated the entire evidence and found the guilt of the appellant for all the charged offences and rightly convicted and sentenced as stated above.



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21. This Court does not find any perversity in the appreciation of evidence by the trial Court. Further, considering the serious nature of offence committed on the victim who was only aged about 14 years and was studying 9th Std. at the time of occurrence, this Court does not find any mitigating circumstances to reduce the quantum of sentence. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

22. Accordingly this Criminal Appeal is dismissed.

23. Mr.Pa.Kadirvel, Legal aid Counsel appeared for the appellant is entitled for the remuneration as per rules.

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To
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1. The Special Court (POCSO Cases), Cuddalore District
2. The Inspector of Police
Chidambaram Town 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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