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Crl.A.No.720 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.11.2022

CORAM:

THE HON'BLE Mr. JUSTICE P.VELMURUGAN

Crl.A.No.720 of 2022
and
Crl.M.P.No.9364 of 2022

Sethupathi @ Sethu @ Gnana Sekar

... Appellant

Vs.

State Represented by
The Inspector of Police,
H-4, Korukkupet Police Station,
Chennai.

... Respondent

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C., against the judgment and Decree dated 21.03.2022 made in S.C.No.301 of 2018 passed by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act (Mahila Court) Chennai.

For Appellant : Mr.C.S.S.Pillai
Legal Aid Counsel

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGEMENT

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This Criminal Appeal has been filed against the judgment dated 21.03.2022 passed in S.C.No.301 of 2018 on the file of the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act (Mahila Court) Chennai.

2. The respondent police registered a case in Crime No.551 of 2016 against the appellant on the complaint made under “girl missing”. Subsequently, during investigation, it is found that the victim was kidnapped by the appellant and yet another accused, after investigation laid a charge sheet against the accused No.1 for an offence punishable under Section Girl Missing @ 363, 506(i) IPC and for the offence under Section 4 of POCSO Act @ 366A, 506(i) of IPC and 4 of POCSO Act and against the accused No.2 for the offence punishable under Section 4 read with 17 of POCSO Act. After investigation, laid a charge sheet before the Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai, since the offence is against child. The learned Sessions Judge taken the charge sheet on file in S.C.No.301 of 2018. After completing the formalities,

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framed the charges for the offence under Section 506(ii), 366 of IPC and also for the offence under Section 6 of POCSO Act against the first accused and further framed the charges for the offence under Section 6 read with 17 of POCSO Act against the second accused. During trial, in order to substantiate the charge, on the side of the prosecution, totally 11 witnesses were examined as P.W.1 to P.W.11 and 15 documents were marked as Ex.P1 to P15. Besides, five material objects were exhibited as M.O.1 to M.O.5. On completion of examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of prosecution witnesses put before the accused by questioning under Section 313 Cr.P.C. He denied the same as untrue and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

3. On completion of trial and hearing arguments advanced on either side and considering the materials placed, the trial court not found the second accused guilty for the offence under Section 6 read with 17 of POCSO Act and acquitted him and found the first accused not guilty for the offence under Section 506(ii) IPC and acquitted him for the abovesaid



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charge, however, convicted the the first accused/appellant herein for the offence under Section 366 IPC and also for the offence under Section 6 of POCSO Act @ Section 10 of POCSO Act and he was sentenced to undergo 7 years imprisonment with a fine of Rs.10,000/- in default to undergo simple imprisonment for three months for the offence under Section 366 IPC and sentenced to undergo 7 years imprisonment with a fine of Rs.10,000/- in default to undergo simple imprisonment for three months for the offence under Section 6 of POCSO Act @ Section 10 of POCSO Act. Challenging the said judgment of conviction and sentence, the appellant has filed the present appeal before this Court.

4. Learned counsel for the appellant would submit that there is a contradictory statement made by the victim girl before the Judicial Magistrate while recording statement under Section 164 Cr.P.C., and the evidence of the victim girl as P.W.1. Before the Judicial Magistrate, she has not stated anything about sexual assault. Even during examination also, she has not specifically stated that she was subjected to penetrative sexual assault. Though the trial court rightly appreciated the evidence and found



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that the commission of offence made by the appellant on the victim girl is only sexual assault not penetrative sexual assault and not convicted the appellant for the offence under Section 6 of POCSO Act. However, maximum punishment has been awarded. Age of the appellant at the time of occurrence is only 20 years and he is a juvenile and he should not have been tried before the regular court and he should have been referred before the Juvenile Justice Board. Without following the procedures to ascertain the age of the appellant as per the Juvenile Justice Act and without declaring his age, the prosecution produced the appellant before the regular court as he completed the age of 21 years. Therefore, judgment of the trial court is liable to be set aside. He would further submit that, except the victim girl, all other witnesses were turned hostile and they have not supported the case of the prosecution. There are material contradictions between the statement of the victim girl under Section 164 Cr.P.C and also deposition of the victim girl as witness. Still there is no sufficient evidence to prove that the appellant had committed sexual assault and there is no corroborative evidence has been made by the victim girl. Evidence of the victim girl is not trustworthy. Based on the non-corroborative evidence, the trial court



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wrongly convicted the appellant. Though the trial court acquitted A2, from the very same materials, erroneously convicted the appellant herein. There is no material to prove that the appellant kidnapped the victim girl for the purpose of having sexual intercourse. Once the trial court found that there was no physical relationship between the accused and the victim, acquitted the appellant for the offence under Section 6 of POCSO Act, offence under Section 366 IPC would not attract. Though he was acquitted for the offence under Section 506(ii) IPC, from the very same materials, he was convicted for the offence under Section 366 IPC which is also against the fundamental principles of law. Therefore, judgment of conviction and sentence passed by the trial court is liable to be set aside.

5. Learned Additional Public Prosecutor appearing for the respondent would submit that the victim was aged about 11 years at the time of occurrence and not even completed the age of 12 years. As per birth certificate, date of birth of the victim girl is 06.09.2004 and the date of occurrence is 18.07.2016. In order to prove the age of the victim girl, birth certificate of the victim girl has been marked as Ex.P1. Hence, the victim is a



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child under the definition of POCSO Act. Further, the accused removed the custody of the victim girl from her lawful guardian without their consent for the purpose of having illegal intercourse with her and also while commission of offence, the appellant threatened the victim girl as to not raise any voice and not to inform the said sexual act to anybody. Initially, case was registered under the head of “girl missing” subsequently, during investigation, it is found that the victim was kidnapped by the appellant and yet another accused, after investigation laid a charge sheet for the offence under Section 366, 506(ii) IPC and for the offence under Section 6 of POCSO Act. In order to substantiate the charges, victim was examined as P.W.1. The victim girl was produced before the doctor for medical examination. P.W.7, who is the doctor conducted medical examination, has clearly deposed that her hymen teared up to 7'o clock position and further stated that the victim was subjected to penetrative sexual assault. Since the trial court found that there is a contradiction between the statement of the victim girl before the learned Magistrate and during evidence, not convicted the appellant for the offence under Section 6 of POCSO Act, however, convicted the appellant for the offence under Section 10 of POCSO Act.



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Father of the victim girl was examined as P.W.2, who has spoken about the complaint given by him. Though other witnesses were turned hostile, the victim girl has clearly stated about the incident and also the evidence of P.W.1 proved that the victim girl was not in her house on the date of occurrence. Evidence of the victim girl clearly shows that the appellant kidnapped her. Therefore, the trial court rightly appreciated the evidence and found that victim is a minor girl and the appellant removed the custody of the victim girl from her lawful guardian without their consent had sexual assault on her, hence, offence committed by the appellant falls under Section 366 IPC. From the evidence of the victim girl and doctor and the medical records, prosecution substantiated the charges. Since the victim has not substantiated that A2 was involved in the case, he was acquitted.

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



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7. Specific case of the prosecution is that the the appellant/first accused removed the custody of the victim girl from her lawful guardian without their consent and stayed in second accused house and at that time, appellant had committed sexual assault on her. Based on the complaint given by the father of the victim girl, the respondent police registered the case under the head of “girl missing”. Subsequently, during investigation, it is found that the victim was kidnapped by the appellant and yet another accused, after investigation laid a charge sheet before the Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai.

8. In order to substantiate the charges framed against the appellant, on the side of the prosecution, 11 witnesses were examined as P.Ws.1 to 11 and 15 documents were marked as Exs.P1 to P15. Out of 11 witnesses, victim was examined as P.W.1. She has clearly deposed that the appellant took her from her residence and both of them stayed in A2's house and during the stay, he misbehaved with her. The victim girl was produced before the Judicial Magistrate to record statement under Section 164 Cr.P.C., and the same was marked as Ex.P2. During investigation, she



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deposed that the appellant had committed penetrative sexual assault on her.

From the birth certificate of the victim girl-Ex.P1, it is seen that the date of birth of the victim girl is 06.09.2004. The date of occurrence is 18.07.2016. Hence the victim is a child aged about 12 years on the date of occurrence. The victim girl was produced before the doctor for medical examination. P.W.7 is the doctor one who conducted medical examination on the victim, has clearly deposed that the victim was subjected to penetrative sexual assault. Though doctor has stated that no external injury, however, stated that the victim was subjected to sexual intercourse. Combined reading of evidence of P.W.1-the victim girl, Ex.P2-statement recorded by the Judicial Magistrate under Section 164 Cr.P.C., evidence of the doctor-P.W.7, medical certificate Ex.P7, it is proved that the victim who was aged about 12 years was subjected to penetrative sexual by the appellant. Therefore, prosecution substantiated its case that the victim girl was kidnapped by the appellant and she was subjected to penetrative sexual assault by the appellant. The trial court acquitted the appellant for the offence under Section 6 of POCSO Act, however convicted him only for the offence under Section 10 of POCSO Act. However, neither victim side nor the prosecution



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side have filed any appeal with regard to the same. Since there is no appeal against order of acquittal for the offence under Section 6 of POCSO Act, this Court is the appellate court cannot go beyond the scope of appeal, since the appeal has been filed by the convict against the judgment of conviction. The contradictions pointed out by the learned counsel for the appellant are not material contradictions which would go to the root of the case of the prosecution. In cases of this nature, the victim girl is a child and she may not know the consequences of the penetrative sexual assault and one cannot expect that the victim girl will recollect and narrate the entire incident as such. The discrepancies and contradictions pointed out by the learned counsel for the appellant are not materials contradictions.

9. In view of the above, this Court do not find any perversity in the appreciation of the evidence and there is no merit in the appeal and the same is liable to be dismissed. Accordingly the Criminal Appeal is dismissed. Consequently, connected miscellaneous petition is closed.

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P.VELMURUGAN, J.

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To

1. The Sessions Judge,
Special Court for Exclusive Trial of Cases under POCSO Act (Mahila Court), Chennai.
2. The Inspector of Police,
H-4, Korukkupet Police Station,
Chennai.
3. The Public Prosecutor,
High Court, Chennai.

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