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Crl.A.No.611 & 685 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.11.2022

CORAM

THE HONOURABLE Mr.JUSTICE P.VELMURUGAN

Crl.A.611 and 685 of 2021

Murugan (M/40 years)

.. Appellant in
Crl.A.No.611 of 2021

Sekar (M/28 years)

.. Appellant in
Crl.A.No.685 of 2021

Vs.

State rep. by the Inspector of Police,
All Women Police Station,
Krishnagiri District.
(Crime No.11 of 2018)

... Respondent in
Both Criminal Appeals

PRAYER in Crl.A.No.611 of 2021 : Criminal Appeal filed under Section 374 of Cr.P.C. praying to set aside the conviction and sentence imposed on the Appellant by the Magalir Neethimandram (Fast Track Mahila Court), Krishnagiri dated 11.05.2021 and made in Special Sessions Case No.48 of 2018 and acquit the appellant.

PRAYER in Crl.A.No.685 of 2021 : Criminal Appeal filed under Section 374(2) of Cr.P.C. praying to set aside the Judgment passed by the learned Sessions Judge (Fast Track Court), Krishnagiri in Special Sessions Case No.48 of 2018 dated 11.05.2021 and allow this appeal.



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For Appellant in Crl.A.611/2021 : Mr.V.Parthiban
for Mr.M.Jayachandran

For Appellant in Crl.A.685/2021 : Mr.P.Dinesh Kumar

For Respondent in both Appeals : Mr.S.Sugendran,
Addl. Government Pleader

COMMON ORDER

Both the Criminal Appeals have been filed to set aside the conviction and sentence imposed on the appellants by the Sessions Judge, Fast Track Magalir Neethimandram, Krishnagiri by judgment dated 11.05.2021 in Special Sessions Case No.48 of 2018

2. The respondent Police, originally, registered a case under Section 366A IPC and subsequently, after investigation, altered the Sections as 366A r/w Section 5(1) r/w Section 6 of POCSO Act. After completing investigation, the Investigating Officer laid a charge sheet before the Sessions Judge, Fast Track Magalir Court and it was taken on file as Spl.S.C.No.48 of 2018.



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3. After completing formalities, the Trial Court has framed the charges against A1 for the offences punishable under sections 366 IPC and, 5(l) r/w 6 of POCSO Act; and against A2 for the offence under Section 16 punishable under Section 17 of POCSO Act.

4. During Trial, on the side of the prosecution as many as 17 witnesses were examined as PW1 to PW17 and 27 documents were marked as Ex.P1 to Ex.P27. Besides, 2 Material Objects received and 5 Court documents were marked as Ex.C1 to Ex.C5.

5. After completing entire evidence of the prosecution witnesses, an incriminating circumstances culled out from the evidence of prosecution witnesses were put before the accused persons by questioning under Section 313 of Cr.P.C., and the accused persons denied the same as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.



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6. On completion of Trial, hearing the arguments advanced on either side and considering the materials, A1 was found guilty for the offence under Section 366 IPC and Section 5(l) r/w 6 of POCSO Act and A2 was found guilty for the offence under Section 16 and 17 of POCSO Act. Accordingly, A1 was convicted for the offence under Section 366 IPC and sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.5,000/-, in default, to undergo rigorous imprisonment for a further period of 6 months; and also convicted for the offence under Section 5(l) r/w 6 of POCSO Act and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for a further period of six months. Likewise, A2 was convicted for the offence under Section 16 r/w 17 of POCSO Act and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for a further period of 6 months.



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7. Aggrieved over the conviction and sentence, A1 preferred Crl.A.No.685/2021 and A2 preferred Crl.A.No.611/2021. Since both the appeals are arising out of same judgment, heard together and common judgment is delivered.

8. The specific case of the prosecution is that, on 01.05.2018, the appellants kidnapped the victim and kept her till 23.08.2018 in a house, there, A1 had sexual intercourse with her. The mother of the victim gave a complaint before the respondent police on 20.05.2018 and based on the complaint, the respondent police registered a case under Section 366 A of IPC and also started investigation. On 23.08.2018, the respondent police secured both the appellants and victim and after recording the statement of the Victim, they have altered the Sections as 366 IPC and Section 5(l) r/w 6 of POCSO Act and also Section 16 r/w 17 of POCSO Act. After investigation, the Investigating Officer, laid a charge sheet before the Sessions Judge, Fast Track Magalir Court, Krishnagiri . The Sessions Judge, after taking cognizance of the offence, has taken the case on file and after Trial, convicted the accused as stated above.



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9. The learned counsel appearing for the appellant (A1) in Crl.A. No.685/2021 submitted that the appellant never kidnapped the victim and the victim herself fell in love with the appellant and she voluntarily eloped with him, since her parents arranged marriage with some other person. He further submitted that the investigating officer has not conducted fair investigation and even prior to secure the accused and prior to recording evidence from the victim or the confession statement from the accused persons, the appellant was charged for the offence under Section 5(l) r/w 6 of POCSO Act, without any materials.

9.1. The learned counsel for the appellant argued that on 20.05.2008, FIR was registered under Section 366A IPC and according to the prosecution, Observation Mahazar was prepared on 20.05.2008. The report for alteration of charges from Section 366A to Section 366 IPC and Section 5(l) r/w 6 of POCSO Act, was submitted on 23.05.2008 only. But, the investigating officer has not stated as to how in Ex.P3 observation mahazar dated 20.05.2008 itself, he included the offences under Section 5(l) r/w 6 of POCSO Act. Therefore, the above fact clearly



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shows that the investigating officer has not prepared the mahazar on 20.05.2008 and never visited the place of occurrence and the houses of the appellant as well as the victim. As such, the investigating officer has not conducted proper investigation and foisted a false case against the appellant, which will go to the route of the case of the prosecution.

9.2. The learned counsel further submitted that, the victim, while giving statement under Section 164 of Cr.P.C. before the Judicial Magistrate, has stated that she was kidnapped forcefully by the appellant, whereas, while giving statement to the Inspector of Police, All Women Police Station, Krishnagiri, she has stated that, she voluntarily left along with the accused. Therefore, the contradictory statements given by the victim before the Judicial Magistrate and before the respondent police, clearly shows that the evidence of the victim during Trial is not trustworthy and she has not spoken truth.

9.3. Further the learned counsel for the appellant submitted that the investigating officer clearly stated that, in and around the occurrence



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place, residences are there, however, they have not been examined by the prosecution to prove, whether the victim stayed along with the appellant in the said occurrence place. Even in the statement given by the victim under Section 164 of Cr.P.C. and while deposing evidence as PW2, she has stated about other persons, but unfortunately, the prosecution has not added them as accused persons and also, there is no specific reason, as to why they have been omitted to be added as accused, which created suspicious about the genuineness of the case.

9.4. Further, he argued that, even while recording the Statement under Section 164 of Cr.P.C, the victim stated about one Gonvindasamy that, on 01.05.1018, while kidnapping, he was sitting in the two wheeler as a pillion rider and A1 along with Govindasamy, kidnapped her. Further, in the above statement, she has stated about one Pacchammal, wife of Murugan that, while she was in illegal custody in their house, they helped the appellant/A1. However, the above said persons have not been impleaded in this case as accused and no explanation has been given by the prosecution for non implementation of the above Govindasamy and



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Pacchammal. Therefore, the prosecution has registered the case against the accused as pick and choose manner and they purposely omitted to include the other persons in this case.

9.5. Further, the prosecution has not proved the case beyond reasonable doubt, whether the appellant forcefully kidnapped the victim and forcefully made the victim to stay for 22 days and during that time, he committed penetrative sexual assault on her. However, the Trial Court has failed to appreciate the entire materials and wrongly convicted the appellant and hence, the judgment of conviction and sentence passed against the appellant/A1 is liable to be set aside and the appellant has to be acquitted.

10. The learned counsel for the appellant in Crl.A.No.611 of 2021 submitted that initially, in 164 Statement, the victim stated about one Govindaamy that he accompanied A1 while kidnapping her. However, the above Govindasamy name was deleted later on, and falsely added the name of this appellant by the investigating officer. He further submitted



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that the investigating officer has stated that she has visited the place of occurrence, but has not properly drawn the sketch and also has not examined the neighbours as independent witness. Therefore, the prosecution has not established that A1 took the Victim to the place of A2 and whether the A1 and victim stayed together. Further, none of the witnesses spoken that A2 was seen along with A1 and victim. In such circumstances, it is the bounden duty of the prosecution to establish that A2 also involved in this case and knowing fully well that the victim is a minor, he helped A1 to commit such an offence of Penetrative Sexual assault. But, without any material, the prosecution impleaded the appellant/A2 in this case, only in order to escape the real accused.

10.1. The learned counsel also argued that, in the observation Mahazar and other documents, there are many material contradictions to each other, which are fatal to the case of the prosecution. Further, the prosecution has not explained, as to how A2 involved in this case and hence, the prosecution has failed to prove its case, beyond reasonable doubts, as such, Section 29 and 30 of POCSO Act would not attract for



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A2, as it is for sexual intent. It is argued by him that Section 29 is only presumption for Section 3, 5, 7 and 9 of POCSO Act and not for Section 16 r/w 17 of POCSO Act. Therefore, no presumption can be drawn against A2 that he had also sexual intent to help A1 for having such penetrative sexual assault on the victim. Hence, the judgment of conviction passed against A2 has to be set aside and the appeal filed by him has to be allowed.

11. Heard the learned counsel appearing for the appellants and the Additional Public Prosecutor appearing for the respondent and I have perused the materials on record.

12. Admittedly, the respondent police registered the case, based on the complaint given by the mother of victim (PW1) on 20.05.2008 against A1 and one Govindasamy, under Section 366 A IPC and not against A2. Subsequently, after securing the victim, and recording her statement, altered the Section as 366A IPC and Section 5(1) r/w 6 and 16 r/w 17 IPC. Consequently, after completing investigation, they filed a



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charge sheet before the Special Court against A1 and A2. The Special Court, after taking cognizance of the offence, taken the case on its file and tried the case and convicted the appellants. Hence, both the appeals have been filed.

13. 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. Accordingly, this Court has re-appreciated the entire oral and documentary evidence produced before this Court.

14. In this case, in order to prove the charges against the appellants, totally 17 witnesses were examined and 27 documents were marked. Out of 11 witnesses, the victim was examined as PW2. The victim was also produced before the Judicial Magistrate and her statement was recorded under Section 164 of Cr.P.C which was marked as Ex.P2 . A perusal of the evidence of Victim (PW2) and her statement under Section 164 Cr.P.C. (Ex.P2) clearly proved that A1 took her on 01.05.2018 and till 20.05.2018 he kept her in a house, far away from her



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house and during their stay, the appellant had sexual intercourse with the victim on several times. Therefore, in order to substantiate the same, the victim was produced before the Doctor. The Doctor, who conducted medical examination on the victim girl, and was examined as PW13, has clearly stated that the victim was subjected to penetrative sexual assault and her hymen was not intact and there was no natural external injury. Though it may not be a forceful sexual assault, since the victim is a child comes under the definition of 2(i)(d) of POCSO Act, it is a sexual assault. Even assuming that, with the consent of victim, A1 had sexual intercourse with her, since the victim is a child, the above act is an offence falls under Section 5(1) punishable under Section 6 of POCSO Act. Therefore, on combined reading of the evidence of PW2 and the previous statement of the victim (Ex.P2) before the Judicial Magistrate under Section 164 of Cr.P.C and the medical certificate (Ex.P10) given by the Doctor and also the evidence of PW10, PW12 and PW13, this Court finds that A1 has committed an offence of penetrative sexual assault on the victim for more than once, which is aggravated penetrative sexual assault under Section 5(1), punishable under Section 6 of POCSO Act.



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15. As far as the offence under Section 366 is concerned, admittedly, the victim is a child under the definition of POCSO Act and the prosecution proved that the appellant/A1 took the victim. During the statement given before the Inspector of Police, the victim stated that she had voluntarily went along with the A1. Even assuming that the victim on her own volition went along with the appellant, since she has not completed 18 years, her consent is immaterial and therefore, the appellant (A1) has committed the offence punishable under Section 366 IPC.

16. Therefore, a perusal of the evidence of PW1, mother of the victim; evidence of Victim (PW1) ; previous statement given by the victim before the Judicial Magistrate (Ex.P2); evidence of doctor (PW13); evidence of PW14 and the documents Ex.P10, ExP11, Ex.P13 and Ex.P14, proved that the appellant(A1) kidnapped the victim and committed the offence of penetrative assault for more than ones. As such, this Court finds that the A1 committed the offences punishable under Section 366 IPC and Section 5(1) and 6 of POCSO Act.



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17. As far as the A2 is concerned, while giving statement before the learned Judicial Magistrate under Section 164 of Cr.P.C.(Ex.P2), the victim has not mentioned about A2. However, during examination as PW2 before the Trial Court, has clearly stated that A1 took the victim, and A2 helped A1 to restrain the victim in a room and to have penetrative sexual assault on her. But, A2 has not cross examined the victim/ PW2 to prove that, he is no way connected with the above occurrence and he has not seen the victim. Since the victim has clearly stated that A2 helped A1 to have penetrative sexual assault on her, it is proved that, knowing fully well that the victim has not completed the age of 18 years and she is not a legally wedded wife of A1, A2 helped A1 to keep the victim in a room for more than 20 days and during that time to have sexual intercourse on the victim. Therefore, this Court finds that A2 committed offence under Section 16 of POCSO Act, which is punishable under Section 17 of POCSO Act.

18. In the cases of this nature, no other independent witnesses can be expected and only the victim can speak about the penetrative sexual



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assault. The evidence of victim is natural, cogent and consistent and it inspires the confidence of this Court. Therefore, this Court can safely record that there is no reason to disagree or disbelieve the evidence of the Victim. Therefore, re-appreciating the evidence independently, this Court finds that A1 committed the offence under Section 366 IPC and also under Section 5(l) punishable under Section 6 of POCSO Act. Likewise, A2 committed the offence under Section 16, punishable under Section 17 of POCSO Act. Therefore, this Court finds that the Trial Court has rightly appreciated the prosecution evidence and rightly convicted both the appellants and awarded only minimum sentence to them. Further, this Court finds that there are no mitigating circumstances to award lesser punishment. Therefore, both the appeals are liable to be dismissed.

19. On seeing the entire materials, it reveals that the investigating officer has not properly conducted investigation. The Ex. P4 observation Mahazar, as has been mentioned therein, it was prepared on 20.05.2018. Further, in the observation Mahazar, the commission of offence is



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mentioned as " under Section 366 A IPC altered as 5(l) and 6 of POCSO Act", without any materials. Admittedly, the complaint was given on 20.05.2018 and the respondent police secured the accused on 23.05.2018 and only during investigation, they came to know about the offence of penetrative sexual assault, under Section 5(i), which is punishable under Section 6 of POCSO Act and for the same, they filed a Report for alteration of Charges. However, on 20.05.2018 itself, i.e., while preparing the observation mahazar (Ex.P4), the investigating officer mentioned the above altered sections. Therefore, it is clear that Ex.P4 would not have been prepared on 20.05.2018. This is one of the examples that the investigating officer investigated the matter in such a lethargic manner.

20. Therefore, this Court finds that there is no competent officer in the State to conduct fair investigation, especially under POCSO Act, and in this case, they are not conducting the investigation in a fair manner. Though a defect in the investigation, may not be a sole ground to acquite the accused, some times, it create doubt in the minds of the Court in



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finding the truth and the culprit will get benefit, in view of the lethargic attitude of the investigating officers. Therefore, it is the right time to the State to Recruit a new Investigating Officers, especially to investigate the matter under POCSO Act, otherwise, the purpose of enactment would be defeated.

21. With the above recommendations, both the appeals are dismissed. The trial Court is directed to secure the appellants/accused to serve remaining period of imprisonment, if any.

08.11.2022

Index:Yes/No
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To

1. The Sessions Judge Fast Track Mahila Court, Krishnagiri.
2. The Inspector of Police, All Women Police Station, Krishnagiri District.
3. The Public Prosecutor Officer, High Court, Madras.
4. The Section Officer, Criminal Section, High Court, Madras.

P. VELMURUGAN,J.

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