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CRL A No.662 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.10.2022

Coram:

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

Criminal Appeal No.662 of 2022

and

Crl.M.P.No.8871 of 2022

Rajdurai

... Appellant

Vs.

State rep by
The Inspector of Police
AWPS, Ariyalur
(Crime No.09.2021)

... Respondent

Prayer : Criminal Appeal filed under Sections 372 of Criminal Procedure Code, praying to call for the records and to set aside the Judgment and sentence dated 17.05.2022 imposed in Spl.S.C.No.10 of 2021 on the file of the learned Fast Track Mahila Court, Ariyalur.

For Appellant : Mr.S.Agileshkumar

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been filed seeking to set aside the Judgment of conviction and sentence dated 17.05.2022 imposed in Spl.S.C.No.10 of 2021 on the file of the learned Fast Track Mahila Court, Ariyalur.

2.The respondent police registered the case against the appellant in Crime No.9 of 2021 initially for offence under Section 366(A) IPC and subsequently, altered into Section 366 IPC and Section 5(l) punishable under Section 6 of POCSO Act and after completing the investigation, laid charge sheet before the Fast Track Mahila Court, Ariyalur. The learned Sessions Judge after completing the formalities, taken up the charge sheet on file in Spl.S.C.No.10 of 2021 and framed charges against the appellant for the offence under Sections 366, 376(2) (n) IPC and also for the offence punishable under Section 6 of POCSO Act.

3. After framing the charges, in order to prove the case of the prosecution during trial before the trial Court, totally 11 witnesses were



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examined as P.W.1 to P.W.11 and 21 documents were marked as Exs.P.1 to P.21 and one material object was exhibited as M.O.1 besides one Court document was marked as Ex.C.1.

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 was produced.

5. On conclusion of trial after hearing the arguments advanced on either side, considering the materials, the learned Sessions Judge found the accused guilty for the offences under Sections 366, 376(2)(n) IPC and Section 5(l) punishable under Section 6 of POCSO Act and convicted and sentenced to undergo 10 years of rigorous imprisonment and to pay fine of Rs.10,000/- in default to undergo simple imprisonment for a further period of one year for the offence under Section 366 IPC; to



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undergo 25 years of rigorous imprisonment and to pay fine of Rs.10,000/- in default to undergo simple imprisonment for a further period of one year for the offence punishable under Section 6 of POCSO Act. 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 on 09.03.2021 at about 12 noon, while the victim was standing near her house, the appellant came there and was talking with the victim. On seeing the same, the parents of the victim quarreled with the appellant. Subsequently, the appellant pulled the hands of the victim and taken her in his bike. Initially the case of registered for the offence under Section 366(A) IPC and during investigation, it was found that the appellant took the victim to his uncle's house and stayed there for 2 days and under the guise of marrying the victim, had sexual intercourse with her. Hence, the offence was altered into Section 366 IPC and Section 5(l) punishable under Section 6 of POCSO Act.



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7. The learned counsel for the appellant would submit that the prosecution has not proved the foundational fact that the victim was forcibly taken by the appellant without the consent of her natural / lawful guardian and committed penetrative sexual assault on the victim for more than once. Further, the prosecution also failed to prove that the victim was forcibly subjected to rape. The trial Court failed to appreciate the evidence of the prosecution witnesses and wrongly convicted the appellant. Further there are material contradictions between the evidence of the victim/P.W.1 and her parents P.W.2 and P.W.3 regarding abduction and also regarding forcible sexual assault on the victim. Further there are material contradictions even between the evidence of the victim before the trial Court and the statement of the victim made before the Magistrate under Section 164 Cr.P.C. In the previous statement recorded by the Magistrate under Section 164 Cr.P.C., the victim has not stated that she was subjected to forcible sexual assault, whereas during cross examination before the trial Court, she has stated that she was taken forcibly and subjected to penetrative sexual assault forcibly by the appellant which itself is contradictory. Therefore, the evidence of the



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victim is not trust worthy and it is unsafe to rely on the evidence of victim/P.W.1. Further, there is no other independent witness to this case. Even the medical evidence also not fully supported the case of the prosecution. Before the doctor/P.W.5, the victim has informed that she willingly had sexual intercourse with her loved one. Therefore, the conviction passed against the appellant under Section 366 and 376(2)(n) IPC are unwarranted. He would further submit that the victim and the appellant are lovers. The parents of the victim due to economical status between their two families, refused to give the victim into marriage with the appellant and subsequently, foisted the false case against the appellant. Eventhough, marriage was performed between the victim and the appellant, subsequently after giving the police compliant and taken the victim from the police station, the parents of the victim, given her into marriage with P.W.4. At the time of occurrence, the victim was aged 17 years and 11 months and 6 days and therefore, it is not either abduction or rape or forcible sexual intercourse. Out of love affair, the victim on her own volition left along with the appellant and had relationship. The evidence of the prosecution itself would clearly show



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that both the victim and the appellant were in love with each other and the victim voluntarily went along with the appellant and also accepted his marriage and she willingly participated in the sexual relationship. Subsequently, when the parents of the victim gave complaint and police intervened, things have changed. He would submit that if taking into consideration the age of the appellant and the victim, it would clearly show that it is not an offence and due to age and also love affair, they both voluntarily had such a relationship. He would further submit that the Hon'ble Supreme Court also time and again has given recommendation to the Law Commission of India and the Government to consider and reduce the age of the child which is defined under Section 2(d) of POCSO Act, from 18 years to 16 years. Further, the Hon'ble Supreme Court and various other High Courts have recommended to amend the law that if boys and girls due to adolescent and out of love affair involved in the consented relationship, that may not be taken as serious offence either under IPC or under any other Act since there may not be any motive or intention behind it. Further there are several Judgments which have recommended to award landing punishment like warning or



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advise punishment or the period of incarceration already undergone can be treated as punishment. This is one such case which also comes under the same facts that the appellant who was only 20 years old and the victim who was 17 years and 11 months old and was about to complete the age of 18 years at the time of occurrence, without knowing the consequences and intricacies of law, had relationship and that the prosecution also failed to substantiate its case beyond all reasonable doubt. Therefore, the appellant has to be acquitted and in case, if this Court is not convinced, atleast landed punishment may be awarded.

8. The learned Additional public prosecutor appearing for the respondent police would submit that the date of birth of the victim as per Ex.P.7/School Certificate is 10.03.2001. The date of occurrence as per the complaint is on 09.03.2021. Therefore the victim had not completed the age of 18 years and the age of victim was 17 years and 11 months old at the time of occurrence. Therefore, she was a child under the definition of POCSO Act at the time of occurrence. In the previous statement recorded by the Magistrate from the victim under Section 164 Cr.P.C., the



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victim has clearly stated that the appellant took her to his uncle's house and they stayed there and at that time, they both had relationship. Subsequently, before the Court while the victim was examining as P.W.1, though she stated that she was forcibly subjected to penetrative sexual assault by the appellant. However, the fact remains that both the victim and the appellant had sexual intercourse. Since the victim was a minor more so over, she was a child under the definition of POCSO Act, the act committed by the appellant is nothing but an offence under the POCSO Act. Even doctor/P.W.5 who conducted medical examination on the victim has clearly stated that the victim was subjected to penetrative sexual assault and the medical evidence, Ex.P.3/copy of the Accident Register of the victim clearly shows that the hymen of the victim is not intact. Therefore, the medical evidence was corroborated with the evidence of the victim that she was subjected to penetrative sexual intercourse. Even assuming that the victim did not resist and she had given consent for the sexual relationship, still it is an offence since the victim was a child under the definition of POCSO Act and therefore, the consent is immaterial. The trial Court rightly appreciated the evidence



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

10. In order to substantiate the charges framed against the appellant on the side of the prosecution totally 11 witnesses were examined out of which, the victim was examined as P.W.1.

11. A reading of the evidence of the victim/P.W.1 shows that the victim got acquaintance with the appellant while going to the shop of the appellant. Once the father of the appellant had asked the uncle of the victim to give the victim into marriage with the appellant for which, the uncle of the victim refused the same. On 09.03.2021 at about 12 noon, while the victim was standing near her house, the appellant came there and was speaking with the victim. On seeing the same, the parents of the



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victim quarreled with the appellant. Subsequently, the appellant took the victim in his bike to his relative's house and stayed there for two days during which, the appellant forcibly had sexual intercourse with the victim. Subsequently, on the complaint made by the parents of the victim, the police secured them and sent the victim along with her parents. The victim has further stated that after attaining majority, she married P.W.4.

12. In the statement of the victim recorded by the Magistrate under Section 164 Cr.P.C., the victim has stated that she went along with the appellant and stayed in the house of his uncle during which, they had sexual intercourse and that the appellant had not compelled her.

13. In order to prove the sexual assault made on the victim, the victim was produced before the Medical Officer who was examined as P.W.5 and she has clearly stated that on 11.03.2021 while she was on duty in the Ariyalur Government hospital, the victim was brought for medical examination during which, the victim had informed her that she had sexual intercourse with her loved one on the previous day night.



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Further, the doctor has given opinion that the hymen of the victim was not intact. The copy of the Accident Register with the opinion of the doctor was marked as Ex.P.3.

14. In order to prove the age of the victim, Ex.P.7/school certificate was marked through P.W.7/Head Master of the School in which, the victim studied. As per Ex.P.7/school certificate, the date of birth of the victim is 03.04.2003 and the date of occurrence was on 09.03.2021 and therefore, the age of the victim was 17 years and 11 months at the time of occurrence. Therefore, the victim was a child under the definition of POCSO Act.

15. Therefore, from the evidence P.W.7, Ex.P.7/School Certificate the prosecution proved that the victim was a child under the definition of POCSO Act and she had not completed the age of 18 years at the time of occurrence. Further, from the statement of the victim made before the Magistrate under Section 164 Cr.P.C./Ex.C1 and from the evidence of P.W.5/doctor and also Ex.P.3/copy of the Accident Register with the opinion of the doctor, this Court finds that the victim who was a child under the definition of POCSO Act, had sexual intercourse with the



appellant. However, there is no evidence or material to show that the appellant had sexual intercourse with the victim for more than once. It is stated that both the victim and the appellant had love affair and at the time of occurrence the appellant was only aged about 20 years and the victim was aged about 17 years 11 months and after attaining majority, the victim ignored the marriage performed with the appellant and now she married P.W.4. Considering the facts of the case, this Courts finds that the offence committed by the appellant false under Section 3 punishable under Section 4 of POCSO Act and not under Section 5 (I) punishable under Section 6 of POCSO Act. Therefore, the conviction recorded by the trial Court for the offence punishable under Section 6 of POCSO Act is modified to Section 4 of POCSO Act. Accordingly, the sentence awarded is reduced to 10 years from 25 years.

16. As far as, the charge under Section 366 IPC is concerned, it is admitted that the appellant and the victim had love affair with each other and the victim had voluntarily went along with the appellant. However, since the victim was under the age of 18 years at the time of occurrence, she was a child under the definition of 2(1)(d) of POCSO Act. Since the



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appellant removed the custody of the victim who was a child under POCSO Act, from the natural / lawful guardian without their consent, the appellant has committed the offence under Section 366 IPC. Therefore, the trial Court rightly convicted the appellant for the said charge.

17. As far as Section 376(2)(n) IPC is concerned, as already stated the victim herself admitted in her previous statement given before the Magistrate under Section 164 Cr.P.C. that on 09.03.2021, she had voluntarily left along with the appellant and stayed at the house of the appellant's uncle's house and on 10.03.2021 she had physical relationship with the appellant. Further, the doctor/P.W.5 who conducted medical examination on the victim/P.W.1 has clearly stated that the victim had informed her that she willingly had sexual intercourse with her loved one. Since the appellant was already charged and convicted for the offence punishable under Section 4 of POCSO Act as stated above, the conviction passed for the charge under Section 376 (2)(n) IPC is set aside and the appellant is acquitted from the charge under Section 376 (2)(n) IPC.



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18. This Court being an appellate Court and final Court of fact finding while re-appreciating the entire materials, finds that the appellant has committed offence only under Section 366 IPC and also under Section 3 punishable under Section 4 of POCSO Act.

19. This Criminal Appeal is partly allowed to the effect that the appellant is convicted for the offence punishable under Section 4 of the POCSO Act and sentenced to undergo rigorous imprisonment for a period of 10 years and the conviction and sentence for the offence under Section 366 IPC is confirmed and direction towards fine and compensation for the offence punishable under the POCSO Act awarded by the trial Court shall remain intact. Further the appellant/accused is acquitted for the offence under Section 376(2)(n) IPC. Consequently, connected Miscellaneous Petition is closed. The respondent police is directed to secure the appellant to undergo the further period of sentence if any.

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Index:Yes/No



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P.VELMURUGAN, J

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To

1. The Fast Track Mahila Court, Ariyalur.
2. The Inspector of Police
AWPS, Ariyalur
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.

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