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CRL A No.717 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.11.2022

Coram:

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

Criminal Appeal No.717 of 2022

and

Crl.M.P.No.9344 of 2022

Khaja Husain

... Appellant

Vs.

State by, Inspector of Police

Peelamedu Police Station

Coimbatore

In Crime No.1468 of 2017

... Respondent

Prayer : Criminal Appeal filed under Sections 374 (2) of Criminal Procedure Code, praying to set aside the Judgment and conviction passed in Spl.C.C.No.52 of 2019 dated 09.05.2022 on the file of the learned Special court for Exclusive Trial of Cases under POCSO Act and allowing the appeal throughout by acquitting the appellant

For Appellant : Mr.S.Shunmugavelayutham, Senior Advocate
for Nowfal

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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J U D G M E N T

This Criminal Appeal has been filed seeking to set aside the Judgment of conviction and sentence passed in Spl.C.C.No.52 of 2019 dated 09.05.2022 on the file of the learned Special court for Exclusive Trial of Cases under POCSO Act.

2.The respondent police initially registered the case in Crime No.1468 of 2017 under “Girl Missing” and during investigation, it was found that the victim went along with the appellant and that the appellant had committed penetrative sexual assault on the victim. Therefore the case was altered into Section 3 read with 4 of POCSO Act. After completing the investigation, the respondent police filed charge sheet before the Special Court for Exclusive Trial of cases under POCSO Act, Coimbatore, in Spl.C.C.No.52 of 2019 for the offence under Section 5(l) read with 6 of POCSO Act, 2012 and the learned Sessions Judge after completing the formalities, framed the charges against the accused for the offence under Section 5(l) read with 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 before the trial Court, totally 16 witnesses were examined as P.W.1 to P.W.16 and 16 documents were marked as Exs.P.1 to P16 and no material object was 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 and after hearing the arguments advanced on either side and also considering the materials, the learned Sessions Judge found the guilt of the accused for the offence punishable under Section 6 of POCSO Act and convicted and sentenced to undergo twenty years rigorous imprisonment and to pay fine of Rs.10,000/- in default to undergo a further period of one year rigorous imprisonment and the said fine amount of Rs.10,000/- has to be paid to the victim/P.W.2 towards compensation, after appeal time is completed.



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6. The case of the prosecution is that on 24.10.2017, the daughter of the defacto complainant was found missing. Initially the case was registered under “Girl Missing” and during investigation, it was found that the victim went along with the appellant and that the appellant had committed penetrative sexual assault on the victim. Therefore the case was altered into Section 3 read with 4 of of POCSO Act and proceeded further against the appellant.

7. The learned counsel for the appellant would submit that there is no corroborative evidence except the evidence of the victim but her evidence does not have a sterling quality. When there is no corroborative evidence and the evidence of the victim is not having sterling quality, it is unsafe to convict the appellant based on the evidence of the victim alone. Though the victim has stated that the appellant without her consent, forcibly had penetrative sexual intercourse, the evidence of the doctor shows that there is no violence or forcible penetrative sexual intercourse and there was no recent symptoms of penetrative sexual intercourse on the victim and that there is no injury on the body of the victim which would clearly show that the evidence of the victim is highly



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doubtful and based on the evidence of victim alone, the appellant should not be convicted. Further he would submit that initially the case was registered only under “Girl Missing” and even in the complaint or FIR, the name of the appellant has not been shown as accused. If at all, they had got doubt on the appellant, they would have mentioned the name of the appellant in the complaint itself which clearly shows that the appellant not committed the offence. Further, P.W.1 and P.W.3 are the parents of the victim and they are not the eye witnesses to the occurrence and they have only stated what they hear from the victim. Therefore, there is no corroborative evidence in this case and the medical evidence also otherwise. Further he would submit that the victim girl fell in love with the appellant and he had intimacy with the victim girl only out of love affair and not with any bad intention to cheat the victim girl. Even prior to the occurrence, the appellant had approached the parents of the victim to give her into marriage with the appellant but they did not agree the same since the appellant belongs to different community. Therefore, the appellant has not committed any offence more so ever, he had no intention either to cheat the victim or to have forcible intercourse.



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Further, there is no material to establish that there was aggravated penetrative sexual assault on the victim girl and the trial Court failed to appreciate the evidence properly and convicted the appellant. He would further submit that the minimum sentence prescribed for the offence under Section 6 of the POCSO Act before amendment is only 10 years but, the trial Court has wrongly imposed 20 years as minimum sentence for the offence punishable under Section 6 of POCSO Act, 2012 which warrants interference.

8. The learned Additional Public Prosecutor appearing for the respondent police would submit that totally 16 witnesses were examined and 16 documents were marked and out of the 16 witnesses, the victim was examined as P.W.2 and she has clearly narrated the entire occurrence. The father and mother of the victim girl were examined as P.W.1 and P.W.3 respectively. The victim was also produced before the learned Judicial Magistrate to record statement under Section 164 Cr.P.C. which was marked as Ex.P.3. A combined reading of the evidence of victim/P.W.2 would clearly show that her evidence is substantiated by her



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statement recorded under section 164 Cr.P.C/Ex.P.3 and also the medical evidence/ Exs.P.4 and P5. In the evidence, the Doctor has stated that there was no forceful sexual intercourse and no symptoms of recent sexual intercourse and the doctor has not specifically stated that there was no possibility for sexual intercourse on 23.10.2017. Therefore, the prosecution proved its case that the victim girl was subjected to penetrative sexual intercourse by the appellant. Further, Ex.P.8 is the bonafide certificate of the victim issued by the Head Master of the school in which the victim was studying and Ex.P.9 is the birth certificate of the victim and as per Exs.P.8 and P.9, the date of birth of the victim is 06.11.2003 and the date of occurrence is 24.10.2017 and therefore, the age of the victim was only about 15 years at the time of occurrence and therefore, she was a child under the definition of POCSO Act. Further, the victim clearly stated that the appellant had penetrative sexual intercourse for more than once, the offence committed by the appellant falls under Section 5(1) punishable under Section 6 of POCSO Act. Therefore, the trial Court rightly appreciated the evidence and convicted the appellant and there is no merit in the appeal and the appeal is liable to be dismissed.



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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. Now the Court has to see whether the prosecution has proved that the appellant has committed penetrative sexual assault on the victim child for more than once as projected by the prosecution.

11. In order to substantiate the case of the prosecution 16 witnesses were examined as P.W.1 to P.W.16 and 16 documents were marked as Ex.P.1 to Ex.P.16 and out of the 16 witnesses, the victim was examined as P.W.2.

12. A careful reading of the evidence of the victim/P.W.2 shows that prior to the occurrence i.o. on 23.10.2017, that the appellant forcibly had penetrative sexual intercourse with her against her will. If that be the case definitely she would have informed either to her parents or to her



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kith and kin. Further, she has stated that she herself called the appellant and went along with him. Even the evidence of the doctor/P.W.4 and medical evidence Exs.P.4 and P5 shows, that there was no forceful penetrative sexual assault and there was no physical injuries on the victim.

13. A reading of the statement of the victim girl/P.W.3 recorded by the learned Judicial Magistrate under Section 164 Cr.P.C. clearly shows that there was affair between the appellant and the victim and prior to the occurrence, the appellant had penetrative sexual assault on her. Though the victim stated that against her will the appellant compelled her and had sexual intercourse, if there was any compulsion against her will, soon after the incident, the victim would have intimated the same either to her parents or to the kith and kin or atleast she would have avoided the appellant. But the evidence shows that even after that also, she had contact with the appellant. Therefore, the appellant might not have had penetrative sexual intercourse under compulsion or force. However, the POCSO Act does not say anything about the consent or forceful or coercion. Even assuming that the victim had not resisted the act



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committed by the appellant or she willingly participated, still it is an offence since the victim was a child at the time of occurrence under the definition of POCSO Act. Section 2(1)(d) of POCSO Act defines child as “person either male or female who have not completed the age of 18 years, those are child under the definition of 2(1)(d) POCSO Act.” The bonafide certificate of the victim/Ex.P.8 and the birth certificate of the victim/ Ex.P.9 clearly show that the date of birth of the victim is 06.11.2003 and the date of occurrence is on 23.10.2017. Therefore, the victim is aged only about 15 years at the time of occurrence and therefore, she was child under the definition of POCSO Act. This fact is not denied or challenged by the appellant. Therefore, undisputedly, the victim was a child under the POCSO Act at the time of occurrence.

14. As far as penetrative sexual assault is concerned, the only witness who has spoken about the penetrative sexual assault is the victim. In the cases of this nature, no independent witnesses can be expected since these type of offences are committed by the accused in a secluded place and not in a public view or in the presence of any other independent witnesses. Therefore, the evidence of the victim has to be



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taken into consideration. Though the learned counsel for the appellant stated that the sterling character of the victim has to be taken into consideration, even as per the defence, the appellant and the victim had love affair and it is not the case that they do not know each other and therefore, there is possibility of access or nexus between them. Even P.W.1 and P.W.3/ the parents of the victim have clearly stated that the boy/appellant and the victim had love and they reprimanded the same. Therefore, the appellant is known person. Further, as per the evidence of the victim/P.W.1, the appellant used to come to the house of the victim when her parents were not in house and he had sexual intercourse with her for more than once. It might be with or without the consent and willing of the victim. However, since the victim was a child under the definition of POCSO as stated above, the consent is immaterial. Therefore, the act committed by the appellant attracts the offence under Section 5 (l) which is termed as aggravated penetrative sexual assault punishable under Section 6 of PCOSO Act.



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15. This Court as appellate and final Court of fact finding, has to necessarily re-appreciate the entire evidence and to give its findings independently. Accordingly, this Court re-appreciated the entire evidence and gives its findings independently.

16. This Court finds that the prosecution proved its case beyond all reasonable doubt and the evidence of the victim is natural, consistence and inspires the confidence of this Court. This Court finds no reason to discard or disbelieve the evidence of the victim. Therefore, under these circumstance, considering the evidence of the victim/P.W.2 coupled with the statement recorded from the victim under Section 164 Cr.P.C/ Ex.P.3 and the medical evidence of P.W.4/doctor and Exs.P.4 and P5, this Court finds that the victim who was a child under the definition of POCSO was subjected to penetrative sexual assault by the appellant and therefore, the appellant has committed the offence under Section 5 (I) punishable under Section 6 of POCSO Act.



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17. This Court does not find any perversity in the appreciation of evidence by the trial Court. However, the learned counsel for the appellant drew the attention of this Court that the alleged offence stated to have been committed prior to the amendment and as per Section 6 of POCSO Act, the minimum sentence is only 10 years whereas, the trial Court has imposed 20 years as minimum sentence which is the minimum sentence after the amendment.

18. Further, it is seen that the appellant had not moved with the victim with any bad or cheating intention. The appellant had love affair with the victim and in order to marry the victim, he approached them however, they did not agree the same. Now it is stated that the victim is now given in marriage with some other person who is the relative of P.W.1 and P.W.3 and she begotten a child. Therefore, considering the mitigating circumstances, this Court is of the opinion that some leniency may be shown on the appellant.

19. In view of the mitigating circumstances, the sentence imposed by the trial Court on the appellant is reduced to 10 years which would meet the ends of justice.



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20. Accordingly, this Criminal Appeal is partly allowed.

Consequently, the connected Miscellaneous Petition is closed. The respondent police is directed to secure the appellant to undergo the remaining period of sentence if any.

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Index:Yes/No



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To

1. The Special court for Exclusive Trial of Cases under POCSO Act
Coimbatore
2. The Inspector of Police
Peelamedu Police Station
Coimbatore
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.



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P.VELMURUGAN, J

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