



Crl.A.No.940 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2022

CORAM:

THE HON'BLE Mr. JUSTICE P.VELMURUGAN

Crl.A.No.940 of 2022
and
Crl.M.P.No.13027 of 2022

Ajith @ Ajith Kumar
Appellant

...

Vs.

State represented by
The Inspector of Police,
A.Pallipatti Police Station,
Dharmapuri District.

... Respondent

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C., to set aside the conviction imposed in the judgment dated 10.05.2022 made in Spl.S.C.No.13 of 2018 on the file of the Sessions Judge, Fast Track Mahila Court, Dharmapuri.

For Appellant : Mr.J.Pradeep

For Respondent : Mr.S.Sugendran

Additional Public Prosecutor

JUDGEMENT

This Criminal Appeal has been filed to set aside order dated 10.05.2022 passed in Spl.S.C.No.13 of 2018 on the file of the Sessions Judge, Fast Track Mahila Court, Dharmapuri.



Crl.A.No.940 of 2022

2. The respondent police registered a case against the petitioner for the offence under Sections 363 and 366(A) of IPC. After investigation, altered the sections from 363, 366(A) IPC into 363, 366(A) IPC and Section 5(l) read with 6 of POCSO Act. After investigation, laid a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Dharmapuri. The learned Sessions Judge, after completing the formalities, framed the charges for the offences under Sections 366 and 363 IPC, 9 of Prohibition of Child Marriage Act and Section 5(l) read with 6 of POCSO Act.

3. In order to substantiate the charges framed against the appellant, on the side of the prosecution, totally 16 witnesses were examined as P.W.1 to P.W.16 and 16 documents were marked as Ex.P1 to Ex.P16. Besides, one material object was also exhibited as M.O.1. After completing the examination of the prosecution witnesses, incriminating circumstances were culled out from the prosecution witnesses, put before the accused, by questioning under Section 313 Cr.P.C., and the same was denied by the accused as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced. On conclusion of trial and



Crl.A.No.940 of 2022

hearing the arguments advanced on either side and perused the materials on record, the trial judge found the appellant not guilty for the offence under Section 366 IPC and Section 9 of Prohibition of Child Marriage Act. Though the trial court acquitted the appellant for the abovesaid two charges, found the appellant guilty for the offence punishable under Section 6 of POCSO Act and sentenced him to undergo 10 years Rigorous Imprisonment and to pay fine of Rs. 5,000/- in default to undergo further period of six months simple imprisonment. Further the trial court found the appellant guilty for the offence under Section 363 IPC and sentenced him to undergo three years Rigorous Imprisonment and to pay fine of Rs.3,000/-, in default to undergo three months simple imprisonment. Challenging the said judgment of conviction and sentence, the accused has filed the present appeal before this Court.

4. Learned counsel for the appellant would submit that there was a delay in filing the complaint and registering the F.I.R. The alleged occurrence is said to have taken place on 03.02.2018, where as the complaint was given on 04.02.2018 and F.I.R was sent to the Court only on



Crl.A.No.940 of 2022

06.02.2018. Hence, the delay in filing the complaint, registering the F.I.R and delay in sending the same to the Court are fatal to the case of the prosecution. After much deliberation, false case has been registered as against the appellant. Further he would submit that the victim was produced before the doctor on 06.02.2018, whereas the doctor, who conducted medical examination on the victim girl has clearly stated that possibility of tearing of hymen was caused not only due to penetrative sexual assault but also for some other reasons. Further, no dresses of either the appellant or the victim were sent to Forensic Lab for getting expert opinion, which are fatal to the case of the prosecution. Except P.W.3, no other eye witness has spoken about the occurrence. There is no material to show that the victim was forcibly taken by the appellant from the custody of the lawful guardian. The trial court rightly appreciated the evidence and not found the appellant guilty for the offence under Section 366 IPC and for the offence under section 9 of Prohibition of Child Marriage Act, acquitted him. Prosecution has failed to prove that the victim was forcibly taken by the appellant and tied "Thali" and the respondent police has not recovered any material, hence the Trial Court rightly appreciated the evidence and



Crl.A.No.940 of 2022

acquitted the appellant. But from the very same materials, the appellant was convicted for the offence under Section 363 IPC and Section 6 of POCSO Act. Even in the statement recorded under Section 164 Cr.P.C., the victim girl has clearly stated that she voluntarily left with the appellant and the appellant has not forcibly married her. There is no material evidence, except P.W.3-victim, to show that the appellant had physical contact with her. The victim girl and appellant loved each other, hence the parents of the victim girl foisted a false case as against the appellant. The Investigating officer failed to investigate the matter in a fair manner and filed a charge sheet as against the appellant. The Trial Court though disbelieved the evidence of the prosecution for the offence under Section 366 IPC and under Section 9 of Prohibition of Child Marriage Act, wrongly convicted the appellant for the offence punishable under Section 363 IPC and also for the offence punishable under Section 6 of POCSO Act, which is perverse and warrants interference of this court.

5.Learned Additional Public Prosecutor would submit that the victim is aged about only 13 years at the time of occurrence. School certificate



Crl.A.No.940 of 2022

Ex.P10 clearly shows that the date of birth of the victim is 03.04.2005. The date of occurrence is 03.02.2018. Age of the victim girl is only 13 years at the time of occurrence and she is a child under the definition of POCSO Act. Further, evidence of P.W.3-victim girl has clearly deposed that the appellant took the victim and married her forcibly and also took her to some places and stayed there for two days. During that time, he compelled the victim and had penetrative sexual intercourse with her. Hence, he committed offence under Section 5(l) which is punishable under Section 6 of POCSO Act. P.W.8-doctor has clearly stated that hymen of the victim girl was not intact and she was subjected to penetrative sexual assault. Therefore, evidence of victim girl/P.W.3 corroborated with the evidence of P.W.7-medical evidence. Ex.P2-statement under Section 164 Cr.P.C clearly proved that the appellant has committed penetrative sexual assault on the victim girl. From the evidence of the victim girl, medical evidence and previous statement of the victim girl, prosecution proved its case beyond reasonable doubt. There is no merit in the appeal and the same is liable to be dismissed.

6. Heard the learned counsel appearing for the appellant and the



Crl.A.No.940 of 2022

learned Additional Public Prosecutor appearing for the respondent and perused the materials available on record.

7. The specific case of the prosecution is that on 03.02.2018 at about 11 hours, when the victim was alone in her house, the appellant removed the custody of the victim from her lawful guardian and without their consent he married her forcibly and had sexual intercourse with her. Hence, parents of the victim girl registered the case. The prosecution conducted the investigation and laid a charge sheet.

8. It is the specific case of the prosecution that the victim is a minor child. Ex.P10 is the study certificate issued by the school in which the victim was studied and as per Ex.P10, the date of birth of the victim is 03.04.2005 and as per complaint-Ex.P1 and the evidence of P.W.1, the date of occurrence is 03.02.2018. From the reading of Ex.P10 and Ex.P1, it is found that on the date of occurrence the victim was only 13 years old. Therefore, the victim is a child under the definition of 2(1)(d) of POCSO Act. As far as the offence under Section 363 of IPC is concerned, P.W.3 is



Crl.A.No.940 of 2022

the victim girl has clearly stated that on 03.02.2018 when the victim was alone in her house and in the absence of her family members, the appellant forcibly took the victim from the custody of lawful guardian and forcibly married her and also had penetrative sexual intercourse with her. There is no material to show that he married the victim girl forcibly. However, evidence of P.Ws.1 and 2 clearly show that the victim girl was missing from their house for two days. Hence they searched in and around place and also in their relatives house, which clearly shows that custody of the victim was removed by the appellant from the lawful guardian without their consent. During cross examination, P.W.3-the victim girl has stated that she was not forcibly taken by the appellant and she admitted that she went along with the appellant. Though the victim went along with the appellant voluntarily and the appellant has not forcibly taken her and age of the appellant is 29 years and the age of the victim is 13 years, the consent is immaterial. Once the custody of the child was removed by a person from the lawful guardian without their consent, Section 361 IPC would attract and also which is punishable under Section 363 IPC. Therefore, the Trial Court rightly appreciated the evidence of P.W.3-the victim girl that she went along with



Crl.A.No.940 of 2022

the appellant to some places and stayed there for two days. Though the learned counsel for the appellant stated that both loved each other, love is not an offence, however, age of the victim is only 13 years who is a child under the definition of Section 2(i)(d) of POCSO Act and her custody was removed by the appellant from the lawful guardian without their consent, therefore, the act committed by the appellant falls under Section 361 IPC, punishable under Section 363 IPC. The Trial Court rightly convicted the appellant for the offence under Section 363 IPC. Evidence of P.W.3-victim girl has clearly proved that while they were outside the house on 03.02.2018, 04.02.2018 and 05.02.2018, the appellant had penetrative sexual assault on her more than once. Even if there is no forcible intercourse, and even there is no external injury or even assuming that the victim girl has not resisted the sexual act of the appellant, since the victim is a child and aged about only 13 years, the offence committed by the appellant falls under section 3(a) of POCSO Act, which is punishable under Section 4 of POCSO Act. The victim girl clearly stated that the appellant had penetrative sexual assault on her more than once, therefore the offence falls under Section 5(1) which is punishable under Section 6 of POCSO Act. P.W.8-doctor in his



Crl.A.No.940 of 2022

evidence has clearly stated that the victim girl was subjected to penetrative sexual assault and her hymen was damaged and also Ex.P6 -medical record clearly shows that her hymen was not intact. Though the learned counsel for the appellant submitted that hymen may be damaged due to some other reason ie., may be due to cycling, where as they have not put a suggestion before the Medical Officer. From Ex.P2, statement recorded by the Judicial Magistrate under Section 164 Cr.P.C which is the previous statement of the victim girl corroborated with the medical evidence.

9. Since this Court is the appellate court, it is a final court of fact finding, this Court also re-appreciated the entire evidence and finds that the appellant has committed offence under Section 363 IPC and also Section 6 of POCSO Act. Therefore, this Court independently has come to the conclusion that the appellant has committed penetrative sexual assault and the trial court rightly appreciated the evidence and convicted him. Hence, this Court does not find any specific reason to discard or disbelieve the evidence of the victim girl/prosecution. Cases of this nature, no independent eye witness can be expected except the victim and therefore under these



Crl.A.No.940 of 2022

circumstances, conviction can be recorded based on the evidence of the prosecutrix, if the evidence of the prosecutrix inspires the confidence of the Court. The victim girl's evidence is natural, cogent and consistent and no reason to discard the evidence of the victim girl and it inspires the confidence of the Court. A reading of the entire materials, this Court does not find any perversity or illegality in the order passed by the trial court and there is no merit in the appeal and the same is liable to be dismissed. Accordingly Criminal Appeal is dismissed. Consequently, connected miscellaneous petition is closed.

07.11.2022

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Index:yes/No
Internet:yes/No



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Crl.A.No.940 of 2022

P.VELMURUGAN, J.

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To

1. The Sessions Judge,
Fast Track Mahila Court,
Dharmapuri.
2. The Inspector of Police,
A.Pallipatti Police Station,
Dharmapuri District.
3. The Public Prosecutor
High Court,
Chennai.

Crl.A.No.940 of 2022
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07.11.2022

12/12