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CrI.A.No. 864 of 2022

,IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.11.2022

Coram

THE HON'BLE MR. JUSTICE P.VELMURUGAN

CrI.A.No. 864 of 2022
and
CrI.MP.No. 12248 of 2022

Sanjib Naik @ Babu

...Appellant

-Vs-

State rep. By
The Inspector of Police,
Vellakoil Police Station,
Tirupur District.
Crime No. 435 of 2019

..Respondent

PRAYER : Criminal Appeal filed under Section 374(2) Cr.P.C., praying to set aside the conviction imposed in judgment dated 07.06.2022 made in Spl. Sessions Case No. 51/2019 on the file of Sessions Judge, Mahila Court (FTC), Tiruppur.

For Appellant : Mr.C.S.Saravanan
For Respondent : Mr.S.Sugendran, APP



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ORDER

WEB COPY This Criminal Appeal is filed challenging the judgment dated 07.06.2022 made in Spl. Sessions Case No. 51/2019 on the file of Sessions Judge, Mahila Court (FTC), Tiruppur.

2. The respondent police registered a case against the appellant in Crime No. 435 of 2019 initially for girl missing and after securing the victim and the appellant proceeded with the investigation for the offence under Section 366(A) IPC and under Section 5(1) r/w 6 of POCSO Act . Subsequently, after investigation altered the section for the offences under Section 366 (A) , 373(3) IPC and Section 5(1) r/w 6 of POCSO Act. After completing investigation, laid charge sheet before the Special Court since the offences are against the child falls under POCSO Act, Special Sessions Judge, Tiruppur taken the case on file in Spl.SC.No. 51 of 2019. After completing procedural formalities framed charges against the appellant for the offences under Section 366 (A) of IPC, 373(3) of IPC and Section 5(1) r/w 6 of POCSO Act.



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3. After framing charges and completing procedural formalities, during trial, on the side of the prosecution, in order to substantiate the case of the prosecution as many as eight (8) witnesses were examined as PW1 to PW8 and 13 documents were marked as Ex.P1 to P13 and no material objects was exhibited. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused/ appellant and questioned under Section 313 of Cr.P.C and he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

4. The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that the accused/appellant is guilty for the offences as follows;

(i) Under Section 366 (A) IPC, the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.500/-, in default, to undergo simple imprisonment for a period of three months.



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(ii) Under Section 5(1) punishable under Section 6 of POCSO Act, the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.500/-, in default, to undergo simple imprisonment for a period of three months.

(iii) Under Section 376 (3) of IPC, the appellant was convicted and sentenced to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.500/-, in default, to undergo simple imprisonment for a period of three months. Aggrieved over the same, the appellant/accused is before this Court.

5. It is the case of the prosecution that on 09.08.2019, at about 1.00pm, the appellant called the victim child over phone and informed her to come to Kamala Mill Bus Stop at 6.00 pm after she came to the spot, the appellant took the victim and the custody of the victim was removed by the appellant without the consent of the lawful guardian illegally, therefore the appellant committed offence under Section 366(A) of IPC. The appellant had committed aggravated sexual assault, since the victim is a minor, the appellant had committed offence punishable under Section 376 (3) of IPC. Further the victim is a child under the definition of POCSO Act, the offence committed by the appellant would fall under Section 5 punishable under



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Section 6 of the POCSO Act. Therefore the respondent after investigation laid charges for the above said offences. The trial Court after trial found guilt of the appellant for the above said charges and convicted the appellant.

6. The learned counsel for the appellant would submit that the victim herself eloped with the appellant. Though the witnesses had stated that while they travelling in the bus, the girl did not cry and she happily eloped with the appellant and no evidence to prove that the appellant committed the offence of kidnap and penetrative sexual assault on her. The victim was examined by the Judicial Magistrate on 20.07.2019 and a statement was recorded under Section 164 Crpc. Though she has stated that the appellant had committed penetrative sexual assault, while examining before the trial Court as a witness, she deposed that the appellant attempted to do wrong things but she resisted the same, thereafter nothing was happened. Medical evidence also says that there was no external or internal injuries and hymen was intact and there is no symptoms of sexual assault except the statement recorded by the Judicial Magistrate which was marked as Ex.P2. Except the said statement, nowhere the victim girl has stated that she was subjected to penetrative sexual assault and the appellant had forcefully committed the



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WEB CO said offence. Since the medical evidence not corroborated the statement recorded by the Judicial Magistrate under 164 Cr.pc, the evidence of prosecutrix is not truthful. In view of the untrustworthy and un-corroborative of the evidence of the prosecutrix, it is unsafe to record the conviction under Section 5(1) punishable under Section 6 of POCSO Act. The victim girl voluntarily left with the appellant, therefore Section 366(A) of IPC would not attract. Further there is no forceful sexual assault, hence Section 376(3) of IPC also would not attract. Unfortunately, the trial Court failed to appreciate the oral and medical evidences and only on the sympathy grounds, convicted the appellant without any substantiating evidences, therefore the conviction and sentence imposed by the trial Court is liable to be set aside.

7. The learned Additional Public Prosecutor would submit that the victim girl was aged only 13 years at the time of the occurrence. The date of birth of the victim is 06.07.2006, the date of occurrence on 09.08.2019, therefore, on the date of occurrence, the victim has completed 13 years of age. In order to prove the age of the victim, transfer certificate of the victim was marked as Ex.P1. As per Ex.P1, the date of birth the victim is



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06.07.2006, therefore the prosecution has proved that the victim is a child under the definition of POCSO Act.

8. The learned Additional Public Prosecutor would further submit that in the previous statement recorded from the victim under Section 164 Crpc, which was marked as Ex.P2, she has clearly narrated that on 09.08.2019 the appellant called the victim over phone and asked her to come to Kamala Mill Bus stop at 6.00pm and threatened that if she fails to do so, he will come to her house, therefore she went to the spot and immediately, the appellant abducted the victim from the place. The appellant introduced her to his co worker as he is going to marry her and also threatened the victim to introduce her as his wife and on the same day night he did sexual intercourse. Thereafter she took her to his uncle's house at Andhra Pradesh and also did penetrative sexual assault. Since the parents of the victim filed a complaint for girl missing, the investigating officer started to probe into the matter, subsequently, based on the information received by the parents of the victim, the respondent police secured the victim child and the appellant and produced before the doctor. Even though the doctor's evidence is otherwise,



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the victim in her previous statement has clearly stated that she was subjected to penetrative sexual assault and by threaten, the appellant took her to Andhra Pradesh without the knowledge of the parents, therefore the prosecution after completing investigation has laid the charge sheet and the trial Court has rightly convicted and imposed the sentence on the appellant, therefore, there is no merits in the appeal and the same is liable to be dismissed.

9. Heard Mr.C.S.Saravanan, learned counsel appearing for the appellant and Mr.S.Sugendran, learned Additional Public Prosecutor appearing for the respondent and peruse the materials available on record.

10. It is the specific case of the prosecution that the victim is a child under the definition of POCSO Act. The appellant forcefully taken away the custody of the child from the lawful guardian of the child without their consent and also committed penetrative sexual assault therefore, the offence falls under Section 366(A) and 376(3) of IPC. In order to prove the age of the victim, transfer certificate was marked as Ex.P1, which proves the date of birth of the child is 06.07.2010 and the date of the occurrence is on



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09.07.2019, therefore, the age of the victim is only 13 years and she is a child under the definition of Section 2(1)(d) of POCSO Act. The age of the victim has not been disputed by the defence, therefore this Court as per Section 94(2) of Juvenile Justice Act, presumes that the victim is a child under the definition of POCSO Act.

11. As far as commission of offence under Section 366 (A) of IPC is concerned, the victim girl clearly stated that on 09.08.2019 the appellant called the victim over phone and asked her to come to Kamala Mill Bus stop at 6.00pm and threatened that if she fails to do, he will come to her house, therefore she went to the spot and immediately, the appellant forcefully took the victim to a room situated in the Murugan Mill and committed penetrative sexual assault and also introduced her to his co-worker as he is going to marry her and also threatened the victim to introduce her as his wife. Since the custody of the victim was removed by the appellant without the consent of the lawful guardian and had illegal intercourse with the victim girl, therefore the act committed by the appellant falls under Section 366(A) of IPC. The only defence is that the victim has voluntarily gone with the appellant. Once the appellant has admitted the fact that the victim girl was



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with him and the custody was removed by the appellant without consent of any lawful guardian and committed sexual assault on the victim, the same would attract Section 366 (A) of IPC.

12. The previous statement of the victim/Ex.P2 recorded by the Judicial Magistrate on 27.08.2019 in which she has stated that she was subjected to penetrative sexual assault by the appellant/accused, but during examination before the trial Court as PW1, she has stated that the appellant/accused has only made an attempt to commit sexual assault, but she avoided. The victim was produced before the doctor/PW5 for medical evidence, wherein she has stated that the hymen of the victim was intact and there is no external or internal injuries. The victim has stated before PW5 that some known persons have attempted to commit penetrative sexual assault, but she resisted. As per Ex.P6/Accident register, known persons to the victim have attempted to commit penetrative sexual assault, but in Ex.P7/Medical examination report, it is clearly stated by the doctor/PW5 that hymen of the victim was intact and she was not pregnant and no external or internal injuries on the body of the victim. Therefore, when the victim girl has stated during examination as witness that the appellant



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attempted to commit penetrative sexual assault on her and she resisted the same, the medical evidence corroborates that there was no external or internal injuries and the hymen was intact, therefore under these circumstances, this Court finds that the prosecution has not proved the charged offence under Section 376(3) of IPC and also 5(1) punishable under Section 6 of POCSO Act.

13. Further, no aggravated penetrative sexual assault has been substantiated, since the victim has completed 12 years and the victim has not stated that the appellant committed penetrative sexual assault more than once, therefore the charges framed as against the appellant for the offences under 5(1) of POCSO Act has not been substantiated. However, the victim girl clearly deposed before the trial Court that the appellant made an attempt to commit sexual assault and even before the doctor/PW5, she has stated that the appellant had committed sexual assault.



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14. Therefore, on overall reading of the deposition of the victim as well as the medical evidence, this Court has come to the conclusion that the prosecution has not proved beyond reasonable doubt that the appellant has committed offence under Section 376(3) IPC and also under Section 5(1) punishable 6 of POCSO Act. However this Court from the evidences of the victim and also from the evidence of PW5/doctor finds that the appellant/accused has committed offence under Section 7 punishable under Section 8 of POCSO Act and Section 4 r/w 18 of the POCSO Act and also for the offence under Section 376 r/w 511 IPC. Accordingly, the judgment of the trial Court is modified to the extent as follows;

- i. Conviction and sentence imposed by the trial Court for the offence punishable ***under Section 366(A) is confirmed.***
- ii. Conviction and sentence imposed for the offence under Section 5(1) r/w 6 of POCSO Act is ***modified to Section 3(a) r/w 4, r/w 18 of POCSO Act and to undergo 3 ½ years rigorous imprisonment.***
- iii. Conviction and Sentence imposed for the offences under Section 376(3) of IPC and to undergo 20 years rigorous imprisonment is ***modified to Section 376 r/w 511 IPC and to undergo 10 years rigorous imprisonment.***



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iv. The fine imposed and the default clause for payment of fine amount shall remain same as ordered by the trial Court.

With the above modification, the Criminal Appeal is partly allowed.

Consequently, connected Miscellaneous Petition is closed.

17.11.2022

Index:Yes/No

Speaking order/Non-speaking order

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To

1. The Inspector of Police,
Vellakoil Police Station,
Tirupur District.

2. The Sessions Judge,
Mahila Court (FTC),
Tiruppur.



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