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CRL A No.876 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.11.2022

Coram:

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

Criminal Appeal No.876 of 2022

Vimal Raj

... Appellant

Vs.

State by its
Inspector of Police
Kandamangalam Police Station
Kandamangalam
Villupuam District
(Crime No.208 of 2016)

... Respondent

Prayer : Criminal Appeal filed under Sections 374 (2) of Criminal Procedure Code, praying to allow the appeal and set aside the conviction and sentence imposed upon the appellant vide Judgment dated 07.07.2022 in S.C.No.102 of 2020 on the file of the Sessions Judge, Magalir Needhi Mandram (Fast Track Mahila Court), Villupuram, Villupuram District and acquit the appellant.

For Appellant : Mr.K.G.Senthil Kumar

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been filed seeking to set aside the conviction and sentence imposed on the appellant vide Judgment dated 07.07.2022 in S.C.No.102 of 2020 on the file of the Sessions Judge, Magalir Needhi Mandram (Fast Track Mahila Court), Villupuram, Villupuram District and acquit the appellant.

2.The respondent police registered the case in Crime No.208 of 2016 against the appellant for the offence under Section 366(A) IPC and after completing the investigation, laid charge sheet before the learned Judicial Magistrate, Additional Mahila Court, Villupuram for the offence under Section 366 (A) IPC. The learned Judicial Magistrate taken the case on file and since the offence is exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions. After commitment, the learned Principal District Judge, Villupuram, made over the case to the learned the Sessions Judge, Magalir Needhi Mandram (Fast Track Mahila Court), Villupuram, Villupuram District, in S.C.No.102 of 2020. The learned Sessions Judge after completing the formalities, framed the charges against the appellant for the offence under



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Section 366 IPC.

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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 7 witnesses were examined as P.W.1 to P.W.7 and 5 documents were marked as Exs.P.1 to P5 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 was produced.

5. On conclusion of trial, after hearing the arguments advanced on either side and also considering the materials, the learned Sessions Judge, found the appellant guilty for the offence punishable under Section 363 IPC and convicted and sentenced to undergo Rigorous Imprisonment for three years and to pay fine of Rs.5,000/- in default to undergo simple



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imprisonment for a further period of one month. 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 27.06.2016 at about 10.00 a.m., the complainant and his wife and family members had gone out and the victim girl was alone in the house. At that time, the appellant came to the house of the victim and forcefully took her with him in a motorcycle.

7. The learned counsel for the appellant would submit that there is a delay in filing the complaint. The alleged occurrence is said to have taken place on 27.06.2016, whereas the complaint was lodged only on 30.06.2016. Even though P.W.3 who is alleged to be the eyewitness to the occurrence informed the father of the victim about the appellant taking the victim in a two wheeler on 27.06.2016 itself, they had not filed any complaint immediately soon after receiving the information and they lodged the complaint only on 30.06.2016 and the delay in filing the complaint was not properly explained by the prosecution. The unexplained delay in filing of the complaint itself is fatal to the case of the



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prosecution. Further, P.W.3 in his evidence never stated that the appellant forcefully took the victim girl but he has only stated that the appellant and the victim girl were going together in a motorcycle. P.W.1 and P.W.2 are the parents of the victim girl and they are not eyewitnesses to the occurrence and they are only hearsay witnesses. Even though, in the complaint as well as in the charge sheet it is mentioned that the victim girl who was aged 17 years was kidnapped by the appellant, no documentary evidence was produced by the prosecution to prove that the victim was a minor and she had not completed the age of 18 years at the time of occurrence. Further, none of the witnesses have spoken about the age and date of birth of the victim girl. Therefore, the prosecution failed to establish the age of the victim and also failed to substantiate the charge that the appellant is the one who forcefully kidnapped the victim and therefore, the prosecution failed to prove its case beyond all reasonable doubt. Therefore, the commission of offence alleged to have been committed by the appellant does not fall much less than under Section 363 IPC. Further, though the alleged eyewitness/P.W.3 had stated that the victim girl was taken by the appellant in a two wheeler, the said two wheeler was not recovered by the prosecution which is fatal to the



case of the prosecution. The trial Court also failed to appreciate the evidence properly and failed to give a finding that the victim was a minor and she had not completed the age of 18 years at the time of occurrence. Unless a specific finding is given that the victim was a minor, the offence under Section 363 IPC would not attract. Though the trial Court had framed the charge against the appellant for the offence under Section 366 IPC but convicted the appellant for the offence under Section 363 IPC without giving any specific findings regarding the age of the victim girl. Though the trial Court not found the guilt of the appellant for the offence under Section 366 IPC, erroneously found the appellant guilty for the offence under Section 361 @ 362 IPC which is punishable under Section 363 IPC. Hence, the Judgement of the trial Court is liable to be set aside and the appeal has to be allowed.

8. The learned Additional Public Prosecutor appearing for the respondent police would submit that in this case, P.W.3 is the eyewitness to the occurrence and he has clearly spoken that the appellant is the one who took the victim in a two wheeler. As soon as he informed the same to the father of the victim, the father of the victim, started to search for



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the victim girl in and around and also in his relatives' house. At last, he lodged the complaint before the respondent police. He would further submit that the specific charge framed against the appellant is that the victim who was aged 17 years was kidnapped by the appellant. But the appellant did not dispute the age of the victim and therefore, the prosecution did not produce any document to prove the age of the victim. Even the victim girl who was examined as P.W.4 has clearly stated that the appellant compelled her and took her from his house to his relatives house. Since the victim who was a minor girl was taken by the appellant forcefully from the custody of the lawful guardian without their consent, the offence is made out. Therefore, the trial Court rightly convicted the appellant 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 learned Additional Public Prosecutor appearing for the respondent police and perused the materials available on record.



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10. The specific charge framed against the appellant is that the victim girl who was a minor was forcefully removed from the custody of the lawful guardian without their consent by the appellant. Therefore, the offence falls under Section 366 IPC. However, there is no material to show that the victim was a minor at the time of occurrence. Even though in the charge it is mentioned that the victim was a minor aged about 17 years, a careful perusal of the records shows that none of the witnesses have spoken about the date of birth of the victim. Unfortunately, the prosecution has not marked any document to establish the age of the victim. Even during cross examination, the Investigating Officer/P.W.8 admitted that at the time of complaint itself, he collected the birth certificate of the victim, however, he had not marked the said document. As rightly pointed out by the learned counsel for the appellant, even in the annexure of the documents mentioned in the Judgment, the birth certificate of the victim girl was not marked.

11. The learned Additional Public prosecutor produced the copy of the birth certificate of the victim girl before this Court in which, the date of birth of the victim is mentioned as 29.04.1999 and the date of



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occurrence is on 27.06.2016 and therefore, the age of the victim was only about 17 years at the time of occurrence and she had not completed the age of 18 years. Though none of the witnesses have spoken about the date of birth of the victim, in the complaint/Ex.P.1 itself, the father of the victim has clearly stated that the age of the victim was 17 years and she was kidnapped by the appellant on 27.06.2016. Even the Investigating Officer/P.W.8 admitted that at the time of complaint itself, he collected the birth certificate of the victim however, he did not mark the document. Therefore, mere defect in the investigation may not be a sole ground for the accused to get acquitted.

12. This case itself is supported with the fact that the minor girl was kidnapped by the appellant. Though the witnesses have not stated that the victim girl was forcefully taken by the appellant, if the victim had completed the age of 18 years at the time of occurrence, forceful or compulsion may be a ground for getting acquittal from the offence under Section 366 IPC. But in this case, since the victim was a minor, either forceful or compulsion may not be a ground for acquittal from the offence under the POCSO Act. Therefore, the trial Court while pronouncing the



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Judgment, rightly found that the prosecution not proved the case for the offence under Section 366A IPC and thereby, not found the appellant guilty for the offence under Section 366A IPC however, found the appellant guilty for the offence under Section 361 @ 362 IPC which is punishable under Section 363 IPC and convicted and sentenced as stated above.

13. The entire reading of the evidence including P.W.3/eyewitness and the complaint/Ex.P.1, show that the prosecution proved its case that the victim was aged only about 17 years and she had not completed the age of 18 years at the time of occurrence. If the custody of a minor girl is removed from the lawful guardian without the consent of such guardian, it amounts to kidnap of such minor person from lawful guardianship and abducting falls under Sections 361 and 362 IPC, punishable under Section 363 IPC. The trial Court rightly appreciated the evidence and convicted the appellant for the offence under Section 363 IPC. This Court does not find any perversity, infirmity or illegality in the appreciation of evidence by the trial Court and there is no merit in the appeal and the appeal is liable to be dismissed.



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14. Accordingly this Criminal Appeal is dismissed. 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 Sessions Judge,
Magalir Needhi Mandram (Fast Track Mahila Court),
Villupuram, Villupuram District
2. The Inspector of Police
Kandamangalam Police Station
Kandamangalam
Villupuram District
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.

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