



CrI.A.No.925 of 2022b

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 15.11.2022

CORAM:

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

CrI.A.No.925 of 2022

Subash

...Appellant

Vs.

The State represented by
The Inspector of Police,
All Women Police Station, Kondalampatti,
Salem District.
Cr.No.9/2018

...Respondent

This Criminal Appeal is filed under Section 374(2) of Cr.P.C. to admit the appeal and set aside the conviction and sentence imposed on the appellant by judgment dated 07.07.2022 passed in New Spl.S.C.No.277 of 2019 (Old Spl.S.C.No.78 of 2019) by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under the POCSO Act, Salem, by allowing the present criminal appeal.



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For Appellant : Mr.R.Nalliyappan

: Mr.H.Maruthiraj
Legal Aid Counsel

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor

JUDGMENT

The criminal appeal has been filed against the judgment of conviction and sentence dated 07.07.2022 passed in New Spl.S.C.No.277 of 2019 (Old Spl.S.C.No.78 of 2019) by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under the POCSO Act, Salem.

2 The respondent police registered a case in Cr.No.9 of 2018 stating that on 20.12.2018 at about 12.30 hours, the appellant taken the victim girl from the College Hostel at Yercaud to Rasipuram and thereafter to Attur Nainarpalayam and stayed up to 04.01.2019, in the interregnum, on 01.01.2019, when both were staying in the house of Vetri, she got married with the appellant at Vinayakar Temple at Nainarpalayam and on the same



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day, the appellant alleged to have caused sexual intercourse with the victim.

Therefore the respondent police after investigation has filed charge sheet, before the learned Sessions Judge, Special Court for Exclusive Trial of Cases under the POCSO Act, Salem, which was taken on file in New Spl.S.C.No.277 of 2019 (Old Spl.S.C.No.78 of 2019). The learned Sessions Judge, after hearing both the accused and the prosecution and after perusing the records, since there is *prima facie* case, framed charges against the appellant/accused for the offence under Sections 363 and 366 IPC, Section 9 of the Prohibition of Child Marriage Act, 2006 and Section 3 punishable under Section 4 of Protection of Children from Sexual Offences Act, 2012 (in short the “POCSO Act”).

3 Before the trial Court, in order to prove the case of the prosecution, as many as 10 witnesses were examined as P.Ws.1 to 10 and Exs.P1 to P20 were marked besides 1 material object was exhibited as M.O.1. After completing examination of prosecution witnesses, when incriminating circumstances culled out from the evidence of prosecution witnesses were put before the accused by questioning under Section 313



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Cr.P.C., he denied the same as false and pleaded not guilty. On the side of the defence, no one was examined and no document was marked.

4 The learned Sessions Judge, Special Court for Exclusive Trial of Cases under the POCSO Act, Salem, on completion of trial and hearing arguments advanced on either side, by judgment dated 07.07.2022 convicted the appellant/accused and sentenced him to undergo rigorous imprisonment for a period of three years with fine of Rs.5000/-, in default, to undergo simple imprisonment for a further period of three months for the offence under Section 363, to undergo rigorous imprisonment for a period of seven years with fine of Rs.10,000/-, in default, to undergo simple imprisonment for a period of six months for the offence under Section 366 IPC, to undergo rigorous imprisonment for a period of two years with fine of Rs.1000/-, in default, to undergo simple imprisonment for a period of three months for the offence under Section 9 of Prohibition of Child Marriage Act, 2006 and to undergo rigorous imprisonment for a period of ten years with fine of Rs.20,000/-, in default, to undergo simple imprisonment for a period of six months for the offence under Section 3 of POCSO Act. Further the learned



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Judge ordered to pay the total fine of Rs.36,000/- to the victim as compensation and also ordered the sentence imposed on the appellant to run concurrently. Aggrieved against the said judgment of conviction and sentence, the accused has preferred the present criminal appeal before this Court.

5 The learned counsel appearing for the appellant/accused would submit that age of the victim has not been proved by producing either Birth Certificate or any authenticate document and has not examined any person to speak about the date of birth of the victim. To attract the offence under the POCSO Act, it is the primary duty of the prosecution to prove age of the victim and in this case age of the victim has not been proved by the prosecution with admissible document. Therefore the charges under the POCSO Act would not attract, since prosecution has failed to prove that on the date of alleged occurrence, the victim was a child under the definition of Section 2(1)(d) of POCSO Act.

5.1 In this case victim was examined as P.W.2 and she was



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previously examined by the Judicial Magistrate to record statement under Section 164 Cr.P.C, wherein she has not spoken anything about the sexual assault made by the appellant and the victim has stated that she voluntarily eloped with the appellant and while examining before the Court also she has stated that she voluntarily went along with the appellant, since they both loved each other. The appellant and the victim together went to all the places and they got married and also lived as husband and wife for some time and hence it cannot be blamed the appellant alone.

5.2 The learned counsel would further submit that there is 9 days delay in lodging the complaint and the prosecution has not offered any explanation for the same. Therefore unexplained delay is fatal to the case of the prosecution. Further medical evidence also does not corroborate with the evidence of P.W.2 victim girl. P.W.6 Medical Officer, who made entry in the Accident Register Ex.P9 has stated that hymen was intact and in other medical records viz. Ex.P10 and P11 it is stated that hymen was not intact. The victim girl was not subjected to medical examination immediately and there was three months delay in conducting medical examination. Even the



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evidence of P.W.6 the Medical Officer, who has stated contradictory statement in Ex.P9 and Exs.P 10 and 11, shows that the prosecution has failed to prove the offence of sexual assault beyond reasonable doubt.

5.3 The victim girl has stated that the appellant has not forcefully taken her against her will and she on her own wish eloped with the appellant. Further even though prosecution has not proved age of the victim and assuming that the age of the victim, at the time of occurrence, as per the prosecution, is 17½ years, the age of the appellant is only 20 years at the time of occurrence and the cases of this nature the Court cannot strictly construed the offence of kidnap or rape or penetrative sexual assault or aggravated penetrative sexual assault. The cases having facts like this, the boy alone cannot be victimised considering the age of the boy and the girl. To support his contention, the learned counsel placed reliance on the decision of *Madurai Bench of this Court in the case of Arivalagan vs. State of Tamilnadu in Crl.A.(MD)No.2 of 2014*.

5.4 There are lot of contradictions between the evidence of the



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prosecution witnesses and prosecution has failed to prove its case beyond reasonable doubt. A careful reading of the charges and the evidence of the victim girl would go to show that the charges have not been proved beyond reasonable doubt as projected by the prosecution.

5.5 The trial Court has miserably failed to consider the above facts and erroneously convicted the appellant/accused, which warrants serious interference of this Court and the learned counsel prays to allow the appeal by setting aside the conviction recorded against the appellant.

6 Mr.S.Sugendran, learned Additional Public Prosecutor appearing for the respondent police would submit that to prove the age of the victim, prosecution has marked the school Certificate as Ex.P19, in which date of birth of the victim is mentioned as 23.07.2001 and the date of occurrence is 20.12.2018 and hence the age of the victim at the time of occurrence is 17½ years only. The defence side has not disputed the school Certificate Ex.P19 and has not produced any contra evidence to show that the victim has completed the age of 18 years. In the absence of the same, the



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trial Court has rightly come to the conclusion that the prosecution has proved that the age of the victim is 17 years only. The appellant forcefully kidnapped the victim and married her and also had physical relationship with the victim against her will, which is proved from the evidence of the victim girl.

6.1 Trial Court has considered all the defence taken by the accused and found the appellant/accused guilty and made conviction giving well founded reasons, which does not call for any interference of this Court and the appeal is liable to be dismissed.

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

8 Case of the prosecution is that the appellant and the victim



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were studying in the same college doing Hotel management Course and in that way they known to each other. On 20.12.2018 at about 12.30 hours, the appellant/accused taken the victim girl from the College Hostel at Yercaud to Rasipuram by threatening her that he would cut his hand and thereafter went to Attur Nainarpalayam and stayed there up to 04.01.2019, in the interregnum, on 01.01.2019, when both were staying in the house of Vetri, the appellant forcefully married the victim girl at Vinayakar Temple at Nainarpalayam and on the same day, the appellant alleged to have caused sexual intercourse with the victim forcefully. Hence the present case was registered against the appellant for the offence under Sections 363 and 366 IPC, Section 9 of Prohibition of Child Marriage Act, 2006 and Section 3 punishable under Section 4 of POCSO Act, 2012.

9 This Court, being an Appellate Court, is a final Court of fact finding, which has to necessarily re-appreciate the entire evidence and give an independent finding. Accordingly, this Court has re-appreciated the



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entire oral and documentary evidence produced before this Court.

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10 It is the main contention of the learned counsel for the appellant that prosecution has not proved age of the victim and hence offence under the POCSO Act would not attract. To prove the age of the victim, even though Birth Certificate of the victim was not marked, prosecution has marked Ex.P19 School Certificate of the victim. The defense side has not raised any objection to mark the said document and has not challenged the same by putting suggestion neither before P.W.2 the victim nor before the Investigating Officer and hence Ex.P19 remain unchallenged document. It is relevant to refer Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 which says that any entry made in the public record said to be a genuine, unless, the contrary is proved. Under this circumstances, the Court can safely come to the conclusion that prosecution has proved the age of the victim by producing Ex.P19 School Certificate. Therefore, prosecution has proved that at the time of occurrence the victim girl was aged about 17 years and hence she was a child under the definition of Section 2(1)(d) of POCSO Act.



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As far as commission of offence under Section 363 IPC is concerned, as already stated on the date of occurrence, the victim girl has not completed the age of 18 years and she is a child under the definition of POCSO Act. Admittedly due to love affairs, the victim left the Hostel and went along with the appellant, but, since the victim was a child and her custody was removed from the lawful guardian without their consent, which is the offence under Section 361 IPC punishable under Section 363 IPC. P.W.2, victim girl even though, while recording statement under Section 164 Cr.P.C. by the Magistrate, has stated that they both loved each other and she voluntarily eloped with the appellant and performed the marriage, but subsequently, while examining before the Court as P.W.2, she has stated that at the time of giving statement before the Magistrate, she was not aware and further stated that the appellant/accused forced her to leave the hostel by saying that he would cut his hand and compelled her for the marriage and thereafter they had sexual intercourse. Therefore it is proved that the appellant/accused committed the offence under Section 366 IPC.



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12 The other charge under Section 9 of the Prohibition of Child Marriage Act is concerned prosecution has not substantiated as to whether actually marriage had taken place between the appellant and the victim with sufficient materials. To prove the offence of penetrative sexual assault, there may not be any independent witness, but the offence of child marriage is concerned, there must be some eye witnesses and independent witnesses and prosecution could have collected sufficient materials to prove the marriage, but on perusal of the materials available, it could be seen that there is no sufficient materials to prove the marriage. Prosecution has not even produced any marriage photographs and has not recovered the Mangalyam tied by the appellant at the time of marriage with the victim. Therefore the offence under Section 9 of the Prohibition of Child Marriage Act was not proved. This Court, as appellate Court, while re-appreciating the evidence, finds that prosecution has not proved the offence under Section 9 of the Prohibition of Child Marriage Act.



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13 Coming to commission of offence under the POCSO Act, even

though the learned counsel appearing for the appellant vehemently contended that in Ex.P9 it is stated that hymen intact and in other medical records viz. Ex.P10 and Ex.P11, it is stated that hymen was not intact and hence there is discrepancy in the medical evidence and the same could not be relied upon. But, a careful perusal of the Ex.P9 copy of Accident Register, it is seen that the victim before the Doctor has stated that she and the one who studied along with her at Yercaud were loved each other and they went to Chennai and got married and also had sexual intercourse. In Ex.P10 Medical Examination report, it has been clearly stated that hymen not intact and in the history of the case it is stated that the victim and the appellant loved each other and went to Chennai and also had sexual intercourse. Further in Ex.P11 Medical Certificate also it is clearly mentioned that hymen not intact. Evidence of P.W.2 victim girl corroborated with the medical evidence. P.W.6 the Doctor who examined the victim girl has spoken about the entry made in the Accident Register, which corroborates with the evidence of the victim girl. Therefore it is proved that the victim was subjected to sexual intercourse and the evidence



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of the victim P.W.2 shows that the appellant is the one, who had sexual intercourse with the victim.

14 It is true in this case the victim is aged about 17 years and appellant is aged about 20 years at the time of occurrence, but, unfortunately the POCSO Act defined the age of the child as 18 years. There are difference of opinion in the judicial pronouncements in the cases of teenagers, but however as per the POCSO Act, once the girl has not completed the age of 18 years, she is a child and there cannot be any exemption. People should know the consequences of their act and every citizen should abide by law, if one is exempted, then the purpose of enactment of the Law would not be fulfilled and it would become futile exercise. Even though this Court express its mercy on the ground of humanity, but coming to the legal aspect, the victim is a child under the definition of POCSO Act and she was subjected to penetrative sexual assault. This Court does not find any perversity in appreciation of evidence by the Court below except for the offence under Section 9 of the Prohibition of Child Marriage Act. Hence the appellant/accused is acquitted for the



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offence under Section 9 of the Prohibition of Child Marriage Act.

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15 Accordingly, this criminal appeal is partly allowed by confirming the conviction and sentence for the offence under Sections 363 and 366 IPC and Section 3 punishable under Section 4 of the POCSO Act and setting aside the conviction and sentence for the offence under Section 9 of the Prohibition of the Child Marriage Act. The trial Court is directed to secure the appellant/accused to serve remaining period of imprisonment, if any.

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Index : Yes/No
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To

1. The Sessions Judge,
Special Court for Exclusive Trial of
Cases under the POCSO Act, Salem.
2. The Inspector of Police, All Women Police Station,
Kondalampatti, Salem District.
3. The Public Prosecutor, High Court of Madras.

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P.VELMURUGAN, J.,

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