



CRL A No.920 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.11.2022

Coram:

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

Criminal Appeal No.920 of 2022

A.Prakash M/23 years
S/o Abimannan

... Appellant

Vs.

The State, rep. by the Inspector of Police,
All Women Police Station,
Mettur, Salem District.
(Crime No.4/2019)

... Respondent

Prayer: Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, praying to call for the records pertaining to the order dated 19.07.2022 in Special Sessions Case No.12/2020 on the file of the Sessions Judge, Principal Special Court for exclusive Trial of cases under the protection of Children from Sexual Offences (POCSO), Act, Salem to set aside the same and allowing the present Criminal Appeal.

For Appellant : Mr.A.M.Esakkiappan
and
Ms.S.Vasavi Sridevi
Legal Aid Counsel

For Respondent : Mr.S.Sugendran
Government Advocate (Crl.Side)



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J U D G M E N T

This Criminal Appeal has been filed to set aside the judgement of conviction and sentence passed by the learned Sessions Judge, Principal Special Court, Salem in Special S.C.No.12 of 2020 dated 219.07.2022.

2. The respondent police registered a case against the appellant in Crime No.4/2019 for the offence punishable under Sections 417, 366(A) IPC. After investigation, they altered the charges as 417, 366 (A) IPC r/w Section 7 and 8 of POCSO Act. After completion of investigation, they laid a charge sheet before the Special Court, since the offence is against a child.

3. The learned Sessions Judge, Principal Special Court for the cases under POCSO Act, Salem, after taking cognizance of the charges, has taken the case on file in Special S.C.No.12/2020. After completing formalities, the learned Judge framed charges against the appellant for the offences punishable under Sections 363, 366 of IPC and Section 7 r/w 8 of POCSO Act.

4. After framing charges and completing the formalities, during



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Trial, in order to substantiate the charges framed against the appellant, on the side of the prosecution, as many as 9 witnesses were examined as PW1 to PW9 and 22 documents were marked as Ex.P1 to Ex.P22, besides, two material objects were exhibited.

5. After completing examination of entire prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant / accused by questioning under Section 313 Cr.P.C. However, the same were denied by the accused as false and pleaded not guilty. On the side of the defence no oral or documentary evidence was produced.

6. On completion of trial and hearing the arguments advanced on either side and considering the materials, the Trial Court not found guilty of the appellant for the offence under Section 366 IPC, however found guilty for offence punishable under Sections 363 IPC and Section 7 r/w 8 of POCSO Act. Accordingly, the Trial Court convicted the appellant for the offence under Section 363 IPC and sentenced to undergo four years rigorous imprisonment and to pay a fine of Rs.10,000/-, in default, to



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undergo a further period of six months simple imprisonment; and convicted for the offence under Section 7 r/w 8 of POCSO Act and sentenced to undergo four years rigorous imprisonment and to pay a fine of Rs.10,000/-, in default, to undergo a further period of six months simple imprisonment. Challenging the said judgment of conviction and sentence, the accused has filed the present appeal before this Court.

7. The specific case of the prosecution is that, on 12.10.2019, at 5.00 p.m. while the victim was standing in the bus stand, after returning from the school, the appellant took her in a two wheeler to his sister's house and stayed there and during the stay, the appellant took the victim to the terrace and hugged her. The parents of the victim lodged a complaint stating that the appellant kidnapped the victim. Subsequently, after investigation, the prosecution finds that the appellant has also committed the offence punishable under Section 7 r/w 8 of POCSO Act and laid a charge sheet before the Special Court and the Special Court also, considering the facts and after completing the formalities, framed the charges as stated above.



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8. When the matter was taken up for hearing, since the counsel for the appellant has not cooperated for disposal of the appeal and there was no representation for the appellant, this Court is inclined to dispose the matter as early as possible, as the Appeal is against a child. Therefore, this Court directed the Registry to appoint a Legal Aid Counsel to appear on behalf of the appellant, thereby, Ms.S.Vasavi Sridevi, Legal Aid Counsel was appointed to appear for the appellant.

9. The learned Legal Aid counsel, appearing for the appellant would submit that no occurrence has been taken place, as projected by the prosecution and the appellant had no sexual intention and the prosecution has failed to prove that the appellant had approached the victim with sexual intent. He also submitted that the appellant never kidnapped the victim and they are only friends, later, the friendship developed into love. Therefore, due to love and affection, the appellant and the victim went to the house of the own sister of the appellant and they did not go anywhere else and during their stay, nothing had happened.



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9.1. He further submitted that the previous statement (Ex.P2) of the victim, recorded before the Judicial Magistrate under Section 164 of Cr.P.C., clearly shows that nothing had happened in the house of the sister of the appellant, when they stayed there. Subsequently, while deposing evidence as PW1, before the Trial Court, she stated that, the appellant hugged her. None of the prosecution witnesses have stated that the appellant had sexual intent, while hugging the victim and he had physical contact with her, which would attract the offence under Section 7 of POCSO Act. Though the appellant hugged the victim, it will not attract Section 7 of POCSO Act. Therefore, the prosecution has not proved that the appellant had approached the victim with sexual intent, as such, the Trial Court has failed to appreciate the object of the POCSO Act as well as not properly appreciated the prosecution evidence in a right manner. The learned counsel also argued that, if a girl and boy are under teenage, with the age difference of 2 or 3 years; and due to love affair, if they had any physical relationship, that act would not attract POCSO Act.

9.2. Further, the medical evidence does not say that there was



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penetrative sexual assault on the victim and the appellant either forcefully taken; or kidnapped the victim. The victim herself stated during the evidence that only the appellant took her, which is not forceful or against the wish and will of the parents. Therefore, out of love and affection, they went to the house of the appellant's own sister and even none of the prosecution evidences proved that the appellant had physical relationship with the victim, while they staying in his sister house. As such, the prosecution has failed to prove its case beyond reasonable doubts and hence the presumption under Section 29 of POCSO Act would not arise. Further, the age of the victim is 16 years and she voluntarily left with the appellant and the appellant has not committed any offence under Section 7 r/w 8 of POCSO Act. Therefore, the conviction and sentence imposed on the appellant is liable to be set aside.

10. The learned Additional Public Prosecutor would submit that as per School Certificate Ex.P4, the date of birth of victim is 04.07.2004 and the date of occurrence is 12.10.2019. Therefore, on the date of occurrence, the age of the victim was only 15 years 3 months and hence, she is only a child under the definition of POCSO Act. Further, from the evidence of PW2, it reveals that the victim was kidnapped by the



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appellant and also she was subjected to sexual assault. It is argued by the learned Additional Public Prosecutor that though there is no medical evidence, based on the material, the Trial Court framed the charges under Section 7 and 8 of POCSO Act and not either under Section 3 or 5 of POCSO Act. Therefore, the prosecution clearly proved that the victim is a child and the appellant had committed sexual assault on her, which is falls under Section 7 punishable under Section 8 of POCSO Act.

10.1. The foundational fact that the appellant kidnapped the victim and both of them stayed in the house of the appellant's sister, where, the appellant committed sexual assault on her. Once the evidence of prosecution proved that the appellant had physical contact, then, it is for the appellant to rebut the presumption that he had no sexual intent, while hugging the victim. But there is no rebuttal evidence on the side of the defence, In such circumstances, the prosecution has proved its case beyond reasonable doubt. Even otherwise, if once the foundational fact has been established by the prosecution then there is a legal presumption under Section 29 of the POCSO Act, it is for the appellant to rebut the presumption, in the manner known to law. Therefore, the Trial Court has



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14. It is argued by the counsel for the appellant that, the victim while giving statement under Section 164 Cr.P.C., has not stated anything about the physical contact by the appellant with her and therefore, there is a material contradiction. However, a combined reading of the evidence of PW1 to PW4 proved that the appellant took the victim, without consent of her natural/legal guardians. Once the victim is a minor and she is under the control of her family; and if her custody is removed from the natural guardian, without their consent, that would attract Section 361 IPC, which is punishable under Section 363 IPC. The PW1, PW2, and PW3 in their evidence, and even during their cross examination, have not disputed that the appellant and the victim went together from the house of the de-facto complainant. Therefore, once the prosecution proved that the victim is a minor, below the age of 18 years and her custody was removed from the lawful guardian, without their consent, it would attract Section 361 IPC, which is punishable under Section 363 IPC. As such, the Trial Court has rightly appreciated the evidence of the prosecution and has rightly convicted the appellant/accused under Section 363 IPC.



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15. Asfar as the offence under POCSO Act is concerned, the evidence of PW1 clearly shows that the appellant and the victim went to the house of the appellant's sister and stayed there for a night and next day only, they came to their house. The above fact clearly shows that the appellant took the victim from the custody of her guardian, without their consent. Further, the evidence of victim clearly shows that while staying in the house of the appellant's sister, the appellant hugged her in the open terrace, which clearly shows that the appellant had a physical contact with the victim.

16. The learned counsel for the appellant vehemently argued that the appellant had no physical relationship with the victim and he had no sexual intent and hence, Section 7 of POCSO Act would not attract. But a reading of above section clearly speaks as " Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."



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17. Therefore, the above said Act clearly speaks that if a person touches any parts of body of the child, with sexual intent, it would attract Section 7 of the POCSO Act. Once, it is proved the foundational fact of the prosecution that there was physical contact between the appellant and the victim, then, there is a presumption under Section 29 of POCSO Act that the accused committed the offence. Therefore, it is for the appellant to rebut the presumption that the above said physical contact was not with sexual intent, whereas, in this case, the appellant was not examined as a witness. Normally, in criminal cases, accused need not come to the witness box and open his mouth and speak about his defence to disprove the commission of offence under the POCSO Act.

18. In the POCSO Act, Section 29 and 30 has been incorporated, which reads as follows.

29. When a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

30 (i) In any prosecution for any offence under this Act,



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which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state, but, it shall be a defence for the accused to prove the fact that he had no such mental state, with respect to the act charged as an offence in that prosecution

(2) For the purpose of this Section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation - In this section, " culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

Therefore, once the prosecution proved the foundational fact that the accused committed the offence, and if there is a defence that the accused had no such mental state with respect to the act charged as an offence, it has to be proved by the accused. In this case, during the cross examination, it was denied only regarding the permission of the parents and relationship of the parties and it was not specifically denied that there was no physical contact between the appellant and the victim. Further, they have not stated that in the presence of any other independent witness, the appellant had committed the said act. Further, in a case of this nature, normally, no independent witness can be expected and this



type of occurrence would be taken only in a secluded place.

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19. The learned counsel for the appellant submitted that, the appellant did not go to any secluded place and he went only to his sister's house and go to the open terrace, there, he hugged the victim, without any sexual intent. But, it is not the case of the defence that, in the presence of family members and only in order to exchange the love and affection, the appellant hugged the victim, without any sexual intent. Therefore, in the absence of such rebuttal, this Court can presume under Section 29 of the POCSO Act, that the appellant had committed the offence under POCSO Act. Further, once the prosecution proved that there is a physical contact, this Court can presume that such act is with sexual intent, it is for the defence side to rebut the same in the manner known to law by preponderance of probabilities.

20. Therefore, while re-appreciating the entire evidence, this Court finds that by examining oral and documentary evidence the prosecution has proved that the appellant committed the offences under Section 363 IPC and Section 7 r/w 8 of POCSO Act and The Trial Court has rightly



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inviting Section 29 of POCSO Act, found that the appellant had committed the offence under Section 7 r/w 8 of POCSO Act and also under Section 363 IPC. Therefore, there is no merits in the appeal and it deserves for dismissal.

21. However, considering the age of the appellant and taking into account the other materials, and to meet the ends of justice, this Court is inclined to impose minimum sentence for a period of three years, each, for the offences under Section 363 IPC and Section 7 punishable under Section 8 of POCSO Act and the above sentences are ordered to run concurrently.

22. Accordingly, the sentence imposed on the appellant by the Trial Court is reduced from 4 years to 3 years, each, for the offences under Section 363 IPC and Section 7 punishable under Section 8 of POCSO Act and the above sentences are ordered to run concurrently. However, there is no modification in the fine amount and the order of the Trial Court for payment of fine amount is confirmed.



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23. With the above modification, this criminal appeal is dismissed.

The trial Court is directed to secure the appellant/accused to serve remaining period of sentence of imprisonment, if any.

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Index: Yes/No

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To

1. The Sessions Judge, Fast Track Magalir Court, Ariyalur.
2. The Inspector of Police, All Women Police Station, Jeyankondam, Ariyalur District..
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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