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Crl.A.No.1130 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.11.2022

CORAM:

THE HON'BLE Mr. JUSTICE P.VELMURUGAN

Crl.A.No.1130 of 2022
and
Crl.M.P.No.15614 of 2022

Prakash

... Appellant

Vs.

The State of Tamilnadu,
Represented by
The Inspector of Police,
All Women Police Station,
Perur,
Coimbatore District.

... Respondent

Prayer:

Criminal Appeal filed under Section 374(2) Cr.P.C., to call for the records in Special Calendar Case No.55 of 2019 on the file of the Special Court for Exclusive Trial of Cases under POCSO Act, Coimbatore and set aside the conviction and sentence imposed on the appellant by the judgment dated 07.06.2022.

For Appellant : M/r.P.Prajeeth



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and
M/s.A.Veeramarthini
Legal aid counsel

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor

JUDGEMENT

This Criminal Appeal has been filed against the judgment dated 07.06.2022 passed in Special Calendar Case No.55 of 2019 on the file of the Special Court for Exclusive Trial of Cases under POCSO Act, Coimbatore.

2.The respondent police registered a case against the appellant/Accused No.1, in Crime No.1 of 2018 for the offence under Sections 5(l), 5(j)(ii) punishable under Section 6 of POCSO Act, Section 366(A), 313 of IPC and Section 9 of Prohibition of Child Marriage Act and against the accused No.2, for the offence punishable under Section 10 of Prohibition of Child Marriage Act, 2006. After investigation, laid a charge sheet before the Mahila Court, Coimbatore, since the offence is against

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child. The learned Special Judge taken the charge sheet on file in Special C.C.No.54 of 2019. After completing the formalities, framed the charges against the accused No.1 for the offence under Section 5(l), 5(j)(ii) punishable under Section 6 of POCSO Act, Section 366(A), 313 of IPC and Section 9 of Prohibition of Child Marriage Act, 2006 and against the Accused No.2 for the offence under Section 10 of Prohibition of Child Marriage Act, 2006. Later, the case was transferred to the Special Court for Exclusive Trial of Cases under POCSO Act and renumbered as Special C.C.No.55 of 2019. During trial, in order to substantiate the charges, on the side of the prosecution, totally 15 witnesses were examined as P.Ws.1 to 15 and 20 documents were marked as Exs.P1 to P20. No material object was exhibited. After completing the examination of the prosecution witnesses, incriminating circumstances were culled out from the evidence of 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.

3. On completion of trial, hearing the arguments advanced on either



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side and considering the material facts, the trial court found the appellant guilty for the offences under Section 5(j)(ii) and 5(l) of POCSO Act and he was convicted and sentenced to undergo 10 years Rigorous Imprisonment and to pay fine of Rs.10,000/- in default to undergo Simple Imprisonment for six months for the offence under Section 5(j)(ii) punishable under Section 6 of POCSO Act and convicted and sentenced to undergo ten years Rigorous Imprisonment and to pay fine of Rs.10,000/- in default to undergo Simple Imprisonment for six months for the offence under Section 5(l) punishable under Section 6 of POCSO Act. The appellant not found guilty for the offence under Sections 366(A), 313 of IPC and Section 9 of Prohibition of Child Marriage Act. The trial court not found the second accused guilty and acquitted him for the offence under Section 10 of Prohibition of Child Marriage Act. Challenging the abovesaid judgment of conviction and sentence, the appellant/accused No.1 has filed the present Criminal Appeal before this Court.

4. Learned counsel for the appellant would submit that the appellant



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is none other than the friend of the brother of the victim. The appellant used to come to victim's house to meet victim's brother. Subsequently, both the appellant and victim loved each other and they had penetrative sexual intercourse on several occasions at the victim girl's parents garden with the consent of the victim girl. Hence the victim girl got pregnant and she insisted the appellant to marry her. Since the victim was pregnant, marriage was solemnized on 19.05.2017 between the appellant and the victim girl. Hence, the act committed by the appellant cannot be come into the definition of penetrative sexual assault under POCSO Act. The consent of the minor is immaterial as the question to be considered is to the materiality of the consent but the circumstances leading to the act. The Hon'ble Delhi High Court, in Dharmander Singh Vs. State (Government of NCT of Delhi) reported in 2020 SCC Online Del 1267 made a detailed order on several factors to be considered while trying a case under POCSO Act and the court below has failed to consider such factors. As per P.W.5-doctor who examined the potency of the appellant, P.W.10-doctor who give treatment to the victim girl for the alleged miscarriage and P.W.11-doctor who medically examined the victim girl, there is no evidence linking the accused to the



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sexual activity or to the miscarriage of the foetus of the victim. The miscarried materials removed through D&C was not subjected to DNA test against the DNA of the accused which goes to draw a presumption in favour of the accused in this case. In the absence of any such evidence linking the accused to the alleged offence, conviction cannot be recorded under Section 5(j) which is punishable under Section 6 of POCSO Act. In the present case, there is no evidence of assault, influence, coercion, rape or any other form of threat on the victim. In the absence of any such act, the alleged offence is not made out. The term aggravated penetrative sexual assault is absolutely severe and the present case does not qualify to be classified under such offence. The basic principles of criminal justice administration while convicting the accused for the alleged offence absolutely erroneous in the absence of any specific evidence to the fact of making out of the offence against the accused. Further, he would submit that, both the appellant and the victim were teenagers during the period of alleged offence and no logic falls under the definition of penetrative sexual assault. The school certificate issued by the Headmistress of the school in which the victim girl studied has been marked as Ex.P8, in which date of birth of the victim girl has not



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been mentioned instead, it is mentioned that the victim girl was studied X standard during the period of 2014 – 2015. Therefore, Ex.P8 cannot be the conclusive proof of age of the victim. The Court below placing extreme reliance on this school certificate ruled that the victim is a minor without considering any other authentic documents such as birth certificate or identity card issued by the government. Unless the prosecution proved the foundational fact that the appellant committed penetrative sexual assault on the victim girl beyond reasonable doubt, offence under POCSO Act would not attract. Considering the fact that both the appellant and victim are teenagers and they loved each other for more than one year and they exchanged their love and affection and during that period they crossed their limit and therefore, beneficial construction has to be adopted by the Court. In this case, the victim and the appellant are teenagers and they loved each other. They exchanged their feelings and subsequently they got married and due to some misunderstanding, they got separated. Now, they married another person separately and living peacefully. The trial court failed to appreciate the facts and circumstances of the present case moreover when the victim willingly participated in the sexual act, convicted the appellant



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and sentenced him to undergo 10 years rigorous imprisonment. The trial court failed to consider the entire facts and convicted the appellant. Hence, the judgment of the trial court is liable to be set aside.

5. Learned counsel for the appellant vehemently contended that since both the victim and the appellant are lovers, they had sexual intercourse and the victim girl actively participated in the sexual act and also they got married. Due to some misunderstanding, they separated. Only after the separation, they foisted a false complaint against the appellant by misusing the provisions of POCSO Act. Trial Court failed to consider the facts and circumstances of the case and the objectives of the POCSO Act, erroneously convicted the appellant for the abovesaid charges.

6. Learned Additional Public Prosecutor would submit that at the time of occurrence, age of the victim was only 17 years. In order to prove the age of the victim, school certificate of the victim was marked as Ex.P8 through P.W.9, the Headmistress of the school in which the victim girl studied. Evidence of the victim girl and also the medical records show that at the time



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of occurrence, the victim has not completed the age of 18 years. As per

Ex.P8, date of birth of the victim is 15.03.2000. When the complaint was given on 18.01.2018, age of the victim was 17 years. When the victim girl was examined as P.W.2 on 11.02.2020, the victim was 19 years old. Prior to the complaint itself, the appellant had physical relationship with the victim. Therefore, at the time of commission of offence, the victim has not completed the age of 18 years. From the evidence of medical officer and the victim girl and school records, it is found that the victim is a child under the definition of POCSO Act at the time of occurrence.

7. He would further submit that the appellant is the friend of the brother of the victim. While coming to the house of the victim to meet her brother, they become friends. The appellant told the victim that he loved her and drove her to the garden owned by her father had sexual intercourse with the victim girl for several times and she became pregnant. The victim girl told her pregnancy to the appellant and asked him to marry her. But the appellant insisted her to abort the foetus. Then the victim girl informed the entire incident to her parents and the relatives. Panchayath also intervened in



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which the family members decided to marry the victim girl to the appellant.

Soon after the marriage, within 4 or 5 days, when she was suffering from cold and fever, the appellant provided some pills to the victim. She thought that the same was pain killer and when she administered the pill, her pregnancy was miscarried. The appellant provided pills to the victim to abort the foetus. Subsequently the appellant left the victim girl. Evidence of P.Ws.1 to 4 clearly shows that the appellant married the victim girl, however the trial court acquitted both the appellant and other accused for the other charges. Since the judgment made in Special Calendar Case No.55 of 2019 on 07.06.2022, the prosecution has taken steps to file an appeal after getting opinion from the Director of Prosecution.

8. In order to corroborate the evidence of P.W.2-victim, the doctor one who conducted medical examination on the victim girl was examined as P.W.10 and P.W.11. Evidence of P.Ws.10 and 11 clearly shows that the victim was subjected to penetrative sexual assault and she got pregnant and subsequently the foetus of the victim was miscarried. Though the learned counsel for the appellant stated that the foetus was not sent for DNA test,



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but the appellant has not denied the same. During cross examination, the appellant has admitted the acquaintance with the victim girl. Mother and brother of the victim were examined as P.W.1 and P.W.3 respectively. Subsequently, the victim girl was produced before the Magistrate for recording statement under Section 164 Cr.P.C., and the same was marked as Ex.P3. Therefore, from all these oral and documentary evidence, prosecution proved its case beyond reasonable doubt that the victim is a child at the time of occurrence and the appellant committed penetrative sexual assault on the victim girl more than once. Therefore, act of the appellant falls under Section 5(l) which is punishable under Section 6 of POCSO Act. Due to physical relationship, the victim girl become pregnant. Therefore, the act of the appellant falls under Section 5(j)(ii) of POCSO Act which is punishable under Section 6 of POCSO Act. Therefore, the trial court rightly appreciated entire evidence and convicted the appellant.

9. Heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the respondent and



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perused the materials available on record.

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10. In order to prove the age of the victim girl, the prosecution has marked Ex.P2- Transfer Certificate of the victim girl through P.W.9- Headmistress of the school in which the victim girl was studied. Date of birth of the victim is 15.03.2000. Date of the complaint is 18.01.2018. In the compliant itself, it is stated that marriage has been taken place between the victim girl and the appellant on 19.05.2017 and she has also stated that even nine months prior to the marriage, she fell love on the appellant and she had physical relationship with the appellant. Therefore, at the time of first incident ie., physical relationship of the victim and the appellant, age of the victim was only 16 years. Therefore, from the evidence of PW.9 and Ex.P2 and also the evidence of the victim girl, it clearly shows that at the time of first occurrence, the victim was a child under the definition of Section 2(i)(d) of POCSO Act. Out of 15 witnesses examined by the prosecution, the victim was examined as P.W.2. Evidence given by the victim girl during examination of witness as P.W.2, she has clearly narrated the entire incident as to how she got relationship with the appellant and also



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the act of penetrative sexual assault committed by the appellant and her pregnancy and miscarriage also. In order to corroborate the evidence of the victim girl, the doctor who gave treatment and conducted medical test were examined as P.Ws.10 and 11. The evidence of P.Ws.10 and 11 clearly stated that the victim was pregnant and also her miscarriage of the foetus. Evidence of P.W.11 clearly shows that the victim was subjected to penetrative sexual assault and her hymen was not intact and also P.W.11 opined that more than one torn wound on a hymen may occur due to sexual intercourse. From the evidence of P.Ws.10 and 11, it is found that the victim was subjected to penetrative sexual assault and also she become pregnant and later foetus was aborted. Mother of the victim girl was examined as P.W.1. Brother of the victim girl was examined as P.W.3. Uncle of the victim was examined as P.W.4. From their evidence, the prosecution proved that the appellant is the friend of the brother of the victim and he used to come to the victim's house and the appellant fell on love with the victim. As per evidence of P.W.2-victim, it is found that the appellant had physical relationship with her on several occasions and due to the same, she become pregnant. When the pregnancy of the victim was



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informed to the appellant, he insisted her to abort the foetus. When the appellant refused to marry her and also she got pregnant, she informed the entire incident to her parents and parents of the victim girl also insisted the appellant to marry her. From the evidence of P.W.4, it is clear that they intervened panchayath and as per the decision of the panchayath, they got married. Subsequently pregnancy was miscarriaged and now they got separated. Both married another person each other.

11. From the evidence of P.Ws.1 to 4 and also the evidence of P.Ws.9 to 11, the prosecution proved that at the time of occurrence, the victim was a child under the definition of POCSO Act. The victim girl was produced before the Judicial Magistrate to record statement under Section 164 Cr.P.C., which has been marked as Ex.P3. In the statement of the victim girl Ex.P3, she has clearly stated that the appellant is the friend of her brother and he had penetrative sexual assault on her more than once on several occasions. Ex.P3, Exs.P7 to 11, it is found that the victim was a child and she was subjected to penetrative sexual assault more than once on several occasions by the appellant.



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12. The appellate court is the fact finding court, it has to re-appreciate and revisit the entire evidence and give independent finding. Considering the facts and circumstances of the case, the prosecution has proved its case beyond reasonable doubt. This Court finds that the appellant has committed penetrative sexual assault on the victim girl more than once, hence the act committed by the appellant falls under Section 5(l) which is turned into an aggravated penetrative sexual assault. From the evidence of P.Ws.10 and 11, prosecution proved that the victim got pregnant, therefore the act committed by the appellant falls under Section 5(j)(ii) which is punishable under Section 6 of POCSO Act. This Court finds that the trial court proved the abovesaid charges beyond reasonable doubt. Once foundational fact is established by the prosecution, Section 29 and 30 of the POCSO Act come into play. It is for the appellant has to rebut the presumption in the manner known to law.

13. As discussed above, the prosecution proved that the appellant committed penetrative sexual assault on the victim girl more than once, due



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to that the victim got pregnant and subsequently aborted. On a careful reading of the POCSO Act, it is found that no provision under POCSO Act give any exception for the man who fall in love with the minor child who committed sexual assault on her.

Section 4 of POCSO reads as follows:

Section 4 - Punishment for penetrative sexual assault

[(1)] Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than 2 [ten years] but which may extend to imprisonment for life, and shall also be liable to fine.

[(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.]

Section 4 of POCSO Act clearly states that whoever committed penetrative sexual assault on child, shall be punished with imprisonment. From the



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reading of Sections 3 to 10 of the POCSO Act, which clearly state that whoever committed sexual assault or penetrative sexual assault or aggravated penetrative sexual assault on child, shall be punished.

14. Therefore, under these facts and circumstances, the contention of the learned counsel for the appellant that both the victim and appellant are teenagers and they equally participated in the sexual act and hence the sexual act committed by the appellant is not punishable under sections of POCSO Act is not acceptable.

15. In view of the above, this Court finds that there is no merit in the Criminal Appeal and the same is liable to be dismissed. Accordingly, Criminal Appeal is dismissed. Consequently, connected miscellaneous petition, is closed.

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Index:yes/No
Internet:yes/No



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P.VELMURUGAN, J.

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To

1. The Special Judge,
Special Court for Exclusive Trial of Cases under POCSO Act,
Coimbatore.
2. The Inspector of Police,
All Women Police Station,
Perur,
Coimbatore District.
3. The Public Prosecutor
High Court,
Chennai.

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and
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