



Crl.A.No.532 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	:	13.10.2022
Pronounced on	:	18.11.2022

Coram:

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

Criminal Appeal No.532 of 2021

Angamuthu

... Appellant

Vs.

State by the Inspector of Police,
All Women Police Station,
Mettur, Salem District.
Crime No.8 of 2018

... Respondent

PRAYER: Criminal Appeal 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 the judgment dated 06.08.2021 passed in New SSC No.212 of 2019 (Old SCC No.12 of 2019) on the file of Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Salem.

For Appellant : Mr.Karthick,
Senior counsel for
Mr.R.Nalliyappan

For Respondent : Mr. S.Sugendran,
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been filed to set aside the judgment passed by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Salem made in New SSC No.212 of 2019 (Old SCC No.12 of 2019) dated 06.08.2021

2. The respondent police registered a case against the appellant in Crime No. 8 of 2018 for the offences punishable under Sections 363, 366 of IPC. During investigation, the offences are altered into Section 363 and 366 of IPC and Section 3(b) punishable under Section 4 of the POCSO Act, 2012. Subsequently, after investigation, the respondent police laid a charge sheet for the offences punishable under Section 363 and 366 of IPC and Section 3(b) punishable under Section 4 of POCSO Act, 2012 before the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Salem.

3. After framing of charges, the case was posted for trial and during the trial, in order to substantiate the charges framed against the appellant,



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on the side of the prosecution, as many as 11 witnesses were examined as Pw1 to 11 and 22 documents were marked as Exs.P1 to 22 and no material objects were marked.

4. After completing the examination of prosecution witnesses, when the incriminating circumstances culled out from the evidence of prosecution witnesses were put to the appellant by questioning under Section 313 of CrPc, wherein he denied the same as false and pleaded not guilty. On the side of the defense, no oral and documentary evidence was produced.

5. On conclusion of trial, hearing the arguments advanced on either side and considering the materials, the trial court found the appellant guilty for the offences punishable under Section 363 and 366 of IPC and Section 3(b) punishable under Section 4 of POCSO Act, 2012 and accused was convicted and sentenced to undergo 3 years of rigorous imprisonment and pay fine of Rs.5,000/- in default to undergo three months of simple imprisonment for the offence punishable under Section 363 of IPC. Further, the accused was convicted and sentenced to undergo



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3 years of rigorous imprisonment and pay fine of Rs.5000/- in default to undergo three months of simple imprisonment for the offences punishable under Section 366 of IPC and the accused was also convicted and sentenced to undergo 10 years of rigorous imprisonment and pay fine of Rs.10,000/- in default to undergo three months of simple imprisonment for the offences under Section 3(b) punishable under Section 4 of POCSO Act, 2012.

6. Challenging the said judgment of conviction and sentence passed by the trial court, the accused has filed the present appeal.

7. The case of the prosecution is that the victim child was aged 17 years at the time of occurrence on 19.08.2018. When the victim was staying at her grand mother's house, the appellant herein went there at about 10.30 am. He promised to marry the victim girl and took the victim to Ariyur on 20.08.2018 and thereafter, they went to Mettur on 22.08.2018. While staying there, the appellant had committed penetrative sexual assault on the victim by inserting his fingers into her private part. Subsequently, the mother of the victim gave a complaint before the



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respondent police.

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8. After receiving the complaint, the respondent police registered a case against the appellant in Crime No. 8 of 2018 for the offences under Sections 363, 366 of IPC. During investigation, the respondent came to know that the appellant had committed penetrative sexual assault on the victim, which falls under Section 3(b) punishable under Section 4 of POCSO Act, 2012 and they have also added the said commission of offence in the charge sheet. Subsequently, they laid the charge sheet for the offences under Section 363 and 366 of IPC and Section 3(b) punishable under Section 4 of POCSO Act, 2012 before the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Salem.

9. The learned counsel appearing for the appellant would submit that a false case has been foisted against the appellant, since the victim and the appellant loved each other. Initially, the victim has not made any allegation against the appellant regarding the penetrative sexual assault and there is discrepancy and contradictions in the statement of the victim



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under Section 164 of Cr.P.C and the evidence before the Trial Court. The victim also loved the appellant, after coming to know about the medical evidence that the appellant is not a potent, they foisted a false case against the appellant that he had committed penetrative sexual assault by inserting his finger into her private part. The victim has also completed the age of 18 years and she is not a child under the definition of Section 2(1)(d) of POCSO Act. The prosecution failed to prove its case beyond all reasonable doubts.

10. He would further submit that there are contradictions in the statement of PW1/mother of the victim, who set the law into motion by filing complaint and the evidence of PW2, who is the grand father of the victim. Further, the prosecution has not proved that both appellant and the victim were seen together and also the medical evidence of the appellant clearly shows that the appellant is not a potent. Therefore, he could not have committed the alleged offence. The prosecution has miserably failed to prove the age of the victim to attract the offence under the POCSO Act. The appellant and the victim are only having three years of age difference. They have only loved each other and no offence has



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been committed by the appellant as alleged by the prosecution.

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11. He would also further submit that the Special Court has failed to appreciate the evidence of PW9/Doctor, who had conducted potency test on the appellant. Therefore, the occurrence could not have taken place as alleged by the prosecution and the Trial Court failed to consider the said contradictions in Ex.P5, which is the statement recorded under Section 164 of Cr.P.C., from the victim child. A combined reading of evidence of PW9/Doctor and Ex.P15, which is the certificate issued by PW9/Doctor, the Trial Court failed to appreciate the evidence and erroneously convicted the appellant, which is perverse. Therefore, the judgment of conviction and sentence passed by the Trial Court are liable to be set aside.

12. Per contra learned Additional Public Prosecutor appearing for the respondent police would submit that the occurrence is stated to have taken place on 19.08.2018 and also between 20.08.2018 and 22.08.2018. The age of the victim girl is only 16 years at the time of occurrence. In



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order to prove the age of the victim, the prosecution had filed the certificate obtained from the school and marked as Ex.P8. As per the said certificate, the date of birth of the victim is 04.06.2002 and the date of occurrence is stated to have taken place between 19.08.2018 and 22.08.2018 . Therefore, the age of the victim is only 16 years and she has not completed the age of 18 years. Therefore, she is a child under the definition of 2(1)(d) of POCSO Act.

13. The learned Additional Public Prosecutor would further submit that the statement of the victim under Section 164 of Cr.P.C., before the learned Judicial Magistrate was recorded and it was marked as Ex.P5. As per Ex.P5, the victim has stated that while she was studying X standard, the appellant used to follow her for 2 years. The appellant used to torture her to accept his love proposal. Even though she refused, the appellant used to follow her continuously. On the date of occurrence, she was staying in the grand mother's house and during that time, she went outside the house for attending nature's call, since there was no bathroom in the grand parents house and when she went outside of the house in the open space area near the bush, the appellant herein along with three other



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persons followed her and closed her mouth and taken her to the building, which is situated in the lonely area.

14. Thereafter, they provided juice to her and she refused to take the juice and they compelled her and made the victim to drink the juice. Subsequently, she was not aware of what had happened to her at that time. When she wake up and questioned the same to the appellant, the appellant had beaten her. Thereafter, they took her by car and they also took her to the appellant's relative's house and informed her that he is going to marry her. Subsequently, when the victim was examined before the Court as PW4, she has not stated anything about the penetrative sexual assault.

15. The victim was produced before PW8/ Doctor and she had conducted medical examination on the victim. After conducting medical examination, PW8/Doctor has stated that the victim was subjected to penetrative sexual assault. Though the victim girl has not stated anything about the penetrative sexual assault, the PW1/mother of the victim has clearly stated that at the time of occurrence, the appellant committed



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penetrative sexual assault on the victim. PW8/Doctor has clearly stated that the victim was subjected to penetrative sexual assault and therefore, the Trial Court has found that the appellant had committed penetrative sexual assault by kidnapping the victim girl and convicted the appellant and there is no merit in the appeal.

16. Heard the learned counsel on either side and perused the materials available on record.

17. It is the specific case of the prosecution that the appellant had kidnapped the victim girl, who is a minor and had committed penetrative sexual assault on her. In order to substantiate the case, on the side of the prosecution, as many as 11 witnesses were examined as Pw1 to 11 and 22 documents were marked as Exs.P1 to 22 and no material objects were marked. The victim was examined as PW4 and her previous statement recorded under Section 164 of Cr.P.C., was marked as Ex.P5. The Doctor who conducted medical examination on the victim was examined as PW8. The Doctor who conducted potency test on the appellant was examined as PW9.



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18. In order to prove the age of the victim, school certificate of the victim was marked as Ex.P8. As per the Ex.P8, the Date of Birth of the victim is 04.06.2002 and the date of occurrence is 19.08.2018. Therefore, the age of the victim is 16 years at the time of occurrence. She has not completed the age of 18 years. Therefore, she is a child under the definition of Section 2(1)(d) of POCSO Act.

19. As far as the commission of offences are concerned, though the victim was produced before the learned Judicial Magistrate and her statement was recorded under Section 164 of Cr.P.C., which was marked as Ex.P5, she has not stated anything in that statement about the offence of penetrative sexual assault whereas, the doctor/PW8 has stated that she was subjected to penetrative sexual assault. The victim has also stated before the Doctor/PW8 that the appellant had committed penetrative sexual assault by inserting finger into her private part. The mother of the victim told in her 164 statement that her daughter/victim told that the appellant had touched her breast and private part. The evidence of the victim is contrary. According to the Doctor/PW9, who had conducted



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medical examination on the appellant, the appellant is not a potent.

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20. A perusal of Ex.P10 to 13, reveals that there is no external and internal injury on the body of the victim and the hymen was not intact and it allows one finger and sometimes, it was due to sexual intercourse. Therefore, even though there are contradictions between the evidence of PW4 and her statement under Section 164 of Cr.P.C., the statement of the Doctor/PW8 clearly shows that the victim is a child aged about 16 years. Since the appellant removed the custody of the victim child from her lawful guardian without their consent for committing penetrative sexual assault on her, the act of the appellant falls under Sections 363 & 366 of IPC.

21. As far as the offence under Section 3(b) punishable under Section 4 of POCSO Act, 2012 is concerned, the evidence of victim/PW4 and the statement recorded before the learned Judicial Magistrate under Section 164 of Cr.P.C., are contrary and she has not stated anything about the penetrative sexual assault before the learned Judicial Magistrate. Therefore, this Court feels that the evidence of PW4 is not trustworthy



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and her evidence is not cogent, consistent and also not natural. Under these circumstances, this Court finds that the prosecution has not proved the case, even though the medical evidence shows that the victim was subjected to penetrative sexual assault, whereas, the victim has not clearly stated before the learned Magistrate while recording the statement under Section 164 of Cr.P.C or before the Court as the appellant had committed penetrative sexual assault on her. The Doctor PW9 one who conducted medical examination on the appellant has stated that the appellant is not potent.



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22. Therefore, this Court is of the opinion that the prosecution has not proved the offence under Section 3(b) punishable under Section 4 of POCSO Act, 2012 beyond all reasonable doubts. Since the prosecution has not proved the foundational fact of penetrative sexual assault on the victim beyond all reasonable doubts, the benefit of doubt is extended infavour of the appellant and hence, the appellant is acquitted for the offence under Section 3(b) punishable under Section 4 of POCSO Act, 2012 and conviction for the offences under Sections 363 & 366 of IPC are hereby confirmed.

23. Considering the facts and circumstances, the judgment passed by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Salem made in New SSC No.212 of 2019 (Old SCC No.12 of 2019) dated 06.08.2021 regarding the offence under Section 3(b) punishable under Section 4 of POCSO Act, 2012 alone is set aside. Accordingly, this Criminal Appeal is partly allowed.

18.11.2022

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To
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1. The learned Sessions Judge,
Special Court for Exclusive Trial of Cases
under POCSO Act, Salem.
2. The Inspector of Police,
All Women Police Station,
Mettur, Salem 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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**Pre-Deliver Order in
Criminal Appeal No. 532 of 2021**

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