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Crl.A.No.564 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.11.2022

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.564 of 2021

Ganapathi

... Appellant

Vs.

State Rep. by
The Inspector of Police,
Tiruttani All Women Police Station,
Tiruvallur District
(Crime No.02/2018)

... Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the conviction and sentence made in Spl.S.C.No.78 of 2018, dated 11.10.2021 on the file of Session Judge, Magalir Neethi Mandram (Fast Track Mahila Court), Tiruvallur.

For Appellant : Mr.K.Srinivasan for
Mr.R.Vivekananthan

For Respondent : Mr.S.Sugendran APP



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J U D G M E N T

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This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 11.10.2021 made in Spl.S.C.No.78 of 2018, by the learned Session Judge, Magalir Neethi Mandram (Fast Track Mahila Court), Tiruvallur.

2. The specific case of the prosecution is that due to the false promise made by the appellant/accused that he would marry the victim girl, she fell in love with him. The minor victim girl was doing 12th standard at the time of incident. On 16.05.2018 at about 12.00 p.m at Thirunadharajapuram, Pallipattu near river at Podaiyan's sugarcane field, the accused under some pretext of marrying the victim girl, persistently committed penetrative sexual assault on her. After committing repeated penetrative sexual assault, the appellant/accused refused to marry her by which the appellant/accused has cheated her and caused harm to her mind, body and spoiled her reputation. On 16.05.2018 at about 7.30 PM, PW-7, who is the younger sister's husband of PW-1, viz., Munirathinam, who dropped PW-2/ minor child in his bike at



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her house had informed PW-1 that the accused and minor victim girl was talking near river at Podiayan Sugar cane field and he dropped the victim girl into the house. After the incident, the parents of the appellant/accused came to the house of the PW-1/ father of the child, and assured that if their son had committed the offence, they would get married the victim girl to the appellant/accused. Thereafter the accused with two of his friends came to the house and informed that he never saw the victim girl and left. On 17.05.2018, PW1 had informed the village elders about kidnap and rape committed by the accused on his daughter and they assured to arrange the marriage of them and asked PW-1 not to be hurry in lodging the complaint. After three days, the Panchayadars informed PW-1 that the appellant/accused had informed them that he did not commit any offence against the minor victim girl. Hence, PW-1/father of the victim girl lodged a complaint on 21.05.2018.

3. The respondent-police has registered a case against the appellant in Crime No.2 of 2018, originally for the offences under Section 376(1) and



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Section 4 of Protection of Children from Sexual Offences Act, 2012 (for brevity “the POCSO Act”). After investigation, charge sheet was laid before the learned Judge, Special Court for the offence under Section 376 and 417 and Section 4 of POCSO Act.

4. The learned Special Court took the charge sheet on file in Special Sessions Case No.78 of 2018, and the offence against the child, after completing the formalities, framed charges against the appellant/accused for the offence under Section 376(1) and 417 IPC and Section 5(l) read with Section 6 of POCSO Act.

5. During trial, in order to substantiate the case of the prosecution as many as 14 witnesses were examined as PW-1 to PW-14 and 13 documents were marked as Exs.P1 to Exs.P13. No material object was exhibited. After completing the examination of the prosecution witnesses, when incriminating circumstances culled out from the evidence of the prosecution witnesses were put to the appellant/accused by questioning under Section 313 Cr.P.C., he



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denied the same as false and pleaded not guilty. On the side of the defence, one witness was examined as DW-1 and no documentary evidence was produced.

6. After considering the evidence on record and hearing on either side, the Trial Court by judgment dated 11.10.2021, found that the appellant/accused was guilty under Section 235(ii) Cr.P.C., for the offence under Section 3(a) of POCSO Act and 376(1) IPC. Further, the Trial Court found that the appellant/accused was not guilty for the offence under Section 417 IPC and acquitted him under Section 235(i) Cr.P.C. However, punishment was not imposed under Section 376(1) IPC, as it is a similar offence under Section 3(a) of POCSO Act, which is punishable under Section 4 of POCSO Act. Therefore, the Trial Court convicted the accused and sentenced him to undergo Seven years of rigorous imprisonment and also imposed him with a fine of Rs.50,000/- in default, sentenced him to undergo Six months simple imprisonment. Out of the fine amount of Rs.50,000/-, Rs.40,000/- was ordered to be paid as compensation to the victim for the loss



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or injury caused by the commission of the offence under Section 357(b)

Cr.P.C., and the remaining amount of Rs.10,000/- was a Government fine.

Aggrieved against the judgment of conviction and sentence, dated 11.10.2021, the appellant/accused has preferred the present Criminal Appeal before this Court.

7. The learned counsel appearing for the appellant would submit that the appellant has not committed any penetrative sexual assault on the victim child and it is submitted that the appellant never made any promise to marry the victim child at any point of time. The learned counsel further would submit that the occurrence was alleged to have taken place on 16.05.2018, whereas the complaint was lodged only on 21.05.2018 and there was no proper explanation for the said delay. Further, the learned counsel would submit that admittedly there was a love affair between the appellant and the victim child and due to the subsequent dispute which arose between the respective family members, they foisted a false case against the appellant. Further, the learned counsel would submit that there was a prohibited degree



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of relationship between the victim and the appellant and therefore, they refused to marry her and there is no evidence to show that the appellant made a false promise to marry her and committed penetrative sexual assault. The learned counsel would submit that the prosecution miserably failed to prove that the victim girl was subjected to rape as defined under Section 375 IPC and it is bounden duty of the prosecution to explain how she was subjected to rape or whether his male organ has penetrated in the vagina or not. Even the Doctor's evidence also was not corroborated that the victim was forcibly subjected to rape or penetrative sexual assault and there was no internal or external injury found on her and if such a big thing has happened against her wish and by force no ordinary prudent woman will look so calm and cool and walking along with the accused as if nothing had happened.

8. Further, the learned counsel would submit that the victim girl date of birth is 22.04.2001 and on the date of occurrence, her age was 17 years and the victim girl knows about the consequences, there was a love affair between the appellant and the victim girl and therefore, the allegation levelled against



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the appellant does not attract the provision of Section 5 of POCSO Act. The learned counsel further would submit that from the evidence of PW-2/victim girl and the statement recorded by the Judicial Magistrate under Section 164 Cr.P.C., from the victim, it is found that there are contradictions and discrepancies and even the medical evidence also was not corroborated by the evidence of the prosecution. Further, the learned counsel would submit that the Trial Court failed to appreciate the materials that there are material contradictions between the evidence of the prosecution witnesses and also especially the evidence of PW-6 & PW-9, with regard to the penetrative sexual assault committed by the appellant on her. The learned counsel would submit that even assuming without admitting, there is no materials in the evidence to show that the victim was forcibly subjected to rape or penetrative sexual assault. At the most, there was an attempt to commit the offence and therefore, the conviction of the appellant under Section 376 is liable to be set aside and the appeal has to be allowed.



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9. The learned Additional Public Prosecutor submitted that the victim child was aged about 17 years at the time of occurrence and did not complete 18 years, there was a love affair between the appellant/accused and the victim minor child; the appellant/accused had a sexual intercourse with her on several occasions, due to false promise made by the appellant that he would marry her. Therefore, it is submitted that the appellant/accused has committed the offence under Section 376 and 417 IPC. Since he has committed penetrative sexual assault more than once, it would attract the offence under Section 5(l) which is punishable under Section 6 of POCSO Act, but however the prosecution was able to substantiate the charges for the offence under Section 376 IPC and also under Section 3(a) of POCSO Act and therefore, the Trial Court rightly convicted the appellant/accused.

10. Further the learned Additional Public Prosecutor submitted that the victim child was examined as PW-2 and she has clearly narrated the entire incident and in the statement of the victim child recorded by the Judicial Magistrate under Section 164 Cr.P.C., which was marked as Ex.P2, also she



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has deposed the entire incident and the act committed by the appellant/accused. The learned Additional Public Prosecutor by relying upon the evidence of Doctor/PW-12 and the medical records and the AR copy as Exs.P6 & P7, submitted that the prosecution has proved its case that the appellant/accused was subjected to penetrative sexual assault more than once and therefore, the Trial Court rightly convicted the appellant/accused and there is no merit in the Appeal and the same is liable to be dismissed.

11. Heard the learned counsel appearing on either said and perused the materials placed on record.

12. As far as the age of the victim child is concerned, it is to be noted that at the time of occurrence, the victim child was aged about 17 years and in order to prove the age of the victim child, the prosecution has marked Ex.P.13/school certificate of the victim child and the appellant/accused also has not objected the same. As per Section 94(2) of Juvenile Justice Act, for proving her age, school document has been produced and in the said school

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document, the date of birth of the victim child is mentioned as 22.04.2001 and it is proved that on the date of occurrence, said to have taken place on 16.05.2018, her age was 17 years and therefore, the victim was a child under the definition of Section 2(1)(d) of POCSO Act.

13. As far as the delay is concerned, the victim minor girl was examined as PW-2 and she has clearly stated that on 16.05.2018 the appellant/accused under the pretext of marrying her, persistently committed penetrative sexual assault on her, but however, the complaint was given only on 21.05.2018, the appellant and the victim girl are the relatives and the victim girl informed the act committed by the appellant/accused to her parents, four members from the side of the appellant/accused approached the parents of the victim girl and they assured that if their son had committed the offence, they would get married the victim girl to the accused and subsequently, they did not agree for their marriage. Hence, a complaint was lodged only on 21.05.2018 and the delay had occurred. Therefore, the contention raised by the learned counsel in this regard is rejected.



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14. As far as the commission of penetrative sexual assault is concerned, on a reading of the deposition of PW-2/victim girl it is stated that the victim child has clearly stated that on 16.05.2018, the appellant/accused has committed penetrative sexual assault by falsely making a promise that he would marry her, but subsequently, he refused to marry her and therefore, lodged a complaint only on 21.05.2018. After registering the complaint, the victim child was produced before the Doctor/PW-12 on 21.05.2018 itself, who conducted the medical examination and before the Doctor also, victim child has clearly stated that her age was 17 years and the appellant/accused alleged to have committed rape in Sugarcane field near riverbed and the Doctor examined the victim and filed the report as Ex.P.6 and entry was made in the Accident Register /Ex.P.7.

15. The Doctor's report/Ex.P.6 would clearly show that on the physical examination of the victim girl, she is alleged to have been raped by the appellant/accused and in this regard, column 16 to 19 of the physical examination are extracted hereunder:-



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16. Date and hour when the female first made complaint and the precise words employed by her at the time, i.e., detailed account of the occurrence as given by the women	: Alleged b/o being raped by Mr.Ganapathy – known person in sugar cane field near Thirundarajapuram
17. General behaviour	: Normal
18.Date and exact time when the rape was still to have been committed	: 16.05.2018 at 12.00 PM
19.Place where is occurred	: Sugar cane field near Thirundarajapuram.

16. Further, the Doctor also opined about the examination of the clothes including inner wear worn at the time of the alleged rape and preserved for examination, as “changed clothes” and at the time of giving complaint also, she has not produced the cloths and the Doctor's report would show that the hymen was not intact and subsequently, the victim child was produced before the Judicial Magistrate on 25.05.2018, wherein she has clearly narrated the entire incident and apart from her evidence, the evidences of PW-1, PW-3, PW-6 & PW-9 and the statement given before the Doctor and before the learned Judicial Magistrate that she was subjected to penetrative sexual assault. Since the victim is a child below the age of 18



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years, her consent is immaterial. Even assuming that the victim fell in love with the appellant/accused, and the victim girl has given consent to have a sexual intercourse, still it amounts to commission of an offence under the POCSO Act, as the offence against the minor child, who is aged about 17 years, would fall under the ambit of POCSO Act, since consent and knowledge are immaterial.

17. In a case like this, the evidence of the victim child has to be taken into consideration, unless doubt arises about the trustworthiness of the witness of the victim child. In this case, there is no reason to disbelieve her or discard the evidence of the victim child and the prosecution has proved its case beyond any doubt. Once, if the prosecution has proved its case, then onus will be shifted to the appellant and the appellant has to rebut the presumption.

18. In this case, a combined reading of the evidence of the prosecution, especially the evidence of PW-2, PW-12 and Ex.P.2, Ex.P.6, Ex.P.7 and Ex.P.13, this Court finds that the prosecution has proved its case that the



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victim is a child and she was subjected to penetrative sexual assault by the appellant/accused. In the nature of a case, like this, there will be no independent witness or eye witness, since culprits always take advantage of the loneliness of the child and take them to a secluded place and satisfy their lust and in order to escape from the clutches of law, they raise a contention that there is no eye witness for the alleged occurrence, which cannot be accepted and the same is outrightly rejected.

19. More over, the prosecution witnesses have seen the appellant/accused with the victim in the place nearby occurrence on the date of the occurrence. Further the evidence of PW-1 and PW-3 would show that the parents of the appellant came to the house of the victim and also there was a compromise talk between them and the same was not denied by the appellant/accused. Further, the appellant/accused has not substantiated that victim child's family have attributed any strong motive to foist a false case was foisted against the appellant/accused.



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20. The learned counsel for the appellant has pointed out that as the appellant had not committed penetrative sexual assault, Section 3 of POCSO Act would not be attracted and therefore, the conviction and sentence passed by the learned Judge for the offence under Section 3(a) of the POCSO Act warrants interference. At this juncture, it would be useful to refer to the Sections 3(a), of POCSO Act:-

"Section 3. Penetrative sexual assault:-

A person is said to commit "penetrative sexual assault" if--

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

21. A careful reading of the language of the said provisions of law and also the evidence of P.W.2, the victim child, it could be seen that Section 3(a) of POCSO Act get attracted in this case, and the appellant cannot be given the benefit of doubt. P.W.2 in her evidence, has clearly deposed that the appellant/accused has committed penetrative sexual assault on her in the



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sugar cane field near riverbed. Section 3(a) of the Act defines that '*he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person.*' and as such, Section 3 of POCSO Act would get attracted in this case.

22. Since this Court is an Appellate Court and also final Court of fact finding, it has to re-appreciate the entire evidence and come to the conclusion independently. On a reading of the entire materials and evidence of the victim child P.W.2, the evidence of the doctor-P.W.12 and statement under Section 164 Cr.P.C., Ex.P2, Sexual offence certificate of the victim child/Ex.P.6, Accident register of victim child/Ex.P7 and +2 mark list of victim child/Ex.P.13, and Section 3 (a) of the POCSO Act, it is very clear that the appellant has committed the offence under Section 3(a), which is punishable under Section 4 of the POCSO Act, This Court does not find any perversity or any reason or ground to interfere with the judgment of the trial Court.



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23. Therefore, under the circumstances, this Court finds that the prosecution has proved its case beyond the reasonable doubt and there is no reason to interfere with the judgement of the learned Session Court, Magalir Neethi Mandram (Fast Track Mahila Court), Tiruvallur. Since the Trial Court imposed a minimum sentence of five years, this Court does not find any mitigating circumstances to reduce the sentence and therefore, there is no merit in the Appeal and the same is liable to be dismissed. Accordingly, the Criminal Appeal is dismissed.

24.As per order of this Court in Crl.M.P.No.11882 of 2021, dated 21.12.2021, it is seen that the appellant is on bail. Therefore, the Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Tiruvallur shall take steps to commit the accused to prison to undergo the remaining period of sentence, if any.

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Internet : Yes./No

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To

- 1.The Session Court, Magalir Neethi Mandram (Fast Track Mahila Court),
Tiruvallur
- 2.The Inspector of Police,
Tiruttani All Women Police Station,
Tiruvallur District



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P.VELMURUGAN,J

This Criminal Appeal is listed today under the caption "for clarification" at the instance of the learned Additional Public Prosecutor appearing for the respondent.

2. The learned Additional Public Prosecutor appearing for the respondent submitted that fifth line of paragraph No.23 of the order dated 02.11.2022 it has been wrongly mentioned as five years instead of 7 years and the same has to be corrected in the said paragraph.

3. In view of the above, the Registry is directed to carry out the aforesaid corrections as stated above and issue fresh order copy to the parties concerned.

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