



CRL A No.586 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.11.2022

Coram:

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

Criminal Appeal No.586 of 2021

Pushparaj

... Appellant

Vs.

State Rep. by
Inspector of Police
Pennagaram Police Station
Dharmapuri District
(Crime No.215 of 2016)

... Respondent

Prayer : Criminal Appeal filed under Sections 374 of Criminal Procedure Code, praying to set aside the conviction and sentence made in Spl.S.C.No.23 of 2016 dated 29.10.2021 on the file of the Fast Track Mahila Court, Dharmapuri.

For Appellant : Mr.V.Sakkarapani

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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J U D G M E N T

This Criminal Appeal has been filed seeking to set aside the conviction and sentence made in Spl.S.C.No.23 of 2016 dated 29.10.2021 on the file of the Fast Track Mahila Court, Dharmapuri.

2.The respondent police registered the case in Crime No.215 of 2016 against the appellant initially for the offence under Section 366(A) IPC and during investigation, it was altered into Sections 366(A) IPC and Section 3 read with 4 of POCSO Act, 2012 @ into Sections 363 and 366 IPC and 6 read with 5(l) of POCSO Act, 2012 and after completing the investigation, laid charge sheet before the Fast Track Mahila Court, Dharmapuri, in Spl.S.C.No.23 of 2016 for the offences under Section 9 of Prohibition of Child Marriage Act, 2006, Sections 363 and 366 IPC, Section 5(l) read with 6 of POCSO Act, 2012 and the same was taken cognizance The learned Sessions Judge after completing the formalities, framed the charges against the appellant for the offences under Section 9 of Prohibition of Child Marriage Act, 2006, Section 366A IPC, Section 5(l) read with 6 of POCSO Act, 2012.



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3. After framing the charges, in order to prove the case of the prosecution, during trial before the trial Court, totally 25 witnesses were examined as P.W.1 to P.W.25 and 19 documents were marked as Exs.P.1 to P.19 and one material object was exhibited.

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

5. On conclusion of trial, after hearing the arguments advanced on either side and also considering the materials, the learned Sessions Judge, found the appellant guilty for the offences under Sections 363 IPC, Section 9 of Prohibition of Child Marriage Act, 2006 and Section 5(l) of POCSO Act punishable under Section 6 of POCSO Act and convicted and sentenced to undergo three months Rigorous Imprisonment and to pay fine of Rs.1,000/- in default to undergo simple imprisonment for a



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further period of one month for the offence under Section 9 of Prohibition of Child Marriage Act, 2006; to undergo two years Rigorous Imprisonment and to pay fine of Rs.2,000/- in default to undergo simple imprisonment for a further period of two months for the offence under Section 363 IPC; to undergo Ten years Rigorous Imprisonment and to pay fine of Rs.5,000/- in default to undergo simple imprisonment for a further period of three months for the offence punishable under Section 6 of POCSO Act. Challenging the said Judgment of conviction and sentence, the accused has filed this present appeal before this Court.

6. The case of the prosecution is that on 08.06.2016, the daughter of the defacto complainant who was aged about 17 years had eloped with the appellant. Subsequently, they were separated by the villagers and the victim girl was sent to her grandmother's house by her parents. Again on 19.06.2016 at about 1 a.m., the appellant kidnapped the victim girl. Initially, the case was registered for the offence under Section 366(A) IPC and after investigation, it was found that the victim girl was subjected to penetrative sexual assault and the appellant also married the victim girl in a temple. Hence, the respondent police laid charge sheet for the offences



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under Section 9 of Prohibition of Child Marriage Act, 2006, Sections 363 and 366 IPC, Section 5(l) read with 6 of POCSO Act, 2012.

7. The learned counsel for the appellant would submit that the appellant was aged only about 19 years at the time of occurrence. Both the appellant and the victim girl fell in love with each other. While so, the parents of the victim girl had arranged marriage to the victim girl with her maternal uncle. Since, the victim did not like to marry her maternal uncle, she voluntarily left from her house on 08.06.2016 and asked the appellant to take her to somewhere else and therefore, the appellant without knowing the consequences, took her. Subsequently, on 14.06.2016, they were separated by the villagers and the victim girl was sent to her grandmother's house by her parents. Again on 18.06.2016, the victim girl only had called the appellant to come and take her from her grandmother's house. Though the said facts clearly stated by the victim in her statement recorded by the Magistrate under Section 164 Cr.P.C., the trial Court failed to consider the same. He would submit that the appellant has not committed any offence as alleged by the prosecution. Since the victim had completed the age of 18 years at the time of



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occurrence, she was not child under the definition of POCSO Act and therefore, the POCSO Act would not attract. Even in the statement recorded by the Magistrate under Section 164 Cr.P.C., the victim has not stated that the appellant had forcibly removed her from the custody of her natural or lawful guardian without their consent. Therefore, the offence under Section 366(A) IPC would not attract. Further the doctor evidence also not corroborated with the evidence of the parents of the victim. It is the bounden duty of the prosecution to prove the charge that the victim was a child and she had not completed the age of 18 years at the time of occurrence. Also the prosecution has to prove that the appellant had forcibly committed penetrative sexual assault on the victim girl. Though in the school certificate/Ex.P.9 the date of birth of the victim is mentioned as 10.05.1999, the Head Master/P.W.21 who issued the said certificate has clearly stated that he issued same from the Admission Register and not by verifying the birth certificate or Transfer Certificate of the victim girl. Therefore, the school certificate/Ex.P.9 issued by the Head Master/P.W.21 is not an authenticated document and therefore, the prosecution has failed to prove the age of the victim and also failed to prove that she was a child at the time of occurrence. In this case, the



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prosecution miserably failed to prove its case beyond all reasonable doubt and unfortunately the trial Court also failed to appreciate the evidence properly even otherwise, the age of the appellant was only about 19 years and therefore, the conviction and sentence recorded by the trial Court warrants interference.

8. The learned Additional Public Prosecutor appearing for the respondent would submit that the victim was only aged about 17 years at the time of occurrence. In order to prove the age of the victim, the school certificate issued by the Head Master of the school in which the victim girl was studying was marked as Ex.P.9 in which it is clearly mentioned that the date of birth of the victim is 10.05.1999 and the date of occurrence is on 19.06.2016 and therefore, the age of the victim was only 17 years on the date of occurrence. Since the victim had not completed the age of 18 years, she was a child under the definition of Section 2(1) (d) of POCSO Act. Further he would submit that earlier the victim child was produced before the Judicial Magistrate for recording statement under Section 164 Cr.P.C. and the said statement was marked as Ex.P.2. A reading of Ex.P.2 would clearly show that the appellant had penetrative



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sexual assault on the victim child. Further, the victim child was examined as P.W.2 wherein, she has clearly stated that she was subjected to penetrative sexual assault for several times. The doctor who conducted medical examination on the victim girl was examined as P.W.22 and the doctor's evidence clearly shows that the victim was subjected to penetrative sexual assault. Though the doctor has stated that there was no symptoms of recent sexual intercourse, she has stated that the hymen was not intact and the private part of the victim admits two fingers. Therefore, the prosecution proved the charge that the victim was a child under the definition of POCSO Act and she was subjected to penetrative sexual assault by the appellant. Therefore, the appellant has committed the charged offences and the trial Court rightly appreciated the evidence and recorded conviction and sentence. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

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



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10. In order to substantiate the charges levelled against the appellant, on the side of the prosecution, as many as 25 witnesses were examined and 19 documents were marked besides one material object was exhibited. Out of the 25 witnesses, the victim girl was examined as P.W.1 and the statement of the victim girl recorded by the Magistrate under Section 164(5) Cr.P.C. was marked as Ex.P.2.

11. A combined reading of the evidence of P.W.1/victim and the statement of the victim recorded by the learned Magistrate under Section 164 Cr.P.C./Ex.P.2 clearly show that after the victim had left from her grandmother's house and when she was with the appellant, she was subjected to penetrative sexual intercourse.

12. Now the Court has to see whether the act of the appellant is an offence and whether the same falls under the POCSO Act.

13. A reading of evidence of P.W.21/Head Master and Ex.P.9/school certificate show that the date of birth of the victim is 10.05.1999. As per the complaint and even as per the evidence of the



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victim, the cause of action arising on 19.06.2016 and therefore, the age of the victim at the time of occurrence was only 17 years and she had not completed the age of 18 years. Therefore, she was child under the definition of Section 2(1)(d) of POCSO Act. Even though the learned counsel for the appellant submitted that the victim had completed the age of 18 years and she was not child, a reading of Ex.P.9 and the complaint/Ex.P.3 show that the victim had not completed the age of 18 years at the time of occurrence.

14. Section 94(2) of Juvenile Justice (Care and Protection of Children) Act, speaks about that the presumption and the determination of age of a person who claims to be a juvenile. If any document recorded by legally competent authority or issued by the school authority to prove the date of birth of a person, then the age mentioned in the said document may be presumed as genuine. No doubt, such presumption is a rebuttable presumption. But to rebut the presumption, the appellant has not produced any other document except mere submission that the victim had completed the age of 18 years at the time of occurrence. Even the doctor/P.W.22 has stated that she examined the victim who was aged 17



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years. Further, the father of the victim/P.W.2 in his complaint/Ex.P.3 has clearly stated that the age of the victim was only 17 years. The same provision is relevant to determine the age of the victim and the same can be adopted. Therefore, from the above evidence, this Court comes to the conclusion that the victim was aged only about 17 years and she was a child at the time of occurrence, under the definition of POCSO Act.

15. As far as penetrative sexual assault is concerned, from the evidence of the victim/P.W.1 and Ex.P.2/Statement of the victim recorded under Section 164 Cr.P.C. clearly show that after the appellant taken the victim from her grandmother's house, they got married and the appellant had sexual intercourse with her for several times. Though the marriage between the victim and the appellant was not proved, from the statement of the victim recorded under Section 164 Cr.P.C./Ex.P.2, the evidence of the doctor/P.W.22 and Medical report of the victim/Ex.P.11 clearly show that the victim was subjected to penetrative sexual assault for several times. Therefore, it is proved that the appellant has committed the offence under Section 5(l) which is termed as aggravated penetrative sexual assault, punishable under Section 6 of POCSO Act.



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16. The contention of the learned counsel for the appellant is that the victim only had voluntarily left from her house and sought help from the appellant and therefore, in order to safeguard the victim, the appellant helped her and he did not commit any offence as projected by the prosecution. Further, at the time of occurrence, the appellant was only aged about 19 years and the same may be considered. However, once it is proved that the victim was a child and she had not completed the age of 18 years at the time of occurrence, the contention of the appellant is not acceptable. If at all the victim had not liked to marry some other person, he should have given a complaint either to the police or to the competent authority. The evidence of the victim/P.W.1 is very clear that the victim expressed her grievance to the appellant and subsequently went along with the appellant where she was subjected to penetrative sexual assault. The consent or compulsion or coercion are unknown to POCSO Act. More particularly speaking, due to teen age, the offence is committed on infatuation. From the evidence of the victim/P.W.1, this Court finds that the appellant has not committed the offence under Section 366 IPC. However since the victim was a child and she was subjected to



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penetrative sexual intercourse by the appellant, the Act committed by the appellant falls under Section 5(l) of POCSO Act punishable under Section 6 of POCSO Act.

17. This Court as appellant Court as a final Court of fact finding, while re-appreciating the entire evidence, finds that the victim was a child under the definition of POCSO Act at the time of occurrence and she was subjected to aggravated penetrative sexual assault made by the appellant which falls under Section 5 (l) of POCSO Act, punishable under Section 6 of POCSO Act. Therefore, the Judgment of conviction and sentence passed by the trial Court for the offence under Section 5(l) punishable under Section 6 of PCOSO is confirmed.

18. As far as the charge for the offence under Section 9 of Prohibition of Child Marriage Act is concerned, the prosecution has failed to prove the same beyond all reasonable doubt. The prosecution neither recovered the Thali nor examined any persons or any authorities to witness the marriage of the victim and the appellant and they have not



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produced any marriage certificate or any other records to show that the appellant married the victim. Even otherwise, at the time of alleged marriage, the victim was only aged about 17 years and the appellant was aged about 19 years. Further, it is submitted that the victim after the incident and after attaining majority, married some other person. If at all the victim had married the appellant, she would not have left the appellant. Therefore, under these circumstances, this Court finds that the prosecution failed to prove the marriage between the appellant and the victim beyond all reasonable. Therefore, the benefit of doubt is extended to the appellant and the conviction and sentence passed by the trial Court for the offence under Section 9 of Prohibition of Child Marriage Act is set aside.

19. Further, the victim herself has admitted in her statement recorded before the Magistrate under Section 164 Cr.P.C., that she fell in love with the appellant and since, her parents arranged her marriage with her maternal uncle, she herself asked the appellant to take her to some other place. Even in the evidence, the victim/P.W.1 has stated that she sought help from the appellant to pursue her study further and thereby,



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she went along with the appellant which clearly shows that the appellant had no intention to abduct the victim and the prosecution not proved its case for the offence under Section 366A IPC beyond all reasonable doubt. Therefore, the conviction and sentence passed by the trial Court for the offence under Section 366A is also set aside.

20. As stated above, this Court find that the victim was aged only 17 year at the time of occurrence and she was subjected to penetrative sexual intercourse by the appellant. Therefore, the conviction and sentence passed by the trial Court for the offence punishable under Section 6 of POCSO Act alone is confirmed.

21. With the above observations and modifications, the Criminal appeal is partly allowed. The respondent police is directed to secure the appellant to undergo the remaining period of sentence if any.

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To

1. The Fast Track Mahila Court, Dharmapuri.
2. Inspector of Police
Pennagaram Police Station
Dharmapuri 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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