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CRL A No.719 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.11.2022

Coram:

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

Criminal Appeal No.719 of 2021

and

CrI.M.P.No.14457 of 2021

Shajakhan

... Appellant

Vs.

The Inspector of Police
All Women Police Station
Krishnagiri
Krishnagiri District
Crime No.199 of 2015

... Respondent

Prayer : Criminal Appeal filed under Sections 374 (2) of Criminal Procedure Code, praying to call for records made in SPL.S.C.No.43 of 2015 on the file of Session Judge, Fast Track Mahila Court, Krishnagiri, dated 20.11.2018 and the same is to be set aside as illegal.

For Appellant : Mr.R.Ganesh
Legal Aid Counsel

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 Judgement of conviction and sentence passed in Spl.S.C.No.43 of 2015 dated 20.11.2018 on the file of Session Judge, Fast Track Mahila Court, Krishnagiri.

2.The respondent police registered the case in Crime No.199 of 2015 initially under “Girl Missing” and during investigation, it was found that the appellant with the help of another accused, kidnapped the victim girl and committed penetrative sexual assault on her. Hence, the case was altered into Section 366(A) IPC, 120(B) read with Section 3 & 4 of POCSO Act 2012 and after completing the investigation, laid charge sheet before the Session Judge, Fast Track Mahila Court, Krishnagiri and the same was taken cognizance in Spl.S.C.No.43 of 2015. The learned Sessions Judge after completing the formalities, framed the charges against the 1st accused/appellant for offences under Sections 366 IPC, 5(l) read with Section 6 of POCSO Act 2012 and against the 2nd accused for the offence under Sections 366(A) read with 109 IPC.



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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 11 witnesses were examined as P.W.1 to P.W.11 and 16 documents were marked as Exs.P.1 to P16 and no 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 were produced.

5. On conclusion of trial and after hearing the arguments advanced on either side and also considering the materials, the learned Sessions Judge found the guilt of the accused for the charged offences and convicted the 1st accused for offences under Sections 366 IPC, 5(l) read with Section 6 of POCSO Act 2012 and the 2nd accused for the offences



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under Sections 366(A) read with 109 IPC and sentenced the 1st accused to undergo 5 years rigorous imprisonment and to pay fine of Rs.5,000/- in default to undergo rigorous imprisonment for further period of six months for the offence under Section 366 IPC; to undergo 10 years rigorous imprisonment and to pay fine of Rs.5,000/- in default to undergo rigorous imprisonment for further period of one year for the offence under Section 5(l) punishable under Section 6 of POCSO Act 2012 and the 2nd accused was sentenced to undergo 6 years rigorous imprisonment and to pay fine of Rs.2,500/- in default to undergo rigorous imprisonment for further period of six months for the offence under Section 366(A) read with 109 IPC. Challenging the Judgment of conviction and sentence, the 1st accused alone has filed the present appeal before this Court.

6. The case of the prosecution is that on 01.04.2015, the daughter of the defacto complainant was found missing. Initially the case was registered by the respondent police for “Girl Missing” and during investigation, it was found that the appellant abducted the victim and the brother of the appellant/A2 committed abatement by helping the



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appellant to take the victim from the custody of her lawful guardian.

Therefore, the case was subsequently altered into Section 366(A) IPC, 120(B) read with Section 3 & 4 of POCSO Act 2012 and proceeded against the two accused.

7. The learned counsel appearing for the appellant would submit that a false case is foisted against the appellant. He would submit that since the victim did not study upto the expectation of her parents and since they were very strict with the victim girl, she voluntarily left her house and therefore, initially the case was lodged only for girl missing and subsequently, due to personal enmity with the appellant who is none other than the husband of the sister of the mother of the victim, taking advantage of the circumstances, tutored the victim and foisted a false case against the appellant as if, he kidnapped her forcefully and committed penetrative sexual assault on her. He would submit that there are contradictions even between the statement of the victim girl recorded under Section 164 Cr.P.C., and the evidence of the victim girl, which are material contradictions and therefore, the evidence of the victim girl is not trust worthy. Further, there is no independent witness or eye witness



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to the occurrence and only based on the evidence of the untrustworthy witness, the trial Court recorded the conviction which is against law. Further he would submit that the age of the victim has not been proved by the prosecution by producing either birth certificate or any authenticated record except the school certificate. He would further submitted that in the original complaint, the name of the victim was not mentioned and subsequently, in the complaint and FIR, the name of the victim girl was inserted which creates doubt as to whether the said victim girl was missing from her house or not. He would further submit that when the victim girl and parents were recalled and cross examined, the victim girl retracted from her previous statement recorded under Section 164 Cr.P.C. and also from her evidence in chief examination. Even the parents of the victim also stated that the victim girl had voluntarily left home since the mother of the victim had scolded her to study properly and thereafter, she returned home by herself. Therefore, the prosecution has not proved its case beyond all reasonable doubt as to whether the said victim was kidnapped or abducted by the appellant. The trial Court failed to consider the materials and erroneously convicted the appellant.



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Even the medical evidence has not corroborated with the evidence of the victim. The doctor has stated that there was no symptoms of forceful sexual assault and there was no external or internal injuries. Therefore, the prosecution failed to prove as to whether the victim was subjected to penetrative sexual assault alleged to have been committed by the appellant. Therefore, it is unsafe to convict the appellant with uncorroborated evidence. Therefore, the judgment of the trial Court is liable to be set aside.

8. The learned Additional Public Prosecutor appearing for the respondent police would submit that as per the School Certificate/Ex.P14 issued by the Headmaster of the school in which the victim girl was studying, the date of birth of the victim girl is 15.01.2000 and the date of occurrence is on 01.04.2015 and therefore, the age of the victim was only about 15 years at the time of occurrence and therefore, she was a child under the definition of Section 2(1)(d) of POCSO Act. Further, the evidence of the victim/P.W.3 and the parents of the victim/P.W.1 and P.W.2 would clearly show that the victim girl was found was missing for



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few days. The appellant is none other than the husband of the sister of the mother of the victim. He used to go to the house of the victim in the absence of her parents and had intimacy with the victim by threatening her. At one point of time, the appellant by sweet coated words took the victim to outside and stayed for sometime where he has committed penetrative sexual assault on the victim girl for several times. Therefore, the appellant has committed the charged offences. Even the medical evidence would clearly show that the victim was subjected to penetrative sexual assault and her hymen was not intact and therefore, the evidence of the victim and also the statement of the victim recorded under Section 164 Cr.P.C. are corroborated with the medial evidence. He would submit that since the appellant is the close relative of the victim, there is no independent witness to the occurrence. Therefore, the prosecution proved its case. He would further submit that though in the chief examination of P.W.1, P.W.2 and P.W.3 and in the complaint and also in the previous statement of the victim girl recorded under Section 164 Cr.P.C., it was categorically stated about the commission of offence by the appellant, after 2 years of the occurrence when they were recalled and cross



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examined, they retracted their previous statement since the appellant is their close relative. However, once the prosecution proved the foundational facts that the victim child was subjected to penetrative sex committed by the appellant then, it is for the appellant to rebut the presumption under Sections 29 and 30 of POCSO Act. But the appellant not rebutted the presumption in the manner known to law. Therefore, the trial Court rightly appreciated the evidence and convicted the appellant and 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 also perused the materials on records.

10. In order to substantiate the charges, on the side of the prosecution as many as 11 witnesses were examined and 16 documents were marked and out of the 11 witnesses, the victim child was examined as P.W.3. Prior to that, during investigation, the victim child was also produced before the learned Judicial Magistrate for recording statement



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under Section 164 Cr.P.C.

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11. A combined reading of evidence of P.W.3/victim girl and Ex.P.10/the statement recorded from the victim child under Section 164 Cr.P.C., it is clearly seen that the appellant who is none other than the husband of the sister of the mother of the victim girl, in the absence of the elderly members in the family, misbehaved with the victim and when she resisted the same, he used to threaten her and by praising her with sweet coated words, took her from her house and committed penetrative sexual assault on her for several times. In order to corroborate the evidence of the victim child/P.W.3, the doctor who conducted medical examination on the victim girl was examined as P.W.8. A reading of the evidence of P.W.8/doctor it is clearly seen that the victim girl was subjected to penetrative sexual assault and the doctor has stated that the hymen of the victim was not intact. Though the doctor stated that there was no symptoms of recent sexual intercourse and there was no external or internal injury, the medical evidence clearly proved that the victim girl was subjected to penetrative sexual assault. Further, the other witnesses P.W.4 and P.W.5 have also clearly spoken about the relationship of the



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appellant and the victim girl and the misbehaviour of the appellant with the victim girl prior to the incident and securing the victim and the appellant. Even assuming that there was no forceful sexual intercourse and the victim girl had not resisted the act of the appellant and had given consent, since the age of the victim is only about 15 years as per her school certificate, the consent is immaterial since the victim girl was a child under the definition of POCSO Act. Further, as per the evidence of the victim child/P.W.3, the appellant had committed penetrative sexual assault on her for more than once. Therefore, the offence committed by the appellant falls under Section 5(l) punishable under 6 of POCSO Act.

12. Further, from the evidence of victim/P.W.3 and from the evidence of the parents of the victim/P.W.1 and P.W.2, it is proved that the victim was removed from the custody of her parents without their consent by the appellant. Therefore, the prosecution has proved the foundational facts that the custody of the victim child was removed from the natural/lawful guardian without their consent by the appellant for the purpose of having sexual intercourse illegally and therefore, the appellant



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has committed the offence under Section 366 IPC.

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13. Once the prosecution proved the foundational facts that the victim was a child and she was subjected to penetrative sexual assault by the appellant, then the Court can draw the presumption under Sections 29 and 30 of POCSO Act. No doubt that the said presumption is a rebuttable presumption then it is for the appellant to rebut the presumption in the manner known to law. But this Court finds that the appellant has not rebutted the presumption in the manner known to law.

14. Therefore this Court does not find any perversity in the appreciation of evidence by the trial Court. Therefore, this Court as an appellant Court and final Court of fact finding, while re-appreciating the entire evidence, finds that the appellant has committed the charged offences and the trial Court has rightly appreciated the entire evidence and convicted and imposed sentences as stated above.

15. Further, this Court finds that the appellant who is a married man and also a close relative of the victim child, taking advantage of the



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relativeness and loneliness of the victim child, has exploited her sexually.

Therefore, this Court does not find any mitigating circumstances to reduce the sentence. Therefore, the appellant deserves for the conviction and sentence imposed by the trial Court.

16. Accordingly, this Criminal Appeal is dismissed. Consequently, connected Miscellaneous Petition is closed. The respondent police is directed to secure the appellant to undergo the remaining period of sentence if any.

17. Mr.R.Ganesh, Legal Aid Counsel, appeared on behalf of the appellant is entitled for the remuneration as per the existing rule.

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Index:Yes/No



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To

1. The Session Judge,
Fast Track Mahila Court, Krishnagiri
2. The Inspector of Police
All Women Police Station
Krishnagiri
Krishnagiri District
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.

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