



WEB COPY



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :03.11.2022

Pronounced on :11.11.2022

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

K.Palanisamy

.. Appellant

/versus/

State by Inspector of Police,
All Women Police Station,
Neyveli Township,
Mantharankuppam Police Station,
Cuddalore District.
Crime No.49 of 2015

.. Respondent

Prayer: Criminal Appeal has been filed under Section 374(2) of Criminal Procedure Code, to set aside the order of conviction imposed in judgment dated 11.08.2016 made in Spl.S.C.No.28 of 2015 on the file of the District Magalir Sessions Court, Cuddalore by allowing this Criminal Appeal.



WEB COPY



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

For Appellant :Mr.R.Shase
For Respondent :Mr.R.Kishore Kumar
Government Advocate (Crl.Side)

J U D G M E N T

The Criminal Appeal is preferred by the sole accused being aggrieved by the order of conviction dated 11/08/2016 in Spl.S.C 28/2015 on the file District Magalir Sessions Court, Cuddalore.

2. The particulars of the offences and the terms of sentence imposed by the trial court are as under:-

Convicted for the offence under Sections by the trial Court	Conviction and sentence imposed by the trial Court
Section 366-A IPC	Sentenced him to undergo 7 years RI and to pay a fine of Rs.1000/-, in default, to undergo 1 year RI
Section 9 of the Prohibition of Child Marriage Act, 2006	Sentenced him to undergo 1 year RI
Section 5(1) r/w Section 6 of the Protection of Children from Sexual Offences Act, (POCSO Act), 2012	Sentenced to undergo him to 10 years RI and to pay a fine of Rs.1000/- in default to undergo 1 year RI.

The period of Substantive Sentence ordered to run concurrently. The period



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

WEB COPY

of imprisonment pending trial ordered to be set off under Section 428 of Cr.P.C.

3. The case of the prosecution:

On 03/04/2015 at about 8.00 p.m, the parents of the PW-2(victim girl) who was about 17 years old leaving her at home went to attend the Village Ayyanar Temple Festival. When they returned home at about midnight from the temple festival, they found PW-2 was missing. After searching her at all probable places found not traceable. The information gathered in the course of search revealed that the petitioner (Palanisami) aged about 37 years had kidnapped her with intention to have sex with her. Hence, police complaint Ex.P-1 was given on 07/04/2015 at about 16.00 hrs by PW-1,the father of minor girl. Based on the complaint, First Information Report [Ex.P-9] was registered in Crime No:49/2015 under Section 366-A IPC. Later, it was altered into Sections 363,365,366 A IPC and Section 5 (I) r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

WEB COPY

and Section 9 of Prohibition of Child Marriage Act, 2006.

4. The trial Court, on examining the records filed along with the Final Report, framed charges for the offences under Section 366 A IPC, Section 9 of Prevention of Child Marriage Act, 2006 and Section 5(l) r/w 6 of the Protection of Children from Sexual Offences Act, 2012.

5. On appreciating the evidence of PW-1 to PW-12, the documents marked as Ex.P-1 to Ex.P-13 and the Material Objects M.O-1 to M.O-9, the trial Court has found the accused guilty of charges under Section 366(A) of IPC, Section 9 of Prevention of Child Marriage Act, 2006 and Section 5(l) r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012.

6. The trial Court from the testimony of the witnesses and the



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

WEB COPY

exhibits, has ascertained the age of PW-2 as 21/07/1997 through her School Certificate Ex.P3. The accused, 37 years old, male and married man, had enticed PW-2 to elope with him on the promise to marry her and keep her comfortable. Believing his words, on 03/04/2015 after PW-2 parents left the home to attend the Ayyanar Temple festival, the accused came to PW-2's house and took PW-2 with him to Thiruppur. On the next day i.e. on 04/04/2015 he married her at Durgai Amman Temple. He rented a house and stayed with PW-2. Had sexual intercourse with her. On 08/04/2015 at about 8.15 am when they both were waiting to board bus at Periya Kurinchi Bus Stand, the the Investigating Officer rescued the minor girl and arrested the accused. Ex P-2 is the statement of the victim girl recorded by the Judicial Magistrate III, Cuddalore on 26/05/2015 wherein the minor girl has admitted that she was a minor at the time of incident and she loved the accused and eloped with him. PW-10 [Dr.Manjula] on examining PW-2, opined that, PW-2 had been subjected to sexual intercourse. The Medical Report of the accused revealed that he is potent and capable of having



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

WEB COPY

intercourse. While PW-1 the father of the victim girl and PW-3 the mother the victim girl had narrated the circumstances under which their daughter went missing, PW-2 the victim girl had narrated, why she went with the accused, her affair with him, the earlier episode of their attempt to elope, for carnal relationship she had with the accused and her date of birth.

7. The Learned Counsel appearing for the appellant challenging the Judgment of the trial Court made three fold submissions as under:-

(i) Primarily, the trial Court erred in concluding that PW-2 is a minor, below the age of 18 years. The evidence for the prosecution does not conclusively prove that PW-2 was the minor on the alleged date of occurrence. Ex-P-3, which is relied by the prosecution to prove the age, is a photocopy of the Mark Sheet. There is no explanation from the Investigating Officer, why the secondary evidence is let in and why he did not collect the original Mark Sheet. In the primary evidence marking of this document was objected by the defence and no reasoning assigned by the trial Court for



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

WEB COPY

overruling the objection. With holding the original Mark Sheet of PW-2, which will reflect the true age of PW-2 is a deliberate act of concealment of valuable evidence, hence, it would attract presumption adverse to the prosecution, as per section 114(g) of the Indian Evidence Act, 1872. The trial Court also erred by ignoring Ex.P-6-Final opinion of the Doctor, who conducted Radiology Test of PW-2, which categorically says that the individual has completed 18 years and not completed 20 years. To attract POCSO Act. 2012, the age of the victim is the foundational fact. In view of the contradictory evidence about the age of the victim, the opinion of the Doctor after scientific examination of the victim will prevail and the benefit should go to the accused.

(ii) There is no evidence to prove the factum of marriage between the accused with PW-2 on 04/04/2015 at Durgai Amman Temple, Thiruppur. The uncorroborated testimony of PW-2 cannot form the basis for proof of marriage to attract the provision of Prohibition of Child Marriage Act, 2006.

(iii) To attract offence under Section 366 A of IPC, the necessary



Crl.A.No.722 of 2017

and

Crl.M.P.No.14190 of 2017

WEB COPY

ingredients are (a) the girl must be below the age of 18 years. (b) She must be induced to go from any place or to do any act with intent, she be forced or seduced to illicit intercourse with another person. The prosecution evidence does not satisfy the above requirements. Therefore, the conviction of the accused for offence under Section 366-A IPC is a miscarriage of justice.

8. The Learned Counsel for the appellant, reading out the deposition of PW-2 submitted that the girl has positively asserted that she had affair with the accused over a period of time. She voluntarily went with him got married and was living with him at Thiruppur, leading life as wife and husband. Therefore, but for the intervention of the police, on the complaint of her father, they would have continued to live peacefully. The age difference or the first marriage of the accused in subsistence, which is alleged but not proved will not attract any of the offences charged and found guilty. The prosecution having failed to prove the age of PW-2 beyond



WEB COPY

Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

doubt, the presumption clause under the POCSO Act, 2012 cannot be relied to penalise the accused.

9. The Learned Government Advocate(Crl.Side) appearing for the State, in response to the above submission stated that Ex.P-3 is the X Standard Mark sheet of the victim girl (PW-2). It carries the photograph of PW-2, name and date of birth, besides marks she scored in the said examination. The photocopy of the Mark Sheet is shown to PW-2 and only after she ascertained and admitted that it is her X Standard Mark Sheet and it has been marked. Therefore, neither the objection for marking the photocopy nor negative presumption under Section 114(g) of the Indian Evidence Act, 1872 is sustainable. When the part concern had identified the mark sheet as her mark sheet and the same is also gone with the photo affixed in the Mark Sheet, the trial Court has rightly given primary to the documentary evidence maintained by the School Education Department over the opinion of the expert based on Radiological Test.



WEB COPY



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

10. The Learned Government Advocate further fairly submitted that the testimony of PW-2, is wholly reliable and needs no corroboration. It is pure and un-adulterated. This witness had admits the affair with the accused though she knows,he is a married person. She admits that she by consent married him. She also admits that the accused told her that if they begot a child, her parents will not attempt to separate them, hence, she consented to have sex with the accused and had intercourse for more than once. She at the same time also positively deposed that her date of birth is 21/07/1997 and Ex.P-2 is her Mark Sheet. Hence, she is a 'child' as defined under Section 2(1)(d) of the POCSO Act 2012. So, the evidence, which proves that the accused had sexual intercourse with the child, attracts Section 5 (I) of the POCSO Act, 2012 which is punishable under Section 6 of the said Act.

11. Heard Learned counsels on either side.



WEB COPY



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

12. Section 5(l) of the POCSO Act, 2012 says whoever commits penetrative sexual assault on a child more than once or repeatedly said to have committed aggravated penetrative sexual assault.

13. Section 2 (d) of the POCSO Act, 2012 defines a 'child' means a person below the age of 18 years.

14. Section 3 of the POCSO Act, 2012 defines 'penetrative sexual assault'. It includes any act of causing penetration into the vagina, uretra, anus or any part of body of the child.

15. The evidence proves that PW-2 was repeatedly subjected to sexual penetration between 04/04/2015 and 07/04/2015 by the accused. Though the prosecution has filed Final Report alleging that the minor girl was forcible taken away from the custody of the parents with intention to



WEB COPY

Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

subject her into forcible intercourse, the evidence of PW-2 had turned to be a voluntary elopement with the accused, knowing fully well that he is a married man and she has not attained majority. Therefore, unless it is established that PW-2 was above age of 18 years, at the time of occurrence, the evidence of PW-2 is adequately sufficient to convict the accused for the offence under POCSO Act, 2012. If not for offence u/s 366 A of the IPC and Section 9 of Prohibition of Child Marriage Act, 2006, since as pointed by the learned Government Advocate (Crl.Side), the prosecution has not able to prove these charges beyond doubt with adequate corroboration.

16. Therefore, the sole point remains to be tested is the admissibility and reliability of Ex.P-3, which is the photocopy of the victim's X Standard Mark Sheet. The Court below distinguishing the judgement of the Madras High Court rendered in ***Kamaraj –vs- Manikam*** reported in ***[2012(2) MWN(Cri.) 615]*** and relying upon the judgment of the Hon'ble Supreme Court rendered in ***Mahadeo –vs- State of Maharashtra and***



WEB COPY

Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

another reported in **[CDJ 2014 SC 029]** held that, Ex.P-3- Mark Certificate issued by the Board is more authenticated and in compliance to the guidelines laid by the Hon;ble Supreme Court. The trial Court has also observed that, the accused has not questioned its authenticity but only marking of photocopy. While the secondary evidence is marked, after due attestation by PW-11 as true copy, the date of birth of the victim has been fixed as 21/07/1997 as mentioned in Ex.P-3. It may be noted that Section 34 of the POCSO Act, 2012 prescribes procedure to be followed in case of commission of any offence against a child under the POCSO Act, 2012 and also deals with determination of age of a person by the Special Court under the POCSO Act, 2012.

17. Section 34 of the Protection of Children from Sexual Offences Act, 2012 reads as under:-

"34.Procedure in case of commission of offence by child
and determination of age by Special Court :-

(1)Where any offence under this Act is committed by a



WEB COPY



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

child, such child shall be dealt with under the Provisions of the Juvenile Justice (Care and [Protection of Children](#)) Act, 2015 (2 of 2016).

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court, after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under Sub-Section (2) was not the correct age of that person. "

18. Reverting to Juvenile Justice Act, Section 49 of the said Act, deals with presumption and determination of age. Rule 12 framed by the Central Government in exercise of the power conferred under Section 64 of the Juvenile Justice Act has laid the procedure to be followed in determination of Age.



WEB COPY

Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

19. In *Jarnail Singh –vs- State of Haryana (2013 (7) SCC 263)*

when the Supreme Court had the occasion to decide how the age of the prosecutrix in the POCSO Act to be determined, it has been observed that, "Eventhough Rule 12 is strictly applicable only to determine the age of child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining the age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child, who is a victim of child. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix. The manner of determining the age conclusively, has been expressed in Sub-Rule (3) of Rule 12”.

20. In this contest, it is profitable to extract Rule 12 of the Juvenile Justice (Care and Protection of Children), Rules, 2007, which reads as



WEB COPY

below:-



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

“12. Procedure to be followed in determination of Age:- ?

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining:-

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;



WEB COPY



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

(iii)the birth certificate given by a corporation or a municipal authority or a panchayat;

(b)and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4)If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof



WEB COPY



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”



WEB COPY

Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

21. Under this aforesaid provision, the age of a child ascertained, by adopting the first clause out of a number of options postulated in Rule 12(3). If in the scheme of options under Rule 12(3), option expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3) matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of said certificate, Rule 12(3), envisages consideration of other options. Only in the absence of all the options specifically mentioned in Rule 12 (3) (i) to (iii), the medical opinion can be relied.

22. In the light of the above legal position, Ex.P-3 is the most appropriate evidence to determine the age, it being the matriculation certificate of the prosecutrix. Because it is a photocopy and not marked through the authority who issued is a merit less submission. Since the



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

WEB COPY

document marked through none else that the holder of the certificate. Her photo is found in the certificate and she admits it as her certificate. No further best evidence could be adduced to prove the age of the victim than Ex.P-3, just because it is a photocopy, its authenticity does not get diminished in any manner, particularly, when the accused is not able to rebut the presumption of its genuineness being a document maintained by public department.

23. Therefore, this Court holds that the judgement of the trial Court holding the accused guilty of offence under Section 5(l) r/w 6 of the POCSO Act, 2012 is well fortified by evidence and law. As far as the offence under Section 9 of the Prohibition of Child Marriage Act, 2006, this Court finds that the prosecution has failed to prove the necessary ingredients required to hold the accused guilty beyond doubt. The prosecution lacks corroboration to prove the marriage alleged to have been solemnized on 04/04/2015 at Durgai Amman Temple, Thiruppur.



WEB COPY



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

24. As far as the charge under Section 366 A IPC, it is contended by the Learned Counsel appearing for the appellant that the case of the prosecution is not that the minor girl was procured to force her to have illicit intercourse with another person, hence, no offence is made out. Undoubtedly this submission is sustainable legally. However, the evidence available and the facts proved attracts offence under Section 366 IPC, which is cognate offence of 366 A IPC. Since the victim was minor at the time of occurrence and was seduced to have illicit intercourse, her consent on seducing attracts under Section 366 IPC, which reads as below:-

25. Section 366 of the IPC reads as below:

“366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that



WEB COPY



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; 1[and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid].”

26. Section 222 (2) of Cr.P.C permits Court to convict a person for minor offence though charged of major offence, although not charged with it.

27. Therefore, to punish the accused for the offence under Section 366 of IPC without charge instead of offence under Section 366 A IPC for which he was charged and tried, the offence under Section 366 IPC must be a minor offence than offence under Section 366 A IPC. However, comparing these two penal provisions, this Court finds that the punishment for these



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

WEB COPY

offences is prescribed as imprisonment, which may extend to 10 years, and shall also be fined. So, it cannot be presumed that offence under Section 366 IPC is minor to the offence under Section 366 A of IPC.

28. As a result, **this Criminal Appeal is partly allowed.** The trial Court judgment is confirmed in so far as offence under Section 5(l) r/w 6 of POCSO Act, 2012, the accused/appellant is to undergo RI of 10 years. Fine amount Rs.1000/- already paid and the same is confirmed. Whereas the conviction and sentence for offences under Section 366-A IPC and Section 9 of the Prohibition of Child Marriage Act, 2006 is set aside. Fine amount paid, if any, shall be refunded to the accused. Consequently, connected Miscellaneous Petition is closed.

11.11.2022

Index:yes
speaking order/non speaking order
ari

To :

Page No.23/25



WEB COPY



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

- 1.The District Magalir Sessions Court, Cuddalore.
- 2.The Inspector of Police, All Women Police Station,
Neyveli Township, Mantharankuppam Police Station,
Cuddalore District.
- 3.The Public Prosecutor, High Court, Madras.

DR.G.JAYACHANDRAN,J.



WEB COPY



Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

ari

Delivery Judgement made in
Crl.A.No.722 of 2017
and
Crl.M.P.No.14190 of 2017

11.11.2022