



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.02.2023

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CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.A.No.345 of 2016

Boss @ Sathish @
Sathish Kumar

...Appellant

Versus

State by Inspector of Police,
B – 2, R.S.Puram Police Station,
Coimbatore District,
Crime No.693 of 2013

...Respondent

Prayer: Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code, to set aside the conviction and sentence imposed in the Judgment dated 11.04.2016 made in Special C.C.No.20 of 2013 on the file of the Learned Sessions Judge, Magalir Neethimandram (Mahila Court) Coimbatore.

For Appellant : Mr.V.Balamurugane

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

JUDGMENT

The accused in Spl.CC.No.20 of 2013 has filed the Criminal Appeal challenging the Judgment dated 11.04.2016 passed by the learned Sessions Judge, Magalir Neethimandram (Mahila Court), *Coimbatore* convicting him for



the offence under Section 366-A (3 Counts) and sentenced him to undergo R.I for one year and also to pay a fine of Rs.1000/- (Rupees One thousand only) in respect of each count and in default to undergo 2 months S.I.

2.The case of the prosecution on 25.05.2013, when **P.W.13; Revathi** was on duty at the R S Puram Police Station, *Coimbatore*, **P.W.1; Sithrakala** came to the Police Station and lodged a complaint to the effect that in the absence of the Warden, she was only taking care of the Destitute Home known as *Seva Nilayam Girls Hostel* and on 25.05.2013 at about 7:00 AM when all the inmates went to the rear side for using the bathroom, three inmates who are minor girl children namely *Barathy, Vaitheeswary* and *Venmani* did not return even after some time and upon being checked, it is seen that they have escaped from the home. On the strength of the said complaint, girls missing First Information Report was registered in Crime No.693 of 2013 and was taken up for investigation by P.W.16; *Balamuralisundaram*. Thereafter, the girls were secured and on completion of investigation filed a chargesheet against the appellant herein proposing him guilty of the offences under Sections 366-A (3 Counts), 376 (1) and Sections 3 and 4 of the POCSO Act. The same was taken on file as Special S.C.No.20 of 2013 and upon framing of the charges and upon being questioned, the accused denied the same and stood trial.



3. The prosecution in order to bring home the charges, examined **P.W.1 to P.W.16** and marked **Exs.P-1 to P-25. M.Os.1 to 4** were also produced on behalf of the prosecution. Upon being questioned about the material evidence and incriminating circumstances on record as per Section 313 of Code of Criminal Procedure, the accused denied the same as false. No evidence was let in on behalf of the defence.

4. Thereafter by a Judgment dated 11.04.2016, the trial Court after hearing the learned counsel on either side found that in view of the evidence of the victim who was examined as **P.W.2**, no offence under sections 3 r/w 4 of the POCSO Act or 376 of IPC was made out as the victim had clearly spoken that the accused was helping her all along and unable to bear the stress at the Destitute Home, she only invited the accused to take her out. Even though, the accused took her along, since the police was looking for them, they again returned to Coimbatore where she was secured. Since there is absolutely no evidence as to any sexual act or any intercourse, the trial Court acquitted the accused of the offences under section 376 (1) as well as under Section 3 r/w Section 4 of POCSO Act. However, since the trial Court found that the accused took all three minor children out of the Destitute Home, away from their lawful guardianship and convicted the accused for the offence under Section 366-A (3 Counts) and sentenced him to undergo R.I for one year and also to pay a fine of



Rs.1000/- (Rupees One thousand only) in respect of each count and in default to undergo 2 months S.I. Aggrieved by the same, this appeal is laid before this Court.

5.Heard *Mr.V.Balamurugane*, learned counsel for the Appellant and *Mr.Kishore Kumar*, learned Government Advocate (Crl.Side) on behalf of the respondent.

6.*Mr.V.Balamurugane*, the learned counsel appearing on behalf of the appellant, taking this Court through the evidence of **P.W.2**/victim girl, would submit that it can be seen from the evidence that the minor children were unable to bear the stress inside the Destitute Home and it is they who had voluntarily called the accused. As a matter of fact, they voluntarily came out of the home by jumping the compound wall and the accused merely took them home. Even as per the evidence, when the complaint was given and when they came to know that the Police was looking for them, the accused had voluntarily brought them back to *Coimbatore*. Under these circumstances, the learned counsel for the appellant relying upon the Judgment of Honourable Supreme Court of India in *S.Varadarajan vs. State of Madras*¹ would submit that in order to charge for an offence under Section 366-A of IPC, the prosecution has

¹ 1965 AIR 1942



to prove some act of the accused in enticing or cajoling or coaxing the minor in any manner what so ever, from the custody of the lawful Guardian. Mere taking away or if the minors who have voluntarily come out the lawful guardianship, will not make out an offence. Therefore, the learned counsel prayed that the appeal to be allowed.

7.Per *contra*, *Mr.K.Kishore Kumar*, the learned Government Advocate (Crl.Side) appearing for the respondent would submit in this case that children were residing in a Destitute Home. The petitioner had actually enticed three of them and they have come out. Once the minor children who are entrusted with the Seva Home are enticed and taken away, the offence is proved. Even if he had taken them in good intention, the accused should have handed them over to the appropriate Police or their respective parents. But in this case, he has taken them to his residence at *Papanasam* near *Tirunelveli*. Therefore, this amounted to enticing the already affected children and therefore he would submit that the trial Court rightly convicted the Appellant.

8.I have considered the rival submissions made on either side and perused the material records of this case.



9. In this case, the victims have categorically spoken that there was no any sexual act or intent. Secondly, unable to bear the stress at the Destitute Home, it was the victims who had climbed the wall and came out of the home. Under the above circumstances, except for taking them to his native place, there is absolutely no evidence whatsoever that the accused did anything in the form of enticing the minor in any manner whatsoever. On the other hand, it is the minors who insisted upon coming out the Home. Therefore under these circumstances, when out of an intention to help the girls, unwittingly that the petitioner has committed the act of taking them away from the home, it cannot be said that with the criminal intent he has taken them out of the lawful guardian so as to punish him for the offence under Section 366-A of IPC. As a matter of fact, the trial Court, did not consider this aspect and on the mere finding that the girls were taken away from the home convicted the appellant.

10. On an earlier occasion, the Hon'ble Supreme Court of India in its judgment in *Iqbal Vs. State of Kerala*² had also considered the same issue and has held that unless the prosecution has proved the additional element, the offence under Section 366-A will not be made out. The relevant paragraphs are extracted hereunder :-

² (2007) 12 SCC 724



“ 9. The residual question is of applicability of Section 366-A IPC. In order to attract Section 366-A IPC, essential ingredients are (1) that the accused induced a girl; (2) that the person induced was a girl under the age of eighteen years; (3) that the accused has induced her with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse; (4) such intercourse must be with a person other than the accused; (5) that the inducement caused the girl to go from any place or to do any act.

10. In the instant case, the admitted case of the prosecution is that the girl had left in the company of the accused of her own will and that she was not forced to sexual intercourse with any person other than the accused. The admitted case is that she had sexual intercourse with the accused for which, considering her age, conviction under Section 376 IPC has been maintained. Since the essential ingredient that the intercourse must be with a person other than the accused has not been established, Section 366-A has no application.

11. In the result, the conviction for the offence punishable under Section 366-A IPC is set aside while the conviction and sentence imposed



in respect of the offence punishable under Section 376 IPC is maintained. “

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11. In the result,

(i) Crl. Appeal. No. 345 of 2016 is allowed. The accused is acquitted of the charge under Section 366-A IPC (3 counts).

(ii) Fine amount is paid if any is ordered to be refunded to the appellant.

03.02.2023

dk

Index: Yes/No

Speaking Order: Yes/No

Neutral Citation : Yes/No

To

1. The Sessions Judge, Magalir Neethimandram (Mahila Court), Coimbatore.
2. The Public Prosecutor, High Court of Madras.
3. The Inspector of Police, B – 2, R.S.Puram Police Station, Coimbatore District.



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D.BHARATHA CHAKRAVARTHY,J.

dk

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