



Crl.A.No.43 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.07.2023

DELIVERED ON : 31.07.2023

CORAM :

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

Crl.A.No.43 of 2022

M. Gowthaman

... Appellant

Vs.

The Inspector of Police
All Women Police Station Thenkanikottai
Krishnagiri District
(Crime No.11/2015)

... Respondent

PRAYER: Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code, 1973 against the judgment dated 11.02.2019 passed by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, in Spl.S.C. No.60/2015.

For Appellant : Mr.P. Muthamizh Selvakumar

For Respondent : Mr.R.Vinothraja, GA (Crl. Side)

**J U D G M E N T**

WEB COPY This criminal appeal is filed against the Judgment and order dated 11.02.2019 passed by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, in Spl.S.C. No.60/2015.

2. The appellant is the accused in Spl.S.C.No.60/2015 and he is convicted and sentenced as detailed hereunder:

<i>Conviction</i>	<i>Sentence</i>
Section 366 IPC	Rigorous Imprisonment for 5 years and a fine of Rs.5,000/-, in default, to undergo 6 months Rigorous imprisonment.
Section 5(L) r/w 6 of POCSO Act	Rigorous Imprisonment for 10 years and a fine of Rs.5,000/-, in default, to undergo 1 year Rigorous imprisonment.

3. The case of the prosecution

- i. A 17 year old girl who was studying in Hosur Higher Secondary School in Class XII was missing from her paternal uncle's house in Denkanikottai on 31.05.2015. She was the daughter of a couple, husband being a drawing master and the wife doing business.



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- ii. On 02.06.2015 a police complaint (Ex.P1) was lodged by Sivakumar P.W.1 (the paternal uncle). The victim was traced along with one Gowthaman (the accused) and brought to the All Women Police Station, Denkanikottai.
- iii. The said Gowthaman (accused) had kidnapped the minor girl (P.W.5) in his vehicle bearing Registration No.TN70A0080 on 31.05.2015 at about 8 a.m from the house of P.W.1, the victim girl's paternal uncle in Denkanikottai.
- iv. It is alleged that the accused was in love with the victim girl and though she was shifted to her paternal uncle's house in Denkanikottai atleast 6 months before the incident, the accused kidnapped the victim under the guise of marrying her, taken her to his sister's house, sexually harassed her and later the accused was apprehended by the police on 02.06.2015 and remanded to judicial custody for the offences punishable under Section 366 A IPC and also Section 4 of the Protection of Children from of Sexual Offences Act (herein after referred to as POCSO Act).
- v. The victim girl was sent for medical examination on 03.06.2015 at



about 12.30 p.m. to Denkanikottai Government Hospital where Dr.Hariharan (P.W.8) who though did not have a consent from the victim for physical examination of the victim due to the gender difference had reported rape by one known person on 31.05.2015 at 2.30 p.m. (as stated by her) in Hosur in a house near Bagalur Check post, which was recorded by him in the AR copy (Ex.P5). Dr.Hariharan had recommended her to be examined by Dr. Parvathy (P.W.15) who did the physical examination and found the 'hymen not intact', 'no physical injuries' and the vaginal smear, pubic hair and vaginal swab were sent for forensic analysis.

4. The Investigation by the Investigating Officer

- i. Mr.Saravanan, the Investigating Officer (P.W.17), Inspector of Police All Women Police Station, Denkanikottai, who took up investigation in Cr.No.11/2015 in First Information Report (Ex.P14) dated 02.06.2015, visited the crime spot at 18.40 hours the same day, prepared the Observation Mahazar (Ex.P3) and rough sketch (Ex.P15) in the presence of witnesses Balaji (P.W.10) and Amutha



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(P.W.6) and also recorded the statements of the victim girl (P.W.5), Sivakumar (P.W.1), Jayanthi (P.W.2), Kavitha (P.W.4) and Balaji and Amutha.

- ii. He arrested the accused near Bagalur Check Post at about 8 p.m. and his confession statement was recorded in the presence of Mohammed Rafiq (P.W.11) and Nagaraj (P.W.7). The victim girl was also found with him and her statement is (Ex.P2).
- iii. After getting the facts right from the investigation, an alteration report (Ex.P17) was filed altering the offence to Section 4 of POCSO Act.
- iv. The next day on 03.06.2015, the victim girl was sent for medical examination to Denkanikottai Government Hospital and the accused was remanded to judicial custody.
- v. On 10.06.2015 the accused was sent for medical examination and age determination to Dharmapuri Government Hospital.
- vi. On 24.06.2015, the contents procured from the victim during her medical examination were sent to the forensic laboratory, Salem, for Chemical analysis.
- vii. The three doctors, namely Dr. Hariharan (P.W.8), Dr. Parvathy



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(P.W.15) and Dr. Azhagu (P.W.9) were examined by the Investigating Officer and the accused also was inquired by him and his statement recorded. Subsequently, Inspector Jayanthi had resumed duty and therefore, the further investigation was handed over to her.

viii.Tmt. Jayanthi, Inspector of Police All Women Police Station, Denkanikottai (P.W.18) completed the investigation by recording the statement of Dr.Parvathi, who examined the victim girl and Special Sub Inspector of Police Nagamani (P.W.16) and then filed the charge sheet after taking advice from Prosecution Department. The section was altered to Section 5(L) r/w 6 of POCSO Act.

5. The Trial in the court.

- i. There were 18 witnesses on the side of the prosecution and 21 exhibits (Ex.P1 to Ex.P21). There were no witnesses or exhibits on the defence side. No Material Objects were produced.
- ii. The accused in his questioning before the court under Section 313 Cr.P.C had denied the charge.



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iii. In the trial P.W.1 Sivakumar, P.W.2 Jayanthi (Wife of P.W.1), P.W.3 Mohan (father of the victim), P.W.4 Kantha (mother of the victim) have all deposed that the accused was found stalking the victim girl and in order to prevent that she was shifted to P.W.1's house six months before the incident. P.W.5 the victim girl had a slightly different version to narrate. Though in her examination in chief she had deposed that she was subjected to torture and threat by the accused and that he had also threatened to kill her parents and forcibly had sex with her, in her cross examination she had deposed that she was shifted to her paternal uncle's house as she was not studying properly and that she was not kidnapped by anyone and that the accused had nothing to do with her going with her friends after a family tiff. However, she admitted her statement Ex.P.2 made before the police in which she had clearly stated that she was in love with the accused and eloped with him under the promise of getting married and then kept confined in his sister's place, she was sexually harassed by the accused who forcibly had sex with her. No statement under Section 164 Cr.P.C was taken from the victim.



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- iv. Amutha (P.W.6) is the sister of P.W.2. She is a witness to the Observation Mahazar along with Balaji (P.W.10). Nagaraj (P.W.7) and Mohammed Rafiq (P.W.11) witnessed the arrest of the accused near Begalur Check Post and his confession statement (Ex.P8).
- v. Dr. Hariharan (P.W.8) who was the doctor who attended to the victim girl in Denkanikottai Government Hospital to whom she had reported of the rape by the accused on 31.05.2015 at 2.30 p.m. Since the girl intended a female doctor to physically examine her, Dr. Hariharan referred her to Dr.Parvathy (P.W.15) as evidenced in the Accident Register dated 03.06.2015 signed by him (Ex.P5).
- vi. Dr.Azhagu (P.W.9), a dentist in Denkanikottai Government Hospital was asked to determine the age of the victim girl on 03.06.2015 and he issued a age certificate based on his examination (Ex.P6) determining her age as 17. The victim girl was accompanied by a woman constable Sumathi (P.W.14) to the doctors.
- vii.Mr. Ravi (P.W.12), Head constable along with woman constable Sumathi (P.W.14) in Denkanikottai Police Station accompanied the accused for medical examination on 10.06.2015.



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viii. Dr. Arun Prabhu who examined the accused certified that the accused was about 21 years of age (Ex.P10) and he was not impotent (Ex.P9).

ix. Dr. Parvathi (P.W.15) a gynecologist who examined the victim certified in Ex.P12 about the condition of the victim girl and sent the vaginal smear, swab, pubic hair for forensic chemical examination. The forensic report is Ex.P11 which did not detect any semen on the specimen sent for analysis nor any sperm. Based on this P.W.15 had given final opinion (Ex.P13) stating that the hymen was not intact, vagina admitted two fingers and that no external injuries were there. She also stated that the possibility of sexual assault could not be ruled out.

x. Tmt.Nagamani (P.W.16) the Sub Inspector of Police, Denkanikottai All Woman Police Station deposed about the lodging of the complaint by P.W.1 and subsequent registering the FIR by her (Ex.P14) on 02.06.2015. She had forwarded the same to the concerned court and also to the Inspector of Police All Women Police Station.

xi. Mr. Saravanan (P.W.17) the Inspector of Police Denkanikottai Police Station and incharge of Denkanikottai All Women Police Station was



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the Investigating Officer who later handed over the investigation to

WEB COPY Tmt.Jayanthi (P.W.18), Inspector of Police.

xii.The trial court (Fast Track Court, Krishnagiri) had found the accused guilty of the offences under Section 366 IPC and under Section 5(L) r/w 6 of POCSO Act and he was inflicted upon a punishment of 5 years Rigorous Imprisonment and a fine of Rs.5,000/- in default, to undergo 6 months Rigorous Imprisonment for Section 366 IPC and 10 years Rigorous Imprisonment with a fine of Rs.5,000/- and in default to undergo 1 year Rigorous Imprisonment and the aforesaid sentences are ordered to run concurrently.

6. The Appeal

The present appeal is against this conviction and punishment.

6.1. Heard Mr.P. Muthamizh Selvakumar, learned counsel for the appellant and Mr.R.Vinothraja, Government Advocate (Crl. Side) for the respondent.

6.2. The learned counsel for the appellant contended as follows:



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- i. The victim girl has gone with the accused on her own will and that the doctor who examined her was categorical in stating that there were no visible injuries on the person of the victim to suggest rape or even sexual assault.
- ii. The chemical analysis report from the Forensic Laboratory in Salem also was clear that no semen or spermatozoa was found in any of the specimen sent for forensic chemical analysis.
- iii. There was undue delay in lodging the complaint with the police adversely affecting credibility of the complaint. The victim girl was reportedly missing from 31.05.2015 while the complaint was lodged on 02.06.2015 evening which arouses suspicion.
- iv. The girl and the accused were in relationship for quite sometime and she was shifted to her paternal uncle's house in Denkanikottai only to dissuade her from the relationship and therefore neither kidnapping nor forcible sex can be alleged against the accused.
- v. The contradictory statements were made by the victim herself and the trial court had failed to consider any of these aspects and went ahead with the conviction without proper application of mind. Therefore, he



pleaded for acquittal.

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6.3. Per contra, the learned Government Advocate (Crl. side) explained to this court the urgent need to curb such diversionary tactics of the defence to circumvent the provisions of law. According to him the girl being a minor (17 years old), the plea of consent for sex fails in the light of the provisions contained in POCSO Act. He further added that the onus of proof lies with the accused in a POCSO case and it was for the accused to prove his innocence and not the responsibility of the victim girl to prove the charges.

7. Conclusion

Quickly a recap of the event leading to the arrest of the accused.

- i. The victim girl who is just 17 years of age goes missing from her paternal uncle's house in Denkanikottai on 31.05.2015.
- ii. There is a frantic search launched by the near and dear ones. Parents are also informed.
- iii. Needle of suspicion points out to the involvement of the accused Gowthaman who has been stalking the girl for quite sometime.



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iv. The girl is traced with the accused confirming the involvement of the accused.

v. The girl in her complaint talks about "promise" to marry and eloping with the accused. She also mentions about the forced sex the accused had with her.

vi. The girl is sent for medical examination. The doctor does not rule out possibility of sexual intercourse. Hymen is not intact and also two fingers are admitted in the vaginal surface.

vii. The girl is a minor and POCSO is clear on the offence as she is yet a child.

7.1. Let us quickly go into the provisions of Section 29 of POCSO

Act.

"Section 29 of Protection of Children from Sexual Offences Act, 2012 : Presumption as to certain offences

Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such



person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

7.2. Now a discussion on the grounds raised by the learned counsel for the defence/appellant.

- i. The inordinate delay in lodging a police complaint has been highlighted. This court opines that there is no undue delay. A family member that too a minor girl is missing and the needle of suspicion points to the appellant. The family has taken a conscious and well thought decision of going to the police since it involves the future of the girl as well as the reputation of the family. It cannot be said to be an unreasonable delay.
- ii. Another contention that there was a mutual consent between the minor girl and the appellant is again bad in law. A minor girl even if she consents cannot be subjected to any sexual harassment. It is very clear that taking a minor girl from her custodian's home and then having intimacy with her (even with her consent) for a couple of days have to be disproved by the appellant as they are the basic presumption envisaged in the Act. The minor girl even in her letter



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(Ex.P2) addressed to the police had stated that she was forced to have sex. Her cross examination was done about 7 months after the examination in chief. Such a belated cross examination cannot be relied upon as any contradictory statement made later gives rise to suspicion about the accused gaining over the witnesses. In the instant case also it appears that the witnesses have compromises on their earlier stance by making 'diluted' deposition during cross examination. This may also could have been possible due to the prolonged legal tussle. Moreover, the first statement of the victim before the doctor in the Denkanikottai Government Hospital was that she was raped. Therefore there is substance in both the charges i.e one of kidnapping and another of rape. Had she been a major, things would have been different. But clearly there is no dispute about her age.

iii. Absence of visible injuries or semen in the specimens sent for chemical analysis does not rule out sexual assault. Even assuming that there was consensual sex, the subject matter is whether she was a minor or major at the time of the incident. A minor girl is naturally swayed by false promises and emotions. POCSO is to prevent such



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children. She is a child in the eyes of law. However, in the instant case the victim girl also deposed about the threats from the appellant. The appellant presumably has adopted a "carrot and stick" method to make her submit to his desire. He used the 'carrot' of promise to marry and also the 'stick' by threatening to kill/harm her parent/grand father. The malafide intention of the appellant is crystal clear and needs no further probe.

8. POCSO Act is an act to protect children from sexual assault, sexual harassment and pornography and provide for establishment of special court for trial of such offences and for matters connected therewith or incidental thereto. The punishment under this Act are severe in nature only to act as a deterrent to the commission of such offence. Despite such a stringent Act, the cases of children subjected to sexual assault are on the rise.

9. Therefore, I opine that this case is a fit one to be convicted and



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punished under POCSO Act. I find no reason to interfere with the findings of the trial court.

10. In the result,

- i. The Criminal Appeal is dismissed.
- ii. The conviction and sentence dated 11.02.2019 passed by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, in Spl.S.C. No.60/2015. is confirmed.
- iii. The appellant in Crl.A. No.43 of 2022 (accused in Spl.S.C. No. 60/2015), shall surrender before the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, within 15 days from today, failing which, the Trial Court shall take steps to secure him for undergoing the sentence.

31.07.2023

bga
Index : yes/no
Speaking /Non speaking Order

To

1. The Inspector of Police

17/19



Crl.A.No.43 of 2022

All Women Police Station Thenkanikottai
Krishnagiri District
(Crime o.11/2015)

- 2.The Sessions Judge, Fast Track Mahila Court, Krishnagiri
- 3.The Section Officer, Criminal Section, High Court, Madras.



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R.HEMALATHA, J.

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Pre-Delivery Judgment in
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