



Crl.A(MD)340 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 19.09.2023

Pronounced on: 29 .09.2023

CORAM:

THE HONOURABLE MR.JUSTICE **P.DHANABAL**

CRIMINAL APPEAL(MD)No. 340 of 2016

P.R.Selvaraju

.. Appellant

Vs.

1. The Inspector of Police
Srirangam Police Station,
Tiruchirapalli

2. S.Boopalan

...Respondents

PRAYER : Criminal Appeal is filed under Section 372 of Cr.P.C to set aside the judgment dated 13.04.2016 passed in Spl.S.C.No.11 of 2015 on the file of the learned Sessions Judge, Mahila Court, Tiruchirapalli.

For Appellant : Mr.D.Selvanayagam

For R-1 : M/s.Aasha
Government Advocate(Crl.Side)

For R-2 : Mr.S.A.Ajmal Khan, Senior Counsel

JUDGMENT

This Criminal Appeal has been preferred as against the judgment of acquittal passed by the learned Sessions Judge, Mahila Court,



Tiruchirapalli in Spl.S.C. No.11 of 2015, wherein the second respondent herein was arrayed as accused and the trial Court has acquitted the accused for the offence under Section 366(A) of IPC and sections 3 r/w 4 of POCSO Act.

2. The case of prosecution is that the victim was aged about 16 years on the date of occurrence and she was studying X standard. At that time she was at her relatives house at Thiruvanaikovil, Trichy District. On 03.03.2015 the accused kidnapped the victim girl and taken her to Virugambakkam , Chennai. The accused deceitfully spoken with the victim girl and had intercourse with her, thereby the mother of the victim lodged complaint/Ex.P.1 before the Srirangam Police Station. Based on the complaint given by the mother of the victim, P.W.19 registered First Information Report/Ex.P.12 and thereafter the case was investigated by P.W.20 and P.W.21. After completion of investigation P.W.21 filed final report as against the accused for the offences under Sections 366(A) of IPC and Section 3 r/w 4 of POCSO Act.

3. Thereafter copies of documents relied by the prosecution were furnished to the accused under Section 207 of Cr.P.C and then after hearing both sides the trial Court has framed charges under Section 366(A) of IPC and Sections 3 r/w. 4 of POCSO Act. The charges were read over and



explained to the accused and he denied the charges and thereby in order to prove the case the prosecution has examined P.W. 1 to P.W.21 and marked documents Ex.P.1 to Ex.P.28 and ten material objects were marked as M.O.1 to M.O.10. On the side of the defence no witnesses were examined and two documents were marked as Ex.D.`1 and EX.D.2. After completion of prosecution side evidence the trial Court had examined the accused under Section 313(1)(b) of Cr.P.C with regard to the incriminating circumstances as against the accused and the accused denied the evidence. After analysing the oral and documentary evidence adduced on both sides the trial Court had acquitted the accused for the offence under Section 366(A) of IPC and Sections 3 r/w.4 of POCSO Act.

4. As against the judgment passed by the trial court, the present appeal has been filed by the father of the victim/P.W.2 on the following grounds:

a) the judgment of the trial Court is against law, weight of evidence and probabilities of the case.

b) the trial Court has failed to consider the evidence of PW.1 and not followed the mandatory provisions under Section 35(1) of POCSO Act within 30 days from the date of taking cognizance the trial Court has to examine the victim but the above said procedure has not been followed.



c) the prosecution has clearly established that the accused on 03.03.2015 kidnapped the victim girl from the lawful guardianship and she was rescued on 16.03.2015 at Chennai. During that period the victim was subjected for penetrative sexual assault at the hands of the accused. The above said aspect has not been considered by the trial Court.

d) the minor girl was born on 07.11.1999 and she was child at the time of occurrence from 03.03.2015 to 16.03.2015. P.W.18/doctor who medically examined the victim has opined that the victim might have subjected for sexual intercourse. Further the doctor has also stated about the age of victim but these aspects have not been considered by the trial Court.

e) The victim girl was kept at Virugambakkam, Chennai under the illegal custody by the accused from 03.03.2015 to 16.03.2015 in the house of one Pushpa, thereby the offences under Section 366(A) of IPC and Section 4 of POCSO Act squarely would attract but the trial Court failed to consider the same. The trial Court has disbelieved the case of prosecution and wrongly acquitted the accused.

5. The learned counsel appearing for the appellant would contend that the accused had kidnapped the victim girl and he had taken from Thiruvanaikovil to Chennai from 03.03.2015 to 16.03.2015 and he also



committed penetrative sexual assault against the victim. In order to prove the case of prosecution the prosecution has examined P.W. 1 to P.W.21 and marked documents Ex.P.1 to Ex.P.28 and ten material objects M.O.1 to M.O.10 were marked. On the side of the defence no witnesses were examined and two documents were marked as Ex.D.1 and Ex.D.2. P.W.1 who is the victim has categorically deposed about the sexual assault made by the accused. P.W.18/doctor also categorically deposed the possibility of having sexual intercourse and further the police also secured the victim girl from Chennai from the house of one Pushpa. The accused was also found along with the minor girl. The trial Court failed to consider the evidence of prosecution and wrongly came to conclusion that the prosecution failed to prove the case and acquitted the accused. The trial Court failed to consider that as per Section 29 of POCSO Act, the accused has to disprove the case.

6. The learned counsel appearing for the second respondent would contend that the prosecution witnesses are highly doubtful and the evidence of P.W.1 is also doubtful and her evidence is not cogent and during chief examination she stated something and changed her version during the cross examination the victim herself stated that nobody kidnapped her and she voluntarily left her house and the sister of the victim scolded her with unparliamentary words. Therefore there is no evidence to prove the alleged kidnap by the accused and according to the prosecution case the alleged



occurrence of penetrative sexual assault took place in the house of one Pushpa and the said Pushpa has not been examined. The investigation officer also failed to take action as against the said Pushpa who alleged to have given shelter to the victim and the accused and the medical evidence is also not against the accused. P.W.18/Doctor had given evidence that the victim might have undergone intercourse and without definite evidence the Court cannot come to conclusion about the commission of penetrative sexual assault. Further the trial Court after analysing all the aspects correctly acquitted the accused therefore the appeal is liable to be dismissed.

7. The learned Government Advocate appearing for the first respondent has argued that the mother of the victim girl had given complaint and based on the complaint the first respondent registered First Information Report and after elaborate investigation filed final report. In order to prove the case of prosecution they examined P.W. 1 to P.W.21 and marked documents Ex.P.1 to Ex.P.28 and ten material objects M.O.1 to M.O.10 were marked. On the side of the defence no witnesses were examined and two documents Ex.D1 and Ex.D2 were marked. The P.W.2 is the father and he deposed about the occurrence and the penetrative sexual assault committed by the accused. The doctor P.W.18 also corroborated the evidence of P.W.1. The case of prosecution has been proved beyond



reasonable doubts through sufficient evidence. As per Section 29 of the POCSO Act the presumption is in favour of the prosecution and the accused has failed to rebut the presumption. However the trial Court failed to believe the prosecution case and acquitted the accused from the charges levelled against him. The state also not preferred any appeal against the judgment of the trial Court.

8. Upon hearing both sides, perusing the records, grounds and the judgment of the lower Court, the point for determination in this appeal are:

a)Whether the prosecution has proved the charges levelled against the accused under Section 366(A) of IPC and sections 3r/w.4 of POCSO Act?

9. In this case there is no contravention with regard to the age of the victim and on the date of alleged occurrence the victim was child and the accused also not disputed the age of the victim. In this case the accused has been charged for the offences under Section 366(A) of IPC and Section 3 r/w. 4 of POCSO Act. The offence under Section 366(A) of IPC would not attract as against the accused since the accused himself said to have intercourse with the victim and inorder to attract the provision under Section 366(A) of IPC somebody have to kidnap the victim for commission of



illicit intercourse with another person but in this case the accused himself alleged to have involved and thereby no offence would attract as per section 366(A) of IPC.

10. In this case in order to prove the charges as against the accused the prosecution has examined P.W. 1 to P.W.21 and marked documents Ex.P.1 to Ex.P.28 and ten material objects were marked as M.O.1 to M.O. 10. On the side of the defence no witnesses were examined and two documents were marked as Ex.D.1 and Ex.D.2.

11. P.W.1 is the victim and she deposed that the accused used to speak with the victim and thereby he took photographs with the victim and thereafter he compelled to marry the victim by showing that photos. Hence on 24.02.2015 at about 2.00 pm., she left her home and the accused had taken her to his house. After complaint given by her father she came to Triplicane police station along with the accused. After compromise she went along with her father. Thereafter she was sent to Thiruvanaikovil. After knowing that the victim was in Thiruvanaikovil the accused called the victim over phone and threatened her to come to Chennai, thereby at about 4.00 am., she left from the home. One Pushpa along with the accused in that house compelled her to marry the accused and thereafter due to the complaint given by her father the police taken her on 16th March since the



accused threatened her showing photos she went along with the accused. In the house of the said Pushpa the accused had intercourse with her. Thereafter complaint was given by the mother of the victim which was marked as Ex.P.1. On perusal of Ex.P.1 it reveals that on 03.03.2015,early morning at about 4.30 am., the victim had gone out from the house and she was disappeared, but the said author of the complaint,i.e., the mother of the victim has not been examined as witness due to her death.

12.In this case the same P.W. 1 in her cross examination stated that the contents deposed in chief examination are at the instigation of the her parents due to compulsion she gave such evidence. The above said evidence deposed before the court by the victim in chief examination are not true and particularly her father threatened her to give such evidence, therefore the evidence of P.W .1 is highly doubtful as to whether the occurrence happened as alleged by the prosecution. P.W.1 in her cross examination stated that “நான் முதல் விசாரணையில் சொல்லி உள்ள சங்கதிகள் அனைத்தும் என் வீட்டில் உள்ளவர்கள் கட்டாயப்படுத்தி என்னை சொல்ல சொன்னதால் நான் சாட்சியம் அளித்தேன். அவை அனைத்தும் உண்மையில்லை. எதிரி என்னிடம் போட்டோவை காட்டி மிரட்டி என்னுடன் உடலுறவு கொண்டதாக சொல்லியிருப்பது உண்மையில்லை, என்னை என் அப்பா சொல்ல சொல்லி மிரட்டினார்” Therefore from the evidence of P.W.1 it is revealed that when she was examined in chief she stated something about the occurrence but in the cross examination she totally changed her version



and thereby the evidence of P.W. 1 is highly doubtful and it does not inspire confidence of this Court. In spite of the evidence given as against the prosecution the victim /P.W.1 was not treated as hostile by the prosecution.

13. Further on the side of defence two exhibits were marked as Ex.D. 1 and Ex.D.2. On perusal of Ex.D.1 it reveals that the victim herself wrote a letter to the Triplicane Police officer stating that she left from her parental home due to the harassment by the family members and therefore she went through bus and somebody has taken ticket for her. Thereafter she stayed in the temple and then at 4.00 am., she made phone call to Boopalan and thereafter the parents of the Boopalan have taken her to their house and to that effect P.W. 2 also wrote a letter to the Triplicane Police Officer that already he gave complaint for missing of her girl. Therefore the police rescued her and handed over to him. Therefore from those documents they revealed that the victim voluntarily left from home and thereafter she went to the house of accused and parents of the accused have taken her to police station. P.W.2 also in his evidence stated that after the accused had brought her to the police station therefore this attitude of the victim shows that she voluntarily went to the house of the accused, therefore there is no question of kidnap would arise to attract the offence under Section either 366(A) of IPC or 366 of IPC. In this case the proper charge is 366 of IPC. Even to attract the section 366 of IPC the victim has



not stated that the accused kidnapped the victim girl.

14. So far as evidence of P.W 2 is concerned he is none other than the father of the victim and he deposed that on 24.02.2015 her daughter was disappeared. After some time he came to know that she was brought to the police station and he had taken her daughter from the police Station to Trichy. On 03.03.2015 at about 05.0 a.m. once again her daughter was disappeared. Thereafter on 16.03.2015 he came to know that the accused wrongfully confined the victim girl and the police has brought the accused along with the victim girl to the police station and the complaint was given by this wife. P.W.2 is not eyewitness to the occurrence and he is only hearsay witness. Further P.W.2 in his cross examination admitted that the victim was brought by the father of the accused. As per chief examination of P.W.2 police have taken victim to the police station but in the cross examination he stated that the father of the accused only brought the victim to his house.

15. P.W.3 is the brother of the victim and he also not supported the case of prosecution. P.W.4 is the parental aunt of the victim and she deposed that on 27.05.2015 the victim eloped with the one Boopalan and thereafter she was handed over by the police to her parents and then the victim along with her mother were stayed in her house. While so on 03.03.2015 at about 04.30a.m., the victim disappeared. After searching they



were unable to trace out her and hence on 05.03.2015 the complaint was given before the Srirangam Police Station and she has not deposed anything about the accused. P.W.5 in his evidence has also deposed about the disappearance of the victim. P.W.6,7,9 and 10 have not supported the case of prosecution and turned hostile and the other witnesses are also not the eye witnesses to the said occurrence.

16. P.W.11 has deposed about the statement of the victim recorded under Section 164(5) of Cr.P.C which has been marked as Ex.P.2. The doctor who medically examined the victim as P.W.18 and she deposed that she medically examined the victim and gave certificate Ex.p.13, which reads as follows:

- i) she is not a virgin as hymen is not intact
- ii) As hymen is not intact there is a possibility of sexual intercourse
- iii) No injuries over external genitalia
- iv) No object seen over the external genitalia

17. Though the doctor has suggested that there might be chances for sexual intercourse the victim girl has given evidence stating that due to compulsion of her father she gave such evidence before the trial court and she was not subjected for penetrative sexual assault thereby the entire prosecution case is doubtful due to the evidence of the victim. Further



prosecution failed to examine the Pushpa where the accused and the victim stayed at Chennai. Though prosecution has collected materials from the victim as well as accused sent for chemical analysis there is no incriminating evidence available as against the accused through forensic evidence. P.W.21, the investigation officer in his evidence also admitted that he has not examined the said Pushpa. From the above evidence the reasonable doubt would arise as to whether the victim was subjected for penetrative sexual assault or not. Further the main witness P.W.1 in her cross examination stated that due to compulsion of her father she gave such evidence. The evidence as against the accused through the prosecution is highly doubtful and hence with the available evidence it is unsafe to convict the accused.

18. The learned counsel appearing for the appellant relied on the judgment of the Hon'ble Apex Court in the case of ***State of Himachal Pradesh .vs. Shre Kant Shekari*** reported in ***(2004) 8 Supreme Court Cases 153***, wherein it is held as follows:

It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional. However, if the court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or



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circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would suffice.

19. Further the Hon'ble Supreme Court in the case of **Leela Ram(D) through Duli Chand .vs. State of Haryana in Crl.A.No.297 of 1992**, wherein it is held as follows:

This longish quotation probably could have been avoided but we thought it fit to reproduce it verbatim so as to assess the situation in the proper perspective, more so when there is an order of acquittal by the High Court in reversal of the conviction and sentence for life imprisonment passed by the trial Court. Apart from the comment on the method of investigation, the High Court mainly proceeded on two counts. On the first, the learned Judges commented that the discrepancies and contradictions between the witnesses do not inspire confidence and on the second count they noted that there was fabrication of evidence by the investigating agency

20. Further this Court in the case of **Rangaswami Gounder .vs. State reported in 1995(1)L.W.(Cr.)12. S.N.** wherein the Hon'ble Division Bench of this Court has held as follows:

22. The word evidence in the act signified only the instruments by means of which relevant facts are brought before Court., viz., witnesses and documents and by means of which this Court is convinced on facts. In judging whether a fact is or is not proved the court is entitled to take into consideration not only the statement of witnesses but also the surrounding circumstances and probabilities of the case. Even if the statement of witnesses standing by themselves are open to criticism a fact may be held established on such evidence read in the light of the surrounding circumstances. The term'



matters before it ' in the definition of the expression proved includes matter which do not fall within the definition of evidence and such matter may include inference from acts. The proof of a fact depends upon the accuracy of statement made at different stage of the case, but on the probability of its having existed . Evidence of of a fact and proof of fact are therefore different and distinct. In the sense of they not being synonymous. It is broad facts of the case and not the little details that go make up those fact that will make the extent of those facts probable or not. If a fact is to be held provided, the court must either believe it to exist or consider its existence so probable that a prudent man ought under the circumstance, to set upon the suppositions that it had existed. Thus, it is crystal clear that the positive statements of witnesses is subject to the rule of probability or otherwise such statements of witnesses have to be excluded from the purview of consideration as being not proved.

21. On careful reading of the above judgments they will not be applicable to the present facts of the case. In this case the evidence of victim creates serious doubts. In the cross examination she deposed that due to compulsion of her father she deposed in the chief examination and foundational facts regarding commission of offence were not proved by prosecution, therefore the above case laws will not be applicable to the present facts of the case.

22. In POCSO cases the identity of the victim could not be revealed but the trial Court has mentioned the name of the victim. As per Section 33(7) of the POCSO Act the identity of the victim could not be revealed in the court proceedings but unfortunately the trial Court has not followed the



procedures.

23. Further the learned counsel appearing for the second respondent relied on the judgment passed by the Hon'ble Apex Court in the case of ***T.Subramanian .vs State of Tamil Nadu***, wherein it is held that in appeal against acquittal where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubts. In the case on hand also P.W.1 in chief examination stated about the penetrative sexual assault made by the the accused but in the cross examination stated that the accused has not committed any offence and due to the compulsion made by her father she gave such evidence, therefore the case of prosecution has not ben proved beyond reasonable doubts, thereby the case law is squarely applicable to the present facts of the case.

24. Further the Delhi High Court in the case of State .vs. Habib in Cri.L.P. 295 of 2014 dated 16.05.2014 reported in 2014 Crl.L.J.4286, wherein it is held as follows:

"23. On careful reading of the impugned judgment and the material placed on record including the testimony of prosecution witnesses , we find that the trial Court had given clear, cogent and convincing reason for disbelieving the testimony of prosecutrix. It cannot be said that the findings of the trial Court for palpably wrong, manifestly erroneous or demonstrably unsustainable. We do not find that there is any illegality, perversity or infirmity in the order passed by the learned Sessions Judge, The present Criminal



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Leave Petition preferred by the petitioner/State to challenge the judgment 16th November 2013 passed by the learned Additional Sessions Judge -01, North Rohini, Delhi, Delhi, is therefore, dismissed”.

25. On a careful reading of the above judgment it is clear that when the trial Court has given clear, cogent and convincing reason for the disbelieving the testimony of prosecutrix and it cannot be said that the findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. In the case on hand also the trial Court has given clear, cogent finding and reason for disbelieving the evidence of prosecution. Therefore the above judgment is squarely applicable to the present facts of the case.

26. Further P.W.1 during examination by the learned Magistrate under Section 164 of Cr.P.C has stated one person made love proposal to her and thereafter since he was good boy she had physical relationship with him. After when the same came to the knowledge of her sister she opposed to that love. Thereafter her sister scolded her in filthy language and the family members also gave torture, due to that angry she committed mistake and no action may be taken against the accused. The statement recorded under Section 164 of Cr.P.C shows that she has not stated with whom she had physical relationship. By analysing the evidence of P.W.1 and



statements recorded under Section 164 of Cr.P.C and careful perusal of the entire evidence no sufficient evidence adduced by the prosecution to prove the case as against the accused and with this evidence it is not proper to hold that the prosecution has proved the charges levelled against the accused and the evidence of PW.1 is not trust worthy, thereby the prosecution has miserably failed to prove the case as against the accused.

27. Further the trial Court also after discussing about the evidence adduced by the prosecution had categorically come to conclusion that the prosecution failed to prove the charges levelled against the accused and acquitted the accused. So far as the offence under Section 366(A) of IPC is concerned this Court has already discussed in previous paras that as against the accused the offence under Section 366(A) of IPC would not attract since he himself alleged to have intercourse with the victim. So far as section 3 r/w. 4 of POCSO Act is concerned the prosecution failed to prove the foundation facts with regard to the commission of offence.

28. It is true, as per Sec. 29 of POCSO Act, there is a presumption as against the accused when he is facing trial for the offences u/s 3,5,7 and 9 of POCSO Act that he only committed the offence unless the contrary is proved. But the prosecution has to prove the prima facie case and foundation facts regarding the occurrence. But the available evidences are



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not sufficient to prove the foundation facts regarding the commission of offence. It is well settled law that the prosecution case can be demolished through cross-examination and in all cases, the accused need not examine the witnesses. In this case, the prosecution failed to establish the prima facie case and thereby presumption U/s 29 of POCSO Act would not arise. Therefore, there is no sufficient evidence adduced by the prosecution to prove the commission of offence and thereby the accused is entitled for acquittal.

29. Therefore as discussed supra this Court is of the opinion that the prosecution has failed to prove the charges levelled against the accused and the trial Court has correctly acquitted the accused, thereby there is no warrant to interfere with the judgment of the trial Court and this appeal is liable to be dismissed.

30. Accordingly the appeal is dismissed and the acquittal judgment passed by the trial Court in Spl.S.C.No.11 of 2015 on the file of the learned Sessions Judge, Mahila Court, Tiruchirapalli is hereby confirmed.

29. 09.2023

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P.DHANABAL, J.

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To

1. The Sessions Judge, Mahila Court, Tiruchirapalli
2. The Inspector of Police
Srirangam Police Station,
Tiruchirapalli
3. The Section Officer,
Criminal Records,
Madurai Bench of Madras High Court,
Madurai.
4. The Additional Public Prosecutor
Madurai Bench of Madras High Court,
Madurai.

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