



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 3.3.2023.

Delivered on: 31.3.2023.

CORAM

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Criminal Appeal (MD) No.59 of 2016

K.Anantha Perumal

Appellant

vs.

The Inspector of Police,
Theni Police Station,
Theni.
(Crime No.553/2012)

Respondent

Criminal Appeal filed under Section 374(2) of Cr.P.C. against the judgment dated 17.2.2016 made in Spl.S.C.No.57 of 2015 by the Sessions Judge (Mahalir Fast Track Court), Theni.

For Appellant : Mr.P.Chandrasekaran
for Mr.S.Chandrasekar

For Respondent : Mr.T.Senthil Kumar, APP

JUDGMENT

The Criminal Appeal has been filed by the appellant against the judgment of conviction dated 17.2.2016 made in Spl.S.C.No.57 of 2015 convicting him under Section 6 of Protection of Children from



Sexual Offences Act, 2012 and sentencing him to undergo 10 years rigorous imprisonment and to pay fine of Rs.10,000/-, in default to undergo rigorous imprisonment for a period of one year.

2. The allegation against the appellant/accused is that he had induced PW3, the victim minor girl by name Divya, daughter of P.Ws.1 and 2, made her to elope with him to Thekkadi and Coimbatore and had forcible intercourse with her.

3. The facts that give rise to filing of the present Criminal Appeal, in brief, are as under:-

i) PW1, the mother of the victim girl and wife of PW2, being resident of Sivaji Nagar, Theni, lodged a complaint, Ex.P1 on 23.8.2012 contending that on the fateful day, viz., on 23.8.2012, she went to give lunch to her son, who studies in Muthuraja School and when she came back, she found a communication calling her daughter for Nursing Counselling, but, Divya, who was awaiting for the counselling, was missing. She also claimed that the certificates and some dresses of her daughter were also missing and thereby, she informed her husband PW2, a retired Army staff and subsequently,



both PW1 and PW2 enquired their relatives as to whether their daughter went there. Whiles, PW5, Anbu, who is the son of sister in law of PW1 had informed her that her daughter and the appellant/accused had intimacy and thereupon, she had lodged the complaint by 6.30 pm on 23.8.2012 for tracing her daughter, which has been countersigned by PW2 as a witness to the complaint.

ii) On receipt of the complaint, Ex.P1, the Sub Inspector of Police, Theni Police Station, PW15 had registered the same in CSR No. 581/2012 and placed it before the Inspector of Police, PW14 for investigation.

iii) On 26.8.2012, PW14, the Inspector of Police registered the complaint in Crime No.553/2012 for offence punishable under Section 366(A) IPC, prepared the printed FIR, Ex.P8, took up the case for investigation and visited the scene of occurrence at 8.00 pm and prepared the observation mahazar, Ex.P9 and rough sketch, Ex.P10 in the presence of mahazar witnesses, PW8, Saravanan and PW10 Abbas. Then PW14 had enquired the witnesses, PW1 Rani, PW2 Kannan, PW4 Lakshmi, PW5 Anbu, PW8 Saravanan and PW10 Abbas and recorded



their statements. Subsequently, on 27.8.2012, PW14 had enquired the witnesses PW6 Vignesh, PW7 Mano and one Easwaran and recorded their statements.

iv) On 28.8.2012, at about 2.00 pm, PW14 had secured PW3 the victim girl and the appellant/accused, took them to the police station at about 2.15 pm and on obtaining statement from the victim girl at about 3.15 pm, arrested the appellant/accused and recorded his voluntary confession statement in the presence of witnesses, PW9 Mahendran and one Moovendran and thereafter, remanded the appellant/accused.

v) On 29.8.2012, PW14 had produced the victim girl and gave requisition to the court for subjecting the victim girl and the appellant/accused for medical check up.

vi) PW13, Dr.Juliyana Jayanthi, who examined the victim girl on 29.8.2012, had issued the Medical Report, Ex.P6 contending that her examination revealed that the victim girl was not virgin and symptoms were found to show that she had sexual intercourse. Further, PW13



had examined the appellant/accused on 30.8.2012 and issued the Medical Report Ex.P7 affirming his potency.

vii) On 30.8.2012, PW14 had enquired the witnesses PW12 Ananthi, PW11 Thirumalaichami and one Maheswaran and recorded their statements.

viii) On 3.9.2012, PW14, having received the Medical Reports, enquired PW13 Dr.Juliyana Jayanthi and PW15 Radha, Sub Inspector of Police and recorded their statements.

ix) On the same day, as an outcome of his investigation, PW14 had altered the case to one punishable under Sections 366(A) and 376 IPC and sent the Alteration Report, Ex.P11 to the court. Thereafter, on completion of investigation, PW14 had filed the final report on 3.9.2012 as against the appellant/accused for the offence punishable under Sections 366(A) and 376 IPC.

x) The final report was taken in P.R.C.No.13 of 2013 on the file of Judicial Magistrate, Theni. Summons were issued to the accused



and on his appearance, the learned Judicial Magistrate furnished copies of the relevant documents to the accused under Section 207 Cr.P.C. and finding that the offences alleged are exclusively triable by the court of Sessions, had committed the accused to the Principal District and Sessions Court, Theni and it was, in turn, made over to the Sessions Judge (Mahalir Fast Track Court), Theni in Spl.S.C.No.57 of 2015 for trial.

xi) On appearance of the accused and after hearing both sides, finding that prima facie case is made out, the Trial Court had framed the charges against the accused for offence punishable under Sections 366(A) and Section 376 IPC and when questioned, the accused pleaded not guilty and sought to be tried.

xii) During trial, the prosecution has examined P.Ws.1 to 15 and marked Exs.P1 to P11 and the evidence on the side of the prosecution came to be closed on 28.4.2015.

xiii) On closure of evidence of on the side of the prosecution, the Trial Court had proceeded to question the appellant/accused under



Section 313 Cr.P.C. on 5.8.2015 for which, the appellant pleaded not guilty.

xiv) Subsequently, on 16.11.2015 the appellant had examined himself as DW1 and the list showing SMS details was marked as Ex.D1 while a Pen Drive was marked as M.O.1. On the same day, the Trial Court had chosen to reframe the charges against the appellant/accused to that punishable under Sections 366(A) IPC and Section 6 of Protection of Children from Sexual Offences Act, 2012 and when the appellant/accused was confronted with the same, he had pleaded not guilty.

xv) Thereafter, the Trial Court, on hearing the learned counsel for both sides, found the accused guilty for the offence punishable under Section 6 of Protection of Children from Sexual Offences Act, 2012 and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/- in default to undergo rigorous imprisonment for a further period of one year, while acquitting him of the charges under Section 366(A) IPC.



xvi) Aggrieved against the judgment of conviction and sentence, the present Criminal Appeal has been filed by the accused.

4. Assailing the judgment of conviction and sentence, learned counsel Mr.P.Chandrasekaran appearing for the appellant submitted his arguments as under:-

i) The Trial Court has erred in rendering the judgment of conviction and sentence without properly considering the merits of the case of the appellant and the materials available on record.

ii) A careful reading of the testimony of the prosecution witnesses and the evidence adduced by DW1 would go to show that the appellant and the victim are close relatives, there was a love affair between them and they eloped from their homes and by the time of occurrence, the appellant was just crossing the age of 19 and the victim girl was 17 years old. Their elopement was on 23.8.2012 and they were secured by the police on 28.8.2012, thereby the alleged offence is stated to have been committed prior to 28.8.2012. PW3, the victim girl herself admits that she had taken her clothes and school certificates when she went alongwith the appellant, however, the



appellant did not bring any of his belongings. She also admits that she was hiding the cell phone provided by the appellant and she had sent several SMS to the appellant. The other prosecution witnesses also admit that the appellant and the victim girl are close relatives and there was a love affair between them. Such being the case, the conduct of the victim girl, as admitted by her, that she took her clothes and her educational certificates alongwith her would prove that she voluntarily eloped with the appellant/accused to get married with him and there was a consensual physical relationship between them during the period of their elopement which is also supported by medical evidence. Whiles, the evidence of the victim before court that the appellant/accused had forceful sexual intercourse with her is untrustworthy and does not inspire confidence. The Trial Court erred in believing the evidence of such untrustworthy witnesses which did not inspire confidence.

iii) Though the Trial Court framed charges against the appellant for offence under Section 366(A) and 376 IPC, later, having found that such offences are not attracted, had hastily altered the same to one under Section 366 (A) IPC and Section 6 of POCSO Act without proper



opportunity to the appellant to defend the same, with pre-determination to convict the appellant and ultimately, convicted him under Section 6 of POCSO Act alone.

iv) The Trial Court has erred in convicting the appellant under the provisions of POCSO Act, 2012 when the prosecution has failed to establish that the victim girl/PW3 was below the age of 18 years as on the date of occurrence by producing any documentary evidence to attract the provisions of the Act.

v) Even according to the prosecution, the offence is alleged to have been committed during the period between 23.8.2012 (eloped) and 28.8.2012 (secured). When the POCSO Act itself came into force on 14.11.2012, the Trial Court erred in altering the charge for offence under Section 6 of POCSO Act and also erred in not affording opportunity to defend the case for the altered charge and erred in convicting the appellant under the said provision.

vi) The Trial Court has erred in relying upon the testimony of the victim girl/PW3, which was not trustworthy as it was inconsistent and



contradictory and not corroborated by other prosecution witnesses, to convict the appellant.

vii) The Trial Court has committed error in convicting the appellant by finding that the appellant had committed penetrated sexual assault on the victim girl when the medical evidence viz., the testimony of PW13, the Doctor, who examined the victim girl does not prove the same.

viii) The Trial Court has not properly considered the evidence of DW1 and the list showing the SMS details and the Pen Drive containing such details produced by the appellant to prove the cordiality and intimacy between the victim girl and the appellant before convicting the appellant and hence, the judgment of conviction and sentence is liable to be set aside.

5. Per contra, Mr.T.Senthil Kumar, Additional Public Prosecutor has submitted his arguments as under:-

i) The Trial Court has convicted and sentenced the appellant only after thoroughly considering the entire evidence and therefore, it does



not require any interference.

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ii) The evidence of the victim girl and her mother prove that the girl was awaiting the call letter for Nursing Counselling which goes to prove that she had not completed the age of 18 and further, her evidence clearly proves that she was induced by the appellant to elope with him and subjected to aggravated penetrative sexual assault, attracting the provisions of POCSO Act.

iii) The Trial Court, considering the totality of the circumstances and the evidence adduced on either side, has come to the conclusion that the appellant has committed the aggravated penetrative sexual assault and convicted and sentenced him therefor.

iv) Though there is an error in the Trial Court altering the charge and finding the appellant guilty for offence under Section 6 of POCSO Act, the appellant/accused had not raised any objection when the charges were altered and he had, without making any protest, examined himself as a defence witness. The Criminal Procedure Code is sufficiently flexible for altering the charges to meet the ends of



justice rather than justice being defeated by technical rigidities.

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6. Placing reliance on the decision of the Full Bench of the Apex Court in ***Rohtas and another vs. State of Haryana*** (2020) SCC OnLine SC 1014, the learned Additional Public Prosecutor would submit that alteration of charges is permissible even at the appellate stage and improper framing or non-framing of charges by itself cannot be a ground for acquittal under Section 464 Cr.P.C and the appellate court, relying upon the evidence, can hold that the appellant/accused is guilty for offence punishable under Section 376 IPC. He would also submit that the offence committed by the appellant on the victim minor girl being a heinous one, the appellant is not entitled to any indulgence by this court and thus the Criminal Appeal is liable to be dismissed.

7. In reply, the learned counsel appearing for the appellant/accused would submit that even taking into consideration the available materials, the evidence of the victim girl does not inspire confidence and it, being untrustworthy and unreliable, cannot form basis for convicting the appellant even for offence under Section 376 IPC and thereby he would seek to allow the Appeal.



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8. Heard the learned counsel appearing for the appellant, the learned Additional Public Prosecutor and perused the materials available on record.

9. The case of the prosecution is that the appellant had been teasing the victim minor girl/PW3 in several ways from the year 2008 when she was studying 9th standard and ultimately, on 23.8.2012, he induced her to elope with him and thereupon, he took her to several places like Thekkadi and Coimbatore and had forcible intercourse with her whereas, the case of the appellant is that he is related to the victim girl and it was a consensual relationship and there was no force or coercion by him and in fact, it was the victim girl, who had insisted him to take her away from her home as her mother had changed her initial proposal to give the girl in marriage to the appellant and if the appellant does not take her with him, she would commit suicide and to save his fiancée, he took her away from her home and since she was a minor by then at the verge of attaining the age of majority, they were staying at his friends houses and thereby he had not committed any offence however, the Trial Court, after completion of evidence on the



side of the prosecution, and questioning the appellant under Section 313 Cr.P.C. and having found that Sections 366(A) and 376 IPC are not attracted, had altered the charge to one under Section 6 of POCSO Act and convicted and sentenced the appellant under the provisions of POCSO Act which was not at all brought in force by the time of the alleged occurrence.

10. It is very pathetic that a girl, claimed to be 17 years old at the time of occurrence, who is the daughter of an Ex-Army employee, was intrigued to indulge into a love affair inviting trouble to both herself and her counterpart. The conviction and sentence of her counterpart under Section 6 of POCSO Act has resulted in filing of the present Appeal.

11. Section 6 of POCSO Act reads as under:-

"Whoever, commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life and shall also be liable to fine."



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12. The object of this legislation is to protect the minor children at their tender age from sexual offences and ensure that they are not abused and their childhood is protected against exploitation, but, not to criminalize the relationship among the minors and it was never intended to penalize the teenagers in relationships. No doubt, voluntariness of the minor victim cannot be a defence in offences under the POCSO as consent of a minor or the child and it is immaterial.

13. "Child" is defined in the POCSO Act as any person below the age of 18 years and thus, to attract the provisions of POCSO Act, the victim should be below the age of 18 years as on the date of occurrence.

14. In the case on hand, the elopement of the appellant and the victim girl, PW3 is said to have taken place on 23.8.2012. The evidence of PW3, the victim girl is that her date of birth is 1.9.1995, but, during the cross-examination, she had admitted that her date of birth is reflected as 1.5.1995 in her school certificate. Other than the



oral evidence, no steps have been taken by the prosecution to prove the age of the victim in the manner known to law, whereas, the medical evidence viz., Ex.P6, the Medical Report dated 29.8.2012 issued by PW13, Dr.Juliyana Jayanthi, who had examined the victim girl shows the age of the victim girl as 18, which has also been vouched by the Doctor during her testimony and added to that she would depose that the girl aged 18 years was brought for examination and on her examination, she found physical as well as mental development of the girl was in proportion to the age claimed by the girl.

15. If the version of PW3, the victim girl during her chief examination is taken as correct, she was at the verge of completing 17 years and lacking week's time alone. If the school certificate is assumed to be reflecting the correct date of birth, viz., 1.5.1995, then she could have completed 17 years and 4 months. But, if the medical version proves that the girl herself had claimed that she was 18 years old when she was examined on 29.8.2012, viz., after six days from elopement.

16. Further, as rightly pointed out by the learned counsel for the



appellant, the POCSO Act itself came into force only on 14.11.2012, almost three months after the date of the alleged occurrence, prescribing the age of consent as 18 instead of 16, which prevailed by then and such being the legal position, the Trial Court has proceeded to alter the charges against the appellant from Section 376 IPC to one punishable under Section 6 of POCSO Act and convicted him thereunder without providing proper opportunity to the appellant to put forth his case. Thus, the conviction and sentence of the appellant under Section 6 of the POCSO Act applying them retrospectively is, certainly, bad in law.

17. Now, taking into consideration the submission of the learned Additional Public Prosecutor, what is to be seen is whether, on the set of evidence available, the appellant can be convicted under Section 376 IPC by altering the charge against him to one punishable under Section 376 IPC.

18. Of course, the Full Bench of the Apex Court in ***Rohtas and another vs. State of Haryana*** (2020) SCC OnLine SC 1014 has held that improper or non-framing of charge by itself is not ground for



acquittal under Section 464 Cr.P.C. and the charges can be altered even at the appellate stage.

19. But, in the case on hand, on one side, much contradictions exist with regard to the correct age of the victim girl, however, the prosecution has not taken any efforts to establish the correct age of the victim girl and the Trial Court has also proceeded to convict the appellant under the provisions of POCSO Act by altering the charges from one under Section 376 IPC without affording proper opportunity to the appellant to putforth his case.

20. On the other hand, there exist much contradictions and untrustworthy version in the evidence of PW2, the victim girl. Though she claims that she was subjected to forcible sexual assault by the appellant, contrary to that, she had accompanied the appellant to many places, especially public places like restaurant, hostel and a Sub Registrar's office at Coimbatore for registering the marriage without any protest and in fact, she admits that she alone had taken her clothes and her school certificate with her when she went alongwith the appellant, whereas, the appellant had not taken his belongings.



She also admits that since she also loved the appellant, she had kept the cell phone given by the appellant secretly and she had sent several SMS to the appellant.

21. A perusal of the testimony of the prosecution witnesses including that of the victim girl shows that a consensual teenage relationship that existed between the appellant and the victim girl has been messed up at the level of their parents and relatives and thereby both appellant and the victim girl were muddled resulting in their elopement inviting further complication.

22. The evidence of PW3 would speak much on the above aspect. During her chief examination, she tries to stick on to the stand that she was induced by the appellant and subjected to sexual intercourse without her consent, whereas, the defence had elicited during her cross-examination that she had not taken any effort to walk away from his relationship despite several opportunities were there, rather, it is the victim girl, who had insisted the appellant to take her away from her home, however, subsequently, they developed some dispute between themselves upon her intention to proceed with her



studies viz., Nursing Course. The above aspects have been probalised by her admission that she alone had taken her belongings and certificates while she eloped, but, the appellant did not do so and further, she was secretly keeping the cell phone given by the appellant and had sent several SMS to the appellant. PW7, Pandian, in whose residence, the appellant and the victim girl were said to have been staying for four days after their elopement also affirms about non-bringing of belongings by the appellant. He speaks in his evidence that the appellant and the victim girl came to his house during August 2012 and that the appellant had informed him that they had come out of their home since their affair was known to their families and since he did not bring his certificates, he sought for permission for the stay of the victim girl in their house for four days.

23. The consensual relationship between the appellant and the victim girl, PW3 has been spoken by PW4, Lakshmi, aunt of the victim girl and such acquaintance has been admitted by PW3 in her cross-examination.

24. Above all, the case of the prosecution alleged against the



appellant viz., aggravated penetrative sexual assault committed on the victim girl has been falsified by the medical evidence viz., Ex.P6 Medical Report issued by the Doctor PW13 and her testimony affirming the contents of the Medical Report, however, the prosecution has not taken any initiative to prove its case, whereas, the appellant has proved his case of consensual relationship by producing Ex.D1 list showing the details of SMS sent by the victim girl to him and M.O.1 Pen Drive also in that regard. However, the Trial Court, without properly considering the fact that the prosecution has failed to establish the commission of offence by the appellant, while the appellant has come out with strong piece of evidence to prove his case, erred in convicting the appellant and thus, the judgment of conviction and sentence rendered by the Trial Court is liable to be set side.

25. Further, to recapitulate, the period of elopement is between between 23.8.2012 (eloped) and 28.8.2012 (secured). The POCSO Act came into effect from 14.11.2012. Article 20(1) of the Constitution of India signifies that no penal provision can be given retrospective effect and thus, it is clear that the appellant cannot be



penalised for the occurrence that has taken place prior to the penal provision coming into force.

26. In the result, the Criminal Appeal is allowed setting aside the judgment of conviction and sentence rendered by the Sessions Judge (Mahalir Fast Track Court), Theni dated 17.2.2016 in Spl.S.C.No.57 of 2015 and acquitting the appellant of all the charges. The appellant is on suspension of sentence and bail. He is not required to surrender. Bail bond executed, if any, shall stand cancelled. Fine amount paid, if any, shall be refunded to the appellant.

31.3.2023.

Index: Yes/No.
Internet: Yes/No.
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To

1. The Sessions Judge,
(Mahalir Fast Track Court),
Theni.
2. The Inspector of Police,
Theni Police Station, Theni.
3. The Public Prosecutor,
Madurai Bench of
Madras High Court, Madurai.



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A.D.JAGADISH CHANDIRA, J.

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P.D. JUDGMENT IN
Criminal Appeal (MD) No.59 of 2016

Delivered on
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