



CrI.A(MD) No. 79 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 13.09.2023

Pronounced on: 10.11.2023

CORAM:

THE HONOURABLE MR. JUSTICE P.DHANABAL

CrI.A(MD) No. 79 of 2017

K.Tamilarasan

Appellant

Vs.

State by
The Inspector of Police,
Velliyanai Police Station,
Karur District (Cr.No.279 of 2015)

Respondent

Prayer: Criminal Appeal filed under Section 374(2) Cr.P.C. to set aside the judgment passed against the Appellant on 09.02.2017 in S.C. No.45 of 2015 on the file of the learned Fast Track Mahila Court, Karur and acquit him from the charge and thus render justice.

For Appellant : Mr.J Agni Selvaraju
For Respondent : M.Aasha (Govt. Advocate CrI Side).

JUDGMENT

This Criminal Appeal has been preferred as against the judgment and conviction passed by the Fast Track Mahila Court, Karur, in Sessions Case No.

45 of 2016. Wherein the Trial Court has convicted the accused for the offences



Crl.A(MD) No. 79 of 2017

under Section 366 of IPC and sentenced to undergo 10 years rigorous imprisonment and to pay fine of Rs.5000/- in default to undergo 1 month simple imprisonment and convicted under section 5(l) read with Section 6 of POCSO Act and sentenced him to undergo 10 years rigorous imprisonment and to pay a fine of Rs.5000/- in default to undergo simple imprisonment for one month and both the sentences are running concurrently. As against the judgment and conviction present appeal has been filed by the accused.

2. The case of prosecution before the Trial Court is that the accused and the victim were working in the Brick Kiln in the same place. While so on 27.12.2015 at about 6 p.m. when the victim was aged about 15 years, the accused taken her to the coconut grove near to the Brick Kiln and committed penetrative sexual assault two times, thereafter he took her to the water tank near to the Brick Kiln and then he left from there. Thereafter the victim told about the same to her maternal uncle. On the date of occurrence, the parents of the victim were not in the brick kiln and went to their native place at Villupuram. Thereafter the maternal uncle informed the occurrence to the parents of the victim and they came to Karur on the next date i.e., on 29.05.2015 and then they went to the police station and gave a complaint/ Ex.P1. Based on the said complaint PW13/Sub Inspector of police registered FIR/Ex. P10 in Crime No.279 of 2015 under Section 4 of POCSO Act.



Thereafter, PW15/Inspector of Police had taken over the case for investigation and examined the witnesses, recorded their statements and collected some documents and filed a final report as against the accused for the offences under Section 366 of IPC and section 5 (1) read with 6 of POCSO Act. Thereafter the Special Court has furnished the copies of the documents relied on by the prosecution to the accused under Section 207 of Cr.PC. After hearing both sides, the Special Court has framed the charges as against the accused for the offences under Section 366 of IPC and section 5 (1) read with 6 of POCSO Act and the said charges were explained and read over to the accused but he denied the charges as false. The prosecution has examined PW1 to PW17 and marked Ex.P1 to Ex.P12 and no witnesses were examined and no documents were marked on the side of the accused. After completion of prosecution evidences, the Trial Court has examined the accused under Section 313(1)(b) Cr.PC with regard to the incriminating circumstances available against the accused and he denied the same.

3.After elaborate discussion and evaluating the oral and documentary evidences adduced on either sides, the Special Court found the accused guilty for the offences under Section 366 of IPC and Section 5 (1) read with Section 6 of POCSO Act and sentenced the accused to undergo 10 years rigorous imprisonment and to pay fine of Rs. 5000/- in default to undergo 1 month



simple imprisonment for each offence. As against the said Judgment and conviction the appellant/accused has preferred this appeal on the following grounds:-

- (a) The Judgment of the Sessions Judge Karur is against the probabilities, facts and evidence available on record and the judgment is based on only presumptions, surmises and conjuctres.
- (b) The Trial Court failed to consider the inordinate delay in lodging the complaint and failed to examine the independent witnesses available near the scene of occurrence.
- (c) The Trial Court failed to consider that the witnesses PW1, 2, 3, 4 and 14 are the interested witnesses and other witnesses are close relatives of the PW1.
- (d) The Trial Court failed to consider that the case was registered as against the appellant only for threaten of marriage by the victim and the evidence of PW1 and 2 also reveals the same and the victim also fell in love with the accused for the past three years.



(e) The Trial Court failed to consider that there are major contradictions between the evidence of PW2 and her previous statements recorded under Sections 164(5) and 161 (3) of Cr.PC.

(f) The Trial Court failed to consider that PW2 herself in her evidence admitted that the accused did not touch her due to the reason that she was on menstrual period.

(g) The Trial Court failed to consider that the prosecution has failed to prove the place of occurrence mentioned as coconut grove but the PW2 in her statement before the learned Magistrate under Section 164 of Cr.PC mentioned as Thuvaraikadu/Pigeon Peas field.

(h) The Trial Court failed to consider that PW2 had been unconscious after being aggravated penetrative sexual assault but in the statement recorded under Section 164 Cr.P.C, she had stated that she had been unconscious before being penetrative sexual assault.

(i) Further the Trial Court failed to consider that as per the evidence of PW2 the accused had bitten the victim on her breast and there were nail marks but the aforesaid evidence had not been corroborated by the evidence of doctor PW7 and the evidence of P.W.1 is not tallied with the medical evidence.



WEB COPY

(j) The Trial Court failed to consider that as per the evidence of PW1 and 2 the FIR has been registered on 28.01.2015 after 6 pm but Ex.P10 reveals that the FIR was registered on 28.12.2015 at around 2.30 p.m. and PW15 investigation officer also prepared sketch and observation mahazar on 28.12.2015 at around 3.30 p.m. therefore, there are various contradictions between the evidence of PW1 and PW2 and the prosecution case.

(k) As per the evidence of prosecution witnesses, the accused was present in the police station but the investigation officer stated that the accused was arrested on the next day in a different place. The above said discrepancy has not been considered by the Trial Court.

(l) Further the Trial Court failed to consider that there were no injuries found on the back side of the victim girl when the occurrence took place on soil bund.

(m) The Trial Court failed to consider that the dresses worn by the victim at the time of occurrence have not been seized and sent to the Forensic Laboratory by the prosecution agency and the Trial Court failed to consider that as per the doctor evidence there is no chance to cause the intact of hymen



within 1 week from the date of her examination. The victim was subjected for medical examination immediately after two days from the date of alleged occurrence. While so the evidence of doctor shows that the victim was not subjected for penetrative sexual assault within one week from the date of examination. The above said fact has not been considered by the Trial Court.

4.1. The learned Counsel appearing for the Appellant would contend that the prosecution has failed to prove the charges levelled against the accused that the accused had kidnapped the victim and had illicit intercourse with her and further he committed the aggravated penetrative sexual assault towards the victim. In this case the prosecution has examined PW1 to PW17 and marked Ex.PI to P12 but the evidence of PW2 is not cogent and her evidence is highly doubtful and in one place she has stated that the accused closed her mouth by handkerchief and then taken to the coconut grove and had committed penetrative sexual assault. In another place, she stated that when the accused closed her mouth through handkerchief she became unconscious and thereafter he had taken her to the coconut grove and had committed sexual assault and after becoming conscious she asked the accused, what was happened and he told that he committed wrong. Then again the accused committed penetrative sexual assault when she was conscious, these versions are unbelievable. Further the victim herself admitted that she fell in love with the accused and she voluntarily went to the coconut grove along with accused



and the accused had only conversation with her and the accused did not touch her due to her menstrual period. Further the doctor who treated the victim has also deposed that the victim was subjected for medial examination and the hymen was not intact and she was subjected for sexual intercourse but no chance to have sexual intercourse within one week. The specific prosecution case is that the occurrence took place on 27.12.2015 and the victim was medically examined on 31.12.2015 i.e., within three days the victim was examined by the doctor and thereby the medical evidence is not tallied with the evidence of PWI with regard to the occurrence.

4.2. Further the Trial Court failed to consider the discrepancies found on the evidence of PW2 with regard to the manner of occurrence and further the prosecution case is that the occurrence took place in the coconut grove but the victim during the course of examination by the learned Magistrate under Section 164 of Cr.PC, she stated that the occurrence took placed in the thoor dhall field. Therefore, the prosecution has failed to prove the foundational facts with regard to the commission of offence and the accused is entitled to the benefit of doubt. The Trial Court failed to consider the aforesaid aspects and wrongly convicted the accused. Therefore, the judgment and conviction passed by the Trial Court are liable to be set aside by allowing this appeal.



5.The learned Government advocate (Criminal Side) appearing for the respondent would contend that the accused and the victim are known to each other and they were working in the Brick Kiln. On the date of occurrence the accused had taken the victim to the coconut grove and had committed penetrative sexual assault twice. In order to prove the offence, the prosecution examined PW1 to P17 and had marked Ex.P1 to P12, PW1 is the mother of the victim and deposed about the lodging of the complaint and PW2 is the victim in this case and she had categorically deposed about the manner of occurrence and that the accused had taken the victim to the coconut grove and committed penetrative sexual assault. The Investigation Officer also deposed about the fair investigation conducted by him and as per his investigation the accused had committed the aggravated penetrative sexual assault and thereby the Trial Court also after elaborate discussion had found the accused guilty for the offence under Section 366 of IPC and Section 5 (I) read with Section 6 of the POCSO Act. The prosecution has proved the case as against the accused and as per Section 29 of the POCSO Act the presumption is in favour of the prosecution and the accused has to prove the contrary. In this case the prosecution has failed to prove the contrary and thereby the Trial Court has correctly convicted the accused for the offences under Section 366 of IPC and Section 6 of the POCSO Act. Therefore, the present appeal is liable to be dismissed.



WEB COPY

6. This court heard both sides and perused the records. Upon hearing both sides and perusing the records, the judgment of Trial Court and grounds of appeal the points of determination in this appeal are:-

(i) Whether the prosecution has proved the charges levelled against the accused for the offences under Section 366 of IPC and Section 6 of POCSO Act?

(ii) Whether the judgment and conviction of Trial Court are sustainable in law and on facts?

Points:

7. The Prosecution case is that the victim was aged about 13 years on the date of occurrence and she was working in the Brick kiln. The accused also was working with her and also residing near to the Brick Kiln. On 27.12.2015 at about 6pm the accused had taken the victim to the coconut grove and had committed penetrative sexual assault. After occurrence he took the victim near to the water tank and then dropped her there and went away from that place. Therefore he has committed the offences under Section 366 of IPC and Section 5 (I) of POCSO Act read with Section 6 of POCSO Act. In order to prove the charges levelled against the accused, the prosecution has examined witnesses PW1 to PW17 and also marked Ex.P1 to P12. The PW1 is the de



facto complainant as well as the mother of the victim and she deposed about of the lodging of the complaint and the occurrence happened to her daughter.

8. PW2 is the main witness in this case and she deposed before the Trial Court that she was aged about 13 years and she studied up to 7 standard at Thiruvurthyur at Vilrampattai Panchayat Union Middle School and she was working in Brick Kiln along with her parents in Karur district. The accused and his mother were also working in the same Brick Kiln and they both were working and residing near the same Brick Kiln. Thereby she is well acquainted with the accused and his mother. While so, on 27.12.2015, at about 6pm, the accused promised her to marry and she also consented for that. Thereafter he also called her to the coconut grove and he also stated that if she had not consented for committing wrong he would die and further she stated that after her marriage they can have that but the accused compelled her to come and she also stated that she was under menstrual period. In spite of that the accused called her and taken her to the coconut grove and placed the handkerchief on her face. After three hours, when she woke up she realized that her chudidar pant was removed up to her knee, immediately she asked the accused what happened and he replied that he committed wrong. Thereafter the accused again had sexual intercourse with her. Thereafter she asked the accused to take her to her house. Thereafter he took her up to the water tank. At that time her maternal uncle and paternal uncle were searching for her. After seeing her they



asked where did she go, she told that she went for bathroom. Again her maternal uncle asked by beating her and thereafter she narrated the happenings, thereafter her uncle informed the same to her parents.

9. Thereafter her maternal uncle asked the accused about the occurrence and requested to marry her but he denied the wrong committed to her and also refused to marry her and he stated that he had not touched the victim and had only conversation with her. Again her uncle asked her whether the statement of accused is true or not and she replied yes true. Thereafter they went to police station and gave a complaint. After sometime she was taken to the hospital where she was examined by the doctor. Therefore, from the evidence of PW1, it reveals that the accused called the victim to the coconut grove and he also stated that if she had not consented for committing wrong he would die and she replied that after their marriage they can have that but the accused compelled her to come and she also stated that she was under menstrual period, in spite of that the accused called her and taken her to the coconut grove and placed the handkerchief on her face, after three hours, when she woke up she realized that her chudidhar pant was removed upto her knee, immediately she asked the accused what happened and he replied that he committed wrong. Thereafter the accused again had sexual intercourse with her, but the same PW1 in later part of her evidence stated that when her uncle



asked about the accused she stated that the accused not even touched the victim since she was under menstrual period. When again the same was asked to the victim she said yes the statement of accused that he did not touch her is true. While so the reasonable doubt would arise, about the evidence of P.W.1 and as to whether the occurrence was happened as alleged by the victim.

10. The victim herself admitted that her uncle asked the accused to marry her but he refused for the same. Further the PW2 was examined by the learned Magistrate and under Section 164(5) of Cr.PC and the statement was marked as Ex.P9. On careful perusal of Ex. P9 it reveals that the victim fell in love with the accused for the past three years, the accused taken her to the Thoor Dhall field and placed the handkerchief on her nose and thereafter she became unconscious for three hours and after becoming conscious she knew that her pant was removed up to her knee, immediately she asked the accused and he stated that the accused had committed wrong with her and further she stated that she requested to marry her and he also promised to marry her and after she became conscious, he again raped her, thereafter he taken her to the water tank, dropped her and left from that place. Thereafter she narrated about the incident to her maternal uncle Murugan and then the same was informed to her parents who were in the native place at Villupuram. Thereafter her



relatives asked the accused to marry her but he refused, thereby the complaint was given.

11. Therefore, according to the statement given by the victim before the Magistrate the occurrence took place at Thoor dhal field but according to the prosecution, the occurrence took place at the coconut grove. According to the statement of PW2 that is Ex.P9, the accused lifted her to the Thoor dhal field but the evidence of PW2 reveals that the accused taken the victim to the coconut grove, where he placed the handkerchief on her nose and she became unconscious. Therefore, the above said statement is contra to the evidence of victim/P.W.2 and there are major contradictions between the evidence of P.W. 2 and the statement recorded under Section 164 (5) with regard to the manner of occurrence. It is well-settled law that the evidence recorded under Section 164 (5) of Cr.P.C, it can be used for corroboration or contradiction. In this case the evidence of PW2 is totally contradictory to the previous statement recorded under Section 164 (5) of Cr.PC.

12. Further in this case the prosecution has examined PW7/doctor and she also deposed in her evidence that she examined the victim on 30.12.2015 and she told that on 27.12.2015, the accused promised to marry her and taken her to the coconut grove and where committed rape on her, thereafter she



became unconscious and after conscious, again the accused committed rape on her. At that time she was on her menstrual period. On examination it was found that there was no intact of hymen in her private parts and no sperms found. Thereafter there are no symptoms of having recent sexual intercourse. To that effect Ex P7 also issued and the same revealed that no intact of hymen and no sperms found and no evidence for recent sexual intercourse. However, the same PW7 in her cross-examination stated that it is true that merely because of non-intact of hymen it cannot be said that she had sexual intercourse and further stated that there are chances to have sexual intercourse and she admitted that in general the hymen could be ruptured due to cycling and sports activities, therefore, the medical evidence is also reveals there is a possibility of having sexual intercourse but PW7 herself admitted that there is a possibility of having sexual intercourse.

13. In this case, the evidence of PW1 itself is highly doubtful and the medical evidence is to corroborated the evidence of P.W.2 and thereby, the evidence of P.W.7 alone is not sufficient to prove the prosecution case. Further according the to evidence of PW2/victim. the accused caused injuries on her breast and chin and also she sustained injuries on her body. But P.W.7 stated that no bite marks and nail marks on the breast of the victim and further she stated that when a person having intercourse in the normal surface there may be chances of having aberrations and signs on the body, also P.W.7 stated that



there is no injury on the chin of the victim. Therefore, the evidence of the victim with regard to the injuries sustained by her are not tallied with the medical evidence and thereby the reasonable doubt would arise about the prosecution case as to whether the occurrence happened as alleged by the prosecution.

14. The case of defence is that the de-facto complainant and her relatives wanted to have marriage between the victim and the accused but the accused refused for the same and thereby the complaint has been lodged. In this context the PW1 in her evidence stated that at the time of occurrence her daughter was aged about 13 years but she gave a complaint as 16 years, for the reason that if the age is higher then they can have marriage with the accused that's why she stated her age as 16 instead of 13. Further during the cross-examination she admitted that it is true that in order to do marriage between the accused and the victim she stated the age of the victim as 16 instead of 13.

15. The PW2 also in her evidence stated that she fell in love with the accused and the accused refused to marry her and her maternal uncle also requested the accused to marry her but he refused. Therefore, the evidence of PW1 and PW2, they reveal that they want to solemnize marriage between the accused and the victim but the accused refused to marry her. Therefore, the



defence theory has been probabalised and the evidences adduced on the side of the prosecution are highly doubtful and the prosecution has failed to prove the foundational facts with regard to the commission of offence. PW15 who is the Investigating Officer in his evidence stated that the occurrence took place at Soil Band. While so, as per the evidence of doctor there would be chances to sustain aberrations and signs on the back side of the victim but the medical evidence is totally contrary to the prosecution case.

16. In this case, there is no contravention that the victim was child on the date of occurrence and the accused also did not deny the age of the victim as per the evidence of PW 3 the date of birth of the victim was 16.02.2002 since the accused himself has not denied the age of the victim and childhood, this court need not go further in this aspect and hold that the victim was child on the date of occurrence. The Trial Court also correctly came to the conclusion that the victim was child on the date of occurrence. However, the trial Court failed to note that the evidence of PW2 is highly doubtful and her evidence does not inspire confidence. Further PW1 and PW2 categorically stated that after giving complaint the police had taken the accused to the police station and he was also present in the police station. But PW15 in his evidence stated that he arrested the accused on 20.09.2015 at about 7 p.m. near the bus



stop, Uppidamangalam, therefore, the arrest of the accused also creates serious doubt over the prosecution case.

17. Further as per the prosecution case during the course of occurrence the dress of the victim got blood stains and her bangles were also broken. While so Investigation Officer failed to recover the same. In this contest, PW1 during her cross-examination stated that she went to the place of occurrence and saw that her daughter's bangles were broken and there were blood stains and the dress worn by her daughter were also torn but the dresses were not handed over to the police. This also creates a serious doubt to the prosecution case. Further, PW2 who is the victim in this case also admitted that after arrival of her parents they asked the accused to marry the victim and since he refused they gave a complaint before the police. Further she stated in her evidence that when she was conscious, the accused while attempted to have sexual intercourse, she has not resisted, when again he attempted to have intercourse, at that time, she resisted and her dress were torn and her bangles were also broken and she sustained injuries on her chin and also the accused had bitten on her breast and she sustained injuries. But as per medical evidence, she did not sustain injuries on her back. Further she also stated that the injuries sustained by her were told to doctor and the doctor also recorded the injuries. Therefore, even according to evidence of victim during the course



of occurrence her bangles were broken and dress was also torn but the said broken bangles and the torn dress materials were not seized by the prosecution agency. These are all the major discrepancies which affect the root of the case but the Trial Court has failed to consider the same and wrongly came to the conclusion that prosecution has proved the charges levelled against the accused.

18. As far as Section 366 of IPC is concerned, there is no evidence that the accused kidnapped the victim and had illicit intercourse with her and the evidence adduced on the side of the prosecution are filled with doubts. Particularly the evidence of the victim is highly doubtful and does not inspire confidence of this court thereby the prosecution has failed to prove the charge levelled against the accused for the offence under section 366 of IPC. As far as Section 6 of POCSO Act is concerned the evidence of PW2 is highly doubtful and does not inspire confidence of this court and further there is no sufficient evidence adduced by the prosecution that the accused committed aggravated penetrative sexual assault as defined under Section 5 (1) of the POCSO Act that the accused committed penetrative sexual assault towards the victim more than once or repeatedly. Therefore, the prosecution has failed to prove the charges levelled against the accused for the offence under Section 366 of IPC and Section 5 (1) read with Section 6 of POCSO Act but the Trial Court



without considering facts stated supra wrongly convicted the accused and thereby the judgment and conviction of the Trial Court are unsustainable and are liable to be set aside.

19. It is true that under Section 29 of the POCSO Act there is a presumption in favour of the prosecution and the accused has to prove the contrary when the charges were under Sections 4, 6 and 8 of the POCSO Act, but at the same time the prosecution has to establish the prima-facie case that is foundational facts with regard to the commission of offence and then only the accused has to prove the contrary. In this case the prosecution miserably failed to prove the foundational facts with regard to the commission of the offence. Therefore the presumption under Section 29 of the POCSO Act would not attract in this case. Therefore, as discussed above, this court is of the opinion that the prosecution has failed to prove the charges levelled against the accused for the offence under Section 366 of IPC and section 6 of POCSO Act.

20. The Learned Counsel appearing for the respondent has argued that the grounds raised by the appellant with regard to non following of the mandatory procedures of the POCSO Act no way affect the prosecution case and in fact the accused cannot take advantage of the lapses committed by the prosecution. To support her contention, she relied on a judgment *in Crl A.No.*



Crl.A(MD) No. 79 of 2017

261 of 2014 in Damodhar Vs. The State of Maharashtra, through Police

Station Officer CDJ 2015 BHC 3030 dated 12.08.2015. Wherein the High

Court of Maharashtra in para 13 held as follows:-

"In fact the investigating agency requires to be sensitive in such matters. The object and purpose of the said provisions is to see that the child, who has already been victimised by the perpetrator of the crime, should not be subjected to recording of statement at the police station by a male officer in uniform thereby again making her uncomfortable and casting mental trauma. In that view of the matter, though the procedure prescribed under Section 24 of POCSO Act, is not followed, it cannot be used to benefit the accused."

21. On careful perusal of the aforesaid judgment it is clear that if any violations of procedure in recording statement of victim the same cannot be used to the benefit of accused and the object and purpose of the POCSO Act is to see that the child who has already been victimised by the perpetrator of the crime, should not be subjected for uncomfortable and mental trauma. If any procedures of POCSO Act are not followed the same cannot be used for the benefit of the accused.

22. The appellant raised a ground that the procedures under Section 24 of the POCSO Act have not been followed. In view of the aforesaid judgment the accused cannot take advantage of the procedural lapse. Further in this case



Crl.A(MD) No. 79 of 2017

there is no proof that the procedures under Section 24 of the POCSO Act has been violated.

23. In the result, this criminal appeal is allowed and the judgment and conviction passed by the Trial Court in S.C.No. 45 of 2016 on the file of the Sessions Judge, Fast Track Mahila Court, Karur are set aside and the accused is acquitted from the charges under Section 366 of IPC and Section 5(l) read with Section 6 of the POCSO Act and he be set at liberty subject to other cases if any, bail bond if any executed by the accused shall stand cancelled, the fine amount paid by the accused shall be refunded to him.

10.11.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
NST/mpa



WEB COPY



Crl.A(MD) No. 79 of 2017

P.DHANABAL, J.

mpa

Copy to

1. The learned Fast Track Mahila Court, Karur.
2. The Inspector of Police, Velliyanai Police Station. Karur District.

Criminal Appeal (MD). No.79 of 2017

10.11.2023