



Crl.A(MD). No. 9 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on: 13.09.2023

Pronounced on: 10.11.2023

CORAM:

THE HONOURABLE MR. JUSTICE P.DHANABAL

Crl.A(MD). No. 9 of 2017

Sivasamy

Appellant

vs.

State by Inspector Of Police,
Thirukkattuppali Circle,
Thanjavur District.
(Crime No. 125/2014)

Respondent

Prayer: Criminal Appeal filed under Section 374 (2) Cr.P.C. to set aside the conviction and sentence imposed against the appellant/accused by the learned Sessions Judge/Mahalir Neethimandram (Fast Track Mahila Court), Thanjavur in Special Case No.20 of 2014 and acquit the appellant/accused.

For Petitioner :Mr.R.Anand for M.Saravanan

For Respondent :Mr.M. Sakthi Kumar
(Govt. Advocate Crl.Side).



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JUDGMENT

WEB COPY This appeal has been preferred against the judgment and conviction passed by the learned Sessions Judge/ Mahalir Neethimandram [Fast Track Mahila Court), Thanjavur bearing Sessions Case No.20 of 2014 dated 29.11.2016. Wherein the Special Court has convicted the accused for the offences under Section 366 of IPC and Section 6 of "Protection of Children from Sexual Offences Act, 2012" (in short "POCSO Act, 2012). The Trial Court sentenced the accused to under go 10 years rigorous imprisonment and to pay a fine of Rs.5000/- and in default of paying the fine amount to undergo simple imprisonment of 3 months for each of the offences under Section 366 of IPC and under Section 6 of POCSO Act, 2012 and ordered that the sentence of the imprisonment would run concurrently. As against the said judgment and conviction, the accused has preferred this criminal appeal.

2.The prosecution case is that on 29.05.2014 at about 2 a.m. when the victim was in her house, the accused taken her and till 30.05.2014 had sexual intercourse with her so many times. The father of the victim on 30.05.2014 at about 5 a.m. after waking up saw that his daughter was not found in the house and immediately he searched her but was not able to trace her out. Thereafter they enquired with one Sekar, President of the Panchayat but he did not reply properly. Thereafter he gave a complaint/Ex.P1 before the Thirukkattuppalli



Police Station. Based on the said complaint, PW10 registered an FIR/Ex.P7 and thereafter the case was investigated by the investigating officer/PW11 and he examined the witnesses and collected materials. Thereafter filed a final report as against the accused for the offence under Section 366 of IPC and Section 6 of the POCSO Act. Thereafter the copies of records relied on the prosecution were furnished to the accused under Section 207 of the Cr.P.C and then the Trial Court after hearing both sides framed charges under Section 366 of IPC and Section 6 of the POCSO Act. The charges were read over and explained to the accused but he denied the same.

3. The Trial Court examined the witnesses PW1 to PW11 and marked EX.P1 to P9 and no material objects were marked. On the side of the defence no witnesses were examined and no documents were marked. After completion of prosecution witnesses, the Trial Court has examined the accused under Section 313 (1) (b) of Cr.P.C with regard to incriminating circumstances found against him and the same was denied by him. After evaluating oral and documentary evidences adduced on either sides, the Trial Court has convicted the accused under Section 366 of IPC and Section 6 of the POCSO Act. As against the judgment and conviction, the appellant/accused has preferred this appeal on the following grounds:-



(a) The judgment of the Trial Court is contrary to law and the weight of the evidence and all the probabilities of the case.

(b) The Trial Court has failed to see that the prosecution has projected the case to the effect that the appellant/accused and the victim girl were classmates and friends, at about 2.00 am on 29.05.2014 the victim girl went out of her house to attend call of nature, at that time, the appellant/accused kidnapped her to Trichy and had sexual relationship with her several times up to 30.05.2014.

(c) The Trial Court ought to have seen that PW2, the mother of the victim girl has deposed that when she went along with her husband to give the complaint on 29.05.2014 i.e, on the date of occurrence, the victim girl was found in the police station. Hence the allegations that on 29.05.2014 the appellant/accused had taken the victim girl to Trichy and the police secured the accused and the victim girl near Ponitha Poondi Madha Alayam Church on 31.05.2014 and the appellant/accused had sexual relationship with her till 30.05.2014 are not proved by the prosecution.

(d) The Trial Court ought to have seen that the accused has totally denied the alleged occurrence. The statement given by the victim girl to the Doctor would prove that the denial of the accused is true.



(e) The Trial Court ought to have seen that the prosecuting agency has omitted to investigate and find out the person with whom the victim girl went to Chennai on the date of the alleged occurrence and got married in pursuance of her sexual relationship with him for 2 years.

(f) The Trial Court ought to have seen that the evidence of PW7 a lady Doctor would prove that the victim girl had under menstrual period on 29.05.2014 and that there were no symptoms of having had sexual intercourse in the recent past.

(g) The Trial Court ought to have seen that the averments of the complaint would show that PW1 learnt from his villagers that the victim girl had gone with the accused as assisted by Chandrabose, Poosaimuthu and Rajesh. However the prosecution has not examined the villagers who claimed to have seen the occurrence and the persons who were said to have assisted the victim girl and the accused to go away from the village.

(h) The Trial Court ought to have seen that the prosecuting agency, which claims that the accused a classmate of the victim girl has completed 18 years of age, ought to have adduced evidence to prove that the accused had the



knowledge that the victim girl has not completed 18 years of age during the occurrence.

(i) The Trial Court ought to have seen that the evidence on record would show that the victim girl had not preferred to go with her parents when produced before the Court and hence she had been ordered to be kept in a children home and that she had voluntarily went out of the house as such she was not kidnapped by the accused as alleged.

(j) The Trial Court ought to have seen that the self contradictory and uncorroborated evidence of PW3 the victim girl is unreliable in nature.

4.1. The Learned Counsel appearing for the appellant would contend that the accused had been convicted for the offence under Section 366 of IPC and Section 6 of the POCSO Act but in order to attract the provisions, the Trial Court failed to adduce sufficient evidences and the evidences adduced on the side of prosecution are filled with doubts. The prosecution has not proved the age of victim and the Trial Court failed to consider that the victim as well as the accused both were studying in the same school and both are of same age and on seeing the complaint/Ex.P1, shows that the victim took the money and other articles which shows that she herself voluntarily left from the home.

Further the case of the prosecution is that the accused has kidnapped the



victim girl to Trichy and committed sexual intercourse with her several times up to 30.05.2014 but the victim before the doctor, the first statement given by her reveals that she went to Chennai with a known person and had sexual intercourse on several times. These contradictions had not been considered by the Trial Court.

4.2. Further the Trial Court failed to consider the evidence of Doctor which is contra to the evidence of PW1. The Trial Court failed to see that the evidence of PW5 shows that the victim girl was in her grandmother's house at Indhalure village on the date of occurrence and thereby the prosecution theory has been falsified through the evidence of PW5 and the same has not been considered by the Trial Court. According to the prosecution, the PW1 learned from the villagers that the victim had gone with the accused but the said villagers have not been examined as witnesses by the prosecution. The Trial Court failed to consider that the accused and the victim are classmates and thereby the accused had knowledge and belief that she completed 18 years of age. The prosecution not even proved the age of the victim in accordance with law. The Trial Court failed to see that the victim girl after secured by the police refused to go with her parents and she was kept in a home (MahalirKappagam) for about 2 to 3 months. Thereafter she went with her parents. While so during that period, she was tutored by somebody. The Trial



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Court without considering the aforesaid aspects, wrongly convicted the accused and thereby the judgment and conviction of the Trial Court is liable to be set aside by allowing this appeal.

5.The Learned Government Advocate (Crl.Side) appearing for the respondent would contend that the accused had kidnapped the victim girl and had sexual intercourse and committed the offence under 366 of IPC and Section 6 POCSO Act, 2012 and in order to prove the prosecution case they have examined PW1 to PW11 and marked exhibits P1 to P9 and the victim/PW3 had categorically deposed about the manner of occurrence. PW7 has deposed about the medical test conducted to the victim. The prosecution evidence of PW3 was corroborated by the evidence of PW7. PW10 had deposed about the registration of FIR and PW11 has deposed about the investigation conducted by him and as per his investigation the accused has committed the offence of aggravate penetrative sexual assault towards the victim. Therefore, the prosecution has amply proved the charges levelled against the accused. The Trial Court also took into consideration of all the facts and evidences correctly arrived at just and fair conclusion and thereby convicted the accused. Hence this appeal is liable to be dismissed.



6.This Court heard both sides and perused the materials available on record. Upon hearing both sides, Perusing the records, Judgment of Trial Court and grounds of appeal, the points for determination in this appeal are:-

(a) Whether the Prosecution has proved the charges levelled against the accused for the offence under Section 366 of IPC and Section 6 of Protection of Children from Sexual Offences Act, 2012.

(b) Whether the judgment and conviction passed by the Trial Court in SPL Case No.20 of 2014 on the file of the Sessions Judge Mahalir Court are sustainable in law and on facts.

Discussion on the Points:

7. The Prosecution case is that the accused and the victim are classmates and on the date of occurrence i.e., on 29.05.2014 when the victim girl was in her house at about 2 am, the accused went to the house of the victim and taken her to Trichy and till 30.05.2014, the accused had penetrative sexual assault on several occasions. Thereby the Trial Court convicted the accused for the offences under section 366 of IPC and section 6 of POCSO Act.

8.In this case, at the out set the prosecution has to prove that the victim was child on the date of occurrence. In order to prove the same, no Independent witnesses were examined and they only marked the transfer certificate as Ex.P2 at the time of examination of PW3 who is the victim in this case. As per Ex.P2 the date of birth of the Victim is 22.02.1997, the date of



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occurrence is 29.05.2014, therefore, as per Ex.P2, the victim was below the age of 18 years and completed 17 years. Now the question is whether the Ex.P2 has been proved in accordance with law.

9. The Learned Counsel appearing for the petitioner/appellant has argued that the prosecution has failed to examine the school authorities to prove the above said school certificate and the parents of the victim had not stated anything about the date of birth of the victim and thereby the prosecution has failed to prove the age of the victim.

10. In this case, the Prosecution has not examined the School Authorities, where the Victim was studied. Further not even shown the Ex. P2 to the parents of the Victim during their examination before the Court. Mere production of School Certificates through Victim is not sufficient to prove the age of the Victim. The Prosecution ought to have examined the School Authorities to prove the School Certificates. Though the Prosecution examined the Parents of the Victim as PW1 and PW2 they failed to put quietus in respect of School Certificates and the age of the Victim. The Competent Persons to speak about the Age and School Certificates are Parents and the School Authorities, but the Prosecution failed to examine the School Authorities where the victim studied. But in this case procedures mandated as per Section



94 of The Juvenile Justice (Care And Protection Of Children) Act, 2000 have not been followed. The School Certificates of the victim was marked through victim but not examined the School Authority. It is an admitted fact that the accused and the victim were classmates. While so the age of the accused shown as 20 and the age of the victim shown as 17 years. Since the victim was aged nearing 18 years on the date of occurrence, the Prosecution must prove the age of the Victim by examining competent witnesses, but they failed to examine any witnesses to prove the age of the victim.

11. In this context the learned Counsel appearing for the appellant has relied on the judgment in ***P. Yuvaprakash Vs. State Rep.by Inspector of Police (2023) Livelaw (SC) 538***. Wherein the Supreme Court held in para 14:

“14. Section 94 (2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or



matriculation or equivalent certificate was considered. Ex. C1. i.e. the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, ie, CW.1. The burden is always upon the prosecution to establish what it alleges: therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-I could not have been relied upon to hold that M was below 18 years at the time of commission of the offence."

12. On careful perusal of the aforesaid judgment, it is clear that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority and mere transfer certificate could not have been relied upon to hold



that the victim was aged 18 years. In the case on hand also the prosecution has marked the Transfer Certificate of the victim though PW3 and no documents marked under Section 94 (2) (iii) of the said Juvenile Justice (Care and Protection of Children) Act, 2015. In view of the above discussions and in view of the said judgment, this Court is of the opinion that the prosecution failed to prove the age of the Victim as below 18 years.

13. In this case PW1 is the de-facto complainant, father of the Victim and PW2 is the mother of the victim and PW3 the victim girl. PW7 is the Doctor who treated the victim and PW10 registered an FIR based on the complaint given by PW1 and PW11, is the investigation officer who had filed the final report. PW1 is not an eye witness and he deposed before the court that on 29.05.2014 after having dinner they went for sleep. After sometime at about 5 am when he woke up for attending the natural call, the father of the victim saw that her daughter was missing, immediately he started searching of his daughter and then enquired with one Sekar who is the President of Panchayat, he has not replied properly and then he gave a complaint before the police. The said complaint was marked as Ex.P1. On careful perusal of Ex.P1/complaint, it reveals that on the date of occurrence the victim at about 2 a.m., when the PW1 woke up, he saw that his daughter was missing at that time, his bureau was opened from which 50 sovereigns of gold jewels and a



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sum of Rs. 50,000/- cash were also missing. Thereafter he came to know that her daughter/victim girl eloped with the accused to Trichy. One Chandrabose, Poosaimuthu and Rajesh were also abetted for the offence. Therefore, from the complaint, it appears that on the date of occurrence, the victim was missing at about 2 a.m. and at the same time a sum of Rs.50,000/- and 50 sovereigns of gold were also missing from the bureau kept in the house of the victim. This shows that the victim herself voluntarily left from the home.

14. PW2 who is the mother of the victim has also stated that on 29.05.2014 she along with husband and son, sleeping in the house, on the very same day at about 2 am when she woke up for nature's call at that time her daughter was not present and thereafter her husband gave a complaint. After three days the police called them and they went there and saw their daughter and when she asked to come with her to the house, she refused. Thereafter she told that the accused raped her. Thereafter her daughter was sent to home and she stayed there for two to three months. Therefore from the evidence of PW2 it reveals that after missing of her daughter the police secured her within three days and the victim refused to come with her parents and from there she was sent to home. Therefore, the evidence of P.W.2 reveals that after missing of her daughter within 3 days the police secured her daughter, but she refused to



go along with her parents and she was in home for 2 to 3 months. The said version shows that the victim was left the parents home voluntarily.

15. The victim/PW3 in this case in her evidence stated that the accused is known to her and she aged about 17 years and her date of birth is 22.02.1997. On 29.05.2014 at 2 a.m., when she woke up for nature's call the accused was standing outside the house and he asked her to come out and insisted to marry her and after forcing her, the accused abducted the victim girl by closing her mouth. Thereafter she was taken to Trichy and they stayed there. At that time he had sexual intercourse with her. Thereafter, they went to Poondi Madha Temple. At that time Thirukkattuppalli Police secured them. Thereafter she was subjected for medical examination and then she was sent to home. Therefore from the evidence of PW3 it reveals that on 29.05.2014 at about 2 a.m. the accused taken taken the Victim from her house to Trichy and there he had sexual intercourse with her. The same PW3 in the cross- examination stated that she did not know the place where the accused had taken her to Trichy and she also admitted that there are so many houses in and around the place where she was staying in Trichy, but she has not raised any alarm. Further at the time of taking the victim by the accused in the night hours she has not raised any alarm. More over there is no whisper about the vehicle in which she was abducted. This shows that she herself voluntarily left



from the home. As far as the child below 18 years is concerned, the consent is immaterial but this Court already decided in the previous para that the Prosecution failed to prove the age of the Victim. However, the evidence of PW3 creates a serious doubt and the conduct of the victim shows that she herself left from the home.

16. The victim was medically examined by the doctor PW7 and she also stated that on 06.06.2014 at about 10.40 am when she was in emergency section she examined the victim girl and she told that she was in physical contact with a known for the past two years and more than 10 times she had intercourse with him. On 29.05.2014 she went to Chennai to marry him and had intercourse and thereafter on 31.05.2014 returned to home. On perusal of EP4 it reveals that the finding of clinical examination and reports are not consistent with recent sexual intercourse/assault. The victim was medically examined on 06.06.2014 and the occurrence was taken place on 31.05.2014 but the medical evidence shows that there is no any recent Sexual intercourse and the medical evidence is totally contra to the evidence of PW3. Further the victim/PW3 in her evidence did not state about the stay at home and did not go with her parents after secured by the police. Neither the victim nor her father stated about the factum that the victim was not willing to go with her parents and sent for home (MahalirKappagam) after the victim was secured by the



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police. Therefore, they suppressed something before the court.

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17. In fact, this court can infer from the evidences of the prosecution witnesses that the victim herself eloped with the accused and then the victim was secured by the police, after arriving at the police station, the victim girl refused to go with her parents and thereby she was sent to home (MahaliKappagam). Thereafter she went along with her parents and after reuniting with her parents she changed her version and suppressed the facts, therefore, the evidence of PW3 is highly doubtful and does not inspire confidence of this court.

18.As per the evidence of PW1 on the date of occurrence an amount of Rs.50,000/- and 50 sovereigns of gold were also missing but PW3 has not stated anything about the same and as per the complaint on the date of occurrence the said amount and gold were also missing but none of the prosecution witnesses that are PW1 to 3 have stated about the same and they suppressed the facts and thereby the prosecution case is highly doubtful as to whether the occurrence was happened as alleged by the prosecution. Further, the Investigating Officer failed to go to the place, where the victim was alleged to have stayed with the accused and further none of the witnesses were



examined from the place where the occurrence alleged to have taken place. In this context PW15 also admitted that he did not go to Trichy where the victim alleged to have stayed with the accused and subjected for sexual assault. Further the Investigation Officer failed to examine the persons in and around the place where the victim was residing. Therefore, the prosecution has failed to prove the foundational facts with regard to the commission of offence as against the accused.

19. As far as the offence under section 366 of IPC is concerned there is no evidence that the accused kidnapped the victim girl and the prosecution evidences shows that the victim herself left her parents house and thereby prosecution failed to prove the offence under section 366 of IPC. As far as offence under section 6 of POCSO Act is concerned the prosecution not even proved the age of the victim and failed to prove that the victim was child on the date of occurrence and medical evidence also not incriminating against the accused and the evidence of prosecution are not sufficient to prove the guilt of the accused for the offence under section 6 of POCSO Act and thereby prosecution failed to prove the charges levelled against the accused. 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 Trial Court has failed to consider the above said aspects and wrongly convicted the accused for the aforesaid offences and failed to consider the evidence of PW7 and suppression of material facts. Therefore, the judgment and conviction of Trial Court are unsustainable and the same are liable to be set aside.

21. In the result the appeal is allowed and the judgment and conviction passed by the Trial Court in Sessions Case No.20 of 2014 on the file of the learned Sessions Judge Mahalir Neethimandram [Fast Track Mahila Court], Thanjavur are set aside. The accused is acquitted from the charges under Section 366 of IPC and Section 6 of Protection of Children from Sexual Offences Act, 2012 and he be set at liberty subject to other cases if any. The bail bond executed by the accused stands cancelled and the fine amount paid



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by the accused shall be returned to him.

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Index : Yes/No
Internet : Yes/No
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To

1. The Learned Sessions Judge/Mahalir Neethimandram
(Fast Track Mahila Court), Thanjavur.
2. The Inspector of Police, Thirukkattuppali Circle, Thanjavur District.

P.DHANABAL, J.



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