



CrI.A.(MD)No.73 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON: 04.09.2024

PRONOUNCED ON : 22.10.2024

CORAM

THE HON'BLE MR.JUSTICE **C.V.KARTHIKEYAN**
AND
THE HON'BLE MR.JUSTICE **J.SATHYA NARAYANA PRASAD**

CrI.A.(MD)No. 73 of 2021

J.Ajit Babu

... Appellant / Sole Accused

Vs

State rep. by
The Inspector of Police
All Women Police Station
Thiruvaiyar Women Police Station
Thanjavur.
(Crime No. 2/2017)

...Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C. to set aside the Judgment dated 28.02.2020 passed in S.C.No. 129 of 2019 on the file of the learned Sessions Judge for the Sexual Offences against the Children Special Court, Thanjavur and acquit the appellant/sole Accused of the charge.

For Appellant : Mr. S. Sivasubramanian
for Mr.E.Somasundaram
For Respondent : Mr. A.Thiruvadi Kumar
Additional Public Prosecutor



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JUDGMENT

WEB COPY (Judgment of this Court was delivered by **C.V.KARTHIKEYAN, J.**)

The accused in Special S.C.No. 54 of 2017 (129 of 2019), who had suffered conviction for offence punishable under Section 366 of IPC and sentenced to undergo 10 years rigorous imprisonment and fine of Rs. 5,000/- in default one year simple imprisonment and also suffered conviction for punishment of offence under Section 5(l) read with Section 6 of POCSO Act, 2012 and sentenced to life imprisonment and fine of Rs.5,000/- in default one year simple imprisonment by Judgment dated 28.02.2020 by the learned Mahila Court, Thanjavur, has filed the present Criminal Appeal.

2.The victim child was a student of 11th standard. She was in relationship with the accused for two years. She had come home for the summer vacation in May 2017. It was her contention that the accused presurried her to marry him. This was objected to by her parents, who complained to the parents of the accused.

3.It is contended on behalf the prosecution that on 19.05.2017, the accused enticed the victim child to go with him and took her from her



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normal place of residence at Thiruvaiyaru to the outskirts of Chennai to the house of his uncle. She was confined there for about 2 ½ months. It is further contended that he sexually assaulted her. Thereafter, since her father had given a complaint, enquires were made and fearing reprisal, the accused brought the victim child back. A complaint has been lodged consequent to which FIR in Cr.No. 2 of 2017 had been registered on 19.05.2017 under Section 366A IPC. After investigation, the final report had been filed before the Mahila Court / Fast Track Mahila Court, Thanjavur, which was taken cognizance as Spl.S.C.No. 54 of 2017 for commission of offences punishable under Section 366(A) IPC and Section 6 POCSO Act, 2012. After following due procedure, charges had been framed under the aforementioned provisions on 05.09.2019. The accused denied the charges and claimed to be tried.

4.The prosecution was then called upon to prove the charges. The prosecution examined PW-1 to PW-13 witnesses and marked as exhibits, Exs. P-1 to P-14. No material objects were produced. On completion of examination of prosecution witnesses, the accused was questioned with respect to the incriminating evidence as enunciated under Section 313(1)



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(b) of Cr.P.C.

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5.On 28.02.2020, additional charges were framed against the accused for offences under Section 366 IPC and under Section 5(l) read with 6 of POCSO Act, 2012. The gist of the charges remained the same. The provision of law alone were altered. No additional evidence was taken.

6.By Judgment dated 28.02.2020, on the same day when the additional charges had been framed, the accused was convicted for offences punishable under Section 366 IPC and under Section 5(l) read with 6 of POCSO Act, 2012 and sentenced as aforementioned.

7.The present Appeal has been filed questioning such conviction and sentence.

8.The facts of the case are that the victim child, who according to the birth certificate in her school transfer certificate marked as Ex.P-8 was born on 21.12.1999, but according her evidence was born on



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10.10.2000, at any rate, less than 18 years of age as on 19.05.2017 was enticed away from her house by the accused, who was known to her for the past two years and taken from Thiruvaiyaru to the outskirts of Chennai to the house of his uncle PW7 and kept in confinement for about two months. During that time, it is in her evidence that she was subjected to sexual assault. Later, when it transpired that her father/PW-1 had given a complaint consequent to which FIR in Cr.No. 2 of 2017 had been registered against the accused for offence punishable under Section 366A IPC and on enquiries being made, the accused had brought her back.

9.In her evidence, the victim, who was examined as PW-2 stated that she knew the accused for two years and that he had, under threat that he would commit suicide, forced her to go with him and took her to the house of his uncle PW-7 and kept her in confinement for 2 ½ months. She stated that she was subjected to sexual assault. PW-7 then received a phone call from her father and when it was evident that enquiries were being made, she was brought back to the High Court of Madurai Bench, wherein H.C.P(MD)No.1082 of 2017, had been filed. She was subjected to medical examination at Thanjavur Medical College and Hospital. Her



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statement under Section 164(5) Cr.P.C., was also recorded which was marked as Ex.P-1. She also identified her signature and thumb impression in her Confidential Medical Report as Exs. P-2 and P-3. In the report, it was recorded that she had gone with the accused and that she had known him for two years. It was also recorded that they had consensual physical relationship. It was however stated that there were no injuries in any part of her body. During the course of her evidence, she stated that the accused was known to her and was a resident of the same town, residing just about 5 to 6 houses away. She had further stated that she knew him from the time when she was in 9th/10th Standard. Her parents had advised her to exercise caution till she attains the age of 18 years. She also stated that her actual date of birth is 10.10.2000 and not 21.12.1999 as recorded in her school certificate.

10.The prosecution further examined her father as PW-2. He also confirmed that he knew the accused earlier. He further stated that on 19.05.2017 when he came home in the evening at around 5 to 5.30 p.m., after doing agricultural coolie work he found the victim child missing. He had earlier complained to the parents of the accused about his



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behaviour. He had also complained to the Headman of the Village. He went over to the house of the accused. His parents informed that the accused also not available. They all concluded that the children ran away together. Thereafter, he had given a complaint before the All Women Police Station, Thiruvaiyaru wherein FIR in Cr.No. 2 of 2017 had been registered for offence under Section 366-A IPC. He identified his complaint which was marked as Ex.P-4.

11.He further stated that the police were dragging the issue stating that they were searching for his daughter/victim child. He forwarded complaints to the Superintendent of Police.

12.Thereafter, he came to know that the victim child was in the house of PW-7, who is a relative of the accused. He was then informed that his daughter had been located and that she would be produced before the Madurai Bench of the Madras High Court, wherein the H.C.P(MD)No.1082 of 2017 was pending. During the proceedings before the Madurai Bench of Madras High Court, his daughter was handed over to him. He also stated that his daughter informed that the



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accused had enticed her to go with him on the promise of marriage. The witness withstood the cross examination and reiterated that the accused had taken away his daughter to the house of PW-7.

13.The prosecution further examined as PW-3 an uncle of the victim child. He also stated about the missing of the victim child and the efforts taken to locate her.

14.Subsequent to the registration of the FIR and the location of the victim child, the investigation was taken over by PW-13 Inspector of Police at All Women Police Station, Thiruvaiyaru. In her evidence, she stated that she prepared the rough sketch (Ex-P11) of the house of the accused in the presence of witness Vanathaiyan (PW4) and Anandraj (not examined). She then recorded the statement of the Meenambika (PW5) and Janava Mary (not examined), Jeeva (not examined) and Anbu (not examined). She also recorded the statements of Divyanathan and Robbert (both not examined). She was then informed that the accused had surrendered before the Judicial Magistrate Court on 21.07.2017. She then went over to the house of PW-7 and prepared an observation



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mahazar Ex.P-12 and rough sketch Ex.P-13. She then produced the victim child before the Madurai Bench of Madras High Court wherein H.C.P.(MD)No. 1082 of 2017 was pending. She then handed over the custody of the victim child to her parents. She then directed medical examination of the victim child on 19.02.2017. She also directed medical examination of the accused. The Accident Register and Confidential Medical Examination Report relating to the victim child were marked as Exs.P-6 and P-7. The Medical Report of the accused was marked as Ex.P-9. She also obtained the Transfer Certificate from the school where the victim child was studying was marked as Ex.P-8. She then directed recording of the statement of the victim child under Section 164(5) Cr.P.C., by the Judicial Magistrate, Thiruvaiyaru. The said statement was marked as Ex.P-1. She also recorded the statement of the school Headmistress, sister Arokiya Mary (PW6) and the uncle of the accused (PW7) and Dr.Tamil Mani (PW-10). Thereafter, she filed final report before the Court charging the accused with an offences punishable under Section 366A IPC and under Section 6 of POCSO Act, 2012.



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15. During her cross examination, she stated that she did not seize the birth certificate of the victim child and also did not examine and record the statement of the Doctor, who conducted the medical test of the victim child. During her re-examination, she stated that she was informed that the victim child was born in the home in the village and therefore, the birth had not been registered.

16. PW-7 was the witness in whose house the accused had kept the victim child in confinement. He did not support the case of the prosecution and was declared hostile.

17. PW-8, who knew PW-7 and was related to him was also declared hostile.

18. The learned trial Judge on analysis of the evidence had, on the date of delivering the Judgment framed additional charges, charging the accused with commission of offences punishable under Section 366 IPC and under Section 5(1) read with 6 of POCSO Act, 2012. The original charge was under Section 366-A of IPC and Section 6 of POCSO Act.



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19.The trial Judge held that the charges were proved by the prosecution and accordingly, convicted the accused for the aforementioned offences and sentenced him to undergo imprisonment for 10 years for offence punishable under Section 366 IPC and imposed fine of Rs.5,000/-, in default to undergo 1 year simple imprisonment and also sentenced him for offence punishable under Section 5(l) read with Section 6 of POCSO Act, 2012 to life imprisonment and fine of Rs. 5,000/- in default 1 year simple imprisonment. The learned Trial Judge also recommended payment of compensation of Rs.2/- lakhs by the Government to the Victim Child.

20.Questioning such conviction and sentence, the accused has filed the present Criminal Appeal.

21.Heard arguments advanced by Mr.S.Sivasubramanian, learned counsel for the appellant/accused and Mr.A.Thiruvadi Kumar, learned Additional Public Prosecutor for the respondent.



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22.Mr.S.Sivasubramanian, learned counsel for the

appellant/accused pointed out the facts of the case and laid stress on the fact that the victim child and the accused knew each other for two years and that the victim child had voluntarily gone away with the accused without raising any protest and had travelled with him from Thiruvaiyaru to the house of PW-7 in the outskirts of Chennai. He stated that the victim child never complained about being forcibly taken away by the accused and pointed out her statement in the Confidential Medical Examination Report Ex.P-7, in which she had informed the Doctor that she had gone away with a known person, who she had known for two years and she had gone out of her own volition on 09.05.2017 and also had physical relationship. The learned counsel further pointed out that the Doctor, who had recorded her statement and had conducted the medical examination had not been examined as a witness by the prosecution. He pointed out that therefore, the prosecution had not brought before the Court the true facts and alleged that they had suppressed the statement of the victim child before the Doctor, who had first examined her and also had not examined the Doctor as a witness.



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23.The learned Counsel then pointed out the contents in Ex.P-7 wherein it had been stated that there were no injuries on her body and that there was not evidence that she had conceived. He therefore pointed out that the offence under Section 5(l) of the POCSO Act, 2012 was not attracted. He therefore stated that the offence under Section 366 IPC is also not attracted since the said offence stipulates kidnaping or abduction or inducing a women to compel her marriage or for illicit intercourse.

24.The learned counsel pointed out that the victim child had also received compensation as directed by the trial Court and further stated that the accused is prepared to compensate her further. The learned counsel therefore stated that the conviction of the accused and the sentence imposed should be set aside by this Court.

25.Mr.A.Thiruvadi Kumar, learned Additional Public Prosecutor however pointed out the evidence of PW-1 the victim child and stated that she had very clearly stated about how she was enticed go out of her house on 19.05.2017 and how she was forced to stay in confinement in the house of PW-7 for about 2 ½ months and the ill-treatment meted out



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to her at that place. The learned Additional Public Prosecutor pointed out that it was only after two months that she was rescued consequent to filing of H.C.P(MD)No.1082 of 2017 before the Madurai Bench of the Madras High Court. He pointed out that viewed from any angle, she still was a minor less than 18 years of age. The learned Additional Public Prosecutor further pointed out that Ex.P-7 contained all details and therefore, the non examination of the Doctor would not affect the case of the prosecution.

26.The learned Additional Public Prosecutor also, on instructions, forwarded the communication sent on behalf of the District Collector, Tiruchirapalli wherein it had been stated that if the victim child is eligible, then under the scheme of the Government, she could be accommodated for nursing training. The learned Additional Public Prosecutor pointed out all these facts and asserted that the Criminal Appeal deserves to be dismissed.

27.We have carefully considered the arguments advanced and perused the materials available on record.



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28.After conclusion of the arguments, we had a discussion with the victim child in the chambers on 22.08.2024. She had suffered physically and emotionally and is suffering economically. We asked her about the possibility of further rehabilitating her both in society and economically. She expressed an inclination to pursue nursing course in the next academic year at Tiruchirappalli. It was under those circumstances that we had placed a request before the learned Additional Public Prosecutor to find out whether there were any rehabilitation scheme of the Government. We must place our appreciation on record. We were given a copy of communication dated 20.09.2024 in Na.Ka.No. 2681/A-1/2024 addressed to the Additional Public Prosecutor of the Madurai Bench of the Madras High Court that the District Collector, Tiruchirapalli, is prepared to take on board the victim child if she is eligible and admit her to nursing course which we hope, would provide a stable future for her.

29.The case of the prosecution is that the victim child, who according to the certificate produced, namely, her school certificates



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under Ex.P-8 and Ex.P-14 was born on 21.12.1999 and therefore, less than 18 years as on 19.05.2017 had been enticed away from the house of her lawful guardian/father by the accused.

30.The evidence in this regard is clear and convincing. The victim child had very categorically stated that she had known the accused for two years and on that very day, when she was enticed and go away (19.05.2017), the accused had threatened that if she does not, he would commit suicide. He gave her a very narrow option. She had to agree to go with him. She was then taken to the outskirts of Chennai to the house of PW-7.

31.PW-7 however did not support the case of the prosecution. We hold that it is only natural that he would not do so, since he had harboured a minor child in his house and had not taken any efforts to hand her over to the father. It is also in evidence that the father of the victim child who was examined as PW-2 had come to know that the victim child and the accused were residing in the house of PW-7, but was not given correct information, when he enquired.



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32.It must be stated that the victim child knew the accused, who was residing just about 5 or 6 house away from her house. But we also hold that the said affinity did not give him the liberty to take her away from lawful guardianship. After being brought back consequent to the directions of the Madurai Bench of the Madras High Court wherein H.C.P.(MD).No. 1082 of 2017 had been filed, the victim child was subjected to medical examination. The report had been marked as Ex.P-7. She admit her signature and thumb impressions on the same which were marked as Exs.P-2 and P-3.

33.She had also given a statement under Section 164(5) Cr.P.C. That was marked as Ex.P-1. The father had given a complaint which was marked as Ex.P-4. The FIR which was recorded was marked as Ex.P10. All these documents point out to the fact that the accused had kept the victim child in confinement at Chennai away from her normal place at residence at Thiruvaiyaru. But it is also to be admitted that in her statement before the Doctor, she had stated that she had gone with the accused out of her own volition. To balance that statement, it must be



kept in mind that she was a minor and therefore, could not give lawful consent. Even she had consented, it cannot be taken note of under law.

34.In **2004 SCC Crl. 1545 (Moniram Hazarika Vs. State of Assam)**, the Hon'ble Supreme Court had held with respect to the ingredients under Section 366 IPC as follows:-

“6. As stated above, the learned counsel for the appellant placed strong reliance on the judgment of this Court in **Varadarajan case [AIR 1965 SC 942 : (1965) 2 Cri LJ 33]**. The facts of that case show that the minor in that case left the house of the legal guardian as per her own choice and not on the basis of any enticement or persuasion on the part of the accused. This is clear from the following observations of this Court in that case: (**AIR p. 944, para 7**)

“There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this



was sufficient in law to make them man and wife) by force or blandishments or anything like that.”

7. It is on the basis of the said finding that the minor in that case walked out of the house of her guardian without any inducement from the accused; this Court came to the conclusion that the accused in that case was not guilty of the offence. It is also worthwhile to notice what this Court said about the act of the accused in such cases which amounts to enticement which is found in para 10 of the said judgment and which reads thus: (AIR p. 945)

“10. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so.”

8. It is clear from the above observations of this Court that if the accused played some role at any stage by which he either solicited or persuaded the minor to abandon the legal guardianship, it would be sufficient to hold such person guilty of kidnapping. ”

35.The evidence with respect to penetrative sexual assault however is not available. In her evidence, she only stated that she had been subjected to sexual assault. The Medical Report, Ex-P11 also does not confirm that she had been subjected to penetrative sexual assault. We would therefore hold that the charge under Section 366 IPC had been proved. We would however set aside the conviction under Section 5(l) read with Section 6 of POCSO Act but rather convict the accused for



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offence punishable under Section 7 of POCSO Act and sentence him under Section 8 of the POCSO Act, 2012 for sexual assault.

36.We would also issue a direction to the District Collector, Tiruchirappalli to examine the eligibility of the victim child to be admitted in the course in Nursing in Tiruchirappalli under the Government Scheme.

37.We would also direct the accused to pay compensation directly to the victim child for a sum of Rs.3/- lakhs to be paid within a period of 8 weeks from this date. The amount should be deposited in Fixed Deposit for one year in the name of the victim child in any one Nationalised Bank and the Fixed Deposit should be deposited in Madurai Bench of Madras High Court to the credit of this Crl.A.(MD).No. 73 of 2021.

38.We would also interfere with the sentence imposed on the accused.



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39.In result, we hold as follows:

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(1) the accused is convicted for offence punishable under Section 366 IPC and sentenced to undergo rigorous imprisonment for three years. We retain the fine of Rs.5,000/- as directed by the trial Court.

(2) The accused is convicted for offence under Section 7 of POCSO Act punishable under Section 8 of POCSO Act, 2012 and sentenced to undergo rigorous imprisonment for three years. We would retain the fine of Rs.5,000/- as imposed by the trial Court.

(3) We direct both the sentences to run concurrently.

(4) We also direct that the period of confinement already undergone either during remand or after conviction by the trial Court to be set off under Section 428 Cr.P.C.

(5) We direct the accused to deposit for one year in Fixed Deposit a sum of Rs.3,00,000/- in the name of the victim child and deposit the Fixed Deposit Receipt to the credit of Crl.A.(MD).No. 73 of 202 in the



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Madurai Bench of the Madras High Court. On such deposit, we would place a request on Mr. A.Thiruvadi Kumar, learned Additional Public Prosecutor, to call upon the Inspector of Police, All Women Police Station, Thiruvaiyaru, to issue notice to the victim child and the Registry to hand over the fixed deposit receipt to the victim child on proper identification and acknowledgement.

(6) We would place a request on the District Collector, Tiruchirappalli, to, in accordance with the letter dated 20.09.2024 in Na.Ka.No. 2681/A-1/2024 issued to the Additional Public Prosecutor, Madurai Bench of the Madras High Court, from his office, to examine, if the victim child is otherwise eligible and provide her admission in Nursing Course from the funds available in the office of the District Collector in the next academic year (2025-2026).

40.The Bench expresses its deep gratitude to the District Collector, Tiruchirappalli in coming forward to be of assistance to the victim child.



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41.This Criminal Appeal stands partly allowed as aforementioned.

The trial Court is directed to take the accused in custody to serve the remaining portion of sentence.

[C.V.K., J.] & [J.S.N.P., J.]
22.10.2024

Internet :Yes/No
Index :Yes/No
NCC :Yes/No

vsg

To

1.The Sessions Judge for the Sexual Offences
against the Children Special Court, Thanjavur.

2.The Inspector of Police,
All Women Police Station,
Thiruvaiyar Women Police Station,
Thanjavur.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

4.The Section Officer,
ER/VR Section,
Madurai Bench of Madras High Court, Madurai.



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C.V.KARTHIKEYAN, J.
And
J.SATHYA NARAYANA PRASAD, J.

vsg

Judgment made in
Crl.A.No. 73 of 2021

22.10.2024