



CRL.A(MD).No.39 of 2022

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 20.12.2023

Pronounced on : 09.01.2024

CORAM

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

Crl.A(MD)No.39 of 2022

N.Balamurugan

.. Appellant/Sole Accused

Vs.

State, rep. by
The Inspector of Police,
Rajapalayam South Police Station,
Virudhunagar District.
(Crime No.760/2017)

.. Respondent/Complainant

Prayer: This Criminal Appeal is filed under Section 374(2) of Cr.P.C. to call for the records and set aside the Judgment and Conviction dated 08.12.2021, by the Special Court For Exclusive Trial of Cases Under the Protection of Children from Sexual Offences Act, 2012, Virudhunagar at Srivilliputhur in Spl.S.C.No.18 of 2018 and acquit the Appellant.



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For Appellant : Mr.R.L.Dhilipan Pandian
for Mr.D.Rajaboopathy

For Respondent : Mr.T.Senthil Kumar
Additional Public Prosecutor

JUDGMENT

The appellant, who is the sole accused in Spl.S.C.No.18 of 2018 on the file of the Special Court for POCSO Act cases, Srivilliputhur, filed this criminal appeal challenging the conviction and sentence imposed against him by the Special Court for POCSO Act Cases, Srivilliputhur. The learned trial Judge convicted the appellant for the offence under Sections 417, 366 IPC and Section 6 r/w 5(l) of the POCSO Act and sentenced him to undergo 7 years imprisonment and a fine of Rs.1000/- for the offence under Section 366 IPC; to undergo one year imprisonment and a fine of Rs.1000/- for the offence under Section 417 IPC; and to undergo 7 years imprisonment and a fine of Rs.1000/- for the offence under Section 6 r/w 5(l) of the POCSO Act, 2012.

2. The case of the prosecution is that the respondent police registered a case against the appellant in Crime No.760 of 2017 on 16.10.2017 on the allegation that the appellant kidnapped the victim girl



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took her to Othakuthirai Village, Gopichettipalayam, Tiruppur District. In the said village, he took a rental house from PW.8 and married the victim girl and had sexual intercourse with her. Thereafter, he dropped the victim girl in her village. In the meantime, PW.1, the father of the victim girl lodged a complaint before the jurisdictional police. The same was registered in Crime No.760 of 2017 for 'girl missing'. Thereafter, PW.1 produced the victim girl before the respondent police and the respondent police conducted the medical test and altered the offence into Sections 417, 366, 376 (2 counts) IPC and Section 6 r/w 5(1)(2 counts) of the POCSO Act, 2012. Thereafter, the respondent police arrested the appellant and completed the investigation and filed the final report before the learned trial Judge. The learned trial Judge taken the final report on file in Spl.S.C.No.18 of 2018. The learned trial Judge issued summons to the accused and after his appearance, served the copies under Section 207 Cr.P.C. Thereafter, he framed necessary charges and questioned the accused. The accused pleaded not guilty and hence the trial commenced against the accused.



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3. To prove the case, the prosecution examined PW.1 to PW.12 and Ex.P1 to Ex.P15. The learned trial Judge thereafter questioned the accused under Section 313 Cr.P.C by putting the relevant question and the accused denied the same as false and thereafter, the case was posted for examination of the witnesses on the side of the accused. The accused neither produced any documents nor examined any witnesses on his side.

4. The learned trial Judge, on considering the evidences and witnesses, convicted and sentenced the appellant for the offence as stated supra and he acquitted the appellant for the offence under Section 9 of the Prohibition of Child Marriage Act. Aggrieved over the same, the appellant preferred this appeal.

5. The learned counsel for the appellant submitted that the victim girl gave 164 Cr.P.C statement before the learned trial Judge and in the said 164 Cr.P.C statement, she did not disclose any penetrative sexual assault and the marriage. Further, she did not depose about the kidnapping done by the appellant. But in the evidence before the Court, she deposed that the appellant committed penetrative sexual assault in



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the said village of Gobichettipalayam. The said evidence of the victim girl is not trustworthy in view of the above said improvement over the 164 Cr.P.C statement. Hence, her evidence is to be supported with sufficient corroboration. In this case, there was no corroboration. The medical evidence stated that there was no injury on the part of the victim girl and also there is no recent penetrative sexual assault. In the said circumstances, the conviction under Section 6 of the POCSO Act is not maintainable. The learned counsel for the appellant further submitted that in view of the absence of the evidence to prove that the appellant kidnapped the victim girl for the purpose of having sexual intercourse and marriage is not proved, the conviction passed under Section 366 IPC is not legally valid. In the said circumstances, he seeks for acquittal. He further submitted that the trial Judge acquitted the accused under Section 9 of the Prohibition of Child Marriage Act. In that event, the conviction under Section 417 and 366 IPC is not made out. Hence, he argued that the learned trial Judge committed error in convicting the appellant.



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6. The learned Additional Public Prosecutor countered the argument of the learned counsel for the appellant and made the following submission.

6.1. The prosecution proved the charges framed against the appellant through the evidence of the victim girl and the evidence of the Doctor. The alleged kidnapping and stay at Gopichettipalayam is proved through the evidence of PW.8 and hence, the prosecution clearly proved the offence under Sections 417 and 366 IPC. The evidence of the victim girl that there was penetrative sexual assault by the appellant is proved through her evidence apart from the evidence of the Doctor. Hence, he seeks for confirmation of the conviction and sentence passed by the trial Judge.

7. This Court has Court has considered the rival submissions made by either side and perused the records and also the precedents relied upon by them.



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8. In this case, the prosecution is duty-bound to prove the following foundational facts:

(i)the appellant kidnapped the victim with false promise to her from the custody of P.W.1.

(ii)The appellant married the victim girl to attract the offence under Section 9 of the Prohibition of Child Marriage Act.

(iii)The appellant committed aggravated penetrative sexual assault.

9. Proof of the offence under Section 417 of IPC

The victim is more than 17 ½ years at the time of the occurrence. Even as per the evidence of the victim girl and the other documents, the victim girl and the appellant loved each other. It is the specific case of the prosecution that the appellant kidnapped the victim girl to marry her. Therefore, he took the victim girl to the Othakuthirai Village, Gopichettipalayam, Tiruppur District and tied Thali and consummated the marriage with her. Thereby, he committed offence under Section 9 of the Prohibition of the Child Marriage Act. According to the the finding of the learned trial Judge, the marriage was not proved in accordance with law and hence, he acquitted the appellant from the charge framed under Section 9 of the Prohibition of the Child Marriage Act. In view of the



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above said finding, the conviction under Section 417 of IPC is not legally maintainable.

10.Proof of Aggravated Penetrative Sexual Assault:

According to the prosecution, the appellant kidnapped the victim girl on 16.10.2017. He tied Thali at Pillaiyar Kovil, Othakuthirai Village, and resided in P.W.8's house. In the said house, he committed aggravated penetrative sexual assault till she parted company with the appellant on 01.11.2017. The victim girl gave 164 Cr.P.C., statement before the learned Judicial Magistrate on 02.11.2017. The statement is as follows:

இராஜபாளையம் சேத்துார் சேவுக பாண்டியன் அரசு மேல்நிலைப்பள்ளியில் 12 ம் வகுப்பு படித்துக்கொண்டிருக்கிறேன். 16.10.2017 ம் தேதி காலை 10.00 மணிக்கு இராஜபாளையத்திலிருந்து திருப்பூர் நானும் பாலமுருகன் என்பவரும் பஸ் ஏறி போனோம். அங்கிருந்து கோபிக்கு பக்கமுள்ள ஓட்டகுநிரை என்ற இடத்திற்கு போய் வாடகைக்கு குடியிருந்தோம். 21.10.2017 ம் தேதி அங்குள்ள பிள்ளையார் கோவிலில் வைத்து திருமணம் செய்துகொண்டோம். அன்றிலிருந்து 01.11.2017 ம் தேதி வரை அவருடன் குடியிருந்து வந்தோம். நேற்று பாலமுருகன் வீட்டார்கள் எங்களை அழைத்து வந்தார்கள்

From the above reading of 164 Cr.P.C., statement, it is clear that victim



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girl never stated the appellant committed aggravated penetrative sexual assault. But, during the course of the examination before the Court, she deposed that she was subjected to aggravated penetrative sexual assault. The said deposition of the victim girl amounts to material improvement which affects the trustworthiness of the victim's evidence. Therefore, the said improvement of the victim girl's version is not lightly to be brushed aside. In the said circumstances, this Court is duty-bound to see if there is any corroborative material to match the aggravated penetrative sexual assault. According to the prosecution, the victim girl was taken by the appellant on 16.10.2017. Thereafter the victim girl was produced before her house on 01.11.2017. In the meantime, according to the medical evidence, there is no trace of aggravated penetrative sexual assault. As per the Doctor's evidence, the victim girl's last mensuration was on 19.10.2017. The Doctor also taken the test to find out any pregnancy on 02.11.2017. There was no pregnancy. They also had taken the vaginal smear and swab and the same was also not in favour of the prosecution. The Doctor also stated that there was no injury in the body of the victim girl. He also confirmed the rupture of the vagina can happen due to some other reason other than the sexual intercourse. In the said circumstances,



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the evidence of the victim girl that she was subjected to aggravated penetrative sexual assault by the appellant is not corroborated with medical evidence. The corroboration of the medical evidence is not necessary in all circumstances, but in the present case, the victim girl in her 164 Cr.P.C statement, never stated that she was subjected to the aggravated penetrative sexual assault. In the said circumstances, the corroboration of the medical evidence is necessary. In the said circumstances, this Court feels that the prosecution failed to prove the offence under Section 6 of the POCSO Act.

11. Proof of offence under Section 366 of IPC

The learned trial Judge already found that the prosecution failed to prove the marriage. In view of the above specific finding that the prosecution also not proved the penetrative sexual assault upon the victim girl, the offence under Section 366 IPC is not also made out against the appellant. Further, when the learned trial Judge acquitted the appellant for the offence under Section 9 of the Prohibition of the Child Marriage Act, the conviction for the offence under Section 417 IPC that the appellant made the sexual intercourse with the victim girl under the



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promise of marriage is not legally made out. Hence, the offence under Section 366 of IPC is not made out.

12. Conclusion:

When the evidence of victim is intrinsically inseparable one, then her whole evidence liable to be rejected. According to her evidence, the appellant took her to the Othakuthirai Village and tying the Thali and committed aggravated penetrative sexual assault. In her 161 statement, she specifically stated that on 21.10.2017, the appellant married the victim girl. But, the learned trial Judge disbelieved the said version on account of the absence of any corroboratory evidence. But, the learned trial Judge believed her evidence without considering the material improvement subsequently made by her ie., she was subjected to the aggravated penetrative sexual assault without any corroboratory evidence.

12.1. But, the learned trial Judge, without considering the above legal and factual aspects, only on the basis of the evidence of the victim girl's statement that she was subjected to penetrative sexual assault,



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convicted the appellant for the offence punishable under Sections 366 IPC and 6 of POCSO Act. The said approach of the learned trial Judge is not correct in the considered view of this Court for the reason that when the victim girl made substantial improvement in the deposition before the Court over the 164 Cr.P.C statement, this Court is duty-bound to analyse the evidence of the victim girl and the other evidence. In the said circumstances, this Court finds that the prosecution miserably failed to prove the charges against the appellant. Hence, this Court is inclined to interfere with the finding of the learned trial Judge in convicting the appellant under Section 366, 417 of IPC and Section 6 of the POCSO Act, and acquit the appellant for the above stated reasons.

13. In the result, this Criminal Appeal stands allowed. The conviction and sentence dated 08.12.2021, passed by the learned Special Judge, Special Court for Exclusive Trial of Cases under the Protection of Children from Sexual Offences Act, 2012, Virudhunagar at Srivilliputhur in Spl.S.C.No.18 of 2018 is hereby set aside. The learned trial Judge granted compensation to the victim girl. Even though this Court acquitted the appellant from all the charges, the order of compensation



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granted to the victim girl is not disturbed. The fine amount, if any, paid by the appellant/sole accused shall be refunded to him. The bail bond, if any, executed by the appellant/sole accused shall stand cancelled. The appellant is set liberty unless his presence is required in any other case.

09.01.2024

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

To

- 1.The Special Judge For Exclusive Trial Of Cases
Under POCSO Act Cases,
Virudhunagar At Srivilliputhur.
- 2.The Inspector of Police,
Rajapalayam South Police Station,
Virudhunagar District.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 4.The Section Officer,
Criminal Section(Records),
Madurai Bench of Madras High Court,
Madurai.



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K.K.RAMAKRISHNAN,J.

PJL

Pre delivery Judgment made in
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