

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.02.2021

Delivered on : 19.04.2021

CORAM :

THE HONOURABLE MR. JUSTICE P. VELMURUGAN

Crl.A.No.671 of 2019

Parthiban

... Appellant

Vs.

State by
The Inspector of Police,
W-24, All Women Police Station,
Teynampet,
Chennai.

... Respondent

Criminal Appeal filed under Section 374(2) Cr.P.C., praying to set aside the judgment of conviction and sentence, dated 22.11.2018 in S.C.No.250 of 2016 on the file of the Special Court for cases under POCSO Act, 2012 (Mahila Court), Chennai.

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For Appellant : Mr.T.Muruganantham
for Mr.K.S.Arumugam

For Respondent : Mr.R.Suryaprakash
Government Advocate (Crl. Side)

JUDGMENT

This Criminal Appeal is filed against the judgment of conviction and sentence, dated 22.11.2018, in S.C.No.250 of 2016, on the file of the Special Court for cases under POCSO Act, 2012 (Mahila Court), Chennai.

2.Originally, a case was registered by the E-3 Teynampet Police in Crime No.5 of 2015 for “Girl Missing”. Subsequently, a case was registered by the respondent police (W-24 All Women Police Station, Teynampet) in Crime No.5 of 2015 for the offences punishable under Sections 366-A IPC r/w. Section 4 of the Protection of Children from Sexual Offences Act, 2012 (“POCSO Act” for brevity). After investigation, the respondent police laid a charge-sheet before the Special Court for the cases under POCSO Act, 2012 (Mahila Court), Chennai, since the offences are against women, particularly a child under POCSO Act, and the learned Special Judge had taken the case on file in S.C.No.250 of 2016.

3.After completing the formalities, the learned Special Judge framed the charges for the offences punishable under Sections 366 IPC and Section 6 of the POCSO Act, against the appellant.

4.After framing the charges, in order to prove the case of the prosecution, on the side of the prosecution, during trial, as many as 9 witnesses were examined as P.W.1 to P.W.9 and 12 documents were marked as Exs.P1 to P12. Three Court documents were marked as Exs.C1 to C3.

5.After completing the examination of the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant and he denied the same as false. On the side of the defence, no witness was examined, however, two documents were marked as Exs.D1 and D2. One Material Object was exhibited as D.M.O.1.

6.After completing the trial and hearing of the arguments advanced on either side, considering the facts and circumstances, the trial Court found the appellant guilty of the offences punishable under Sections 366 IPC and Section 6 of the POCSO Act, and convicted and sentenced him as follows :

<i>Provision under which convicted</i>	<i>Sentence</i>
Section 366 IPC	Rigorous Imprisonment for five years and a fine of Rs.5,000/-, in default, to undergo Rigorous Imprisonment for six months
Section 6 of POCSO Act	Rigorous Imprisonment for ten years and a fine of Rs.10,000/-, in default, to undergo Rigorous Imprisonment for six months
The sentences shall run concurrently. The victim girl is entitled for compensation of Rs.6,00,000/- and Rs.1,50,000/- is fixed as interim compensation.	

7.Challenging the said conviction and sentence, the appellant/accused has filed the present appeal before this Court.

8.The learned counsel appearing for the appellant/accused would submit that the prosecution has failed to prove its case beyond reasonable doubt. The victim girl (P.W.3) has not disclosed the facts correctly and the evidence of the victim girl (P.W.3) is not trustworthy. The trial Court convicted the appellant only based on the evidence of the

victim girl (P.W.3). The victim girl (P.W.3) was produced before the learned Judicial Magistrate for recording the statement under Section 164 Cr.P.C. on 27.11.2015 and the said statement was marked as Ex.C3, in which, she has clearly stated that she came out of her house as she got angry with her parents and went to Tirupathi, and after she knew that her parents had given a complaint, she came back. The trial Court failed to see that the victim girl appeared before the Police on 21.11.2015, however she made her statement only on 27.11.2015 before the learned Judicial Magistrate, which itself highly suspicious in the case of the prosecution.

9. The learned counsel appearing for the appellant would further submit that the prosecution has failed to produce any material document to prove that the appellant and the victim girl were staying at lodge either in Tirupathi or in Velankanni as per the prosecution case. The statement recorded from the victim girl under Section 161 Cr.P.C. reached the Court only on 30.11.2015 and there was a delay in sending the records to the Court, which is also fatal to the case of the prosecution. The prosecution has not examined any witness to prove where the victim girl and the appellant have stated to have stayed. The age of the victim girl was not

proved. Once the age of the victim girl was not proved, she is not a child under the POCSO Act, and therefore, the case registered under POCSO Act is not maintainable. The victim girl has not stated that, on 15th night, when they were staying at Tirupathi, the appellant had sexual intercourse with her. Though the prosecution has stated that the victim girl was taken to Tirupathi and subsequently to Velankanni, and made to stay with the appellant and the appellant had sexual intercourse with her during that period, neither any witness was examined nor any document was produced to prove that they were staying there at a lodge and the prosecution has not enquired the place where they have stated to have stayed.

10. The learned counsel appearing for the appellant would further submit that the Doctor (P.W.6), one who conducted the medical examination of the victim girl, deposed that, on examination, no external injury was found on her body of the victim girl, which falsifies the case of the prosecution that the appellant had forcible sexual intercourse with the victim girl. The trial Judge failed to appreciate the evidence produced on the side of the defence and convicted the appellant only based on assumptions and conjectures and on sympathetic grounds and not based on

the material evidence. Therefore, the judgment of conviction and sentence, passed by the trial Court, is liable to be set aside.

11.The learned Government Advocate (Crl. Side), appearing on behalf of the respondent police, would submit that, at the time of occurrence, the age of the victim girl was only 17 years and she had not completed 18 years of age. The victim girl (P.W.3) has clearly stated that, since her mother scolded her, she left the house, and at that time, the victim girl met the appellant; the appellant misguided her and also forced her to come with him and also took a gold chain from the victim girl and arranged money and left to Tirupathi and stayed there; subsequently, they went to Velankanni and stayed there at a lodge; during that period, the appellant committed sexual assault on her; when she refused and denied, he threatened her and had forcible sexual intercourse with her. The appellant forcibly took the victim girl to Tirupathi, and subsequently to Velankanni and several other places without the consent of either the victim girl or her parents, who are the lawful guardians of the victim girl. Since the victim girl had not completed 18 years of age, she was a minor at the time of occurrence. Therefore, since the victim girl was forcibly

removed from the custody of the lawful guardians without their consent, the appellant has committed the offence under Section 366 IPC. Since the the appellant had sexual intercourse with the victim girl, who was a child under the definition of POCSO Act, he has committed the offence punishable under Section 6 of the POCSO Act.

12.The learned Government Advocate (Crl. Side) would further submit that, though the victim girl, in her statement under Section 164 Cr.P.C. before the learned Judicial Magistrate, has not stated that when they were staying in Tirupathi at a lodge, she was subjected to penetrative sexual assault, however, she has clearly stated in that statement itself that, while they were staying at Velankanni on 18.11.2015 to 19.11.2015, the appellant had forcible sexual intercourse with her. The evidence of the Doctor (P.W.6) also corroborates with the same that the hymen of the victim girl was not intact. Though the Doctor (P.W.6) has stated that there was no external injury on the victim girl, the opinion of the Doctor was that the victim girl was subjected to penetrative sexual assault.

13. Therefore, the learned Government Advocate (Crl. Side) would submit that, once the prosecution has proved that the victim girl was a child and she was removed from the custody of her lawful guardians without their consent, the appellant has committed the offence under Section 366 IPC and since the prosecution has proved that the victim girl, who was a child under the POCSO Act, was subjected to penetrative sexual assault by the appellant, the appellant has committed the offence punishable under Section 6 of the POCSO Act. Therefore, the trial Court rightly appreciated the oral and documentary evidence and has convicted the appellant and there is no merit in the appeal and the appeal is liable to be dismissed.

14. Heard the learned counsel on either side and perused the materials available on record.

15. The case of the prosecution is that the victim girl was a minor aged about 17 years. On 12.11.2015 at about 05.00 p.m., the appellant made the victim girl to come to Kattupakkam in Two-Wheeler, bearing Registration No.TN-01-AW-8002, and they went to Kattupakkam at about

06.45 p.m. There, the appellant got one sovereign of gold from the victim girl on compulsion and raised money by pledging the same, and thereafter, he left the Two-Wheeler in Koyambedu and took the victim girl to Tirupathi. He took a room on 13.11.2015 at 08.00 a.m. and stayed there for three days, i.e., till 15.11.2015. Subsequently, on 15.11.2015 at 10.00 p.m., the appellant took the victim girl to Nagapattinam by Bus and from there, he took her to Velankanni, where they stayed in a room at Sankarapani Lodge till 18.11.2015, and during that period, the appellant had forcible sexual intercourse with the victim girl several times on compulsion. Thereafter, he vacated the said room and they stayed in another lodge by name MJN Lodge from 18.11.2015 @ 07.30 p.m. to 20.11.2015 @ 07.30 p.m. Since the appellant had removed the victim girl, who is a minor aged about 17 years, from the custody of her parents, who are her lawful guardians, and had forcible sexual intercourse with her, who is a child under POCSO Act, the appellant has committed the offences punishable under Sections 366 IPC and Section 6 of the POCSO Act.

16. After completing the investigation, the respondent police laid a charge-sheet before the Special Court for the offences under POCSO

Act, 2012 (Mahila Court), Chennai, and the learned Special Judge had taken the case on file in S.C.No.250 of 2016.

17.The trial Court framed the charges against the appellant as stated *supra*. When questioned, the appellant pleaded “not guilty”.

18.In order to prove the case of the prosecution, on the side of the prosecution, during trial, 9 witnesses were examined and 12 documents were marked. Three Court documents were marked. On the side of the defence, no witness was examined, however, two documents were marked. One Material Object was exhibited as D.M.O.1.

19.After hearing the arguments advanced on either side and considering the evidence on record, the trial Court, by judgment, dated 22.11.2018, in S.C.No.250 of 2016, convicted and sentenced the appellant for the offences punishable under Section 366 IPC and Section 6 of the POCSO Act, as above.

20.Challenging the said judgment of conviction and sentence, the accused/appellant has preferred the appeal before this Court.

21.This Court, being an Appellate Court, is a fact finding Court, and it has to give its finding independently after appreciating the entire evidence. Accordingly, this Court has re-appreciated the entire evidence.

22.The victim girl was examined as P.W.3. On a careful reading of the evidence of the victim girl (P.W.3), it is seen that she has narrated the entire events. There is no eye-witness in this case. P.W.5 is the owner of the house in which the victim girl along with her parents were residing. She (P.W.5) has stated that the victim girl was missing during the relevant point of time; the parents of the victim girl filed a complaint before the Police for “Girl Missing”, and subsequently, came to know that the appellant only took the victim girl. The Doctor, one who conducted the medical examination of the victim girl, was examined as P.W.6. The evidence of the Doctor (P.W.6) clearly shows that though there was no external injury on the body of the victim girl, but the hymen was not intact.

23.The victim girl was produced before the learned Judicial Magistrate for recording statement under Section 164 Cr.P.C. The said statement was marked as Ex.P3. Though, in the said statement, the victim girl has stated that the appellant took the victim girl to Tirupathi and they stayed in a lodge, where he has not committed any penetrative sexual assault, however, she has stated that, subsequently, they went to Velankanni, and stayed at Sankarapani Lodge and MJN Lodge on 18.11.2015 and 19.11.2015, and during that period, the appellant had forcible sexual intercourse with her. Though the statement recorded under Section 164 Cr.P.C. is not a substantive evidence, subsequently, the victim girl was examined before the Court as P.W.3, during trial, and she has deposed that she was subjected to forcible penetrative sexual assault by the appellant. Therefore, the statement under Section 164 Cr.P.C. corroborates with the evidence of the victim girl (P.W.3). The evidence of the Doctor (P.W.6) also corroborates with the same. The Accident Register of the victim girl was marked as Ex.P6, which also clearly shows that the victim girl was subjected to penetrative sexual assault.

24. At the time of occurrence, the victim girl had not completed 18 years of age, and therefore, she is a “child” under Section 2(1)(d) of the POCSO Act. In order to prove the age of the victim girl, the Birth Certificate of the victim girl was marked as Ex.P2. As per Ex.P2, the Date of Birth of the victim girl is 06.11.1998. The date of occurrence is between 12.11.2015 and 19.11.2015, and therefore, at the time of occurrence, the age of the victim girl was only 17 years, and she had not completed 18 years. Even as per Ex.P7 (medical records of the victim girl), the age of the victim girl was 17 years, and the defence has not disputed the age of the victim girl. Therefore, it is clear that, at the time of occurrence, the age of the victim girl was only 17 years, and therefore, she is a “child” under Section 2(1)(d) of the POCSO Act. The appellant was aged about 26 years at the time of occurrence.

25. From the evidence of the victim child (P.W.3), P.W.1 (father of the victim girl), P.W.2 (mother of the victim girl), Ex.P11 (F.I.R. registered on 13.11.2015 for “Girl Missing”) and Ex.P12 (F.I.R. registered on 28.11.2015 for the offences under Sections 366-A IPC and Section 4 of the POCSO Act), it is clear that the appellant has removed the custody of

the victim girl from her parents, who are the lawful guardians, without their consent, and therefore, he has committed the offence punishable under Section 366 IPC, and since the minor victim girl, who was a child under POCSO Act, was subjected to aggravated penetrative sexual assault, the appellant has also committed the offence punishable under Section 6 of the POCSO Act.

26. Though there is no independent witness, in cases like this, conviction can be made solely based on the evidence of the prosecutrix. In this case, the victim is a child and her custody was removed from her lawful guardians without their consent. Even assuming that the appellant took the victim girl with her consent, since the victim child had not completed the age of 18 years, her consent cannot be taken as a lawful consent. Further, from the evidence of the Doctor (P.W.6), it is seen that there were no external injuries on the victim girl. Even assuming that the victim child had not objected to the sexual intercourse and had given her consent, such a consent of a child is not legally valid. Once the victim is a child, falling under Section 2(1)(d) of the POCSO Act, her consent is immaterial.

27.From the oral and documentary evidence, the prosecution has proved that the appellant removed the custody of the victim child from her parents, who are the lawful guardians, without their consent, and subsequently, had forcible penetrative sexual intercourse with her, and therefore, the appellant has committed the offences punishable under Section 366 IPC and Section 6 of the POCSO Act. Though there are contradictions from the evidence of the prosecution witnesses, the contradictions are not material contradictions, which will go to the root of the case of the prosecution. This Court does not find any reason to discard the evidence of the victim child (P.W.3). On a combined reading of the evidence of P.W.1 to P.W.6 and also the documents Exs.P1 to P8, this Court also finds that the appellant has committed the offences punishable under Sections 366 IPC and Section 6 of the POCSO Act. The trial Court has rightly appreciated the entire oral and documentary evidence and has rightly convicted the appellant for the offences as stated above. Therefore, this Court does not find any merit in the appeal and the appeal is liable to be dismissed.

28. Accordingly, this Criminal Appeal is dismissed and the judgment of conviction and sentence, passed by the trial Court, is confirmed.

29. Consequently, the suspension of sentence and bail granted to the appellant/accused on 28.01.2020 in Crl.M.P.No.14232 of 2019 in Crl.A.No.671 of 2019, is cancelled. The trial Court is directed to secure the accused/appellant and commit him to prison for sufferance of remaining sentence. Bail bond, if any, executed by the appellant shall stand cancelled.

19.04.2021

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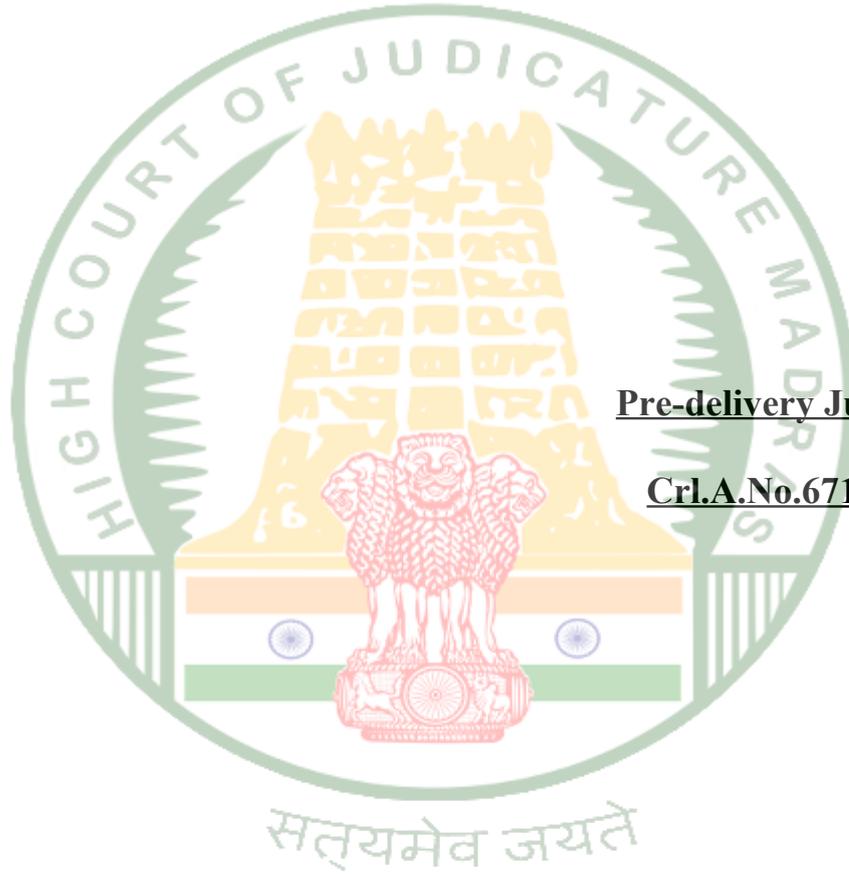
To

- 1.The Sessions Judge,
Special Court for the cases under POCSO Act, 2012,
(Mahila Court),
Chennai.
- 2.The Inspector of Police,
W-24, All Women Police Station,
Teynampet,
Chennai.
- 3.The Inspector of Police,
E-3 Teynampet Police Station,
Chennai.
- 4.The Public Prosecutor,
High Court, Madras.
- 5.The Deputy Registrar
(Criminal Section),
High Court, Madras. | with a direction to send back the
original records to the trial Court,
if any, immediately

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P. VELMURUGAN, J.

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Pre-delivery Judgment
in
Crl.A.No.671 of 2019

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