BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.04.2022
(Reserved on 12.04.2022)

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Criminal Appeal(MD)No.354 of 2021

Rajivgandhi ... Appellant

vs.

The State rep by
The Inspector of Police,
Mathur Police Station,
Pudukkottai District.
(Crime No.366 of 2020) ... Respondent

Appeal filed under Section 374(2) of the Criminal Procedure Code, against the conviction and sentence passed by the learned Sessions Judge (Mahila Court), Pudukkottai, in Special S.C.No.2 of 2021, dated 05.05.2021.

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

JUDGMENT

R.SUBRAMANIAN, J.
AND
N.SATHISH KUMAR, J.

The accused who has been convicted for life sentence which would be till the end of the life time for the offences under Section 5(l) read with Section 6(1) of the Protection of Children from Sexual Offences Act, 2012 (for brevity, ''POCSO Act'') with a fine of Rs.1,00,000/-, in default to undergo simple imprisonment for 3 months and 7 years rigorous imprisonment for an offence under Section 363 of IPC along with a fine of Rs.20,000/- in default to undergo simple imprisonment for 3 months, has come up with this appeal.

2. The case of the prosecution is as follows:-

The accused who was running a tailoring shop in Perambur Village, Viralimalai Taluk, Pudukkottai District, had befriended the victim girl aged about 16 years when she went for tailoring training for about two months. The accused had enticed the girl and had sexually abused her. When the accused attempted to talk to the

victim girl over cell phone at odd hours, her mother deprecated the practice and thereafter stopped the girl from attending the tailoring classes. However, the accused on 05.12.2020 came near the house of the victim girl and enticed her to meet him near Sengulam. The victim girl had left the house under the pretext of getting some old clothes stitched at about 04.00 p.m. Since she did not return for a long time, the father of the victim girl/PW1 went in search of her and was not successful. He, therefore, lodged a complaint with the respondent/Police under Ex.P1 on 06.12.2020 at about 10.00 a.m. Thereafter, on the same day, the Police called him and asked him to come near the Mathur E.B office. When he went there, he found his daughter with the Police. The victim girl was taken for medical examination. Upon medical examination, it was found that the accused had penetrative sexual intercourse with the victim girl. PW10-Inspector of Police, on receipt of a complaint had enquired PW1 and other witnesses on the same day and recorded their statements. He had also arrested the accused who attempted to escape when he was on a routine vehicle check on Trichy-Mavur road. The confession made by the accused was recorded by him and

on the basis of the confession, the two wheeler bearing registration No.TN-42-R-4966 used by the accused to take the victim girl was seized from the accused. He had also taken the minor girl for medical examination and recorded the statements of the Doctor and the Constable who took her for medial examination. upon request, Section 164 statement of the victim girl was recorded on 21.12.2020. The accused was medically examined on 23.12.2020 and the report of the Doctor was also taken. The statement of the Doctor who had examined the accused, was recorded on 04.01.2021. Upon completion of the investigation, he laid a charge sheet charging the accused for the offences stated supra.

3. The accused denied having committed the crime. In order to prove the guilt, the prosecution, before the trial Court, examined as many as 10 witnesses and marked Exs.P1 to P12. The motorcycle was marked as MO1 and the CD was marked as MO2. The accused did not adduce either oral or documentary evidence.

4. The learned Sessions Judge upon consideration of the evidence on record, concluded that the prosecution has proved the guilt of the accused. Taking note of the fact that the accused had repeated sexual intercourse with the victim girl, the trial Court found that the accused is guilty of the offence under Section 5(l) of the POCSO Act. The Court also found that the accused is guilty of kidnapping a minor girl and as such, he has committed an offence punishable under Section 363 of IPC. Upon such conclusion, the learned Sessions Judge convicted the accused for the offences and sentenced him to undergo imprisonment as stated supra.

5. We have heard Mr.S.Sivasubramanian, learned counsel appearing for the appellant and Mr.T.Senthil Kumar, learned Additional Public Prosecutor appearing for the prosecution.

6. Mr.S.Sivasubramanian, learned counsel appearing for the appellant/accused would contend that the very narration of the incident by PWs 1 and 2 bristles with inconsistencies and therefore, conviction cannot be based on such inconsistent testimonies. The

learned counsel would point out that in the Section 164 statements of the victim girl which has been marked as Ex.P3, there is not even a whisper of penetrative sexual assault. Therefore, according to him, we should not give any credence to the vocular evidence of the victim girl which runs counter to the statement made under Section 164 Cr.P.C., before the learned Magistrate. Contending further, the learned counsel would submit that the entire evidence if read in a proper perspective, would show that the victim girl had gone with the accused on her own and it was a consensual relationship and therefore, the theory of kidnapping cannot be countenanced.

7. Arguing further, the learned counsel would submit that while the accident register records that the hymen was not intact, the Doctor namely, PW3 had deposed that the hymen was torn and the vagina admitted two fingers. Therefore, according to the learned counsel, the inconsistencies in the medical evidence would have a bearing on the credibility of the case of the prosecution. The learned counsel would also plead that the quantum of sentence is excessive and is improportionate to the proved offence. The trial Court has

failed to note that the minor girl who is aged about 16 years had voluntarily accompanied the accused. The relationship being consensual and on a promise of marriage, the same cannot be treated as a forced sexual relationship. The learned counsel would contend that the fact that there was a consent, though invalid, would be a mitigating factor while considering the quantum of sentence.

8. Contending contra, Mr.T.Senthil Kumar, learned Additional Public Prosecutor would submit that the vocular evidence of the victim girl is clear and categoric. He would also point out that there is no cross examination of the victim girl on the vital aspects of her evidence. Decrying the attempt of the learned counsel for the appellant to highlight the differences between the 164 statement and the substantive evidence before the Court, the learned Additional Public Prosecutor would point out that the statement has not been put to the victim girl while she tendered evidence in Court. According to the learned Additional Public Prosecutor, in the absence of such cross examination pointing out the inconsistencies in the statement made under Section 164 Cr.P.C., the 164 statement

cannot be relied upon by the accused to whittle down the effect of the vocular evidence of the victim girl. The learned Additional Public Prosecutor would also point out that even assuming without admitting that there was a consent, the same cannot be of any use to the accused, since the victim girl is a minor and any consent would be invalid. He would also point out the evidence of the victim girl who has been examined as PW2, to contend that there was no consent and the relationship was by use of force.

9. Replying to the contention of the learned counsel based on the difference in the evidence of the Doctor and the accident report, the learned Additional Public Prosecutor would submit that use of imperfect language by medical professionals in their oral evidence that too when they were forced to depose in Tamil, cannot be a ground to discredit their testimony or to disbelieve the prosecution theory. The difference between hymen not intact and hymenal tear cannot be put in very refined Tamil and therefore, according to the learned Additional Public Prosecutor, the said contention has to be brushed aside. On the two finger test, the

learned Additional Public Prosecutor would submit that the Hon'ble Supreme Court has deprecated the said practice and it is high time that the said practice must be stopped.

10. The learned counsel for the appellant also would submit that the two finger test has been held to be unconstitutional and several State Governments have banned it. He would also persuade us to impose a ban on the two finger test by relying upon the judgments of the Hon'ble Supreme Court in **Lillu @ Rajesh and another vs. State of Haryana (Criminal Appeal No.1226 of 2011, dated 09.04.2013), In Re : Assessment of the Criminal Justice System in response to Sexual Offences (Suo Motu Writ Petition(Crl)No.04 of 2019,** and that of the Gujarat High Court judgment in **State of Gujarat vs. Rameshchandra Ramabhai Panchal** reported in **2020 SCC Online Gujarat 114**. The learned counsel would also draw our attention to the article in the Hindu dated 10.04.2022 wherein, the author has pointed out that the protocols of medical examination prescribed by the Supreme Court are often not implemented in cases of sexual violence relating to children.

11. The learned counsel would also draw our attention to the judgment of the Supreme Court in **EERA vs. State (NCT of Delhi)** reported in **(2017) 15 SCC 133,** to contend that the two finger test which mocks the dignity of the child, which has been laid immense emphasis in the scheme of the POCSO Act, should be stopped. Reliance is also placed by the learned counsel on a judgment of the Supreme Court in **S.Varadharajan vs. State of Madras** reported in **AIR 1965 SC 942,** to contend that the offence under Section 363 IPC had not been made out since the victim girl had admitted that she went voluntarily along with the accused.

12. We have considered the rival submissions.

13. The accused has been charged under Section 363 of IPC for having kidnapped the minor girl. Section 361 IPC defines 'kidnapping from lawful guardianship' as follows:-

> ''Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of

> the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.
>
> Explanation.--The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.''

14. Of course, a bare reading of the provision would show that a person who takes or entices any minor under 16 years of age if a male, or under 18 years of age if a female, or any person of unsound mind, from the lawful guardianship of a guardian, is said to have kidnapped the minor. The meaning of the word 'taking' was considered by the Hon'ble Supreme Court in **S.Varadharajan vs. State of Madras reported in AIR 1965 SC 942.** The Hon'ble Supreme Court held as follows:-

> ''9. It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying

down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.''

15. After observing so, the Hon'ble Supreme Court found that the minor girl who was aged about above 16 years, had on her own free will walked out of the house and gone with the accused person. The meaning of the word 'enticing' was also considered by the Hon'ble Supreme Court in the said judgment and the Supreme Court

held that in order to prove the offence of kidnapping, it must be established that the accused had a role in her walking out and he had taken her away from her house. In the case on hand, it is in evidence that the victim girl had walked out of her house on her own in the pretext of having some old clothes stitched. She had travelled with the accused and was caught after nearly 24 hours. She never made an attempt to escape from his custody. The above conduct of the minor girl would show that she had gone on her own volition and therefore, the essential ingredients of the offence under Section 363 IPC has not been made out. We, therefore, conclude that the conviction for the offence under Section 363 IPC is not justified and the accused should be acquitted of the offence under the said section.

16. Adverting to the conviction for the offences under the POCSO Act, though the contention of the learned counsel for the appellant that there was a consent on the part of the victim girl appears to be very attractive on the face of it, we do not think that we could fault the trial Court for having convicted the accused under

the provisions of the POCSO Act. The evidence of PW2, the victim girl, is clear and categoric in respect of penetrative sexual assault for more than once. Of course, Section 164 statement of the victim girl does not speak about penetrative sexual assault. Unfortunately, for the accused, the said statement had not been put to the victim girl while she was tendering her substantial evidence before the Court in order to elicit the contradiction. In the absence of such exercise, the contradiction between Section 164 statement and the oral evidence cannot be taken advantage of by the accused in order to dislodge the presumption that is created under Section 29 of the POCSO Act.

17. Section 29 of the POCSO Act creates a presumption of guilt. No doubt, Courts have held that the presumption under Section 29 is not absolute and it is for the prosecution to prove the foundational requirements of commission of an offence in order that the presumption can be drawn. In the case on hand, if we scan the evidence of the victim girl and the medical evidence available, we will have to necessarily concede that the prosecution has proved the foundational facts. To our dismay, we find that there has been no

attempt by the accused either by way of cross examination of the victim girl or by production of any other evidence to project a motive and to dislodge the presumption under Section 29 of the POCSO Act. Section 30 of the POCSO Act creates a presumption of culpable mental state on the part of the accused. Though Section 30 provides that the accused can prove the fact that he had no such mental state with respect to the act charged, such an attempt has not been made. This leaves us without an option but to confirm the findings of the trial Court based on the evidence of PW2, the victim girl and the medical evidence that is available. We, therefore, conclude that the trial Court was right in its finding that the accused is guilty of the offences under Section 5(l) and Section 6(1) of the POCSO Act.

18. Coming to the quantum of sentence, we find that the sentence of life imprisonment is really harsh, particularly, on the given set of facts. From the evidence of PW2, we are able to find that there was some kind of relationship between the accused and the victim girl. No doubt, the accused is a married person and he

could be said to be guilty of deceiving the victim girl on a promise of marriage, but the evidence of the victim girl would show that there was actually a love affair between the two and the accused had stated that he could not live without seeing her. Taking into account this evidence, we are of the opinion that a minimum sentence of imprisonment for a period of 20 years would suffice. After all, reformation is the object of sentencing. We, therefore, modify the sentence for life imposed by the trial Court and reduce it to 20 years of rigorous imprisonment. The fine and the default period of sentence are sustained. The period of incarceration already undergone is directed to be set off under Section 428 Cr.P.C.

19. Before parting with this case, we feel that it is necessary for us to put an end to the practice of the two finger test. We find that the two finger test is being used in cases involving sexual offences, particularly, on minor victims. As early as in 2013, the Hon'ble Supreme Court had held that the two finger test and its interpretation violates the right of rape survivors to privacy, physical

and mental integrity and dignity. While doing so, the Hon'ble Supreme Court in **Lillu @ Rajesh and another vs. State of Haryana (Criminal Appeal No.1226 of 2011, dated 09.04.2013)** has observed as follows:-

> ''12. .... They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.
>
> 13. Thus, in view of the above, undoubtedly, the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent.''

20. Again, in **Re : Assessment of the Criminal Justice System in response to Sexual Offences (Suo Motu Writ Petition(Crl)No.04 of 2019,** the Hon'ble Supreme Court had called for a status report and the 5th question that has been framed is as follows:-

> ''(5) whether the medical experts have done away with the Per-Vaginum examination commonly referred to as 'Two-finger test' and whether any directions have been issued by the states in this regard?''

21. The Gujarat High Court in **State of Gujarat vs. Rameshchandra Ramabhai Panchal** reported in **2020 SCC Online Gujarat 114**, had held that the two finger test is the most unscientific method of examination used in the context of sexual assault and has no forensic value. The Court observed as follows:-

> ''30.The two-finger test is unconstitutional. It violates the right of the victim to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, give rise to presumption of consent. In view of the

International Covenant on Economic, Social, and Cultural Rights 1966 and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, the victim of sexual assault are entitled to legal recourse that does not traumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with their privacy. [See: Lilu @ Rajesh and Anr. Vs. State of Haryana, (2013) 14 SCC 643]

34. We take notice of the fact that the Maharashtra Government has done away with finger test on rape victims by issuing a Government Resolution in 2013. The

Resolution says that such test is non-scientific most of the time, often resulting in hurdles in the investigations and miscarriage of justice. This GR was issued based on a report by eight member panel appointed by the Maharashtra Government. The GR explained that the procedure of finger test is degrading and crude and medically and scientifically irrelevant. Information about the past sexual conduct has been considered irrelevant and the doctor need not verify if the victim habitually has sexual intercourse.''

22. In **EERA vs. State (NCT of Delhi)** reported in **(2017) 15 SCC 133,** the Hon'ble Supreme Court while dealing with the POCSO Act, had observed that the interest of the child both as a victim as well as a witness needs to be protected. The Court added as follows:-

''20..... The stress is on providing child-friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act.''

23. In view of the above judicial pronouncements, we have no doubt that the two finger test cannot be permitted to be continued. Therefore, we issue a direction to the State Government to ban the practice of two finger test on victims of sexual offences by the medical professionals forthwith.

24. In fine, the Criminal Appeal is partly allowed. The conviction and sentence for the offence under Section 363 IPC is set aside *in toto*. The conviction for the offences under Section 5(l) and 6(1) of the POCSO Act is confirmed and the life sentence is, however, reduced to 20 years of rigorous imprisonment. The fine of Rs.1,00,000/- and the default sentence of simple imprisonment for 3 months, is confirmed.

(R.S.M., J.) (N.S.K., J.)
21.04.2022

Index : Yes / No
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To

1.The Inspector of Police,
Mathur Police Station,
Pudukkottai District.

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

R.SUBRAMANIAN, J.
AND
N.SATHISH KUMAR, J.

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PRE-DELIVERY JUDGMENT MADE IN
CRL.A(MD)No.354 of 2021
DATED : 21.04.2022