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Crl.A.No.627 of
2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.11.2022

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.627 of 2021

Ravi @ Virumandi

.. Appellant

.Vs.

1.State represented by:

The Assistant Commissioner of Police,
North Range,
Tiruppur.

2.State represented by

The Inspector of Police,
North Police Station,
Tiruppur,
Crime No.624 of 2014.

..

Respondents

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure to set aside the judgment of conviction and sentence dated 04.01.2020 by the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court) Tiruppur in Spl.S.C.No.14 of 2017 and acquit the appellant.

For Appellant : Mr.Naveen Kumar
Legal Aid Counsel

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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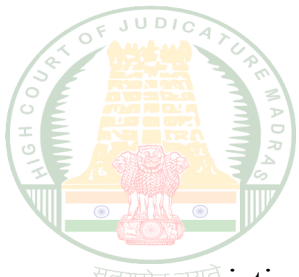
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This Criminal Appeal has been filed against the judgment of conviction and sentence dated 04.01.2020 passed by the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court) Tiruppur in Spl.S.C.No.14 of 2017.

2. The case of the prosecution is that the victim, who was aged about 17 years, was working as an Assistant Tailor at Anitha stitching centre. The accused/appellant was also working in the same stitching centre. On 05.05.2014, the victim went to the stitching centre for attending the work at about 8.30 a.m the victim stated to her parents that she was not doing well and that she is going to her house. At the same time, the accused also went out from the stitching centre. Thereafter, the accused kidnapped the minor victim girl from the lawful guardians from Tiruppur to Amurdhahalli, Bangalore in train and forcefully married her and both were residing in a rented house at Bangalore near the house of P.W.5 one Nagamani. Both the accused and the victim resided at Bangalore for about 76 days i.e. from 05.05.2014 to 19.07.2014 and at that time the accused forcefully had sexual intercourse with the minor

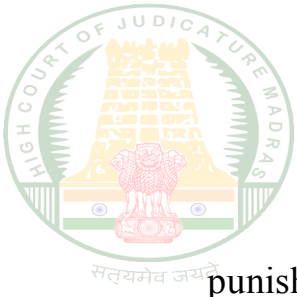


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victim several times. Further, the accused is a non-member of the Schedule Castes and Schedule Tribes Community and the victim girl belongs to Schedule Castes and Schedule Tribes Community, thereby, the offence committed by the appellant falls under Sections 363, 344 IPC and Sections 3 r/w 4 and 5(1) r/w 6 of 'The Protection of Children from Sexual Offences Act, 2012' [hereinafter referred to as 'POCSO Act' for the sake of convenience] and Sections 3(1)(r)(w)(i) r/w 3(2)(Va) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, [hereinafter referred to as 'SC/ST Act'].

3. On the complaint given by the *de-facto* complainant/P.W.1, the respondent/Police registered a case in Crime No.624 of 2014 as 'girl missing'. After investigation, the respondent/Police filed alteration reports before the learned Judicial Magistrate No.1, Tiruppur against the appellant for the offences under Section girl missing @ 366(A) IPC @ 3(1)(r)(w)(i) and 3(2)(v) of SC/ST Act and Sections 366-A and 376 IPC. Thereafter, the respondent/Police laid a charge sheet before the learned Magalir Neethimandram (Fast Track Mahila Court), Tiruppur for the offences under Sections 366 and 344 IPC and Section 5(1) which is



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punishable under Section 6 of POCSO Act and Sections 3(1)(r)(w)(i) and 3(2)(Va) of SC/ST Act and the same was taken on file in Spl.S.C.No.14 of 2017. When questioned, the accused denied the allegation. However, based on the materials, the trial Court framed the aforementioned charges against the appellant.

4. In order to prove its case before the trial Court, on the side of the prosecution, as many as 13 witnesses were examined as P.W.1 to P.W.13 and 16 documents were marked as Exs.P1 to P16.

5. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused and he was questioned under Section 313 Cr.P.C., wherein he had denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, no oral evidence was adduced and no documentary evidence was produced.

6.1 The Court below, after hearing the arguments advanced on



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either side and also considering the materials available on record, found that the appellant is guilty of the offences under Section 366 IPC and Section 5(1) r/w 6 of POCSO Act and Section 3(1)(w)(i) r/w 3(2)(Va) of SC/ST Act and he was convicted and sentenced as follows :

(i) for the conviction under Section 366 IPC he was sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.1,000/-, in default, to undergo additional rigorous imprisonment for a period of one year;

(ii) for the conviction under Section 5(1) which is punishable under Section 6 of POCSO Act he was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.10,000/-, in default, to undergo additional rigorous imprisonment for a period of two years;

(iii) for the conviction under Sections 3(1)(w)(i) r/w 3(2)(Va) SC/ST Act he was sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.5,000/-, in default, to undergo additional rigorous imprisonment for a period of one year;

(iv) the trial Court ordered that the sentences imposed on the appellant shall run concurrently.



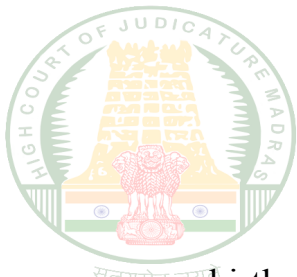
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6.2 As the prosecution has failed to prove the guilt of the accused under Section 344 IPC and Section 3(1)(r) r/w 3(2)(Va) of SC/ST Act beyond reasonable doubt, the benefit of doubt is given to the accused and he is acquitted of the above charges.

7. Challenging the said conviction and sentences, the appellant is before this Court.

8.1 The learned counsel for the appellant submitted that the prosecution has not proved the age of the victim in the manner known to law. Actually, at the time of occurrence, the victim has completed 18 years, but, the documents which were created by the prosecution, show that the victim has not completed 18 years. Originally, the case was registered as 'girl missing', subsequently, it was altered into Section 366(A) IPC and also altered into Sections 3(1)(r)(w)(i) and 3(2)(v) of SC/ST Act and Sections 366-A and 376 IPC and they have not altered into the offence under POCSO Act. On the date of registering the case, no document was produced to prove the date of birth of the victim. Therefore, initially, the case was registered as 'girl missing' and subsequently, after investigation, the prosecution altered the charges and even they have not produced any Birth Certificate to prove the date of

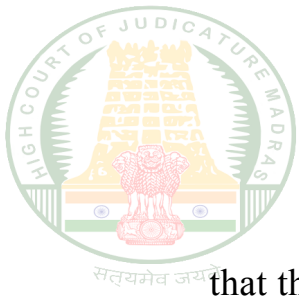


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birth of the victim as 10.05.1997. In the alteration report, the Investigating Officer has stated that, based on the School Certificate issued by the School Authority, they have mentioned the date of birth of the victim girl as 10.05.1997, but the same was not annexed with the alteration report. The facts remains that the School Certificate was obtained only in the year 2016. The Doctor who examined the victim girl, has advised the prosecution to send the victim for radiology test to ascertain her age, but, the radiology test was not conducted on the victim. He further submitted that, to prove the age of the victim, if any medical examination was conducted, the correct age of the victim would come to light and to avoid the same, they did not send her for medical test to obtain certificate from the competent medical officers. Once the age of the victim has not been proved, then the offence under the POCSO Act would not attract. The prosecution had created the documents to prove the age of the victim, after registering the complaint, which creates a doubt in their case.

8.2 The learned counsel for the appellant further submitted that from the evidence of victim it would shows that the victim voluntarily went along with the appellant. During trial the victim girl has deposed



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that the appellant married her and they stayed in Bangalore for more than 2 ½ months as husband and wife. Therefore, Section 366 IPC would not get attracted. He further submitted that the medical report also shows that there were no external injuries found on the victim. Therefore, from the evidence of the victim and also from the medical evidence, it reveals that the victim had given her consent for marriage and hence, Section 3(1)(w)(i) of SC/ST would not get attracted. There are no materials to prove that without consent or against her will, the appellant forcefully taken the victim to Bangalore and married her and also had physical relationship with her. Therefore, none of the ingredients have been made out to frame the charges against the appellant for the offence under Section 5(1) r/w 6 of POCSO Act. The prosecution has failed to prove the foundational fact that the victim was a child and the appellant kidnapped the victim and forcefully married her and had a physical intercourse with her. He further submitted that the respondent/Police went to Bangalore and secured both the victim and the appellant, however, they have stated that, based on the secret information they have secured the appellant and victim at Tiruppur while they were coming from Bangalore to Tiruppur. It is not a case which would fall under the NDPS Act or an offence of

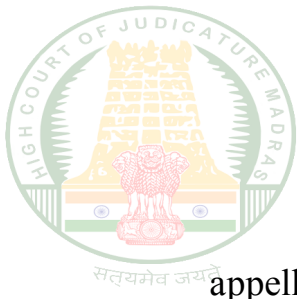


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Sedition or an offence of Conspiracy, to keep the information secretly for securing the accused and the victim. The prosecution has not come out with correct facts that they have investigated the matter in a fair manner and they have found out the truth. All the material documents submitted by the prosecution are only an after-thought, and they have created the documents to suit their case in their favour. Further, there are material contradictions between the evidence of prosecution witnesses and all the contradictions would go to the root of the case of the prosecution. In criminal cases, it is the duty of the prosecution to prove its case beyond reasonable doubt and they cannot take advantage of the defence side arguments. None of the charges framed against the appellant are proved by the prosecution beyond reasonable doubt by establishing the foundational facts. Therefore, the benefit of doubt should be extended to the appellant. For the very same facts and materials, the appellant was acquitted for the offences under Sections 344 IPC and 3(1)(r) r/w 3(2)(Va) SC/ST Act. However, the trial Court failed to appreciate the entire oral and documentary evidence and convicted and sentenced the appellant for the offences as stated supra.

8.3 In support of his contentions, the learned counsel for the



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appellant placed reliance of the judgments of the Hon'ble Supreme Court and other High Courts and this Court as follows :

(i) ***Jasbir Singh & Anr. V. State of Punjab*** reported in **2009 (SCC) Online P&H 5214**;

(ii) ***Kala Singh V. State of Punjab*** reported in **1996 (SCC) Online P&H 819; 1997 Cri LJ 1313**;

(iii) ***Ravi v. State by Inspector of Police*** reported in **CDJ 2010 MHC 2205**;

(iv) ***Ram Murti V. State of Haryana*** reported in **1970 (3) SCC 21**;

(v) ***XXXXX V. State Govt of NCT of Delhi and Anr.*** reported in **2022 LiveLaw (Del) 1077**;

(vi) ***Vijayalakshmi & Anr. V. State by Inspector*** [Crl.O.P.No.232 of 2021 dated 27.01.2021 (Madras HC)]; and

(vii) ***Sabari @ Sabarinathan @ Sabarivasan V. State by Inspector*** [Cri.Appeal No.490 of 2018 dated 26.04.2019 (Madras HC)] reported in **2019 (3) MLJ (Crl)110**.

8.4 As per the Judgment of ***Ram Murti V. State of Haryana*** reported in **1970 (3) SCC 21**, when the Doctor suggested the

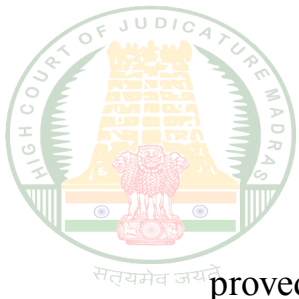


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respondent/Police therein, they sent the victim girl for radiology test to find out her age, however, in the case on hand, the prosecution has not conducted the radiology test and also brought the actual age of the victim and hence, the documents submitted by the prosecution have not been sufficient to prove that the age of the victim was below 18 years or she was a minor girl or child. The learned counsel also placed reliance on the judgment of this Court stated supra to show that the age of the victim was between 16 and 18 years and she cannot be treated as a minor or a child. The teenage persons, who fall in love and develop any physical relationship due to infatuation, may not be punished under POCSO Act. Therefore, the trial Court failed to appreciate the entire materials placed before it and erroneously convicted and sentenced the appellant, which warrants interference of this Court.

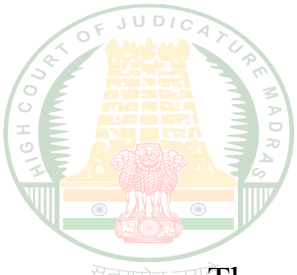
9. The learned Additional Public Prosecutor appearing for the respondent submitted that date of birth of the victim is 10.05.1997, whereas the occurrence took place on 05.05.2014 and the case was registered on 10.05.2014. Therefore, at the time of occurrence, the victim girl was aged about 17 years and she is a child coming under the definition of Section 2(1)(d) of the POCSO Act. The prosecution has



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proved the date of birth of the victim by producing Ex.P6/School Certificate. On the date of occurrence, the appellant took the victim, who has not completed 18 years to Bangalore and forcefully married her and also had physical relationship with her. Therefore, as per Section 94(2)(ii) of the Juvenile Justice (Care and Protection) Act, 2015, the trial Court presumed that the age mentioned in the School Certificate/Ex.P6 is genuine and taken the said Certificate to fix the age of the victim. When the victim girl was examined as P.W.2, she has clearly narrated that the appellant enticed her that he will marry her and took care of her and took her to Bangalore. Later, the accused forcefully married her and had committed physical relationship with her. Since the victim has not completed 18 years at the time of occurrence, the act committed by the appellant falls under Section 366 IPC and also Section 5(1) which is punishable under Section 6 of POCSO Act. He further submitted that in Bangalore, the appellant and victim girl resided in a rental house. P.W.5 who is the neighbour of the victim and the appellant at Bangalore, has categorically stated that often disputes arose between them and when P.W.5 enquired about the same, they stated the reason for their quarrel is that they belong to different Community and P.W.5 used to pacify them.



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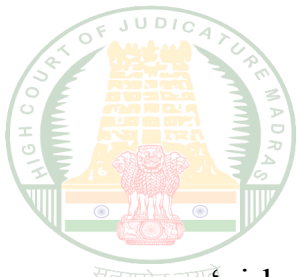
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Therefore, the offence under Section 3(2)(Va) of SC/ST Act would get attracted. The prosecution has proved its case beyond reasonable doubt. Once the prosecution has proved the foundational fact that at the time of occurrence, the victim was a child and she was subjected to penetrative sexual assault, then as per Sections 29 and 30 of the POCSO Act, it is for the accused to rebut the presumption that he had no sexual intent. However, in the case on hand, the appellant has not rebutted the presumption in the manner known to law. There is no merit in the appeal and the same is liable to be dismissed.

10. Heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the respondent and also perused the materials available on record.

11. This Court, being an Appellate Court, is a final Court of fact finding, which has to necessarily re-appreciate the entire evidence and give an independent finding. Accordingly, this Court has re-appreciated the entire oral and documentary evidence produced before this Court.

12. In the present case, originally the complaint was registered as



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girl missing' and subsequently the Sections of the offences were altered, since the victim was child at the time of occurrence and custody of the victim was removed from the lawful guardians without their consent by the appellant and also, she belongs to the Scheduled Tribes Community and he forcefully married her and had physical relationship with her on several times. Therefore, the trial Court framed charges against the appellant for the offences under Sections 366 and 344 IPC and Section 5(l) which is punishable under Section 6 of POCSO Act and also under Section 3(i)(r)(w)(i) r/w 3(2)(Va) of SC/ST Act.

13. In order to substantiate the charges framed against the appellant, on the side of the prosecution, totally 13 witnesses were examined, out of which, the victim girl was examined as P.W.2; the father of the victim was examined as P.W.1; the Doctor who conducted medical examination on the victim, was examined as P.W.3; the Doctor who conducted medical examination on the appellant was examined, as P.W.4; the neighbour where the appellant and the victim were residing at Bangalore, was examined as P.W.5; the Thasildar who issued community certificate/Ex.P9 to the victim was examined as P.W.9; and the Head Mistresses who had issued School Certificate, was examined as P.W.7. In



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order to prove the age of the victim, the prosecution has produced Ex.P6/School Certificate in which the date of birth of the victim is mentioned as 10.05.1997. As per the complaint/Ex.P1 and the evidence of P.W.1 and P.W.2, the occurrence had taken place on 05.05.2014. Therefore, at the time of occurrence, the victim was 17 years and she has not completed 18 years.

14. The main contention raised by the learned counsel for the appellant is that the prosecution has not proved the age of the victim in the manner known to law. However, P.W.7 has clearly stated that the victim girl studied in her school and P.W.13/Investigating Officer gave a requisition to obtain the School Certificate and at the request of the Investigation Officer, she issued Ex.P6/School Certificate. A careful reading of the evidence of P.W.1, P.W.2 and P.W.7, the defence has not disputed the age of the victim and also not disputed Ex.P6.

15. Section 34 of the POCSO Act stipulates that if any question regarding the age of a person arises, it shall be determined by the Special Court where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care



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and Protection) Act, 2015. As per the Juvenile Justice Act, the date of
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Birth Certificate from the school of the matriculation or the equivalent certificate issued by the competent authority, can be determined for fixing the age of the child and such document is presumed to be a genuine. No doubt, the said presumption is rebuttable presumption, then it is the burden of the defence to rebut the presumption in the manner known to law. However, in the case on hand, the defence has not even put any suggestion before P.W.1/father of the victim, P.W.2/victim, P.W.7/Head Mistress and P.W.13/Investigation Officer regarding the date of birth mentioned in the School Certificate issued by the School Authority that the date of birth mentioned in the School Certificate is not a correct date of birth of victim and the same was as an after-thought. Since the same has not been disputed by the defence, the trial Court presumed that the Certificate issued by the School Authority Ex.P6 is a genuine unless it is proved contrarily in the manner known to law. This Court also finds that on the date of occurrence, the victim was a minor and she has not completed the age of 18 years and hence, she comes under the definition of Section 2(1)(d) of the POCSO Act.



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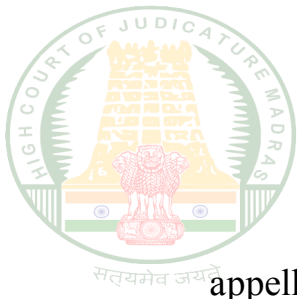
16. As far as commission of Section 366 IPC is concerned, the best witness who spoke about kidnapping is a victim/P.W.2 and she has clearly stated that the appellant forcefully took her to Bangalore and married her and had a physical relationship with her. Even assuming that the victim voluntarily went along with the appellant and given her



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consent, the consent said to have been given by the minor child is not a valid consent and the accused cannot take advantage of the teenage of the victim. Once the Court declared that the victim was a child and she comes under the definition of the POCSO Act, consent is immaterial. The facts remains that the appellant took the victim to Bangalore and forcefully married her and thereafter, had a physical relationship with her. However, the said marriage was not substantiated by the prosecution and they have not framed any specific charges against the appellant for the offence under the Prohibition of Child Marriage Act, 2006. This Court, being an Appellate Court, is a final fact finding Court and on re-appreciation of the entire oral and documentary evidence, it is found that the trial Court has not framed any specific charges against the appellant for the offence under the Prohibition of Child Marriage Act, 2006 and this Court cannot traverse beyond the scope of appeal, when neither the State nor the victim filed any appeal either for non framing of charge under the head or the finding in that regard. However, this Court finds that since the victim was a minor and her custody was taken away from her natural and lawful guardians without their consent, for marrying the minor girl and have a physical relationship, the offence committed by the



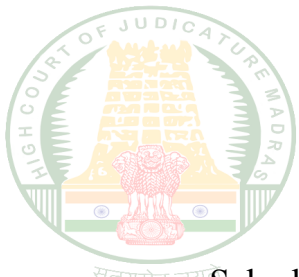
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appellant falls under Section 366 IPC and the trial Court rightly appreciated the evidence of P.W.2 and P.W.5 and rightly convicted and sentenced the appellant for the above said offence.

17. Though the learned counsel for the appellant vehemently contended that the act committed by the appellant does not fall under Section 366 IPC, the victim voluntarily went along with the appellant to Bangalore and with her consent, he married her. However, at the time of occurrence, the victim was a child and so, consent is immaterial and if the Court finds that the custody of the victim is removed from her natural guardians, that too for the purpose of marriage, the act committed by the accused falls under Section 366 IPC. Therefore, the contention raised by the learned counsel for the appellant is not acceptable.

18. As far as Sections 3(1)(w)(i) r/w 3(2)(Va) of SC/ST Act is concerned, the learned counsel for the appellant contended that the victim girl went along with the appellant to Bangalore and the appellant has not taken her to Bangalore without her consent or against her will. A reading of the evidence of P.W.2, P.W.5 and P.W.9 and Ex.P9/Community Certificate of the victim girl clearly show that the victim belongs

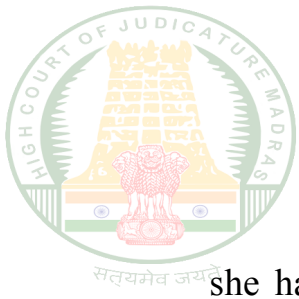


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Scheduled Tribes Community and the appellant is a non-member of the Scheduled Castes and Scheduled Tribes Community. The victim was a child and the appellant took the victim to Bangalore without consent or knowledge of her parents, it amounts to without her consent and hence, the offence committed by the appellant falls under Section 3(1)(w)(i) r/w 3(2)(Va) of SC/ST Act. From the evidence of P.W.2, P.W.5, and P.W.9 and Ex.P9 and the cross examination of the defence counsel with the victim itself prove the attitude of the appellant. Therefore, the above contention raised by the learned counsel for the appellant is not acceptable.

19. As far as Section 5(l) which is punishable under Section 6 of the POCSO Act is concerned, as already held, at the time of occurrence, the age of the victim was 17 years and she was subjected to penetrative sexual assault by the appellant. The evidence of the victim child clearly shows that while residing in Bangalore more than once the appellant had penetrative sexual assault. Further, P.W.3/Doctor who examined the victim girl, has stated that her hymen was not in-tact and she has also stated that there were no external injuries found on the victim. The medical evidence also supported the case of the prosecution. Even assuming that the victim voluntarily went along with the appellant and

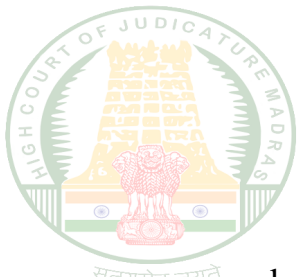


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she had given her consent for sexual intercourse, consent is immaterial and language of consent is unknown to the POCSO Act, since the victim was a child and she has not completed 17 years. If the victim was a child and the appellant had committed penetrative sexual assault on the victim for more than once, then it is termed as aggravated penetrative sexual assault which falls under Section 5(1) which is punishable under Section 6 of the POCSO Act.

20. The judgment cited by the learned counsel for the appellant in the case of *Ram Murti V. State of Haryana* reported in *1970 (3) SCC 21*, the Hon'ble Supreme Court dealt as how the age of the prosecutrix has to be determined. However, the said judgment was prior to the POCSO Act which is a Special Act and also the Juvenile Justice Act which came into force after that judgment. Further, Section 34 of POCSO Act clearly stipulates as to how the Special Court can determine the age of the victim and as far as Section 94(2)(ii) of the Juvenile Justice (Care and Protection) Act, 2015 is concerned, it mentions as to how the Court can presume the certificate issued by the authorities as genuine. In the case on hand, the prosecution has proved the age of the victim by



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producing Ex.P6/School Certificate which was issued by the Headmistress of the School in which the victim was studied and the same was not disputed. This Court presumes that the document issued by the School Authority is genuine and the date of birth mentioned in the School Certificate is also genuine. As far as Ex.P6 is concerned this Court already held that the victim has not completed age of 18 years and hence, the decision referred to by the learned counsel for the appellant is not applicable to the case on hand.

21. Further, as far as the other decisions of this Court referred to by the learned counsel for the appellant are concerned, though this Court has expressed the view that the teenage persons who have completed 17 years and not completed 18 years may not be punished under the POCSO Act, with great respect to the learned brother Judges, that it is the opinion of the particular Judge and it may not be a finding in all cases. Whereas, the law defines that the person who has not completed the age of 18 years, is a child. This Court, being an Appellate Court, is a final fact finding Court cannot traverse beyond the statute. This Court also eagerly is waiting for the amendment in the Legislature as expressed by my learned brothers. In the case on hand, this Court finds that the victim was



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a minor and the appellant took the custody of the minor without the knowledge or consent of her natural guardians and had committed penetrative sexual assault on her and hence, the offence committed by the appellant falls under Section 5(1) which is punishable under Section 6 of the POCSO Act.

22. This Court, being an Appellate Court, as a final Court of fact finding and re-appreciated the entire evidence supra and found that the appellant has committed the offences under Section 366 IPC, Section 5(1) which is punishable under Section 6 of the POCSO Act and Section 3(1)(w)(i) r/w 3(2)(Va) of SC/ST Act and the trial Court has rightly convicted and sentenced the appellant.

23. In fine, this Court does not find any merit in the appeal and Criminal Appeal deserves to be dismissed and accordingly, the same is dismissed. The conviction and sentences passed in Spl.S.C.No.14 of 2017 by the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Tiruppur are confirmed.



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24. This Court while hearing the appeal on 07.11.2022, revoked the order of suspension of sentence already granted by this Court on 04.03.2022 and directed the second respondent/Police to secure the appellant and produce him before this Court today i.e. on 18.11.2022. As directed, the respondent/Police produced the accused before this Court today and after hearing arguments advanced on either side, this Court dismissed the appeal and confirmed the judgment of conviction and sentence of the trial Court. The accused was earlier confined in Central Prison, Coimbatore. At the request of the learned counsel for the appellant, the appellant is directed to be detained in Central Prison, Madurai, since his native place is Usilampatty, Madurai District. The appellant/ accused shall undergo the remaining period of sentence, if any, and the same shall be set-off under Section 428 Cr.P.C.

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To

1. The Sessions Judge,
Mahalir Neethimandram
(Fast Track Mahila Court)
Tiruppur.
2. The Assistant Commissioner of Police,
North Range,
Tiruppur.
3. The Inspector of Police,
North Police Station,
Tiruppur.
4. The Superintendent,
Central Prison,
Madurai.
5. The Superintendent,
Central Prison,
Coimbatore.
6. The Public Prosecutor,
High Court, Madras.
7. The Deputy Registrar
(Criminal Section),
High Court, Madras. | with a direction to send back the
| original records, if any, to the
| trial Court



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2021

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18.11.2022