



Crl.A.No.732 of 2016

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.05.2024

CORAM :

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

Crl.A.No.732 of 2016

Baskar

... Appellant

Versus

State Rep. By
The Inspector of Police,
Andimadam Police Station,
Andimadam,
Ariyalur District.
(Crime No.165 of 2015)

... Respondent

Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, 1973, to call for the records and set aside the conviction and sentence imposed in Spl.S.C.No.26 of 2015 dated 07.04.2016 on the file of the learned Sessions Judge, Fast Track Mahila Court, Ariyalur District.

For Appellant	: Mr.S.Sivakumar
For Respondent	: M/s.G.V.Kasthuri
	Additional Public Prosecutor

J U D G M E N T

The Criminal Appeal had been filed seeking set aside the order of conviction and sentence imposed in Spl.S.C.No.26 of 2015, dated 07.04.2016 on the file of the learned Sessions Judge, Fast Track Mahila Court, Ariyalur District.

2. The Appellant is the sole Accused in Spl.S.C.No.26 of 2015



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on the file of the learned Sessions Judge, Fast Track Mahila Court,
Ariyalur District.

3. The Trial Court, vide impugned judgment dated 07.04.2016 in Spl.S.C.No.26 of 2015, had convicted the Sole Appellant/Accused as follows:-

Conviction under section	Sentence Awarded
6 of Protection of Children from Sexual Offences (POCSO Act), 2012	To undergo ten years of rigorous imprisonment and to pay a fine of Rs.25,000/- and in default, to undergo one year of simple imprisonment.
366 of IPC	To undergo five years of rigorous imprisonment and to pay a fine of Rs.5,000/- and in default, to undergo one year of simple imprisonment.

The Trial Court ordered the sentences to run concurrently and had also granted set-off under Section 428 Cr.P.C. for the period of incarceration undergone by the Accused during investigation/trial.

4. Today, 19.07.2023, when the case came up for hearing, Mr.S.Sivakumar, (Enrolment No.828 of 1996, Contact No.9444212323) learned Counsel appearing for the Appellant would submit that he has filed a change of Vakalat on 14.07.2023. Since the Appellant had engaged a new



Counsel, the new Counsel is directed to proceed with the Appeal. The memo of appearance filed by the nominated Legal Aid Counsel is revoked today.

5. The brief facts, which are necessary for disposal of this Criminal Appeal, are as follows:

5.1. This is a case of a father of two children eloping with another minor girl. The Inspector of Police, in charge of Andimadam Police Station filed a final report on 10.12.2015 before the learned Sessions Judge Fast Track Mahila Court, Ariyalur as follows:

5.2. The victim girl aged 17 years was studying +2 in a Government Higher Secondary School. The date of Birth of the victim girl is 10.06.1999. When she was studying 10th standard in another School, the Accused/Baskar, S/o.Arumugam aged 35 years, a married man proposed love to the victim girl, convinced her and moved with her intimately, when the victim girl was returning to her house on 26.01.2013 after celebrating Republic Day, the Accused stopped her and requested her to come to a Cashew nut grove near Veeranar Temple. Accordingly the victim had gone to the said place along with the Accused. There the Accused cajoled and



coerced her to have sexual intercourse with him. Enticed by the sweet talks, the victim yielded and allowed the Accused to have sexual intercourse with her.

5.3. The illegal intimacy of the Accused with the victim came to the notice of the wife of the Accused namely Dhanalakshmi. The wife of the Accused quarrelled with the Accused due to his infidel activities and went to her parents house. After the wife vacated the house of the Accused, in December 2014, the Accused developed courage to take the victim girl to his house itself and had sexual intercourse often.

5.4. While so, on 30.06.2015 during one such intimate relationship in the night at the house of the Accused, when the victim and the Accused were all alone, the residents of the street who had noticed it informed the family of the victim. As such the parents of the victim decided to take the victim with them to Kerala. The Accused who came to know about the decision of the parents of the victim on 01.07.2015 (due to typographical error 01.07.2015 is mentioned as 07.07.2015 in the final report) at about 10.30 p.m in the night kidnapped the victim, took her to the house of a relative Rangan at Srimushnam and thereafter he went to Thiruppur



District. The Accused rented out a house at Valluvar Street, Chinthamani Avinashi and stayed there for about five months, lived with the victim as husband and wife. As such the victim became pregnant for four months. The acts of the Accused have rendered him liable for punishment under Section 366A of IPC and Section 5(j)(ii) r/w.6 of POCSO Act 2012.

5.5. After filing of the final report, on summons the Accused was produced from prison and appeared before the learned Sessions Judge, Fast Track Mahila Court. After appearance of the Accused, copies under Section 207 of Cr.P.C was furnished to the Accused by this Court free of cost.

5.6. Since there was a prima facie case against the Accused, the learned Sessions Judge heard the prosecution and defence regarding framing of charges against the Accused under section 366 of I.P.C and Section 6 of POCSO Act 2012. The Charges were read over and explained to the Accused, the Accused pleaded not guilty and claimed to be tried. Accordingly trial was ordered and the Accused faced trial. To prove the charge, the Prosecution had examined 21 witnesses as P.W-1 to P.W-21 and marked 17 documents as Ex.P-1 to Ex.P-17. After closing of prosecution evidence, the sister of the Accused was examined as Defence



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witnesses.

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5.7. After hearing the arguments of the Prosecution and the defence, the learned Sessions Judge, Fast Track Mahila Court, Ariyalur on proper appreciation of evidence had by judgment dated 07.04.2016 in Spl.S.C.No.26 of 2015 convicted the Accused for offences under Section 366 of I.P.C and under Section 6 of POCSO Act 2012. For the offence under Section 6 of POCSO Act, 2012, the Accused was sentenced to undergo 10 years Rigorous imprisonment and to pay a fine of Rs.25,000/- in default, to undergo one year simple imprisonment. For the offence under Section 366 of I.P.C, the Accused was sentenced to undergo 5 years Rigorous imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo one year simple imprisonment.

5.8. Aggrieved by the judgment of conviction, the Accused had preferred this Appeal seeking to set aside the judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Ariyalur as perverse and acquit the Appellant from the charges.

6. The learned Counsel for the Appellant invited the attention of



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this Court to the statement of P.W-1/Victim under Section 164(5) of Cr.P.C., marked as Ex.P-1, in which she had clearly stated that she went along with the Accused and stayed at Tiruppur, took a house on rent, and stayed for a while, where the Accused subsequently went out for having an intoxicating drink. He had a fight with her at the time when he was staying there. He also tied Thali on her. Thereafter, the Ariyalur Police secured them.

7. On a perusal of the 164(5) statement of the Victim under Ex.P-1, she had not stated any incriminating statement that she was kidnapped or that she was forcibly taken by the Accused.

8. Further, the learned Counsel for the Appellant invited the attention of this Court through the evidence of P.W-1 on both the Chief and Cross-examination, wherein she had stated that at the time of joining School, her parents had given her date of birth as three years less than the original age. In the evidence, she had stated that her age and her maternal uncle's daughter's age were the same. Further, now her maternal uncle's daughter is married and living with her husband and children. The same evidence had been corroborated by the mother and father of the



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Victim/P.W-1, in their cross-examination.

9. The Chief and Cross examination of P.W-1 which reads as follows:

"நான் முடியாது என்று சொல்லவும் முடியாது என்றால் இனிமேல் உன்னை பார்க்கமாட்டேன் வெளியூருக்கு போய் விடுவேன் என்று சொன்னார். அவ்வாறு சொன்னதால் நானும் சம்மதித்தேன். திரும்பவும் வீட்டிற்கு வந்துவிட்டேன். அதன் பிறகு பாஸ்கரின் மனைவி அவருடன் சண்டை போட்டுவிட்டு அவர் அம்மா வீட்டிற்கு சென்றுவிட்டார். பெரிய கருக்கையில் மேற்கு தெருவில் எதிரியின் வீடு உள்ளது. நானும் எதிரியும் அந்த வீட்டில் இருந்து பேசிக்கொண்டிருந்ததை இளையராஜாவும், சுப்ரமணியும் பார்த்துவிட்டு எனது தம்பி முருகானந்ததீபம் சொல்லிவிட்டார்கள். நானும் எதிரி பாஸ்கரும் அவர்கள் யாருக்கும் தெரியாமல் சிதம்பரத்திற்கு சென்றுவிட்டோம். அங்கிருந்து நேராக திருப்பூர் சென்றோம். திருப்பூரில் அவினாசி என்ற இடத்தில் வள்ளுவர் வீதியில் ஒரு வீடு வாடகைக்கு எடுத்து கணவன் மனைவியாக குடும்பம் நடத்தி வந்தோம். அவ்வாறு குடும்பம் நடத்தியதால் தற்சமயம் நான்கு மாதம் கர்ப்பிணியாக உள்ளேன். ஒருநாள் எதிரி பாஸ்கர் குடித்து விட்டு சென்றபோது அங்குள்ள போலீசிடம் மாட்டிக்கொண்டார். அதன் மூலம் ஆண்டிமடம் போலீசாருக்கு விலியம் தெரிந்துவிட்டது. அங்கிருந்து வந்து எதிரி பாஸ்கரை பிடித்து கொண்டார்கள். என்னையும் போலீசார் உடன் அழைத்து வந்துவிட்டார்கள். என்னை அதன் பிறகு மருத்துவர் ஜெயங்கொண்டம் அரசு மருத்துவமனையில்



பரிசோதனை செய்தார். நான் நான்கு மாதம்
கார்ப்பிணியாக இருப்பதையும் என்றால் கார்ப்பம்
ஆனதையும் மருத்துவரிடம் சொன்னேன்."

Cross-examination of P.W-1:

"எனக்கு 01.07.2015 அன்று 20 வயது முடிந்து
6 மாதம் நடந்து கொண்டிருந்தது. என்னை பள்ளியில்
சேர்க்கும் போது எனது பெற்றோர் 3 வயது குறைவாக
சொல்லி சேர்த்துவிட்டார்கள். மேற்படி ஆய்வாளர்
கவிதாவிடம் எனது வயது 20 என்று சொன்னேன்.
ஆனால் மாற்றுச்சான்றிதழில் உள்ளவாறு தான்
வயதினை சொல்லவேண்டும் என்று அவர் என்னிடம்
சொன்னார். அப்போது தான் உன்னை அந்த
பாஸ்கருடன்சேர்ந்து வைப்பேன் என்று ஆய்வாளர்
கவிதா மிரட்டி சொன்னார். ஏற்கனவே நான்
நீதிமன்றத்தில் சாட்சியம் அளித்த போது ஆய்வாளர்
கவிதா என்னை மிரட்டி இவ்வாறு தான் சாட்சியம்
அளிக்க வேண்டும் என்று சொன்னதால் நான்
அவ்வாறு சொன்னேன்.

எதிரி என்னை கட்டாயப்படுத்தியோ, கடத்தியோ
செல்லவில்லை. நான் வயதுக்கு வந்த பெண்
என்பதாலும், எனக்கு 20 வயதுக்கு மேல் என்பதாலும்
என் விருப்பத்துடன் தான் எதிரியுடன் சென்றேன்.
எனக்கு எதிரிக்கும் உடல் உறவு எனது சம்மதத்தின்
பேரில் தான் நடந்தது."

10. The learned Counsel for the Appellant invited the attention of
this Court to the evidence of cross-examination of P.W-2, which reads as
follows:



Cross-examination of P.W-2:

"எனது மகள் மாற்றுச்சான்றிதழில் ஏன் 17 வயது என்று இருக்கிறது என்று சொன்னால் நாங்கள் மிகவும் கஷ்டப்பட்டு வந்தோம் அதனால் கேரளாவிற்கு பிழைப்புக்காக சென்றுவிட்டோம் திரும்பி வந்து பள்ளியில் அனிதாவை சேர்க்கும்போது 3 வயது குறைத்து சொல்லி சேர்த்துவிட்டோம். எனது அண்ணன் பூராசாமி மகள் பூவரசி 1996 ஆம் வருடம் 5 வது மாதம் பிறந்தாள். எனது மகளும் அதே மாதம் வருடத்தில் தான் பிறந்தாள், ஆதனால் தான் எனது மகள் வயது தற்சமயம் 20 என்று கூறகிறேன்."

11. The learned Counsel for the Appellant invited the attention of this Court to the evidence of cross-examination of P.W-2, which reads as follows:

Cross-examination of P.W-3:

"கடந்த முறை சாட்சி சொல்லும் போது எனது மகளுக்கு 17½ என்று சாட்சி சொன்னேன் தற்போது அவருக்கு என்ன வயது என்றால் 20 நடக்கிறது. அன்று 17 வயது என்று நான் தான் சொன்னேன். அன்று தெரியாமல் சொல்லிவிட்டேன். யாரும் சொல்லிக்கொடுத்து அவ்வாறு சொல்லவில்லை. எனது மாமா பூராசாமி மகள் பூவரசி 1996 ஆம் வருடம் 5வது மாதம் பூவரசி பிறந்தாள். அதே வருடம் அதே மாதத்தில் தான் எனது மகளும் பிறந்தாள். தற்சமயம் அதை வைத்து தான் எனது மகளுக்கு 20 வயதாகிறது என்று சொல்கிறேன்."

12. P.W-4 is the sister of the victim, who turned hostile. P.W-5 is



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the younger brother of the victim, who turned hostile.

13. P.W-6 had supported the Prosecution case, and in the cross-examination, she had stated that as follows:

"நான் கடந்த முறை சாட்சி சொன்னபோது
சொன்ன விஷயங்களை எல்லாம் போலிசார்
சொல்லிக்கொடுக்க படி தான் சொன்னேன்."

Therefore, the evidence of the paternal grandmother is unbelievable.

14. P.W.7 turned hostile. P.W.8 is the maternal uncle of the victim. He had also turned hostile.

15. The learned Counsel for the Appellant submitted that there are evidence before the Trial Court that the provisions of the Protection of Children from Sexual Offences 2012, are not attracted in this case. Therefore, the submission of the learned Counsel for the Appellant that the Prosecutrix/Victim/P.W-1, the parents of the victim also admitted in cross-examination that the victim was admitted in School, showing her date of birth less than three years of the actual date of birth. Therefore, the Trial Court failed to consider this evidence and convicted the Accused for the offence under the Protection of Children from Sexual Offences Act, 2012,



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and therefore same is perverse.

16. In support of his contention, learned Counsel for the Appellant relied on the following rulings:

16.1. In the case of ***Suresh @ Sureshkumar Vs. State rep. by the Inspector of Police, Ponmalai All Women Police Station, Thiruchirappalli***, in ***Crl.A(MD).No.195 of 2016, dated 03.09.2021*** wherein it is observed as follows:

“44.It is pertinent to mention that P.W.3 has specifically stated that she was aged 23 years at the time of giving evidence in January 2016 and that there was a difference of three years between herself and P.W.2. As already pointed out, P.W.10 in his evidence would also say that there was a difference of two years between P.W.2 and P.W.3. As rightly contended by the defence, if the evidence of P.W.3 and P.W.10 are taken into account then P.W.2 would be aged 20 or 21 years at the time of giving evidence and would be aged between 19 to 21 years at the time of occurrence. It is pertinent to mention that P.W.1 has categorically admitted that they have not entered the correct age of inmates while admitting them after Tsunami. Considering the above, the prosecution has utterly failed to prove that P.W. 2 was a minor at the time of occurrence.”

16.2. In the case of ***Sajeev Vs. State of Kerala, Represented by the Public Prosecutor, High Court of Kerala, Ernakulam, in Crl.A.No.143 of 2011, dated 01.03.2016***, it has been observed by the Kerala High Court as



under:

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“13. The principle relating to the proof regarding the age has been dealt with by the Hon'ble Supreme Court in various decisions. Several decisions were relied on by the learned counsel for the accused to contend that a public document in relation to the date of birth is admissible if it satisfies the ingredients of [Section 35](#) of the Indian Evidence Act and if it relates to the fact in issue. The evidentiary value of such documents had been considered by the Supreme Court in a catena of decisions. In the decision in [Birad Mal Singhvi v. Anand Purohit](#) (AIR 1988 Supreme Court 1796), the Supreme Court had occasion to deal with probative value of the documents regarding the date of birth. One of the certificate produced to prove the birth date was the certificate issued on the basis of the entries contained in the scholar's register. The Supreme Court held that such documents are relevant and admissible, but such documents have no evidentiary value for the purpose of proof of date of birth unless the vital piece of evidence in the form of evidence of person on whose information the date of birth of the concerned person was recorded in the document was adduced. Parents or near relatives having special knowledge are the best persons to depose about the date of birth of a person. If entry regarding date of birth in the scholar's register is made on the information given by parents or some one having special knowledge of the fact, the same would have probative value. It was held that since the truth of the fact, namely the date of birth of the concerned person was in issue, the mere proof of the documents does not furnish evidence of the truth of the facts or contents of the documents.

14. The Supreme Court held that [Section 35](#) of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. According to the Apex Court to make a document admissible under [Section 35](#), three conditions are to be satisfied. Firstly, there is an entry in a public or other official book, register or record. Secondly, it must be an entry stating a fact in issue or relevant fact and thirdly it must be made by a public servant in the discharge of his official duty or any other person in performance of a duty specially enjoined by law. The court held that the entry relating to date of birth made in the school register is relevant and admissible under [Section 35](#) of the Act, but the entry regarding the age of a person in a school register or such document



is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded.”

16.3. In the case of *State of Madhya Pradesh Vs. Munna @*

Shambhoo Nath, in Crl.A.No.658 of 2011, dated 18.09.2015 wherein the

Hon'ble Supreme Court has observed as under:

“From the X-ray report of the ossification test, the doctor opined that the age of the prosecutrix could not be more than 14 years. However, since the doctor was never examined, the X-ray report is not sufficient to prove the age of the prosecutrix. The prosecutrix was examined as PW5 but the prosecution failed to question the prosecutrix on her age, therefore no fact could be gathered from her regarding the issue of age. PW6 Malti Devi mother of the prosecutrix was examined where she stated the age of prosecutrix to be 13 years. However, in her cross-examination, she stated that her marriage was performed about 20 years ago and after two years of her marriage the elder daughter (Sunita) was born, and 2-3 years thereafter the prosecutrix was born. It means that the prosecutrix was aged about 15- 16 years at the time of the incident. But this is not sufficient to come to any conclusion about the exact age of the prosecutrix. It appears that the Ossification Test X-ray report is not sufficient to prove the age of the girl. Further, the mother of the prosecutrix also was not able to give the exact age of the prosecutrix. No question was also asked to the prosecutrix by the prosecution about her age. Taking into account all these facts, the High Court correctly came to the conclusion that the prosecution has totally failed to prove beyond reasonable doubt that the girl was less than 16 years of age at the time of the incident. Therefore, the High Court presumed that the girl was more than 16 years of age and was competent to give her consent.”

16.4. In the case of *Ashik Ramjan Ansari Vs. The State of Maharashtra & Anr. in Crl.A.No.1184 of 2019 dated 10.07.2023* the High Court of Bombay has observed as follows:

“29. In the wake of the clear case of consensual sex, emerging from



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the prosecution case, between a girl aged 17 years and 5 months and a man aged 25, merely because the statute provide punishment for an act of sexual indulgence, as the girl has not attained the age of maturity i.e. 18, when it can be specifically inferred from her conduct that she was capable of understanding the consequences of her act, I am of the opinion that the learned Special Judge has erred in convicting the appellant for committing the offence of rape under [Section 376](#) of IPC as well as the offences under [Sections 4 and 6](#) of the M.M.Salgaonkar 31/31 APEAL 1184-19.odt [POCSO Act](#) and awarded him the sentence in the impugned judgment.

In the wake of the aforesaid discussion, since I am unable to concur with the conclusion derived by the learned Judge, merely on the ground that though the sexual intercourse was consensual, but the girl was minor and based on this aspect, the appellant, in my considered opinion, cannot suffer the sentence, in case of a consensual sexual act.

30. As a result of the above discussion, the impugned judgment dated 21/02/2019 passed by the learned Special Judge in POCSO Special Case No.203 of 2016 is set aside.”

17. The learned Counsel for the Appellant relied on the reported ruling of the Hon'ble Bombay High Court in the case of *Ashik Ramjan Ansari Vs. The State of Maharashtra & Anr.* and sought to set aside the judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Ariyalur District.

18. The learned Additional Public Prosecutor Mrs.G.V.Kasthuri appearing for the State vehemently objected to the submission of the learned Counsel for the Appellant, stating that P.W-1 is the victim. In the statement under Section 164 of Cr.P.C. recorded before the learned



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Sessions Judge, Fast Track Mahila Court, Ariyalur District, she had herself filled up the form, wherein she had stated her age as 17 years. As per the 164 statement, she stated that she had left her house on 01.07.2015, with Baskar (Accused). They left for Tiruppur, and taken a house on rent, and resided there. The said Baskar tied Thali on her neck. Thereafter, they had indulged in sexual intercourse (as per the Tamil version entered in family life). Prior to the day of the arrest, the said Baskar consumed alcohol and picked up quarrel with the victim. The next day, when he went on the motorcycle to the wine shop, he was arrested by the Perumanallur Police and subsequently handed over to Andimadam Police. The Andimadam Police had only registered the case. The Andimadam Police secured the victim and the Accused.

19. The learned Additional Public Prosecutor also relied on the deposition of P.W-1, victim, as stated in above paras. The learned Additional Public Prosecutor submitted that before trial, the Accused in this case had influenced the witnesses.

20. The learned Additional Public Prosecutor submitted that the Accused in this case was already married and has children. He had coerced



the School-going girl, a minor girl, whose parents were away in Kerala working as daily wage earners for their daily wages. The Victim/P.W-1 was under the care of her maternal grandmother, P.W-6, Chinna Ponnu. As per the evidence of P.W-1, the Accused had stalked the victim and made advancement as though he wanted to marry her. The victim, who was a minor, has protested, stating he had wife and children. For which the Accused/Appellant herein had stated to the victim minor that he will divorce his wife and marry the victim.

21. The learned Additional Public Prosecutor also submitted that as per 164 statement of the victim before the learned Sessions Judge, Fast Track Mahila Court, Ariyalur District, the Accused had tied a Thali on her neck, making her to believe that they are married and that they are husband and wife. The Accused had not divorced his wife and had married a minor, which marriage is not acceptable as per law when the earlier marriage is subsisting. There are sufficient materials in the evidence of the victim that show she had voluntarily went along with the Accused. The influence of the Accused had made her to go with him, but that does not mean it is consensual sex. The victim is aged 17 years and not a major to decide her fate. Therefore, the judgment of conviction recorded by the learned



Sessions Judge, Fast Track Mahila Court, Ariyalur District, is a well-reasoned judgment. Further, in the cross-examination of P.W-2 and P.W-3, her mother and her father had stated that they had admitted their child with three years reducing her original age. There is no proof regarding the same. It had been made only under the influence of the Accused. As per the evidence of the School Headmaster before the Court had furnished Ex.P-7, School Certificate extract from the Admission Register maintained in the School as Ex.P-7, wherein the date of birth is recorded in the Register as 10.06.1999 and the Transfer Certificate of the victim marked as Ex.P-8, wherein also it is recorded as 10.06.1999.

22. The learned Additional Public Prosecutor also submitted that S.S.L.C. School public exam mark sheet was marked by School Headmaster as Ex.P-9, in which also, the date of birth of the victim is recorded as 10.06.1999. Therefore, on the date of the alleged occurrence of the disappearance of the victim and the kidnapping of the minor from her lawful guardian grandmother when the parents are away in Kerala, attracted Section 366 of IPC. The argument of the learned Counsel for the Appellant cannot at all be accepted in the absence of any proof regarding the correct age. Only if there is oral evidence by P.W-2 and P.W-3, parents



of P.W-1, this Court can draw adverse inference against the witnesses turned hostile. It is a clear case of the provision of the Protection of Children from Sexual Offences Act, 2012, where the victim had become pregnant as per the evidence before the Court. Therefore, the learned Sessions Judge had arrived at a logical finding based on appreciation of evidence. Apart from that, the wife of the Accused, Mrs.Dhanalakshmi, P.W-10 was examined as witness before the Court and she remained hostile. P.W-2 in the cross-examination before the Trial Court admitted that she had given a complaint to the Andimadam Police Station against the relationship of the Accused with the victim. A married man having family takes a teenage girl out of her lawful custody from her paternal grandmother under the guise of living with her after the divorce of his married wife and making her to believe that he will marry her and have sex with her, which attracts the provisions of the Protection of Children from Sexual Offences Act, 2012. There is sufficient material from the evidence of P.W-1, victim, alone that he had taken a house in Tiruppur and married her (marriage is void when the marriage with P.W-10 is subsisting). Therefore, the submission of the learned Counsel for the Appellant cannot at all be sustained. The judgment of the learned Sessions Judge, Fast Track Mahila Court, Ariyalur District, is a well-reasoned judgment that does not



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warrant any interference.

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23. If the submission of the learned Counsel for the Appellant is accepted, then there is every likelihood of defeating the Protection of Children from Sexual Offences Act, 2012 by persons like the Accused enticing minor girls under the pretext of marriage to have sexual pleasure. This has to be curtailed. Therefore, the points raised by the learned Counsel for the Appellant cannot at all be sustained and are to be rejected. The Appeal lacks merit and is to be dismissed.

24. Had it been a case of teenagers, the Court would have considered it favourably. Here, it is a case that the Accused is a married person having family and indulging in conduct which is not expected from a married man. Only with his influence he had threatened the victim and his parents.

25. The learned Additional Public Prosecutor also invited the attention of this Court to the discussion by the learned Sessions Judge, Fast Track Mahila Court, Ariyalur District, rejecting the rulings cited by the learned Counsel for the Accused in paras 51 to 56.



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26. The learned Sessions Judge, Fast Track Mahila Court, Ariyalur District, observed in para 58 that the Accused had enticed the victim from the lawful paternal grandmother, subsequently exploited her and subjected her to carnal desires that attracted offence under Section 366 of IPC and Section 6 of Protection of Children from Sexual Offences Act, 2012. The evidence of the Defence witness was also rejected by the learned Trial Judge. Therefore, the learned Additional Public Prosecutor seeks to dismiss this Appeal and confirm the judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Ariyalur District. The Accused is married. He was aged 35 years on the date of the alleged occurrence, and the victim was aged 16 years. Only oral evidence is available that the date of birth is falsely given as three years reduced from the actual age, which is the evidence of P.W-1, victim, P.W-2, mother of the victim, P.W-3, father of the victim. Except them, no other evidence and there is no proof of the same. Further, the learned Trial Judge observed that the victim in Court had stated she appeared to be a teenager less than 16 years by her physical appearance, that demeanour of the witness had to be given due weightage. Therefore, this Court cannot accept the argument of the learned Counsel for the Appellant. The Appeal lacks merit and is to be



dismissed.

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27. The learned Additional Public Prosecutor invited the attention of this Court to the reported ruling of the Hon'ble High Court of Delhi in the case of *Surjeet Kumar Vs. State, in Crl.A.No.485 of 2020 dated 19.01.2023* reported in *2023 SCC Online Del 215* wherein it has been held as under:

“18. The victim, at the time of commission of first offence, was 15 years of age. The Supreme Court in *Satish Kumar Jayanti Lal Dabgar v. State of Gujarat* [*Satish Kumar Jayanti Lal Dabgar v. State of Gujarat*, (2015) 7 SCC 359 : (2015) 3 SCC (Cri) 108] opined that— (SCC pp. 366-368, paras 11, 14, 15 and 16)

“11. ... Having regard to her age, the trial court concluded that it was a case of kidnapping as her consent was immaterial inasmuch as being a minor she was not capable of giving any consent at that age. Likewise, since sexual intercourse had been virtually admitted and proved as well by medical evidence, the same would clearly amount to rape. Apart from the admission of the accused himself, the factum of sexual intercourse was proved by medical examination and Dr Raj Kamal, who had examined the victim as well as the accused, had deposed to this effect.

14. The first thing which is to be borne in mind is that the prosecutrix was less than 16 years of age. On this fact, clause sixthly of Section 375IPC would get attracted making her consent for sexual intercourse as immaterial and inconsequential. It reads as follows:

‘375. *Rape*.— A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions—



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Sixthly.— With or without her consent, when she is under sixteen years of age.

Explanation.— Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.’

15. The legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.

16. Once we put the things in right perspective in the manner stated above, we have to treat it as a case where the appellant has committed rape of a minor girl which is regarded as a heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as a mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind the Protection of Children from Sexual Offences Act, 2012.”

Point for consideration:



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***Whether the judgment of conviction recorded
by the learned Sessions Judge, Fast Track Mahila
Court, Ariyalur, in Spl.S.C.No.26 of 2015 dated
07.04.2016, is to be set aside as perverse?***

28. Heard the learned Counsel for the Appellant and the learned Additional Public Prosecutor for the Respondent.

29. Perused the evidence of the witnesses, P.W-1 to P.W-21. Ex.P-1 to Ex.P-17 marked on the side of the Prosecution. The evidence of the Defence witness, D.W-1 and the judgment of the learned Sessions Judge, Fast Track Mahila Court, Ariyalur, in Spl.S.C.No.26 of 2015.

30. On perusal of the depositions, it is found that P.W-1, victim, had narrated the facts originating in the case when the Accused is stated to have stalked the victim when she was going to School. He was stalking on his two-wheeler. After developing friendship with her, he told her that he wanted to marry her. When she protested, stating that he was a married man having wife and children, he stated that he does not like his wife and that he will marry her. Subsequently, he had made advancement seeking sexual pleasures, for which she protested. When she protested, he stated that they both will leave this village and go elsewhere. Therefore, she



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consented to sexual pleasures. Subsequently, the wife of the Accused protested on coming to know about the relationship between the victim and the Accused, and she also picked up quarrel with the victim. Subsequently, the victim had been making visit to the house of the Accused, which was witnessed by Ilayaraja and Subramaniam, neighbours, who had informed the younger brother of the victim, P.W-5. On 30.06.2015, when she was in the house of the Accused, the younger brother of the victim went to the house of the Accused, slapped her, and brought her back to the house of the grandmother, P.W-6, Chinna Ponnu. Also, he informed his parents that she had developed a relationship with Baskar and should not be sent to School. Therefore, she had informed the Accused that she will be taken to Kerala by her parents. The Accused took her to Tirumuttar. The relatives of the Accused protested. Therefore the Accused took her to Chidambaram. From Chidambaram, they went to Tiruppur. In Tiruppur, he had taken a house and lived as husband and wife. [Meaning they had sexual intercourse through which she became pregnant]. At the time of her deposition as witness, the victim was four months pregnant, as per her own evidence. When they were residing as husband and wife, one day the Accused went out of the house, consumed alcohol, and was arrested by the Police in Tiruppur, from where the information was given to the Andimadam Police.



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Based on that the Andimadam Police secured the Accused and the victim.

In the cross-examination, she had stated that she was aged 20 as same as her cousin [daughter of P.W-8, Poorasamy]. P.W-8 is the brother of P.W-2, Ramayee. Therefore, P.W-8 is the maternal uncle of P.W-1, victim. The daughter of maternal uncle was born in the same year. The daughter of P.W-8, Poovarasi, was married and living with her husband and children. Therefore, her age is 20. In the cross-examination, she had stated that her age was 20 years to the Police Officials, but they refused to accept it.

31. As pointed out by the learned Additional Public Prosecutor, it is found that she had been influenced by the Accused, which is the only presumption available to the Court when there is evidence that the age of the victim is 16 years. In the deposition sheet, she had recorded her age as 20 years. Whereas, in the Section 164 statement under Ex.P-1, she had filled up her age as 17 years. The Court has to draw adverse inference from the conduct of the witnesses that the Accused is aged 35 years on the date of occurrence. Whereas the victim is aged 16 years. Without any documentary proof, the parents of the victim had stated that they had admitted their child, reducing her actual age by three years. The learned Trial Judge had observed the witnesses, including the victim, and found



that the victim appeared to be a minor based on her physical appearance.

Therefore, the learned Trial Judge rejected the evidence of the victim claiming that she is aged 20 years and also the evidence of P.W-2 Ramayee, mother of the victim, and P.W-3 Amaresan, Father of victim. On analysis of evidence, the learned Trial Judge had arrived at the conclusion that the Accused herein, who was a family man having wife, and children, enticed the minor girl under the pretext of promise to marry her with the ulterior motive to enjoy her for sexual pleasure. Therefore, he had found the Accused guilty for the offence of kidnapping a minor from the lawful guardianship under Section 366 of IPC as per the charge framed by the trial Court and for the offences under Section 6 of Protection of Children from Sexual Offences Act, 2012. D.W-1 is the sister of the Accused. The learned Trial Judge had discussed the evidence of D.W-1, Vijayalakshmi, that she heard the victim informing the Inspector of Police that she was 20 years, as on the date of the alleged occurrence, she had gone along with the Accused on her own volition, for which the Inspector of Police had stated that if her parents are able to state so, she will unite the victim with the Accused. It is the evidence of the D.W-1 that a false case had been foisted against her brother by P.W-21, the Inspector of Police, Andimadam Police Station. In the cross-examination of D.W-1 by the learned Public Prosecutor, she had



stated that she had not preferred any complaint against the action of the P.W-21 with the higher officials of the Police Department. The learned Trial Judge had rejected the evidence of D.W.1, based on the assessment of the evidence available in the Prosecution evidence. The learned Trial Judge had in the discussion in paras 31 to 58 discussed the entire evidence and arrived at the conclusion that the offence alleged against the Accused by the Prosecution had been proved by the Prosecution.

32. On consideration of the evidence available before the learned Sessions Judge, Fast Track Mahila Court, Ariyalur, the victim Prosecutrix had not supported the case of the prosecution. She claims that on her own volition She went along with the Accused. Further she claims that the date of birth recorded in the School Register was 3 years less than her original date of birth. She and her cousin Poovarasi were of the same age. Poovarasi was married off by her parents and she is living happily with her family having two children. Since the parents of the Prosecutrix were working as farm labourers in Kerala, they had admitted her in School only belatedly. Therefore they had given the date of birth suppressing her original date of birth. It is the case of the victim, P.W-1 that on the date of eloping with the Accused, the victim/P.W-1/Prosecutrix was not a minor.



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33. The Prosecutrix was examined as P.W-1. The mother of the Prosecutrix was examined as P.W-2. She was the original defacto Complainant. She had not supported the ingredients of the complaint. Therefore she was treated hostile by the prosecution. She had denied the suggestion made by the learned Additional Public Prosecutor that she had been influenced by the family of the Accused. Therefore she had not supported the prosecution case. This suggestion was denied by her in cross examination.

34. When the defacto Complainant herself had not supported the case of the prosecution, also the victim, Prosecutrix had claimed that her original age was suppressed and false date of birth was given therein. Her age on the alleged date of occurrence was 20 years and it was accepted by her mother too in her evidence as P.W-2.

35. The learned Sessions Judge, Fast Track Mahila Court, Ariyalur had failed to appreciate those facts and had mechanically convicted the Accused, based on the fact that the case arose out of POCSO Act. Therefore the prosecution version is to be believed as true. Under



those circumstances, the conviction recorded by the learned Sessions Judge Fast Track Mahila Court, Ariyalur convicting the Accused for the offences under Section 6 of the POCSO Act and under 366 of the I.P.C is found perverse. Therefore the same is set aside. The fine already imposed and collected by the Court is to be refunded to the Accused/Appellant.

36. The ruling cited by the learned Additional Public Prosecutor in the case of *Surjeet Kumar -vs- State* reported in *2023 SCC Online Del 215* is a case where the Prosecutrix was aged 15 years and the prosecution had proved the case cogently before the trial court. Therefore the learned Judge had dismissed the appeal. In this case before the Court of the learned Sessions Judge, Fast Track Mahila Court, Ariyalur, even though the Accused was a married man aged 35 years, it was the case of the prosecution that the Accused had stalked the victim and kidnapped her from lawful custody, when the Prosecutrix was a minor. As per the School certificate marked as exhibits before the learned Sessions Judge, Fast Track Mahila Court, Ariyalur, the Prosecutrix was aged 16 years and 10 months.

37. As per the reported rulings cited by the learned Counsel for the



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Appellant in **(1) Suresh @ Sureshkumar Vs. State rep. by the Inspector of Police, Ponmalai All Women Police Station, Thiruchirappalli**, in **Crl.A(MD).No.195 of 2016, dated 03.09.2021**; **(2) Sajeev Vs. State of Kerala, Represented by the Public Prosecutor, High Court of Kerala, Ernakulam**, in **Crl.A.No.143 of 2011, dated 01.03.2016**; **(3) State of Madhya Pradesh Vs. Munna @ Shambhoo Nath**, in **Crl.A.No.658 of 2011, dated 18.09.2015** **(4) Ashik Ramjan Ansari Vs. The State of Maharashtra & Anr. in Crl.A.No.1184 of 2019 dated 10.07.2023**, the case is where the Victim/Prosecutrix was in the borderline above 16 and below 18. The Court had recommended for reconsideration under Protection of Children from Sexual Offences Act, 2012. The Prosecution witnesses had not supported the case of the Prosecution. The Pictim/Prosecutrix had claimed that she was 20 years on the date of the alleged offence. This can be rejected by the Court. Whereas in the judgement of Kerala High Court in **Sajeev Vs. State of Kerala, Represented by the Public Prosecutor, High Court of Kerala, Ernakulam**, in **Crl.A.No.143 of 2011, dated 01.03.2016** the learned Judge of the Kerala High Court had placed reliance on the ruling of the Honourable Supreme Court in the case of **Birad Mal Singhvi vs. Anand Purohit (AIR 1988 SC 1796)** regarding entries in School register whether it is admissible in evidence under Section 35 of the Indian



Evidence Act? As per the ruling of the Hon'ble Supreme Court, such documents are relevant and admissible but such documents have no evidentiary value for the purpose of proof of date of birth unless the vital piece of evidence in the form of evidence of person on whose information the date of birth of the concerned person was recorded in the document was adduced. The parents or near relatives having special knowledge are the best persons to depose about the date of birth of the person. The Courts have consistently held that the date of birth mentioned in the scholar's register or Secondary School Certificate has no probative value unless either the parents are examined or the person on whose information the entry may have been made, is examined. In the case before they learned Fast Track Mahila Court, Ariyalur, the Prosecutrix/Victim claimed that she was a major on the date of alleged occurrence and claimed to be aged 20 years. But in her School Certificate, Transfer Certificate, SSLC Mark Sheet, under Ex.P-7, Ex.P-8 and Ex.P-9 her date of birth is mentioned as 10.06.1999. Therefore, on 01.07.2015, the date of alleged occurrence she was approximately aged 16 years. She had claimed as witness before the trial Court that her age was 20 and not 16 or 17 as claimed by the Prosecution and she was not a child on the date of alleged occurrence. Her parents P.W-2 and P.W-3 had supported her claim by claiming that they



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had given her age less 3 years at the time of admission.

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38. As per the reported ruling of the Honourable Supreme Court relied on by the learned Judge of Kerala High Court in ***Sajeev Vs. State of Kerala, Represented by the Public Prosecutor, High Court of Kerala, Ernakulam, in Crl.A.No.143 of 2011, dated 01.03.2016*** the learned Judge had discussed about the reliability of School Certificate regarding proof of age of victim of Protection of Children from Sexual Offences Act, 2012 or sexual offence. Based on the decision of the Honourable Supreme Court until otherwise parents or any relative of the victim is examined regarding the proof of age that the School Certificate or the School record showing the date of birth has no evidentiary value. Therefore, as per Ex.P-7, Ex.P-8 and Ex.P-9 the date of birth of the victim here in this case, P.W-1 is 10.06.1999. On the date of alleged occurrence on 01.07.2015, as per the School certificate she was aged 16 years. Therefore, she is a child under the Protection of Children from Sexual Offences Act, 2012 but the evidence was otherwise. Her contention was supported by her parents P.W-2 and P.W-3. The learned Judge had rejected the hostile evidence of P.W-1, P.W-2 and P.W-3 on the ground that they had been influenced by the Accused. Maybe they have been influenced but the fact remains that



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P.W-1 claims that her cousin Poovarasi born to her maternal uncle P.W-8 Poorasamy, also on the same age and she had already married and having two children. When her parents had supported her that she is 20 years, the Court cannot convict the Accused based on the age certificate under Ex.P-7, Ex.P-8 and Ex.P-9. Therefore, when the entire family remains hostile, the learned Judge convicting the Accused based on Ex.P-7, Ex.P-8 and Ex.P-9 is contrary to the rulings of the Honourable Supreme Court in ***Birad Mal Singhvi vs. Anand Purohit (AIR 1988 SC 1796)*** based on which the learned Judge of the Kerala High Court had acquitted the Accused. Where also the victim of Protection of Children from Sexual Offences Act, 2012, was aged 14 and she had claimed that she was a major on the date of alleged occurrence. The facts of the ruling in ***Sajeev Vs. State of Kerala, Represented by the Public Prosecutor, High Court of Kerala, Ernakulam, in Crl.A.No.143 of 2011, dated 01.03.2016*** are similar to the facts of this case. In the light of the rulings cited by the learned Counsel for the Appellant, the submissions of the learned Counsel for the Appellant is accepted and the conviction recorded against the Appellant/ Accused is to be set aside.

39. The argument of the learned Additional Public Prosecutor that



the Accused is already married having wife and children he had stalked the victim and eloped with the victim, the victim is incompetent to give consent for sexual intercourse are all rejected and the judgement relied by the learned Additional Public Prosecutor in *Surjeet Kumar Vs. State* reported in *2023 SCC Online Del 215* is not applicable to the facts of this case.

40. In the light of the above discussion, the point for consideration is answered in favour of the Appellant/Accused and against the Prosecution. The judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Ariyalur, in Spl.S.C.No.26 of 2015, dated 07.04.2016, is found perverse and the same is to be set aside.

In the result, **this Criminal Appeal is allowed**. The conviction recorded by the learned Sessions Judge, Fast Track Mahila Court under Section 6 of the POCSO Act and under section 366 of the I.P.C is set aside. The bail bond executed by the Accused shall be cancelled, if he is not required in any other case. The fine amount paid by the Appellant/Accused, if any, shall be refunded.



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29.05.2024

cda/shl

Internet : Yes/No

Index : Yes/No

Speaking/Non-speaking order

Neutral Citation : Yes/No



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SATHI KUMAR SUKUMARA KURUP, J.,

cda/shl

To

- 1.The Sessions Judge,
Fast Track Mahila Court,
Ariyalur District.
- 2.The Inspector of Police,
Andimadam Police Station,
Andimadam,
Ariyalur District.
- 3.The Public Prosecutor,
High Court, Madras.
- 4.The Section Officer, VR Records,
High Court, Chennai.

Judgment in
Crl.A.No.732 of 2016

29.05.2024