

Bail Slip
that the Appellant/Accused namely Gopal @ Gopala Krishnan S/o Shanmugam was directed to be released on bail as per the order of this court dated 09.07.2015 in MP.No.1/2015 in CrI.A.No.291/2015.

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

and

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.291 of 2015

Gopal @ Gopalakrishnan .. Appellant/Accused

- Vs -

The State rep. by
The Inspector of Police,
All Women Police Station,
Erode, Erode District.
(Cr.No.12 of 2013) .. Respondent/Complainant

Prayer:- Appeal filed under Section 374 of the Code of Criminal Procedure against the judgment passed by the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, Erode District in Spl.S.C.No.1 of 2014 dated 07.03.2015.

For Appellant : Mr.T.Murugananthan

For Respondent : Mr.M.Maharaja
Additional Public Prosecutor

J U D G M E N T

(Judgment of the Court was delivered by S.Nagamuthu, J.)

The appellant is the sole accused in Spl.S.C.No.1 of 2014 on the file of the learned Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court, Erode. He stood charged for offences under Sections 370 and 506(ii) I.P.C. and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act) (later the said charge

was altered into one under Section 6 of POCSO Act). By judgment dated 07.03.2015, the trial Court convicted him under all the charges and sentenced him to undergo imprisonment for life and pay a fine of Rs.1000/- in default to undergo simple imprisonment for three years for offence under Section 370 I.P.C.; to undergo rigorous imprisonment for seven years and pay a fine of Rs.1000/- in default to undergo simple imprisonment for one year for offence under Section 506(ii) I.P.C. and to undergo imprisonment for life and pay a fine of Rs.1000/- in default to undergo simple imprisonment for three years for offence under Section 6 of the POCSO Act. Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

2. The case of the prosecution in brief is as follows:

2.1. P.W.2 is the victim in this case. At the time of occurrence, she was doing 9th standard in C.S.I. Girls Higher Secondary School at Erode. Her date of birth is 07.05.2000. P.W.1 is her father. They were residing at Odaipallam at Poonthurai road, Erode. It is the case of the prosecution that at around 08.00 a.m. on 18.08.2013, P.W.2 was proceeding to her school. On her way, the accused intercepted her. He told her that he would pluck mangoes and give the same to her. She believed his words. Then, he took her to an old building near the railway colony. There, he attempted to sexually exploit her. It is the further case that despite the resistance by P.W.2, he had sexual intercourse with her. Then, she returned home. It is further alleged that on the same day at around 08.00 p.m. the accused came to the house of P.W.2 and took her again to a secluded place and had sexual intercourse with her. Then, he gave Rs.100/- to her and sent her back home. Again on a Sunday, it is stated that the accused took her to a secluded place and again had sexual intercourse with her. P.W.2 did not disclose the same to anybody.

2.2. On 23.09.2013, P.W.1 and his wife enquired as to why P.W.2 was very sad. At that time, P.W.2 informed P.W.1 that the accused had raped her. She told P.W.1 that on 18.08.2013, he had sexual intercourse with her first and then on two more occasions he had sexual intercourse with her. Then P.W.1 went and enquired the accused as to why he had done so. The accused challenged P.W.1. Thereafter, P.W.1 went to the All Women Police Station, Erode and made complaint on 23.09.2013 at 11.30 a.m. P.W.14 the then Inspector of Police on receipt of the said complaint, registered a case in Crime No.12 of 2013 under Sections 366, 506(i) and Section 4 of POCSO Act. Ex.P13 is the F.I.R. He forwarded Ex.P1 and P13 to the Court and the same was received by the learned Magistrate at 09.15 p.m. on 23.09.2013.

2.3. P.W.14 took up the case for investigation. She went to the place of occurrence at 01.45 p.m. on the same day and prepared an observation mahazar and a rough sketch in the presence of witnesses. Then, he examined P.Ws.1, 6 and few more witnesses. On 23.09.2013 at 04.30 p.m. she arrested the accused. On such arrest, he disclosed that he had hidden a dark blue colour briefs, a brown colour vest and a black colour pant at his house. In pursuance of the said disclosure statement made in the presence of P.W.9 and another witness, he took P.W.14 and witnesses to his house and produced M.Os.6 to 8. P.W.14 recovered the same. Then he forwarded the accused for medical examination. She forwarded P.W.2 also for medical examination. The report revealed that P.W.2 had been sexually exploited. P.W.14 collected evidences to prove the date of birth of P.W.2. She forwarded the accused and the material objects which revealed that he was sexually fully grown up and capable of doing penile intercourse with a woman, to the Court. On completing the investigation she laid the charge sheet against the accused.

2.4. Based on the above materials, the trial Court framed charges as detailed in the first paragraph of this judgment. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 14 witnesses were examined, 19 documents and 8 material objects were marked.

2.5. Out of the said witnesses, P.W.1 is the father of P.W.2, the victim girl. P.W.1 has stated that on 23.09.2013, P.W.2 told him about the occurrence. He has further stated that he made a complaint immediately to the police on the same day. P.W.2 has vividly spoken about the entire occurrence. She had stated that on one occasion, when she was proceeding to the school, the accused took her to an old building, where he had sexual intercourse with her by force. On two other occasions, he did so. She has vividly narrated as to where, when and how the accused had sexual intercourse with her against her wish. P.W.3 Dr.Mythili has stated that she examined P.W.2 on 24.09.2013 and gave opinion that the hymen was found ruptured in the vagina of P.W.2. She has further stated that there were no other injuries found on her. P.W.4 Dr.Thenmozhi has stated that she examined P.W.2 to ascertain her age. According to her, P.W.2 had completed 13 years of age and not completed 15 years of age. Ex.P3 is the certificate issued by P.W.4.

2.6. P.W.5 was the then head master of C.S.I. Girls Higher Secondary School, Erode, where P.W.2 was studying. According to her, the date of birth of P.W.2 was 07.05.2000. Ex.P4 is the school Transfer Certificate. P.W.6 is the mother of the P.W.2.

She has also stated that on 22.09.2013, P.W.2 told her about the occurrence. P.W.7 Dr.Valavan has stated that he examined the accused on 25.09.2013 and found that he is sexually fully grownup and he is capable of performing penile intercourse with a woman. P.W.8 has stated that on 22.09.2013, P.W.1 told him about the occurrence and then he enquired the accused about the same and that the accused challenged P.W.1. P.W.9 has spoken about the arrest of the accused and the consequential recovery of the material objects.

2.7. P.W.10 has stated that on one occasion, she found the accused and P.W.2 going together in a motorcycle. P.W.11 has stated that on 18.08.2013, around 4.00 p.m. he found the accused and P.W.2 standing together near a old building near the railway gate. Then the accused took P.W.2 in a motorcycle bearing Registration No.TN 37 0954. P.W.12 the then learned Judicial Magistrate has stated that she recorded the statement of P.W.2 under Section 164 Cr.P.C. P.W.13 has stated that he produced the motorcycle belonging to the accused to the police, which was earlier entrusted to him by the accused. P.W.14 has spoken about the registration of the case and the investigation done by him.

3. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., he denied the same as false. However, he did not choose to examine any witness nor mark any document on his side. His defence was a total denial. Having considered all the above, the trial Court convicted him as detailed in the first paragraph of this judgment and that is how, he is before this Court with this appeal.

4. We have heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the State and also perused the records, carefully.

5. In this case, there is no dispute that during the relevant time of occurrence, P.W.2 was studying at C.S.I. Girls Higher Secondary School, Erode in 9th standard. According to the evidence of the Headmaster of the school and the official transfer certificate issued by the school, her date of birth is 07.05.2000. The alleged occurrence in this case was on 18.08.2013. Medical evidence also corroborates the school certificate in respect of the age of P.W.2. Thus, in our considered view, the prosecution has clearly established that as on the date of the alleged occurrence, P.W.2 had not completed 14 years of age. She was thus a child in terms of the POCSO Act.

6. P.W.2 has vividly stated as to how the accused had sexual intercourse with her. But the learned counsel appearing for the

appellant would submit that the evidence of P.W.2 is not in tune with the charges framed against the accused in respect of the date and time of the alleged occurrence. The learned counsel would further submit that there was a long delay in preferring the complaint, which also creates doubt in the case of the prosecution.

7. But, we find it difficult to accept the said argument for more than one reason. First of all, P.W.2 is a child hardly aged about 14 years. Therefore, there are bound to be some inconsistencies in her evidence. Those inconsistencies cannot be blown out of proportion so as to disbelieve her entire evidence. For a young child of her age, one cannot expect her to vividly, meticulously and free from any inconsistency to speak about the occurrence. We have to appreciate the evidence of such a child by having a comprehensive approach. A reading of the chief examination as well as the cross examination of P.W.2 would give a clear picture of the occurrence. We find no reason to reject the evidence of P.W.2. Her evidence is duly corroborated by the medical evidence also. The inconsistency pointed out by the learned counsel for the appellant would not in any manner go to cause dent in the case of the prosecution. We find that the evidence of P.W.2 is fully believable and the same is free from any tutoring. From out of the evidence of P.W.2, coupled with medical evidence and the evidence of her parents, we are of the view that the prosecution has clearly proved the case beyond reasonable doubts. The trial Court has made meticulous analysis of the entire evidence to come to the right conclusion that the prosecution has proved the charges.

8. According to the charge, the first act of penetrative sexual assault was made by the accused on P.W.2 on 11.08.2013. However, according to the charge, the offence had taken place in a old building near railway colony at old Punthurai road. P.W.2 in her evidence has stated that around 08.00 a.m. when she was proceeding to the school, the accused took her to the said building and made her to lie down and he laid on her. She has further stated that at that time the accused touched her breast alone and he did not do anything more. Thus, it is not the evidence of P.W.2 that the accused had pineal sexual intercourse at that time.

9. P.W.2 has further stated that on the same day at about 08.00 p.m. when she was at her house, the accused came to her house and wanted her to come to a lane. Accordingly, she went to the lane, in the lane, according to P.W.2, the accused again attempted to misbehave with her. But at that time also he did not commit any sexual intercourse with her. He sent her back to her house. But this alleged occurrence at 08.00 p.m. is not

covered in the charge. This is only an improvement made by P.W.2 which cannot be given any weightage.

10. According to the charge, on 18.08.2013, again at 03.00 p.m. the deceased was taken to the very same building near railway colony, where, this time the accused had sexual intercourse with her. P.W.2 has stated that around 03.00 p.m. on a Sunday, the accused again took her to the lane and he intimated her not to disclose about the happenings to anyone. Accordingly, she went back. Though it is charged that on 18.08.2013, at 03.00 p.m. the accused had sexual intercourse with her, P.W.2 has not stated so. In her whole evidence, she has stated that it was only at 08.00 p.m. on 11.08.2013 in the lane the accused had sexual intercourse with her. Thus, admittedly, there are inconsistencies in her evidence and her evidence is not in strict consonance with the charges framed against the accused.

11. In our considered view, on that score, we cannot reject the evidence of P.W.2 in toto. After all P.W.2 was a child at the time when she disposed about the occurrence, she would have been under a trauma arising out of the shock due to the occurrence as the accused had also threatened her of dire consequences if she disclosed the occurrence to anybody. Because of these reasons, naturally, there have occurred certain inconsistencies in her evidence. For that reason, as we have already pointed out, we cannot reject her evidence and we hold that the prosecution has proved that at least once the accused had penetrative sexual assault with P.W.2. Rupture of the hymen in the vagina of P.W.2 as spoken by the doctor also corroborates the said conclusion. Thus, in our considered view, the prosecution has proved that at least once, the accused had penetrated sexual assault with P.W.2, which is punishable under Section 6 of the POCSO Act. Similarly, he is liable for punishment under Section 506(ii) I.P.C. also. As far as conviction under Section 370 I.P.C. is concerned, Section 370 penalises a person for trafficking. But in the instant case, there is no evidence to prove that the accused had committed offence of trafficking of a person in terms of Section 370 I.P.C. Therefore, he is entitled for acquittal from the said charge.

12. Now turning to the quantum of punishment, in view of the inconsistency in the evidence and since there is evidence to show that the accused had penetrative sexual assault with P.W.2 only once and having regard to all other aggravating and mitigating circumstance, in our considered view, the accused is liable to be punished for offence under Section 6 of POCSO Act and sentenced to undergo rigorous imprisonment for 10 years and

pay a fine of Rs.1000/- in default to undergo simple imprisonment for four weeks, for offence under Section 506(ii) he is sentenced to undergo rigorous imprisonment for one year and pay a fine of Rs.500/- in default to undergo simple imprisonment for four weeks, would meet the ends of justice.

13. In the result, the appeal is partly allowed and he is convicted and sentenced to undergo rigorous imprisonment for 10 years and pay a fine of Rs.1000/- in default to undergo simple imprisonment for four weeks for the offence under Section 6 of the POCSO Act and to undergo rigorous imprisonment for one year and pay a fine of Rs.500/- in default to undergo simple imprisonment for four weeks for offence under Section 506(ii) I.P.C. The conviction and sentence imposed under Section 370 I.P.C. is set aside and he is acquitted from the said charge. The above sentence shall run concurrently. The period of sentence already undergone by the accused shall be set off under Section 428 Cr.P.C. The bail bond shall stand cancelled. The Trial Court shall take steps to secure the accused and commit him to prison so as to undergo the remaining sentence. The fine amount, if any already paid, shall be adjusted towards the fine imposed herein and the excess, if any, shall be refunded to the appellant.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

kua/kk

To

1 The Judicial Magistrate III, Erode

2 Do thro the Chief Judicial Magistrate Erode

3. The Sessions Judge,
Magalir Neethi Mandram
(Fast Track Mahila Court), Erode .

4 Do thro The principal Sessions Judge, Erode

5 The Superintendent Central Prison, Coimbatore

6 The Inspector of Police,
All Women Police Station,
Erode, Erode District.

7. The Public Prosecutor,
Madras High Court.

8 The Director General of Police,
Mylapore, Chennai 600 004

9 The District Collector
Erode

+1 CC to Mr. T. Muruganantham, Advocate Sr.No.39276

Crl.A.No.291 of 2015

MG (CO)
MD : 06/10/2016



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