

Bail Slip

That the Appellants herein/Accused A3,A4,A6,A7 and A8 Viz;-

- 1)N.Rasu @ Velayutham (A3) Aged 53 years
- 2)N.Durairaj (A4) Aged 50 Years
- 3)R.Manickam @ Thirunavukkarasu (A6) Aged 21 years
- 4)N.Paramasivam (A7) Aged 51 years
- 5)P.Nirmala Devi (A8) aged 46 Years

Were directed to be released on bail as per the order of this Court dated 19.05.2016 and made in CrI Mp.No.5645 of 2016 in CrI Appl No.372 of 2016.

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.12.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

and

THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

Criminal Appeal Nos.372, 376, 400 & 630 of 2016
and CrI.M.P.10364 of 2016

1. N.Rasu @ Velayutham (A3)
2. N.Durairaj (A4)
3. R.Manickam @ Thirunavukkarasu (A6)
4. N.Paramasivam (A7)
5. P.Nirmala Devi (A8) .. Appellants in CrI.A.No.372/2016
Accused

Citi @ Chandrakumar (A9) .. Appellant in CrI.A.No.376/2016
Accused 9

P.Yuvaprakash (A1) .. Appellant in CrI.A.No.400/2016
Accused

S.Karthikeyan (A2) .. Appellant in CrI.A.No.630/2016
Accused

- Vs -

State rep by Inspector of Police,
Erode South Police Station,
Erode - 2.

(Cr.No.22 of 2015) .. Respondent in all the appeals
Complainant

Prayer:- Appeals filed under Section 374 of the Code of Criminal Procedure against the judgment passed by the learned Sessions Court, Mahalir Court (Mahalir Fast Track Court), Erode in Spl.S.C.No.26 of 2015 dated 10.05.2016.

For Appellants 1 & 3 : Mr.A.N.Rajan
in Crl.A.No.372/16

For Appellants 2,4&5 : Mr.C.Munusamy
in Crl.A.No.372/16

For Appellant : Mr.A.Natarajan
in Crl.A.No.376/16 SC for Mr.R.Gopinath

For Appellant : Mr.C.Munusamy
in Crl.A.No.400/16

For Appellant : Mr.V.R.Balasubramanain
in Crl.A.No.630/16 for Mr.C.Prakasam

For Respondent : Mr.P.Govindaraj
in all the appeals Additional Public Prosecutor

C O M M O N J U D G M E N T

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

The appellant in Crl.A.No.400 of 2016 is the first accused, the appellant in Crl.A.No.630 of 2016 is the second accused, the appellants in Crl.A.No.372 of 2016 are the accused 3, 4, 6, 7 & 8 and the appellant in Crl.A.No.376 of 2016 is the 9th accused in Spl.S.C.No.26 of 2014 on the file of the learned Sessions Judge, Mahila Court (Mahila Fast Track Court), Erode. The 5th accused was one Mr.D.Yuvaraj. The trial Court framed charges against all the nine accused as detailed below:

Serial Number of charge	Charge(s) framed against	Charge(s) framed under Section
1	A1, A2 & A9	370 of IPC
2	A2 & A9	332 of IPC
3	A1	366 of IPC
4	A3 to A6	366 r/w 34 of IPC
5	A1	506(ii) of IPC
6	A1 to A9	368 r/w 366 of IPC

Serial Number of charge	Charge(s) framed against	Charge(s) framed under Section
7	A1	9 of Prohibition of Child Marriage Act, 2006
8	A2 to A9	10 of Prohibition of Child Marriage Act, 2006
9	A1	6 of POCSO Act
10	A2 to A9	6 r/w 17 of POCSO Act

By judgment dated 10.05.2016, the trial Court acquitted the 5th accused from all charges however convicted and sentenced the accused 1 to 4 and 6 to 9, who are the appellants herein, as detailed below:



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Rank of the Accused	Penal provision(s) under which convicted	Sentence
A1	Section 366 of IPC	Rigorous Imprisonment for ten years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for two years
	Section 506(ii) of IPC	Rigorous Imprisonment for seven years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for one years
	Section 368 r/w 366 of IPC	Rigorous Imprisonment for ten years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for two years
	Section 9 of Prohibition of Child Marriage Act, 2006	Rigorous Imprisonment for two years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for six months
	Section 6 of POCSO Act	Imprisonment for life and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for two year
A2	Section 368 r/w 366 of IPC	Rigorous Imprisonment for ten years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for two year

Rank of the Accused	Penal provision(s) under which convicted	Sentence
A3	Section 10 of Prohibition of Child Marriage Act, 2006	Rigorous Imprisonment for two years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for six months
A4	Section 10 of Prohibition of Child Marriage Act, 2006	Rigorous Imprisonment for two years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for six months
A6	Section 10 of Prohibition of Child Marriage Act, 2006	Rigorous Imprisonment for two years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for six months
A7	Section 10 of Prohibition of Child Marriage Act, 2006	Rigorous Imprisonment for two years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for six months
A8	Section 10 of Prohibition of Child Marriage Act, 2006	Rigorous Imprisonment for two years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for six months

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Rank of the Accused	Penal provision(s) under which convicted	Sentence
A9	Section 368 r/w 366 of IPC	Rigorous Imprisonment for ten years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for two years
	Section 10 of Prohibition of Child Marriage Act, 2006	Rigorous Imprisonment for two years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for six months

Challenging the said conviction and sentence, the appellants are before this Court with these appeals.

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

2.1. The third witness for the prosecution was a child aged about 17 years at the time of occurrence. She was residing with her parents previously at Tindal area in Erode Town. P.W.1 is her father. P.W.4 is her sister. She has got an aunt by name Amena.

2.2. The first accused was residing in Sasthiri Nagar in Erode. He was doing drinking water sales business. He used to carry drinking water cans and supply the same to the consumers in that area. In such a way he used to supply drinking water cans to the house of P.W.3 also. Thus, he had seen P.W.3 on many occasions. It is alleged that he developed a love for her. After some time, P.W.1 shifted his family to a house in 3rd street of Sasthiri Nagar in Erode. The first accused continued to supply drinking water cans to the house of P.W.3. The accused continued to have a love for P.W.3 and he had in his mind a desire to marry her.

2.3. It is further alleged that the accused 3 to 6 and 9 are the relatives of the first accused. The accused 7 and 8 are the parents of the first accused. The second accused is the friend of the first accused.

2.4. On 13.01.2015, P.W.3 had stomach ache. P.W.4 and Amena (aunt of P.W.3) took her to a hospital in Erode. After meeting the doctor, all the three were returning to their house. From the hospital they travelled in a bus and got down in the bus

stand at Nadar Medu. From there, all the three were walking towards their house. When they were nearing a school known as Rita School, two persons came in a motorcycle. They are accused 1 and 2. The 9th accused came in another motorcycle. All these three accused were already known to P.W.3. They intercepted P.W.3. The first accused offered to take them in the motorcycle and leave them in their house. They refused, suddenly, the first accused pulled the hands of P.W.3 and dragged her towards the motorcycle. P.W.4 and Amena tried to prevent, but the first accused succeeded in dragging her towards the motorcycle and forced her to sit on the motorcycle. Accordingly, P.W.3 did. When P.W.4 and Amena tried to pull P.W.3 back, the first accused pushed them aside and threatened them of dire consequence. At that time, a white colour Omni van came to the spot. The first accused drove the motorcycle carrying P.W.3. The accused 2 and 9 prevented P.W.4 and Amena from rescuing P.W.3. The accused 3 to 6 followed the motorcycle in the Omni Van. The first accused drove the motorcycle to the house of the second accused at Vilakethi village. All the other accused except A2 followed the motorcycle, left P.W.3 and the first accused in a room in the house of A2. In the room, as against the resistance made by P.W.3, it is alleged that the first accused had sexual intercourse with P.W.3.

2.5. On 14.01.2015, the first accused and the accused 3, 4 and 6 to 9 followed in the van. They took P.W.3 to a temple at Kodumudi town. In the said temple, the first accused tied thali around the neck of P.W.3 by way of marriage (since P.W.3 is a Muslim and the first accused is a Hindu, the so called marriage in the temple celebrated as per the Hindu religious rites and customs is void, it is alleged). After the marriage, again the accused 1, 3, 4 and 6 to 9 took P.W.3 to the house of the second accused, where they made first accused and P.W.3 to stay together. While in the said house, the first accused had repeated sexual intercourse with P.W.3.

2.6. On 15.01.2015, it is alleged that they took P.W.3 in an Omni van to Madurai. In a house at Madurai, the first accused stayed with P.W.3 in the house of the uncle of A1, between 15.01.2015 and 25.01.2015, at Seelanayakanpatti. During that time also the first accused had repeated sexual intercourse with P.W.3.

2.7. In the meanwhile, P.W.4 on the day of occurrence informed about the above occurrence to the father of P.W.3 namely P.W.1. P.W.1 made a complaint to the police on 14.01.2015 at 05.45 p.m. P.W.15 the then Sub Inspector of Police of Erode South Police Station registered a case in Crime No.22 of 2015 under Section 366(A) I.P.C. Ex.P1 is the complaint and Ex.P15 is the F.I.R.

2.8. P.W.16 the Inspector of Police took up the case for investigation. He went in search of P.W.3 to various places. He prepared an observation mahazar and a rough sketch at the place of occurrence. Until 25.01.2015, he was not able to make any breakthrough. When P.W.3 was at the house of the uncle of A1 at Seelanayakanpatti, the first accused and the other accused had messaged that P.W.1 had made complaint to the police and the police were on the look out for the accused. Therefore, leaving P.W.3 at lurch, they all escaped. P.W.3 managed to return to the house of P.W.1 at Erode. P.W.1 thereafter, took her to the police station and caused her appearance before P.W.16 at 01.30 p.m. on 25.01.2015.

2.9. P.W.16 examined P.W.3 and recorded her statement with the aid of a woman Sub Inspector of Police. Based on the said statement of P.W.3, P.W.16 altered the case into one under Section 366(A) I.P.C. and Sections 6 and 17 of the POCSO Act. Ex.P20 is the alteration report. Then, he forwarded P.W.3 to the Government Hospital for medical examination.

2.10. P.W.11 Dr.Kavitha examined her on 27.01.2015 at 05.45 p.m. at the Government Hospital at Erode. P.W.3 told P.W.11 that at that time she was aged 17 years and out of her own volition, she went along with one Yuvaraj to Vilakethi village on 13.01.2015 and had sexual intercourse with him twice. She has further stated that on 25.01.2015, she was taken by the police. On examination, P.W.11 found no external injuries on the body of P.W.3. Her sexual organs had full development. The hymen was found ruptured. Her vaginal cavity allowed two fingers to move into it freely. She collected vaginal fluid in two glass pans and sent them for chemical examination, which revealed that there was no spermatozoa. The further medical examination revealed that she was not pregnant. Based on these findings, P.W.11 opined that there was no sign of any sexual intercourse within 48 hours from the time of examination. Ex.P11 is the accident register and Ex.P12 is her opinion.

2.11. On the same day at 04.15 p.m. P.W.16 arrested the accused 2 and 3 at Modakurichi village. On such arrest, the second accused gave a voluntary confession, in the presence of witnesses, in which, he disclosed the place where he had hidden an Appachi motorcycle. In pursuance of the same, he took the police and the witnesses to the place of hideout and produced the motorcycle. Similarly, the Omni van was also recovered. On returning to the police station, he forwarded these two accused to Court for judicial remand and handed over the material objects also to the Court. On 27.01.2015, as per the orders of the learned Judicial Magistrate No.III, Erode, he again forwarded P.W.3 for medical examination. On 30.01.2015, A1, A4,

A7 and A8 were granted anticipatory bail by the High Court.

2.12. On 16.02.2015, he made a request to the learned Judicial Magistrate No.III, Erode to forward the first accused for medical examination. Accordingly, he was sent for medical examination on 16.02.2015. P.W.12-Dr.Ananda Kumar examined him and found that his sexual organs were fully developed and he was sexually potential to perform sexual intercourse with a woman. Ex.P13 is the accident register and Ex.P14 is his final opinion. He collected the saliva, blood and semen from the accused and forwarded the same to forensic lab for further examination. P.W.16 examined many more witnesses, collected medical records and on completing the investigation on 14.07.2015, he laid chargesheet against the accused.

2.13. 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 16 witnesses were examined, 22 documents and 5 material objects were marked. Three documents were marked as Court documents as Ex.C1 to C3.

2.14. Out of the said witnesses, P.W.1 the father of P.W.3 has stated that on 13.01.2015, in the evening, P.W.4 and Amena informed him that P.W.3 was kidnapped in a motorcycle by the accused 1, 2 and 9. He has further spoken about the complaint made to the police. He has further stated that on 25.01.2015, P.W.3 returned home and narrated the entire events. He has further spoken about the fact that he produced her before the police.

2.15. P.W.2 is a relative of P.W.1, he has spoken about the arrest of the accused 2 and 3 and the disclosure statement made. He has also spoken about the recovery of the motorcycle and the van. P.W.3 has vividly spoken about the entire occurrence as we have already narrated. P.W.4 is the sister of P.W.3, she has also stated that when she accompanied P.W.3 from the hospital, the accused 1 to 9 came and took P.W.3 in a motorcycle by force. She has further stated that she informed the same to P.W.1.

2.16. P.W.5 has turned hostile and he has not supported the case of the prosecution in any manner. P.W.6 has stated that he made signature in the observation mahazar and he has not stated any other fact. P.W.7 is the owner of the motorcycle bearing registration No.TN 33 AB 6469. According to him on 13.01.2015, the first accused borrowed the said motorcycle from him (M.O.2) and thereafter returned the motorcycle, which was later on seized by the police. P.W.8 has stated that the TVS Star City motorcycle was abandoned at Vignesh Nagar and the same was

seized by the police (vide M.O.3).

2.17. P.W.9 Dr. Thenmozhi has stated that she examined P.W.3 on 28.01.2015 to give her opinion regarding the age of P.W.3. She took X-rays and gave final opinion based on the same that P.W.3 had completed 18 years of age but not completed 20 years of age. Ex.P7 is the certificate issued by her. P.W.10 Dr.Anand has stated that he examined P.W.3 on 27.01.2015 at 02.35 p.m. He made entries in the accident register and then forwarded P.W.3 to a lady doctor for examination.

2.18. P.W.11 Dr.Kavitha has stated that she examined P.W.3 on 27.01.2015 at 05.45 p.m. She has further stated that at that time, P.W.3 told that she went on her own volition with one Yuvaraj to Vilakethi village where she married Yuvaraj and had sexual intercourse with him twice. She has further stated that thereafter on 25.01.2015, she was rescued by the police. P.W.11 on examination has opined that within 48 hours before the examination, P.W.3 would not have had sexual intercourse. P.W.12 Dr.Ananda Kumar has stated that he examined the accused on 16.02.2015 and gave opinion that he was sexually potential to perform sexual intercourse with a woman. P.W.13 is the Head Clerk of the learned Jurisdictional Magistrate Court, who has stated that he forwarded the material objects for chemical examination. The report revealed that there was no semen on the material objects. P.W.14 has spoken about the registration of the case on the complaint of P.W.1. P.W.15 has spoken about the initial investigation done by him and P.W.16 has spoken about the further investigation and the final report filed by him.

3. When the above incriminating materials were put to the accused, they denied the same as false. Their defence was a total denial. On their side, four witnesses were examined. D.W.1 one Shaira Banu has stated that she was the then Judicial Magistrate No.II, Erode and she recorded the statement of P.W.3 under Section 164 Cr.P.C. on 25.01.2015. According to D.W.1, P.W.3, in the said statement has stated that she had fallen in love with one Yuvaraj (first accused) for about one and half years prior to the occurrence. In the said statement, she has further stated that they used to exchange their love through phone on several occasions. This came to the knowledge of the grandmother of P.W.3 and she in turn informed the same to P.W.1. When P.W.1 warned her to stop the said love, P.W.3 attempted to commit suicide by consuming ant poison. After treatment, when she was returning home, the first accused came to see her. During that time, according to her statement, P.W.3 told A1 that he wanted A1 to take her with him. Accordingly, as per the statement, she went with the first accused. At that time, according to the statement, her sister and aunt were also present. She further told the learned Magistrate that she was

not either kidnapped or abducted by anyone and she went on her own accord. Ex.P4 is the said statement of P.W.3 recorded under Section 164 Cr.P.C. D.W.2 one Mrs.Poongothai has stated that P.W.3 was studying in the Panchayat Union Middle School at Chinasoalipalayam where D.W.2 was the Head Mister. She has stated that P.W.3 joined the said school on 03.06.2002. Her Date of Birth is 11.07.1997. She has further stated that the said date of birth was entered in the school records based on the birth certificate produced. Ex.C3 is the certificate regarding the date of birth entered in the school register. D.W.3 was the then Deputy Tahsildar at the office of the Tahsildar, Paramathivelur. He was summoned to produce the birth register containing the registration of the birth of P.W.3. But, he has stated that the entire birth register for the year 1997 was found missing in his office and to that effect, he issued Ex.C4 letter. D.W.4 is a resident of Vilakethi at Olapalayam village. He is a friend of A2. On 13.01.2015, he had gone to the aunt's house of A2 to attend pongal festival. From 08.00 a.m. onwards, he stayed there for three days. According to him, neither A1 nor any other girl stayed at the house of A2 from 13.01.2015 onwards so long as he was staying at the house of A2. One Mr.Marudupandian was examined as a Court Witness (C.W.1). He has stated that P.W.3 studied in the Vellore Girls Higher Secondary School. According to the school records, her date of birth is 11.07.1997. Ex.C1 is the said certificate. Having considered all the above the trial Court convicted these appellants / accused 1 to 4 and 6 to 9 as detailed in the first paragraph of the judgment and that is how they are before this Court with these appeals.

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

5. The learned counsel for the appellant would seriously dispute the age of P.W.3. According to him, she had completed 18 years of age as on the date of occurrence and therefore the provisions of POCSO Act are not applicable in this case. The learned counsel relies on the evidence of P.W.9-Dr.Thenmozhi, who, from out of the X-ray reports, had opined that P.W.3 had completed 18 years of age but not completed 20 years of age. On the side of the accused one Mrs.Poongothai has been examined as D.W.2. D.W.2 was the Head Master of the Panchayat Union Middle School, where P.W.3 studied. Ex.C3 is the xerox copy of the original register of Admission maintained in the school. D.W.3 was examined at the instance of the accused. He was summoned to produce the birth register of the year 1997. This was done by the accused in an attempt to prove that the date of birth of P.W.3 as entered in Ex.C3 is not correct. But D.W.3 has stated that the original birth register for the year 1997 was found

missing from his office. The said fact is not disputed by the accused. One Mr.Mardhupandian has been examined as C.W.1. He was the headmaster of the Higher Secondary School where P.W.3 had studied. He had produced the transfer certificate of P.W.3 issued by the headmaster of the said school. The said document has been marked as Ex.C1 which shows that the date of birth of P.W.3 is 11.07.1997. Thus, as of now, there are two certificates one from the Elementary School and the other from the Higher Secondary School to show that the date of birth of P.W.3 is 11.07.1997. The learned counsel for the appellants would submit that in the absence of production of the birth certificate, no weightage could be given to these two documents.

6. We are not persuaded by the said argument. As per Section 34 of the POCSO Act, if any dispute is raised in respect of the age of the victim, the question shall be determined by the Court. Sub Section (1) of Section 34 gives an indication that the age may be determined as per the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015. Section 94 of the Juvenile Justice (Care and Protection of Children) Act states that in case there is reasonable doubt regarding the age, the determination of age shall be made by seeking evidence by obtaining (i) the transfer certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available, and in the absence thereof; (ii) the birth certificate given by a corporation or a municipal authority or a panchayat; (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board.

7. In the instant case, since the certificate issued by the school is available and no dispute whatsoever has been raised by the accused in respect of Exs.C1 to C3, the Court need not look for either the birth certificate or the opinion of the medical expert. The date of birth as mentioned in the school certificate should be presumed to be the correct date of birth and the opinion of the doctor based on some scientific examination in respect of the age is always subject to some marginal error and that is the reason why the Hon'ble Supreme Court has stated that two years of margin could be added on either side. When the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor. Therefore, in the instant case, as on the date of occurrence, going by the school certificate, since P.W.3 had not completed 18 years of age, we hold that P.W.3 was a child as defined in the POCSO Act.

8. The learned counsel for the appellants would contend that P.W.3 had gone out with the first accused on her own accord. In order to substantiate his contention, the learned counsel would

rely on the evidence of D.W.1 the learned Judicial Magistrate, where she has stated that she recorded the statement of P.W.3 under Section 164 Cr.P.C. as requested by the police. The said statement has been marked as Ex.P4. The learned counsel would submit that in the said statement, P.W.3 has stated that she had fallen in love with A1 for about one and half years before the occurrence. She had further told that she used to speak to A1 often exchanging love and pleasantries. Since the love affair came to the knowledge of her grandmother and since she had informed the same to her father, and out of frustration in an attempt to commit suicide, she consumed poison. She has further stated that she was taken to the hospital. There she underwent treatment as in patient and she has also stated that she was discharged from the hospital and when she was returning home with P.W.4 and her aunt, the first accused met her and at that time, she, on her own, insisted the first accused to take her with a view to marry and that is how she went along with the first accused. Relying on this statement of P.W.3, the learned counsel submitted that her present evidence that the first accused by force took her in a motorcycle, is not true. In this regard, it is needless to point out that the said statement (Ex.P4) is nothing but a former statement of P.W.3, which cannot take the place of substantive evidence. P.W.3 was duly contradicted by the said statement. When it was brought to her notice the said contradictory statement, P.W.3 has stated that because the accused had threatened her, out of fear for him, she gave such a statement which is untrue.

9. The said explanation of P.W.3 does not persuade us at all. We find that the said former statement made by her reflects the truth. Thus, from the evidence of P.W.3 as elicited with reference to Ex.P4 would clearly go to show that P.W.3 went with the first accused on her own accord and not out of any compulsion. If once such a conclusion is arrived at, then all the accused are entitled for acquittal from the charges under Section 366 r/w 34 I.P.C., Section 506(ii) I.P.C. and Section 368 r/w 366 I.P.C.

10. After she was taken from the occurrence village, the fact remains that according to P.W.3 she was taken to Vilakethi village, where P.W.3 and the first accused alone were left in the house. According to her, the first accused had sexual intercourse with her. She has stated that the first accused had sexual intercourse with her despite her resistance. From the fact that P.W.3 had gone on her own accord with the first accused and stayed with him at the house at Vilakethi would go to show that she would not have resisted for the first accused to have sexual intercourse with her. Thus, it was by consent of P.W.3.

11. Now the question is whether such consent from P.W.3 would exonerate the first accused from the offence of penetrative sexual assault. Section 3 of the POCSO Act which defines 'penetrative sexual assault' states that if a person penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person, it is penetrative sexual assault, whether such penetration was with the consent of the child or not is immaterial. In other words, the penetration by the man even with the consent of the child, is no exception to the offence of penetrative sexual assault. Therefore, in the instant case, though we find reason to hold that P.W.3 had consented for sexual intercourse by the first accused, since she was a child, that consent would not exonerate the first accused from the charge of penetrative sexual assault.

12. Thereafter, a formal marriage was celebrated in the temple at Kodumudi on 14.01.2015. After that, the first accused took her again to Vilakethi village, where he stayed with her for several days. During that period also, according to P.W.3, the first accused had sexual intercourse with her. Thus, the penetrative sexual assault committed by the first accused is an aggravated penetrative sexual assault and punishable under Section 10 of the POCSO Act. It is no defence for the accused to say that there was marriage between him and the victim on 14.01.2015. The said marriage conducted in violation of the provisions of the Prohibition of Child Marriage Act, 2006 is voidable at the option of the child. Such voidable marriage would not exonerate the first accused from the offence of aggravated penetrative sexual assault as the POCSO Act does not provide for any such exemption. Therefore, the first accused is liable to be punished for offence under Section 10 of the POCSO Act.

13. Since P.W.3 had gone on her own accord without any persuasion with A1, in view of the Hon'ble Supreme Court decision in S.Varadarajan Vs. State of Madras reported in AIR 1965 SC 942, it cannot be stated that she was kidnapped by the first accused and therefore the first accused is entitled for acquittal from the charge under Section 366 I.P.C.

14. So far as the second accused is concerned, there is no evidence that he actually participated in the occurrence. P.W.4, of course has stated that the second accused also accompanied the first accused along with the 9th accused when the child was taken in the motorcycle. Since, we have already held that P.W.3 had gone on her own volition and she was not taken by anybody, we have to reject the evidence of P.W.4 and acquit the second accused.

15. Now turning to the accused A3, A4 and A6 to A9, it is in the evidence of P.W.3 that they celebrated the marriage between the first accused and P.W.3 in the temple at Kodumudi. P.W.3 has clearly spoken about the said fact. The learned counsel would submit that these accused would not have known the age of P.W.3 at the time when they celebrated the marriage. It is not as though A3, A4 and A6 to A9 simply participated in the marriage celebration after being invited by the family members. It is the case that they actively participated in taking the first accused and P.W.3 to the Temple to celebrate the marriage. Had they been mere participants as invitees, it could be held that they are not liable for any punishment. But since they arranged for the marriage, took A1 and P.W.3 to the Temple and celebrated the marriage, they would have verified the age of P.W.3, the normal presumption is that they knew that she was a child. Therefore, for having celebrated the child marriage in violation of the provisions of the Prohibition of Child Marriage Act, 2006, they are liable to be punished under Section 10 of the said Act and all these accused are entitled for acquittal from other charges.

16. Now turning to the quantum of punishment, the first accused was hardly aged about 25 years, out of love for P.W.3 and since P.W.3 had gone to the extent of taking poison to commit suicide out of love failure, under enormous pressure, he had accompanied P.W.3, married her and had sexual intercourse with her, both before the marriage as well as after the marriage. He has got no bad antecedents. Having regard to these aggravating as well as the mitigating circumstances, we are of the view that sentencing him to undergo 10 years rigorous imprisonment and to pay a fine of Rs.10,000/- in default to undergo rigorous imprisonment for four weeks and for the offence under Section 10 of the Prohibition of Child Marriage Act, 2006 sentencing him to undergo rigorous imprisonment for one year and pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for two weeks would meet the ends of justice.

17. So far as the accused 3, 4 and 6 to 9 are concerned, for the offence under Section 10 of the Prohibition of Child Marriage Act, the maximum punishment provided itself is only two years of imprisonment with fine. In this case, we are told that these accused were in prison for few months. In our considered view, the same would be sufficient besides we impose a sum of Rs.2,000/- each as fine. We are also of the view that the entire fine amount shall be paid to P.W.3 as compensation.

18. In the result, the appeal is partly allowed in the following terms:

(a) The conviction of the first accused / the appellant in CrI.A.No.400 of 2016 under Section 6 of the POCSO Act is confirmed however the sentence is reduced to undergo rigorous

imprisonment for ten years and to pay a fine of Rs.20,000/- in default to undergo rigorous imprisonment for six weeks. He is further convicted under Section 10 of the Prohibition of Child Marriage Act and sentenced to undergo rigorous imprisonment for one year and pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for two weeks. He is acquitted from the charge under Section 366 I.P.C. and the conviction and sentence imposed on him under the said charge are set aside.

(b) The appellant in CrI.A.No.630 of 2016 / the second accused is acquitted from all charges.

(c) The appellants in CrI.A.Nos.372 & 376 of 2016 / accused 3, 4 and 6 to 9 are convicted under Section 10 of the Prohibition of the Child Marriage Act, 2006 and the sentence imposed on them by the trial Court is reduced to the period of sentence already undergone, with a fine of Rs.2,000/- each in default to undergo rigorous imprisonment for six weeks.

(d) All the appellants are acquitted from all the other charges except the charge for which they have been convicted as stated herein above.

(e) The sentences imposed on the first accused shall run concurrently.

(f) The sentence already undergone by the first accused shall be set off under Section 428 Cr.P.C. Consequently, the connected miscellaneous petition is closed.

sd/
Assistant Registrar (CS VI)

/true copy/

Sub Assistant Registrar

To

- 1.The Sessions Court,
Mahalir Court (Mahalir Fast Track Court),
Erode.
- 2.-do-Thro The Principal Sessions Judge,
Erode.
- 3.The Judicial Magistrate, Erode.
- 4.-do-thro The Chief Judicial Magistrate,erode.

- 5.The Superintendent,
Central Prison, coimbatore.
- 6.The Superintendent central prison for women,
Coimbatore.
- 7.The District Collector,
Erode, Erode District.
- 8.The Director General of Police,
Mylapore, Chennai-4
9. The Inspector of Police,
Erode South Police Station,
Erode - 2.
10. The Public Prosecutor,
Madras High Court.
- 11.The Record Keeper,
Criminal Section,
High court, Madras.

+1cc to Mr.ChandraSekar, Advocate SR.No.73198
+2cc to Mr.C.Munusamy, Advocate SR.No.72892,72893
+2cc to Mr.R.Gopinath, advocate SR.No.73514,73164
+1cc to Mr.C.Prakasam, Advocate SR.No.73059,

Crl.A.Nos.372, 376, 400 & 630 of
2016 and Crl.M.P.10364 of 2016

UG(CO)
GN(23/02/2017)

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