

Crl.M.P.No.4327 of 2016 in Crl.A.269 of 2016
S.NAGAMUTHU, J.
AND
V.BHARATHIDASAN, J.

(Order of the Court was made by **S.NAGAMUTHU, J.**)
Crl.A.269 of 2016 has been filed by the sole accused in the said case, challenging his conviction under Section 6 of the Protection of Children from Sexual Offences Act, 2012. He has been sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for two years. Pending disposal of the said appeal, seeking suspension of the substantive sentence of imprisonment, the accused has come up with Crl.M.P.No.4327 of 2016.

2. We have heard the learned counsel for the petitioner, the learned Government Advocate (criminal side) appearing for the State and also perused the records carefully.

3. In this case, P.W.3 is the victim of the alleged penetrative sexual assault. P.W.3 has given evidence in a cogent manner stating that the accused had sexual intercourse with her which resulted in pregnancy. Ultimately, it was aborted. There was a delay in preferring the complaint. P.W.1 is the mother of the victim. She has strongly

supported the case. The medical evidence also fully corroborates the evidence of P.W.3.

4. The learned counsel for the petitioner would submit that the doctor P.W.8, who conducted examination of P.W.3 has given the opinion that she had completed 18 years of age, but not completed 20 years of age. He would further submit that there is no evidence at all to prove that P.W.3 was a child as defined under the POCSO Act as on date of the alleged commission of crime. Thus, according to the learned counsel in the absence of the proof of the age of P.W.3, the conviction given by the lower Court, is illegal. The learned counsel would further submit that there was inordinate delay in preferring the complaint which would create a doubt in the case of the prosecution.

5. The learned Government Advocate would however oppose this petition. He has produced the case diary. He has also taken us through the Judgment of the trial Court to substantiate his contentions that as on the date of alleged commission of crime, P.W.3 was a child as defined under the Act.

6. We have considered the above submissions.

7. A perusal of the Judgment of the trial Court would show that the trial Court had concluded that the victim girl was less than 18 years of age as on the date of the alleged commission of crime. The final report filed by the Inspector of Police states that the date of birth of P.W.3 is 30.8.1997. The trial Court has made observation that without any record whatsoever, to prove the date of birth of the victim girl, the investigating officer had mentioned the date of birth of the victim girl as 30.8.1997. The trial Court after having noticed the above anomaly in the case of the prosecution, had directed the investigating officer to rectify the same. The investigating officer produced xerox copies of the school transfer certificate of P.W.3. But they were not marked in the evidence. The trial Court has lamented that even the Head Master of the school had not been examined. Further, the trial Court has concluded that P.W.3 was a child, going by the evidence of P.W.1 and P.W.3 wherein they have stated that on the date of occurrence, she was only a child.

8. We have gone through the case diary. The case diary contains xerox copy of the school transfer certificate of P.W.3 issued by the HeadMaster of the Government High School, Alathur, Thattarpalayam-638 455, Gobichettipalayam, Erode District. According

to the said certificate, the date of birth of P.W.3 is 17.11.1997. The birth certificate obtained from the Sub Registrar, Kavundapadi. According to the said certificate, the date of birth is mentioned as 30.8.1997. Neither the birth certificate nor the school certificate has been proved in evidence to prove the age.

9. It is not understandable as to why the trial Court had not thought it fit to exercise its judicial obligation under Section 311 of Cr.P.C to summon the relevant witnesses and receive evidence such as school certificate or the birth certificate in order to do justice in this case. Though the trial Court has lamented that the investigating officer had not taken any view to prove the school certificate, in our considered view, that by itself would not suffice on the part of the trial Court. The trial Court ought to have exercised its power under Section 311 Cr.P.C because ultimately, the Court obligated to do justice to the parties. For the failure of the police, the Court cannot afford to allow justice to be killed at the altar of Goddess of justice.

10. Our further perusal of the case diary shows that the draft final report was approved by one Mr.Rajasekaran, the Assistant Director of Prosecution, Erode. It is not understandable as to how

Mr.Rajasekaran had omitted to notice that the age of the victim is to be proved during trial by means of documentary evidence. It shows that he has, without applying his mind simply approved the draft Final Report filed by the Inspector of Police. We direct the Government to take appropriate action against him for his dereliction of duty in this case. This is not the only case where we have come across such kind of dereliction. Very often we have come across many such instances. The Inspector of Police, even after the flaw was brought to her notice, had not made any attempt to rectify the same by giving additional list of documents and witnesses to prove the age of the victim girl. We are at pain to note that even the Special Public Prosecutor, who conducted trial before the Court had not taken adequate steps to rectify the above flaw. She also remained as a silent spectator, despite the fact that the trial Court had reminded her about the flaw.

11. Having said all the above facts, we, on our part, cannot close our eyes and allow justice to be killed on the ground of above lapses. Therefore, we deem it appropriate to invoke the power under Sections 311 and 391 Cr.P.C to summon the following witnesses and to prove the following documents:

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(i) We hereby recall P.W.13/Inspector of Police for the purpose of further examination before this Court. The Inspector of Police shall appear along with the original birth extract (birth certificate) of the victim.

(ii) We also summon the Head Master of the Government High School, Alathur, Thattarpalayam-638 455, Gobichettipalayam, Erode District, who shall appear before this Court along with the original admission register.

(iii) The witnesses shall appear before this Court on 05.07.2016. The Superintendent Central Prison, Coimbatore shall cause the production of the accused before this Court on 05.07.2016 at 12.30 p.m.

12. In the result, Crl.M.P.No.4327 of 2016 is dismissed with the above directions.

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**[S.N.,J.] [V.B.D.J.,]
23.06.2016**

Copy to
The Superintendent of Police,
Central Prison, Coimbatore.

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