

THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 12..04..2017

Coram:

THE HON'BLE MR.JUSTICE S.NAGAMUTHU
AND
THE HON'BLE DR. JUSTICE ANITA SUMANTH

Criminal Appeal No.45 of 2017

Ayyasamy ...Appellant/Single Accused

-Versus-

State Rep. by its
Inspector of Police,
Perungudi Circle,
Perundurai,
Erode District.
[Crime No.33 of 2014 on the
file of Kanchikovil Police Station] ... Respondent/Complainant

Appeal filed under Section 374(2) of Cr.P.C. challenging the judgement of conviction and sentence dated 03.09.2015 recorded by the learned Sessions Judge, Mahila [Fast Track] Court, Erode, in Spl.S.C.No.16 of 2015.

For Appellant : Mr.P.M.Doraisamy for
Mr.S.Lakshmanasamy

For Respondent : Mr.P.Govindarajan,APP

JUDGEMENT

(Judgement of the Court was delivered by S.NAGAMUTHU, J.)

The appellant is the sole accused in Spl. S.C.No.16 of 2015 on the file of the Fast Track (Mahila Sessions Court), Erode [Special Court under The Protection of Children from Sexual Offences Act, 2012. He stood charged for offences under Section 366 of IPC, Section 9 of The Prohibition of Child Marriage Act, 2006 and Section 6 of the Protection of Children from Sexual Offences Act, 2012 [in short, the POCSO Act]. By judgement dated 03.09.2015, the trial court acquitted the accused from the charge under Section 9 of the Prohibition of Child Marriage Act, 2006, however, convicted him under Section 366 of IPC and Section 6 of the POCSO Act and sentenced him to undergo rigorous

imprisonment for ten years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for two years for the offence under Section 366 of IPC; and to undergo imprisonment for life and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for two years for offence under Section 6 of the POCSO Act. Challenging the above said conviction and sentences, the accused is before this court with this criminal appeal.

2. The case of the prosecution in brief is as follows:- P.W.1 is the mother of P.W.2. At the time of occurrence, P.W.2 was aged 17 years and ten months. They were residing at Thannerpanthal Palayam, Kanchikovil in Erode District. The husband of P.W.1 died some time before. P.W.2 was working in a private company at SIPCOT in Erode. P.W.2 used to go to the said company in the bus belonging to the company. The accused was working as a driver in the said company. On 16.03.2014, around 05.00 p.m., according to the case, P.W.2 was at her house alone at Thanneerpanthal Palayam, the accused spoke to her over phone and requested her to come out of the house. P.W.2 told that she would not come out. Then, the accused assured her over phone that he would marry her. P.W.2 got persuaded by the words of the accused. Thereafter, she came out of the house and went to the place where the accused was waiting in his motor cycle. Then, both of them went to Appakudal Ayyampalayam Village in the motor cycle to the house of a friend of the accused where they stayed for few days. Thereafter, the accused took her in the motor cycle to Pollachi to the house of one Mannan who was also a friend of the accused. At Pollachi, the accused and P.W.2 joined a private company thereby securing employment. While they were staying together at the house of Mannan, it is alleged that the accused had sexual intercourse with her.

3. Since P.W.2 was found missing, P.W.1's husband made a complaint to Kanchikovil Police Station on 20.03.2014 at 01.30 p.m. On the said complaint (Ex.P.7), a case was registered in Crime No.33 of 2014 for "Girl Missing". Ex.P.8 is the FIR. During the course of investigation, the accused was arrested by the investigating officer on 25.03.2014 at 03.00 p.m. P.W.2 was also secured. Then, statement of P.W.2 was recorded and she was sent for medical examination. The accused was also sent for medical examination. The medical examination revealed that she had been subjected to sexual intercourse. The medical examination of the accused revealed that he was capable of performing penile sexual intercourse with a woman. On completing the investigation, he laid charge sheet against the accused.

4. Based on the above materials, the trial court framed three charges as detailed in the first paragraph of this judgement. The accused denied the same. In order to prove the

case, on the side of the prosecution, as many as 13 witnesses were examined, 16 documents and 2 material objects were marked.

5. Out of the said witnesses, P.W.1, the mother of P.W.2 has stated that P.W.2 was working in a private company at SIPCOT. P.W.1 was also working somewhere. According to P.W.1, when she returned home, she found her daughter (P.W.2) missing. Thereafter, according to P.W.1, her husband made a complaint to the police. P.W.2, the victim girl, has stated that on 16.03.2014, when she was at her house, the accused contacted her over phone and persuaded her to come out of the house and then took her in the motorcycle to Appakudal Ayyampalayam and after some time, he took her to the house of Mannan at Pollachi, where they stayed together. They secured employment in a company and they were working there. Thereafter, they returned to Thambi Kalai Ayyan Koil village. Then, according to her, they were taken into custody by the police. P.W.3 is a neighbor of P.W.1. He has stated that on 16.03.2014 about 02.30 - 03.00 p.m. near the house of P.W.2, he found the accused and P.W.2 standing together and chatting. P.W.4 has spoken about the preparation of observation mahazar and rough sketch at the house of P.W.2. P.Ws.5 and 6 have turned hostile. P.W.7 has stated that he signed some documents at the police station. P.W.8, the doctor, has stated that he examined the accused and gave opinion that he was capable of performing penile sex with a woman. P.W.9, the doctor, has stated that he examined P.W.2 and gave opinion that she was more than 18 years of age and less than 20 years of age. P.W.10 has spoken about the registration of the case and the initial investigation done by him. P.W.11, the doctor, has stated she examined P.W.2 on 07.05.2014 and gave opinion that P.W.2 had been subject to sexual intercourse. This opinion is based on the fact that the hymen was not intact. But, smear taken from the vagina revealed that there was no spermatozoa. P.W.12 has spoken about the investigation done by him in this case. P.W.13 has spoken about the further investigation done by him and the filing of charge sheet against the accused.

6. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C. he denied the same as false. However, he did not choose to examine any witness nor did he mark any document on his side. His defence was a total denial.

7. Having considered all the above, the trial court convicted the appellant/accused as detailed in the first paragraph of this judgement and sentenced him accordingly. Challenging the above said conviction and sentences, the accused is now before this Court with the present criminal appeal.

8. When this appeal came up for hearing, the Investigating Officer in the case has filed a miscellaneous petition in

CrI.M.P.No.3955 of 2017 under Section 391 of Cr.P.C. seeking permission to let in additional evidence by examining the Head Master of the school where P.W.2 was studying and to prove the transfer certificate of P.W.2 so as to establish the date of birth of P.W.2. After due notice and after affording sufficient opportunity to the appellant/accused, the above said petition was allowed on 17.03.2017 and the Head Master of the School was summoned and examined as P.W.14. P.W.14 before this court has stated that P.W.2 studying in the Government Higher Secondary School at Kanchikovil, Erode District. According to the school record, her date of birth is 05.05.1996. The accused was, thereafter, again examined by this court under Section 313 of Cr.P.C. in respect of the additional evidence of P.W.14 and the transfer certificate (Ex.P.17) received in this court. He denied the same.

9. Thereafter, we have heard the learned counsel appearing for the appellant/accused and the learned Additional Public Prosecutor appearing for the respondent/State and we have also perused the records carefully.

10. At the outset, the learned counsel for the appellant/accused would submit that as on the date of occurrence, P.W.2 was more than 18 years of age and thus, she was not a child in terms of the POCSO Act. This argument is based on the evidence of P.W.9 - Dr.Sivakumar. He has stated that he examined P.W.2 on 08.05.2014. He found that the growth of wrist and radius revealed that she was more than 18 years of age. Similarly, the growth of acromion process bone also indicated that she was more than 18 years of age. By means of this scientific examination, he issued Ex.P.6 certificate stating that as on the date of occurrence, P.W.2 had completed 18 years of age, but, not completed 20 years of age. M.O.2 series are X-Rays taken on P.W.2.

11. The learned counsel for the appellant would submit that there is no reason to reject the evidence of P.W.9 who has made an objective assessment of the age based on scientific methods. But the learned Additional Public Prosecutor would submit that according to the evidence of P.W.14, the date of birth of P.W.2 was 05.05.1996 and thus, as on the date of occurrence, P.W.2 was 17 years 10 months and 11 days old. Therefore, she was child in terms of the POCSO Act.

12. We have considered the above submissions carefully.

13. P.W.1, the mother of P.W.2 has not at all stated anything about the date of birth of P.W.1. But, during cross examination, she has stated that as on the date of examination of P.W.2 she was more than 18 years of age. P.W.2, in her cross examination, has stated that her date of birth is 05.05.1995.

She has not stated that her date of birth is 05.05.1996. P.W.14, the Head Master has stated that entry of date of birth of P.W.2 in the school register was made by his predecessor. But, he did not know on what basis the date of birth was entered in the elementary school register. It is not in evidence that the date of birth of P.W.2 was entered in the school register based on birth certificate or any other authenticated document. The person who gave the date of birth at the time of admission of P.W.2 in the school has also not been examined. The person who entered the date of birth of P.W.2 in the school register has also not been examined. The school certificate needs to be given primary consideration. But, at the same time, the fact that P.W.1 has admitted that P.W.2 was more than 18 years of age as on the date of examination, cannot be ignored. Similarly, the evidence of P.W.2 that her date of birth is 05.05.1995 also cannot be ignored. Above all, P.W.9, the doctor, had assessed the age of P.W.2 objectively by following the scientific methods. Based on the X-Ray examination, which revealed the growth of vital bones of P.W.2, the doctor-P.W.9 had assessed the age of P.W.2. According to P.W.9, P.W.2 had completed 18 years of age, but was not completed 20 years of age. We find no reason to reject the medical evidence of P.W.9. In the light of the evidences of P.Ws.1 and 2, the evidence of P.W.9 needs more weightage than the evidence of P.W.14 which is not based on any supporting document. In other words, P.W.14 did not know on what basis the date of birth of P.W.2 was entered in the school register.

14. In view of the above, we hold that the prosecution has miserably failed to prove the age of P.W.2 at the time of occurrence that she was a child in terms of the POCSO Act. Since we hold that as on the date of occurrence, P.W.2 had completed 18 years of age, the provisions of the POCSO Act, 2012 are not applicable. P.W.2 has stated that she went along with the accused in the motor cycle initially to the house of a friend of the accused at Appakudal Ayyampalayam and after few days of their stay there, they went to Pollachi, stayed at the house of one Mannan and they also secured job in a private company where they worked together for some time. Had it been true that P.W.2 was not a willing party to the above transactions, she would have raised alarm and would have tried to escape. During cross examination, P.W.2 has stated that when the accused called her over phone, she was at her house which was situated at a distance of 1 km to the place where the accused was waiting for her and then, went along with him. She has further stated that every day she went to the company for work and earned her livelihood along with the accused. She has not at all stated that she raised any alarm or objection at any stage or informed to anyone that she has been kidnapped and illegally detained by the accused. This would go to show that P.W.2 was a consenting party to go with the accused and also to

the alleged sexual intercourse. Thus, in our considered view, neither offence of kidnapping nor the offence under Section 6 of the POCSO Act has been proved beyond any reasonable doubt. Therefore, the appellant/accused is entitled for acquittal.

15. In the result, the criminal appeal is allowed; the conviction and sentence imposed on the appellant/accused are set aside and he is acquitted from the charge under Section 366 of IPC and Section 6 of the POCSO Act also. Fine amount already paid, if any, shall be refunded to him. It is reported that the accused is in Central Prison serving sentence imposed on him by the trial court. The appellant/accused is, therefore, directed to be set at liberty forthwith unless and otherwise his detention is required in connection with any other case.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

kmk

To

- 1.The Sessions Judge,
Mahila [Fast Track] Court, Erode
- 2.The Inspector of Police,
Perungudi Circle, Perundurai,
Erode District.
- 3.The Public Prosecutor,
High Court, Chennai.
- 4.The Superintendent, Central Prison,
Coimbatore.
- 5.The Chief Judicial Magistrate,
Erode.
- 6.The Judicial Magistrate,
Perundurai.
- 7.The District Collector,
Erode District.

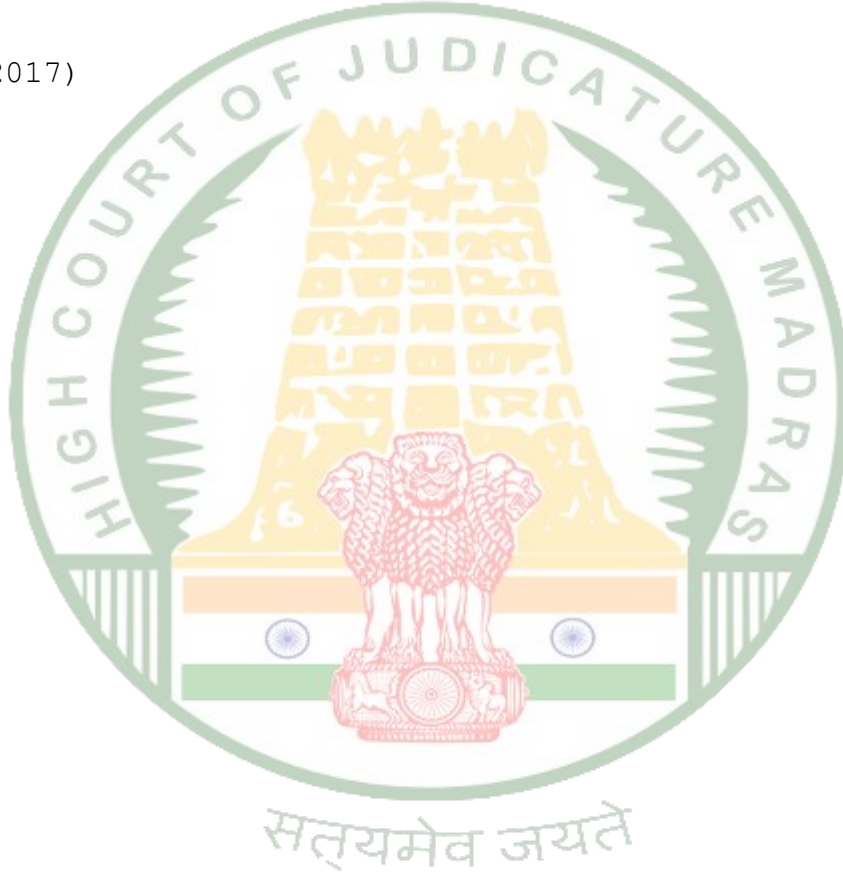
8.The Director General of Police,
Mylapore, Chennai.

9.The Section Officer,
Criminal Section, High Court,
Madras.

+1cc to Mr.S.Lakshmanasamy, Advocate Sr. 22737

Cr1.A.No.45 of 2017

SJ(CO)
VR(07/06/2017)



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