

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 17.04.2017

CORAM

THE HONOURABLE MR. JUSTICE S. NAGAMUTHU
AND
THE HONOURABLE MRS. Dr.JUSTICE ANITA SUMANTH

CRL.A.No.410 of 2016

S. Suresh

... Appellant

Vs

The State rep by its
The Inspector of Police,
Chennimalai Police Station,
Erode District
Crime No.211/2014

... Respondent

Appeal filed u/s.374 (2) Cr.P.C., against the Judgment of conviction and sentence passed by the learned Sessions Judge, Fast Track Mahila Court, (Mahila Fast Track), Erode, dated 29.10.2015 made in Spl.S.C.No.20 of 2015

For Appellant : Mr.T. Muruganantham

For Respondent : Mr.P. Govindarajan
Addl. Public Prosecutor

JUDGMENT

[Judgment of the court was delivered by S.NAGAMUTHU, J.]

The appellant is the sole accused in Special Sessions Case No.20/2015 on the file of Fast Track Mahila Court (Special Court under the Protection of Children from Sexual Offences Act,2012), Erode. He stood charged for the offence under Secs.366 IPC, Sec.9 of Prohibition of Child Marriage Act 2006 and under Sec.6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). By Judgment dated 29.10.2015, the trial Court convicted him under all the three charges and sentenced the appellant 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 Sec.366 IPC; to undergo rigorous imprisonment for two years for the offence under Sec.9 of the Prohibition of Child Marriage Act 2006 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 the offence under Sec.6 of The Protection of Children from Sexual Offences Act, 2012 (POCSO Act). Challenging the said conviction and sentence, the appellant has come up with this appeal.

2. This Criminal Appeal came up before the Division Bench of Hon'ble Mr. Justice A. Selvam and Hon'ble Mr. Justice P. Kalaiyarasan. Since the accused was not represented by any counsel, the Division Bench dismissed the criminal appeal, by Judgment dated 01.12.2016, for default. Thereafter, the appellant filed a petition in CrI.M.P.No.4607 of 2017, seeking restoration of the appeal. A question arose before this Court as to whether the dismissal of the criminal appeal summarily for default was correct and whether this Court could restore the appeal.

3. This Court, after having referred to the judgment of the Hon'ble Supreme Court in Bani Singh and Others Vs State of UP reported in 1996 (4) SCC 720 and Surya Baksh Singh Vs State of Uttar Pradesh reported in 2015 1 SCC (CrI) 313 and Vishnu Agarwal Vs State of UP reported in 2011 (3) MLJ (CrI) 63 (SC), by Order dated 12.04.2017, allowed the petition and restored the Criminal Appeal. That is how, the present Criminal Appeal is taken up for disposal.

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

(a) P.W.1 is the father of P.W.2. P.W.2's mother is one Mrs. Banumathi. They were residing at Porainayankadu village in Erode District. P.W.2 is the victim in this case. She was studying XII Standard in Government Higher Secondary School, Eengoor. There was a house, under construction, by the side of the house of P.W.1. The accused was working in the said building as a construction worker for sometime. At that time, the accused developed friendship with P.W.2. On few occasions, the accused had taken P.W.2 in the motorcycle to the school. On coming to know about the same, P.W.1 warned the accused not to do so. P.W.1 believed that the accused had stopped his love for P.W.2, but it did not happen.

(b) On 22.09.2014, as usual, around 8.00 a.m, P.W.2 was proceeding to her school. When she was waiting at the bus stop at Sennimalai, the accused came there. He lured P.W.2 stating that he would marry her. Deceived by such words, P.W.2 accompanied him. He took her to Salem Bus Stand, left the motorcycle at cycle stand at Salem Bus Stand, then took P.W.2 in the bus to Bangalore. In Bangalore they stayed at Ennore Cross in Nehru Nagar. He took a room and stayed with P.W.2. In

Bangalore the accused performed marriage with P.W.2. Thereafter, they started living together at Bangalore itself. During the said period, on several occasions, the accused had sexual intercourse with P.W.2. The accused was doing sundry work there for his livelihood. Since there was no sufficient income, the accused took P.W.2 to Natram Palli at Thayappan Circle and took a hut on rent belonging to Tirupati and stayed there. There also, the accused had repeated sexual intercourse, as a result, P.W.2 became pregnant. When she was three months pregnant, the police rescued her from the hut of Tirupati on 31.01.2015.

© P.W.1, as usual, was expecting P.W.2 to return home from school around 4.00 p.m on 22.09.2014. Since she did not return, P.W.1 went in search of her. She was told in the school that P.W.2 did not attend classes on that day. Since P.W.2 was not found anywhere, P.W.1 made complaint at Sennimalai Police station at 23.09.2014 at 3.30 p.m. A case was registered on the said complaint in Cr.No.211 of 2014 for the offence under Sec.366 (A) IPC. Ex.P.1 is the complaint and Ex.P.18 is the First Information Report.

(d) The case was taken up for investigation by P.W.17 Inspector of Police. P.W.17 went to the place of occurrence and prepared an Observation Mahazar and a Rough Sketch on the same day at 3.30 p.m. Then, he examined many witnesses. On 31.01.2015, around 7.15 a.m, on reliable information, she went to the hut, belonging to Tirupati at Natrampalli and rescued P.W.2 from the custody of the accused. He arrested the accused also. While in custody, the accused made voluntary confession, in which, he disclosed the place where he had kept the motorcycle. In pursuance of the same, he took the police and produced the motorcycle. P.W.17 recovered the same. Then, the accused and P.W.2 were sent for medical examination. The medical examination revealed that P.W.2 was pregnant and the accused was fully sexually grown up and he was potential to have sexual intercourse with a woman. On completing the investigation, P.W.17 laid charge sheet against the accused.

5. Based on the above materials, the trial Court framed charges as detailed in the first paragraph of the Judgment. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 17 witnesses were examined and 24 documents and 2 material objects were also marked.

6. Out of the said witnesses, P.W.1, the father of P.W.2 has stated that P.W.2 went to School at 8.00 a.m on 22.09.2014, but did not return by evening. He further stated about the complaint made on 23.09.2014 at 3.00 p.m. He also stated that P.W.2 was rescued on 30.01.2015.

7. P.W.2 is the victim and she has stated about the entire occurrence; P.W.3 is the one who was running a cycle stand at Salem New Bus stand. According to him on 22.09.2014, the motorcycle was kept there in the name of the accused, which was later on recovered by the police; P.W.4 is the Forensic Lab Assistant. He has stated that he examined the vaginal fluid of P.W.2. According to him, spermatozoa was not detected on any of the material objects; P.W.5 was the Building Contractor (nk!;jphp) in the house, which was under construction, on the side of the house of P.W.1. He has stated that the accused was working there for sometime; P.W.6 Dr.Srinivasan, attached to Erode Government hospital has stated that he examined P.W.2 to find out her age. He forwarded P.W.2 for examination; P.W.7 Dr. Kavitha has stated that he examined P.W.2 on 13.04.2015 and found that she was not pregnant; P.W.8 Dr.Anand has stated that he examined P.W.2 and forwarded her vaginal fluid for chemical examination. He examined the accused and gave opinion that he was sexually potential; P.W.9 Dr.Thenmozhi, Government Hospital, Erode has stated that she examined P.W.2, estimated her age by taking out x-rays and opined that she had completed 16 years of age; P.W.10 has spoken about the preparation of observation mahazar and rough sketch; P.W.11 has spoken about the recovery of motorcycle from the cycle stand; P.W.12 - Sub Inspector of Police has spoken about the rescue of P.W.2 by the Inspector of Police; P.W.13 has spoken about the registration of the case made by P.W.1; P.W.14 turned hostile and he has not supported the prosecution case in any manner; P.W.15 Tirupati has stated about the rescue of P.W.2; P.W.16 Dr.Vanitha Sri has stated that on 27.01.2016 she examined P.W.2 and found her pregnant and the pregnancy was 9 to 10 weeks. P.W.17 Inspector of Police has spoken about the investigation done and final report filed.

8. When the above incriminating materials were put to the accused u/s.313 Cr.P.C., he denied the same as false. His defence was a total denial. However, he did not choose to examine any witness nor to mark any document.

9. When this appeal was heard by us, the learned counsel for the appellant disputed the date of birth of P.W.2. Therefore, in exercise of the power under Sec.164 of the Code of Criminal Procedure, we passed order, recalling P.W.17.

10. The case diary contained the birth certificate issued by Karumandichellipalayam Town Panchayat, Erode District, showing the date of birth of P.W.2. The said statement was marked as Ex.C.3. According to such certificate, the date of birth of P.W.2 is 12.04.1999.

11. Similarly, we examined one Mrs.R. Vanaja, Head Mistress of Komarappa Sengunthar Girls High School, Chennaimalai, Erode District, where P.W.2 was studying from the month of June 2014 onwards. She was examined as C.W.1. According to her, as per school

records, P.W.2's date of birth was 08.05.1998. Thereafter, the accused was questioned under Sec.313 of Criminal Procedure Code on 26.07.2016 in respect of additional evidence under Sec.391 of Criminal Procedure Code. He denied the same.

12. Therefore, we heard the learned counsel for the appellant, learned Additional Public Prosecutor for State and we have perused the records carefully.

13. There is no controversy over the fact that P.W.2 was studying XII Standard in Komarappa Sengunthar Girls High School, Chennaimalai, Erode District. According to C.W.1 Head Mistress, the date of birth of P.W.2 is 08.05.1998. Ex.C.1 is the entry in the Admission Register. But according to the Birth Certificate, P.W.2's date of birth is 12.04.1999. Of course, there is a variation between the date of birth, mentioned in the School Certificate and in the Birth Certificate. It is immaterial, since going by the date of birth as mentioned either in the School Certificate or in the Birth Certificate, as on 22.09.2014, P.W.2 was less than 18 years and thus she was a child in terms of The Protection of Children from Sexual Offences Act, 2012. The doctor, who examined P.W.2 opined that P.W.2 has completed 16 years of age and not 18 years.

14. From these evidences, we are of the considered view that the prosecution has clearly established that as on the date of occurrence, P.W.2 was a child in terms of The Protection of Children from Sexual Offences Act, 2012.

15. According to P.W.1, on 22.09.2014 around 8.00 a.m P.W.2 had allegedly gone to the school, but she did not return at 4.00 p.m, in the usual course. In the evening when she went to the school and enquired, she was told that P.W.2 did not attend the class. P.W.2 has stated that when she was standing at the bus stop at Sennimalai around 8.00 a.m., on 22.09.2014, the accused came there, took her in a motorcycle, left the motorcycle in Salem Bus Stand, took her to Bangalore, married her, had sexual intercourse with her on several occasions. Then took her to Natram Palli at Thayappan Circle and took a hut belonging to Tirupati on rent and stayed there and had sexual intercourse on several occasions, which resulted in her pregnancy. P.W.16 Dr.Vanitha Sri examined P.W.2 on 31.01.2015 as soon as she was rescued from the accused. During the medical examination, she

found that P.W.2 was 10 (ten) weeks pregnant.

16. We find no reason to reject the evidence of P.W.2. P.W.2's evidence is duly corroborated by the evidence of P.W.1 as well as medical evidence. Subsequently, P.W.2 has suffered abortion. She was then taken to hospital on 13.04.2015. At that time, it was found that there was no pregnancy. This would go to prove that she had suffered abortion. At any rate, from the medical evidence, it is clearly established that P.W.2 was pregnant because of the sexual intercourse the accused had with her on several occasions.

17. From these evidences, in our considered view, the prosecution has clearly established that it was the accused, who took P.W.1 to Bangalore, married her, had sexual intercourse with her at Bangalore and then to Natram Palli at Thayappan Circle and had repeated sexual intercourse, which resulted her in pregnancy. The above said act of the accused would squarely amount to the offence under Sec.366 IPC; Sec.9 of the Prohibition of Child Marriage Act 2006 and under Sec.6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). We find no material at all on record to doubt the evidence of P.W.2. The presumption under Sec.29 of the the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) also acts against the accused. Of course, the said presumption is rebuttable, but the accused has not rebutted the presumption either by direct evidence or by circumstantial evidence. Thus, the rebuttable presumption also goes to prove the guilt of the accused.

18. Having come to the conclusion that the accused is guilty of the offences mentioned above, now we have to examine as to what would be the appropriate punishment for the aforesaid proved offences?

19. At the time of occurrence, the accused was 23 years of age. He had no bad antecedents. It appears he had love with P.W.2 and because of love, he took P.W.2, married her and had sexual intercourse with her, which made her pregnant. Subsequent to the occurrence also, the accused has got no criminal record. There are lot of chances of reformation.

20. Having regard to all these aggravating and mitigating circumstances, we are of the considered view that it would be appropriate to sentence the accused to undergo rigorous imprisonment for two years and to pay a fine of Rs.500/-, in default, to undergo rigorous imprisonment for two weeks for the offence under Sec.366 IPC; to undergo rigorous imprisonment for one year and to pay a fine of Rs.500/-, in default, to undergo

rigorous imprisonment for two weeks for the offence under Sec.9 of the Prohibition of Child Marriage Act 2006 and to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,000/-, in default to undergo rigorous imprisonment for four weeks for the offence under Sec. under Sec.6 of the Protection of Children from Sexual Offences Act, 2012.

21. In the result,

(i) The appeal is partly allowed and the conviction of the accused for the offence under Sec.366 IPC, Sec.9 of the Prohibition of Child Marriage Act 2006 and Sec.6 of the Protection of Children from Sexual Offences Act, 2012 are confirmed, however, the sentences are modified and the appellant is sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.500/-, in default, to undergo rigorous imprisonment for two weeks for the offence under Sec.366 IPC; to undergo rigorous imprisonment for one year and to pay a fine of Rs.500/-, in default to undergo rigorous imprisonment for two weeks for the offence under Sec. 9 of the Prohibition of Child Marriage Act 2006 and to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,000/-, in default to undergo rigorous imprisonment for four weeks for the offence under Sec.6 of the Protection of Children from Sexual Offences Act, 2012.

(ii) The above sentences are ordered to run concurrently.

(iii) the period of sentence already undergone by the accused shall be set off under Section 428 Cr.P.C.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sr

To

1. The Judicial Magistrate No.II,
Erode.
 2. -do- Thro the Chief Judicial Magistrate,
Erode.
 3. The Sessions Judge,
Mahila Court, (Mahila Fast Track)
Erode.
 4. The Inspector of Police,
Chennimalai Police Station,
Erode District
 5. The Superintendent,
Central Prison,
Coimbatore.
 6. The District Collector,
Erode.
 7. The Director General of Police,
Mylapore, Chennai.
 8. The Public Prosecutor,
High Court, Chennai.
- +1cc to Mr.T.Muruganantham, Advocate, S.R.No.23135

KJI (CO)
RS(16/05/2017)

Cr1.A.No.410/2016

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