

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 27.07.2019

CORAM
THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.A.No.231 of 2016 and
Crl.M.P.Nos.521 & 13973 of 2017

Azhagudurai

... Appellant/Accused

Vs.

STATE BY:

Inspector of Police,
All Women Police Station,
Ariyalur,
(Crime No.5 of 2015).

... Respondent/Complainant

PRAYER: Criminal Appeal is filed under Section 374 (2) of the Code of Criminal Procedure, to set aside the Judgment dated 16.03.2016 and made in Spl.S.C.No.1 of 2016 on the file of the Fast Track Mahila Judge, Ariyalur and acquit the appellant.

For Appellant : Mr.A.Ilangovan
Legal Aid Counsel

For Respondent : M/s.T.P.Savitha
Government Advocate [Crl. Side]

JUDGMENT

This Criminal Appeal arises out of the conviction and sentence imposed by the learned Fast Track Mahila Judge, Ariyalur, in S.C.No.1 of 2016 dated 16.03.2016, wherein the appellant was acquitted under Section 450 of IPC and found guilty for the offence under Section 6 of POCSO Act, 2012 and sentenced to undergo rigorous imprisonment for a period ten years and ordered to pay a fine of Rs.50,000/-, in default two years simple imprisonment.

2.The case of the prosecution is that PW12/defacto complainant, the wife of the appellant lodged a complaint [Ex.P13] dated 17.04.2015 on the premise that her husband on 18.01.2015 married PW1, the minor girl aged about 16 years by deserting her and his son Praveen Kumar aged about 14 years. The family members of the appellant had supported the child marriage. On registration of the F.I.R against the appellant and his family members in Crime No.5 of 2015 for the offence under Sections 9 & 10 of Prohibition of Child Marriage Act 2006,

investigation was carried out by PW13. After concluding the investigation, recorded the statements under Section 164 of Cr.P.C of PW1 and PW2 and subjected to Medical Examination and collected School Certificates of PW1 from PW7 and further as per the Ex.P1 disclosed that baby Varunesh was born to appellant and PW1. On 27.10.2015, the respondent Police filed a charge sheet against the appellant for the offence under Sections 450 of IPC r/w 5 J (ii), (I) r/w 6 of POCSO Act, 2012 and dropped the case against other accused.

3.Before trial Court, prosecution examined 13 witnesses and marked 16 exhibits. None were examined on the side of defence and no exhibits were marked. Ex.C1 has been marked as Court Side Exhibit.

3.1.PW1 the victim girl, through her the birth certificate of Varunesh [Ex.P1] has been marked. PW1 stated that she was studying 8th std in Athur Panchayat School and she was in love with appellant, despite knowing the fact that he was a married man and having a son. PW1 stated that the appellant had filed a Divorce Petition seeking divorce from his wife PW12 and deposed that she voluntarily had physical relationship with the appellant.

3.2.PW2 the mother of PW1 deposed about her family members and reiterated that it was PW1, who had relationship with the appellant and a baby Varunesh was born to them. PW1 was adamant that she wanted to live with the appellant. Both PW1 and PW2 were treated hostile.

3.3.PW3 the Dentist had examined PW1 and opined that the age of PW1 was between the range of 14 to 17 years.

3.4.PW7 the Headmaster of the Panchayat School, through whom the School Certificate and Record Sheet of the victim were marked as Ex.P11 and Ex.P12 respectively. As per Ex.P11, the date of birth of the victim was 20.03.1998.

3.5.PW4 the Doctor had examined the appellant and gave a potency certificate [Ex.P5]. PW4 stated that the victim has been examined and the report [Ex.P6] has been issued by Dr.Priya Saran. Since she was on medical leave, Ex.P6 was marked through him as he know the signature of Dr.Priya Saran.

3.6.PW5 and PW10 are the neighbours of PW1 and PW2, who turned hostile.

3.7.PW8 the villager in whose presence Rough Sketch [Ex.P7] and Observation Mahazar [Ex.P8] were prepared, who had also not supported the case of the prosecution.

3.8.PW6 the Village Assistant, in whose presence Ex.P7 to Ex.P10 have been prepared.

3.9.PW9 the Head Constable had escorted the accused to hospital for medical examination.

3.10.PW11 the Head Constable accompanied the victim to hospital for medical examination.

3.11.PW12 who being the estranged wife of the appellant has stated about her complaint [Ex.P13] against the appellant and his family members for child marriage.

3.12.PW13 the Investigating Officer, who on receipt of the complaint [Ex.P13] from PW12 registered an F.I.R in Crime No.5 of 2015, visited the scene of occurrence, prepared Observation Mahazars [Exs.P7 & 9] and Rough Sketches [Exs.P8 & 10], examining the witnesses present in the scene of occurrence, collected medical certificates by subjecting PW1 and the appellant for medical examination. On coming to know that no marriage had taken place between PW1 and the appellant, PW13 altered the Sections 9, 10 & 8 of the Prohibition of Child Marriage Act into Section 5 J (ii), (I) r/w 6 of POCSO Act, 2012. After completion of the investigation the names of the other accused found in the F.I.R were deleted through deletion report [Ex.P16] dated 05.02.2016 and PW13 filed a final report against the appellant.

4.Heard learned counsel for appellant and learned Government Advocate [Crl. Side] for the State. Perused the materials on record.

5.The learned counsel for the appellant would submit that as per the evidence of PW1, she attained majority and her age was around twenty years and above and was mad in love with the appellant. PW1 had voluntarily forced the appellant for physical relationship and she admits about the birth of minor child Varunesh under Ex.P1. Even during recording the statement of PW1 under Section 164 of Cr.P.C., she reiterated the same. Hence, PW1 had never made any accusations about forcible penetrative sex by the appellant.

6.PW2 corroborated the evidence of PW1. PW2 categorically stated that since PW1 was suffering from seizures and due to her poor health she was belatedly admitted in school in 1st std during the year 2003 at the age of eight instead of five. PW2 also informed the same to the School Authorities, she is a uneducated person and a rustic villager. Though she had informed about the date of birth and year, the school authorities had entered the age of PW1 in the school certificate on their own, which she was not aware.

7.PW11, the Headmaster through whom the School Certificate [Ex.P11] and the Record Sheet [Ex.P12] have been marked admitted that he was not working as Headmaster, when PW1 was admitted in the school and there is no Birth Certificate in the school records and he cannot express any opinion about PW1 joining the school of over age.

8.PW3 the Dentist had given certificate [Ex.P3], in which it is found that PW1's age should be between 14 and 17 years, which is suggestive in nature and it cannot be acted upon.

9.The independent villagers PW5, PW8, PW10 have not supported the case of the prosecution, since the investigating officer had recorded their statements which is contrary to the truth.

10.PW4 is the Doctor who had examined the appellant and given a potency certificate [Ex.P5]. PW4 stated that the victim has been examined and the report [Ex.P6] has been issued by Dr.Priya Saran, since she was on medical leave. PW4 is familiar with the signature of Dr.Priya Saran Ex.P6 was marked, other than the signature with regard to the contents of the medical report. This witness cannot speak about the same.

11.The learned counsel for the appellant would further submit that PW6 the Village Assistant is an "Obliging Witness" to the prosecution. PW12 the wife of the appellant had given a false complaint against the appellant and his family members as though the child marriage has taken place. She is a motivated witness having animosity against the appellant, due to matrimonial discord between them. PW12 admits that she had been living separately and divorce proceedings is pending between them.

12.PW13 the Investigating Officer without proper analysis of the collected evidence and on wrong premise had come to the conclusion. The documents namely Ex.P3, Ex.P11 and Ex.P12 which could not be acted upon which are contra to the statements of PW1 and PW2.

13.He would further submit that PW1 and her son are living with the family members of the appellant and they are taking care of them. In order to substantiate, the learned counsel filed an affidavit to that effect before this Court.

14.The trial Court had placed heavy reliance on the petition [Ex.C1] filed by PW2 before the Court below to secure her daughter/PW2. The petition is dated 10.08.2015. The trial Court failed to look into the fact that as on that day PW2 was an accused in the above case and her name was deleted from the above case only on 05.02.2016 by deletion/alteration report

Ex.P16. Thus Ex.P16 was with a clog, the trial court had wrongly convicted the appellant. Submitted as above, the learned counsel prayed for acquittal of the appellant.

15.Per Contra, the learned Government Advocate [Cr1. Side] appearing on behalf of the respondent would submit that during relevant time the prosecution has clearly established the victim/PW1 was a minor girl aged below 18 years, which is confirmed by PW7 through the School Certificate [Ex.P11] and the Record Sheet [Ex.P12]. Further PW3/Dentist, medical evidence established PW1 was a minor girl. Though initially PW1 and PW2 gave statements against the appellant, later became complacent to the appellant. Hence, they were treated as hostile.

16.In order to escape the appellant from punishment, PW1 and PW2 did not support the case of the prosecution. When PW2 confronted with Ex.C1, she admits seeking custody of her minor daughter. PW2 became pregnant, due to sexual assault committed by the appellant and gave birth to a child on 27.10.2005 as could be seen from Ex.P1, in which the parents name is notes as PW1 and the appellant.

17.The prosecution had categorically proved the case beyond any reasonable doubt by both oral and documentary evidences and more particularly the evidence of PW7, the School Headmaster, PW3, the Dentist and PW4, the Doctor. The villagers failed to support the prosecution case that would not affect the case. On appreciating the evidence let-in by the prosecution, the trial Court had rightly convicted the appellant. Hence, prayed to dismiss the appeal confirming the conviction.

18.This Court Considered the rival submissions made by the learned Counsel on either side and perused the materials available on record.

19.It is seen that PW1 and PW2 in certain terms had affirmed that PW1 is a major and her date of birth shown in Ex.P11 and Ex.P12 as 20.03.1998 has been recorded by the School Authorities. PW7 the School Headmaster admits that the birth certificate of PW1 was not available in School and the date of birth of the students used to be recorded on parents mentioning date. As far as Ex.P11 [School Certificate] is concerned, PW7 was not working there, when it was recorded. PW7 affirms that over age students were admitted and their date of birth is recorded as per the parents requirement. Since it is a village school no strict rules have been followed with regard to proof of age.

20.PW2 had given an explanation on PW1 admitting in over age in the school in first std since PW2 was suffering from seizures. Due to her health condition, PW1 was admitted

belatedly to the school. Further PW2 is an uneducated and rustic villager, hence her ignorance about the age mentioned in the School Certificate [Ex.P11] is an acceptable one. PW1 had affirmed the same in her evidence. It is pertinent to note that the learned Judicial Magistrate, Jayankondam, who recorded 164 Cr.P.C statement of PW1 and PW2 has not been examined. PW3 Dentist had given certificate [Ex.P3], in which it is found that PW1's age should range between 14 and 17 years, which is suggestive in nature and it cannot be acted upon.

21.The lower Court had placed heavy reliance on Ex.C1, by putting Court questions. On perusal of Ex.C1 it is seen that it is a petition given by PW2 seeking custody of her daughter/PW1, who was taken in custody by the respondent Police, in which it is stated that PW1 is a minor. This fact has been taken to be a proved one along with Ex.P3, Ex.P11 and Ex.P12 by the lower Court placing reliance on Section 165 of the Indian Evidence Act, 1872 and convicted the accused.

22.The lower Court placing on reliance Section 165 of the Indian Evidence Act, 1872 is not proper in this case, the learned Judge in order to discover or to obtain proper proof of relevant facts, could have asked any question he pleases, in any form, at any time, of any witness is subjected to Proviso (1) of Section 165 of the Act. The finding of the Judgment must be based upon the facts disclosed under the said Act to be relevant and duly proved. It is to be seen that in this case Ex.P11 and Ex.P12 cannot be taken to be proved, for the reason that PW7 through whom Ex.P11 and Ex.P12 is marked was not serving at the relevant time, coupled with the fact that PW1 was suffering from seizures. PW2 her mother admitted PW2 in the school at later age. PW7 admits that there was no birth certificate available in school records. Since it is a village school they do not insist upon birth certificate. PW2 is an uneducated rustic villager, hence she is not aware of the date of birth of PW1. So the date of birth of the students was filled up by the school authorities. In view of the above, it cannot be said that Ex.P11 is a proved one.

23.Further Ex.P3 the Dentist Report is only a suggestive one, the lower Court on a wrong premise had come to the conclusion that the prosecution had established the age of the victim as 16 years and the burden shifts on the accused. Invoking presumption is wrong and not proper, it is for the prosecution to prove the case against the accused. Further, it is to be seen that Ex.C1 dated 10.08.2015 on which day PW2 was an accused in the above case. PW2 name was deleted through Ex.P16 on 05.02.2016. In view of the same Ex.C1 cannot be taken as proved document.

24. In view of the infirmity in Ex.P11, Ex.P12 and Ex.P3 and the evidence of PW1 and PW2, it cannot be safe to place reliance on these documents and convict the appellant, as a necessary corollary, suspicion, however, strong or probable, may not take the place of legal proof and when graver the charge, greater should be the standard of proof. The distance between may be true and must be true is too long.

25. The Criminal Appeal shall stand allowed. The conviction and sentence passed by learned Fast Track Mahila Judge, Ariyalur in S.C.No.1 of 2016 on 16.03.2016, is set aside and appellant is acquitted of all charges. Appellant is directed to be released forthwith unless his presence/custody is required in connection with any other case. Fine amount, if any, paid shall be refunded. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (Insp.Cell)

//True Copy//

Sub Assistant Registrar

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To

1. The Fast Track Mahila Court,
Ariyalur.

2. The Inspector of Police,
All Women Police Station,
Ariyalur.

3. The Public Prosecutor,
High Court, Madras.

4. The Superintendent,
Central Prison,
Trichy.

5. The Section Officer,
Criminal Section,
Madras High Court,
Chennai - 104.

+1cc to Mr.A.Ilangovan, Advocate, S.R.No.64427

+1cc to K.Gandhikumar, Advocate, S.R.No.64397

Cr1.A.No.231 of 2016

SJ(CO)

RRS (27/08/2019)