

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.06.2019

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

Crl.A.No.635 of 2018

Vijayakumar,
S/o.Kumaravel,
4/119, Devendrar Street,
R.Goundampalayam,
Rasipuram Taluk,
Namakkal District. ... Appellant/Sole Accused

Vs.

State represented by
Inspector of Police,
Rasipuram Police Station,
Namakkal District. ... Respondent/Complainant

Criminal Appeal filed under Section 374 Cr.P.C., to set aside the judgment and sentence and conviction imposed upon the Appellant herein by the learned Sessions Court (Fast Track Mahila Court), Namakkal District in SPL.C.C.No.15 of 2016, dated 29.06.2018 and acquit the appellant herein.

For Appellant : Mr.R.Karthikeyan

For Respondent : Mr.G.Ramar,
Government Advocate (Crl.Side)

सत्यमेव जयते

J U D G M E N T

This criminal appeal has been preferred seeking to set aside the judgment and order dated 29.06.2018 passed in Spl.C.C.No.15 of 2016 on the file of the learned Sessions Court (Fast Track Mahila Court), Namakkal District.

2 Minus the minute details, the facts germane which are just necessary for deciding this appeal are succinctly stated as under:

2.1 It is the case of the prosecution that the appellant

was in love with the victim girl X (PW2), aged about 17 years and eloped with her on 23.04.2016.

2.2 On the complaint (Ex-P1), lodged by Madhu (PW1), father of X (PW2), the respondent police registered a case in Crime No.205 of 2016 on 25.04.2016, under Section 366-A IPC, against the appellant and prepared the printed FIR (Ex-P10).

2.3 The investigation of the case was taken over by Rajaranaveeran (PW19), Inspector of Police, who secured X (PW2) and the appellant at 7 p.m. On 25.04.2016. X (PW2) and the appellant were subjected to medical examination. X (PW2) was medically examined by Dr.Sathya (PW13), who, in her evidence as well in the Report on medical examination of a female victim of sexual offence (Ex-P5), has opined as follows:

"Might have sexual intercourse since hymen not intact and vagina admits one finger loose. No injuries seen at the time of examination in the external genitalia."

The appellant was medically examined by Dr.Kannan (PW14), who, in his evidence as well in the medical report (Ex-P6), has stated as follows:

"There is nothing to suggest that the above mentioned person is incapable of performing sexual act. There is no evidence to state that the person is impotent."

2.4 The statements under Section 164 (3) Cr.P.C. Of X (PW2) was recorded on 09.05.2016 by the learned District Munsif-cum-Judicial Magistrate, Paramathi and the same has been marked as Ex-P14.

2.5 After the examining of various witnesses and collecting the reports, the police filed final report before the Sessions (Fast Track Mahila) Court, Namakkal and the same was taken on file as Spl.C.C.No.15 of 2016, for trial.

2.6 On the appearance of the appellant, the documents relied upon by the prosecution were furnished to him under Section 207 Cr.P.C.

2.7 The Trial Court framed charges under Section 366-A IPC and Section 9 of the Prevention of Child Marriage Act (for brevity "the PCM Act") and Section 5 (1) r/w 6 of the Protection of Children from Sexual Offences Act, 2012 (for brevity "the POCSO Act") against the appellant. When questioned, the appellant pleaded "not guilty".

2.8 To prove its case, the prosecution examined nineteen witnesses and marked sixteen exhibits and one material object.

2.9 When the appellant was questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against him, he denied the same. On behalf of the appellant, no witness was examined nor any document marked.

2.10 After considering the evidence on record and hearing either side, the Trial Court, by judgment and order dated 29.06.2018 in Spl.C.C.No.15 of 2016, has convicted and sentenced the appellant as under:

Provision under which convicted	Sentence
363 IPC	Five years rigorous imprisonment and fine of Rs.2,000/-, in default to undergo two months rigorous imprisonment
9 of the PCM Act	Two years rigorous imprisonment and fine of Rs.1,000/-, in default to undergo one month rigorous imprisonment.
5(1) r/w 6 of the POCSO Act	Ten years rigorous imprisonment and fine of Rs.3,000/-, in default to undergo three months rigorous imprisonment.

The aforesaid sentences were ordered to run concurrently.

2.11 Challenging the conviction and sentence, the appellant is before this Court.

3. Heard Mr.R.Karthikeyan, learned counsel appearing for the appellant and Mrs.P.Kritika Kamal, learned Government Advocate (Crl. Side) appearing for the respondent/State.

4. In order to establish that X (PW2) was below the age of eighteen, the prosecution examined Babu (PW12), Headmaster of the school, where X (PW2) studied and marked the extract of her educational certificate (Ex-P4). Babu (PW12), in his evidence as well in the educational certificate (Ex-P4), has stated that the date of birth of X (PW2) is 19.01.1999.

5. Mr.R.Karthikeyan, learned counsel for the appellant

placed reliance upon the judgment of this Court in Suramani and others Vs. State of Tamil Nadu [2011 (3) MWN (Cr.) 27], wherein, this Court has held that the extract of school record is a secondary evidence and the same can be admitted only in the absence of primary evidence. Therefore, he contended that the prosecution has failed to prove the correct age of X (PW2).

6. In this case, even if we exclude Ex-P4 by placing reliance on Suramani (supra), X (PW2) in her evidence, has clearly stated that she was born on 19.01.1999 and this has not been challenged or controverted by the appellant in the cross-examination. X (PW2) was studying XI standard at the relevant point of time. Madhu (PW1), father of X (PW2) has stated that she was seventeen years old at the time of the incident. Therefore, in the light of the aforesaid evidences on record, it cannot be stated that the prosecution had failed to prove the age of X (PW2).

7. Now, coming to the allegations against the appellant, it must be necessary to allude to the evidence of X (PW2) herself. In her evidence, she has stated that her date of birth is 19.01.1999; she was brought up by her grandmother Thamarai (PW3), since she was studying in Rasipuram Higher Secondary School, which was away from her parental home; the appellant was residing near her grandmother Thamarai's (PW3) house; whenever she was alone, the appellant would come to the house and propose to her by saying that he was in love with her and he would marry her and keep her happy; on 23.04.2016, she told her grandmother Thamarai (PW3) that she is going to her parents' house; while she was standing in the bus stand, the appellant saw her and proposed to her; the appellant took her by bus to Easwaran temple in Aathur and tied a Yellow string around her neck; thereafter, he took her to his grandmother's house in Ramanaickenpalayam, where, they both spent the night together and had sex; on the next day, she went with the appellant to his uncle's house, where, she learnt that the police were looking out for her and so, she returned to the appellant's house in Rasipuram, where they were caught by the police. X (PW2) has further stated that her statement was recorded by the Magistrate and she was subjected to medical examination. The yellow string that was tied by the appellant around her neck was marked as M.O.1.

8. In the cross-examination, X (PW2) has denied the suggestion that she was tutored by her parents to give false evidence against the appellant. The defence was not able to make any serious dent in the evidence of X (PW2).

9. The evidence of X (PW2) stands corroborated by the evidence of Madhu (PW1), father of X (PW2) and Thamarai (PW3), grandmother of X (PW2), who have stated that X (PW2) was staying in her grandmother's house and was studying XI standard; on 23.04.2016, X (PW2) told her grandmother Thamarai (PW3) that she is going to her parents' house, but, did not go there, instead, she went missing; on coming to know of it, a police complaint was lodged; two days later, she was secured. Thus, from the evidence of the aforesaid witnesses, it has been established beyond doubt that X (PW2) was less than eighteen years and she was enticed by the appellant on the promise of marrying her and was taken to his grandmother's house, where he had conjugal relationship with her.

10. That apart, the prosecution has also proved that the appellant took X (PW2) to the nearby temple and tied a yellow string (M.O.1) as 'thaali', signifying that he has married her. The appellant has been convicted for the offence under Section 5 (1) r/w 6 of the POCSO Act and was sentenced to undergo ten years rigorous imprisonment and fine of Rs.3,000/-, in default to undergo three months rigorous imprisonment, as stated in paragraph 2.10, supra.

11. The learned counsel for the appellant submitted that there is absolutely no material to show that X (PW2) was kidnapped by the accused and he had subjected her to aggravated penetrative sexual assault more than once or repeatedly, as laid down in Section 5(1) of the POCSO Act. There appears to be sufficient force in the submission of the learned counsel for the appellant, inasmuch as the evidence of X (PW2) shows that she was also in love with the appellant and in order to go with him, she lied to her grandmother Thamarai (PW3) that she was going to her parents' house. In her evidence X (PW2) has stated that the appellant had taken her to his grandmother's house and in the night, he had sex with her and thereafter, they returned to Rasipuram and were caught by the police. There is no material to show that the appellant had sex with X (PW2) more than once. The evidence on record discloses the commission of an offence under Section 3 of the POCSO Act punishable under Section 4, ibid.

In the result, this criminal appeal is partly allowed. The conviction and sentence imposed on the appellant for the offences under Section 363 IPC and Section 5 (1) r/w Section 6 of the POCSO Act, are set aside and the appellant is convicted under Section 3 r/w Section 4 of the POCSO to undergo seven years rigorous imprisonment, instead of ten years rigorous imprisonment that was imposed by the Trial Court. The conviction

and sentence for the offence under Section 9 of the PCM Act stand confirmed.

Sd/-
Assistant Registrar(Insp.Cell)

//True Copy//

Sub Assistant Registrar

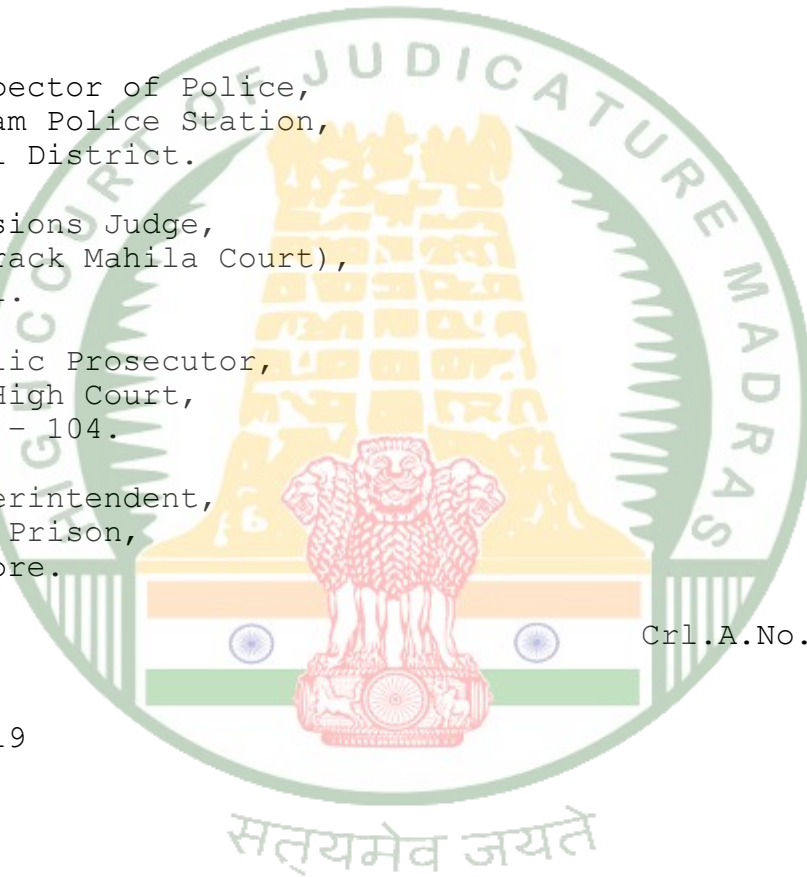
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To

1. The Inspector of Police,
Rasipuram Police Station,
Namakkal District.
2. The Sessions Judge,
(Fast Track Mahila Court),
Namakkal.
3. The Public Prosecutor,
Madras High Court,
Chennai - 104.
4. The Superintendent,
Central Prison,
Coimbatore.

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VBA (CO)
CS/30/07/2019



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