

**Bail slip**

Appellant/Accused namely Prabhu @ Mohamed Bilal aged about 35 years, S/o. Manickam was directed to be released a bail as per order of this Court dated 17.01.2018 and made in CRL MP(MD)No. 10747 of 2017 in CRL A(MD)No.474 of 2017 on the file of this Court.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN**AND****THE HONOURABLE MR.JUSTICE B.PUGALENDHI****Cr1.A(MD)No.474 of 2017**

Prabhu @ Mohmed Bilal

... Appellant / Sole Accused

Vs.

State represented by
The Inspector of Police,
Ammapettai Police Station,
Thanjavur District.
[Crime No.70 of 2014]

... Respondent / Complainant

PRAYER: Appeal is filed under Section 374(2) of the Code of Criminal Procedure, to set aside the judgment dated 31.05.2017 passed in Special S.C.No.15 of 2014 on the file of the learned Mahila Court (Fast Mahila Court Thanjavur / Sessions Judge, Mahila Court), Thanjavur and acquit the appellant/ sole accused of the charge.

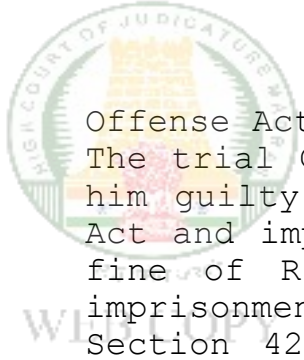
For Appellant : Mr.E.Somasundaram

For Respondent : Mr.S.Chandrasekar,
Additional Public Prosecutor

JUDGMENT

[Judgment of the Court was delivered by **M. SATHYANARAYANAN, J.**]

The sole accused in S.C.No.15 of 2014 on the file of the learned Sessions Judge, Mahila Court, Thanjavur is the appellant herein. The appellant / accused was prosecuted for the commission of offence under Section 6 of Protection of Children from Sexual



Offense Act, 2012 (in short 'POCSO Act') and Sections 450 & 417 IPC. The trial Court, vide impugned judgment dated 31.05.2017, has found him guilty for the commission of offence under Section 6 of POCSO Act and imposed him sentence of imprisonment for life and to pay a fine of Rs.1,000/-, with default sentence of one year rigorous imprisonment. The trial Court has also set off the sentence under Section 428 CrPC. The trial Court had acquitted the appellant / accused for the commission of offence under Sections 450 & 417 IPC and challenging the legality of the acquittal, the State did not prefer any appeal.

2.The relevant facts necessary, in brief, for the purpose of disposal of this appeal, are as follows:

2.1.PW1 is the mother of the victim girl / PW2, who was aged about 16 years at the relevant point of time. She lodged a complaint under Ex.P1 on the file of the Ammapet Police Station, stating among other things that she is a widow and is having three daughters and the victim girl / PW2 is her third daughter and she has studied upto ninth standard and did not pursue her academic career and she was aged about 16 years. It is further stated in Ex.P1 that the appellant / accused in the capacity of the relative, used to come to the house of her neighbour, namely, Vasantha and during such time, he and her daughter / victim girl used to converse with each other and her daughter PW2 was employed in a Bakery and after completing her duty, used to return home at 09.30 pm. On 16.02.2014, she did not return home and PW1 contacted the Bakery, in which, her daughter / PW2 was employed and she was informed that even at about 08.30 pm on that day, PW2 left the place of work and her whereabouts were searched for four days. On 20.02.2014, PW1 was summoned by Ammapet Police Station, stating among other things that her daughter / PW2 has been physically abused and when she went there, the Doctor, who examined her daughter / PW2, stated that she is in a family way and when she questioned her daughter / PW2, she told that the appellant / accused enticed her and had physical relationship for the past three months and on account of the same, she became pregnant.

2.2.PW14/Special Sub Inspector of Police attached to Ammapet Police Station, upon receipt of the complaint / Ex.P1 given by PW1, has registered a case in Crime No.70 of 2014 at about 20.00 hours on 21.02.2014, under the provisions of POCSO Act. The printed First Information Report was marked as Ex.P8.

2.3.PW14 forwarded the original complaint / Ex.P1 and the First Information Report / Ex.P8 to the jurisdictional Magistrate and forwarded the copies of the same to the Inspector of Police.

2.4.The Inspector of Police/ PW.16, attached to Ammapet Police Station, as per the instructions of the Deputy Superintendent of Police, Papanasam, took up the investigation and went to Madhakovil street at Saliyamangalam at about 08.30 hours on 22.02.2014 and in



the presence of PWs. 12 & 13, had prepared the observation mahazar, marked as Ex.P7, rough sketch, marked as Ex.P10. PW16 examined PW2 / victim girl and recorded her statement and thereafter, sent her for medical examination.

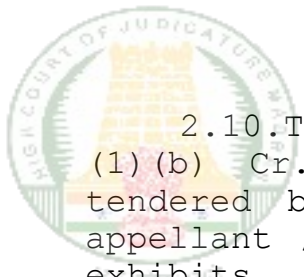
2.5.PW5 / Doctor Jeyarani was the Assistant Professor in Gynaecology Department in Raja Government Hospital and while she was on duty, on 20.02.2014, at about 11.00 am, PW2 was produced along with a requisition by PW16 and another woman Constable and when she was examined, she told her that she had physical relationship with a known person namely, the appellant/ accused at about 9.00 am on 14.02.2014 and they stayed in Tiruppur for two days and she had physical relationship with him twice and thereafter, returned to Saliyamangalam on 18.02.2014 and went to the house of the appellant/ accused and since the relatives of the appellant / accused did not accept such relationship, they left the house and at that time they were intercepted by six or seven known persons and two of them had forcible relationship with her and she further told that she has mensuration about three months back and the Accident Register issued by PW15 was marked as Ex.P2.

2.6. PW16/ Inspector of Police effected arrest of the appellant/accused at about 14.00 hours on 22.02.2014 and in the presence of PW15 and another and examined him and he voluntarily came forward to give a confession statement and as per the admissible portion of confession statement and the material objects namely Mos.1 to 3 were recovered, under a cover of mahazar Ex.P11. PW16 had examined Vijay / PW13, Selvam / PW15 and one Vijayaragavan and recorded their statements under 161(3) CrPC. On 23.02.2014, PW16 had examined PW6, PW4, PW3, PW11 and PW15 and recorded their statements. On the eve of her retirement on 31.03.2014, she handed over the records to the Inspector of Police, Ammapet Police Station.

2.7.PW17, Inspector of Police, continued with the investigation and after having gone through the case diary, since the witnesses have already been examined, he did not record further statement and he recorded the statements of PW5/ Dr.Jeyarani and PW.9/ Dr.Tendral and also examined experts namely PW7, PW8 and PW14 and after completion of investigation, he has filed the final report / charge sheet, charging the appellant / accused for the commission of offence under Sections 363, 450 and 417 IPC and Section 6 of POCSO Act.

2.8.The final report / charge sheet was taken on file by the learned Sessions Judge, Mahila Court, Thanjavur in SC No.15 of 2014 and the accused was summoned and after furnishing the documents under Sections 207 CrPC for free, charges under Sections 450 and 417 IPC and Section 6 of POCSO Act were framed and he has been questioned and he denied the charges framed against him.

2.9.The prosecution in order to sustain their case, had examined PWs.1 to 17 and marked Exs.P1 to P.11 and also marked MOs.1 to 3.



2.10. The appellant / accused was questioned under Section 313 (1) (b) Cr.P.C., with regard to the incriminating circumstances tendered by the prosecution against him and he denied it. The appellant / accused did not let-in any oral evidence and mark any exhibits.

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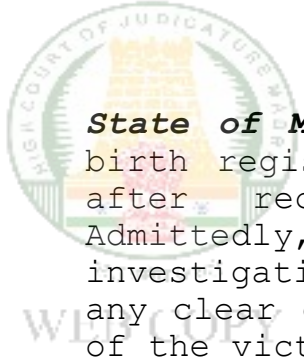
2.11. The Trial Court, on consideration of oral and documentary evidence as well as other materials, has found him guilty for the commission of offence under Section 6 of POCSO Act and imposed him sentence of imprisonment for life and to pay a fine of Rs.1,000/-, with default sentence of one year rigorous imprisonment and acquitted the appellant / accused for the commission of offence under Sections 450 & 417 IPC and challenging the said portion of the acquittal, the State did not prefer any appeal.

3. Mr. E. Somasundaram, learned Counsel appearing for the appellant / accused made the following submissions:

3.1. Ex.P.1 would not have been given by PW1 for the reason that she has only put her left thumb impression and even from her testimony, it is not very clear as to the exact age of the victim girl / PW2, when the alleged commission of offence took place.

3.2. The learned Counsel appearing for the appellant, drawing the attention of this Court to the testimony of PW2/ victim girl and Dr. Jeyarani / PW5, would submit that though the victim girl would state that at the relevant point of time her age was 17 years, PW.5 / the Doctor, who examined PW2 and issued Ex.P.2, in her evidence she had stated that the victim girl has told her that her age was 19 years and therefore, she was not subjected to any test to find out her age and in the light of the discrepancies, the trial Court ought to have presumed that PW.2 victim girl was aged above 18 years.

3.3. It is further pointed out that most of the material witnesses, such as neighbours had turned hostile and further pointed out that even as per the testimony of PW5 in the course of examination, wherein she had deposed that she cannot positively tell that 48 hours prior to the examination, PW2 had physical relationship and as such it cannot be stated that the appellant / accused had physical relationship with her. The learned Counsel appearing for the appellant has also drawn the attention of this Court to Ex.P.3/ Transfer Certificate issued by PW10 and would submit that admittedly he was not the author of the said document and PW1 and did not specifically state anything as to the date of birth of her daughter/ PW2 and drawing the attention of this Court to the judgment of the Hon'ble Supreme Court in Cr.A.No.2308 of 2009 [decided on 04.12.2009] in **Sunil Vs State of Haryana** as well as Cr.A.412 of 2014 [decided on 01.08.2016] in **Ravi Anandrao Gorpude Vs**



State of Maharashtra and would submit that in the said cases the birth register extract has been rejected for the reason that only after recording the statement, certificate was obtained. Admittedly, in the case on hand also, only during the course of investigation, Ex.P3 was obtained from PW10 and in the absence of any clear copy or specific evidence as to the actual date of birth of the victim girl, it cannot be presumed that she was aged below 18 years, so as to attract the stringent provisions of POCSO Act. It is also submissions of the learned Counsel for the appellant that since provisions of POCSO Act are stringent in nature, burden lies heavily on the prosecution to prove the case beyond all reasonable doubt and in the light of the various infractions pointed out, the trial Court has committed grave error in holding the appellant/accused guilty for the commission of offence under Section 6 of POCSO Act and imposed him sentence of imprisonment for life and to pay a fine of Rs.1,000/-, with default sentence of one year rigorous imprisonment.

3.4.The learned Counsel appearing for the appellant by way of alternate submission, would submit that even as per the testimony of PW2/victim girl, it was a case of love affair and PW2 had on her own volition left the parental home and came to the house of the appellant/ accused and they lived as a husband and wife and therefore, prays for modification of the conviction and sentence.

3.5.Per contra, Mr.S.Chandrasekar, learned Additional Public Prosecutor would submit that PW1 was very categorical in more than one time that her daughter was aged 16 years and PW2/ victim girl in her evidence twice had stated that she is aged about 17 years and not even a suggestion to that effect that the said statement made by PWs.1 and 2 relating to her age was false or incorrect, was made. It is the further submission of the learned Additional Public Prosecutor appearing for the state that the transfer certificate was issued by PW.10 and as per Section 35 of the Indian Evidence Act, the date of birth given in school register is admissible, subject to production of proof for recording the said date and in the case on hand, as per Ex.P3, the date of birth of the victim girl/ PW2 is 10.06.1998 and it is also corroborated through the testimony of PW1 and the victim girl/ PW2 herself and as to the evidence of physical relationship, the testimony of PW5 is very clear and PW7 would also state that the appellant / accused is potent. In sum and substance, it is the submission on behalf of the prosecution that the prosecution by letting in quality evidence, had proved its case against the appellant / accused beyond reasonable doubt and would further add that under Section 30 of POCSO Act, the Special Court shall presume the existences of culpable mental state and to discharge the same, the appellant / accused has failed to let in any evidence contra and hence, prays for dismissal of this appeal.

4.This Court has paid it's anxious consideration and best attention to the rival submissions and perused the materials available on record.



5.The question arises for consideration is whether the prosecution through testimonies of the witnesses, documentary evidence and other materials, has proved its case against the appellant/accused that he had committed the offence under Section 6 of POCSO Act beyond any reasonable doubt.

6.PW1 is the mother of the victim girl / PW2 and her chief examination is in consonance with Ex.P1 / the complaint lodged to PW14, based on which, First Information Report Ex.P8 came to be registered. PW1 in her cross examination would state among other things that in the first complaint, she has stated that her daughter /PW2 went along with the appellant / accused and subsequently, she and her daughter were taken to All Women Police Station, Valuthavur and one week thereafter, having found that PW2 was pregnant, treatment for termination of abortion has been effected. As pointed out by the learned Additional Public Prosecutor, in the chief examination, PW1 had specifically stated that her daughter was aged about 16 years and there was no question put to PW1 in the cross examination that her daughter had attained the age of majority.

7.PW2 was questioned in terms of the provisions of POCSO and in her chief examination, she would specifically state that at that time her age was 17 years and she loved the appellant / accused and on the pretext of marriage, they had physical relationship twice and thereafter they went to Tiruppur, where they stayed in the house of her friends and would subsequently narrated about their return from Tiruppur and waylaid by six or seven persons and the forcible physical and sexual assault upon her by them. PWs.3, 4 and 5 turned hostile and PW5 before whom the victim girl was produced for medical examination has spoken about her physical appearance, but she did not note any injury on any of her parts and noted that vagina freely admitted two fingers and on examination, she was found to be pregnant. In the cross examination, PW5 would state that since PW5 would state that since PW2 told her that she was aged about 19 years, no test was conducted to ascertain her age and she would state that in recent times there was no evidence that she had physical relationship and since no spermatozoa was detected, it cannot be stated that prior to 48 hours of examination, she had physical relationship. It is to be noted at this juncture, it is the categorical testimony of PW2 that when she was examined by the Doctor, she was aged about 17 years and no specific suggestion has been put to the appellant / accused that the victim was aged above 18 years and the stringent provisions of POCSO would not get attracted.

8.PW6 is the elder sister of PW2 and she would state that her date of birth is 13.04.1994 and her sister namely PW2 is aged about 17 years and there was no specific question put to PW6 that her sister was aged above 18 years. PW7, who examined the appellant / accused would certify that the appellant / accused is potent. PW11 the neighbour had turned hostile. PW14 had recorded the cross examination of PW1 who denied the suggestion that in blank paper, signature of PW1 was obtained and thereafter, the complaint was prepared.



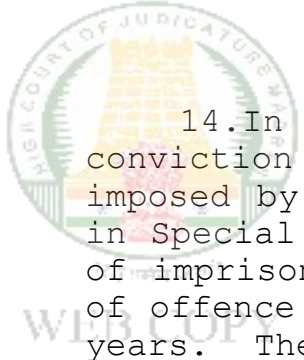
9.PW10, who has issued transfer certificate, marked as Ex.P.3 would state that as per the request made by PW15, he issued the extract of the transfer certificate, wherein it has been stated that the victim girl PW2 was born on 10.06.1998.

10.It is very pertinent to point out at this juncture that PW10 was not at all cross examined.

11.Reliance placed upon the above said two judgments by the learned Counsel appearing for the appellant have no application to the case on hand for the reasons that it is the categoric testimony of PW1 that her daughter victim girl / PW2 was aged about 16 years and the victim girl/PW2 herself, at the time of examination, has deposed that she was aged about 19 years and it is also corroborated through the testimony of PW6 the elder sister of PW.2.

12.The accused was questioned under Section 313(1)(b) CrPC with regard to the incriminating circumstances made out against him, he merely, denied it as false.

13.In the considered opinion of this Court, the prosecution through its testimony of witnesses, supported by documentary evidence and other materials, had proved its case beyond reasonable doubt. Now coming to the alternate plea made by the learned Counsel appearing for the appellant that modification of the conviction and sentence, this Court heard the submission of the learned Additional Public Prosecutor also. Even according to PW2, she was in love with the appellant / accused, on her own volition, she left the parental home. In fact she would stat that under the pretext of marriage, she had physical relationship with the appellant / accused twice and they were staying in their friends house at Tiruppur and since they did not posses money, took a decision to return and at night hours on 18.02.2014 both of them were waylaid and she was forcibly and physically abused by others. Though it appears to be a consensual physical relationship, but unfortunate for the appellant / accused, the victim girl PW.2 at the relevant point of time was aged about 16 years. As per the definition of Section 2(d) of the POCSO Act, 'child' means, any person below the age of 18 years and admittedly PW2 was aged below 18 years and therefore, this Court is unable to come to the aid to the appellant / accused as to the prayer for complete exoneration in the form of acquittal. Further taking into consideration the above facts and circumstances, especially the testimony of PW2 coupled with the testimony of PW5 Doctor, who examined PW2 who issued Accident Register marked as Ex.P2, this Court is of the considered view that the sentence of imprisonment for life imposed upon the appellant / accused under Section of the POCSO Act requires modification.



14. In the result, the criminal appeal is partly allowed and the conviction of the appellant / accused under Section 6 of POCSO Act imposed by the trial Court vide impugned judgment dated 31.05.2017 in Special S.C.No.15 of 2014 is confirmed and however, the sentence of imprisonment for life awarded by the trial Court for commission of offence under Section 6 of POCSO Act is modified to one of seven years. The sentence of fine and the *de fault* sentence are maintained. The appellant /accused is also entitled to set off the period of imprisonment already undergone by him under Section 428 CrPC.

15. The substantive sentence of imprisonment imposed upon the accused / appellant has been suspended by this Court, pendency of the appeal, therefore, the bail bond executed by him shall stand terminated and the respondent is directed to take immediate and necessary steps to secure the custody of the accused / appellant, for undergoing the remaining period of sentence.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

Sub Assistant Registrar(CS)

To

1. THE SESSIONS JUDGE, MAHILA COURT (FAST TRACK MAHILA COURT), THANJAVUR.
2. DO-THROUGH : THE PRINCIPAL SESSIONS JUDGE, THANJAVUR.
3. THE DISTRICT COLLECTOR, THANJAVUR.
4. THE DIRECTOR GENERAL OF POLICE, MYLAPORE, CHENNAI.
5. THE SUPERINTENDENT, CENTRAL PRISON, TRICHY.
6. THE INSPECTOR OF POLICE, AMMAPETTAI POLICE STATION, THANJAVUR DIST,
7. THE ADDITIONAL PUBLIC PROSECUTOR, MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

COPY TO:

The Section Officer, Criminal Section (RECORDS),
Madurai Bench of Madras High Court, Madurai. (2 copies)

+1 CC to M/s.E.SOMA SUNDARAM, Advocate(SR-74978[F]dated 12/07/2019)