



BAIL SLIP

The Appellant herein/Accused Viz., Selvin, (M/28 years), S/o.Dharmalinga Nadar, was released on Bail vide court order dated 05.02.2016, made in CRL MP(MD).No.2 of 2015 in CRL A(MD).No.144 of 2015.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 08.12.2020

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

CRL.A.(MD).No.144 of 2015 and
CRL.M.P.(MD)No.2761 of 2020

Selvin

... Appellant/Accused No.1

Vs.

State rep. by,
The Inspector of Police,
Sathankulam police station,
Sathankulam,
Thoothukudi District.
(Crime No.70 of 2013)

... Respondent/Respondent

PRAYER : Criminal appeal is filed under Section 374(2) of Cr.P.C., to call for the records in Special Case No.16 of 2014 on the file of the learned Sessions Judge, Mahalir Neethimandram(Fast Track Mahila Court), Thoothukudi, Thoothukudi District and set aside the Judgment dated 21.04.2015 and acquit the accused/appellant.

For Petitioner : Mr.Veerakathiravan,
Senior Counsel,
for Mr.A.Thiruvadi Kumar.

For Respondent : Mr.A.Robinson,
Government Advocate(Crl.Side)

JUDGMENT

Heard, Mr.Veerakathiravan, learned Senior counsel, assisted by, Mr.A.Thiruvadikumar, learned counsel appearing for the appellant and Mr.A.Robinson, learned Government Advocate(Crl. Side) appearing for the respondent.

2. This appeal is directed against the Judgment dated 21.04.2015 rendered in Special Case No.16 of 2014 by the Sessions Judge/Fast Track Mahila Court, Thoothukudi.



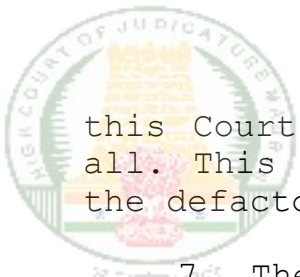
3. By the impugned Judgment, the appellant was found guilty of the offence under Section 366 of I.P.C. and Section 4 of the Protection of Children from Sexual Offences Act 2012 and sentenced to undergo 10 years Rigorous Imprisonment.

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4. The defacto complainant in this case is P.W.1 (xx). Based on her complaint(Ex.P.1), First Information Report in Crime No.70 of 2013 was registered on the file of the respondent for the offences under Sections 376, 417, 420, 294(b) and 506(ii) of I.P.C. against the appellant Selvin his mother, namely, Packiamani and uncle Chinnathurai. Investigation was undertaken by P.W.12. Final report came to be laid. Cognizance of the offences was taken and as many as four charges were framed against the accused. Charges under Section 366 of I.P.C. and Section 4 of the Protection of Children from Sexual Offences Act 2012 were framed against the appellant Selvin. Charge under Section 294(b) of I.P.C. was framed against the appellant's mother/accused No.2 and the charges under Sections 294 (b) and 506(ii) of I.P.C. were framed against the appellant's uncle/accused No.3. The prosecution examined as many as 12 witnesses (P.W.1 to P.W.12) in support of its case. Ex.P.1 to Ex.P.16 were marked. M.O.1 to M.O.8 were also marked. On the side of the accused who had denied the charges in *toto*, no evidence was adduced. The learned trial Judge after a consideration of the evidence of record, acquitted accused Nos.2 and 3 and convicted and sentenced the appellant as mentioned above. Challenging the same, this appeal came to be filed.

5. The learned senior counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds and also took me through the written submissions settled by him.

6. The learned Senior counsel pointed out that there is considerable doubt as to the actual age of the victim. According to him as per the Aadhaar Card of the victim, her date of birth is 15.05.1991. However, the prosecution had proceeded on the premise that her date of birth is 27.05.1996. In this regard, the accused wanted to adduce additional evidence. Though the details set out in the Aadhaar Card as rightly pointed out by the learned Government Advocate, are based on self declaration only, in order to satisfy the conscience of the Court, this Court wanted the defacto complainant to appear before this Court through web hearing. The defacto complainant appeared before this Court today through video conferencing facility. The identity of the defacto complainant, namely, (xx) is not in doubt. The defacto complainant requested this Court to terminate the prosecution against the appellant. She stated that the appellant is a very close relative being her cousin. The appellant was a married person when the occurrence took place. Thereafter, the defacto complainant has got married to one Ponpandi and begotten three children through him. She repeatedly requested



this Court that the appellant Selvin may not be sent to prison at all. This Court is more than satisfied that the statement made by the defacto complainant is absolutely voluntary.

7. The learned Government Advocate would point out that the offence under Section 4 of the Protection of Children from Sexual Offences Act 2012 is a serious one and that in any case, it is not compoundable. I concur with the said submission made by the learned Government Advocate. However the learned Senior counsel appearing for the appellant would point out that this Court can bear the said statement of the defacto complainant at the back of its mind while considering the evidence on record.

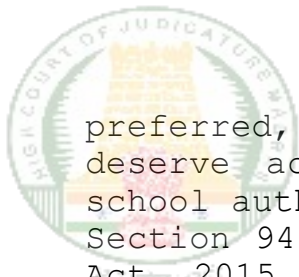
8. The learned Senior counsel would submit that the defacto complainant was certainly aged 19 years and that the prosecution under the provisions of the Protection of Children from Sexual Offences Act itself was not maintainable. He also took me through the evidence on record and contended that the appellant deserves to be acquitted and the appeal has to be allowed.

9. Per contra, the learned Government Advocate(Crl. Side) submitted that the impugned Judgment does not warrant any interference and called for dismissal of the appeal.

10. I carefully considered the rival contentions and went through the evidence on record.

11. The first question that has to be seen is whether P.W.1 (xx) was aged below 18 years at the time of occurrence.

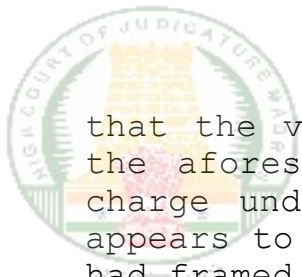
12. The learned Government Advocate would draw my attention to Ex.P.7 and Ex.P.8 in this regard. Ex.P.7 is the certificate based on Radiology Report. It is seen therefrom that according to the radiologist(P.W.8), the age of P.W.1 could be between above 16 years to below 18 years. As rightly contended by the learned Government Advocate, it is not open to the Court to mechanically add two years to what is set out in the Radiology Report. It must be noted that it is not the case of the radiologist that the victim was aged 16 years. If that be so, this Court would not be justified in adding two years to what is mentioned in the Radiology Report. He placed more reliance on Ex.P.8. This record was issued by the headmistress of the school in which the victim had studied. P.W.9 was cross examined by the counsel for the accused. It was elicited from her that the certificate was issued based on the entries found in the attendance register. The learned Senior counsel would draw my attention to the fact that even as per the said entries, P.W.1 had attended the school only for nine days. It has also been brought out in the evidence that the victim had joined school from some other institution. Though as per Section 94 of the Juvenile Justice(Care and Protection of Children) Act, 2015, the school record should be



preferred, it must be shown that the contents of the school record deserve acceptance by the Court. The certificate issued by the school authority must inspire the confidence of the Court. Only then Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 can be applied and not otherwise. In this case, it would be unsafe to go by the contents of Ex.P.8 marked through P.W.9 Headmistress of the school. As rightly pointed out by the learned Senior counsel, P.W.3, father of the victim is the best person to speak about the age of P.W.1. In his evidence, the prosecution has not brought out that P.W.1 was a minor at the time of occurrence. My attention is also drawn to Ex.P.1. Ex.P.1 complaint was drafted in a lawyer's office. The occurrence had taken place on 16.03.2013. She was rescued on 18.03.2013. The complaint was given only on 20.03.2013. Thus the complaint was given after considerable deliberation. It appears that with the assistance of local political functionary, the complaint was given. In the complaint, the age of (xx) had been mentioned as 19. Subsequently it was struck off and in its place, her age was written as 17.

13. Thus taking into account all these aspects, I am of the view that the prosecution has not established the age of the victim beyond reasonable doubt. Prosecution under the Protection of Children from Sexual Offences Act is a serious matter. Therefore, the prosecution is obliged to establish the age of the victim beyond reasonable doubt. This is because, Protection of Children from Sexual Offences Act contains presumptive provisions such as Section 29 and Section 30 shifting the burden of the accused. This presumption can be raised only, if the foundational facts have been established by the prosecution. Proving the age of the victim is below 18 is a foundational fact. After a careful perusal of the evidence on record, this Court comes to the conclusion that the prosecution has not established the age of the victim beyond reasonable doubt. Therefore, the charge framed against the appellant under Section 4 of Protection of Children from Sexual Offences Act has to go.

14. The learned Senior counsel also took me through the evidence of P.W.1. P.W.1 has admitted that she was in love with the appellant for two years. She has also stated that she was aware of the fact that the appellant was a married person. P.W.3, father of the victim had also stated that he was aware of the fact that the victim and the appellant were in love with each other for more than one year. In these circumstances, the learned Senior counsel placed reliance on the decision of the Hon'ble Supreme Court reported in AIR 1965 SC 942 (S. Varadarajan Vs. State Of Madras). In the aforesaid decision, the Hon'ble Supreme Court held that if a person who had attained the age of discretion had voluntarily accompanied the accused that would not amount to "taking" and that therefore, the charge of kidnapping will not be made out. Of course I have already given a finding that the prosecution has not established



that the victim was a minor at the time of occurrence. I refer to the aforesaid decision, only for the purpose of showing that the charge under Section 366 of I.P.C. also will not lie. The victim appears to have voluntarily accompanied the accused. The Court below had framed only these two charges against the appellant herein.

15. The appellant had been in prison for about ten months. Since I have already held that both the charges framed against the appellant will not be made out, the Judgment impugned in this criminal appeal stands set aside. The appellant is acquitted. This criminal appeal is allowed. The bail bond, if any, executed by the appellant shall stand cancelled and fine amount, if any, paid by him, is to be repaid to him.

Sd/-

Assistant Registrar(CS-I)

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/ /2020

Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1. The Sessions Judge, Mahalir Neethimandram
(Fast Track Mahila Court), Thoothukudi, Thoothukudi District.
2. Do Through
The Principal Sessions Judge, Tuticorin.
3. The Judicial Magistrate,
Sathankulam, Tuticorin District.
4. Do Through
The Chief Judicial Magistrate, Tuticorin.
5. The Superintendent, Central Prison, Palayamkottai.
6. The Inspector of Police,
Sathankulam police station, Sathankulam,
7. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.



8. The Record Keeper, Criminal Section,
Madurai Bench of Madras High Court, Madurai. (2 copies)

+1 CC to M/s.A.THIRUVADI KUMAR, Advocate (SR-24805[F] dated
10/12/2020)

CRL.A.(MD).No.144 of 2015
08.12.2020

SSS(CO)

TR(31.12.2020) 6P 11C