



Bail Slip

The Appellant/Accused Muthuselvam S/O Palaniyandi aged about 37/15 Years was released on bail granted as per order dated 21.12.2016 made in MP(MD) 1 of 2015 in CRL A(MD) 339 of 2015.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 14.09.2020

CORAM

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.A.(MD)No.339 of 2015

Muthuselvam

... Appellant/Sole Accused

-Vs-

The State rep.by
The Inspector of Police,
Vilathikulam Police Station,
Thoothukudi District.
(Crime No.53 of 2014)

... Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374 Cr.P.C., to set aside Judgment and conviction of the appellant / accused in S.C. No.15 of 2014 on the file of the Sessions Judge, Mahalir Neethimadram (Fast Track Mahila Court), Thoothukudi District, dated 17.04.2015, acquit the appellant.

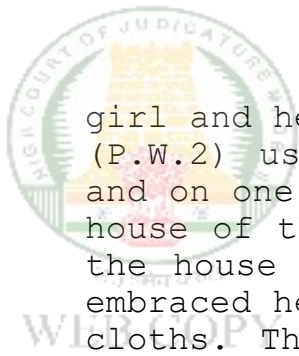
For Appellant	: Mr.A.P.Muthu Pandian
For Respondent	: Mr.A.Robinson, Government Advocate(Crl.side)

JUDGMENT

The appellant was found guilty by the learned Sessions Judge, Mahalir Neethimadram (Fast Track Mahila Court), Thoothukudi, in S.C.No.15 of 2014, dated 17.04.2015 for the offence punishable under Section 366 IPC and Section 4 of POCSO Act, convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1,000/- in default rigorous imprisonment for 6 months for the offence punishable under Section 366 IPC and also convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.2,000/- in default to undergo rigorous imprisonment for six months for the offence punishable under Section 4 of POCSO Act. The sentences were ordered to run concurrently. As against the order dated 17.04.2015, passed by the trial Court, the present appeal is filed.

2.The brief facts of the prosecution case, in a nutshell, are as follows:

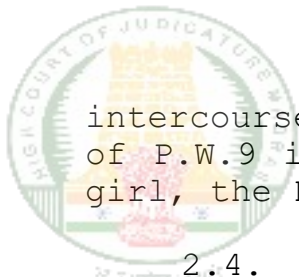
2.1. Muthumari(P.W.2) is the daughter of Mariappan (P.W.1) and Thangamariammal(P.W.3) and she studied upto 10th standard in Vilathikulam, Government Higher Secondary School. The appellant/accused was resided opposite to the house of the victim



girl and he is a married man, having four children. The victim girl (P.W.2) used to play with the accused's daughter, namely Gayathri and on one such occasion, on 20.04.2013, when the victim went to the house of the accused in search of Gayathri, no one was available in the house and at that time, the appellant/accused locked the door, embraced her, kissed her and also committed rape, after removing her cloths. The appellant/accused intimidated her that she should not reveal the same to anyone. He also promised her that he would marry her. Subsequently, on 02.05.2013, the accused called her and the victim girl by informing her mother that she is going to tailor shop, went to Vilathikulam Bus Stand, from there, the appellant/accused taken her to Kerala and stayed in their relative's house and there the appellant/accused had physical relationship with her. From Kerala, they went to Chennai and stayed there for two more months.

2.2. P.W.1, the father of the victim, was working as a coolie and he has gone to Udankudi on 02.05.2013 for a temple festival and returned only on 04.05.2013. After knowing that his daughter was missing, they searched her in their relatives house and thereafter, went to Vilathikulam Police Station on 15.05.2013 and lodged a complaint in Ex.P.1. Tmt.Thanalakshmi, then Sub Inspector of Police(P.W.13), Vilathikulam Police Station received the complaint and registered a case in crime No.53 of 2013 for the offence under Section 366 IPC and the printed First Information Report was marked as Ex.P.9. Thiru.Varatharajan, then Inspector of Police(P.W.14), Vilathikulam Police Station, took up the case for investigation, went to the place of occurrence and prepared observation mahazor (Ex.P.3) and rough sketch(Ex.P.10), in the presence of P.W.4 and another. He also recorded the statements of P.W.1, P.W.3, P.W.4 and few others and after enquiry, found that the other accused, mentioned in the complaint Ex.P.1, did not have any role in the commission of offence, deleted their names. He also examined P.Ws.5, 6, 7 and recorded their statements. After his transfer, the further investigation was taken over by one Thiru.Kamaraj, the Inspector of Police(P.W.15), Vilathikulam Police Station. He formed a special team to trace the accused and the victim/P.W.1.

2.3. In the meantime, the father of the victim(P.W.1) has also filed a Habeas Corpus Petition before this Court in H.C.P.(MD)No.596 of 2013. On 22.07.2013, on information, the respondent police went and arrested the appellant/accused in Vilathikulam Bus Stand at about 03.00 p.m., and they have also rescued the victim girl from the accused through the Sub Inspector of Police (P.W.13). The victim girl was also produced before this Court and also subjected to medical examination before Dr.Shobana (P.W.9), the Medical Officer working in Thoothukudi Government Medical College and Hospital. P.W.9 examined the victim girl on 27.07.2013, at about 11.30 a.m., and has recorded her observation that the victim girl's hymen was not intact and that her vagina admitted two fingers. The victim girl (P.W.2) told the Doctor(P.W.9) that she had sexual



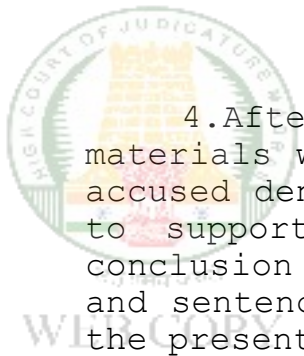
intercourse with known person for three months. The medical report of P.W.9 is marked as Ex.P.7. To ascertain the age of the victim girl, the Doctor(P.W.9) referred her to Radiological Department.

2.4. Dr.Saravanan, Radiologist(P.W.10), Government Medical College Hospital, Thoothukudi, examined the victim girl to determine her age and also issued the age certificate in Ex.P.8 that the victim girl is above 14 years and below 17 years of age.

2.5. The Investigation Officer (P.W.15) has also produced the appellant/accused for medical examination, after obtaining orders from the concerned Court. Dr.Manoharan (P.W.8), who is working as Assistant Professor in the Department of Forensic Science, Government Medical College Hospital, Thoothukudi, examined the appellant/accused on 01.08.2013 and issued a certificate in Ex.P.5 that there is nothing to suggest that the accused is impotent.

2.6. After examining the witnesses, the Investigation Officer (P.W.15) has also collected the School Transfer Certificate of the victim girl, which is marked as Ex.P.2 and examined the Doctors and collected the medical certificates and thereafter, filed the final report as against this appellant/accused for the offence under Section 366 IPC and Section 4 of POCSO Act.

3. During the trial, on the side of the prosecution, 15 witnesses were examined and 12 documents were marked and no material object was marked. P.W.1 Mariappan is the father of the victim girl, who set the law in motion and he speaks about the complaint (Ex.P.1). P.W.2, Muthumari is victim child and she narrated the occurrence, her physical relationship with the appellant/accused. P.W.3, Thangamariamammal is the mother of victim and she speaks about the missing of her daughter from 04.05.2013 and the search made by them and the lodging of complaint(Ex.P.1). P.W.4 was examined for the observation mahazor and P.W.5 and P.W.6 are residents of Keelavilathikulam, who brought appellant's TVS 50 Mopet on 04.05.2013 from Vilathikulam Bus Stand. P.W.7, Valliraj, is known to the accused and according to him, the accused handed over the key of his TVS 50 Mopet to him on 04.05.2013 and made a request to hand over the same in his house. P.W.8 is the Doctor, who examined the accused and issued medical certificate(Ex.P.5) and P.W.9 is the Doctor, who examined victim girl and issued medical certificate (Ex.P.7). P.W.10 is the Radiologist, who issued the age certificate (Ex.P.8) for the victim girl. P.Ws.11 and 12 are the Constable, who produced the accused and the victim child for medical examination respectively. P.W.13 is the then Sub Inspector, who registered the case in Crime No.53 of 2013 on 15.05.2013 and also rescued the victim girl on 22.07.2013 from Vilathikulam Bus Stand. P.W.14 is the Inspector of Police, who conducted preliminary investigation and P.W.15 is the Inspector of Police, who conducted further investigation and filed the final report.



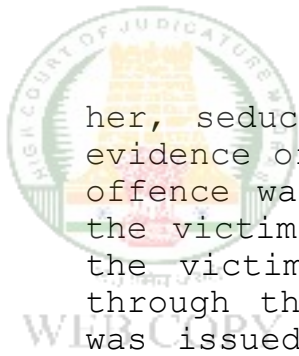
4.After the prosecution witnesses was tried, the incriminating materials were put to the accused under Section 313 Cr.P.C. and the accused denied the same. Though he stated that there are witnesses to support his case, he has not examined any witnesses. In conclusion of the trial, the trial Court found him guilty convicted and sentenced as stated supra. As against the order of conviction, the present appeal is filed.

5.Heard Mr.A.P.Muthu Pandian, learned counsel appearing for the appellant and Mr.A.Robinson, learned Government Advocate(Crl.side) appearing for the respondent/State.

6.Mr.A.P.Muthu Pandian, learned counsel appearing for the appellant submitted that the complaint was lodged after 10 days and there is no explanation for the delay and more over, the prosecution has not established the date of occurrence specifically. It is the case of the prosecution that the accused took the victim to Kerala to their relative's house and from there, went to Chennai and stayed there for two months. But evidence is contrary as to whether they went to Kerala or not. The Investigation Agency has not collected any material that they have stayed in Kerala in the house of one Panneerselvam and also failed to ascertain whether the appellant and the victim girl stayed together at Chennai.

7.The learned counsel further submitted that the victim girl (P.W.2) has stated that prior to the occurrence, the accused gave her his mobile phone, but the same was not recovered and the prosecution failed to establish that there were frequent calls between the appellant/accused and P.W.2. Even according to the case of the prosecution, it is consensual sex and victim girl (P.W.2) went along with him to various places, stayed with him for three months and had sexual relationship. Moreover, according to the Doctor(P.W.9) there is no symptom of any injury. The age of the victim girl has not been established properly. The School Transfer Certificate (Ex.P.2) was not marked through the author of the certificate, namely, Headmaster of the School and the age certificate (Ex.P.8) marked through Radiologist(P.W.10), can be taken as two years from the report and therefore, age of the victim would be around 19 years as per the Radiologist's age certificate. He also relied upon the evidence of the father of the victim girl (P.W.1) that he admits that the child was admitted in the school on her age of 5, before 14 years and therefore age of the victim girl at the time of occurrence would be 19 years, but the same was not properly appreciated by the trial Court. Therefore, he prays for interference.

8.Per contra, Mr.A.Robinson, learned Government Advocate (Crl.side) appearing for the State submitted that the appellant / accused is a married man, aged about 35 years, having 4 children and residing opposite to the house of P.W.1. Taking advantage of the services of the victim girl, he had physical relationship with



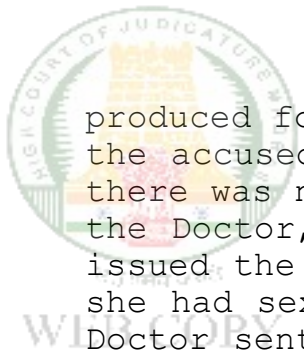
her, seduced her, taken her to Kerala and then to Chennai and the evidence of P.W.2 is very cogent and explore the manner in which the offence was committed. The prosecution has established the age of the victim, at the time of occurrence, as 15. The date of birth of the victim girl is 27.05.1998 and the same has been established through the School Transfer Certificate of the victim girl, which was issued by the Headmaster, Government Higher Secondary School, Vilathikulam and also through the certificate of the Radiologist (P.W.10) in Ex.P.8. Therefore, as on the date of occurrence, on 20.04.2013, the age of the victim girl was 15 and the evidence of the Dr.Shobana(P.W.9) also corroborates with the prosecution case and the victim girl has also stated that she had sexual intercourse with known person for three months and her hymen was not intact. Their case that a girl was missing from 04.05.2013 is also established through P.W.1 and P.W.3 and the elopement of the appellant/accused with the victim is also established through P.Ws.4 to 6. The accused is potent as per the certificate of the Doctor (P.W.8) and the victim girl was also rescued by P.W.15 and P.W.13 from the custody of the accused on 22.0.2013 at Vilathikulam Bus Stand. Therefore, according to him, the prosecution has established the case beyond any reasonable doubt and the trial Court has also rightly found him guilty and convicted and sentenced under Section 366 IPC and Section 4 of POCSO. Therefore, he prays for dismissal.

9.This Court heard the rival submissions made by either side and perused the materials available on record.

10.The appellant/accused is a married man, aged about 35 years and residing in the house opposite to P.W.1's house. The appellant is also having 4 children and the victim girl was studying 10th standard in the year 2013 and used to play with the daughter of the accused. As per the evidence of the victim girl(P.W.2), on 20.04.2013, at about 02.00 p.m., she went to the house of the accused to play with his daughter, however, there was no one in the house and the accused taking advantage of the same, closed the door, embraced her, kissed her and laid her down in the cot and removed her dress and also raped her. The accused intimidated the girl that he would kill her, if she reveal the same to anyone and therefore, she did not reveal this incident to anyone. Subsequently, the accused promised her that he would marry her and taken her to Kerala on 04.05.2013. They stayed in their relative's house for 10 days and thereafter, moved to Chennai and stayed there for another two months. During the said period, the accused had physical relationship with the girl.

11.The father of the girl, P.W.1 filed a Habeas Corpus Petition before this Court and the accused and the girl were traced by forming a special team. Finally the Investigation Agency rescued the girl from the accused on 22.07.2013, at about 03.00 p.m., at Vilathikulam Bus Stand. P.W.15 and P.W.13 speaks about the same.

<https://hdcvires.courts.gov.in/hdcvires>, the accused as well as the victim girl were

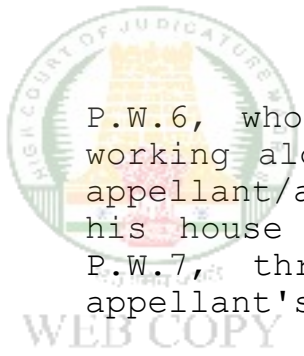


produced for medical examination. P.W.8 is the Doctor, who examined the accused on 01.08.2013 and issued the certificate in Ex.P.5 that there was nothing to suggest that the accused is impotent. P.W.9, is the Doctor, who examined the victim girl on 27.07.2013 and has also issued the certificate in Ex.P.7 that the victim girl told her that she had sexual intercourse with known person for three months. The Doctor sent her opinion that the victim girl's hymen was not intact and also her vagina admits two fingers. The Doctor (P.W.9) has also referred the victim girl to Radiological Department for ascertaining her age and accordingly, Radiology test was conducted on 27.07.2013 by P.W.10. The Radiologist (P.W.10) in his age certificate (Ex.P.8), stated that from the X-Ray appearance, the victim girl's age must be above 14 years and below 17 years. Apart from this age certificate issued by P.W.10 in Ex.P.8, the Investigation Officer has also examined the Headmaster of the Government Higher Secondary School, Vilathikulam and collected the School Transfer Certificate in (Ex.P.2). Though the certificate has not been marked through the Headmaster, the certificate has been marked through the victim girl (P.W.2). The certificate is the Transfer Certificate issued for School leaving of the victim girl (P.W.2) and the same has been marked through the concerned girl herself. Therefore, non-examination of the Headmaster, who issued the certificate, would not affect the credibility of the Transfer Certificate (Ex.P.2).

12.As per Section 94 of the Juvenile Justice Care Act, in the absence of the Birth Certificate, the School Certificate can be relied for age proof. In this case, apart from the School Transfer Certificate (Ex.P.2), the victim girl was also subjected for Radiological examination through Radiologist(P.W.10) at Government Medical College Hospital, Thoothukudi. The Radiologist(P.W.10), vide his certificate (Ex.P.8) has also opined that the age of the victim girl is above 14 years and below 17 years of age. The victim girl in her evidence has stated that her date of birth is 27.05.1998. P.W.1, the father of the victim, has also stated in his evidence that girl was born in the year 1998. The facts remains that the victim girl (P.W.2) has just completed her 10th Standard without any break and she was admitted in the School for 1st Standard at the age of five. Therefore, the available evidence establishes that the age of the victim at the relevant point, is 15 years.

13.Though the victim girl has stated that the accused, on 20.04.2013, taking advantage of the situation that there was no one in his house, locked the door and forcibly raped her, she has also stated that even before that he has presented a mobile phone to her and used to contact her through that mobile phone. In fact, on 04.05.2013 also, he called her through that mobile phone to come and the victim girl has also went along with him to Kerala and Chennai and stayed together for more than three months.

14.The elopement of the appellant/accused with the victim girl has also been established through the evidence of



P.W.6, who is the co-worker of the accused. P.W.7 Valliraj was working along with the accused and on the date of occurrence, the appellant/accused requested him to hand over his TVS 50 Mopet in his house and handed over his vehicle at Vilathikulam Bus Stop. P.W.7, through P.Ws.5 and 6 handed over the vehicle to the appellant's house.

15.The available evidence discloses that the appellant has seduced the victim girl that he would marry her and taken her to various places and also had physical relationship with her. For this offence, he was convicted under Section 366 IPC and Section 4 of POCSO Act. For better appreciation, Section 366 is extracted as follows:

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

16.Section 3 of the POCSO Act defines penetrative sexual assault as follows

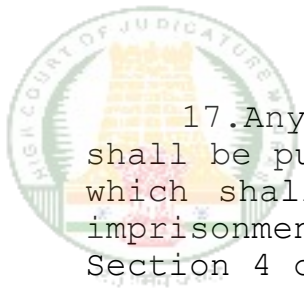
A person is said to commit "penetrative sexual assault" if-

(a)he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b)he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c)he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d)he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.



17.Any person, whoever commits penetrative sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine, as per Section 4 of POCSO Act.

WEB COPY

18.In the said given facts and circumstances of the case, trial Court is of the view that the prosecution has established the case beyond any reasonable doubts and the trial Court has rightly found this appellant guilty for the offence punishable under Section 366 IPC and Section 4 of POCSO Act, convicted and sentenced as stated supra.

19.The appellant, who is aged about 35 years and also having four children, had exploited a minor girl, aged about 15 years, who came to his house for playing with his child Gayathri. Therefore, this Court is not inclined to show any leniency on the punishment imposed by the trial Court. However, considering the fact that this accused is having four children and that he is the only bread-winner of his family, the conviction and sentence is modified as under:-

- to undergo rigorous imprisonment for 5 years and to pay fine of Rs.1,000/- in default rigorous imprisonment for 6 months for the offence punishable under Section 366 IPC.
- to undergo rigorous imprisonment for 7 years and to pay fine of Rs.2,000/- in default to undergo rigorous imprisonment for six months for the offence punishable under Section 4 of POCSO Act. The sentence shall run concurrently.

20.In the result, the appeal is partly allowed. The judgment of conviction passed by the learned Sessions Judge, Mahalir Neethimadram (Fast Track Mahila Court), Thoothukudi District, in S.C. No.15 of 2014, dated 17.04.2015 is confirmed, however, sentence is modified as stated supra. The trial Court is directed to secure the appellant/accused and confine him, so as to undergo remaining period of sentence. Bail bonds if any executed, shall stand terminated.

Sd/-

Assistant Registrar ()

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

gns

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 Neethimadram
(Fast Track Mahila Court), Thoothukudi.

2.The Judicial Magistrate,
Vilathikulam,
Thoothukudi District.

3.The Superintendent of Prison,
Central Prison, Palayamkottai.

4.The Inspector of Police,
Vilathikulam Police Station, Thoothukudi District.

5.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.(2Copies)

Crl.A. (MD) No.339 of 2015
14.09.2020

SCR(CO)
KB(05.10.2020) 9P 8C