

Bail Slip

The Appellant / Accused namely Sankar, S/O. Sanjeevirayar in SC No.27/2018 dated 11/12/18 on the file of the sessions Judge, Cuddalore, he was release on bail as per the order of this Hon'ble Court dated 30/05/2019 in Crl Mp.No.6591/2019 in Crl.A.No.10 of 2019.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.02.2021

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.10 of 2019

Sankar

... Appellant/Accused

Vs.

State of Tamil Nadu
Represented by Inspector of Police
All Women Police Station, Panruti
Cuddalore District
Cr.No.4/2018

... Respondent

PRAYER : Criminal Appeal filed under Section 374(2) Cr.P.C., praying to set aside the judgment passed on 11.12.2018 in Spl.Sessions Case No.27/2018 on the file of Mahila Court, Cuddalore.

For Appellant : Mr.R.Sankarasubbu
For Respondent : Mr.R.Suryaprakash

JUDGMENT

This Criminal Appeal is filed challenging the judgment passed on 11.12.2018 in Spl.Sessions Case No.27/2018 on the file of Mahila Court, Cuddalore.

2. The respondent police registered the case against the appellant in Crime No.4/2018 for the offence under Section 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter called as "POCSO Act") Section 9 of Prohibition of Child Marriage Act, 2006, Section 294(b) and 506(ii) of IPC. After investigation, the respondent police laid charge sheet before the learned Sessions Judge, Mahila Court, Cuddalore. The Mahila Court, after taking the case on file in

Spl.S.C.No.27/2018, framed charges against the appellant for the offence under Section 6 of POCSO Act, Section 9 of Prohibition of Child Marriage Act, Section 294(b) and 506(ii) of IPC and the same have been read over and explained to the appellant/accused who denied the charges and claimed to be tried.

3. After framing charges, in order to prove the case, on the side of the Prosecution, P.Ws.1 to 9 have been examined, Exhibits P.1 to P.11 have been marked. When the appellant/accused has been questioned under Section 313 of the Code of Criminal Procedure, 1973 in respect of the incriminating materials available in evidence against him, he denied it as false.

4. After closing the prosecution witnesses, on the side of defence, no oral or documentary evidence was let in. After completing the trial and arguments, the learned Sessions Judge held that the appellant is found not guilty for the charges under Section 9 of Prohibition of Child Marriage Act, Section 294(b) and 506(ii) of IPC. However, the Sessions Judge held that the appellant is found guilty under Section 6 of POCSO Act and convicted and sentenced to undergo rigorous imprisonment for a period of twenty years and pay a fine of Rs.2,00,000/- in default, the appellant/accused shall further undergo simple imprisonment for a period of five years.

5. Aggrieved against the conviction and sentence passed by the learned Sessions Judge, the appellant/accused filed the present criminal appeal before this court.

6. (a) The learned counsel for the appellant would submit that the appellant has not committed any offence either under POCSO Act or under the Prohibition of Child Marriage Act or under Section 294(b), 506(ii) of IPC. At the time of occurrence, the age of the victim girl was above 18 years. She already completed 18 years and that at the time of the filing the complaint, the age of the victim girl was 22 years and she had live-in relationship with the appellant on her own consent. There was a live-in relationship between the appellant and the victim. Since the victim completed 18 years, none of the charges framed against the appellant was made out. The prosecution failed to establish the case.

(b) The victim girl itself has stated before the Magistrate in the statement recorded u/s.164 Cr.P.C., that she voluntarily lived with the appellant and she already completed the age of 18 years. Further he would submit that though the prosecution recorded the statement under Section 164 Cr.P.C from the victim, they have not marked the said document before the court.

Therefore, the appellant has filed application to receive additional document i.e., Section 164(5) Cr.P.C., Statement of victim recorded by Judicial Magistrate No.1, Chidambaram. The learned counsel submits that the said document clearly reveals that the appellant has not committed any offence.

(c) Further, he would submit that the prosecution has not proved the age of the victim. The doctor from the Radiology Department, who examined the victim, issued certificate that she is aged between 18 to 20 years. Therefore, the age of the victim was not established by the prosecution and the victim has got the copy of the birth certificate, however the same was not marked before the trial court and omitted to be marked. If the correct birth certificate of the victim is produced before the court, it will clearly prove that she completed the age of 18 years and also no offence is made out.

(d) The learned counsel for the appellant would further submit that the Government Head Quarters Hospital has given the certificate and the doctor opinion is that the victim has completed 18 years and not completed 20 years on the date of examination. As per the decision of Hon'ble Supreme Court, 2 years either way can be taken into consideration. Therefore, with the above all the three documents, the court can come to a conclusion which would change the decision otherwise and therefore, the petition filed for receiving additional documents has to be allowed and additional evidence have to be received and the court has to decide the appeal based on the additional documents.

7. In respect of the above submissions of the learned counsel for the appellant, this court deems it fit to answer the contentions raised as following:-

(a) Though the appellant counsel has stated that he has filed the petition in SR.No.4063, the said petition was returned by the Registry for the reason that the counsel has filed a common petition for (i) impleading the victim girl as one of the parties in the said appeal and also (ii) to receive additional documents. When the appeal is against conviction and the prayer sought is to implead the victim as a party to the appeal, it has to be borne in mind that once the case is registered, the offence is against the State. The appellant also filed appeal against State. Therefore, in this case, victim girl cannot be impleaded as one of the parties to the appeal at the final stage. However, the documents produced by the appellant will not in any way helpful to the appellant to escape from the clutches of law.

(b) The victim girl gave the complaint. The appellant already got married the victim when she was below 18 years. The

victim married the appellant and lived with him and she gave birth to two children. Based on the investigation, it is found that the victim was minor and was below 18 years and was living with the appellant and gave birth to two children. Therefore, it is clearly proved that the appellant had aggravated penetrated sexual intercourse with the victim, while she was below 18 years as a child under the definition of POCSO Act 2012.

8. The only point for determination in this criminal appeal is whether the victim girl has completed the age of 18 years or she was below 18 years at the time of occurrence. If the victim completed the age of 18 years, no offence either under Prohibition of Child Marriage Act or under POCSO Act would attract.

9. It is the case of the appellant that the victim herself has stated that she voluntarily joined the appellant and living with him. It is contended by the appellant counsel that when the victim and the appellant are living together, no case is made out against the appellant. He would further submit that the documents produced by the prosecution regarding the age of the victim is not admissible evidence. The school certificate showing the date of birth of the victim has not been marked through the parents of the victim during trial. Further, the Headmistress who gave evidence stated that the certificate produced before the court is not given by her and the date of birth is manipulated in Ex.P.5-School Certificate. Further, original register has not been produced. Further, Ex.P.7 SSLC mark sheet is not admissible in evidence. The person who issued the certificate was not summoned, examined and marked the document. Further, Ex.P.1 Birth Certificate is also not a genuine document and not marked through parents and it is not admissible in evidence.

10. Further, the case of the appellant as contended by the learned counsel is that the prosecution put forth the case as if there is no nexus between the appellant and the victim. The victim herself has stated that three years prior to the complaint, both are living together and they had a live-in relationship and the victim willingly joined the appellant and living together and gave birth to two children.

11. The learned counsel for the appellant in support of his submissions made, placed reliance on the decision of the Honourable Supreme Court reported in (2011) 2 Supreme Court Cases 385 [Alamelu and another Vs. State. Rep. by Inspector of Police]. He vehemently contended that Ex.P.1, Ex.P.5, Ex.P.6 and Ex.P.7 have not been proved and the documents are not admissible in evidence. Further, the date of birth as given in the Birth certificate of the victim is not correct, her father had wrongly

given her date of birth as 16.03.2000 but her actual date of birth is 16.03.1995 and therefore, in this regard, additional document has to be filed. Further, the doctor who conducted Radiology test stated that the age of the victim would be above 18 and below 20. Therefore, taking into account the above factors, it is clear that the prosecution has not established the case beyond reasonable doubt and the statement recorded u/s.164 Cr.P.C., showing that victim was taken forcibly by the accused and he had sexual intercourse with her is false statement and since the victim willingly lived with appellant, POCSO Act would not attract and the trial Judge failed to consider these aspects and even as per Juvenile Justice Act, age of one year for the victim can be considered in favour of the appellant. Further the doctor evidence is that the victim is aged 18 years, therefore, concession can be drawn that she is aged 19 years. Therefore, the prosecution has failed to prove that the victim was below 18 years at the time of occurrence and the appellant had forcible sexual intercourse with her and married her. It is further submitted that though the learned Sessions Judge refused to accept the case of the prosecution that the appellant committed offence under Section 9 of Prohibition of Child Marriage Act, 294(b) and 506(ii) of IPC, and acquitted him however, wrongly convicted under POCSO Act, which warrants interference.

12. The learned Government Advocate submits that the victim girl is below 18 years. The appellant has already got married and having children and he had illegal intimacy with the victim girl and taking advantage of her innocence, he married her and had sexual intercourse. Therefore, the appellant should be convicted under Section 9 of Prohibition of Child Marriage Act. Since the appellant is alleged to have threatened the victim not to reveal the relationship to anybody, the accused has committed offence under Section 506(ii) IPC. Since the victim girl is below 18 years and the appellant had penetrative sexual intercourse with her, the appellant has committed offence under POCSO Act.

13. During trial, the victim girl was examined as P.W.1. She has categorically stated at the time of examination of the victim girl in the year 2018 that the occurrence has taken place in the year 2014. In the year 2018, she has stated that her age is 23 years and Date of Birth is 16.03.1995 and she has also stated that from 2014 onwards, she was living with the appellant and she further admitted that Ex.P.1 Birth Certificate in which her Date of Birth is mentioned as 16.03.2000. But she has clearly admitted that she was living with her husband/appellant. However, she has given the complaint. She further stated that under threat and coercion, he had sexual intercourse with her and she gave birth to two children. The victim girl stated that

from 2014 onwards, she was living with him. The doctor has clearly stated that the age of the victim is between 18 to 20 years. If two years either way taken, the date of birth of victim mentioned in Ex.P.1 Birth Certificate shows that she was born only on 2000. In the year 2014, she was aged 14 years. Subsequently, she gave birth to two children. At the time of giving complaint in the year 2018, she was 18 years. Even as per the documents produced by the victim said to have given by radiologist she completed 18 years as on 01.03.2018. Mother of the victim has also stated that her daughter P.W.1 was studying 10th Standard and she was 19 years. The appellant used to come to her house. At that time, the relationship between the appellant and the victim developed and they were living together and the victim gave birth to two children. Therefore, since she herself admitted that the victim was living together with the appellant and also gave birth to two children, even as per the additional document sought to be produced by the appellant, the statement recorded under Section 164 Cr.P.C., though the appellant denied all the allegations, the victim has admitted that she was living with the appellant and gave birth to two children. Therefore, from the evidence of P.W.1, P.W.2 and also doctor/P.W.7 and also birth certificate of the victim, it is seen that at the time of offence, the victim was only 15 years and not even 18 years completed. Before the victim completing 18 years, the appellant committed sexual offence. Even though marriage is not proved, threat, coercion made by appellant not proved, the fact remains that the appellant had penetrative sexual intercourse with the victim girl at the time when she was not completed 18 years. Therefore, offence under POCSO Act is committed by the appellant and as such, trial court has rightly passed the conviction and sentence.

14. Heard and perused the records carefully.

15. The case of the prosecution is that the respondent police registered the case against the appellant in Crime No.4/2018 for the offence under Section 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter called as "POCSO Act") Section 9 of Prohibition of Child Marriage Act, 2006, Section 294(b) and 506(ii) of IPC, based on the complaint Ex.P.2 given by the victim that while studying 10th Standard in the year 2014, the appellant married her and had penetrative sexual intercourse with her. After investigation, the police laid the charge sheet. The learned Sessions Judge, after framing charge under Section 6 of POCSO Act, Section 9 of Prohibition of Child Marriage Act and Section 294(b) and 506(ii) of IPC, in order to prove the charges framed against the appellant, during the trial, examined 9 witnesses and marked 11 documents on the side of prosecution. No oral and documentary evidence was produced on the side of the defence. After considering the oral

and documentary evidence let in on the side of prosecution and after going through the entire materials available on record, the Sessions Judge found the appellant is found guilty for the offence u/s.6 of POCSO Act and convicted to undergo R.I., for 20 years and to pay a fine of Rs.2,00,000/- in default to undergo S.I., for 5 years. However, the appellant is not found guilty of the charges under Section 9 of Prohibition of Child Marriage Act, Section 294(b) and 506(ii) of IPC. Challenging the said judgment, now the accused is before this court by way of this appeal.

16. The appellate court is a fact finding court and this court has to reappreciate the entire materials and also give independent finding. A reading of the complaint Ex.P.2 shows that the victim girl has stated that the appellant fell in love with her and suppressed his first marriage and had sexual intercourse; the appellant married her and she gave birth to two children. Thereafter, the victim deposed before the court that from the year 2014 onwards, she was living with the appellant and she had a live-in relationship with the appellant. There was no threat or coercion by the appellant and there was no marriage. P.W.2 has also stated that there was a live-in relationship between the appellant and the victim.

17. From the entire evidence and materials available, the undisputed fact is that the appellant had sexual intercourse with victim and the victim gave birth to two children. According to the prosecution, the minor victim girl was subjected to penetrative sexual intercourse and subsequently, gave birth to two children and therefore, the offence falls under Section 6 of POCSO Act.

18. A reading of the entire materials would reveal that the prosecution has not proved that there was a marriage between appellant and victim and threat. However it is proved that the appellant had intimacy with the victim and had sexual intercourse and gave birth to two children.

19. Now the question is as to whether the appellant had sexual intercourse with the victim, need not go into while answering the issues, because it is admitted by the victim girl that she is above 18 years and she voluntarily living with the appellant and gave birth to two children. Therefore, no offence is made out for the offence under Section 9 of Prohibition of Child Marriage Act. Now the only dispute is age of the victim.

20. A careful perusal of the documents viz., Ex.P.1 Birth Certificate, Ex.P.7 SSLC Statement of marks and its combined reading would clearly show that in Ex.P.1 and Ex.P.7, the date of birth is mentioned as 16.03.2000 and the victim girl has

admitted that from 2014 she was living with the appellant and gave birth to two children, which itself clearly prove that the victim girl was living with the appellant. Though marriage was not proved and though the prosecution has not substantiated that the appellant not committed forcible sexual intercourse, in the birth certificate and SSLC mark sheet, date of birth is mentioned as 16.03.2000. At the time of occurrence, the victim was aged 14 years and not completed 18 years. So in this regard, though the appellant counsel has stated that as per the decision of the Apex Court, referred to supra [(2011) 2 SCC 385] the documents are in-admissible in evidence when the person who gave the date of birth certificate was not examined namely either parents or authority who issued the document, the learned counsel for the appellant also produced certificate of Doctor from Radiology Department by way of additional document. If at all the said document was available even at the time of trial, the same should have been produced before the trial court itself for substantiating the contradictory view in respect of age of the victim. But neither the appellant nor the victim denied the birth certificate produced on the side of prosecution. Even as per the statement of the victim, she studied 10th standard and as such, now the contention taken by the appellant counsel that Ex.P.7 is not that of her document, is not acceptable. The contention of the appellant counsel as far as that person who gave the date of birth has not been examined, can be taken into account. But, in this case, a perusal of the records produced even on the side of the appellant by taking reliance on the Radiologist opinion would prove that the victim's age is in between 18 to 20 years as on 01.03.2018. But as per the decision of the Supreme Court referred to supra, either way two years can be considered. The victim herself had stated that she had a live-in relationship with the appellant from 2014. So she could not have completed eighteen years of age on the date of occurrence even if the age of two years is taken either way as per Radiologist opinion dated 01.03.2018. However, the documents Ex.P.1 and Ex.P.7 are corroborative evidence showing the date of birth of victim girl is 16.03.2000. So in such view of the matter, in either way the age of the victim girl cannot be stretched as 18 years completed on the date of occurrence ie., 2014.

21. According to the learned counsel for the appellant, the statement of victim recorded u/s.164 Cr.P.C., by J.M.No.1, Chidambarm, has not been marked at the time of trial. Even that document can only be used either for corroboration or contradictions. However, the said statement make it clear that the appellant had sexual intercourse with the victim and they were in live-in relationship and she was living with the appellant and she gave birth to two children.

22. On the above findings, this court is of the considered view that the prosecution has proved the case through oral and documentary evidence that the victim girl had undergone aggravated penetrative sexual intercourse. The evidence of the victim is that from 2014 she was living with appellant. Ex.P.1 and Ex.P.7 would clearly show that the date of birth of the victim is 16.03.2000. Therefore, at the time of occurrence, victim was not even completed 15 years. Even as per the doctor's opinion, the age can be taken two years either way and therefore, the age of the victim should be only 16 years at the time of occurrence i.e., in the year 2014, as the Certificate issued by the Radiologist, Government Head Quarters Hospital, Cuddalore is dated 01.03.2018.

23. In the light of the above discussion, the additional documents sought to be produced by the appellant counsel is not helpful to the appellant. Since the victim girl gave birth to two children, the victim girl might think of future of two children. After giving the complaint, since the mother as well as the victim would have thought of their future and retracted the statement. Even if she gave contradictory statement that she was living together with the appellant as live-in relationship, it is recognised by judicial precedent that it is not an offence if the girl is above 18 years. In any event, the victim girl was below 18 years, therefore, her consent is immaterial. Even if the victim girl had given her consent, legally it is not a valid consent, as she was below 18 years. Further the appellant is a married man and had children and had sexual intercourse with the victim and gave birth to two children. This Court cannot encourage this type of the offence, wherein, the victim girl now wants to implead herself as a party to the appeal. Once complaint is given and case has been registered, it is not between two individuals, it is offence against State. The learned counsel for the appellant would submit that victim girl is ready to compromise and she filed the affidavit of compromise. It is relevant to note that once the offence is committed under POCSO Act, it is the offence against the State. Offence under POCSO Act is not compoundable one. In this regard, even non marking of the statement recorded under Section 164 Cr.P.C., is not fatal to the case of the prosecution. Statement recorded under section 164 Cr.P.C is not substantive evidence it can be only used either for corroboration or contradiction. Even in that statement, the victim in this case clearly admitted that she was living with the appellant from 2014 onwards and gave birth to two children. Therefore, aggravated penetrative sexual intercourse is proved. The prosecution has established that at the time of commission of offence, the age of the victim girl is below 18 years. Therefore, the appellant has committed the offence. Since the marriage of the victim is not proved, trial court has rightly convicted the appellant for the offence under

Section 6 of POCSO Act since the age of the victim girl is below 18 years and therefore, the Sessions Judge has rightly convicted the appellant for the offence u/s.6 of POCSO Act. There is no merit in the appeal and the appeal is liable to be dismissed.

24. In the result, the Criminal Appeal is dismissed. Consequently, connected Crl.M.P., is closed. Since this court by order dated 30.05.2019 suspended the sentence of imprisonment and the petitioner was enlarged on bail by imposing certain conditions, the trial court is directed to take appropriate steps so as to secure him to serve out the remaining period of sentence.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

nvsri

To

- 1.The Sessions Judge,
Mahila Court, Cuddalore,
- 2.The Judge, Mahila Court, Cuddalore.
- 3.The Chief Judicial Magistrate,
Cuddalore (for information)
- 4.The Superintendent of Police,
All Women Police Station,
Panruti, Cuddalore District.
- 5.The Superintendent,
Central Prison, Cuddalore.
- 6.The Inspector of Police,
all Women Police Station,
Panruti.
Cr.No.4/2018
- 7.The Public Procedure, High Court, Madras.
- 8.The Section Officer,
Criminal Section, High Court, Madras.

Crl.A.No.10 of 2019

SR II (CO)
RMP (25/02/2021)