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IN THE HIGH COURT OF JUDICATURE AT MADRAS

TUESDAY, THE SEVENTH DAY OF SEPTEMBER
TWO THOUSAND AND TWENTY ONE

PRESENT:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.154 of 2021

State represented by
The Inspector or Police,
A.W.P.S.Tiruvallur,
Crime No.07/2015.

..Petitioner / Defacto Complainant

Vs.

1. Victor John
2. Selvam @ Thomas
3. Kirubakaran
4. Rajendiran
5. Beulah

..Respondents/ Accused 1 to 5

Criminal Appeal filed under Section 378 (i) of Criminal Procedure Code, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to set aside the acquittal Judgment for the above named accused 1 to 5 passed by the Magalir Neethimandram Fast Track Mahila Court, Tiruvallur in Special Sessions Case No.34 of 2017 dated 05.07.2019 and convict the Respondents / Accused (A-1 to A-5) for the offences charged against them.

ORDER: - This Criminal Appeal coming on for hearing on this day, and upon perusing the grounds of the appeal and the affidavit filed in support thereof and upon hearing the arguments of Mr. S.Sugendran, Govt. Advocate (Crl.side) for the Appellant and of Mr. M.Jaikumar, Advocate for the Respondents, this Court made the following Order:-

This criminal appeal has been filed by the State against the judgment of acquittal dated 05.07.2019 made in Spl.S.C.No.34 of 2017 by the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court), Tiruvallur.

2 The appellant/State registered a case against the respondents in Crime No.07 of 2015 for the offence under Sections 376(1)(n), 506(1), 315, 342, 344, 346 r/w 109 of IPC and Section 6 r/w 5(ii)(1) of Protection of Children from Sexual Offences Act, 2012 and after investigation, laid a charge sheet before the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court), Tiruvallur, which was taken on file in Spl.S.C.No.34 of 2017 and the learned Special Judge, after



completing all formalities, framed charges against the first respondent/A1 for the offence punishable under Sections 376 (2) (n), 506(ii), 315, 342, 346 IPC and Section 5(j)(ii) and 5(1) r/w Section 6 of the POCSO Act and against the respondents 2 to 5/A2 to A5 for the offence punishable under Sections 342 and 346 r/w 109 IPC.

3 In order to prove the case of the prosecution, before the trial Court, P.W.1 to P.W.5 were examined and Ex.P1 to Ex.P13 were marked and no Material Object was exhibited. After completing evidence of prosecution witnesses, when incriminating circumstances culled out and put before the accused, they denied as false and pleaded not guilty. On the side of the defense, no one was examined and no document was marked.

4 The learned Sessions Judge, after advertng to the materials placed on record and after hearing both the parties, by judgment dated 05.07.2019, acquitted all the respondents/accused 1 to 5 by holding that the victim is not a child, she completed 18 years and the sexual intercourse between the first respondent/A1 and victim is a consensual sex.

5 Aggrieved against the said judgment of acquittal, State has preferred the present criminal appeal.

6 The learned Government Advocate (Crl.Side) appearing for the appellant/State would submit that the victim was 15 years at the initial stage of intimacy with the first respondent/A1 accused and he had sexual intercourse with her for several times, due to which the victim became pregnant. When the victim informed the same to A1, he tried to abort the fetus in the womb itself by giving pills and since they failed in this attempt, A1 took the victim to a Hospital, where the Doctor told it could not be done since, the pregnancy is in advanced stage, if any attempt made, it will be danger to the victim girl. Hence, after all the attempts of A1 to abort the fetus went in vain, he along with the other respondents/A2 to A5 had removed the victim from the custody of lawful guardian. Thereafter, the victim girl with a help of the neighbours, contacted her parents and they secured the victim and lodged the present complaint.

6.1 He would further submit that A1 was a neighbour of the victim and, being a married man and having children, with a devil intent to have sex with the victim, who was a minor, had given a cell phone to her and spoken with her many times. At one point of time, A1 called the victim, when his wife gone outside and by making false promise to marry the victim had sexual intercourse against her will and also threatened her not to reveal to anyone. Like this way, the first respondent/A1 had sexual intercourse with the victim girl for several times



repeatedly, due to which only she became pregnant and when she informed the same to A1, he tried to abort the fetus in the womb itself, since her pregnancy was in advanced stage, he could not succeed in his attempt and at last the victim gave a birth to a male child.

6.2 In Ex.P1 complaint, the victim girl has clearly narrated the incident and act of the first respondent/A1 and also has clearly spoken about the offence committed by him and when she was produced before the Magistrate for recording statement under Section 164 of Cr.P.C, she reiterated the same, which would suffice to convict A1. With regard to age of the victim, from Ex.P12, Bonafide Certificate of the Victim, it is clear that date of birth of the victim is 21.02.1998. In the complaint, the victim has clearly stated that A1 had intimacy with her from the year 2014 i.e. when she was 16 years and had sexual intercourse repeatedly for several times. Therefore it is clear that at the time of commission of offence, the victim was 16 years and hence she was child under the definition of Section 2(1)(d) of the POCSO Act. Further, from Ex.P7, DNA Report, it was proved that A1 is a biological father of the male child born to the victim girl. The trial Court erroneously come to the conclusion that the victim was not a child and hence POCSO Act would not come into play and acquitted all the respondents/A1 to A5, which seriously warrants interference of this Court.

7 Both the learned counsel on record appearing for the respondents/accused and the learned Legal Aid Counsel would submit that prosecution has produced Ex.P12 bonafide certificate to prove the age of the victim. As per Ex.P12, date of birth of the victim is 21.02.1998 and she has not completed 18 years at the time of occurrence, but it is to be noted that prosecution has failed to obtain birth certificate of the victim and even they have not examined the competent person from the School, in which Ex.P12 was obtained, to prove its genuineness. Further, victim herself has not supported the case of the prosecution. In fact, the victim fell in love with A1 and with her consent only A1 had intercourse with her. Further, prosecution has not proved that at the time of occurrence, the victim was a child and hence the trial Court rightly acquitted all the accused, since there is no ingredient attracting the charges framed against the respondents/accused. When the age of the victim is not proved, beyond all reasonable doubt and the victim herself stated that with her consent only A1 had intercourse with her, acquittal of the accused is reasonable and well founded. To support their case, the learned counsel relied on the decisions of this Court made in CrI.A.No.438 of 2017 and CrI.O.P.No.232 of 2021. Therefore, there is no reason to interfere with the judgment of acquittal, when the same is well founded and reasoned.



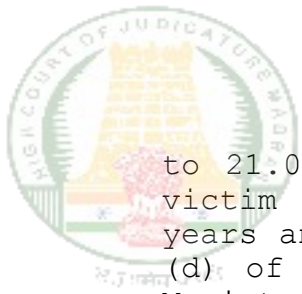
8 Heard the learned counsel appearing on either side and
perused the materials available on record.

9 Case of the prosecution is that A1 and the victim girl were residing at Kondanchery Colony, Thiruvallur and A1 developed acquaintance with the victim girl and enticed her by promising to marry her. On 21.07.2015 at about 12.00 p.m. A1 called the victim to come into his house, when his wife was not available and without her consent had intercourse with her. Like this way, A1 had intercourse with the victim girl several times, due to which she became pregnant. When the victim revealed the same to A1, he tried to abort fetus in the womb itself in many ways and since all the efforts went in vain, A1 along with other accused removed the victim from her lawful guardian. Thereafter with the help of neighbours, the victim informed her parents and they secured the victim and lodged complaint. In the meantime, victim begotten a male child.

10 Admittedly, in this case A1 had intimacy with the victim and sexual intercourse with her for several times, which are not in dispute. From Ex.P7 DNA report, it has been proved that A1 is the biological father of the male child born to the victim and hence there is no need for further evidence to prove the accused committed aggravated penetrative sexual assault on the victim. But, the trial Court held that the accused have not committed any offence charged against them, since at the time of occurrence, victim completed 18 years and the held that the intercourse between A1 and the victim was a consensual.

11 This Court, being an Appellate Court, is a final Court of fact finding, which has to necessarily re-appreciate the entire evidence and give an independent finding. Accordingly, this Court has re-appreciated the entire oral and documentary evidence produced before this Court.

12 On reading of the entire evidence and also the judgment of the trial Court, it reveals that the trial Court acquitted the respondents/accused on the ground that the victim has completed 18 years and it is a consensual sex. But, the fact remains that, in the complaint, the victim has clearly stated that from January 2015 onwards A1 had intimacy with her and when she came to know about her pregnancy, she informed the same to A1 and he gave pills to her for abortion. In the month of February also A1 gave some tonic to the victim for abortion. Thereafter A1 admitted the victim girl in a private Hospital and the Doctor told that her pregnancy was in advanced stage and hence abortion could not be done at this stage and since all the efforts taken by A1 for abortion, went in vain, A1 took the victim to somewhere else. As per Ex.P12, date of birth of the victim is 21.02.1998 and occurrence said to have taken place on or prior



to 21.07.2015, which shows that at the time of occurrence, the victim girl has not completed the age of 18 and she is only 17 years and hence she was child comes under the definition of 2(1)(d) of the POCSO Act. When the victim was produced before the Magistrate for recording statement under Section 164 Cr.P.C, she narrated the entire incident reiterating the contents in the complaint Ex.P1. But, subsequently, during examination as witness before the Court, she denied certain facts, since A1 married the victim girl. Even though, there was no forceful intercourse as contended by the learned counsel for the appellant, the appellant on a false promise to marry the victim, had sexual intercourse for several times, when she was a minor girl. Even otherwise, if she has given consent for sexual intercourse, her consent is immaterial as she was a child under the definition of Section 2(1)(d) of the POCSO Act, as per Ex.P12. Hence the offence committed by the appellant would come under the definition of aggravated penetrative sexual assault under Section 5(1) and 5(j)(ii) punishable under Section 6 of the POCSO Act.

13 No doubt, age of the prosecutrix has to be proved by the prosecution. Regarding proof of age, there is a presumption under Section 94 (2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 and unless the contrary is proved, the Court can presume age of the victim as mentioned in the Certificate given by any of the Authority as stated in Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015. In this case, prosecution has produced a Bonafide Certificate from the School, where the victim studied, and the same was marked as Ex.P12. As per Ex.P12, date of birth of the victim girl is 21.02.1998, which shows that the victim has not completed 18 years at the time of occurrence and she is a child under the definition of Section 2(1)(d) of the POCSO Act. It is relevant to refer Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015, and as per the Act, there is presumption and determination of age, which reads as follows:

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned Examination Board, if available ; and in the absence thereof;

(ii) the birth certificate given by a Corporation or a Municipal Authority or a Panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an Ossification Test or any other latest Medical Age Determination



Test conducted on the orders of the Committee or the Board;

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

In this regard, it is pertinent to note the following decisions:

1. 2015 (7) SCC 773 [State of Madhya Pradesh vs. Anoop Singh], wherein it was held that the Court should rely on first on documents regarding the age of the juvenile and only in its absence, medical opinion should be sought regarding the determination of age.
2. 2015 (2) SCC (Cri) 299 [Darga Ram @ Gunga vs. State of Rajasthan], wherein, it was held that in the absence of documentary evidence like school or other certificate for knowing the age, the opinion offered by the medical board on the age of the person can be relied on.
3. 2012 (9) SCC 750 [Ashwani Kumar Saxena vs. State of Madhya Pradesh], wherein, it was held that the admission register of a school of a candidate first attended is a relevant evidence for determination of the age of the juvenile.

14 In this case, the Head Master of the School, in which the victim studied, has given a Bonafide Certificate based on the entries made in the School records, mentioning the date of birth of the victim as 21.02.1998 and the occurrence said to have taken place on or before 21.07.2015, which shows that at the time of occurrence, the victim has not completed 18 years and was a child under the definition of Section 2(1)(d) of the POCSO Act. It is settled proposition of law that any entry made in the public record said to be a genuine, unless, the contrary is proved. The accused have not proved that the date of birth of the victim mentioned in the Bonafide Certificate/Ex.P12 issued by the Head Master of the School concerned is not a genuine one. Under this circumstances, the Court can safely come to the conclusion that prosecution has proved the age of the prosecutrix by producing Ex.P12 Bonafide Certificate.

15 Even though, prosecution has not produced birth certificate of the victim to prove the age of the victim, however Ex.P12 proved the fact that at the relevant point of time, age of the victim is below 18 years only. In a Cases of this nature, we cannot expect the victim to produce all the documents, the Investigating Officer has to put effort to



collect all the required documents and produce before the Magistrate, if not done, the Magistrate himself can suo motu order for required documents and give effect to the Act. However the respondents/accused have not proved contrary to Ex.P12 and date of birth of the victim is not 21.02.1998. Even though, there is no material to convict the other accused, there are enough material to convict the first respondent/A1. Unfortunately, the trial Court acquitted A1 also, which according to this Court warrants interference. Mere lapse on the side of the prosecution in collecting the documents and examining competent persons is not a sole ground to acquit the accused, when the other materials are very much available and proved for conviction. Further, subsequent marriage of the victim with A1 will not take away the offence committed by him, since he was already married and having children, had sexual intercourse with the victim on a false promise to marry her and made her to give birth to a baby, which is offence under Section 5(j)(ii) of the POCSO Act. The decisions relied on by the learned counsel for the respondents/accused is not made applicable to the present case on hand.

16 This Court time and again held that training has to be imparted to the stake holders, dealing with the cases under POCSO Act, including the Investigating Officers, the Public Prosecutors and the Special Judges, who are dealing with the cases under the POCSO Act.

17 In fine, this Courts finds A1 committed offence under Section 376(2)(n) of IPC and Sections 5(1) and 5(j)(ii) which are punishable under Section 6 of the POCSO Act. Hence the judgment of acquittal made by the trial Court is hereby set aside as far as the first respondent/A1 is concerned and he is hereby convicted for the offence under Section 376(2)(n) of IPC and Sections 5(1) and 5(j)(ii) punishable under Section 6 of the POCSO Act.

As far as the other accused i.e. respondents 2 to 5/A2 to A5 are concerned, prosecution has not proved the charges levelled against them and since the victim voluntarily went with the first respondent/A1, the judgment of acquittal made by the trial Court as far as the respondents 2 to 5/A2 to A5 are concerned is hereby confirmed.

18 With the above observations, directions and modifications, this Criminal Appeal is partly allowed. The first respondent/A1 is directed to appear before this Court on 07.09.2021 for questioning of sentence. The legal aid counsel is entitled for her remuneration as per Rules.



This case having listed on 07/09/2021 for Questioning on sentence in the presence of Mr.S. Sugendran, Government Advocate (Criminal Side) for the Appellant and of Mr.M.Jaikumar, Advocate for the Respondents, this Court made the following order:

Today, in compliance with the order of this Court dated 31.08.2021, the first respondent/A1 appeared before this Court and he has been questioned regarding the sentence to be imposed on him. The first respondent/A1 stated that he has two female children born through the first wife and they are going to School. He further stated that his first wife is not living with him and he is working under daily wages and he is the sole bread winner of the family.

2 Considering the representations made by the first respondent/A1 and the age of the victim and the offence committed, which is grave in nature and also the fact that the first respondent/A1 is a already married man, there is no mitigating circumstances to award lesser punishment. The first respondent/A1 is convicted for the offence under Section 376 (2) (n) of IPC and Sections 5(l) and 5(j)(ii) of the POCSO Act. Since for the above offence under the POCSO Act, minimum punishment is imprisonment of 10 years, the first respondent/A1 is sentenced to undergo rigorous imprisonment for a period of 10 years and fine of Rs.1,00,000/- (Rupees One Lakh only), in default, to undergo simple imprisonment for a further period of three years for the offences under Section 5(l) of the POCSO Act and sentenced to undergo rigorous imprisonment for a period of ten years and fine of Rs.1,00,000/- (Rupees One Lakh only), in default, to undergo simple imprisonment for a further period of three years for the offence under Section 5(j)(ii) POCSO Act. The sentence of imprisonment shall run concurrently. Since, as per Section 42-A of the POCSO Act, the provisions of this Act have overriding effect on the provisions of any such Law, no separate sentence of imprisonment is awarded for the offence under Section 376 (2)(n) of IPC. Out of total fine amount of Rs.2,00,000/-, Rs.1,75,000/- shall be deposited in the name of the child born to the victim as compensation and on attaining majority, the amount with accrued interest may be withdrawn by the child.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar



To

1. The Magalir Neethimandram
(Fast Track Mahila Court), Tiruvallur.

2. The Superintendent,
Central Prison, Puzhal,
Chennai.

3. The Inspector Police,
All Women Police Station,
Thiruvallur.

4. The Public prosecutor,
High Court, Madras, 104.

Copy to

The Section Officer,
Criminal Section,
High Court, Madras-104.

Dated: 07.09.2021

ORDER;

Cr1.A.No.154 of 2021

Giving directions etc as
stated within

RR(CO)
SP(07/09/2021)