



BAIL SLIP

The appellant namely Nagaraj S/o.Ponnusamy accured in Special S.C.No.5/2014 on the file of Mahalir Neethimandram (Fast Track Mahila Court) Sessions Judge, Mahila Court, Thiruppur was directed to be released on bail as per order of this court dated 15.03.2018 made in CrI.MP.No.634/2018 in CRL.A.99/2015.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.10.2021

CORAM:

THE HON'BLE JUSTICE MR. JUSTICE P.VELMURUGAN

CRL.A.NO.99 OF 2015

Nagaraj

...Appellant

Vs

The Inspector of Police,  
Udumalpet Police Station  
(Crime No.7/2013)

...Respondent

Prayer:

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure praying to admit the appeal and set aside the conviction and sentence imposed on the appellant by judgment dated 29.01.2015 passed in Special S.C.No.5 of 2014 on the file of the Mahalir Neethimandram, Fast Track Mahila Court (Sessions Judge, Mahila Court), Thiruppur by allowing the Criminal Appeal.

For Appellant : Mrs.N.Premalatha for  
Mr.R.Nalliyappan

For Respondent : S.Sugendran  
Government Advocate (Crl Side)

JUDGMENT

This Criminal Appeal has been filed against the judgment of conviction and sentence dated 29.01.2015 passed in Special S.C.No.5 of 2014 on the file of the Mahalir Neethimandram, Fast Track Mahila Court (Sessions Judge, Mahila Court), Thiruppur.



2 The respondent police registered a case against the appellant and two others in Crime No.7 of 2013 for the offence under Section 376 (2)(f) IPC and Section 5(1)&(m) punishable under Section 6 of POCSO Act against the appellant and Section 294(b) against the other two accused. After completing investigation, laid a charge sheet before the learned Principal District and Sessions Judge, Tiruppur, and since the offence against the woman, the case was transferred to the Mahila Court (Fast Track Court), Tiruppur District and the case was taken on file in Spl.S.C.No.5 of 2014. The learned Sessions Judge, after completing formalities, framed charges for the offence under Section 376 (2)(f) IPC and Section 5(1)&(m) punishable under Section 6 of POCSO Act against the appellant and Section 294(b) against the other two accused. The learned Sessions Judge after framing the charges proceeded with the trial in accordance with law.

3 During the trial, in order to prove the case of the prosecution, on the side of the prosecution, as many as 21 witnesses were examined as P.Ws.1 to 21 and 17 documents were marked as Ex.P1 to P17 and 8 Material Objects were exhibited as M.O.1 to M.O.8. On completion of examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C. with reference to the incriminating circumstances, they denied the same as untrue and pleaded not guilty. On the side of the defence, no one was examined and no document was marked.

4 On completion of trial and hearing of arguments advanced on either side and also after considering the material objects, the learned Sessions Judge found the appellant guilty for the offence under Sections 376(1) IPC and Section 5(1) of POCSO Act and acquitted him and other two accused from the other charges. The appellant was sentenced to undergo rigorous imprisonment for a period of two years and pay to a fine of Rs.1,000/-, in default, to undergo simple imprisonment for a further period of one month for the offence under Section 376(1) IPC and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,000/- in default, to undergo simple imprisonment for a further period of three years for the offence under Section 5(1) of POCSO Act.

5 Challenging the said judgment of conviction and sentence passed by the learned Sessions Judge, Fast Track Mahila Court, Tiruppur, in Spl.S.C.No.5 of 2014 dated 29.01.2015 the accused has filed present appeal before this Court.

6 Learned counsel for the appellant would submit that



there are material contradictions between the evidence of the victim before the Court below and the statement under Section 164 of Cr.P.C. before the Magistrate, which are not considered by the trial Court. Further, with consent of the victim girl only, the appellant had sexual intercourse with her and even the victim girl herself had stated that with her consent only the occurrence had happened. It is to be noted that the victim girl did not inform the act of the appellant soon after the first occurrence and she did not even reveal the two earlier occurrences to anyone and the present occurrence also she had not informed to anyone and the parent of the victim only came to know about the occurrence, which itself clearly proves that with consent of the victim only the appellant had sexual intercourse with her and there is no forceful sexual intercourse as projected by the prosecution. Further, P.W.15, the Doctor, who examined the victim girl medically, had categorically deposed that at the time of examination, the victim had stated that one known person with her consent had sexual intercourse with her. She further deposed that there was no internal or external injuries on the private part of the victim. Therefore under such circumstances, the ingredients of offence under Section 376 would not at all attract and hence conviction under Section 376 (1) is liable to be set aside.

6.1 Further there is inordinate delay in filing the complaint and there is no explanation offered by the prosecution for the delay. Hence unexplained inordinate delay is fatal to the case of the prosecution. If there are truth in the case of the prosecution, the victim should have filed the complaint soon after the occurrence and hence conviction against the appellant for the offence under Section 376 of IPC is liable to be set aside.

6.2 As far as conviction under the POCSO Act is concerned, prosecution has miserably failed to prove the age of the victim. It is stated that date of birth of the victim is 25.08.2001, but no document has been produced to prove the age of the victim and to substantiate the fact that the victim is a child. The trial Court, even though framed charges for the offence punishable under Section 4 and Section 5(m)&(1) of POCSO Act, punishable under Section 6 of POCSO Act, since prosecution had not proved the charges for Section 4 and Section 5(m) had acquitted the appellant, but, on the very same materials and evidence of the victim, had erroneously convicted the appellant for the offence under Section 5(1) of the POCSO Act.

6.3 The learned counsel further argued that at any angle, prosecution has miserably failed to prove the charges levelled against the appellant and had not produced any valid documents to substantiate the guilt of the appellant. The trial Court has



not appreciated the evidence of the prosecution witnesses in a right perspective and based on the available materials, has erroneously convicted the appellant, which warrants interference of this Court.

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7 The learned Government Advocate (Criminal Side) appearing for the respondent police would submit that the age of the victim was only 12 years at the time of occurrence and was studying 7<sup>th</sup> standard. On the date of occurrence, the victim was on the way to School, at that time the appellant waylaid her and had committed the sexual assault repeatedly forcefully and he threatened her not to reveal the said act committed by the appellant to anybody, if she reveals, he would take away her life.

7.1 He would further submit that P.W.1 is mother and P.W.3 is father of the victim and the victim girl was examined as P.W.2 and she has clearly deposed before the Court as well as while recording statement under Section 164 of Cr.P.C., that the appellant had sexual intercourse with her forcefully and repeatedly. The Head Master of the School, in which the victim had studied was examined as P.W.8 and she has clearly stated that on the date of occurrence, i.e. 04.01.2013, the victim girl did not attend the School.

7.2 Even though, the learned counsel for the appellant contended that the victim, while examining medically, before the Doctor, had stated that with her consent the appellant had sexual intercourse with her, but, since the victim was only 12 years old at the time occurrence, consent of the victim is immaterial. Even though, the trial Court acquitted the appellant for the other offences, had convicted the appellant for the offence under Section 376(1) IPC and Section 5(1) of the POCSO Act. Therefore, the judgment of conviction and sentence made by the trial Court does not call for any interference of this Court and there is no merit in the appeal and the same is liable to be dismissed.

8 Heard the learned counsel appearing for the appellant and the learned Government Advocate (Crl.Side) appearing for the respondent and has carefully perused the materials available on record and the judgment of the trial Court.

9 Case of the prosecution is that on 04.01.2013 and prior to that, while the victim girl, who was aged about 12 years at the time of occurrence and was studying 7<sup>th</sup> standard, was on the way to School, the appellant way laid her and forcefully had taken her to his house and had sexual intercourse against her will repeatedly and also threatened the victim girl that he would take away her life, if she reveals the same to anyone.



Therefore the present complaint.

10 In order to find out the guilt of the accused this court, as final court of fact finding, has re-appreciated the evidence independently. To substantiate the charges, prosecution had examined 21 witnesses, out of which, the victim girl was examined as P.W.2, who had clearly narrated the sexual assault committed by the appellant.

11 Coming to the contention of the learned counsel for the appellant that there are improvements and contradictions between the evidence of the prosecution witnesses. According to this Court and on a careful reading of the evidence of the prosecution witnesses, the contradictions pointed out by the learned counsel for the appellant are not material contradictions and the same will not go into root of the case of the prosecution. P.W.2 the victim girl has clearly stated that even prior to the present occurrence on 04.01.2013, the appellant had sexual intercourse with her forcefully more than 5 times and due to the threat made by the appellant, she did not reveal the same to anyone and hence the contention of the learned counsel that there is inordinate delay in filing the complaint is not acceptable, since it was properly explained by the prosecution.

12 The learned counsel for the appellant contended that with consent of the victim girl only the appellant had sexual intercourse with her and there is no forceful sexual intercourse. As per Section 376, when a prosecutrix is a minor below 16 years, question of consent does not arise. Therefore, the consent said to have given by the victim is immaterial. Hence this Court does not find any perversity in the conviction against the appellant for the offence under Section 376 .

13 It is contended by the learned counsel for the appellant that to prove the age of the victim, prosecution has failed to mark any valid document and Birth Certificate of the victim had not produced before the Court. Even though, as contended by the learned counsel for the appellant Birth Certificate of the victim had not marked, this Court, on verification, found the Birth Certificate is very well available in the CD file, which shows the date of the victim is 25.08.2001. Neither the Investigating Officer has marked the Birth Certificate, which is very well available in the CD file, nor the trial Court summoned the same. When, it is the case of the prosecution that the victim is below the age of 12 years, they should have produced the Birth Certificate or at least the trial Judge should have summoned the same. Even as per the evidence of the victim and Ex.P2, School Certificate, date of birth of victim is 25.08.2001 and she was studying 7<sup>th</sup> standard



at the time of occurrence. Therefore mere non production of Birth Certificate of the victim does not mean that the victim is not a child. This Court, during arguments, had seen the Birth Certificate of the victim and it came to know that the victim was a child under the definition of Section 2(1)(d) of POCSO Act and was below the age of 12 years on the date of occurrence.

14 As per the evidence of the victim, the offence committed by the appellant falls under Section 3 which is punishable under Section 4 and since the appellant committed the said offence repeatedly more than once and also the victim was only about 12 years, the same is falls under Section 5(m)&(l) which is punishable under Section 6. The trial Court, since Birth Certificate of the victim was not marked, had acquitted the appellant from the offence under Section 5(m). However, the Trial Court convicted the appellant for the offence under Section 376(1) and Section 5(1) of the POCSO Act.

15 As per Section 376, the minimum sentence is 7 years and the learned trial Judge had only awarded the sentence for 2 years. Further for the offence under the POCSO Act, the learned trial Judge had only awarded minimum sentence of 10 years.

16 Therefore under these circumstances, this court does not find any perversity in the judgment of the trial Court and considering the facts and circumstances of the case, this court also does not find any mitigating circumstances to reduce the sentence and there is no merit in the appeal and it is liable to be dismissed.

17 Accordingly, the criminal appeal stands dismissed. Trial Court is directed to secure the custody of the appellant/accused to serve remaining period of imprisonment, if any.

Sd/-  
Assistant Registrar

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Sub Assistant Registrar

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To

1. The Sessions Judge, Mahalir Neethimandram, Fast Track  
Mahila Court, Thiruppur.

2. The Inspector of Police, Udumalpet Police Station.



3. The Superintendent,  
Central Prison, Coimbatore.

4. The Judicial Magistrate No.1,  
Udumalpet .

5. The Chief Judicial Magistrate,  
Thiruppur.

6. The Public Prosecutor, Madras High Court.

Copy To

The Section Officer,  
Criminal Section (Records),  
High Court,  
Madras.

+1cc to Mr.R.Nalliappan, Advocate, SR.NO.52354

CRL.A.No.99 of 2015

SSI (CO)  
PM/07/01/2022