



BAIL SLIP

The Petitioners/Accused viz., Irfan, S/o.Shanbasha, was released on bail as per the Order of this Court Dated 24/07/2019 in Crl.M.P.No. 10114/2019 in Crl.A.No.123 of 2019 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.03.2021

PRONOUNCED ON : 05.07.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.123 of 2019

Irfan

.. Appellant

.Vs.

The Inspector of Police,
All Women Police Station,
Krishnagiri,
Crime No.199 of 2015.

.. Respondent

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to set aside the order of conviction passed by the Sessions Judge, Fast Track Mahila Court at Krishnagiri in Spl.S.C.No.43 of 2015 dated 20.11.2018 and under Section 366 (A) r/w Section 109 IPC for the rigorous imprisonment of five years and to pay a fine of Rs.2,500/-, in default, to undergo imprisonment of six months against the appellant herein by allowing the present Criminal Appeal.

For Appellant : Ms.S.Sridevi
Legal Aid Counsel

For Respondent : Ms.T.P.Savitha
Government Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 20.11.2018 in Spl.S.C.No.43 of 2015 by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri.

2.The case of the prosecution is that the victim girl, who is aged about 14 years at the time of occurrence, was studying



9th standard. On 01.04.2015 one Shajahan (A1) aged about 24 years convinced the victim girl and took away her from the custody of her lawful guardians without their consent to Tiruppur and had committed penetrative sexual assault. It is further alleged that Irfan (A2)/ the appellant herein had abetted for the said offence.

3.The respondent-Police registered a case in Crime No.199 of 2015 against A1 and A2/the appellant herein for 'girl missing', subsequently it was altered into Section 366(A), 120(B) IPC r/w Sections 3 and 4 of The Protection of Children from Sexual Offences Act, 2012 [hereafter referred to as 'POCSO Act' for the sake of convenience]. On completion of investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri and the same was taken on file in Spl.S.C.No.43 of 2015. After completing the formalities, the trial Court framed charges against A1 for the offence under Section 366 IPC and Section 5 (1) punishable under Section 6 of POCSO Act; insofar as A2/the appellant herein concerned, the trial Court framed charges for the offence under Sections 366(A) r/w 109 IPC.

4.In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 11 witnesses were examined as P.W.1 to P.W.11 and also marked 16 documents as Exs.P1 to P16 and no material object was marked. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant/accused and questioned under Section 313 of Cr.P.C., wherein he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, no oral and no documentary evidence was produced.

5.1 The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that A1 is guilty for the following offences and imposed sentences as follows :

(i) For the offence under Section 366 IPC, A1 was convicted and sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.5,000/-, in default, to undergo rigorous imprisonment for a period of six months;

(ii) For the offence under Section 5(1) punishable under Section 6 of POCSO Act A1 was convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.5,000/-, in default, to undergo rigorous imprisonment for a period of one year.

5.2 A2/the appellant herein is guilty for the offence under



Section 366 (A) r/w 109 IPC and convicted and sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.2,500/-, in default, to undergo rigorous imprisonment for a period of six months and ordering the sentences to run concurrently. Challenging the said conviction and sentence, the appellant/A2 is before this Court with this Criminal Appeal.

6.The learned counsel for the appellant/A2 would submit that there are material contradictions in the statement made by P.Ws.1 to 3. The trial Court failed to consider the complaint Ex.P1 given by P.W.1/ mother of the victim girl and the First Information Report/Ex.P6 which was registered by P.W.9/Inspector of Police. The name of the victim girl was mentioned as Nabisha in both Ex.P1 and Ex.P6 and later it was strike down and written as Seema, which creates suspicion on credibility of the complaint and the First Information Report. Even P.W.1 has stated that she does not know what was written in Ex.P1/complaint. The evidence of P.W.1 and P.W.3 are totally contradictory each other with regard to the relationship of A2. Even there is a doubt on the evidence of P.W.11/Inspector of Police i.e she arrested A1 and A2 on 10.04.2015 at 5.00 p.m. in London Pettai Bus Stand, when she was in patrol duty, on the identification of P.W.1. However, P.W.1 during her examination has stated that she, her relative and two police men found the accused and her daughter in Tiruppur and bring them to Krishnagiri and produced before the respondent police. Therefore, there is a material contradiction in the evidence of prosecution witnesses. The learned counsel would further submit that there is no material to establish that the appellant abetted A1 to kidnap the victim girl and to commit the offence under POCSO Act and he has not involved any commission of the said offence. All the materials are only against A1 not against this appellant/A2. There is no ingredients of Section 366 (A) IPC r/w 109 IPC made out against this appellant. However, the learned Sessions Judge failed to consider the material contradictions and also failed to found that the prosecution has not established its case beyond all reasonable doubts against the appellant herein and erroneously convicted the appellant only on assumption and on sympathy. Therefore, the judgment of conviction and sentence passed by the trial Court against the appellant/A2, is liable to be set aside.

7.The learned Government Advocate (Crl.Side) appearing for the respondent would submit that A1 is the prime accused and he is none other than the uncle of the victim girl. A1 is a married man and he married the sister of the victim girl's mother. At the time of occurrence i.e. on 01.04.2015, the victim girl, who is aged about 14 years, was studying 9th standard. He would further submit that A1 misguided the victim girl and also



threatened her and take away from her house to A2/the appellant's footwear shop. The appellant/A2 is none other than the brother of A1. The appellant also very well known that the victim girl is a minor girl and he abetted A1 to take away the victim girl to somewhere else without the knowledge of her parents and also stated that he will inform to him what was happening in the victim girl's house and A1's house. Therefore, he committed the offence under Section 366(A) r/w 109 IPC. The learned Government Advocate (Crl.Side) would further submit that though A1 took the victim girl to Nagur and other places and kept her in a rented house and stayed there and he had committed penetrative sexual intercourse on the victim girl and has committed the charged offences, the appellant/A2 aided A1 to take away the victim girl from the lawful custody of her parents. Hence, the appellant has committed the offence under Section 366 (A) r/w 109 IPC. He would further submit that the date of birth of the victim girl is 15.1.2000 and hence, the age of the victim girl is only 14 years at the time of occurrence i.e on 01.04.2015. Since the victim girl has not completed the age of 18 years, she is a minor child under the definition of Section 2(1)(d) of POCSO Act. The prosecution has proved its case beyond all reasonable doubts by examining oral and documentary evidences and the trial Court has rightly convicted the appellant. Hence, there is no merit in this Criminal Appeal and the same is liable to be dismissed.

8. Heard the learned counsel for the appellant and the learned Government Advocate (Crl.Side) for the respondent and also perused the material available on record.

9. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.

10. In order to prove the case of the prosecution, the victim girl was examined as P.W.3 and she clearly deposed that at the time of occurrence i.e. on 01.04.2015, she was studying 9th standard. Shajahan/A1, is the husband of her mother's sister and he used to come to her house frequently and behaved and spoken with her differently. She asked him to not to behave with her like this. However, A1 continuously insisted the victim girl and also informed that he liked her and asked to come with him to the lonely places. If, she refused, he would die and also threatened her that he would leave a suicide note. Therefore, on fear she went to Royakotta Bus Stand, where A1 was standing there and he took the victim girl to A2/the appellant's footwear shop and purchased new slippers for the victim girl. Thereafter, the appellant/A2 aided A1 to took away the victim girl to somewhere else and he also assured that he will inform what was happening in their houses. Thereafter, A1 took the



victim girl to Dharmapuri and then they went to Nagapattinam. Thereafter, on 02.04.2015 they went to Nagur Dharka in the early morning 2.30 hours and prayed in the Dharka and stayed there for some time. Thereafter, A1 took the victim girl to Tiruppur and kept her in a rented house and stayed there. Whenever, A1 went out side, he kept the victim girl inside the house and locked the house. When she tried to inform about the same to her parents, A1 broken her cell phone. While, they were staying at Tiruppur, A1 forcibly had sexual intercourse with her. After one week, the police traced them and took them to Krishnagiri. Thereafter, she was taken to the hospital for medical examination and also produced before the learned Judicial Magistrate for recording statement of the victim girl under Section 164 Cr.P.C.

11.P.W.1, the mother of the victim girl has deposed that A1 is the husband of her sister and A2/the appellant is the brother of A1. On the date of occurrence i.e. on 01.04.2015, the victim girl did not go to school, since she was suffering from ill health and she was alone in the house. While her sister went to her house, the house was locked. They searched the victim girl and they have not found her and hence, a complaint has been lodged before the Krishnagiri Police Station. After one week, the respondent police secured the victim girl and A1, and they sent the victim girl with her parents. P.W.2 is the father of the victim girl and his evidence is corroborated with the evidence of P.W.1.

12.P.W.4 is the relative of A1 and the victim girl and he has spoken about the relationship between A1 and the victim girl. P.W.5 is also one of the relatives of the victim and appellant and has spoken about the missing of the victim girl and also relationship between the victim girl and the appellant's family.

13.P.W.8 is the Doctor, who examined the victim girl has deposed that on 10.04.2015 when she was on duty in the Government Hospital, Krishnagiri, the victim girl aged about 14 years was produced before her and on medical examination, she found that the hymen of the victim girl was not intact. Thereafter, her vaginal smear, nail clippings and few pieces of dark hair were sent to Forensic Department and did not find anything positive and the same were entered into the Accident Register, which was marked as Ex.P4.

14.At the time of occurrence, the victim girl was aged about 14 years and was studying 9th Standard and in order to prove the age of the victim girl, the prosecution has produced School Certificate, which was marked as Ex.P14. Further, A1 is the husband of the sister of the mother of the victim girl and



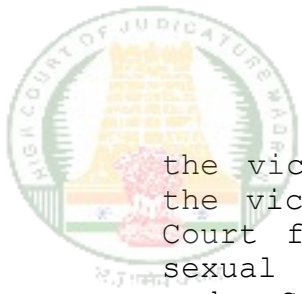
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taking advantage of their relationship, A1 used to come to the house of the victim girl and took the victim girl from the lawful custody of her parents, with out their consent to Tiruppur and kept her in a rented house and had committed penetrative sexual intercourse on her. Therefore, A1 has committed the said charged offence. Further, the evidence of P.W.3/victim girl clearly shows that A1 took the victim girl to A2/the appellant's footwear shop and purchased new slippers for her. A2/the appellant very well known that the victim girl is a minor child and A1 is a married man and he aided A1 to took the victim girl to somewhere else. Therefore, the appellant herein/A2 abetted A1 to remove the custody of the victim girl from her lawful guardians with out their consent. A2 neither prevented A1 to took the victim girl nor informed the same to her parents and the police and hence, the appellant/A2 committed the offence under Section 366 (A) r/w 109 IPC.

15. At this juncture, the learned counsel for the appellant vehemently contended that the appellant has not committed the said offence and there is no material to substantiate the same. However, the victim girl has clearly stated that A1 took the victim girl to the shop of A2 and the appellant herein/A2 had abetted the said offence. The evidence of P.W.8 Doctor also shows that the victim girl was subjected to penetrative sexual intercourse and her hymen was not intact.

16. The defence taken by the learned counsel for the appellant is that there is a contradiction in the evidence of the victim girl during trial and the statement recorded under Section 164 Cr.P.C by the learned Magistrate. It is a well settled law that the statement of the victim recorded under Section 164 Cr.P.C is not a substantive piece of evidence, it can be used by prosecution to corroborate the evidence given in the Court and defence can be used for contradiction. While recording the statement of the victim girl under Section 164 Cr.P.C./Ex.P10, the victim girl has clearly stated that A1 told her that he did not like her aunt i.e wife of A1 and he only liked the victim girl. When the victim girl refused, A1 continuously insisted and threatened her to come with him to somewhere else and at last, took her from the lawful custody of her parents to Tiruppur and had committed penetrative sexual assault on her, for which the appellant/A2 abetted for the said offence. If the evidence of sole witness is cogent, credible and trust worthy, conviction is permissible. However, the statement recorded under Section 164 Cr.P.C has been subsequently substantiated by P.W.3, while examining as witness before the Court.

17. On combined reading of the evidence of P.W.1/ mother of the victim girl, P.W.3/victim girl, P.W.8/Doctor who examined



the victim girl and the Accident Register Ex.P4, Statement of the victim girl recorded under Section 164 Cr.P.C/Ex.P10, this Court finds that the victim girl was subjected to penetrative sexual intercourse by A1. Hence, A1 has committed the offence under Section 366 IPC and Section 5(1) which is punishable under Section 6 of POCSO Act, for which A2 abetted and also aided A1 to commit the said offence. Therefore, A2 committed the offence under Section 366(A) IPC r/w 109 IPC.

18. Under these circumstances, this Court can safely come to the conclusion that the appellant/A2 has committed the said offence and the prosecution has established its case beyond all reasonable doubt. In the light of the above discussion, this Court does not find any merit in this appeal and the appeal is liable to be dismissed.

19. Accordingly, this Criminal Appeal is dismissed and the conviction and sentences passed in Spl.S.C.No.43 of 2015 dated 20.11.2018 by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri is confirmed.

20. The Legal Aid counsel appointed by this Court is entitled to legal fees as per Rules.

Sd/-

Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

ms

To

1. The Sessions Judge,
Fast Track Mahila Court,
Krishnagiri.
2. The Inspector of Police,
All Women Police Station,
Krishnagiri.
3. The Superintendent,
Central Prison,
Vellore.
4. The Honourable POSCO committee,
High Court, Madras.



5.The Member Secretary,
Tamilnadu Legal aid Services Authority,
High Court, Madras.

6.The Public Prosecutor,
High Court, Madras.

7.The Deputy Registrar | with a direction to send back the
 (Criminal Section), | original records, if any, to the
 High Court, Madras. | trial Court

+1cc to Mr.S.Sridevi, Advocate, S.R.No. 31031

CRL.A.No.123 of 2019

KV(CO)
GN(02/08/2021)