



BAIL SLIP

The Appellant/Petitioner/Accused namely Vijay, Male, 27 Years, S/o.Santhamoorthy was directed to be released on bail as per the Order of this Court dated 01.07.2020 made in Crl.MP.No.4327 of 2020 in Crl.A.No.265 & 266 of 2020 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.09.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.Nos.265 & 266 of 2020

Vijay ... Appellant (in both Appeals)
Versus

State Rep.by
The Inspector of Police,
Mathur Police Station,
Krishnagiri District.

... Respondent (in both Appeals)

Common Prayer: Criminal Appeals filed under Section 374 (2) of Code of Criminal Procedure, to allow these appeals by setting aside the conviction and sentence dated 24.01.2020, imposed on the appellant in Spl.S.C.No.77 of 2018 and Spl.S.C.No.69 of 2018 respectively, passed by the learned Sessions Judge, Fast Track Court, Krishnagiri, Krishnagiri District.

Counsel on record for Appellant: Mr. P. Veerananarayanan
(in both the appeals) for Mr.P.Saravanan

Legal Aid Counsel for Appellant
(in Crl.A.No.265/2020) : Mr. S. Rajeswaran

(in Crl.A.No.266/2020) : Mr. C. Samivel

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

COMMON JUDGMENT

These Criminal Appeals have been filed against the Judgment of conviction and sentence dated 24.01.2020 passed in Spl.S.C.Nos.69 & 77 of 2018 respectively, by the learned Sessions Judge, Fast Track Court, Krishnagiri, Krishnagiri District.

2.Since the issue involved in both the criminal appeals are



one and the same, they are taken up for hearing together and are decided by this common Judgment.

3.The case of the prosecution is that on 29.11.2017 at about 2.00 p.m., the appellant abducted the victim girl to Bangalore, married her with an intention to commit sexual assault. On the same day itself, the appellant forcibly committed sexual assault against her and continued such assault with the victim girl from 30.11.2017 to 30.12.2017. Though the mother of the victim girl warned the appellant not to follow her daughter, he did not heed to her words and took her daughter outside frequently and committed sexual assault. Initially the mother of the victim girl has lodged a complaint on 04.12.2017, before the respondent police, based on the same, case was registered in Crime No.423 of 2017, for the offences under Section 366(A) of IPC., and Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Section 9 of the Prohibition of Child Marriage Act, 2006.

4.The appellant once again abducted her daughter on 27.01.2018, hence, the mother of the victim again lodged another complaint on 14.04.2018 against the same accused for the same offence before the same respondent/police and a case was registered by the respondent/police in Crime No.138 of 2018, for the offence under Section 366(A) of IPC.,

5.After completion of investigation, the respondent police laid two charge sheets before the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District and the cases were taken on file in Spl.S.C. Nos. 69 & 77 of 2018. After completing formalities, charges were framed against the appellant for the offence under Section 366 of IPC, Section 9 of the Prohibition of Child Marriage Act, 2006 and Section 5(1) r/w Section 6 of POCSO Act, in both cases.

6.In order to prove the case of the prosecution in Spl.S.C.No.77 of 2018, before the Trial Court, on the side of the prosecution as many as 16 witnesses were examined as P.W.1 to P.W.16 and 19 documents were marked as Exs.P1 to P19. Besides, 7 material objects were marked as M.O.1 to M.O.7. and in Spl.S.C.No.69 of 2018, 15 witnesses were examined as P.W.1 to P.W.15 and 17 documents were marked as Ex.P1 to P.17 and no material object was produced.

7.After completion of examination on the prosecution side witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put against the appellant/ accused by questioning under Section 313 of Cr.P.C., in both the cases, he denied the same as false and pleaded not guilty. On the side of the defence, no oral and documentary



evidence was produced.

8. Upon completion of trial, after hearing the arguments advanced on either side and considering the materials, the learned Special Judge convicted the appellant and sentenced him as follows:

(i) for Section 366 of IPC, sentenced to undergo five years rigorous imprisonment and to pay fine of Rs.1,000/-, in default, to undergo six months rigorous imprisonment.

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

(iii) However, both the sentences were ordered to run concurrently and the period already undergone was ordered to be given set off under Section 428 of Cr.P.C.

(iv) for Section 9 of the Prohibition of Child Marriage Act, 2006, the appellant was acquitted.

9. In Spl.S.C.No.69 of 2018, also the learned Sessions Judge convicted the appellant and imposed the sentence as stated above, which were ordered to run concurrently along with the sentence imposed in Spl.S.C.No.77 of 2018.

10. Challenging the said Judgments of conviction and sentence, the appellant has filed the present two appeals before this Court.

11. The learned counsel for the appellant in both the appeals would submit that before the trial court, the victim herself stated that no occurrence has taken place as alleged by the prosecution. Further, the victim girl stated that she married the appellant and now she is living with the appellant. Therefore, no offence was made out as against the appellant as alleged by the prosecution. Even the medical evidence does not corroborate with the evidence of the prosecution witnesses. Further, the victim girl clearly stated that her mother has given a wrong complaint against the appellant and she also stated that she was not aware of the complaint given by her mother, initially. Even the Doctor stated that there is possibility of hymen getting disturbed, while playing games. The learned counsel would submit that age of the victim was not proved. The certificate produced by P.W.9 is not a conclusive proof, therefore, the commission of offence under POCSO Act, would not attract.

12. Both the learned legal aid counsel appearing for the



appellant would jointly submit that no opportunity was given to cross-examine the witnesses. The trial court has not conducted fair trial and it is in violation of procedural law and principal of natural Justice. Therefore, he stated that this court has to remit back the matter to trial court and to give opportunity to the defence counsel to argue the case against the prosecution and without cross-examination, the chief examination cannot be treated as evidence. Further, he would submit that prosecution has not established that the appellant stayed with the victim girl and he had forcibly had sexual intercourse with her or made her to pregnant. Though the trial court accepted the defence raised and also found that the prosecution has not established any proof of the marriage between the appellant and the victim, however erroneously convicted the appellant for the other offences. Therefore, the prosecution has failed to prove the charge for the offence under Section 9 of the Prohibition of Child Marriage Act, 2006. Once it has come to the conclusion that child marriage has not been proved, the trial court ought to have acquitted the appellant for the charge under Section 5 (1) which is punishable under Section 6 of the POCSO Act. Since the victim had gone with the appellant voluntarily and she had already completed the age of 18 years, the ingredients of the offence under Section 366 of IPC., and Section 5(1) punishable under Section 6 of POCSO Act are not attracted. The trial court had erroneously found the appellant guilty of the said offences and the Judgment of conviction and sentence passed by the trial court are liable to be set aside and the appeal may be allowed.

13.The Learned Government Advocate would submit that age of the victim was 17 years, at the time of occurrence. She is a child under the definition of Section 2(1) (d) of POCSO Act, therefore the offence under POCSO Act would get attracted. Even as per the evidence of P.W.2, the date of birth of the victim is 21.10.2000 and on the date of occurrence viz., 29.11.2017, she completed 17 years and not completed the age of 18 years, therefore, she is a minor and child under the definition of POCSO Act. In order to prove the date of birth of the victim Ex.P.19/Transfer Certificate of the victim was produced through P.W.9/Head Master of the school, where the victim girl studied. As per Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015, once prosecution has produced the Transfer Certificate, issued by the Educational authority to prove the age of victim, the presumption is that the age mentioned in such certificate is genuine, unless, the contrary is proved. Further, while the victim was admitted in the hospital, she has stated before the doctor that a known person had committed sexual assault on her. The doctor, who examined the victim girl in both cases are one and the same, has stated that her vagina admitted one finger and hymen was not intact. Therefore, it is proved that she was subjected to penetrative



sexual assault and while in the second time of examination, her pregnancy was confirmed. The victim girl stated before the doctor and before the police officials, at the time of examination that she was subjected to penetrative sexual assault made by the appellant. However, while she was examined as witness before the trial court, she has not supported the case of the prosecution. Even though she has not stated before the court, however, in her earlier statement, she clearly stated that she was subjected to penetrative sexual assault. The doctor is an independent witness and she has no motive to give false report. Though the mother of the victim girl tried to prevent her daughter from going with the appellant, he took the victim girl from the custody of the mother twice, which is clearly proved by P.W.3, who is neighbour.

14. On combined reading of evidence of P.W.1, P.W.3 and P.W.12/Doctor, the prosecution proved its case beyond reasonable doubt. The victim is a minor under the definition of POCSO Act, and she was subjected to penetrative sexual assault more than once. Therefore, the alleged offence falls under aggravated penetrative sexual assault within the meaning of Section 5 (1) of POCSO Act, which is punishable under Section 6 of POCSO Act. Since the appellant abducted a minor from the custody of lawful guardian twice and had sexual intercourse with her, the ingredients of the offence under Section 366 of IPC., is attracted. Therefore, appellant committed the offences under Sections 366 of IPC., and Section 5(1) punishable under Section 6 of POCSO Act and it has been proved by evidence of prosecution witnesses.

15. Though the victim stated that she lived with the appellant and the appellant is her husband, neither the defence nor the victim has proved the marriage between them, hence, the marriage was not proved in the manner known to law. Therefore, the trial court acquitted the appellant for the offence under Section 9 of the Prohibition of Child Marriage Act, 2006 and rightly convicted the appellant for the offences punishable under Section 366 of IPC., and under Section 5(1) punishable under Section 6 of POCSO Act, in both cases. The learned Government Advocate therefore prayed for dismissal of the appeals.

16. Heard the learned counsel on record for the appellant, both the legal aid counsel for the appellant as well as the learned Government Advocate (Crl.Side) appearing for the respondent and also perused the materials available on record.

17. Since the Appellate Court is a final Court of fact finding and it can re-appreciate the evidence and give independent findings, this Court has carefully gone through the



entire materials.

18.As far as the age of the victim is concerned, the prosecution examined P.W.9/Head Master of School, who issued Ex.P.19/Transfer Certificate of the victim girl, in which, the date of birth of victim is mentioned as 21.10.2000 and date of occurrence was 29.11.2017. Therefore, from the evidence of P.W.9 and Ex.P.19 and even from the evidence of victim girl, it is proved that at the time of occurrence, the victim has not completed 18 years. The victim girl was a child under the definition of Section 2(1)(d) of POCSO Act. Thus, the presumption as regards to the age of the victim is proved by the prosecution. The defence has not rebutted the presumption regarding the age of the victim.

19.As far as the charge under Section 366 of IPC., is concerned, in order to substantiate the charge, on the side of the prosecution, the mother of the victim was examined as PW.1. On reading her evidence, she has clearly narrated that the appellant took the victim for marrying her, however, the marriage was not proved in the manner known to law. Further, on reading of evidence of the P.W.1 to P.W.3, it is seen that even P.W.2/ victim also admitted earlier that the appellant had taken the victim from the custody of her mother/natural guardian without her consent. Even before the Doctor, she has stated that she was subjected to penetrative sexual assault by a known person. The appellant for the purpose of having sexual intercourse, removed the victim from the custody of lawful guardian without her consent. Therefore, the appellant has committed the offence under Section 366 of IPC.

20.As far as the charges under POCSO Act, is concerned the victim herself has stated that her date of birth is on 21.10.2000, and the date of occurrence is 29.11.2017. The victim has stated before the medical officer and also the police officials that she was subjected to penetrative sexual assault, immediately, soon after securing she was subjected to medical examination. The medical officer, who examined the victim girl has clearly stated that hymen was not intact and her vaginal portion admits one finger, thus, she was subjected to penetrative sexual assault. Therefore, the offence under Section 5(1) punishable under Section 6 of POCSO Act, committed by the appellant, was proved.

21.Though the learned counsel for the appellant would submit that the statement made by the victim was not admissible in evidence and the same has not been substantiated before the court of law, while examining as witness, the victim has stated that nothing has happened, as alleged by the prosecution. However, the medical evidence clearly shows that the victim was



subjected to penetrative sexual assault. Since the victim is a child and she was subjected to penetrative sexual assault repeatedly, it falls under Section 5 (1) of POCSO Act which is punishable under Section 6 of POCSO Act. Since the victim girl married the appellant and she is living with appellant as his wife, she made such a contra statement. Even though, the appellant was aware that the victim is minor, committed penetrative sexual assault, and also had sexual intercourse continuously. Since the victim is minor her consent is immaterial, therefore, the trial court rightly convicted the appellant for the offences and acquitted him for the offence under Section 9 of the Prohibition of Child Marriage Act, 2006. Therefore, this Court finds that there is no reason to discard the evidence of the doctor/PW.9, P.W.1 to P.W.3. While re-appreciating the evidence, this Court is of the opinion that the appellant has committed the offence under Section 366 of IPC., and also committed the offence under Section 5 (1) of POCSO Act, which is punishable under Section 6 of POCSO Act and this Court does not find any reason to interfere with the Judgment of conviction and sentence passed by the trial court. Considering the facts and circumstances of case, this court could not find any merits in these appeals and the same are liable to be dismissed.

22. In the result, the Criminal Appeals are dismissed. The suspension of sentence already granted by this Court dated 01.07.2020 in CrI.M.P.No.4327 of 2020 in CrI.A.No.265 of 2020 and in CrI.M.P.No.4328 of 2020 in CrI.A.No.266 of 2020 respectively stand cancelled. The trial court is directed to secure the appellant for sufferance of the above sentence.

Sd/-
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

klt/pbl

To

1. The Sessions Judge,
Fast Track Court, Mahila Court,
Krishnagiri, Krishnagiri District
2. The Inspector of Police,
Mathur Police Station,
Krishnagiri District.



3. The Superintendent,
Central Prison,
Vellore.

4. The Secretary,
Tamil Nadu Legal Services Authority,
High Court, Madras.

5. The Section Officer,
Criminal Section,
High Court, Madras.

6. The Public Prosecutor,
High Court, Madras.

+2ccs to Mr.MP.Saravanan, Advocate, S.R.Nos.48414, 48415

+1cc to Mr.S.Rajeswaran, Advocate, S.R.No.48077

CRL.A.Nos.265 & 266 of 2020

PCH(CO)
SU(09/02/2022)