



BAIL SLIP

The Appellant/Accused Namely, Lakshmanan, aged 34 Years S/o.Kasi was directed to be released on bail by the order of this Court dated 11.12.2020 and made in Crl.MP.No.5663/2020 in Crl.A.No.376 of 2020.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.08.2021

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Criminal Appeal No.376 of 2020

Lakshmanan

Appellant /Accused

Vs.

The State represented by
The Inspector of Police
W4 All Women Police Station
Kilpauk, Chennai- 600 010

... Respondent / Complainant

Prayer : Criminal Appeal filed under Section 374(a)(2) of Criminal Procedure Code, praying to set aside the Judgment dated 19.02.2020 passed in S.C.No. 194/2018 passed by the Session's Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Chennai- 600 104 and sentencing the Appellant to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.10,000/- and in default to undergo Rigorous Imprisonment for a period of 6 months.

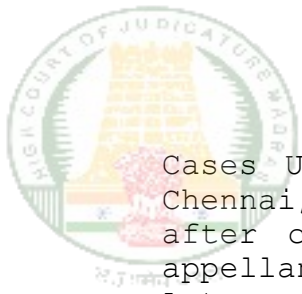
For Appellant	: Mr. Vinod Paul Tyagaraj David
For Respondent	: Mr.S.Sugendran
	Government Advocate (Crl.Side)

J U D G M E N T

(The case has been heard through video conference)

This Criminal Appeal has been filed against the Judgment dated 19.02.2020 passed in S.C.No. 194 of 2018 by the Learned Special Judge, Special Court for Exclusive Trial of Cases Under Posco Act, Chennai.

2. The respondent police initially registered the case against the appellant for the offence under Section 376 of IPC in Crime No.6 of 2017. Subsequently, the Section was altered into 5(1) punishable under Section 6 of POCSO Act. After completing the investigation, the respondent police laid charge sheet before the Special Court for Exclusive Trial of



Cases Under Posco Act, Chennai. The learned Special Judge, Chennai, taken the case on file in S.C.No 194 of 2018 and after completing the formalities, framed charge against the appellant for the offence punishable Under Section 6 of POCSO Act.

3. After framing charges, on the side of the prosecution in order to prove the case of the prosecution during trial, as many as 7 witnesses were examined as P.W.1 to P.W.7 and 14 documents were marked as Exs.P.1 to P.14 and no material object was exhibited. Further, 3 Court Documents were marked as Exs.C1 to C3.

4. On completion of examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant by questioning under Section 313 Cr.P.C. However, he denied the same as false and he pleaded not guilty. On the side of the defence no oral or documentary evidence was marked.

5. On completion of trial and hearing the arguments advanced on either side, the trial Court convicted the appellant for the offence punishable under Section 6 of POCSO and sentenced him to undergo 10 years of rigorous imprisonment and to pay fine of Rs.10,000/- in default to undergo 6 months rigorous imprisonment and also awarded compensation of Rs.7,00,000/-. Challenging the same, the appellant has filed the present appeal before this court.

6. The learned Counsel for the appellant would submit that on conclusion of trial, the trial Court did not give any opportunity to the counsel for the accused to advance his arguments. Though, he filed a petition under Section 309 Cr.P.C., the trial Court failed to consider and rejected the same and pronounced the Judgment without hearing his arguments. The said denial of giving an opportunity to the defence side to put forth their arguments violates Article 39A of the Constitution of India and the accused has got every right to defend his case. In all stages, the trial Court should ensure fair hearing and provide opportunities to the accused to defend their case whereas, in this case, the trial Court did not provide the opportunity to the defence counsel to put forth his arguments. Even assuming, the defence counsel after the trial has not put forth his arguments in order to protract the case, it is the duty of the trial Court to appoint a legal aid counsel and should have heard the arguments through the counsel appointed from the Legal Service Authorities. Therefore, the trial Court failed to do the same and simply stated that the defence counsel has not argued the matter and without hearing the arguments, pronounced the Judgment which warrants interference of this Court to set aside the Judgment and remit the matter back to the trial Court. After giving opportunity to the defence counsel and after hearing the arguments, the Judgment can be delivered.



6.1 The learned Counsel would further submit that though initially the case was registered for the offence under Section 376 IPC, later without any material, altered the charge punishable under Section 6 of POCSO Act. The learned Judge has miserably failed to consider the fact that even the doctor has stated that there is no external injury and therefore, it is proved that with the consent of the victim only the appellant had sexual relationship with her and the victim has not resisted or given any objection and willingly had sexual intercourse with the appellant due to which, she became pregnant and she also gave birth to a child which itself shows that it is only a consensual sex and the trial Court failed to appreciate the same which warrants interference. In order to substantiate his contention, the learned counsel for the appellant relied on the following Judgments;

1. AIR (2020) Supreme Court 232 (Anokhilal Vs. State of Madhya Pradesh)
2. Crl.Appl.No.750-751 of 2020 (Parveen Vs. State of Haryana)

7. The learned Government Advocate (Crl. Side) would submit that when the victim was a child, she was subjected to penetrative sexual assault by the appellant and thereby, she became pregnant and subsequently, she also gave birth to a child. The DNA profile was also taken and sent for Forensic Department and the report was also received and the same has been marked as Court Document from which, it has been proved that the appellant is the biological father of the baby born to the victim. Though, initially the case was registered for the offence under Section 376 IPC, after enquiry, it was found that the victim was a child under the definition of 2(1) (d) of POCSO Act and thereby, the Section was altered to the offence punishable under Section 6 of POCSO Act and the trial Court rightly appreciated the entire evidence. He would further submit that though sufficient opportunity was given to the defence Counsel, for the reasons best known to him, he did not come forward to argue the matter and he was protracting the case. Therefore, the trial Court, considering the entire materials and evidence and hearing the arguments advanced by the learned Special Public Prosecutor, delivered the Judgment and there is no perversity in the order passed by the Court below. Even though, sufficient opportunity was given to the appellant, neither the appellant nor his Counsel utilized the opportunity. Therefore, there is no merit in this case and the appeal is liable to be dismissed.

8. Heard the learned Counsel for the appellant and the learned Government Advocate (Crl. Side) appearing for the respondent police and perused the materials on record.



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9. The case of the prosecution is that the victim is the sister in law of the appellant. The victim used to visit the house of the appellant during which, the appellant developed relationship and had physical relationship with the victim due to which, she became pregnant. Hence, the complaint.

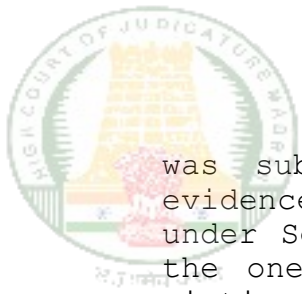
10. In this case, since this Court is the Appellate Court as final Court of fact finding, it has to re-appreciate the evidence independently and to give its findings. Accordingly, this Court has carefully gone through the entire materials and the Judgment of the trial Court and re-appreciated the entire evidence independently and give its finding.

11. In order to substantiate the charge framed against the appellant, on the side of the prosecution as many as 7 witnesses were examined and 14 documents were marked and 3 Court documents were also marked. Out of the 7 witnesses, the victim was examined as P.W.1 and she was produced before the Judicial Magistrate during investigation for recording her statement under Section 164 Cr.P.C. and she was also produced before the doctor for medical examination and the doctor who examined the victim girl was examined as P.W.5.

12. A combined reading of the evidence of P.W.1 and P.W.5, Ex.P.2-the statement recorded under Section 164 Cr.P.C. and Ex.P.3- certificate of examination of sexual offences in respect of the accused and also Ex.C.3-DNA report clearly shows that the victim was subjected to penetrative sexual assault.

13. In order to prove the age of the victim, the birth certificate of the victim was marked as Ex.P.1. The victim-P.W.1 during examination has stated that her date of birth is 22.03.2001 which corroborated with Ex.P.1/copy of birth certificate of the victim. The date of offence is during 2017 and the victim gave birth to a child on 25.02.2018. Therefore, on the date of occurrence, the victim girl was only 16 years. Therefore, from the evidence, of P.W.1-victim, Ex.P.1-birth certificate and Ex.C.1-School Record Sheet of the victim, the prosecution has proved that the victim has not completed the age of 18 years at the time of occurrence. Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, says about Presumption and Determination of age as to prove the age of the Juvenile as well as the victim by evidence. It is the duty of the prosecution to prove the age of the prosecutrix. Accordingly, in this case, the prosecution has proved its case beyond all reasonable doubt that the victim was a child at the time of occurrence under the definition of Section 2(1) (d) of POCSO Act.

14. Further, from the evidence of P.W.1 -victim and P.W.5 -doctor who conducted medical examination on the victim and Ex.P.2-the statement recorded under Section 164 Cr.P.C., Ex.P.7-certificate of examination for sexual offences in respect of the victim child and also Ex.C.3-DNA Report from the forensic Department, it is clearly proved that the victim



was subjected to penetrative sexual assault and from the evidence of P.W.-1 victim and Ex.P.2-the statement recorded under Section 164 Cr.P.C., it is proved that the appellant is the one who committed the penetrative sexual assault on the victim. Further, Ex.C.3 clearly shows that the appellant is the biological father of the baby born to the victim. Therefore, it is clearly proved that the victim was subjected to penetrative sexual assault by the appellant. This Court finds that the appellant has committed offence under Section 5 (1) which is punishable under Section 6 of POCSO Act. Therefore, the trial Court has rightly appreciated the entire evidence and recorded conviction to the appellant for 10 years which is a minimum sentence and according to the Court, there is no mitigating circumstances to reduce the sentence.

15. Though the learned Counsel for the appellant contended that the trial Court did not give opportunity to put forth his arguments, a careful perusal of records would go to show that there is no complaints/allegations against the trial Judge neither for not giving any opportunity for cross examination, nor for not giving opportunity to recall the witnesses. The only contention is that the trial Court has not given opportunity to put forth the arguments of the defence counsel.

16. A reading of the adjudication order from the typed set of papers, reveals that after conclusion of trial, the case was adjourned to several times at the request of the defence Counsel. But despite sufficient opportunity provided to the defence counsel, he has not utilized the same. At last, purposefully he filed a petition under Section 309 Cr.P.C. on 24.01.2020 for protracting the matter. Therefore, the Trial Court refused to grant time to the learned counsel for the defence and considering the entire materials and the DNA report proving that the appellant is the biological father of the baby born to the victim, had come to the conclusion that the prosecution proved that the appellant committed aggravated penetrative sexual assault on the victim. Since, the victim was a child and not completed 18 years, there is presumption under Section 29 of the POCSO Act that the appellant has committed the offence and undoubtedly it is a rebuttable presumption. The appellant has not rebutted the presumption in the manner known to law. The defence Counsel would have thought that he has no other case and therefore, he might have tried to protract the case from pronouncing the Judgment. Therefore, the trial Court rightly dismissed the petition filed by the appellant/accused under section 309 Cr.P.C.

17. This Court come to the conclusion that the appellant has committed aggravated penetrative sexual assault on the victim which falls under Section 5(1) and punishable under Section 6 of POCSO Act. Therefore, the trial Court rightly appreciated the evidence and convicted and sentenced the



appellant to undergo 10 years rigorous imprisonment which is a minimum sentence as prescribed under Section 6 of POCSO Act. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

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18. As per Section 35 of the POCSO Act, the victim has to be examined within 30 days from taking cognizance of the charge sheet and the trial has to be completed within one year from the date of taking cognizance. Whereas, in this case, the trial Court after taking the charge sheet on file, framed charges on 13.08.2018 itself. Thereafter, P.W.1 was examined on 07.09.2018 and the Judgment was pronounced only on 19.12.2020 which clearly shows that even the proceedings went beyond the statutory period as contemplated under Section 35 of POCSO Act. Therefore, the submission made by the learned counsel for the appellant that opportunity for fair hearing was not given is liable to be rejected. A reading of the entire records clearly shows that though the appellant was given sufficient opportunity, the appellant was trying to protract the trial. At last, after completing the trial, since the appellant felt that he has no merit in the case during the arguments, he tried to protract the trial several times. Further all the opportunities were given. Therefore, considering and analysing all the materials available, the Trial Court had pronounced the Judgment. Though, all the opportunities were given to the defence counsel, he has not made use of the opportunities given by the trial Court.

19. Further, the Judgments relied on by the Counsel for the appellant are not applicable to the facts of the present case on hand. In this case, a reading of the materials and adjudication shows that sufficient opportunity was given to the defence Counsel. However, he did not make use of the opportunities given by the trial Court. No prejudice would be caused to the appellant since, the learned trial Judge has elaborately gone into the facts and given findings for convicting the appellant/accused, which according to this Court, is well founded.

20. This Court as appellate Court, re-appreciated the entire evidence independently and gives its finding that the appellant has committed the charged offence. A careful perusal of records and Section 35 of POCSO Act, this Court is of the opinion that there is no merit in the appeal and the appeal is liable to be dismissed.

21. Accordingly, this Criminal Appeal is dismissed with the above observations. Trial Court is directed to secure the appellant/accused to serve remaining period of imprisonment, if any.

Sd/-

Assistant Registrar

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Sub Assistant Registrar



To

1. The Session's Judge,
Special Court for Exclusive Trial of Cases under POCSO
Act, Chennai- 600 104

2. The State represented by
The Inspector of Police
W4 All Women Police Station
Kilpauk, Chennai- 600 010

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

4. The Public Prosecutor Officer, High Court, Madras.

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

+2 ccs to Mr. David Tyagaraj, Advocate Sr. NO. 42856
Criminal Appeal No. 376 of 2020

ca (CO)
A.SK (28.01.2022)