



Bail Slip

The Petitioners/Accused vuz M.Shiva S/o. Manickam Male aged 25 years was released on bail as per the order of this Court dated 11.09.2020 in CrI.M.P. No. 4904/2020 in CrI.A.No. 316/2020.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.09.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.316 of 2020

M.Shiva

..Appellant/1<sup>st</sup> Accused

.Vs.

State Rep. by  
The Inspector of Police,  
All Women Police Station,  
Krishnagiri, Krishnagiri District,  
Crime No.18 of 2016

..Respondent/Complainant

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to allow this appeal by setting aside the conviction and sentence imposed to the appellant by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District, dated 11.02.2020 in Spl.S.C.No.06 of 2017.

For Appellant: Mr.P.Veeranarayanan  
for M/s.M.P.Saravanan  
and Mr.P.G.Perumal Pandiyan  
Legal Aid Counsel

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

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 11.02.2020 passed in Spl.S.C.No.6 of 2017 by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District.



2.The case of the prosecution is that on 01.11.2016 the appellant/A1 abducted the victim child from the lawful custody of her parents without their consent to Krishnagiri. Thereafter, they were roaming in and around Krishnagiri and went to Marudhaipalli and stayed there in a rental house. At that time, the appellant forcibly tied a knot and had sexual intercourse with her more than once. It is further alleged that A2 had abetted the said offence. Hence, P.W.1/father of the victim girl filed a complaint/Ex.P1 against the accused.

3.The respondent police originally registered a case in Crime No.18 of 2016 against the appellant/A1 for the offence under Section 366(A) IPC subsequently altered into Sections 366(A) IPC, Sections 5(1), 6, 16 and 17 of The Protection of Children from Sexual Offences Act, 2012 [hereinafter 'POCSO Act' for the sake of convenience]. On completion of the investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District. Since the offence is against a girl child, it falls under the definition of 2(1)(d) of POCSO Act. After completing the formalities, the learned Sessions Judge taken the case on file in Spl.S.C.No.6 of 2017 and charges were framed against the 1<sup>st</sup> accused/appellant herein for the offence under Section 366 IPC and Section 9 of Prohibition of Child Marriage Act, 2006 and Section 5(1) which is punishable under Section 6 of POCSO Act; and as against the 2<sup>nd</sup> accused for the offence under Section 10 of Prohibition of Child Marriage Act, 2006 and Section 17 of POCSO Act.

4.In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 15 witnesses were examined as P.W.1 to P.W.15 and marked 23 documents as Ex.P1 to Ex.P23 and no material object was marked. After examining the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution were put before the appellant and questioned under Section 313 of Cr.P.C and he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, three witnesses were examined as D.W.1 to D.W.3 and no material object was marked.

5.The Court below, after hearing the arguments advanced on either side and also considering the materials available on record, found that A2 was found not guilty for the charged offences and acquitted him from the charges, but, the 1<sup>st</sup> accused/appellant was found guilty for the following offences:





8.The learned Legal Aid Counsel appearing for the appellant would submit that at the time of occurrence, the victim girl was not a child and she voluntarily eloped with the appellant. P.W.1/father and P.W.2/mother of the victim girl have given only the tentative date of birth of the victim. P.W.11/Assistant Headmistress of the school in which the victim girl studied, has deposed that based on the school records she has given Ex.P.11/Study certificate. It is a well settled proposition of law that prosecution has to prove the age of the prosecutrix by way of valid documents. However, in the present case, no birth certificate has been marked by the prosecution to prove the age of the victim girl. Only based on Ex.P11 the trial Court has decided the date of birth of the victim girl as 02.07.2000, which is not a valid document to confirm her age. Therefore, the trial court failed to appreciate the oral and documentary evidence and wrongly convicted and sentenced the appellant and hence, the judgment passed by the trial Court is liable to be set aside.

9.1 The learned Government Advocate (Crl.Side) for the respondent would submit without consent of the natural/lawful guardians of the victim girl, the appellant forcibly has taken the custody of the victim girl and married her and also had sexual intercourse with her. Since the age of the victim girl is 16 years, the appellant has committed the offence under Section 366 IPC, Section 9 of Prohibition of Child Marriage Act, 2006 and Section 5 (1) which is punishable under Section 6 of POCSO Act. In the First Information Report, it is mentioned that a known person kidnapped the victim girl and had committed sexual assault on her. Further, P.W.10/Doctor who examined the victim girl has clearly deposed that vagina admitted one finger and there was no evidence for sexual intercourse, since she was in menstrual period at the time of medical examination, the Doctor would not give information regarding the sexual assault. Subsequently, the victim girl was also produced before the learned Judicial Magistrate II, Krishngiri for recording her statement under Section 164 Cr.P.C/Ex.P2, in which, the victim girl clearly stated that she voluntarily eloped with the appellant and they got married and they stayed in rented house, which is situated at Marudheppalli and on the same day they were having sexual intercourse. She further stated that both were living happily as husband and wife and during pongal festival, while they were going to temple, they were waiting at Marudheppalli Bus stand and at that time, the respondent/police arrested the appellant and secured the victim girl and produced before the Court.



9.2 The learned Government Advocate (Crl.Side) would further submit that during trial, the victim was examined as P.W.3 and she has deposed that they went to Krishnagiri and at that time, the appellant gave juice and thereafter, she became unconscious and had committed sexual assault on her. The evidence of the victim during trial and her statement recorded under Section 164 Cr.P.C and the entries made in the Accident register clearly show that the appellant has committed penetrative sexual assault on the victim. Since at the time of occurrence the victim was only 16 years, the appellant forcibly has taken the custody of the victim girl from the lawful guardians of her parents without their consent and the act committed by the appellant is punishable under Section 366 of IPC. Since victim is a child and the appellant committed penetrative sexual assault on her for more than once, he has been convicted for the offence under Section 5 (1) which is punishable under Section 6 of POCSO Act. The trial Court rightly appreciated the entire evidence and convicted and sentenced the appellant for the said charges. He would further submit that from the evidence of the victim girl, it is seen that she has not stated anything adversely about A2 and therefore, the trial Court acquitted A2 from the charged offences. Since marriage between the appellant and the victim girl is not proved in the manner known to law, the trial Court acquitted the appellant for the offence under Section 9 of Prohibition of Child Marriage Act, 2006. However from the evidence of the victim, the trial Court found that the appellant committed the offence under Section 366 of IPC and Section 5 (1) which is punishable under Section 6 of POCSO Act.

9.3 The learned Government Advocate (Crl.Side) would further submit that though the learned counsel for the appellant contended that medical evidence does not corroborate with the evidence of victim girl. However, P.W.10/ Doctor has clearly deposed that since the victim girl had menstrual period, during the medical examination and she was not able to examine her. However, the Doctor has stated that vagina admitted one finger. The victim girl also stated that she was subjected to sexual assault by the appellant. Considering the fact that when there is a contradiction between the evidence of the victim girl and the Doctor evidence, however, the evidence of the victim prevail over the medical evidence. In the present case, the victim girl clearly stated that she was subjected to penetrative sexual intercourse and therefore, the trial Court rightly convicted and sentenced the appellant for the offence under Section 366 IPC and Section 5(1) r/w 6 of POCSO Act and hence,



there is no merit in this appeal and the same is liable to be dismissed.

10. Heard the learned counsel for the appellant; the learned Legal Aid Counsel appearing for the appellant and the learned Government Advocate (Crl.Side) for the respondent and also perused the materials available on record.

11. 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.

12. On a careful perusal of the deposition of P.W.3/victim girl, it reveals that on 30.10.2016, without consent of her natural/lawful guardians, the appellant forcibly took her to Krishnagiri and they stayed in a rented house and she was subjected to sexual assault by the appellant. Further she has deposed that her date of birth is 02.07.2000, whereas, date of occurrence is 30.10.2016 and hence, at the time of occurrence the victim was 16 years. In order to prove the same the prosecution examined P.W.11/Assistant Headmistress of the school, in which the victim was studied and marked Ex.P.11/Study certificate. On a perusal of Ex.P.11, it is seen that the date of birth of the victim is 02.07.2000. Though, the defence counsel has stated that the document/Ex.P.11, which was given by P.W.11 is not a conclusive proof to prove the age of the victim girl. As per Section 94(2) of THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015, the age can be proved through the certificate given by the educational institution. Therefore, the Court perused the public record Ex.P.11 and found that the date of birth of the victim girl is 02.07.2000 and at time of the occurrence, the victim was a child and it comes under the definition of 2(1)(d) of POCSO Act. Therefore, this Court finds that the prosecution has proved the age of the victim girl is below 18 years. Hence, the contention raised by the learned counsel for the appellant is not acceptable.

13. As far as the offence under Section 366 IPC is concerned, the age of the victim was 16 years at the time of occurrence, since she is a 'child', the parents of the victim gave a complaint against appellant for kidnapping. P.W.1/father of the victim girl has clearly deposed that his daughter eloped with the appellant, without their consent. The appellant has forcibly taken the custody of the minor child, without consent of her natural guardians, though the victim girl has stated that she voluntarily eloped with the appellant, however considering the age of the victim, the act committed by the appellant falls



under Section 366 IPC and therefore, this Court finds that the appellant committed offence under Section 366 of IPC.

14. As far as offence of aggravated penetrative sexual assault is concerned, P.W.3/victim has very clearly stated that both the appellant and victim girl left together and they got married and thereafter, they had sexual intercourse. Since the marriage was not proved, as per the evidence of the victim girl during trial, even accepting that the appellant married the victim girl, neither the prosecution nor the complainant proved the marriage between them in the manner known to law. The appellant removed the custody of the victim from her natural guardians, without their consent and took her to various places and stayed away from the house of the victim and had committed sexual assault on her for more than once and hence, the act committed by the appellant falls under Section 5 (1) of POCSO Act which is punishable under Section (6) of POCSO Act.

15. On a perusal of Ex.P9/Accident Register it is clearly mentioned that it is a case of sexual assault and the victim has clearly stated that she eloped with her neighbour two months ago. Therefore, as already stated that, the age of the victim is only 16 years and she is a child under the definition of POCSO ACT. The victim girl herself admitted while recording her statement under Section 164 Cr.P.C that she eloped with neighbour, and stayed along with the appellant and they had sexual intercourse, therefore, the act committed by the appellant falls under Section 366 IPC and under Section 5 (1) which is punishable under Section 6 of POCSO Act.

16. The Doctor/P.W.10 who examined the victim girl has stated that there is no symptoms for sexual intercourse, there is no external injuries and she is not pregnant, however, the Doctor has stated that vagina admits one finger. Since the victim girl had menstrual period at the time of medical examination, the Doctor was unable to find out whether she was subjected to sexual assault or not. However, during medical examination, the victim girl has stated that she was subjected to penetrative sexual assault by a known person and subsequently, she was produced before the learned Judicial Magistrate for recording statement under Section 164 Cr.P.C and she has stated that she married the appellant at that time she had sexual intercourse with him. During trial, the victim girl stated that she was subjected to penetrative sexual assault by the appellant. Therefore, the evidence of the victim/P.W.3 and Doctor/P.W.10 clearly show that the victim was subjected to penetrative sexual assault. In cases of this nature presence of eye witnesses are



mostly improbable. The evidence of the victim girl regarding sexual assault is enough for conviction and it does not require any corroborative evidence, unless there are compelling reasons seeking for corroboration. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible. However, as regards the contradictions between the evidence of the victim girl and medical evidence, the evidence of the victim girl prevail over the medical evidence. Even though the victim eloped with the appellant, he could have avoided to take her along with him. However, without consent, the appellant forcibly taken the custody of the victim girl, which falls under Section 366 IPC and had committed sexual assault on her during the stay from the outside of the house it falls under Section 5 (1) which is punishable under Section 6 of POCSO Act.

17. Under these circumstances, this Court, being an Appellant Court as a fact finding Court reappreciated the entire evidence independently and arrived at a just conclusion that the appellant has committed sexual assault on the victim girl and the trial Court has rightly convicted and sentenced the appellant and this Court does not find any mitigating circumstances to reduce the sentence imposed by the trial Court.

18. 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. Accordingly, this Criminal Appeal is dismissed and the judgment of conviction and sentence passed in Spl.S.C.No.6 of 2017 by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District, is hereby, confirmed. If the appellant/accused is not in duress, the trial Court is directed to take appropriate steps to secure the presence of the appellant to serve the remaining period of sentence.

s/d-  
Assistant Registrar

True Copy

Sub-Assistant Registrar

pbl  
To

1. The Sessions Judge,  
Fast Track Mahila Court,  
Krishnagiri, Krishnagiri District.



2.The Inspector of Police,  
All Women Police Station,  
Krishnagiri, Krishnagiri District.

3.The Public Prosecutor,  
High Court, Madras.

4. The Superintendent  
Central Prison, Vellore.

+1 CC to Mr.M.P. Saravanan, Advocate sr 48416.

CRL.A.No.316 of 2020

GSM(CO)  
SP(08/03/2022)