



BAIL SLIP

The Appellant/Accused namely M.Rajadurai, S/o.Murugesan was directed to be released on bail as per order of this Court dated 21.09.2020 and made in Crl.Mp.5287 of 2020 in Crl.A.No.349 of 2020 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.NO.349 OF 2020

M.Rajadurai

... Appellant/Accused

vs.

State Rep. by
The Inspector of Police,
All Women Police Station,
Omalur, Salem.
Crime No.31 of 2018

... Respondent/Complainant

PRAYER:

This Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code, to set aside the judgment in Old S.C.No.38 of 2019 and New S.C.No.237 of 2019 dated 20.08.2020 on the file of Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Salem.

For Appellant : Mr.K.Sathish Kumar

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

J U D G M E N T

This criminal appeal has been filed to set aside the judgment in Old S.C.No.38 of 2019 and New S.C.No.237 of 2019 dated 20.08.2020 on the file of the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Salem.



2. The respondent police registered a case in Crime No.31 of 2018 against the appellant for the offence under Sections 363 and 366 IPC and also Section 5(1) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act' for short). After investigation, the respondent police laid charge sheet before the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Salem.

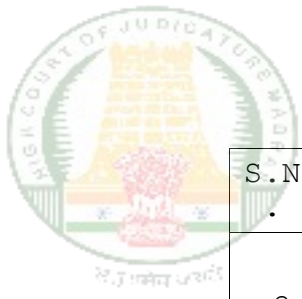
3. The learned Sessions Judge has taken the charge sheet on file in Old.S.C.No.38 of 2019 and subsequently, re-numbered as New.S.C.No.237 of 2019. After completing the formalities, the learned Sessions Judge framed charges against the accused for the offence punishable under Sections 363 and 366 IPC and Section 6 of POCSO Act.

4. After framing charges, in order to prove the case of the prosecution during trial, as many as 8 witnesses were examined as PW.1 to PW.8 and 21 documents were marked as Ex.P1 to Ex.P21 on the side of the prosecution. No material object was exhibited.

5. After completing the examination of the evidence of 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 incriminating circumstances appear against him and he denied the same as false and pleaded not guilty. On the side of the defence, no witness was examined and no document was marked.

6. On completion of trial, after hearing arguments advanced on either side and considering the materials, the Sessions Court found guilt of the appellant/accused for the offence punishable under Sections 363 and 366 IPC and also Section 6 of POCSO Act and he was convicted and sentenced as follows:-

S.No .	Provision under which convicted	Sentence
1	Section 363 IPC	Four years rigorous imprisonment and fine of Rs.5,000/-, in default to undergo three months simple imprisonment
2	Section 366 IPC	Four years rigorous imprisonment and fine of Rs.10,000/-, in default to undergo six months simple imprisonment.



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S.No	Provision under which convicted	Sentence
3	Section 6 of POCSO Act	Ten years rigorous imprisonment and fine of Rs.50,000/-, in default to undergo one year simple imprisonment.

7. Challenging the said judgment of conviction and sentence, the appellant/accused has filed the present criminal appeal before this Court.

8. The learned counsel for the appellant would submit that the prosecution has failed to prove the charges as framed against the appellant. The victim girl herself stated that she was not kidnapped or forcefully taken by the appellant from the custody of the lawful guardian and therefore, the offence punishable under Sections 363 and 366 is not made out. Further, he would submit that the prosecution failed to prove the charge punishable under Section 6 of POCSO Act, since there is no aggravated penetrative sexual assault made out. There are material contradictions from the previous statement of the victim and also the deposition made before the Trial Court and there is no material to show that the appellant had penetrative sexual assault with the victim more than once. Even, the Doctor has not stated that there is possibility of repeated sexual assault. Therefore, under these circumstances, conviction for the offence under Section 5(1) which is punishable under Section 6 of POCSO Act, is unwarranted and the learned Sessions Judge failed to appreciate the evidence and convicted the appellant on the ground of sympathy.

9. Further, he would submit that both the appellant and the victim fell on love and they loved each other. Since the parents of the victim took effective steps to marry the victim to the other person, she left along with the appellant and the appellant did not kidnap the victim and there is no evidence to show that the appellant kidnapped the victim forcefully and without her consent. Since they loved each other, the appellant had physical relationship with the consent of victim, that too once. Since the parents of the victim not accepted their marriage and tried to marry her to other person, she left with the appellant and subsequently, after attaining majority, she got married with the appellant and now she is pregnant. Since the victim married the appellant against the will of her parents, the parents are not supporting the victim. Now, the victim became major and therefore, she is under the care and custody of the appellant only and she is pregnant. The victim is suffering due to conviction and imprisonment of the appellant and therefore, judgment of the learned Sessions Court is liable



to be set aside and the appeal has to be allowed.

10. Learned Government Advocate (Crl.Side) would submit that the mother of the victim girl gave a complaint before the respondent police. On investigation, it got revealed that the victim and the appellant loved each other and the appellant took the victim without the consent of the lawful guardian and subsequently, they had physical relationship with each other. Subsequently, the parents of the victim gave complaint before the police. The subsequent marriage will not absolve commission of offence, since the offence is against child and it is grave in nature and also it is not a compoundable offence. The evidence of the victim and the complaint clearly shows that the appellant had penetrative sexual intercourse with the victim and the Doctor also has given the opinion that after conducting medical examination on the victim that the hymen of the victim was not intact and her vagina admits one finger and there was a possibility of having sexual intercourse and therefore, the prosecution has proved its case beyond reasonable doubt and the Trial Court rightly appreciated the evidence of the prosecution witnesses and materials placed by the prosecution and rightly convicted the appellant for all the charges framed against him and there is no merit in the present appeal.

11. In the complaint, the victim girl herself stated that on the date of occurrence they are staying in the friend's house and the appellant had sexual intercourse with her more than three times and therefore, he has committed penetrative sexual assault more than once. Therefore, the learned Sessions Court rightly framed charges for the offence punishable under Section 6 of POCSO Act, since it is aggravated penetrative sexual assault. There is no merit in the appeal and the appeal is liable to be dismissed.

12. Heard both sides and perused the materials available on record.

13. The case of the prosecution is that the victim was aged about 16 years and she discontinued her 10th Standard and worked at S.N.B Textiles, Omalur. The appellant is the neighbour of the victim and they loved each other. On 01.12.2018 at 4.00 p.m., the appellant had kidnapped the victim and went to Erode and stayed at Kamadhenu lodge in Room No.110 and he had sexual intercourse with her for more than three times for which the case was registered against the appellant for the offence punishable under Sections 363 and 366 IPC and Section 5(1) punishable under Section 6 of POCSO Act. After investigation, the respondent police laid charge sheet before the learned Sessions Judge. After completing formalities, the learned Sessions Judge, found guilt of the appellant and convicted and



sentenced him as stated above. Hence, this appeal.

14. This Court, being an Appellate Court, is the final Court of fact finding and it has to necessarily re-appreciate the entire evidence and give an independent finding, for which this Court carefully perused the entire materials.

15. The Trial Court framed charges against the appellant for the offence punishable under Sections 363 and 366 IPC and also Section 6 of POCSO Act.

16. In order to substantiate charges framed against the appellant, before the Trial Court, on the side of the prosecution, as many as 8 witnesses were examined as PW.1 to PW.8 and 21 documents were marked as Ex.P1 to Ex.P21. No material object was exhibited. On the side of the defence, no oral and documentary evidence was produced. Totally 8 witnesses were examined, out of which, PW.2 is the victim, PW.1 is the mother of the victim, PW.3 is the father of the victim and PW.5 is the Head Master of the school in which the victim studied and he has spoken about the date of birth of the victim. PW.7 is the Doctor, who had conducted medical examination of the victim and PW.6 is the Doctor, who had conducted medical examination of the accused.

17. A careful reading of the evidence of PW.2/the victim produced before the Judicial Magistrate for recording statement under Section 164 of Cr.P.C. shows that she has not stated anything about penetrative sexual assault. However, in the complaint, she has mentioned it and also from the evidence of PW.1 to PW.3 and PW.7/the Doctor, the prosecution proved the penetrative sexual assault.

18. As far as the age of the victim girl is concerned, PW.5/Head Master of the school in which the victim had studied, was examined and Ex.P7 is the school certificate and from the evidence of PW.5 and Ex.P7, the prosecution proved that the date of birth of the victim is 22.07.2002 in view of presumption under Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Section 94(2)(i) of the Act, reads as follows:-

"94(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining:-



(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;"

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19. From the evidence of PW.1 to PW.3, PW.7, Ex.P1, Ex.P12 and Ex.P13, it is clearly shown that the victim was subjected to penetrative sexual assault and from the evidence of PW.6 and Ex.P9, it is shown that the appellant is a capable of having sexual intercourse with the victim and therefore, from the evidence of PW.1 to PW.7, Exs.P1, P7, P9, P10 and P13, the prosecution has proved its case that the victim girl is child as defined under Section 2(1)(d) of the POCSO Act and the victim was subjected to penetrative sexual assault and the appellant one who has committed such a penetrative sexual assault and therefore, the Trial Court rightly appreciated the evidence and convicted the appellant for all the charges framed against him.

20. Even the victim girl has clearly stated that she had voluntarily left with the appellant and since the victim is child, who had not completed the age of 18 years, and the appellant removed her from the custody of the lawful guardian, without their consent and had sexual intercourse, therefore, the offence falls under Section 361 which is punishable under Section 363 IPC and therefore, the Trial Court rightly convicted the appellant for the offence under Sections 363 and 366 IPC.

21. Though the prosecution proved that the appellant committed penetrative sexual assault, but however, the charge is for the offence punishable under Section 6 of POCSO Act, which is aggravated penetrative sexual assault. As contended by the learned counsel for the appellant except Ex.P1/complaint, no material has been produced to show that the appellant had repeated sexual assault on the victim more than once. Since the victim already completed the above age of 12 and there is no repeated sexual assault or injury or any other ingredients, the offence does not falls under Section 5(1) of POSCO Act. However, the prosecution proved that the victim was subjected to penetrative sexual assault, which was committed by the appellant. Therefore, the offence falls under Section 3 which is penetrative sexual assault and which is punishable under Section 4 of POCSO Act.

22. Since learned counsel for the appellant stated that they fell in love and subsequently, after attaining the age of majority, they got married each other, now the victim is pregnant and considering the fact that the minimum sentence prescribed in Section 4 of POCSO Act as seven years and therefore, under these circumstances, this Court considering the facts and circumstances of the case, modified the offence



punishable under Section 6 to Section 4 of POCSO Act and reduced the sentence from ten years to seven years, which will meet ends of justice.

23. The criminal appeal is dismissed with the above modification.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

1. The Sessions Judge,
Special Court for Exclusive Trial of Cases
under POCSO Act, Salem
2. The Inspector of Police,
All Women Police Station,
Omalur, Salem.
3. The Superintendent,
Central Prison, Salem.
4. The Deputy Superintendent of Police,
Salem.
5. The Inspector of Police,
All women Police Station,
Thiruttani,
Tiruvallur District.
6. The Public Prosecutor,
High Court, Madras.
7. The Section Officer,
Criminal Section, High Court, Madras.

+1cc to Mr.K.Sathish Kumar, Advocate, S.R.No.43103

Crl.A.No.349 of 2020

PL(CO)
PM/15/03/2022