

Bail Slip

The Petitioner/Accused, namely Maruthupandi was directed to be released on bail as per order dated 03.06.2019 in CRL MP.NO.6452/19 IN CRL A.NO.258/2019 on the file of this Hon'ble court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Reserved On : 20.04.2021
Delivered on : 30.04.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN
CRL.A.No.258 of 2019
and Crl.M.P.No.6452 of 2019

Maruthupandi ... Appellant/ Accused

.Vs.

The State Rep.by
Inspector of Police,
All Women Police Station,
Harur
Dharmapuri District

... Respondent/Complainant

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to call for the records made in Spl.S.C.No.43 of 2015 dated 12.04.2019 passed by the Sessions Judge, Fast Track Mahila Court, Dharmapuri.

For Appellant : Mr.R.Sankarasubbu

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

J U D G M E N T

This Criminal Appeal has been filed against the Judgment made in Spl.S.C.No.43 of 2015 dated 12.04.2019 passed by the Sessions Judge, Fast Track Mahila Court, Dharmapuri.

2. When this appeal was listed before this court earlier on 04.01.2021, this court directed the Registry to call for records from the Lower Court and prepare typed set of papers and directed the matter to be posted for final hearing on 29.01.2021. Accordingly, the matter was listed on 29.01.2021 and thereafter at the request of the learned counsel for the appellant, the matter was adjourned several times and listed for his arguments on 10.03.2021. On 10.03.2021, learned

counsel for the appellant extensively argued the matter and he has filed CrI.M.P.No.3209 of 2021. This court, after hearing the matter, on 16.03.2021, dismissed CrI.M.P.No.3209 of 2021, which petition has been filed seeking to take additional evidence of the victim by recording her deposition before this court and to mark the affidavit filed by the victim through her in CrI.A.No.258 of 2019.

3. Subsequently, though the learned counsel for the appellant would submit that he has preferred appeal before the Honourable Supreme court against the order passed in CrI.M.P.No.3209 of 2021 in CrI.A.No.258 of 2019, he could not produce any order of stay passed by the Honourable Supreme Court in respect of this appeal. Therefore, considering the serious nature of the offence, this court is inclined to dispose of the appeal.

4. The respondent police registered the case against the appellant for the offence punishable u/s.417, 376 IPC and for the offence under Section 5(1) read with 6 of the Protection of Children from Sexual Offences (POCSO) Act, [hereinafter called as POCSO Act]. After completing the investigation, since the offence is against women, especially child, laid the charge sheet before the Special Court. The special court, taken the case on file in Spl.S.C.No.43 of 2015 and framed charges against the appellant for the offences under section 5 (1) read with 6 of POCSO Act, 312, 417 IPC and also under section 4 of Tamil Nadu Prohibition of Harassment of Woman Act, 1998.

5. After framing of charges, in order to prove the case of the prosecution, on the side of the prosecution, as many as 15 witnesses were examined as P.W.1 to P.W.15, 18 documents were marked as Ex.P.1 to Ex.P.18 and no material object was exhibited.

6. After completing the examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses and put before the appellant. He denied the same as false. On the side of the defence, no oral and documentary evidence was let in. After completing trial and hearing the arguments of either side, considering the material facts, trial court found the appellant guilty of the charges and convicted the appellant for offence u/s.5(1) read with 6 of POCSO Act and sentenced him to undergo 10 years rigorous imprisonment and imposed fine of Rs.5000/- in default to undergo further imprisonment for a period of three months simple imprisonment and also awarded compensation of Rs.1,00,000/- to the victim. Challenging the said conviction and sentence passed by the trial court, the appellant/accused has filed the present appeal before this court.

7. The learned counsel for the appellant would submit that the appellant has not committed any offence as alleged by the prosecution. At the time of commission of the alleged offence, both the appellant and victim are minors and therefore, prosecuting the appellant under POCSO Act is not legally sustainable. Since the appellant was a minor at the time of alleged commission of offence and both the appellant and victim girl loved each other and lived together for more than four years and even at the time of trial, the victim girl filed an affidavit before the trial court that they are living together and also entered into compromise and so they wanted to compromise the matter. The learned trial Judge failed to appreciate the case on hand and the materials furnished in support of the same and not even considered the affidavit filed by the victim girl. Therefore, while they were in the adolescent stage, they loved each other and had physical contact and also lived together. Due to some misunderstanding, the victim girl filed the complaint before the respondent police and thereafter, the girl realized her mistake and she is living with the appellant and she wanted to withdraw her complaint and compromise the matter, however, the trial Judge failed to appreciate the facts and wrongly convicted the appellant, therefore, the judgment of the trial court is liable to be dismissed.

8. The learned Government Advocate (Crl.Side) would submit that the victim has not completed 18 years. At the time of the occurrence, the age of the victim was only 17 years and also at the time of giving complaint, the age of the victim girl was 17 years and the age of the appellant was 20 years. The appellant committed penetrative sexual intercourse with the victim girl and though he promised to marry her, subsequently he refused to marry her and therefore, the victim girl gave the complaint to the respondent police. The respondent police investigated the matter and laid charge sheet. On the side of the prosecution, totally 15 witnesses were examined and 18 documents were marked. Out of which, the victim girl was examined as P.W.1 and the father of the victim girl was examined as P.W.3. The aunt of the victim was examined as P.W.2. The doctor who conducted medical examination on the victim girl was examined as P.W.4 and also the victim girl was produced before the Judicial Magistrate and her statement was recorded under Section 164 Cr.P.C. A reading of the evidence of P.Ws.1, 2, 3 and 4 and also the statement recorded u/s.164 Cr.P.C by the Judicial Magistrate clearly show that the appellant has committed the alleged offence and the trial court rightly appreciated the material evidence that the victim was child at the time of commission of offence under the POCSO Act. The appellant has committed repeated penetrative sexual assault on the victim and therefore, the trial court has convicted the appellant for the offence u/s.5(1) read with 6 of POCSO Act and since the other charge is under IPC, and the POCSO Act is Special Act, the appellant was sentenced only under POCSO Act. Therefore, the appeal is liable to be dismissed.

9. The case of the prosecution is that the appellant committed penetrative sexual intercourse repeatedly with the victim girl and though he promised to marry her, subsequently he refused to marry her and therefore, the victim girl gave the complaint to the respondent police. The respondent police investigated the matter and laid charge sheet before the special court. The special court, taken the case on file in Spl.S.C.No.43 of 2015 and framed charges against the appellant for the offences under section 5(1) read with 6 of POCSO Act, 312, 417 IPC and also under section 4 of Tamil Nadu Prohibition of Harassment of Woman Act, 1998. The date of birth of the victim girl is 24.06.1997 and the date of offence is 24.06.2014. So at the time of occurrence, she was only 17 years and the victim is child under Section 2(1)(d) of POCSO Act.

10. In order to prove the case of the prosecution, totally 15 witnesses were examined and 18 documents were marked and after detailed analysis, the Special Court convicted and sentenced the appellant as stated above.

11. This Court, being an Appellate Court, is a fact finding court and it has to give its independent finding for which it has to re-appreciate the entire evidence. Accordingly, this court has re-appreciated the entire evidence.

12. As per the prosecution evidence and also documents produced by the prosecution, the victim girl is 17 years at the time of the offence as well as giving the complaint. In order to prove the age of the victim child, prosecution marked Ex.P.7, School Certificate. As per Ex.P.7, the date of birth of the victim child is 24.6.1997. Victim, in her evidence also deposed that her date of birth is 24.06.1997. In order to prove the same, on the side of the prosecution, Transfer certificate from the school where she studied was produced which is marked as Ex.P.17. So at the time of giving the complaint Ex.P.1, the age of the victim girl was 17 years and the occurrence is prior to that. Ex.P.17 Transfer certificate of the victim girl was also marked in which document, the date of birth of the victim child is mentioned as 24.06.1997. Therefore, it is proved that on the date of the complaint, victim girl was child aged 17 years. Therefore, during the occurrence, the victim girl has not completed the age of 18 years. Therefore, she is a child under the definition u/s.2(1)(d) of POCSO Act. Therefore, the offence committed by the appellant falls under POCSO Act.

13. In order to prove the commission of offence, prosecution examined victim as P.W.1. A reading of the evidence of the victim child shows that she lost her mother. The appellant was neighbour to her sister Narmadha. While going to her sister's house, she has seen him and while studying in the Government Girls Higher Secondary School, Bommiapatty, the appellant also studied in the Boys Higher

Secondary School, Bommipatty. While going to school, the appellant proposed his love to the victim. Initially she refused, but he continuously followed the victim and also proposed his love. Thereafter, the victim also accepted his proposal and loved each other. One day the appellant took the victim girl and tried to have intimacy with her. When she resisted, he said he is going to marry her. Further he stated to her that since he is going to marry her, it is not wrong to have physical relationship before the marriage and therefore, he had physical contact with her and also he made a promise that he will marry her. Even after having sexual intercourse, he made promise that he would marry her. So in that way 4 or 5 times, they had sexual intercourse. Thereafter, frequently, they used to do it. Subsequently, the appellant avoided to meet the victim and also victim father complained before the Panchayatdars. The appellant and his parents appeared before the Panchayatdars. Even though the appellant accepted about the intimacy with the victim, he refused to marry her and therefore, the victim child with no other option, gave the complaint Ex.P.1.

14. A reading of the deposition of P.W.1 victim child would make it clear that she has narrated more than once that repeatedly the appellant had penetrative sexual intercourse with her. Aunt of the victim child was examined as P.W.2. She has also clearly deposed about the relationship between the victim and appellant and deposed that they loved each other and also she deposed that she had seen them together. She has stated that victim informed her that the appellant had sexual intercourse with her. She has also spoken that the victim got pregnant and the appellant provided pills for abortion and subsequently, she also aborted the foetus and there was a Panchayat and since the Panchayat failed to resolve the issue, victim preferred the complaint.

15. The father of the victim was examined as P.W.3 and the mother of the victim is no more. He has deposed that one day, his daughter consumed poison and when he enquired, she revealed that appellant loved the victim and promised to marry and based on the promise, she allowed him to have sexual intercourse with her. But subsequently, he refused to marry her and also spoken about the Panchayat. Since Panchayat could not resolve the issue, complaint was lodged. After lodging of complaint, the victim child was produced before the doctor for Medical examination. The doctor who conducted medical examination was examined as P.W.4. She has deposed that victim child was produced for medical examination on 09.05.2015. On clinical examination, she found that hymen was not intact and her vagina allows two fingers. After registering the case, the appellant was also produced before the doctor for conducting potency test. The doctor who conducted potency test on the appellant was examined as P.W.5 and he has deposed that

the appellant was not impotent. Though the prosecution examined P.W.6 friend of the appellant in order to prove the case, P.W.6 has not supported the case of the prosecution.

16. After registering the case, victim child was also produced before Judicial Magistrate, Dharmapuri, for recording statement u/s.164(5) Cr.P.C. The statement recorded by the Magistrate was marked as Ex.P.8. A reading of Ex.P.8 statement given by the victim child, would go to show that she has narrated the events that appellant promised to marry her and had sexual intercourse but subsequently, failed to marry her. Thereafter, she came to know that the appellant made a false promise and had sexual intercourse with her but subsequently appellant refused to marry her.

17. Therefore, the evidence of P.W.1 victim child and the evidence of doctor P.W.4 and the statement recorded by Judicial Magistrate, Dharmapuri, u/s.164 Cr.P.C.,-Ex.P.8 and also the Accident Register Ex.P.3, the opinion of the Gynaecologist which also goes to show that hymen of the victim was not intact and she was subjected to sexual intercourse. Therefore, the prosecution has proved its case that at the time of occurrence, the victim girl was child as per Section 2 (1)(d) of POCSO Act and the appellant has committed penetrative sexual intercourse repeatedly on the victim and thereby committed offence u/s.5(1) read with 6 of POCSO Act. Though the charges were framed u/s.312, 417 IPC and Section 4 of Tamil Nadu Prohibition of Harassment of Woman Act, 1998 the prosecution has also proved the case and the trial court also come to the conclusion that the appellant has committed the offence under all the charges. However, he was sentenced to undergo 10 years rigorous imprisonment and imposed fine of Rs.5000/-, in default, to undergo 3 months simple imprisonment for the offence under section 5(1) read with 6 of POCSO Act. This Court, re-appreciating the entire evidence, also finds that the appellant has committed the offence as charged against him.

18. The learned counsel for the appellant vehemently contended that the appellant was also minor at the time of commission of offence. Further he would submit that the victim girl and the appellant subsequently living together and they also entered into compromise and since in this case, it is love affair, it is not the intention of the appellant to have a forceful penetrative sexual intercourse; it is consent of both the adolescent while loving each other having such an intimacy. There is no mensrea and there is no motive and the action committed by the appellant is not an offence punishable under POCSO Act. Even before the trial court, the victim child filed an affidavit that she has compromised with the appellant and she has also filed the compromise memo. The trial Judge failed to consider the same and convicted the appellant.

19. A reading of the entire material papers available on record would make it clear that at the time of commission of offence, the victim is a child. At the time of giving complaint, the appellant completed 20 years. Even prior to that, they had physical contact with each other. According to the victim girl, the appellant proposed love, she refused it, but continuously, he followed her. At last, he obtained her consent. Since she was minor, she does not know what she was doing and the appellant tried to have physical contact. She told him that it was wrong. But he stated that since he is going to marry her, having physical contact is not wrong and also he repeatedly made false promise that he will marry her so that she should not resist him for the physical contact and that he had penetrative sexual intercourse with her several times. The appellant even after attaining age of 20 years also made a promise and had sexual intercourse with the victim child. But subsequently he refused to marry her. She consumed poison. Since she lost her mother, father came to know that and called for panchayat. In the Panchayat, the appellant accepted that he had sexual intercourse with victim but refused to marry her. Therefore, the victim filed the complaint.

20. Though the learned counsel for the appellant would submit that P.W.1 to 3 are interested witnesses, the evidence of P.W.1 victim child and P.W.3 father are corroborated by P.W.4 doctor one who conducted medical examination clearly deposed that hymen was not intact and vagina allows two fingers and she was subjected to penetrative sexual intercourse. Victim child also gave statement before the Judicial Magistrate, Dharmapuri. Therefore, from the oral and documentary evidence, the prosecution substantiated the case of the prosecution. Though the statement recorded u/s.164 Cr.P.C., is not substantive evidence, the victim child deposed before the court and while examining as P.W.1, her evidence was corroborated by P.W.2. which was supported by evidence of doctor P.W.4. Therefore, under these circumstances, this court also finds that the appellant committed the offence. Even though P.W.1 to 3 are stated to be as interested witnesses, that may not be sole ground to discard the evidence of victim child and disallow the case of the prosecution.

21. Though the learned counsel for the appellant would submit that during the adolescent age, they had physical contact and though due to misunderstanding, victim filed the complaint before the respondent police, thereafter, they are living together for the past four years. They also entered into compromise. The appellant also married the victim girl and also filed affidavit before this court and also memo of compromise and also filed CrI.M.P.No.3209 of 2021. This court dismissed the said petition on 16.03.2021. This court already observed, fall on love is not an offence. When the victim is child at the time of commission of offence, any person having sexual intercourse with the minor child is an offence.

Further, any offence against child are offence against State, the Courts and State are defacto guardians of children in the country. Once the complaint filed and the State taken the cognizance of the offence, it is not compoundable offence. The appellant made a false promise and had sexual intercourse with victim child and subsequently failed to marry her. When she lodged a complaint, in order to escape from the clutches of law, after trial, it is stated by the appellant that they are ready to live and ready to compound the offence and ready to marry the victim, which statement will not take away the offence. Once the appellant has committed the offence under POCSO Act, he is liable to be punished. Since it is a serious offence and grave in nature and an offence against women, particularly child, it is not compoundable offence. This court is not inclined to accept the version of the learned counsel for the appellant. The entire evidence show that the appellant has committed the offence. Now only in order to escape from clutches of law, after trial, he has come forward with compromise proposal which cannot be encouraged in heinous crime, then it will defeat the object of POCSO Act. The trial court also rightly rejected the proposal of the victim.

22. A careful reading of the entire materials show that the victim child categorically stated in the complaint, before the doctor, statement recorded under Section 164 Cr.P.C., and also the deposition while examining as witness before the court that the appellant promised to marry her and had penetrative sexual intercourse with her repeatedly and subsequently failed to marry her and tried to marry other girl. Therefore, there was a panchayat. Even the Panchayat also not given any fruitful result. Therefore, she lodged the complaint subsequently, case was registered. So after trial, in order to escape from the clutches of law and punishment, the appellant convinced the victim girl and managed to file an affidavit for compromise which shows that the appellant has committed the offence u/s.5(1) read with 6 of POCSO Act. Therefore, since the offence is not compoundable offence, even the request made by the victim cannot be accepted.

23. This Court, finds it necessary to make few observation in the light of the recent guidelines formulated by the Honourable Supreme Court of India. The Honourable Supreme Court of India, in the Judgment dated 18.03.2021, in Criminal Appeal No.329 of 2021, [SPECIAL LEAVE PETITION (CRL.) NO. 2531 OF 2021] (ARISING OUT OF S.L.P. (CRL.) DIARY NO. 20318 OF 2020) APARNA BHAT & ORS VERSUS STATE OF MADHYA PRADESH & ANR.] issued certain guidelines regarding imposition of bail conditions in a case involving a sexual offence against a women. The Supreme Court, while dealing with the application seeking directions to all the High Courts and trial court to refrain from making observations and imposing conditions in rape and sexual assault cases, at any stage of judicial proceedings, that trivialize the trauma undergone by survivors and adversely affect their dignity, in paragraph 9

of the Judgment, pointed out to the case, wherein this Court referred the case of rape of a minor to mediation and urged that no such observation/condition should be made which initiates or encourages compromise. Paragraph 9 reads as follows:-

"9. The appellants also cite Mohan v. State, where the Madras High Court had referred the case of rape of a minor to mediation and observed that the case was fit for attempting a compromise between the parties. Likewise, Samuvel v. Inspector of Police is cited, where the High Court of Madras referred to mediation, a case of rape where the prosecutrix was a minor and had become a mother of a child as a consequence of rape, because the accused agreed to marry her. It is urged that no observation/condition should be made which initiates or encourages compromise that disparages and downgrades an otherwise heinous crime thus indicating that such offences are remediable by way of a compromise/ by marriage."

24. Before the Honourable Supreme Court, the Attorney General who argued the matter submitted that the foremost aspect to facilitate a gender sensitive approach, is to train judges to exercise their discretion and avoid the use of gender-based stereotypes while deciding cases pertaining to sexual offences. Secondly, judges should have sensitivity to the concerns of the survivor of sexual offences. It was also argued therein that in cases of sexual offences, the concept of compromise, especially in the form of marriage between the accused and the prosecutrix shall not be thought of, as any such attempt would be offensive to the woman's dignity. In the decision State of M.P., Vs.Madanlal, [(2015) 7 SCC 681], in paragraph 18, it is held as follows:-

"18. ...We would like to clearly state that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasise, is the richest jewel one can conceive of in life. No one would allow it to be extinguished. When a human frame is defiled, the "purest treasure", is lost. Dignity of a woman is a part of her nonperishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the

compartment of spectacular error. Or to put it differently, it would be in the realm of a sanctuary of error."

25. In the offence of rape and sexual assault, the decision in Ramphal Vs. State of Haryana [Crl.A.No.438/2011 Supreme Court] by order dated 27.11.2019, held that compromise is of no relevance in deciding the cases of sexual assault. The role of the courts and law enforcement agencies as neutral authorities and their duty to ensure fairness is observed as follows:-

31. The role of all courts is to make sure that the survivor can rely on their impartiality and neutrality, at every stage in a criminal proceeding, where she is the survivor and an aggrieved party. Even an indirect undermining of this responsibility cast upon the court, by permitting discursive formations on behalf of the accused, that seek to diminish his agency, or underplay his role as an active participant (or perpetrator) of the crime, could in many cases, shake the confidence of the rape survivor (or accuser of the crime) in the impartiality of the court. The current attitude regarding crimes against women typically is that "grave" offences like rape are not tolerable and offenders must be punished. This, however, only takes into consideration rape and other serious forms of gender-based physical violence. The challenges Indian women face are formidable: they include a misogynistic society with entrenched cultural values and beliefs, bias (often sub-conscious) about the stereotypical role of women, social and political structures that are heavily malecentric, most often legal enforcement structures that either cannot cope with, or are unwilling to take strict and timely measures. Therefore, reinforcement of this stereotype, in court utterances or orders, through considerations which are extraneous to the case, would impact fairness.

32. Academic writings highlight that a judgment at all levels has a number of distinct audiences, each of which engages with it in a different way. The parties to the case and their counsel will be interested in how the judge resolves their specific dispute - what the law gives to or requires of them. At the same time, in a legal system where judgments of courts set precedents, and in particular within a common law system, judgments have significance beyond their authoritative resolution of a specific dispute-particularly in the Supreme Court. Thus, the judge is not only communicating to the parties their

rights and liabilities in the context of the specific dispute being litigated; the judge is also addressing the broader legal community - other lawyers, judges, legal academics, law students - and indeed the public at large. "

26. The Supreme Court held that "We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a judge. ... The courts are expected to use selfrestraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole - where the victim of crime is discouraged - the criminal encouraged and in turn crime gets rewarded!"

27. Under these circumstances, this court finds that the appellant has committed the offence under Section 6 read with 7 of POCSO Act. Therefore, this court does not find any merit in the appeal and accordingly, this criminal appeal is dismissed. This Court, by order dated 03.06.2019, granted bail and the sentence of imprisonment is suspended. Thereafter, the interim bail granted has been extended. In view of the dismissal of the criminal appeal, suspension of sentence granted by this court stands cancelled. The trial court is directed to secure the appellant/accused to serve the remaining period of sentence.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

nvsri
To

- 1.The Sessions Judge, Fast Track Mahila Court,
Dharmapuri.
- 2.The Inspector of Police,
All Women Police Station, Harur, Dharmapuri District.
- 3.The Superintendent,Central prison,Cuddalore.
- 4.The Section Officer, Criminal Section, High Court, Madras
- 5.The Public Prosecutor Office, High Court, Madras.

+1cc to Mr.R.Sankara Subbu, Advocate SR.No. 26908

CrI.Appeal.No.258 of 2019