

BAIL SLIP

The Appellant/Accused namely Mr.M.Sabari, S/o.Murugan, was directed to be released on bail as per the order of this Court dated 03.07.2019 in Crl.M.P.No.7308 of 2019 in Crl.A.No.322/2019 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.02.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.322 of 2019

M.Sabari ... Appellant

Vs.

State. Rep. by
Inspector of Police,
All Women's Police Station,
Krishnagiri. ... Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the Judgment passed by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri in S.S.C.No.40 of 2018, dated 16.05.2019.

For Appellant : Mr.S.Ranjith Kumar
For Respondent : Mr.R.Suryaprakash
Government Advocate

J U D G M E N T

This Criminal Appeal is filed challenging the judgment passed on 16.05.2019 in Spl.Sessions Case No.40 of 2018, on the file of learned Sessions Judge, Fast Track Mahila Court, Krishnagiri.

2. The respondent-Police registered a case in Crime No.9 of 2018, against the appellant for the offences under Section 366 of IPC, and Section 3 r/w 4 of Protection of Children from Sexual Offences Act, 2012 (for brevity "the POCSO Act"), Section 7 r/w 8 of POCSO Act, 2012, and Section 9 of Prohibition of Child Marriage Act, 2006. After investigation, laid a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri. The learned Sessions Judge, taken the charge

sheet on file as C.C.No.40 of 2018. After completing all the formalities, the learned Special Judge framed the charges for the offence mentioned supra as against the appellant and conducted the trial.

3. After considering the evidence on record and hearing on either side, the learned Judge, by Judgment dated 16.05.2019, convicted the appellant and sentenced him to undergo Rigorous Imprisonment of 5 years and imposed a fine of Rs.5,000/-, in default, to undergo further period of six months Rigorous Imprisonment for the offence under Section 366 of IPC; and sentenced him to undergo Rigorous Imprisonment of 3 years and imposed a fine of Rs.5,000/-, in default, to undergo further period of six months Rigorous Imprisonment for the offence under Section 7 r/w 8 of POCSO Act; and sentenced him to undergo Rigorous Imprisonment of one year Rigorous Imprisonment and imposed a fine of Rs.1,000/-, in default, to undergo further period of two months Rigorous Imprisonment for the offence under Section 9 of Prohibition of Child Marriage Act and acquitted the accused for the offence under Section 3 r/w 4 of the POCSO Act alone.

4. Challenging the Judgment of conviction and sentence, the appellant/ accused is before this Court.

5.1. The learned counsel for the appellant would submit that Section 366 of IPC would not attract in this case, because, the girl had gone with the appellant on her own volition and there is no material to show that the appellant forcibly taken the victim girl or kidnapped the victim girl. Even in the statement recorded by the learned Magistrate under Section 164 itself shows that, she fall in love with the appellant/accused and went along with him. Therefore, the charges framed against the appellant is erroneous and the learned Judge also found guilty of the offence under Section 366 of IPC, and therefore, the same is liable to be set aside.

5.2. The learned counsel would further submit that the victim girl did not say anything about the sexual assault made by the appellant, which falls under the POCSO Act. Even herself during cross-examination not supporting the case of the prosecution and also there is no eyewitness in this case, further the mother of the victim girl also turned hostile and she has not supported the prosecution. Even P.W.2, victim girl, during her evidence had deposed that she had gone along with the appellant and however, not stated anything about either sexual or penetrated sexual assault made by the appellant. Though the learned Judge rightly acquitted the appellant for the offence under Section 3 r/w 4 of of the POCSO Act, however, erroneously held that the appellant had committed the offence

under Section 7 r/w 8 of POCSO Act, which warrants interference.

5.3. In insofar as punishment with regard to marriage is concerned, the learned counsel would submit that there is no eyewitness and the respondent-police has also not recovered thali from the victim girl and produced before the Court and except P.W.2, no one has stated for the alleged marriage, and therefore, the prosecution has not established the alleged child marriage and however, the learned Special Judge, convicted the appellant for the offence under Section 9 of Prohibition of Child Marriage Act, and sentenced him to undergo Rigorous Imprisonment of one year Rigorous Imprisonment and imposed a fine of Rs.1,000/-, in default, to undergo further period of two months Rigorous Imprisonment.

5.4. The learned counsel also referred the Judgment of the Hon'ble Supreme Court in S.Varadarajan Vs. State of Madras [(1965) 1 SCR 243], and a judgment of this Court in N.Rasu Vs. State Re. by Inspector of Police [2016 SCC OnLine Mad 32189] would submit that, if a minor girl went along with the appellant/accused, the ingredients of Section 361 of IPC would not attract and the accused cannot be convicted under Section 363 of IPC, because, the victim girl voluntarily went along with the appellant. Marriage was not proved and the victim girl has stated that she voluntarily left along with the appellant and for that the appellant cannot be punished under Section 366 of IPC. Therefore, the learned counsel prays for setting aside the judgment of conviction and sentence passed by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri.

6. The learned Government Advocate (Criminal Side) would submit that the date of birth of the victim girl is 28.07.2002 and the alleged occurrence took place on 01.05.2018, and at that time, her age is only 15 years. The victim girl has clearly stated during her chief examination regarding sexual assault, whereas, she was not cross-examined on the same day, only after 4 months, she was cross-examined and therefore, the girl has not supported the prosecution. While recording statement under Section 164 of Cr.P.C., the victim girl has clearly stated that the appellant only took her and made sexual assault and tied thali by forcibly. Therefore, under the circumstances, the prosecution has established that the minor girl was removed from the custody of the guardian and as such, Section 363 of IPC would attract. Further, he would submit that P.W.1, the mother of the victim girl and P.W.9, the sister of the victim girl had also adduced evidence that the victim girl's age is 15 years at the time of occurrence and they were informed by the victim girl that the accused took her and made sexual assault and tied thali. Therefore, the prosecution has established regarding

child marriage and sexual assault on the victim girl, as herself stated in the chief examination and also the mother of the victim girl. Though P.W.1 and P.W.9 are hearsay evidence, the victim girl told to her mother and sister, and they deposed before the Court. Therefore, the prosecution has proved its case beyond reasonable doubt. Though the learned Special Judge acquitted the appellant for the offence under Section 3 r/w 4 of POCSO Act, however, the learned Special Judge, rightly convicted the appellant for the other offences and therefore, prays for dismissal of the Appeal.

7. Heard the learned counsel on either side and perused the materials available on record.

8. The case of the prosecution is that on 01.05.2018, at about 5 p.m., the victim girl, about 15 years, was kidnapped by the accused and sexually assaulted her and thereafter, married the victim girl on the next day forcibly, against the her wish and will of her parents, and subsequently, on the complaint given by the mother of the victim girl on 03.05.2018, both were secured.

9. In order to prove the case of the prosecution, on the side of the prosecution, 19 witnesses were examined as P.W.1 to P.W.19 and 25 documents were marked as Exs.P1 to P25. No material objects were exhibited. After completion of the prosecution evidence, the incriminating materials culled out from the prosecution witnesses were put before the appellant, the same was denied as false and on the side of the defence, no oral and documentary evidence was let in. The learned Judge, after completion of trial, hearing the arguments advanced on either side and considering the materials placed on record, found the accused guilty and convicted the accused, as referred above.

10. Since this Court is the first appellate Court, as a fact finding Court, has to re-appreciate the entire evidence on record independently.

11. The crux of the prosecution case is that the victim girl, aged about 15 years, was kidnapped by the accused and sexually assaulted her and thereafter, married the victim girl against the will of the parents of the victim girl, and subsequently, on the complaint given by the mother of the victim girl on 03.05.2018, both the appellant and the victim girl secured and thereafter, the Investigation Officer conducted the investigation and filed a charge sheet.

12. As rightly pointed out by the learned counsel for the appellant that when the victim girl was produced before the learned Magistrate for recording the statement under Section 164

of Cr.P.C., the victim girl has not stated that she was taken by the appellant forcibly and or kidnapped by the appellant, but she has stated that both fall on love each other and when the appellant called her, she also went along with him and also they got married. In the citations referred by the learned counsel, the age of the victims are 16 years, whereas, in the case on hand, the victim girl was not completed 16 years and she was only 15 years. Therefore, the citations referred by the learned counsel for the appellant are not applicable to the case on hand, and it would frustrate the very object of penal provisions. If the minor girl is taken away from the custody of the lawful guardian without their consent, Section 363 of IPC would attract. Though the victim girl subsequently has not supported the case of the prosecution, viz., during cross-examination, however, she has clearly stated before the learned Magistrate, which was recorded under Section 164 of Cr.P.C., that she went along with the accused and she has not stated that by force or she was kidnapped by the appellant, therefore, a perusal of statement recorded under Section 164 of Cr.P.C., it is clear that the victim girl went along with the appellant, but the fact remains that she was not forcibly taken or kidnapped, however, she went along with the appellant on her own volition. It is settled proposition of law that evidence of hostile witness need not be discarded in totality, but the portion of evidence, in chief examination, which supports the prosecution can be taken for consideration.

13. From the evidence of P.W.2 it is clear that the victim girl went along with the appellant and therefore, under the circumstances, even if the victim girl wanted to go along with the accused voluntarily, without the consent of the lawful guardian, her custody cannot be taken away by the accused, especially, when the age of the victim girl is below 16 years. At the time of the occurrence, the age of the victim girl is only 15 years. Therefore, under the circumstances, this Court finds that the appellant has committed the offence which is punishable under Section 363 of IPC.

14. As regards, the offence relating to POCSO Act is concerned, admittedly, a perusal of the statement recorded under Section 164 of Cr.P.C., would show that she has not stated anything about sexual assault and further, a reading of the medical evidence, the victim girl has not spoken the truth and the prosecution has not substantiated the case beyond reasonable doubt under the said circumstances, the conviction and sentence under Section 7 r/w 8 of POCSO Act, is set aside.

15. As far as offence relating to Section 9 of the Prohibition of Child Marriage Act is concerned, there is no evidence to show that the appellant married the victim girl and

except the evidence of the victim girl, no witness has spoken and the prosecution has not established that the appellant tied thali, even the respondent-Police has not recovered the thali. Even, none of the witnesses have spoken about that they married together. In the absence of the same, the benefit of doubt should have extended to the appellant and therefore, under the circumstances, this Court finds that the prosecution has not proved for the offence under Section 9 of the Prohibition of Child Marriage Act, beyond reasonable doubt, and therefore, the conviction and sentence under this offence is liable to be set aside, and accordingly, it is set aside.

16. In the result, the Criminal Appeal is partly allowed and conviction and sentence imposed against the appellant by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, for the offences under Section 7 r/w 8 of POCSO Act, 2012, and Section 9 of Prohibition of Child Marriage Act, 2006 are set-aside. Fine amount if any paid by him, shall be refunded to him, for the above said offences. Insofar as conviction and sentence imposed by the learned Judge under Section 366 of I.P.C., is concerned, as the victim girl herself has stated that she fall on love with the accused and went along with him, he has committed the offence under Section 361 of IPC and punishable under Section 363 of IPC and the period of sentence is modified from five years to three years, which will meet the ends of justice.

Sd/-

Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Fast Track Mahila Court,
Krishnagiri.
2. The Inspector of Police,
All Women's Police Station,
Krishnagiri.
3. The Superintendent,
Central Prison,
Vellore.

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

+lcc to Mr.S.Ranjith Kumar, Advocate, S.R.No. 8222

Cr1.A.No.322 of 2019

BR(CO)
GN(30/06/2021)



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