



BAIL SLIP

The Petitioner/Accused No.1, namely K.Kirubakaran, S/o.Kumar, Age about 24 years is directed to be released on bail as per order of this Honourable Court dated 02.12.2020 made in CrI.M.P.No.6543 of 2020 in CrI.A.No.428 of 2020.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :13.09.2021

CORAM:

THE HON'BLE MR.JUSTICE P.VELMURUGAN

CRL.A.NO.428 OF 2020

K.Kirubakaran
S/o, Kumar

... Appellant/Accused - 1

Versus

State rep. By
The Inspector of Police,
W-15, All Women Police Station,
Royapuram, Chennai - 600 013.

... Respondent

PRAYER:

Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, to set aside the conviction and sentence passed in S.C.No.314 of 2017 dated 24.09.2018 on the file of the Special Court Cases under POCSO Act 2012/Mahila Court, Chennai - 104.

For Appellant : Mr.V.Sambamurthy

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

JUDGMENT

This Criminal Appeal has been filed to set aside the order dated 24.09.2018 passed in S.C.No.314 of 2017 on the file of the Special Court for Cases under POCSO Act 2012/Mahila Court, Chennai - 104.



2. The respondent police registered a case against the appellant and two others in Crime No.1757 of 2016, based on the complaint by the victim's father as "girl missing". Subsequently, the case was altered into Section 366(A) IPC and Section 6 of POCSO Act as against this appellant and as against second and third accused under Section 366(A), 506(ii) I.P.C and Section 6 read with Section 17 of POCSO Act.

3. The respondent police after completing the investigation, laid a charge sheet before the Special Court for Cases under POCSO Act 2012/Mahila Court, Chennai, since the offence is against woman, especially the child, under the definition of Section 2(1)(d) of POCSO Act. The learned Special Judge, after completing the formalities, framed the charge against the petitioner for the offence under Section 366 IPC and section 6 of POCSO Act and as against the second and third accused for the offence under section 366(A) and 506(ii) IPC and Section 6 read with section 17 of POCSO Act. The trial court during trial, on the side of the prosecution, in order to substantiate the charges, nine witnesses were examined as P.Ws.1 to P.W.9 and 17 documents were marked as Exs.P1 to P17. No material object was produced. After recording the evidence of prosecution witnesses, incriminating circumstances culled out from the prosecution witnesses put before the accused, they denied as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

4. On completion of trial, hearing the arguments advanced on either side, the appellant was found guilty for the offence under section 366 IPC and under section 6 of POCSO Act and he was convicted and sentenced to undergo 5 years Rigorous Imprisonment and to pay a fine of Rs.5,000/- in default to undergo further period of 6 months Simple Imprisonment under section 366 IPC and also he was convicted and sentenced to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.5,000/- in default to undergo further period of 6 months Simple Imprisonment for the offence punishable under section 6 of POCSO Act.

The second and third accused are not found guilty for the charged offence and therefore they are acquitted for the charges framed against them. Challenging the judgment of conviction and sentence passed by the Special Court, the appellant/first accused has filed the present Criminal Appeal before this Court.

5. The learned counsel for the appellant would submit that name of the appellant was not mentioned in the complaint and also in F.I.R and a false case has been foisted against him. Even P.W.3, the victim girl has clearly stated that she voluntarily went along with appellant and there is no forcible



action taken against her. From the said evidence, A2 and A3 were acquitted and they were not found guilty, where as, for the very same evidence, the appellant alone was convicted erroneously. Therefore, the prosecution has not proved its case beyond reasonable doubt. None of the witnesses have spoken about the appellant kidnapped the victim girl and has penetrative sexual intercourse with her. The trial court failed to appreciate the evidence and simply convicted the appellant only on the ground of sympathy and on assumption, which warrants interference.

6. The learned Government Advocate (Criminal Side) appearing for the respondent police would submit that initially, a case was registered for girl missing and subsequently on investigation, it is found that the appellant took the victim girl, who is aged about only 13 years to Bombay and kept there and also married her, had sexual intercourse with her. Subsequently, they found that the victim girl along with the appellant. Thereafter, the section was altered and charge sheet was also filed. The trial court also framed the charge against the appellant for the offence under section 366 IPC and also under section 6 of POCSO Act. The victim girl herself has stated that she went along with appellant and also the appellant had a sexual intercourse with her. Since she is a minor, aged about only 13 years and without the consent of the lawful guardian, the custody of the minor was removed by the appellant. Therefore, the appellant has committed offence punishable under section 366 IPC and further she was subjected to penetrative sexual assault. Since the appellant sexually assaulted the minor victim girl more than once, he has committed aggravated penetrative sexual assault. Therefore, he has committed the offence punishable under section 6 of POCSO Act and the trial court rightly appreciated the evidence and convicted the appellant and there is no merit in the appeal and the same is liable to be dismissed.

7. Heard the learned counsel for the appellant and the learned Government Advocate (Criminal Side) appearing for the official respondent.

8. The case of the prosecution is that P.W.1 who is the father of the victim girl who gave a complaint to the respondent police under " girl missing" Later it is found that at the instigation of second and third accused, the first accused had allured the victim girl and kidnapped her. Hence the complaint.

9. In this case, the appellate court is the fact finding court, it has to re-appreciate and revisit the entire evidence and give the independent finding. The trial court framed the



charge against the appellant for the offence under section 366 IPC and also under section 6 of POCSO Act. In order to substantiate the case, totally on the side of the prosecution, nine witnesses were examined and 17 documents were marked. In order to prove the charges, the victim girl was examined as P.W.3, she has spoken about the incident in the chief examination and clearly stated that she only voluntarily went along with the appellant and insisted the appellant to take her to somewhere, since the parents of the victim girl tortured her with cruelty. She has clearly admitted that she went along with the appellant and the appellant took her to Bombay and stayed there in the rental house. During the stay, on several occasions, the appellant had penetrative sexual intercourse. Therefore, the victim girl was not cross examined by the appellant. The appellant counsel would submit that the name of the appellant not mentioned in the F.I.R and the victim girl herself stated all the allegations only against her parents and in order to safeguard the victim girl only the appellant took her along with him. However, she has also clearly stated that she went and stayed with the appellant and during the stay, she insisted the appellant to have sexual intercourse with her, so he committed the same. The age of the victim is only 13 years. The birth certificate of the victim girl has been marked as Ex.P2 and as per Ex.P2, the date of birth of the victim girl is only 05.05.2003 and the date of occurrence is 20.11.2016. Therefore the victim is only 13 years not even completed the age of 14 years. Even assuming that the parents of the victim acted against the interest of the minor and the victim approached the appellant, since the age of the victim was only 13 years, the appellant would have either informed to the police or any social welfare officer or child line instead of that, he took the victim girl to Bombay and stayed there and had sexual intercourse with her. The parents of the victim girl filed the case for girl missing and subsequently during the investigation, it is found that the victim girl went along with the appellant. Since the age of the victim is only 13 years, and she is a child under the definition of section 2(1)(d) of POCSO Act and the consent is immaterial. Even assuming that the victim girl voluntarily left the parental house and went along with the appellant, the appellant without the knowledge of the lawful guardian and without the consent of the lawful guardian, he took the custody of the minor and taken her to the unknown place and later to Bombay, during that time, he had sexual intercourse with her. The act of the appellant falls under section 366 of IPC and also he had penetrative sexual assault more than once and he has committed the offence under section 5(1) which is punishable under section 6 of POCSO Act. Therefore, the trial court rightly appreciated the evidence and considering the facts and circumstances of the case, since the defence side not cross



examined P.W.3 regarding the victim girl went along with the appellant and stayed in Bombay and had sexual intercourse with her, which fact has not been denied either by way of cross examination or by adducing any evidence. Therefore under this circumstances, this Court does not find any perversity in the order passed by the trial court and there is no merit in the Appeal and the same is liable to be dismissed.

10. Accordingly the Criminal Appeal is dismissed.

Sd/-
Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

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To

1. The Special Judge,
Special Court Cases under POCSO Act 2012/Mahila Court,
Chennai - 104.
2. The Inspector of Police,
W-15, All Women Police Station,
Royapuram,
Chennai - 600 013.
3. The Superintendent Central Prison - 1,
Puzhal, Chennai.
4. The Public Prosecutor,
High Court, Madras.
5. The Chairman,
POCSO Committee,
High Court, Madras.

Copy To

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

CRL.A.No.428 of 2020

NMI (CO)
RLP (28/02/2022)