



Bail Slip

The Appellant herein/sole accused viz., Chandrasekar, S/o Narayanappa, aged about 27 years was ordered to be released on Bail vide order dated 13.01.2020 made in Crl.M.P.No.18415 of 2019 in Crl.A.No.346/2019 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.03.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.346 of 2019

Chandrasekar ... Appellant/Sole Accused

Versus

State represented by its
Inspector of Police
All Women Police Station,
Hosur,
Krishnagiri District.
Crime No.60 of 2015

... Respondent/Complainant

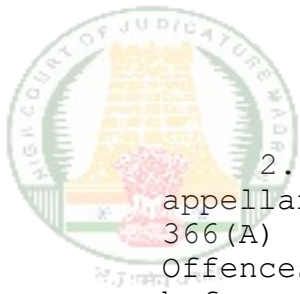
PRAYER: Criminal Appeal is filed under Section 374(2) Cr.P.C seeking to call for the entire records in connection with the Spl.S.C.No.20 of 2017 on the file of the learned Sessions Judge, Fast Track Magalir Nethi Mandram, Krishnagiri, Krishnagiri District and set aside the judgment dated 29.04.2019.

For Appellant : Mr.E.Kannadasan

For Respondent : Mr.R.Suryaprakash
Government Advocate

JUDGMENT

This Criminal Appeal has been filed seeking to call for the entire records in connection with the Spl.S.C.No.20 of 2017 on the file of the learned Sessions Judge, Fast Track Magalir Nethi Mandram, Krishnagiri, Krishnagiri District and set aside the judgment dated 29.04.2019.



2. The respondent-Police registered a case against the appellant in Crime No.60 of 2015, for the offence under Section 366(A) and section 5(1) of Protection of Children from Sexual Offences Act. After the investigation, laid a charge sheet before the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri. After completing the formalities, the learned Judge, Fast Track Court, Krishnagiri, taken the charge sheet on file in Spl.S.C.No.20 of 2017. After framing the charges for the offences under sections 366, 342 IPC and section 5(1) of POCSO Act against the appellant/accused, during the trial, in order to prove the case of the prosecution, on the side of the prosecution, as many as 13 witnesses were examined as P.W.1 to 13 and 17 documents were marked as Ex.P.1 to P.17 but no material object was exhibited. After completing the evidence on the side of prosecution witnesses, incriminating circumstances culled out from the evidence of prosecution witnesses were put before the appellant, for which, he denied it as false and pleaded not guilty. On the side of defence, no oral and documentary evidence was produced.

3. After completing the trial and after hearing the arguments on either side, the learned Special Judge convicted the appellant for the offence under section 342 IPC and sentenced to undergo 10 months Rigorous Imprisonment and to pay a fine of Rs.1000/- in default to undergo Rigorous Imprisonment for one month and convicted for the offence under section 366 IPC and sentenced to undergo rigorous imprisonment for 6 years and to pay a fine of Rs.5,000/- in default to undergo R.I for 6 months and convicted for the offence under section 5(1) of POCSO Act and sentenced to undergo R.I for 10 years and to pay a fine of Rs.5000/- in default to undergo R.I for 1 year. Challenging the above said conviction and sentence passed by the Special Judge, the accused has filed the present appeal.

4. The learned counsel for the appellant would submit that the prosecution has not proved the age of the victim girl. At the time of occurrence, she was not below 18 years but actually her age was above 18 years and no birth certificate was produced. Even though the girl has stated that she was studying 10th standard and her age was 16 years, neither birth certificate or school studying certificate are produced nor records from the school has been summoned. Therefore, the age has not been established. However, the victim girl has clearly stated that the appellant married the victim girl and father of the victim girl also left her in the appellant's house as if she is wife of the appellant and the appellant also taken back her daughter. The learned counsel further submitted that there was no kidnapping or abduction because the victim girl had voluntarily



eloped with the appellant and since she voluntarily eloped with the appellant, there is no offence of kidnapping or abduction. Further no witness has spoken about the wrongful confinement of the victim girl and it has been clearly stated that the victim girl accompanied the appellant's place wherever the appellant goes, therefore, there is no wrongful confinement. P.W.2 is not an eye witness and he is only father of the victim girl even though he has given the complaint. Further the learned counsel would submit that even the doctor has stated that there was no recent sexual assault and therefore, there is no case and therefore, the offence would not fall under section 5(1) of POCSO Act and the prosecution has miserably failed to prove the charges as framed against the appellant. Even though it is stated that the age of the victim girl is 16 years, the prosecution has not proved the age and therefore, she is above 18 years and the appellant married the victim girl and therefore, if the victim girl is above 18 years and married and lead matrimonial life with the appellant, the offence would not fall under POCSO Act. The learned Special Judge failed to appreciate the evidence on record but only based on the presumption and on sympathy ground, convicted the appellant, which warrants interference of this Court.

5. The learned Government Advocate would submit that the victim girl is aged only 16 years at the time of occurrence. Her custody was taken away by the appellant from the lawful guardian without their consent. She was produced before the doctor only on 18.12.2019. Therefore, there is no external fresh injury or recent sexual assault. Therefore, the opinion of the doctor cannot be fully given effect to as such there was no sexual assault. But the victim girl was produced before the Judicial Magistrate for recording statement under section 164 Cr.P.C and she has clearly stated that she was aged about 16 years, she and the appellant stayed at various places and he had sexual intercourse with her. However, thereafter there was a quarrel between them and he slapped her. Therefore she went to her parents house. After getting information from the victim girl, the father of the victim girl gave the complaint.

(b) P.W.9 has clearly stated that he arranged a house for the appellant and the victim girl to stay there and also stated that the appellant beaten her, therefore, he helped her to go to her parents house. The doctor evidence also clearly shows that the victim girl is aged between 16 to 17 years and the age certificate is also produced. However, the appellant has not challenged the age of the victim girl and therefore, no need to file the birth certificate since the age of the victim girl has not been disputed. The appellant, knowing fully well that the



victim girl is below 18 years, even though it is with her consent, but he has taken the victim girl from the custody of the lawful guardian without their consent. Therefore, the above act is an offence under Section 366 IPC. P.W.9 has stated that victim girl was kidnapped while she was minor. Therefore, it is a clear wrongful confinement since the age of the victim girl is below 18 years. Even as per the statement of the victim girl, the appellant had sexual intercourse. Even though the doctor stated that there was no injury it was not stated that she was not subjected to sexual assault. Therefore the learned Special Judge appreciated the entire evidence and come to the conclusion that the prosecution proved the charges framed against the appellant and therefore, convicted the appellant for the above said offence and there is no merit in the appeal and the same is liable to be dismissed.

6. Heard the learned counsel on either side and perused the materials placed on record.

7. The case of the prosecution is that the victim girl is daughter of P.W.1 and she was studying 10 standard at Government High School, Soolagiri and she was aged about 16 years and the appellant used to follow her. While going to school by bus, the appellant enticed her under the pretext of loving her with an intent to exploit her sexually. On 06.07.2015 at the bus stop situated at Berandapalli, Athimugam Berigai Road, Sempatti, he kidnapped her with an intent to have illicit intercourse with her. In the course of same venture, he took her to Athipalli Guest Line and wrongfully confined her in a house for the period of 5 months till 18.12.2015. She returned back to her parents house and thereafter only P.W.1 preferred a complaint before the respondent police. On receipt of her complaint, the respondent police registered a case in Crime No.60/2015 for offence under 366 (A) of IPC and section 5(1) of Protection of Children from sexual offence Act (POCSO Act)

8. Since Appellate Court is a fact finding Court, this Court has to re-appreciate the entire evidence and give independent findings. Accordingly it has re-appreciated the entire evidence.

9. Regarding the complaint given by P.W.1, there is evidence of father of the victim girl viz., P.W.2. The prosecution has proved the complaint filed against the appellant and also a reading of the evidence of the victim girl/ P.W.3, it is seen that she has clearly stated that her age is only 16 years at the time of occurrence and the appellant took her to various places and had sexual intercourse with her and also she was produced before the doctor and doctor who examined the victim girl,



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stated that she was subjected to sexual assault and the doctor after examining her, taken X-ray and also given the opinion that she was only aged about 16 to 17 years and therefore, though in the absence of birth certificate of the victim girl, the doctor opinion can be taken into consideration and in such circumstances, the age of the victim girl in either way can be more or less than the age as opined by the doctor. According to the evidence of the doctor and Ex.P.9-Age Certificate of the victim, age of the victim girl is 16 to 17 years. Even as per the victim girl statement, she would be only below 18 years. Per contra, the appellant has not disproved the age of the victim girl and that she has completed the age of 18 years and in no way the appellant disputed the age of the victim girl and that she attained majority. The statement given by the victim girl was that she was aged about 16 years and therefore, she has not completed 18 years and therefore, the offence committed would attract POCSO Act since because she is a child under the definition of Section 2(1)(d) of the POCSO Act. The evidence of the doctor also proved the same.

10. The victim girl was also produced before the Judicial Magistrate to record her statement under section 164 Cr.P.C. Accordingly, statement was also recorded and the same has been marked as Ex.P.16. A reading of Ex.P.16 shows that the victim girl was taken custody by the appellant without the knowledge of her parents and without their consent he took her and stayed in various places about 5 months and thereafter she came to her parent's house; there was panchayat and after getting the villagers advise, P.W.2/father of the victim girl not preferred the complaint initially. Therefore he waited for some time. At that time, after hearing the victim girl's opinion and that the appellant left the victim girl, the parents preferred the complaint. Even though it is the contention of the learned counsel for the appellant that subsequently they got married each other, however on the date of commission of offence, the victim girl was not completed 18 years and without consent of the parents, the appellant taken custody of the victim girl and had sexual intercourse with her several times repeatedly and therefore the offence falls under section 5(1) of POCSO Act. But however marriage was not proved.

11. Even though the learned counsel for the appellant would submit that the victim girl stated that she got married, the appellant in his confession statement has not admitted the same. There is no oral or documentary evidence produced by the appellant in support of the marriage. The appellant need not give any evidence to prove his defence, but there is a presumption under section 29 of the POCSO Act, if the prosecution has proved the charge under POCSO Act and the victim girl deposed to that extent supporting the case of the



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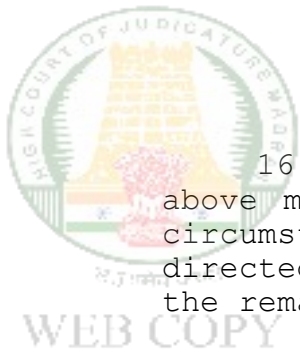
prosecution, the appellant has to rebut the presumption in the manner known to law. Though the victim girl and her father stated that originally there was a marriage, there is no independent evidence examined in this case and no documentary evidence was produced. Therefore, under these circumstances, the defence taken by the learned counsel for the appellant is not acceptable. Since prosecution has established the age of the victim girl that she was not completed 18 years and custody was taken by the appellant from her lawful guardian without their consent, the appellant committed the offence under Section 366 of IPC and since the appellant had sexual intercourse and victim girl is a child as per the definition of POCSO Act and that there was repeated sexual intercourse, 5(1) of POCSO Act would attract. Therefore, conviction and sentence recorded for the offence punishable under section 6 of POCSO Act does not warrant any interference.

12. Insofar as the defence of the appellant is concerned, there is no material to show that there was a wrongful confinement. The victim girl herself stated that knowingly she went along with the appellant by herself. But prosecution has not substantiated its case that the victim girl was wrongfully confined and appellant restricted her movements and wrongfully confined. Therefore, in the absence of material and any evidence to prove the allegation of wrongful confinement of the victim girl by the appellant, conviction recorded under section 342 IPC is set aside.

13. Since the marriage is not proved, offence under section 366 IPC is not made out. The victim girl has not stated that the appellant compelled her to marry him. Therefore offence under section 366 IPC is also set aside.

14. As observed in the above paragraph, since the marriage is not proved and the victim girl has not stated that she has been kidnapped and the appellant forcefully married her, offence under section 342 IPC is not made out. However, since victim girl is below 16 years and her custody was removed by the appellant from the lawful guardian without their consent, offence under Section 361 IPC would attract which is punishable under Section 363 IPC.

15. The conviction and sentence passed for the offence punishable under Section 6 of POCSO Act, is confirmed. The conviction for the offence under Sections 366 IPC and 342 IPC are set aside, however conviction for the offence under Section 366 IPC is modified as under Section 361 IPC which is punishable under Section 363 IPC.



16. In the result, the Criminal Appeal is dismissed with the above modification and this court does not find any mitigating circumstances to reduce the sentence. The trial court is directed to take steps to secure the appellant for sufferance of the remaining period of sentence.

Sd/-

Assistant Registrar(CS IX)
//True Copy//

Sub Assistant Registrar

mpa

To

1. The Sessions Judge,
Fast Track Magalir Nethi Mandram,
Krishnagiri, Krishnagiri District.
2. The Inspector of Police,
All Women Police Station,
Hosur,
Krishnagiri District.
3. The Superindent, Central Prison, Vellore
4. The Public Prosecutor,
High Court of Madras.
5. The District Collector,
Krishnagiri.
6. The Director General Of Police,
Mylapore, Chennai - 4
- 7.The Section Officer,
Criminal Section,
High Court, Madras.

Copy to:

The Hon'ble 'Posco' Committee
High Court, Madras - 104

Cr1.A.No.346 of 2019

CP (CO)
K.RK. (19.07.2021)