

Bail Slip

Manigandan S/o Shanmugam, aged 30 years single Accused in Spl. SC 40/17 on the file of the Sessions Judge, Mahila Court, Cuddalore was enlarged a bail in Crl.M.P.No.9298/19 in Crl.A.No.431/19 by this Hon'ble High Court dated 27/11/2020.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.03.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.No.431 of 2019

Manigandan Appellant

.Vs.

State by its
Sub Inspector of Police,
All Women Police Station,
Panruti, Cuddalore District,
Crime No.4 of 2016. Respondent

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to set aside the conviction and sentence imposed upon the appellant vide judgment dated 08.04.2019 in Spl.S.C.No.40 of 2017 on the file of the Sessions Judge, Mahila Court, Cuddalore and acquit the appellant and direct the trial Court to refund the fine amount.

For Appellant : Mr.I.Syed Sibghatulla
Legal Aid Counsel

For Respondent : Mr.R.Surya Prakash
Government Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal has been filed against the Judgment dated 08.04.2019 in Spl.S.C.No.40 of 2017 by the learned Sessions Judge Mahila Court, Cuddalore.

2.The case of the prosecution is that the appellant was in love with the victim girl/P.W.2, who was a minor studying 11th Standard. The father of the victim girl was working in Salem and her mother is a house wife. When the victim girl was studying 10th Standard, the appellant used to follow her regularly in person and over phone and developed intimacy with the victim

girl. On 09.10.2015, when the victim girl's mother/P.W.1 went to hospital with her sister, the appellant came to the house of the victim girl and knocked the rear side door. When the victim opened the door and questioned the appellant, he informed her that he is going abroad and he would be back only after three years, hence, he wanted to talk to her and he tried to enter into the house. The victim girl refused him to enter into the house and the appellant pulled her nighty forcibly and pushed her on the floor and had sexual intercourse with her. When P.W.1 mother of the victim girl knocked the door, none opened the door and on seeing through the window, she was shocked that the appellant was lying over the victim. She entered into the house and the appellant ran away from that place. Thereafter, P.W.1 informed the said incident to one Shanthi, who is the aunt of the appellant and also informed to the mother and brother of the appellant. The brother (D.W.1) of the appellant assured that the marriage between the appellant and the victim girl would be performed. Believing the said words, no complaint was lodged against the appellant. On 04.04.2016, the victim girl's family came to know that the marriage for the appellant was held with some other girl. Therefore, on 05.04.2016, P.W.1 the mother of the victim girl lodged a complaint (Ex.P1) against the appellant.

3. On receipt of the complaint, the respondent police registered a case in Crime No.4 of 2016 against the appellant/accused for the offence under Section 3 and punishable under Section 4 of The Protection of Children from Sexual Offences Act, 2012 [hereafter 'POCSO Act' for the sake of convenience]. After investigation, the respondent police filed a charge sheet before the learned Sessions Judge, Mahila Court, Cuddalore and the same was taken on file in Spl.S.C.No.40 of 2017. After completing formalities, the trial Court framed the charges against the appellant for the offence punishable under Section 4 of POCSO Act.

4. In order to prove the case of the prosecution before the trial Court, on the side of the prosecution as many as 15 witnesses were examined as P.W.1 to P.W.15 and Exs.P1 to P12 were marked and no material objects were marked. After completion of the prosecution side evidence, incriminating circumstances culled out from the evidence of prosecution witnesses were put against the appellant/accused under Section 313 of Cr.P.C., wherein he denied all the incriminating circumstances as false and pleaded not guilty. On the side of the defence, one witness was examined as D.W.1 and no documentary evidence was produced.

5. The Court below, after hearing the arguments advanced on either side and also considering the materials available on

record, found that the accused/appellant is guilty and convicted for the offence under Section 4 of POCSO Act and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.20,000/- and in default to undergo simple imprisonment for a period of two years.

6. Being aggrieved by the said judgment of conviction and sentence, the appellant is before this Court.

7.1 The learned Legal Aid Counsel appearing for the appellant would submit that there was no forcible sexual intercourse and it was only a consented sexual relationship. The occurrence was said to have taken place on 09.10.2015 at 9.30 p.m in the house of the victim girl (P.W.2). Thereafter, the complaint was lodged on 05.04.2016 with an inordinate delay of six months and the delay has not been properly explained. She would further submit that the appellant and the victim girl were in love with each other. Initially the victim girl refused his love proposal, however, the appellant used to follow her regularly and also made a promise that he would not disturb her studies and would marry her. Thereafter, the victim girl accepted his love proposal and on her free will and consent, they had physical relationship and was not subjected to penetrative sexual assault. Further, the Doctor (P.W.14), who examined the victim girl has deposed that prior to the occurrence i.e., on 05.10.2015, she gave treatment for stomach pain to the victim girl, subsequently, after the occurrence she once again treated the victim girl and advised abdomen scan and given a report which was marked as Ex.P.11, but, the victim girl and her mother have not stated anything about the said incident. However, the victim girl in her cross examination has deposed that she narrated the said incident to the Doctor (P.W.14). Therefore, there is a material contradiction in the evidence of the victim girl (P.W.2) and the Doctor (P.W.14).

7.2 The learned counsel would further submit that the alleged occurrence was not happened on 09.10.2015, since the appellant had taken steps to marry another girl, in order to stop that marriage a false case has been foisted against the appellant. The victim girl in her deposition had deposed that after the occurrence, (P.W.1) mother of the victim girl immediately informed the said incident to one Shanthi, who is the aunt of the appellant and thereafter, on the next day morning P.W.1 accompanied Shanthi and told the said incident to the mother of the appellant. However, the said Shanthi was not examined by the prosecution as one of the witness. Therefore, non-examination of the independent witness is fatal to the case of the prosecution. There was no eye witness to the said occurrence. The mother of the victim has stated that she saw the said occurrence, but, soon after the occurrence she has not

lodge the complaint. It is further submitted that P.W.1 the mother of the victim in her evidence has deposed that since the father of the victim girl is a close friend of (D.W.1) brother of the appellant, they have not lodge the complaint soon after the occurrence. P.W.8, who is the father of the victim girl, has deposed that he was informed about the said incident over phone by his wife (P.W.1), however, he did not rush to home immediately after the occurrence and he simply stated that whenever, he come to the place, he would enquire about the said incident and also told his wife P.W.1 to inform the same to D.W.1, whereas, the said facts were denied by D.W.1. Therefore, the reasons given for the delay in filing the complaint has not been properly explained by the prosecution. The Doctor (P.W.5), has clearly deposed that at the time of clinical examination, the victim girl has stated that she was subjected to forcible penetrative sexual assault by the appellant on 09.10.2015 and after examination she has given a report (Ex.P5) categorically stating that there is no external or internal injury on the victim girl and she was not subjected to sexual assault, whereas, she has stated that the victim girl might have been subjected to penetrative sexual assault. The medical evidence is contrary to the case of the prosecution and therefore, the prosecution has failed to prove its case beyond reasonable doubt. Further, it is a case of consented sexual relationship and not forcible sexual assault.

7.3 The learned counsel would further submit that the mother of the victim girl has stated that the appellant had put one hand in the mouth of the victim girl, unless the consent of the victim girl, it was not possible to put the hand. Therefore, it is clearly a consented sexual relationship and not forcible sexual assault. She would further submit that P.W.1 in her cross examination has deposed that immediately after the occurrence, she lodge a complaint against the appellant and that the respondent police enquired about the said incident and the same was admitted by P.W.7, who is the neighbour of P.W.1, but the same was denied by the Investigating Officer P.W.13. The prosecution has suppressed the earlier complaint and hence, the investigation in this case was not properly done by the Investigating Officer. The learned Sessions Judge also pointed out the faulty investigation in paragraph No.86 of the judgment. It is further submitted that since the appellant's family did not accept the marriage between the appellant and the victim girl, a false case has been foisted against the appellant. There was no material to convict the appellant for the offence punishable under Section 4 of POCSO Act. However, the trial Court failed to appreciate the entire evidence, convicted the appellant only on assumption and sympathy, and therefore, the judgment of conviction and sentence passed by the trial Court against the appellant, are liable to be set aside.

8.1 The learned Government Advocate (Crl.Side) would submit that the victim girl was only 15 years at the time of occurrence i.e. 09.10.2015 and she was studying 11th standard. When the victim girl was studying 10th standard, the appellant used to follow her regularly and developed intimacy with the victim girl; initially, the victim girl refused him, but the appellant promised to marry her and also would not disturb in pursuing her studies; and continuously insisted her and obtained consent for love. On 09.10.2015, when the mother of the victim went to hospital with her sister, the appellant came to the house of the victim girl in the night hours and made forcible sexual intercourse and the mother of the victim girl also seen the said occurrence and immediately informed about the same to her neighbours. Thereafter, on the next day morning, P.W.1, P.W.7 and others went to the house of the appellant and informed about the same to the appellant's mother. Subsequently, P.W.1 informed the said incident to the father of the victim girl. The learned Government Advocate (Crl.Side) would further submit that though the occurrence took place on 09.10.2015, the complaint came to be lodged on 05.04.2016 and the reasons for the delay is, (P.W.8) father of the victim girl is a close friend to (D.W.1) brother of the appellant and there were talks going on for conducting marriage between the appellant and the victim girl and hence, the complaint was not lodged immediately. Initially, D.W.1 the brother of the appellant and the family members accepted for the marriage between the appellant and the victim girl and by giving one reason or other and delayed the marriage. Finally they promised that since the victim girl is 16 years and after obtaining her majority, they would perform marriage between them and that is the reason why the parents of the victim girl were keeping silent and they have also not revealed the said incident to the Doctor (P.W.14). Subsequently, the appellant's family made arrangement for marriage between the appellant and another girl and hence, P.W.1 lodged the complaint and therefore, there was a delay in lodging the complaint. Thus, the prosecution has properly explained the delay in preferring the complaint and it is not fatal to the case of the prosecution.

8.2 The learned Government Advocate (Crl.Side) would further submit that after lodging the complaint, the Doctor (P.W.5) who examined the victim girl has clearly deposed that at the time of occurrence, the age of the victim girl was 16 years and also opined that there is no external and internal injury on the body of the victim girl and she was not subjected to sexual assault, whereas she has stated that the victim girl might have been subjected to penetrative sexual assault. Since the occurrence was said to have taken place on 09.10.2015, whereas, the victim girl was clinically examined by P.W.5 on 05.04.2016, after a gap

of six months, it was not possible to find out any injury or symptoms for the said incident. The victim girl was produced before the learned Judicial Magistrate for recording statement under Section 164 (5) Cr.P.C., which was marked as Ex.P2 and the same was substantiated by the victim girl during the trial and also the victim girl has deposed that the mother also seen the said occurrence. Therefore, the mother of the victim girl was examined as P.W.1 and her evidence was corroborated with the evidence of P.W.2. Further, the Doctor (P.W.14) who examined the victim girl prior to the said occurrence clearly deposed that neither P.W.1 nor P.W.2 had spoken about the incident to her, but, P.W.1 and P.W.2 had properly explained as to why they did not tell the said incident to the Doctor P.W.14. The family of the victim girl did not have any specific reason for falsely implicating the accused in the said offence.

8.3. In order to prove the age of the victim girl, P.W.6, the Principal of the school in which the victim girl studied, was examined and produced the attested copy of SSLC Mark Sheet of P.W.2, which was marked as Ex.P6. As per SSLC Mark Sheet Ex.P6, School Certificate (Ex.P7) and copy of the admission register (Ex.P8) the date of birth of the victim is 20.05.2000 and at the time of incident, she was aged about 15 years and not completed 18 years. Therefore, considering the provision of Section 3 of POCSO Act, the learned trial Judge, has rightly appreciated the entire evidence and convicted the appellant for the offence punishable under Section 4 of POCSO Act and hence, there is no merit in this appeal and the same is liable to be dismissed.

9. Heard the learned Legal Aid Counsel for the appellant and the learned Government Advocate (Crl.Side) for the respondent and also perused the materials available on record.

10. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.

11. In order to prove the case of the prosecution, 15 witnesses were examined as P.W.1 to P.W.15, out of which, the victim girl was examined as P.W.2. The evidence of the victim girl would reveal that on 09.10.2015, the appellant entered in to the house of the victim girl and forcibly had sexual intercourse with her and also deposed that her mother P.W.1 also eye witness to the said incident. The evidence of the victim girl was corroborated with the evidence of P.W.1 the mother of the victim. The Doctor (P.W.5) who examined the victim girl has given opinion that there was a possibility of sexual

intercourse. The victim girl was produced before the learned Judicial Magistrate and her statement was recorded under Section 164 (5) Cr.P.C., which was corroborated with her evidence during trial. In order to prove the age of the victim girl, the prosecution has produced a copy of the Provisional SSLC Mark Statement, which was marked as Ex.P6. As per Ex.P6, the date of birth of the victim girl was 20.05.2000 at the time of committing the offence i.e. on 09.10.2015 and her age was 15 years.

12. The main defence taken by the learned Legal Aid Counsel for the appellant is that there was inordinate and unexplained delay in lodging the complaint and non-examination of the independent witness viz., Shanthi, which are fatal to the case of the prosecution. Inasmuch as the delay was clearly explained by P.W.1 and P.W.2, that the occurrence said to have taken place on 09.10.2015 and P.W.1 informed the said incident to her husband (P.W.8), who was residing out station due to his work and he asked his wife to intimate the said incident to one Sivamuthu (D.W.1)/the brother of the appellant, since he was close friend to the father of the victim girl (P.W.8); when P.W.8 came home during Pongal holidays, they went to D.W.1's house and sought justice. Thereafter, there were talks going on for conducting marriage between the victim and the appellant and hence, the complaint was not lodged immediately. Subsequently, the appellant's family gave one reason or other and delayed the marriage and in the meantime, they arranged the marriage of the appellant with some other girl and the marriage was solemnized on 04.04.2016. Thereafter, on 05.04.2016, the mother of the victim girl P.W.1 lodged the complaint. Thus, the delay in lodging the complaint has been properly explained by the prosecution.

13. In the present case, the appellant had sexually assaulted the victim girl and the mother of the victim girl also saw the said incident. Naturally the family members of the victim girl would think about the future of the victim girl. Since the appellant also a bachelor, they would like to talk settlement amicably. Even the appellant's family initially agreed for their marriage, subsequently, they refused to perform the marriage between the appellant and victim girl and made arrangements for the marriage of the appellant with some other girl. Therefore, the present complaint has been lodged by P.W.1 and the delay also properly explained.

14. Further, defence taken by the learned Legal Aid Counsel for the appellant is that the prosecution has not examined one Shanthi, who is the aunt and also relative of the appellant, as she would not support the case of the prosecution. The occurrence said to have been taken place in the house of the

victim girl during night hours and the mother of the victim girl was one of the eye witness to the said occurrence and her evidence was also corroborated with the evidence of P.W.1 the victim girl during trial and the statement recorded under Section 164(5) Cr.P.C and therefore, non-examination of Shanthi is not fatal to the case of the prosecution. In cases like this, normally the other members of the village would not support the case of the prosecution, because both the families are known to them and that would not support any one of the family. Further, P.W.1 and P.W.2 have clearly deposed the said incident and the medical evidence also supports the case of the prosecution. Therefore, non examination of independent witnesses were not fatal to the case of the prosecution.

15. Even prior the said occurrence i.e. on 05.10.2015, P.W.1 the mother of the victim girl took the victim girl to the Doctor (P.W.14) and gave treatment for stomach pain. Subsequently, after the occurrence, once again on 12.10.2015, the victim girl went to the hospital of P.W.14 for treatment, but, neither P.W.1 nor P.W.2 spoken about the said incident to P.W.14. The Doctor (P.W.14) had given treatment and advised for abdomen scan and given a report which was marked as Ex.P11. The Doctor (P.W.14) in her evidence has clearly deposed that the victim girl and her mother did not reveal the said incident to her and the same was corroborated with the statement of the victim girl recorded under Section 164(5) Cr.P.C by the learned Magistrate. As already the victim girl and her mother P.W.1 stated that they approached the appellant's family for justice and they also assured to conduct marriage between the appellant and the victim girl, after the victim girl completing the age of 18 years. Therefore, they may not reveal the said incident to any other person. Therefore, non information of the said incident to the Doctor is not fatal to the case of the prosecution. After registering the complaint, the victim girl was produced before the Doctor (P.W.5) for medical examination and she has opined that the age of the victim girl is 15 to 16 years at the time of incident (less than 18 years) and therefore, even, if it is assumed that the appellant had sexual intercourse with the victim girl with her consent, in that case also, the appellant is guilty as the victim girl was not completed the age of 18 years and her consent is irrelevant. As per the POCSO Act, the child is defined as any person, who is below the age of 18 years. In the present case, at the time of occurrence the victim girl is 15-16 years and the age of the victim girl is not challenged. The appellant's family made promise to perform marriage between the appellant and the victim girl, after attaining the age of 18 years that itself shows that the victim girl is minor at the time of occurrence.

16. In the light of the above facts and circumstances, this Court on a careful perusal of the entire materials independently come to the conclusion that the accused/appellant committed the charged offence and the trial Court has rightly appreciated the entire evidence and found guilty for the offence punishable under Section 4 of POCSO Act.

17. In fine, this Criminal Appeal deserves to be dismissed and accordingly, the same is dismissed. The conviction and sentences passed in Spl.S.C.No.40 of 2017 by the learned Sessions Judge, Mahalir Court, Cuddalore is confirmed. If the appellant/accused is not in duress, the trial Court is directed to take appropriate steps to secure the presence of the appellant to serve the remaining period of sentence.

18. The Legal Aid Counsel, who argued the case for the appellant is entitled to get legal fees as per rules.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Mahila Court,
Cuddalore.

2. The Sub Inspector of Police,
All Women Police Station,
Panruti, Cuddalore District,

3. The Public Prosecutor,
High Court, Madras.

4. The Superintendent,
Central Prison, Cuddalore.

5. The Deputy Registrar (Criminal Section), High Court, Madras.		with a direction to send back the original records, if any, to the trial Court
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Copy to

The Secretary,
Legal Aid Services Authority,
Chennai.

+1cc to Mr.I.Syed Sibghatulla, Legal Aid Counsel, Sr.13971

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srg 01/07/2021



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