



BAIL SLIP

The Petitioner/Accused Viz., Ramasamy @ Kathirvel, Male aged 35 years S/o.Chinnappanaickar was directed to be released on bail vide order dated 22.12.2020 in Crl.MP.No.7113 of 2020 in Crl.A.462 of 2020 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.07.2021

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CRL.A.NOS.489 AND 462 OF 2020

Chinnathambi @ Bommanaicker

... Appellant/1st Accused
(in Crl.A.No.489/2020)

Ramasamy @ Kathirvel

... Appellant/2nd Accused
(in Crl.A.No.462/2020)

Vs.

The State by Inspector of Police,
Mallasamudram Police Station,
Namakkal District.
Crime No.222 of 2015

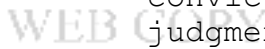
... Respondent/Complainant
(in both Crl. Appeals)

COMMON PRAYER :

Criminal Appeals are filed under Section 374(2) of Criminal Procedure Code, to admit the appeal and set aside the conviction and sentence imposed on the appellant by the Judgment dated 22.10.2020 passed in Special CC.No.5 of 2016 on the file of Sessions (Fast Track Mahila) Judge, Namakkal by allowing the present criminal appeals.

For Appellants : Mr.R.Nalliyappan
(in both Crl. Appeals)

For Respondent : Mr.S.Sugendran
Government Advocate (Crl.Side)
(in both Crl. Appeals)



These criminal appeals have been filed to set aside the conviction and sentence imposed on the appellants by the judgment dated 22.10.2020 passed in Special CC.No.5 of 2016 on the file of Sessions (Fast Track Mahila) Judge, Namakkal.

3. The respondent-police registered a case against the appellants in Crime No. 222 of 2015 for the offences punishable under Sections 363, 366-A of IPC and Section 5(n) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act' for short). After completing investigation, the respondent-police laid a charge sheet before the Sessions (Fast Track Mahila) Judge, Namakkal, since the offences are against child. The learned Judge, Mahila Court taken the case on file in Special C.C.No.5 of 2016 and after completing the formalities, the charges were framed against accused as follows:-

Accused	Offence
A1	Under Sections 363, 366-A of IPC and Section 5(n) punishable under Section 6 of POCSO Act.
A2	Under Sections 363 and 366-A of IPC.

5. After completing the examination of the prosecution witnesses, incriminating materials were culled out from the evidences of the prosecution witnesses and put before the appellants/accused by questioning under Section 313 of Cr.P.C., and they denied it as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

6. On completion of trial, hearing arguments advanced on either side and considering the materials, the Trial Court found guilt of the appellants/accused as follows:-

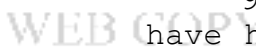


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Accused	Offence	Sentence
A1	Under Section 3 punishable under Section 4 of POCSO Act.	Convicted and Sentenced to undergo ten years rigorous imprisonment and imposed a fine of Rs.1,000/- in default to undergo further period of six months simple imprisonment.
	Under Section 363 of IPC	Convicted and Sentenced to undergo seven years rigorous imprisonment and imposed a fine of Rs.500/- in default to undergo further period of six months simple imprisonment.
	Under Section 366-A of IPC	Convicted and Sentenced to undergo seven years rigorous imprisonment and imposed a fine of Rs.500/- in default to undergo further period of six months simple imprisonment.
A2	Under Section 363 of IPC	Convicted and Sentenced to undergo seven years rigorous imprisonment and imposed a fine of Rs.500/- in default to undergo further period of six months simple imprisonment.
	Under Section 366-A of IPC	Convicted and Sentenced to undergo seven years rigorous imprisonment and imposed a fine of Rs.500/- in default to undergo further period of six months simple imprisonment.

7. Challenging the aforesaid judgment of conviction and sentence, both the appellants/A1 and A2 have filed the present criminal appeals.

8. Learned counsel for the appellants/A1 and A2 would submit that PW2/victim girl was alleged to have been kidnapped by the appellants/A1 and A2 on 06.12.2015 at about 9.00 a.m., and after knowing the same, PW1 made a complaint before the respondent-



9. The chief examination of PW2 shows that A1 is alleged to have harassed PW2/victim girl, under such circumstances, she was not allowed to go to school, whereas in the cross examination, she deposed that after the said occurrence only she came to know about A1, which is totally contradictory. Hence, the case of the prosecution is not acceptable.

11. Further, the learned counsel for the appellants would submit that in her evidence, PW20 specifically states that during investigation PW1 stated that PW2 was having love affair with A1, hence they compelled to marry PW5, under such circumstances PW2 voluntarily left with appellants on 06.12.2015 at about 9.00 am., which would establish that the entire prosecution case is created one for some other purpose. In chief examination, PW3, who is the mother of PW2/victim girl, has stated that before the occurrence she knew the appellants, whereas in the cross examination she stated that after occurrence only, she came to know about the appellants, which creates suspicion over the prosecution case.

<https://hcservices.ecourts.gov.in/hcservices/>

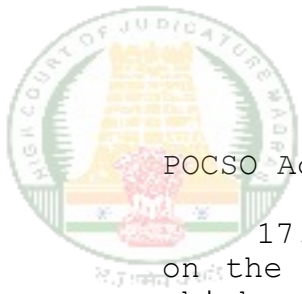


13. Further, he would submit that PW8 categorically admits during cross examination that PW5 shown his willingness to marry PW2, but in the meantime, PW1 and PW3 inclined to perform marriage of PW2 with the A1 and in the course of that dispute only, the above complaint has been made against the appellants. As per the evidence of PW16/Medical expert, it has been stated that on examination of PW2, she has stated that on 07.12.2015 at about 4.15 p.m at Periya Sathapadi, known person has caused sexual assault on her, whereas, as per the prosecution case, the appellants herein alleged to have caused sexual assault at a house at Dindigul, which would establish that the above case is created based on the false complaint. There is a contradiction between the prosecution witnesses regarding place of occurrence and time of occurrence. The complaint has been belatedly lodged and FIR was belatedly registered.

14. He would further submit that in his evidence, PW19/Sub Inspector, who has registered the case, admits that the prosecution has not explained the delay in filing the complaint/Ex.P1 and further, they had registered the above case on 07.12.2015, however the copy of the FIR has been sent to the Court only on 09.12.2015 and the reason for delay in sending the FIR to the Court has not been properly explained by the prosecution, which establishes that the above case is totally foisted one.

15. The investigating officer has not seized the dress of the victim and the same were not subjected to chemical examination and therefore, expert opinions were received in order to prove the case of the prosecution. It is only due to compulsion that PW1 and PW3 wanted PW2 to marry PW5, she left with the appellants in order to safeguard her life. Further, he would submit that the victim girl herself voluntarily left the house and she came on her own and nobody had kidnapped her and therefore, there was no penetrative sexual assault. Therefore, the Trial Court failed to appreciate the evidence and wrongly convicted the appellants.

16. The learned Government Advocate (Crl. Side) would submit that the charge framed against the accused is that they kidnapped the victim child from the lawful guardianship of her parents for conducting marriage with A1 and took her to Namakkal bus stand. PW4, PW5 and PW6 stated that the appellants took the victim girl in a two wheeler and they informed to PW1 and PW1 gave a complaint on 07.12.2015. On 07.12.2015, A1 married the victim girl and took her to his house at periyasathampadi in Salem District and had sexual intercourse with her in the said house and committed offence under Sections 363 and 366-A IPC and also under Section 3 which is punishable under Section 4 of



POCSO Act.

17. In order to substantiate charges against the appellants, on the side of prosecution, 20 witnesses were examined, out of which, the victim was examined as PW2 and she has clearly narrated that the appellants took the victim to various places and also took the victim to a temple at Natham Taluk in Dindigul District and tied Thali and A1 stayed with the victim in his friend's house and had sexual intercourse with the victim and A2 accompanied them. Since criminal case was registered against them and after getting information about the same, they came to the Police Station. PW16 is the Doctor, who examined the victim girl, has clearly stated that the victim girl is subjected to penetrative sexual assault. Victim girl was produced before the Judicial Magistrate and the statement under Section 164 of Cr.P.C., was recorded, in which she has clearly narrated the fact that the accused took the victim girl by two wheeler and A1 had sexual intercourse with her. Subsequently, she was examined as PW2 before the Trial Court and she has narrated the facts.

18. A reading of the medical report clearly shows that the age of the victim girl is only 14 years at the time of occurrence. The custody of the victim girl was taken by the appellants/A1 and A2 from the custody of the lawful guardian without their consent and therefore, the appellants/A1 and A2 have committed the offence of kidnapping. The A1 forcefully married the victim girl with an intention to have illegal intimacy and therefore, he has committed offence under Section 366-A of IPC.

19. Further, he would submit that the prosecution has proved each and every circumstances pointing out the guilt of the accused and the prosecution proved the case beyond all reasonable doubts. The Trial Court rightly considered the entire evidence and convicted both the accused for the aforesaid offences. There is no merit in these criminal appeals and same are liable to be dismissed.

20. Heard both sides and perused the materials placed on record.

21. The case of the prosecution is that the victim child is aged about 14 years. The 1st accused, who is a native of Periyasathampadi, Salem District, had come to the informant village for coolie work. Being the relative of the informant's wife, he used to frequently visit the informant's house and expressed his willingness to marry the victim girl. Subsequently, on 06.12.2015 at about 9.00 am., the 1st and 2nd accused kidnapped the victim child from the lawful guardianship of her parents for conducting marriage illegally with the 1st



accused and took her to Namakkal bus stand. From there the 1st accused alone took the victim to Natham Village in Dindigul District, stayed with the victim in his friend's house. On 07.12.2015, he married the victim girl and took her to his house at Periyasathampadi in Salem District and had sexual intercourse with her in the said house and committed offences punishable under Section 366-A of IPC and Section 6 of POCSO Act.

22. In this regard, PW1/father of the victim girl made a complaint against the appellants before the respondent-police. The respondent-police registered the case against the appellants in Crime No.222/2015 and after completing investigation, they filed the charge sheet before the learned Special Judge. After completing trial, learned Special Judge by judgment dated 22.10.2020 in Special C.C. No. 5 of 2016, convicted the appellants/A1 and A2. Hence these criminal appeals.

23. Since the Appellate Court is a final Court of the fact findings, it has to re-appreciate the entire evidence and give an independent finding. Accordingly, Trial Court has considered entire materials and given the finding.

24. The charges against the appellants/accused are that the A1 and A2 kidnapped the victim girl, who is aged about 14 years, and her custody was taken by the accused from the custody of the lawful guardian without their consent for the purpose of A1 to get marry her and A1 had committed penetrative sexual assault with the victim. Therefore, the charges against the first accused were framed for kidnapping and also aggravated penetrative sexual assault and further as against A2 for kidnapping.

25. It is relevant to extract Sections 361, 363 and 366-A of IPC, which reads as follows:-

"361. Kidnapping from lawful guardianship.-Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

363. Punishment for kidnapping- Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."



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366-A. Procurement of minor girl.-Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine."

26. It is also relevant to extract Sections 2(1)(d), 3 and 4 of POCSO Act,

"2(1)(d) "Child" means any person below the age of eighteen years;

3. A person is said to commit "penetrative sexual assault" if:-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

4. Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine."

27. In order to prove the above charges on the side of the prosecution, totally 20 witnesses were examined. PW1 and PW3 are parents of victim. The victim child was examined as PW2. A reading of the complaint Ex.P1 and the statement of victim recorded under Section 164 of Cr.P.C/Ex.P11 and the copy of the accident register of victim/ Ex.P9 clearly reveal that the appellants removed custody of the victim child from the lawful guardians without their consent and the first accused had committed penetrative sexual assault on the victim.

28. Further, the evidence of Doctor/PW16 and the entry made in the medical report/Ex.P10 clearly show that the victim was



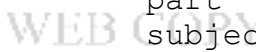
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subjected to penetrative sexual assault. Further, in order to prove the age of victim, a copy of transfer certificate of the victim was marked as Ex.P7. As per Ex.P7, the date of birth of the victim is 08.06.2001. The date of occurrence is 06.12.2015. Therefore, the victim is only 14 years at the time of occurrence. Therefore, the victim is a child under the definition of 2(1)(d) of the POCSO Act and further, in order to establish the charges regarding offence under Sections 361 and 366-A of IPC, the victim girl has clearly stated that when she had gone to wet the walls of the house newly constructed by her parents, both the accused came there and asked her to come with them and took her to various places and the first accused tied yellow thread at her neck and they stayed at his friend's house and committed penetrative sexual assault. After knowing the information, that the father of the victim, gave a complaint against the appellants before the respondent/police, they took back to native. Therefore, it clearly shows that the accused have taken custody of the victim child from the lawful guardians without their consent. Both the accused have committed offence under Section 361 which is punishable under Section 363 of IPC and the evidence of PW2 and other evidences clearly show that the offence under Section 366-A of IPC is made out.

29. The accused took the victim girl with an intention to marry her illegally and committed penetrative sexual assault. A2 abetted A1 for the purpose of marriage and had intercourse with the victim. A1 also took the victim to various places. Therefore, the charges framed against the appellants/A1 and A2 for the offence under Sections 361 and 366-A of IPC are proved.

30. As far as offence under Section 3 punishable under Section 4 of POCSO Act is concerned penetration to any extent is an offence. However, the Judicial Magistrate recorded the statement of the victim girl under Section 164 of Cr.P.C. Subsequently, the same was substantiated by examining the victim as witness before the trial Court. Therefore, the evidence of victim was corroborated by the evidence of PW16 and documents Exs.P6 to P11. This Court finds that the appellants/A1 and A2 have committed all the charged offences.

31. The learned counsel for the appellant vehemently contended that there is an inordinate delay in filing the complaint and the delay in registering FIR. As far as the delay in filing complaint is concerned, since PW1 and PW3 are illiterates and in that situation, they did not know how to prefer the complaint and they are concerned about the future of victim child and approached the police belatedly. Therefore, under these circumstances, the defence of inordinate delay in filing the complaint is fatal to the case of the prosecution is not acceptable. As far as delay in sending FIR to the Court is



32. It is well settled proposition of law that lapse on the part of prosecution should not lead to unmerited acquittal, subjected to rider that in such a situation, evidence on record should be clinching so that lapse of prosecution can be condoned. Whereas, in this case, during the examination of witnesses, PW2 categorically stated about the act committed by both the accused. In this case, there is no reason to discard the evidence of the victim girl, more so, which was corroborated by the medical evidence. The credibility of the evidence is not based on the financial status. The victim girl has categorically stated that the act committed by the appellants/accused was corroborated by the medical evidence.

34. On reading of entire materials, the defence taken by the appellants/A1 and A2 is that the victim girl voluntarily came with them and that the victim did not resist and therefore, there was no external injury on her body. The said defence of the learned counsel for the appellants cannot be accepted. The victim child has clearly stated that the appellants took her to various places and A1 had committed penetrative sexual assault. The age of the victim girl is only 14 years at the time of occurrence and the consent is immaterial. When the victim girl is 14 years, the appellants took the victim from the custody of lawful guardians without their consent, which is an offence under Sections 361 which is punishable under Section 363 of IPC. When the victim girl was taken by the appellants for the purpose of having sexual intercourse or marry her illegally, shall be punishable under Section 366-A of IPC and Sections 3 which is punishable under Section 4 of POCSO Act. Therefore, a combined reading of the aforesaid provisions and evidence of the victim child and statement recorded under Section 164 of Cr.P.C and medical report of the doctor/PW16 clearly proved that the



appellants have committed the offences as stated above and the defence taken by the appellants is not acceptable.

35. Since the age of victim is 14 years at the date of occurrence and therefore, the defence taken by the appellants cannot be accepted for any reason and she was subjected to penetrative sexual assault.

36. Therefore, this Court finds that the appellants/A1 and A2 have committed the offences as stated above and that there is no merit in these criminal appeals and hence, the same are liable to be dismissed. Accordingly, the criminal appeals are dismissed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions (Fast Track Mahila) Judge,
Namakkal.
2. The Superintendent,
Central Prison,
Coimbatore.
3. The Inspector of Police,
Mallasamudram Police Station,
Namakkal District.
4. The Public Prosecutor,
High Court, Madras.

Copy To

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

+2ccs to Mr.R.Nalliyappan, Advocate, S.R.No.31332,31333

Crl.A.Nos.489 and 462 of 2020

PMK(CO)
PM/25/02/2022