

Bail Slip

The Petitioner/Accused viz Saravanan aged 34 years S/o.Nagaraj was directed to be released on bail vide order in M.P. No. 15029/2019 in CrI.A.No.722/2019 dated 11.02.2020.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.02.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CrI.A.No.722 of 2019

Saravanan
S/o.Nagaraj

...Appellant/Accused

Vs.

The Inspector of Police,
All Women Police Station,
Vaniyambadi,
Vellore District.

...Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 (2) of Cr.P.C., to call for the records and to set aside the judgment in S.S.C.No.24 of 2018 passed by the learned Sessions Cum Mahila Judge, Vellore dated 12.03.2019.

For Appellant : Mr.Paul Gnanamuthu S.

For Respondent : Mr.R.Surya Prakash

Government Advocate (CrI.Side)

J U D G M E N T

The respondent police registered a case against the appellant in Crime.No.212 of 2017 for girl missing. Subsequently, on investigation a case was registered for offence under Sections 363, 366, 343 and Section 5(1) r/w. 6 of the POCSO Act and also after completing the investigation, they laid the charge sheet. Since the offence was against woman particularly a child and punishable under the POCSO Act, the learned Sessions Judge after completing the formalities framed the charges against the appellant for offence under Sections 366 and 343 IPC and also Section 5(1) r/w. Section 6 of the POCSO Act.

2. In order to substantiate the above charges, during trial, 8 witnesses were examined as P.W.1 to P.W.8 and 10 documents were marked as Exs.P.1 to P.10. No material objects were marked. After completing the prosecution evidence, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant. He denied the same as false. On the side of the defence, no oral or documentary evidence was produced. The learned Special Judge after hearing the arguments advanced on either side, delivered the judgment in which he found that the appellant committed offence under Sections 366, 343 IPC and Section 5(1) r/w. 6 of the POCSO Act. For the offence under Section 366 IPC he was convicted and sentenced to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.1,000/-, in default, to undergo one month Rigorous Imprisonment; for the offence under Section 343 IPC, he was sentenced to undergo one year Rigorous Imprisonment, and for the offence under Section 5(1) r/w. 6 of the POCSO Act, he was sentenced to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, in default, to undergo three months Rigorous Imprisonment. Challenging the said judgment of conviction and sentence passed by the Court below, the accused has filed the present appeal.

3. Learned counsel for the appellant would submit that the prosecution has not established the case and also not substantiated the charges framed against the appellant and the Special Court convicted only based on assumption, surmises and conjunctures. The appellant was convicted only based on the evidence of P.W.1 and P.W.2 and there was no corroboration and there is no independent witnesses in this case and even the Doctor has opined that the age of the victim girl was between 18 to 21. Therefore, the age can be taken either way, i.e., two years more or less can be taken. As per the evidence of P.W.5, Doctor, the age of the victim girl was above 18 years. Therefore, she cannot be described as a child as defined under Section 2 (1) (d) of POCSO Act. The prosecution only relied on the evidence of P.W.2 and the appellant was erroneously convicted and there is no independent witness and evidence of P.W.2 is not corroborated by any eye-witness or independent witnesses. Ex.P.6, X-ray, is not conclusive proof to show the age of the victim girl. The victim girl was tutored by her parents and their relatives. In order to prove the age, neither the school authority, nor the concerned officer who issued Ex.P.6 was examined and the ingredients of offence under Sections 366, 343 IPC and 5(1) r/w. 6 of the POCSO Act were not made out and without appreciating the evidence of prosecution, the Special Court convicted the appellant only on sympathetic grounds and there are no grounds to convict the appellant for the above said offences and therefore, it warrants interference.

In support of his contention, the learned counsel has cited the judgment of the Hon'ble Supreme Court in the case of Rajak Mohammad Vs. The State of Himachal Pradesh [Crl.A.No.1395 of 2018 dated 23.08.2018].

4. Learned Government Advocate (Crl.Side) would submit that the age of the victim girl was only 17 years and she was subjected to penetrative sexual assault and the prosecution clearly proved the charges framed against the appellant. The victim girl was removed by the appellant from the custody of the lawful guardian without their consent. P.W.2, victim girl, clearly narrated the occurrence and the victim girl was also produced before the Doctor soon after registering the case and the Doctor who conducted medical examination was examined as P.W.3 and as per her evidence, the victim girl's age was between 18 to 21 years and there were no external injuries. However, her hymen was not intact and admit one finger. The Doctor who examined the victim girl for assessing the age was examined as P.W.5, had stated that she had done radiological test and age of the victim would be between 18 to 21 years and the Doctor who examined the appellant for potency test was examined as P.W.6, had clearly stated that the appellant is capable of having sexual relationship. The victim girl was also produced before the Judicial Magistrate for recording statement under Section 164 Cr.P.C., and the said statement was marked as Ex.P.3 and the birth certificate of the victim girl was marked as Ex.P.4. Ex.P.2 clearly shows that the date of birth of the victim girl is 22.01.2001. The date of occurrence was 16.10.2017. Therefore, at the time of occurrence, the victim girl was only aged about 16 years. In Ex.P.2 statement recorded by the Judicial Magistrate, the victim girl clearly stated that the appellant promised to marry her and under the pretext the victim girl had consented to have sexual intercourse with the appellant and subsequently he had sexual intercourse with her on several occasions repeatedly and he took the victim girl to Vaniyambadi, and then Bangalore and both of them stayed there for 4 days. From there, they went to some other places and she does not know where she was brought by the appellant from Bangalore. There also, they stayed for four days and from the village, subsequently, he received phone calls from his relative. Since a case was registered against him, he took the victim girl to the village. Though the Doctor, who examined the victim girl stated that there are no external injuries and signs of forcible intercourse, however, the opinion of the Doctor would clearly reveal that she was subjected to penetrative sexual assault and the prosecution proved its case beyond reasonable doubt and there is no merit in this case. Therefore, the appeal is liable to be dismissed.

5. Heard both sides and perused the materials on record.

6. The case of the prosecution is that the appellant is a married man and has three children. The appellant used to come to P.W.1's house and proposed to marry the victim girl P.W.2 and she refused to marry him. On 16.10.2017 while she was going to school, the appellant, with a motive to sexually assault her, kidnapped the victim girl P.W.2. He took the victim girl to Vaniyambadi then to Bangalore and there, both stayed for 4 days. From there, they went to some other place and she does not know where she was brought by the appellant from Bangalore. There also, they stayed for four days and from the village subsequently he received phone calls from his relative. Since there was a case against him, he took the victim girl to the village, and thereby the appellant committed offence under Sections 366, 343 IPC and Section 5(1) r/w. 6 of the POCSO Act.

7. Since the Appellate Court is final court of fact finding Court, it has to appreciate the evidence and give independent finding.

8. In order to appreciate the evidence, this Court scrutinized the entire materials in this case. A careful reading of the statement recorded under Section 164 Cr.P.C. of the victim child by the learned Magistrate, it could be seen that the victim child has narrated the entire occurrence, which was marked as Ex.P.3, and also during evidence, she deposed the entire occurrence.

9. The Doctor, who conducted medical examination of the victim girl was examined as P.W.3 and she has clearly deposed that the victim girl was subjected to penetrative sexual assault and P.W.5 has given opinion regarding the age of the victim girl. According to him, the age of the victim girl was between 18 to 21 years. Though the Doctor has given opinion about the age of the victim girl, the birth certificate of the victim girl was marked as Ex.P.2, in which the date of birth of the victim girl is 20.01.2001, but that was not challenged. When the birth certificate is produced that can be taken into consideration. Even otherwise as per the evidence of P.W.5, the victim girl is between 18 to 21 years, it can be taken either way ie. Two years more or less can be taken. Therefore one of the Doctor's medical certificate clearly shows that the victim girl was only 16 years. Even as per the medical records, Ex.P.6, the evidence of Doctor P.W.5 it is less than two years from 18 years, naturally only 16 years. Therefore as per Ex.P.2, date of birth of the victim girl is only 20.01.2001 and date of the occurrence was on 16.10.2017, on which date, the victim girl had completed only 16 years. Therefore, even the age as per the Doctor's evidence is

taken less than two years from 18 years, the age of the victim girl was only 16 years and it is corroborated by Ex.P.2, birth certificate. Therefore, at the time of occurrence the victim girl was a child under Section 2 (1) (d) of the POCSO Act. The age of the appellant was 33 years and the victim child was only 16 years old, the appellant removed the custody of the victim girl from the lawful guardian without their consent with intention to compel her to have sexual intercourse with him and therefore, he has committed the offence under Section 366 IPC and the victim girl was also produced before the Judicial Magistrate to record the statement under Section 164 Cr.P.C. The said statement was marked as Ex.P.3. A reading of Ex.P.3, the statement recorded under Section 164 Cr.P.C clearly shows that the appellant is a married man and he used to come to her house and proposed to marry her. Since the victim girl refused to marry him, the appellant took the victim child from her house and he proposed once again. When she refused, he had sexual intercourse with her and subsequently on several occasions and the medical evidence also corroborates the same that she was subjected to penetrative sexual assault. Even though, the statement recorded under Section 164 Cr.P.C., is not a substantive evidence it can be used either for corroboration or for contradiction. On a reading of the statement of the victim child recorded under Section 164 Cr.P.C., Ex.P.3, it is seen that it clearly corroborates the evidence of victim girl. The evidence of the victim girl also clearly shows that she was taken by the appellant and they stayed at Bangalore and some other place for more than three days. Therefore, the appellant has committed offence under Section 343 IPC. Since the victim girl is below 18 years, would fall under the definition of 2 (1) (d) of the POCSO Act. Since she was subjected to penetrative sexual intercourse, the appellant has committed the offence under Section 5(1) r/w. 6 of the POCSO Act.

10. At this juncture, it would be useful to refer the relevant provisions of 2(1) (d) and 3 of the POCSO Act.

" 2(1)(d) - "child" means any person below the age of eighteen years.

3. Penetrative sexual assault - 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.

11. A careful reading of the language of the abovesaid provisions of law and also the evidence of P.W.2, victim child, it could be seen that the appellant has committed the offence under Section 5(b), which is punishable under Section 6 of POCSO Act.

12. In cases of this nature, no eye witnesses can be expected and no corroboration can be made. Since the culprit would take the chance of aloofness of the child and due to their adolescent age, attract them with false promises, commit the offence and thereafter, they used to threat and exploit the children. Though the appellant is a married man, as per the evidence of the victim child, he continuously approached the victim girl with sexual intent and also promised to marry her and had sexual intercourse with her and subsequently took her from the house of the victim girl to various places and stayed there and had sexual intercourse repeatedly and therefore, the appellant has committed the offence under Section 5(1) r/w. 6 of the POCSO Act. The prosecution has proved its case beyond reasonable doubt. This Court finds the accused guilty of the above offence and this Court does not find any merit in the appeal and therefore, the appeal is liable to be dismissed.

13. The learned counsel for the appellant has cited the judgment of Hon'ble Supreme Court. There is no quarrel over the principles laid down therein, but in the considered view of this case, the discussions referred supra, the decision relied on by the learned counsel for the appellant, has no application to the facts of this case. Since the age of the victim girl is only 16 years at the time of the occurrence and in the case referred, the girl is a major and further in that case, the birth certificate was not produced and only the school relieving certificate was produced and radiology report says that she was between 17 to 18 years, both the boy and girl were of equal age and they loved each other, whereas in this case the appellant is a married man, aged about 33 years, Ex.P.2, birth certificate shows that the victim girl was only 16 years and even assuming that she willingly went along with the appellant, considering the age of the victim, consent is not valid one and therefore, that citation referred by the learned counsel for the appellant is not applicable to the facts and circumstances of the case.

14. Accordingly, the appeal is dismissed.

-s/d-
Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

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To

1. The Inspector of Police,
All Women Police Station,
Vaniyambadi,
Vellore District.
2. The Sessions Cum Mahila Judge,
Vellore.
3. The Superintendent
Central Prison, Vellore.
4. The Chairman
POCSO Committee
High Court, Madras 104.
5. The Judicial Magistrate No. I
Tirupathur.
6. The Public Prosecutor,
High Court, Madras.

Copy to
The Section Officer
Criminal Section
High Court, Madras 104.

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PPA(CO)
SP(05/07/2021)