

BAIL SLIP

The Petitioner/Accused Viz., Rajkumar, aged 26 years S/o.Rajamanikkam, was released on bail as per the Order of this Court Dated 27/09/2019 in Crl.M.P.No.11565/2019 in Crl.A.No.524 of 2019 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.02.2021

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.524 of 2019

Rajkumar

...

Appellant

Vs.

The State Represented by
The Inspector of Police,
All Women Police Station,
Cheyyar,
Thiruvannamalai District.
(Crime No.13 of 2015)

...

Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of Cr.P.C. to set aside the Judgment of the learned Sessions Judge, Fast Track Mahila Court, Thiruvannamalai in S.C.No.30 of 2016, dated 01.08.2019.

For Appellant : Mr.R.Thangavel

For Respondent : Mr.R.Suryaprakash
Government Advocate

J U D G M E N T

This Criminal Appeal has been filed against the Judgment of Conviction and Sentence, dated 01.08.2019 made in S.C.No.30 of 2016, by the learned Sessions Judge, Fast Track Mahila Court, Tiruvannamalai.

2. The respondent-police has registered a case in Crime No.13 of 2015 against the appellant for the offences under Sections 4 and 8 of Protection of Children from Sexual Offences Act, 2012 (for brevity "the POCSO Act"). After investigation, laid a charge sheet. Since the offence committed

against the child, the learned Sessions Judge, Fast Track Mahila Court, Tiruvannamalai taken the case on file in Special S.C.No.30 of 2016. After completing the formalities, framed the charges against the appellant for the offences punishable under Sections 4 and 8 of POCSO Act and conducted the trial.

3. After considering the evidence on record and hearing on either side, the learned Judge, by judgment dated 01.08.2019, convicted the appellant for the offence punishable under Section 4 of POCSO Act and sentenced him to undergo seven years Simple Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo six months Simple Imprisonment and for the offence punishable under Section 8 of POCSO Act, sentenced him to undergo 3 years Simple Imprisonment and to pay a fine of Rs.2,000/-, in default to undergo three months Simple Imprisonment.

4. Aggrieved against the judgment of conviction dated 01.08.2019, the appellant / accused had preferred the present Criminal Appeal before this Court.

5. The learned counsel for the appellant would submit that the occurrence was alleged to have taken place on 14.08.2015, whereas, the complaint was lodged only on 15.10.2015, after two months. The delay in giving the complaint has not been properly explained, which is fatal to the case of the prosecution. He would further submit that both the appellant and the victim girl are close relatives and since the parents of the appellant refused the appellant to marry the victim girl, and there was also previous enmity between them with regard to civil dispute, they foisted such a false case against the appellant. He would further submit that the victim girl during her evidence deposed that the occurrence was said to have taken place on 14.08.2015, whereas, in the complaint given by P.W.1-the father of the victim girl, no date of occurrence has been mentioned and even the statement given by the victim girl, which was recorded by the learned Judicial Magistrate under Section 164 of Cr.P.C., she has not stated the date of occurrence and there is no consistency in her statement and there are material contractions. The learned counsel would further stated that though the victim girl informed the occurrence to her parents on 10.10.2015, but the complaint was given only on 15.10.2015, only after 5 days and the delay has not been properly explained and even no independent witnesses were examined in this case. The victim girl has stated that on the date of occurrence, when she was in the house, his brother and sister were available and at that time, the appellant came and had sexual intercourse with her, whereas, her brother and sister, have not been examined as a witness, which is also fatal to the case of the prosecution. Hence, the learned counsel prays for setting aside the

conviction and sentence passed by the learned Judge.

6. The learned Government Advocate for the respondent-Police would submit that at the time of occurrence, the victim girl was only aged 17 years and she is close relative to the appellant. The appellant and the victim girl loved each other and on 14.08.2015, when the parents of the victim girl had gone to Chennai to visit grandfather of the victim girl, who was admitted at Hospital due to an accident, at that time, the victim girl and her younger sister and brother were only in the house, the appellant telephoned the victim girl and after the brother and sister of the victim girl slept, the accused came at 11.30 p.m. and though the victim girl resisted and refused, the appellant had forcibly undergone sexual intercourse with the victim girl and left in the midnight at about 1.00 a.m. After that on 10.10.2015, when the victim girl was in the college, the appellant took the victim girl to Vandalur and came into residence late hours, and on the said date, when her father enquired, she revealed that they are loving each other and also stated that when their parents had gone to Chennai, the appellant came to the house and had sexual intercourse with her. During cross-examination, the victim girl had clearly stated that on 14.08.2015, the appellant forcibly had sexual intercourse with her. During the statement recorded under Section 164 of Cr.P.C., she has clearly stated that during August 2015, the appellant had sexual intercourse with her and further, the Doctor also opined that on examination of the victim girl, she found that her hymen was not intact and she was subjected to sexual intercourse. Even during the defense witness, the brother of the accused, who was examined D.W.1 admitted that the appellant took the victim girl to Beach, and roamed here and there. Therefore, the prosecution has proved its case beyond reasonable doubt and there is no merit in the Appeal and the learned Judge rightly appreciated the evidence of the prosecution, and convicted the appellant.

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

8. The case of the prosecution is that on 10.10.2015, when the victim girl returned to home late hours, the father of the victim girl questioned, she revealed that she went to Vandaloor Zoo along with the accused and he would marry her with consent of his parents and it is also informed that both of them were indulged in sexual intercourse and thereafter, the father of the victim girl approached the parents of the accused and requested the accused to marry his daughter, but the accused denied to marry her and therefore, he filed Ex.P1-complaint before the Police. Subsequently, the Investigating Officer, investigated the matter and laid a charge sheet before the learned Sessions

Judge, Fast Track Mahila Court, Tiruvannamalai.

9. On the side of the prosecution, 11 witnesses were examined as P.W.1 to P.W.11 and 12 documents were marked as Exs.P1 to P12. After completion of the examination of the prosecution witnesses, the incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant, the same was denied as false and on the side of the defence, one Rajasekar was examined as D.W.1 and no document was marked. The learned Judge, after hearing the arguments on either side and considering all the materials placed on record, found that the appellant is guilty and convicted and sentenced, as referred above, which is challenged in this Criminal Appeal.

10. Since this Court is an Appellate Court and also final Court of fact finding, it has to re-appreciate the entire evidence and come to the independent conclusion. The specific case of the prosecution is that the victim girl is a minor, not completed the age of 18 years and on 14.08.2015, the appellant had forcibly sexual intercourse with the victim girl and thereafter, she informed the occurrence to her father and immediately, her parents had gone to the appellant's residence and asked the appellant to marry her daughter, but the appellant's family refused for the marriage and therefore, no other option, the father of the victim girl preferred the complaint. In order to substantiate the case, the victim child was examined as P.W.2. A reading of the entire evidence of the victim girl, she has clearly deposed that when she was studying in the Nursing College, they loved each other and also the appellant is a close relative and they used to go to Vandalur and Mahaballipuram and on 14.08.2015, when the parents of the victim girl were not in house, the appellant telephoned her and came to the house at 11.30 p.m. and had forcible sexual intercourse with her and left home at 1.00 a.m.

11. The learned counsel for the petitioner would contend that at the time of occurrence her brother and sisters were present, but they were not examined, which is fatal to the case of the prosecution. The victim girl has clearly stated that at about 11.30 p.m., the appellant telephoned and he came to her house and he left the home at 01.00 a.m. Thus, both the appellant and the victim girl awaited a chance of brother and sister of the victim girl to fall asleep, and after that only they had sexual intercourse. Therefore, non-examination of the brother and sisters, said to have present at the time of occurrence is not a fatal to the case of the prosecution, when the victim child has not stated that brother and sisters knew about the arrival of the accused to their house at night. It is not the case of the prosecution or the victim girl that the

appellant trespassed into the house and also had forcible sexual intercourse. The victim girl herself has admitted that they loved each other and they used to go to Vandalur and roam here and there and he has not done anything at that time, but knowing fully well when her parents were not in the house, the appellant came to the house at 11.30 p.m. and left on 1.00 a.m. Therefore, they were waiting for a chance to be away from parents and the brother and sister of the victim girl to fall asleep and further, the victim girl has not stated that when the appellant came to her house, her brother and sister also saw them, therefore, under the circumstances, mere non-examining the brother and sister of the victim girl is not a fatal to the case of the prosecution.

12. The next contention of the learned counsel is that there was a delay in filing complaint before the respondent-Police, which is fatal to the case of the prosecution. During evidence, the victim girl has clearly stated that she believed that the appellant would marry her and when the appellant came in the midnight, though she had refused, the appellant had promised her to marry her, therefore, believing the word of the appellant, she had accepted. On 10.10.2015, once again, the appellant called her to Vandalur and after that when they arrived at late hours, her father had questioned the same and at that time, she revealed. Thereafter, the parents of the victim girl had gone to the house of the accused and asked the accused to marry her daughter, since the appellant refused to marry her daughter, no other option, gave a complaint to the Police. Therefore, mere informing the occurrence by the victim girl to her parents after two months is not a fatal to the case of the prosecution. Further, according to the learned counsel, after receiving information on 10.10.2015, the father of the victim girl gave complaint only on 15.10.2015 which is also a fatal to the case of the prosecution. Normally, when parents came to know that their daughter lost her virginity, they tried to mediate with the parents of the accused, since the accused / appellant also close relative they tried to get marry with the appellant and since they refused, no other option, filed a complaint, therefore, the delay in filing the complaint is not fatal to the case of the prosecution and that has been properly explained by the prosecution. Further, P.W.1, the father of the victim girl has spoken that as soon as her daughter revealed the fact that they love each other and the appellant had undergone sexual intercourse, they had approached the appellant's family, but the appellant refused to marry her daughter and therefore, he gave a complaint.

13. The Victim girl was also produced before the Medical Officer and the Doctor, who examined the victim girl was examined as P.W.8 and she had clearly stated that on

examination of victim girl, she found that her hymen was not intact and she was subjected to sexual intercourse and issued Ex.P6 Certificate.

14. Thereafter, the victim girl was produced before the learned Magistrate for recording the statement under Section 164 (5) of Cr.P.C. Before the learned Magistrate, the victim girl had clearly stated that in the month of August 2015, when her parents were not in home, the accused called her and came in the midnight and though she refused, the appellant forcibly had sexual intercourse with her, by making false promise that he would marry her, and subsequently, she revealed the same to her parents and when her parents approached the family of the appellant, the appellant refused to marry her and thereafter, her father made Ex.P1 complaint.

15. In order to prove the age of the victim girl, the prosecution has marked Ex.P11-birth certificate of the victim girl. As per Ex.P11, birth certificate, the date of birth of the victim girl is 12.01.1998 and the occurrence said to have taken place on 14.08.2015, therefore, the victim girl was aged only 17 years at that time, and not completed 18 years. Therefore, she would fall under the definition of Section 2 (1)(d) of POCSO Act. Therefore, the victim girl is a child and the appellant had undergone penetrative sexual intercourse with the victim child and the medical evidence and the statement recorded under Section 164 of Cr.P.C. of the victim girl also proved the same. Even though the statement recored under Section 164 of Cr.P.C., is not substantive evidence, but it is admissible in evidence. The victim girl has stated during her statement before the learned Magistrate that in the month of August 2015, when her parents were not in home, the accused came to the home in the mid night and had sexual intercourse with her. Therefore, the statement recorded under Section 164 of Cr.P.C. has been substantiated by the victim by examining as witness before the trial Court. Therefore, from the evidence of the victim girl and the doctor evidence and also the statement recorded under Section 164 of Cr.P.C., the prosecution has established its case beyond reasonable doubt. In cases of this nature, presence of eyewitnesses are mostly improbable. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible.

16. This Court, a perusal of the entire records independently comes to the conclusion that the appellant has committed the offence under Section 3 of POCSO Act, which is punishable under Section 4 of POCSO Act. But, however, the other charges framed under Section 354 and 376 of IPC, the learned Sessions Judge gave a finding that Sections 354 and 376 of IPC have not been made out and however, the learned Judge convicted

the appellant for the offence punishable under Section 8 of the POCSO Act. Admittedly, there was no charge framed against the appellant under Section 7 of POCSO Act, and gave a maximum sentence of 7 years for the offence punishable under Section 4 of POCSO Act and both the sentences are ordered to run concurrently. Therefore, the conviction and sentence imposed by the learned Judge, under Section 8 of POCSO Act, is liable to be set-aside.

17. Accordingly, the conviction and sentence imposed by the learned Sessions Judge, Fast Track Mahila Court, Tiruvannamalai for the offence punishable under Section 8 of POCSO Act, is set aside. The conviction and sentence passed for the offence punishable under Section 4 of POCSO Act, is confirmed.

18. With the above modification, this Criminal Appeal is partly allowed.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

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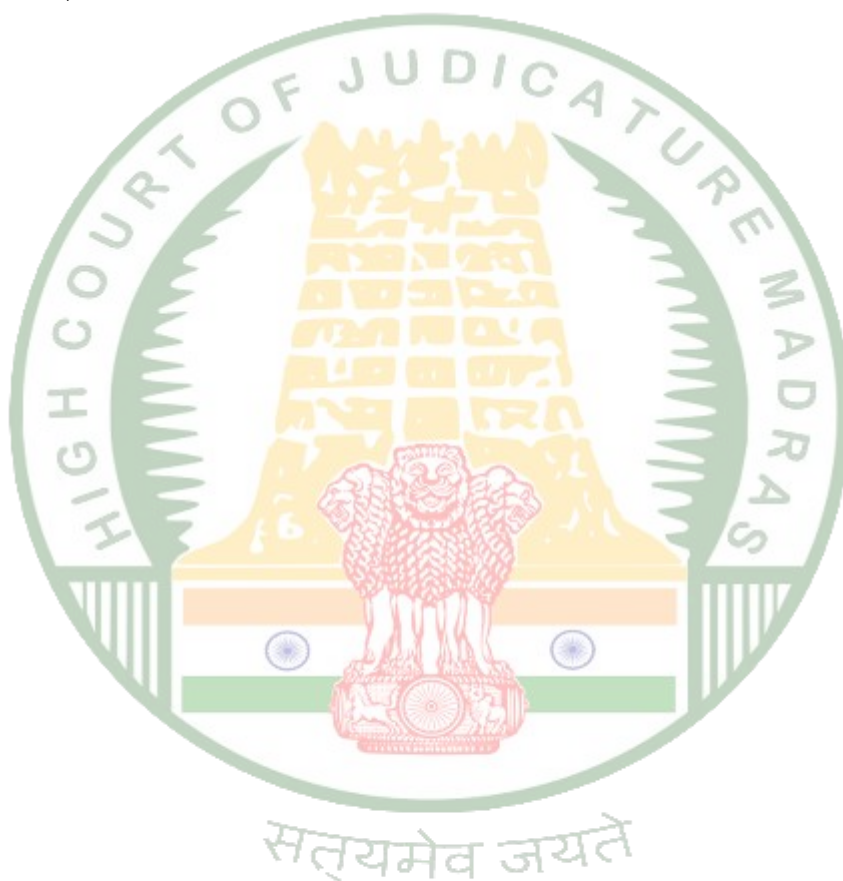
- 1.The Sessions Judge,
Fast Track Mahila Court,
Thiruvannamalai.
- 2.The Judicial Magistrate,
Cheyyar, Thiruvannamalai.
- 3.Do-Thro The Chief Judicial Magistrate,
Thiruvannamalai(For information)
- 4.The Inspector of Police,
All Women Police Station,
Cheyyar,
Thiruvannamalai District.
- 5.The Superintendent,
Central Prison, Vellore.
- 6.The Public Prosecutor,
High Court, Madras.

Copy to:
The Chairman,
Posco committee, High Court,
Madras.

+1cc to Mr.C.Anbu, Advocate, S.R.No.12131

Cr1.A.No.524 of 2019

GSM(CO)
CB(30/06/2021)



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