



BAIL SLIP

The Petitioner/ Accused/ Viz Suresh M / Age 25, S/o Anbalagan was released on bail as per the Order of this Court Dated 27.11.2019 in Crl.M.P.No.14368/2019 in Crl.A.No.677/2019 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS  
DATED: 08.02.2021

CORAM

THE HONOURABLE MR. JUSTICE P.VELMURUGAN  
CRL.A.No.677 of 2019

Suresh  
S/o.Anbalagan

.. Appellant

.Vs.

The Inspector of Police  
All Women Police Station  
Hosur, Krishnaigiri District.

.. Respondent

Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure to set aside the conviction and sentence passed against the appellant by the Judgment dated 20.08.2019 made in Spl.S.C.No.23 of 2018 on the file of the Sessions Judge (Fast Track Mahila Court), Krishnagiri.

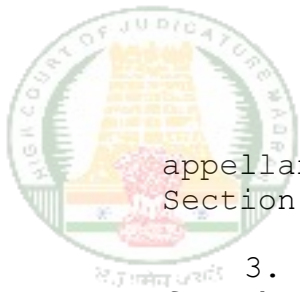
For Appellant : Mr.D.Selvaraju

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 20.08.2019 made in Spl.S.C.No.23 of 2018 on the file of the Sessions Judge (Fast Track Mahila Court), Krishnagiri.

2. Initially, the respondent police registered a case in Crime No.1 of 2018 against the appellant for offence punishable under Section 366(A) of 'Indian Penal Code' [hereinafter 'IPC' for the sake of convenience] and Section 3 r/w Section 4 of 'The Protection of Children from Sexual Offences Act, 2012' [hereinafter 'POCSO Act' for the sake of convenience] and thereafter, altered into Section 363, 366(A) IPC and Section 5(1) r/w 6 of the POCSO Act and a charge sheet was laid before the learned Sessions Judge, Magalir Neethimandram, Krishnaigiri, since the offence is against a child defined under Section 2(1)(d) of POCSO Act. The Sessions Judge, after completing the formalities, taken the case on file in Spl.S.C.No.23 of 2018 and framed charges against the



appellant for the offence under Sections 363, 366(A) IPC and Section 5(1) r/w 6 of the POCSO Act.

3. On completion of trial, the appellant is found guilty for the offence under Section 366 IPC and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.1,000/-; in default to undergo simple imprisonment for six months and for the offence under Section 5(1) r/w 6 of the POCSO Act, the appellant was sentenced to undergo Rigorous imprisonment for ten years and to pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for one year. The Trial Court directed the sentences to run concurrently.

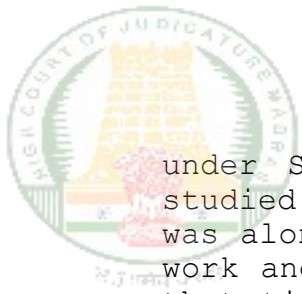
4. Aggrieved by the said judgment of conviction and sentence, the appellant/accused has filed the present appeal before this Court.

5. The learned counsel for appellant would submit that the complaint was lodged on 16.01.2018 i.e., after 6 days of the victim girl found missing, whereas the complaint on record before the Court reveals that the girl was missing only from 13.01.2018 and the complaint was lodged on the third day of alleged missing. He would submit that the father of the victim girl was examined as P.W.1 and he has stated in his evidence that he went to the police station only after the accused was arrested along with the victim girl, whereas, the Investigating Officer has stated that he arrested the accused at the Hosur Bus stop, after he was identified by P.W.1-Perumal/father of the victim girl, which falsifies the case of prosecution. He would further submit that the learned Sessions Judge failed to appreciate the case of the prosecution that P.W.1 has stated that the accused and the victim girl were seen together at Mamudimanapalli by P.W.5. and he informed P.W.1 about the same, which is also a total falsehood for the reason that P.W.5 has stated that he has not informed anything to P.W.1 and he did not see the accused and P.W.2 at the above place and therefore, the learned Sessions Judge wrongly convicted the appellant for the offence punishable under Section 6 of the POCSO Act by stating that the medical evidence proved the case of the prosecution that the victim girl was subjected to forcible penetrative sexual assault, while the evidence of Doctor, copy of medical report and AR copy produced before the Court show that there is no iota of medical evidence pointing out any forcible penetration or even penetration with consent during the alleged dates i.e., 13.01.2018, 14.01.2018 and 15.01.2018. The learned Sessions Judge wrongly convicted the appellant without considering the fact that the period between 13.01.2018 and 15.01.2018 was the menstrual period of the victim girl and only a minimal menstrual bleeding was found in the examination, which proves that there was no probability to hold that she was subjected to forcible penetrative sexual assault during that period. He further submitted that the learned Sessions Judge wrongly convicted the appellant for the



offence punishable under Section 366 IPC since there was no evidence to substantiate the prosecution case that the appellant had taken P.W.2-Victim girl from Chithanahalli to Mamudimanapalli, because neither P.W.2 nor P.W.5 had supported the case of the prosecution. There is material contradiction among P.W.1, P.W.2 and P.W.4 wherein, in their cross examination, they have stated that only due to money dispute, P.W.1 had lodged the above complaint against the appellant. P.W.1, P.W.2 and P.W.4, have clearly stated in their cross examination that the victim girl was not kidnapped by the appellant. No witnesses were examined in the place of occurrence and the prosecution has not proved that the appellant has got old house and no witness was examined to prove that the victim girl was taken by the appellant to his old house and forced the victim girl to have sexual intercourse. P.W.1-father of the victim girl has not supported the case of the prosecution, since he turned hostile. P.W.2-Victim girl has not supported the case of the prosecution, since she also turned hostile. P.W.4-mother of the victim girl also turned hostile. P.W.5-Head Mason has not supported the case of the prosecution, since he has not stated that the victim girl was kidnapped by the appellant. The learned Judge, without considering the evidence and material contradictions, wrongly convicted the appellant, which warrants interference by this Court.

6. The learned Government Advocate (Crl. Side) would submit that at the time of occurrence, the victim girl was minor and she studied upto 9<sup>th</sup> standard and discontinued her studies. He would submit that P.W.1 and P.W.4, father and mother of the victim girl respectively were doing mason work under P.W.5-Head Mason and the appellant is also working along with P.W.1 and P.W.4. The victim girl used to bring food to her parents and at that time, the appellant, who was working there, used to give trouble to her. On 13.01.2018, when the victim girl was in the house, the appellant called her over phone, when she refused to come, he threatened her and took her to his old house and stayed there for three days i.e., from 13.01.2018 to 15.01.2018 and forcibly had sexual intercourse with her. Subsequently, when they planned to go to Bangalore, the respondent police arrested both the appellant and the victim girl and informed to their parents. When the father of the victim girl was examined as P.W.1 on 14.11.2018, he supported the case of prosecution and on the same day, he was cross-examined, there was no contradiction elucidated from him. Subsequently, P.W.1 was recalled on 06.05.2019, on that day, he has deposed that he himself and the appellant worked with P.W.5, due to money dispute between them, he preferred the said complaint against the appellant and thereafter, P.W.5 made compromise between them and also considering the future of the victim girl, he turned hostile. The victim girl was produced before the learned Judicial Magistrate and the statement was recorded under Section 164 Cr.P.C., which was marked as Ex.P3. On a perusal of Ex.P3-Statement recorded



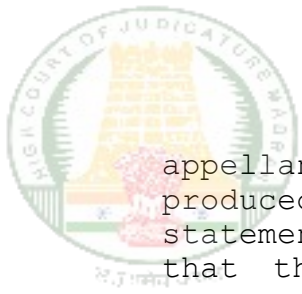
under Section 164 Cr.P.C., it reveals that the victim girl studied upto 9th standard and discontinued her studies, she was alone in her house since her parents went for construction work and she used to go to the work place for giving food. At that time, the appellant, who was also working there, used to trouble her by asking to marry him. She refused for the same by stating that he was already married and having two children. However, during Pongal time, the appellant threatened the victim girl to marry him and took her to his old house and forced her to have sexual intercourse. Subsequently, when the victim girl examined before the Court on 14.11.2018, she reiterates the same, however, after six months, when she was recalled on 06.05.2019, she turned hostile. The trial Judge has rightly convicted the appellant for the above said charges. There is no merits in this case and hence, the same is liable to be dismissed.

7. The case of the prosecution is that the victim girl, who was aged about 16 years at the time of occurrence, went to the work place of her parents for giving food to her parents, the appellant used to convince her to marry him and she refused for the same. On 13.01.2018, when the victim girl was alone in the house, the appellant called the victim girl, threatened her and took her to his old house and stayed for 3 days and had penetrative sexual assault. Thereafter, the father of the victim girl preferred the complaint and the respondent police arrested the appellant and secured the victim girl at Hosur Bus Stop, while going to Bangalore.

8. In order to prove the case of the prosecution, on the side of prosecution, as many as 13 witnesses were examined as Ex.P1 to Ex.P13 and 21 documents were marked as Ex.P1 to Ex.P21. No material objects were marked.

9. When the accused was questioned under Section 313 Cr.P.C., as respect of the incriminating materials available in evidence against him, he denied it as false and pleaded not guilty. No oral or documentary evidence was produced on behalf of the appellant.

10. Since this Court is an appellate Court and also a final Court of fact finding, has to re-appreciate the entire evidence and come to the independent finding. In order to prove the case, the prosecution examined the father of the victim girl as P.W.1, who spoken about the complaint for the offence committed by the appellant and the victim girl was examined as P.W.2, where she has clearly narrated the entire incidents and the mother of the victim girl was examined as P.W.4, she has also narrated the same. Head Mason with whom the parents of the victim girl were working was examined as P.W.5. He has clearly stated that the appellant and the parents of the victim girl were working under him in the construction work and the victim girl used to come to the work place to give food to her parents. Doctor-PW3, one who examined the appellant also spoken about the capability of the



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appellant to have sexual intercourse. The victim girl was produced before the learned Judicial Magistrate for recording statement under Section 164 Cr.P.C, in which, it is stated that the appellant took the victim girl to the place of occurrence and forcibly committed sexual assault. According to the victim girl, the appellant insisted her to marry him, but she refused for the reason that he already got married and have two children. The Doctor, who examined the victim girl was examined as P.W.11 and in her evidence she has deposed that on examination of the victim girl, she found that there was no external injury and her hymen was not intact and also admitted two fingers, however, she opined that possibility of sexual assault cannot be ruled out. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. The Doctor, who examined the accused was examined as PW3 and issued Ex.P4 certificate stating that there is nothing to suggest that the appellant is impotent and incapable of performing sexual assault. Though the Doctor-PW11 deposed that possibility of penetrative sexual assault, cannot be ruled out, there is no good reason to disbelieve the case of the prosecution. During statement recording under Section 164 Cr.P.C., the victim girl had clearly stated that on 13.01.2018, when the victim girl was in the house, the appellant called her over phone, when she refused to come, he threatened her and took her to his old house and stayed there for three days and forcibly had sexual intercourse with her.

11. At this juncture, it would be useful to refer the Sections 5(1) and 6 of POCSO Act, 2012:-

"5. Aggravated penetrative sexual assault.-

(1) whoever commits penetrative sexual assault on the child more than once or repeatedly.

6. Punishment for aggravated penetrative sexual assault.-Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

12. A bare perusal of the statement recorded under Section 164(5) of Cr.P.C., of the victim girl and the evidence of the Doctor-PW11, who examined the victim girl and evidence of the Doctor-PW3, who examined the accused, it is very clear that the appellant has committed the offence punishable under Section 6 of POCSO Act.

13. Though the learned counsel for appellant would vehemently contend that there is material contradiction from the evidence and some of the witnesses have turned hostile, the statement recorded under Section 164 Cr.P.C. cannot be discarded. P.W.11-Doctor has also clearly spoken about the date of occurrence. Ex.P6-Educational Certificate shows that the victim girl is aged about 16 years at the time of



occurrence. When the victim girl was examined before the Court on 14.11.2018, she reiterated the incident, however, after six months, when she was recalled on 06.05.2019, she turned hostile. The statement of the victim girl recorded under Section 164 Cr.P.C. before the learned Magistrate supported the case of the prosecution. It is settled proposition of law that the evidence of hostile witnesses need not be discarded in totally, but the portion of evidence in chief examination which supports the prosecution, can be taken for consideration. Since the appellant kidnapped the victim girl, who is aged about 16 years at the time of occurrence, from the lawful guardian, this Court finds that the appellant has committed offence under Section 366 of IPC. Further, from the evidence and statement recorded under Section 164 Cr.P.C. of the victim girl, it is very clear that the accused committed aggravated penetrative sexual assault on the victim girl by forcibly having sexual intercourse with her and thereby, this Court finds that the appellant committed the offence under Section 5(1) r/w Section 6 of the POCSO Act and the prosecution has proved its case beyond all reasonable doubt. Therefore, the trial Court has rightly convicted the appellant for the above charges. Hence, there is no merit in the appeal and the same is liable to be dismissed.

14. In fine, this Criminal Appeal deserves to be dismissed and accordingly, the same is dismissed. The conviction and sentence passed by Sessions Judge (Fast Track Mahila Court), Krishnagiri, made in Spl.S.C.No.23 of 2018 dated 20.08.2019 is hereby confirmed. It is seen from the records that the appellant/accused is at large and therefore, the trial Court is directed to take appropriate steps to secure the presence of the accused to serve the remaining period of sentence.

Sd/-  
Assistant Registrar(CS III)

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Sub Assistant Registrar

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To

1. The Sessions Judge (Fast Track Mahila Court),  
Krishnagiri.

2. The Inspector of Police  
All Women Police Station  
Hosur, Krishnaigiri District.

3. The Public Prosecutor,  
<https://hcservices.ecourts.gov.in/hcservices/>  
High Court, Madras.



4.The Superintendent,  
Central prision, Vellore.

+1cc to Mr.Selvaraj, Advocate SR.No.7445/21

CRL.A.No.677 of 2019

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B.VC(14.07.2021)