

BAIL SLIP
Crl.A No.760 of 2019

The Petitioners/ Accused (Viz) (i) Periyasamy and (ii) Sangeetha were released on bail as per the order of this Court dated 21/01/2021 in Crl.MP.No.16230 of 2019 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:07.10.2021

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.760 of 2019

1.Periyasamy

2.Sangeetha

Versus

... Appellants

State Rep.by
The Inspector of Police,
Edapadi Police Station,
Salem District.
(Crime No.282 of 2015)

... Respondent

Criminal Appeal is filed under Section 374 (2) of Criminal Procedure Code, to set aside the Judgment dated 05.01.2019 in Spl.S.C.No.51 of 2015 on the file of the Mahila Court, Salem.

For Appellants : Mr.K.Thirukkumaran,
Legal Aid Counsel

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

JUDGMENT

The Criminal Appeal has been filed against the conviction and sentence passed vide Judgment, dated 05.01.2019 made in Spl.S.C.No.51 of 2015, by the learned Sessions Judge, Mahila Court, Salem, Salem District.

2.The respondent/police have initially registered a case in Crime No.282 of 2015, for the offence of "Girl Missing", as against the appellant/ accused-A2.

3. After completion of the investigation respondent/police laid a charge sheet for the offences under Section 363, 366 of IPC., and Section 6, of the POCSO Act, 2012, as against the first accused. However, as against the second accused/A2, the charge sheet has been filed for the offence under Section 363, 366(A) of IPC., and under Section 16 of POCSO Act which is punishable under Section 17 of the POCSO Act, and the same was filed before the Special Court, since the offence is against the woman, particularly child, which falls under the definition of 2 (1)(d) of the POCSO Act.

4. The learned Special Judge, after completing the formalities under Section 207 of Cr.P.C., and also under Section 209 of Cr.P.C., framed the charges against the first appellant for the offences under Sections 363, 366 of IPC., and Section 5 (1), which is punishable under Section 6 of the POCSO Act and as against the second appellant charges were framed for the offences under Sections 363, 366(A) of IPC., and under Section 16 which is punishable under Section 17 of POCSO Act.

5. After framing of charges, during trial, in order to prove the case of the prosecution, on the side of the prosecution, as many as 14 witnesses were examined as P.W.1 to P.W.14 and as many as 22 documents were exhibited as Exs.P.1 to Ex.P.22. Besides 2 material objects were exhibited as M.O.1 & M.O.2.

6. After completing the examination of prosecution witnesses, when incriminating materials culled out from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 of Cr.P.C., they denied the same as false and pleaded not guilty. On the side of the defence, one Chinnadurai was examined as D.W.1 and no document was produced.

7. On completion of trial, after hearing the arguments advanced on either side, and considering the facts and materials, the Trial Court found the first appellant guilty and convicted him for the offence under Section 363, and sentenced to undergo 7 years rigorous imprisonment and to pay fine of Rs.10,000/- , in default, to undergo six months simple imprisonment and for the offence under Section 366 of IPC., he was sentenced to undergo 10 years rigorous imprisonment and to pay fine of Rs.10,000/-, in default, to undergo six months simple imprisonment and also he was convicted for the offence under Section 6 of the POCSO Act, and sentenced to undergo 10 year rigorous imprisonment and to pay fine of Rs.10,000/- in default, to undergo six months simple imprisonment.

8. The trial court also convicted the second appellant for the offence under Section 363, and sentenced to undergo 7 years rigorous imprisonment and to pay fine of Rs.10,000/- , in

default to undergo six months simple imprisonment and for the offence under Section 366(A) of IPC., she was convicted and sentenced to undergo 10 year rigorous imprisonment and to pay fine of Rs.10,000/-, in default to undergo six months simple imprisonment and for the offence under Section 17 of the POCSO Act, she was sentenced to undergo 10 year rigorous imprisonment and to pay fine of Rs.10,000/-, in default to undergo six months simple imprisonment. However, all the sentences were ordered to run concurrently and the period already undergone by the appellants was ordered to be set off, as per Section 428 of Cr.P.C.,

9.Challenging the said Judgment of conviction and sentence passed by the Special Court, both appellants have preferred the present appeal before this Court.

10.The learned counsel for the appellants/accused would submit that it is the duty of the prosecution to prove the age of the victim girl, but, in this case, it has failed to do so. For proving the age of the victim girl, the prosecution has produced Ex.P5/bonafide certificate, which was issued by the Headmaster of the school, where the victim girl studied. As the victim girl studied in that school it may not be too heavy for the prosecution to produce the vital documents viz., transfer certificate, community certificate, mark sheet of the victim girl or any of the documents produced by the parents of the victim girl, to the school, at the time of admission, but, it has not done so. EX.P5/bonafide certificate, is not a conclusive evidence, which does not prove the age of the victim and it is not sufficient to believe that she has not completed the age of 18 years. Therefore, it is a fatal to the case of the prosecution.

11.Further, the learned counsel for the appellants/accused would submit that with the consent of the victim girl only the second appellant took the victim girl and arranged the marriage with the first appellant, other than that she did nothing. After their marriage, the first appellant had sexual intercourse with the victim girl. The mother of the victim girl foisted a false case against the second appellant that the victim girl is a minor and she was abducted by the second appellant. In any event, the prosecution failed to prove the age of the victim that she was a child under the definition of the POCSO Act, therefore, the act committed by the first appellant does not falls under Section 6 of the POCSO Act and also the act committed by the second appellant is also not punishable under Section 17 of the POCSO Act or other offences under Indian Penal Code. When the prosecution failed to proves its case beyond reasonable doubt the benefit of doubt must be extended against the appellants. But, the Trial Court wrongly convicted the

appellants, for the said offences, which warrants interference of this Court.

12.The learned Government Advocate (crl.side) would submit that the school Headmaster was examined as P.W.4 and the parents of the victim girl had produced the Transfer certificate to the Investigation officer, during investigation. In order to get the certificate from the school, they shown Transfer Certificate to the school Headmaster/P.W.4, who has clearly stated that victim girl discontinued her studies and she studied up to 10th standard. P.W.2/victim girl also clearly stated that she discontinued her studies at 10th standard. Though PW.4/Headmaster has stated that at the time of admission for verification some documents were produced and the parents of the victim girl have also stated that they produced relevant documents, except Ex.P5/bonafide certificate, the defence has not proved contra to the certificates otherwise for proving the date of birth of the victim girl.

13.However, at the time of arguing the case, the learned Government Advocate (crl.side) has produced a copy of the Transfer Certificate, which clearly shows that the victim girl studied in the Government Girls Higher Secondary School, Edapadi. On 11.06.2012, the victim girl has got admission in the said school for studying 10th standard, in which, the date of birth of the victim girl was mentioned as 03.06.1998. During chief examination, P.W.2/victim girl, has clearly stated about her date of birth that she was born on 03.06.1998 and her parents also confirmed the same. As per Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015, once it is certified in the Transfer Certificate, the age of the victim by the Educational authority and produced to the Court or Juvenile Board, the presumption is that the age mentioned in such certificate is genuine, unless, the contrary is proved. Therefore, as per the document, the date of birth of the victim girl is 03.06.1998.

14.Therefore, this Court finds that Transfer Certificate, which is produced before this Court at the time of hearing the case, is admissible. However, though the parents of the victim girl have produced the Transfer Certificate of the victim at the time investigation, the Investigation Officer has failed to produce the said vital document, but he only produced a bonafide certificate, to prove the age of the victim girl under Ex.P5, which was issued by P.W.4/Headmaster. Therefore, it clearly shows the lethargic attitude of the Investigation Officer, and they do not understand the object and scope of the POCSO Act. Further, the Investigation Officer does not known, how to proceed with the case of POCSO Act.

15.Thus, this Court has come to the conclusion that the prosecution has proved its case that the age of the victim is below 18 years and she is child under the definition of the POCSO Act and there is no contra evidence laid by the defence. Therefore, Ex.P5/certificate reveal the correct date of birth of the victim girl, since the same was mentioned in the Transfer Certificate, which was produced before this Court, at the time of arguments by the learned Government Advocate (crl.side) appearing for the respondent. Therefore, this Court concludes that the date of birth of the victim girl is 03.06.1998 and the date of occurrence was 10.06.2015, therefore, at the time of occurrence, the age of the victim is only 17 years and she has not completed the age of 18 years, hence, the offence committed by the appellants are punishable under the POCSO Act.

16.This Court time and again condemns that the prosecution agencies have to mark all the relevant documents during the trial as exhibits in the POCSO Act, and also to impart training to the stakeholders, but, still the same attitude of the Investigation Officers are continuing. This Court hopes that the State Government as well as the Central Government would initiate a training programme to the stakeholders, as far as offence of this nature is concerned. This Court, therefore, directs the Director General of Police to take necessary action for imparting proper training to the investigating officers, as otherwise such faulty investigation would lead to the accused being let out on technicalities.

17.As far as the charges against the first appellant, regarding Section 363 and 366 of IPC., are concerned, the evidence of PW.1/mother of the victim and P.W.2/victim girl, would show that the victim girl was kidnapped and subjected to penetrative sexual assault.

18.Though the learned counsel for the appellant would submit that with the consent of the victim only, the appellants have taken the victim and even the victim is also on her own volition eloped with the appellants, since victim is a child, her evidence is immaterial and the ingredients of Section 361 of IPC., clearly states that if any minor girl below 18 years is removed by any person, from the custody of lawful guardian, without their consent it amounts to kidnapping and it falls under Section 361 of IPC., which is punishable under Section 363 of IPC., for the purpose of having illegal intimacy with her. The victim girl was removed from the lawful guardian and during that period the first appellant had illicit sexual intercourse with her, it satisfies the ingredients of Section 363 of IPC., therefore, on combined reading of the evidence of P.W.2/victim girl and also her statement recorded under Section 164 of Cr.P.C., marked under/Ex.P.21 and Ex.P22/statement of the mother

of the victim girl recorded under Section 164 of Cr.P.C., it is clear that the second appellant took the victim from the lawful guardian without their consent and the first appellant had sexual intercourse with her. Therefore, the offence committed by the second appellant is punishable under Section 363 and 366 of IPC.

19.As far as the penetrative sexual assault is concerned, the victim girl/ P.W.2, has clearly narrated the incident that even prior to the statement recorded before the learned Judicial Magistrate viz., EX.P.21, the Doctor, who examined the victim girl has stated that the victim was subjected to penetrative sexual assault and her hymen was not intact.

20.The learned counsel for the appellant would submit that there was no external injury and there is no possibility of forceful sexual intercourse and it is only a consented sexual intercourse. As already stated it is proved from the evidence of P.W.2/victim girl's statement of 164 Cr.P.C., to substantiate the victim evidence, the same was corroborated with the evidence given by the Medical Officer and the medical report has also shows that the victim was subjected to the penetrative sexual assault. Even assuming that the victim girl has not resisted and with the consent of the victim only cohabitation has happened, still it attracts the offence under the definition of POCSO Act because, the victim girl has not completed the age of 18 years and the consent of the child is an immaterial. The POCSO Act, does not speak about the consent, either with or without consent, it is not applicable to this case, since the victim is a child.

21.Therefore, under these circumstances, the contention raised by the learned counsel for the appellants is immaterial and on combined reading of the evidence of P.W.1, P.W.2, P.W.3/Doctor, P.W.4/Headmaster, P.W.10/Forensic expert, P.W.12/Doctor, who examined the victim girl issued the age certificate of the victim girl, which was marked as Ex.P.12,, Ex.P.13/Chemical analysis report of the victim girl, Ex.P.22 the previous 164 Cr.P.C., statement of the mother of the victim girl recorded by the learned Judicial Magistrate and Ex.P21 is the statement recorded under 164 of Cr.P.C., of the victim girl, by the learned Judicial Magistrate, all the above, this Court finds that the first appellant has committed the offences under Sections 363 and 366 of IPC., and Section 6 of the POCSO Act.

22.As far as second appellant is concerned, P.W.2 /victim girl has clearly stated that the second appellant and the first appellant had taken her to Edapadi, thereafter, to Avinashi, where the second appellant insisted the victim girl to marry the first appellant and arranged for the marriage. Thereafter, they

went to Tiruppur Murugan Temple and the first appellant had forcibly tied a Thali on the victim girl's neck. Thereafter, they went to Avinashi and took a house for rent and they stayed there for about 10 days. During that period, the first appellant had sexual intercourse with her without consent of the victim girl. Therefore, the parents of the victim girl had lodged a complaint of "Girl Missing". After investigation, the victim was produced before the learned Judicial Magistrate and recorded the statement under Section 164 of Cr.P.C., and also produced before the Doctor. Therefore, the second appellant also along with first appellant committed the offence. It clearly shows that both the husband and wife forcefully taken the victim girl to various places and also forcibly tied Thali, but the marriage was not proved by the prosecution.

23.However, the prosecution proved both appellants are husband and wife, they had taken the victim girl from the custody of the lawful guardians without their consent and stayed away from the house. During that time, the first appellant had sexual intercourse with her, therefore, the act of the first appellant is punishable under Section 363 and 366 of IPC and Section 6 of the POCSO Act. Since, the second appellant insisted the victim girl to marry the first appellant and took away the victim girl for the purpose of having illicit sexual intercourse with the first appellant, the act of second appellant falls under Section 17 of the POCSO Act, and also attracts the Section 366 (A) of IPC.,

24.Therefore this Court is a final court of fact finding, this court carefully perused the materials available on record and finds that the prosecution has proved its case beyond all reasonable doubt and the Trial Court has rightly appreciated the entire evidence and convicted the appellants. While, re-appreciating the entire evidence, this Court found both appellants guilty of the offence. Hence, there is no merit in the appeal. Accordingly, the appeal is liable to be dismissed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

klt/pbl

To

1. The learned Sessions Judge,
Mahila Court, Salem, Salem District.

2. The Superintendent
Central Prison
Coimbatore.
3. The Superintendent
Central Prison (Woman)
Coimbatore.
4. The District Collecator,
Salem, Salem District.
5. The Director General of Police
Mylapore. Chennai-4.
6. The Inspector of Police,
Edapadi Police Station,
Salem District.
7. The Chief Secretary
Government of Tamil Nadu,
Secretariat, Chennai-9.
8. The Public Prosecutor,
High Court of Madras.

Copy to

9. The Hon'ble POCSO Committee,
High Court of Madras.
10. The Section Officer,
Criminal Section,
High Court, Madras-104.

+1cc to Mr.K.Thirukkumaran,, Advocate, S.R.No.53253

Cr1.A.No.760 of 2019

SMI(CO)
CT 31/01/2022