

Bail Slip

The Appellant herein/Accused Namely Amul Raj S/o.Kaliappan aged 39 years was directed to be released on Bail as per order of this Hon'ble Court dated 18/12/2020 made in Crl.MP.No.17156 of 2020 in Crl.A.No.804 of 2019.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.03.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.804 of 2019

Amul Raj

... Appellant/Accused

-Vs-

State rep.by:

The Inspector of Police,
Nallipalayam Police Station,
Namakkal District.

Crime No.375 of 2016

... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, to set aside the conviction and sentence imposed in Spl.C.C.No.6 of 2017 dated 05.01.2018 on the file of Sessions (FTC) Mahila Court, Namakkal.

For Appellant : M/s.Vasavi Sridevi,
Legal Aid Counsel

For Respondent : Ms.T.P.Savitha,
Government Advocate (Crl. Side)

JUDGMENT

This Criminal Appeal has been filed against the conviction and sentence imposed by the learned Sessions Judge, (Fast Track Mahila), Namakkal in Special C.C.No.6 of 2017, dated 05.01.2018.

2.The respondent Police have registered a case in Crime No.375 of 2016, for the offence under Section 366(A) IPC against the appellant on the complaint (Ex.P1) given by the mother of the victim child (PW1). After completing investigation, the

respondent police altered the charges into Section 366 IPC and Section 3 r/w 4 of the Protection of Children from Sexual Offence Act, 2012 (hereinafter referred to as 'POCSO Act') and laid a charge sheet before the learned Sessions Judge, (Fast Track Mahila), Namakkal and the same was taken on file in Special C.C.No.6 of 2017.

3.After completing the formalities under Section 207 Cr.P.C., since there was a prima facie material to frame charge against the appellant, the learned Sessions Judge, framed charges under Section 366(A) and Section 5(1) r/w 6 of the POCSO Act.

4.After completing the trial and hearing the arguments advanced on either side and also considering the oral and documentary evidence, the learned trial Judge found the appellant guilty and convicted and sentenced as follows:-

- For offence under Section 366(A) IPC, the appellant to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.1,000/-, in default to undergo three months Rigorous Imprisonment.
- For offence under Section 5(1) r/w 6 of the POCSO Act, the appellant to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.2,000/-, in default to undergo six months Rigorous Imprisonment.

5.Challenging the above said Judgment of conviction and sentence, the appellant has filed the present appeal before this Court.

6.The learned counsel for the appellant would submit that there are material contradictions between the prosecution witnesses and also between the statement of the victim child recorded under Section 164 Cr.P.C., (Ex.P4) and the evidence of the victim child (PW2). The learned counsel would further submit that the prosecution has failed to prove the age of the victim child and also failed to prove whether she was a child under the age of 18 years at the time of occurrence. The victim child (PW2) while deposing before the trial Court, has stated that she was born on 11.09.2000, on the contrary, the school authority, where the victim child was studied gave the Age Certificate (Ex.P8) that the victim child was born on 30.05.2000. Hence, there are material contradictions and discrepancies regarding the date of birth of the victim child. In these type of cases, it is duty of the prosecution first of all to prove the age of the victim child and she was a minor under the age of 18 years at the time of occurrence and also she was a child comes under the definition of Section 2(1)(d) of the POCSO Act. On the side of the prosecution, no conclusive

material was produced regarding the age of the victim child and therefore, the benefit of doubt ought to have been extended in favour of the appellant. The learned trial Judge failed to appreciate the evidence and materials and wrongly came to the conclusion that the victim child was a minor under the age of 18 years without any documentary proof.

7. The learned counsel for the appellant would further submit that the victim child was produced before the learned Judicial Magistrate, Tiruchengode for recording the statement under Section 164 Cr.P.C. In the statement recorded under Section 164 Cr.P.C., (Ex.P4), the victim child has not stated anything against the appellant as though he forcibly kidnapped her by threatening and took her to various places and had aggravated penetrative sexual assault, but subsequently while deposing before the trial Court as PW2, she has improved her own version that the appellant kidnapped her and took her to various places and forcibly had aggravated penetrative sexual assault. Therefore, there are material contradictions between the statement of the victim child under Section 164 Cr.P.C., (Ex.P4) and the evidence given before the trial Court. Thus, the previous statement (Ex.P4) of the victim child was not substantiated by the prosecution and the learned trial Judge failed to consider the same.

8. The learned counsel for the appellant would further submit that the Doctor (PW11), who examined the victim child has stated that "there was no external injuries on the victim child, she is not virgin and her hymen absent and vagina admits two fingers freely and she would have had intercourse". The Doctor (PW11) has stated that there is possibility of sexual assault and not conclusively stated that the victim child was subjected to sexual assault. Further, the victim child while recording statement under Section 164 Cr.P.C., has not stated that she was subjected to sexual assault and therefore, in the absence of the same, it cannot be said that the victim was subjected to aggravated penetrative sexual assault and the appellant is the reason for the same. The learned counsel would further submit that in this case, no independent witness was examined by the prosecution to prove the guilt of the appellant and witnesses examined are all interested and motivated witnesses. Based on which only, the learned trial Judge had rendered the judgment of conviction which is against the fundamental criminal jurisprudence.

9. It is for the prosecution to prove the case beyond reasonable doubt and then only, the presumption under Sections 29 and 30 of the POCSO Act would come into play. In this case, since the prosecution failed to prove the case beyond reasonable doubt, the appellant/accused need not rebut the presumption.

Thus, the learned trial Judge miserably failed to consider all the legal as well as factual aspects and wrongly convicted and sentenced the appellant, which warrant interference of this Court.

10.Ms.T.P.Savitha, Government Advocate (Crl. Side) appearing on behalf of the respondent Police would submit that at the time of occurrence, the age of the victim child (PW2) was 16 years and she was a minor. The appellant was a married men and was working in the Poultry Farm of PW4 and he had two children. PW4 has clearly stated that during the relevant point of time, the appellant did not come to work and he was absent and subsequently, he came to know that the appellant took the victim child. The grandfather of the victim child, who was examined as PW3 has stated that the victim child was stayed with him for sometime prior to the occurrence, during that time the appellant had illegal intimacy with the victim child and he warned him. On the date of occurrence i.e., on 16.10.2016, he took the victim child to shop to buy mutton and left her near one Tea Shop and thereafter, she found missing. Later, he came to know that the appellant kidnapped the victim child and after one month, the Police secured the victim child from the appellant and when she was examined, she informed that the appellant forcibly took her to various places and had aggravated penetrative sexual assault. The mother of the victim child, who was examined as PW1 has clearly spoken about giving complaint (Ex.P1) and missing of her daughter.

11.The learned Government Advocate would further submit that though the victim child has not stated anything before the learned Judicial Magistrate, Tiruchengode while recording the statement under Section 164 Cr.P.C., while examining before the trial Court she clearly narrated that the appellant forcibly kidnapped her and took her to various places, during that time he had aggravated penetrative sexual assault on several occasions. The Doctor (PW11), who examined the victim child opined that "there was no external injuries on the body of the victim child, she is not virgin and her hymen absent and vagina admits two fingers freely and she would have had sexual intercourse" and issued the Medical Report (Ex.P3) to that effect. Therefore, the appellant has committed the offence under Section 5(1) r/w 6 of the POCSO Act.

12.From the evidence of the victim child (PW2), her mother (PW1), her grandfather (PW3), the Doctor (PW11) and the independent witness (PW4) and from the complaint (Ex.P1), the Medical Report of the victim child (Ex.P3) and the Age Certificate (Ex.P8), the prosecution has proved its beyond reasonable doubt.

13.Further, the age of the victim child is proved by producing the Age Certificate of the victim child from the school authorities where the victim child was studied. Despite the victim child has stated in her evidence that she was born on 11.09.2000 and from the Age Certificate the date of birth was shown as 30.05.2000, it is very clear that the victim child was born in the year 2000. Hence, the age of the victim child at the time of occurrence was only 16 years and she was a child under the definition of Section 2(1)(d) of the POCSO Act. Therefore, the appellant had aggravated penetrative sexual assault on the victim child and committed the offence under Section 5(1) POCSO Act, which is punishable under Section 6 of POCSO Act. From the oral and documentary evidence produced by the prosecution, the trial Court rightly convicted the appellant which does not warrant interference of this Court and the appeal is liable to be dismissed.

14.Heard the learned counsel appearing for the appellant and the learned Government Advocate [Crl. Side] appearing for the respondent Police and also perused the materials available on record.

15.The case of the prosecution is that at the time of occurrence, the victim child (PW2) was aged about 16 years and she was a child under the definition of Section 2(1)(d) of POCSO Act. Prior to the occurrence, the victim child was staying with her grandfather (PW3) for a period of four months. During that time, the appellant used to induce the victim child to elope and marry him. On 16.10.2016, at about 09.00 a.m., the grandfather of the victim child (PW3) went to shop to buy mutton along with the victim child and the victim child was standing near one Tea Shop. At that time, the appellant came there in bike and kidnapped the victim child by threatening her. Despite made search of the victim child, she could not be found and on coming to know about the appellant had kidnapped the victim child, her mother lodged a complaint (Ex.P1) to the respondent Police. The appellant and the victim child had gone to the mother's house of the appellant and stayed there. During night hour, the appellant had sexual intercourse with her. Thereafter, the appellant took the victim child to R.Vellodu where they were stayed for four days, at that time also the appellant had sexual intercourse with her. Then, they were gone to the appellant friend's house at Thogaimalai where they were stayed for four days, at that time also the appellant had sexual intercourse with her. Since the appellant did not have money, the appellant took the victim child to Namakkal and when they were standing in Namakkal Bus Stand, the Police arrested the appellant and secured the victim child.

16. Based on the complaint (Ex.P1) given by the mother of the victim child (PW1), an FIR in Crime No.375 of 2016 was registered for offence under Section 366(A) against the appellant. After completing investigation, the respondent police laid a charge sheet before the learned Sessions Judge and the same was taken on file in Special C.C.No.6 of 2017.

17. During the trial, on the side of the prosecution, as many as 17 witnesses were examined as PW1 to PW17 and 13 documents were marked as Exs.P1 to P13 and no material object was exhibited. After completing the evidence of prosecution witnesses, when incriminating circumstances were culled out from the prosecution witnesses put before the accused, he had denied as false. On the side of the defence, no oral and documentary evidence was produced.

18. After considering the evidence on record and hearing either side, the learned Sessions Judge, by judgment dated 05.01.2018 in Special C.C.No.6 of 2017, convicted and sentenced the appellant as stated above.

19. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding. Accordingly, this Court appreciated the entire evidence and materials available on record to give independent finding.

20. In this case, the age of the victim child at the time of occurrence was only 16 years and she was a child under the definition of Section 2(1)(d) of the POCSO Act.

21. The learned counsel for the appellant contended that the victim child in her evidence has stated that she was born on 11.09.2000, but the school authorities, where the victim child was studied gave the Age Certificate (Ex.P8) that the victim child was born on 30.05.2000. On the contrary, the learned Government Advocate (Crl. Side) appearing on behalf of the respondent Police submitted that at the time of occurrence, the age of the victim child was 16 years and she was a minor. In order to prove the same, during trial, the prosecution marked the Age Certificate as Ex.P8. Since the Age Certificate of the victim child was produced, the prosecution has not taken any steps to conduct the Radiologist Test to prove the age of the victim child.

22. The victim child (PW2) in her evidence has stated that her date of birth was 11.09.2000. The mother of the victim child (PW1) while giving the complaint (Ex.P1) mentioned that her daughter's age was 17 years. In the Age Certificate of the victim child (Ex.P8), it is seen that during the period from

2011 to 2012, the victim child was studying 6th std and subsequently, she stopped her studies during the academic year 2011-2012 and her date of birth mentioned as 30.05.2000. Though the date and month of the date of birth of the victim child are contrary, the year of the birth is 2000. When the victim girl was studying 6th std, her age was 12 years. In this case, since the occurrence is of the year 2016, the victim child was 16 years and she was a minor. Further, the Doctor (PW11) who conducted the medical examination on the victim child has stated that the age of the victim child was only 17 years. The prosecution has proved through oral and documentary evidence that the victim is below the age of 18 years and she was a child under the definition of Section 2(1)(d) of POCSO Act. Therefore, under these circumstances, this Court finds that the victim child was not completed the age of 18 years at the time of occurrence and she was a child under the definition of Section 2(1)(d) of the POCSO Act.

23. The learned counsel for the appellant contended that the victim child while recording the statement under Section 164 Cr.P.C., has stated that she had voluntarily gone along with the appellant, since her grandfather (PW2) was arranging marriage to someone. On the contrary, the victim child (PW2) while deposing before the trial Court, has stated that the appellant forcibly kidnapped her to various places for several days and during that time, he committed sexual assault. If at all the appellant had kidnapped the victim child nearby the tea shop, it was a busy location and she would have resisted and made a sound. But none of the witnesses have spoken about that the victim child was forcibly kidnapped by the appellant and no eye witness for the same. Thus, the offence under Section 366(A) IPC would not attract against the appellant. In this case, the fact remains that at the time of occurrence, the age of the victim child was below 16 years and she was a child comes under the definition of Section 2(1)(d) of the POCSO Act. From the evidence of the victim child (PW2), the Doctor (PW11) and from the Medical Certificate (Ex.P3), it could be seen that the victim child was subjected to aggravated penetrative sexual assault. Since the appellant removed the custody of the minor child from the lawful guardian without their consent with an intention to have an illegal intimacy, he has committed the offence under Section 366 (A) IPC and the learned trial Judge has rightly convicted and sentenced the appellant under Section 366(A) IPC. Therefore, the contentions raised by the learned counsel for the appellant cannot be accepted.

24. Even though there is contradiction between the statement recorded under Section 164 Cr.P.C., (Ex.P4) and the evidence of the victim child as stated before the trial Court, the evidence of the Doctor (PW11), the mother of the victim child (PW1), the

grandfather of the victim child (PW3) and the Medical Report (Ex.P3) are corroborated the evidence of the victim child (PW2). Though the statement under Section 164 Cr.P.C., is not a substantive piece of evidence, it can be used for either corroboration or contradiction. In this case, it is used for contradiction. Even though in the statement recorded under Section 164 Cr.P.C., (Ex.P4) the victim child admitted that she voluntarily left along with the appellant, the facts remains that the age of the victim child is below 18 years her custody was removed from lawful guardian without their consent and had aggravated penetrative sexual assault on her. Hence, the appellant has committed the offence as charges framed against him.

25.As per the evidence of the victim child (PW2), she was subjected to aggravated penetrative sexual assault by the appellant which was subsequently corroborated by the Doctor (PW11) and the Medical Report (Ex.P3). Even assuming that there was no forceful sexual intercourse and the victim child had given consent for the same, her consent is not legally valid, because she was a child comes under the definition of Section 2 (1)(d) of the POCSO Act. Therefore, once it is proved that the victim child was a minor under the age of 18 years at the time of occurrence and she was subjected to aggravated penetrative sexual assault, her consent for sexual intercourse is immaterial.

26.Therefore, from the evidence of the victim child (PW2), her mother (PW1), her grandfather (PW3), the Doctor (PW11) who gave treatment to the victim child and one independent witness (PW4), who stated that during the relevant point of time, the appellant did not come to work and also from the complaint (Ex.P1), the Medical Report of the victim child (PW3) and from the Age Certificate (Ex.P8), it is proved that the appellant had forcibly kidnapped the victim child and took her to various places and committed the aggravated penetrative sexual assault on her, which falls under Section 366(A) IPC and Section 5(1) r/w 6 of POCSO Act. The trial Court has rightly appreciated the entire evidence and convicted and sentenced the appellant.

27.Since the appellant had developed illegal intimacy with the victim child when she was staying in her grandfather's (PW3) house and spoiled her life, the appellant deserves no sympathy and there is no mitigating circumstances to reduce the quantum of sentence imposed by the learned trial Judge.

28.Hence, this Court can safely come to the conclusion that the appellant has committed aggravated penetrative sexual assault on the victim child by kidnapping her and therefore, the prosecution has established its case beyond reasonable doubt.

In the light of the above discussion, this Court does not find any merit in this appeal and the appeal is liable to be dismissed.

29.The appeal lacks merit and is, accordingly, dismissed and the judgment of conviction and sentence passed by the trial Court are confirmed. The trial Court is directed to secure the appellant for sufferance of the sentence if he is outside.

30.The counsel who appointed by the Legal Services Authority from the legal aid panel for the appellant is entitled for fees as per rule.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

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To

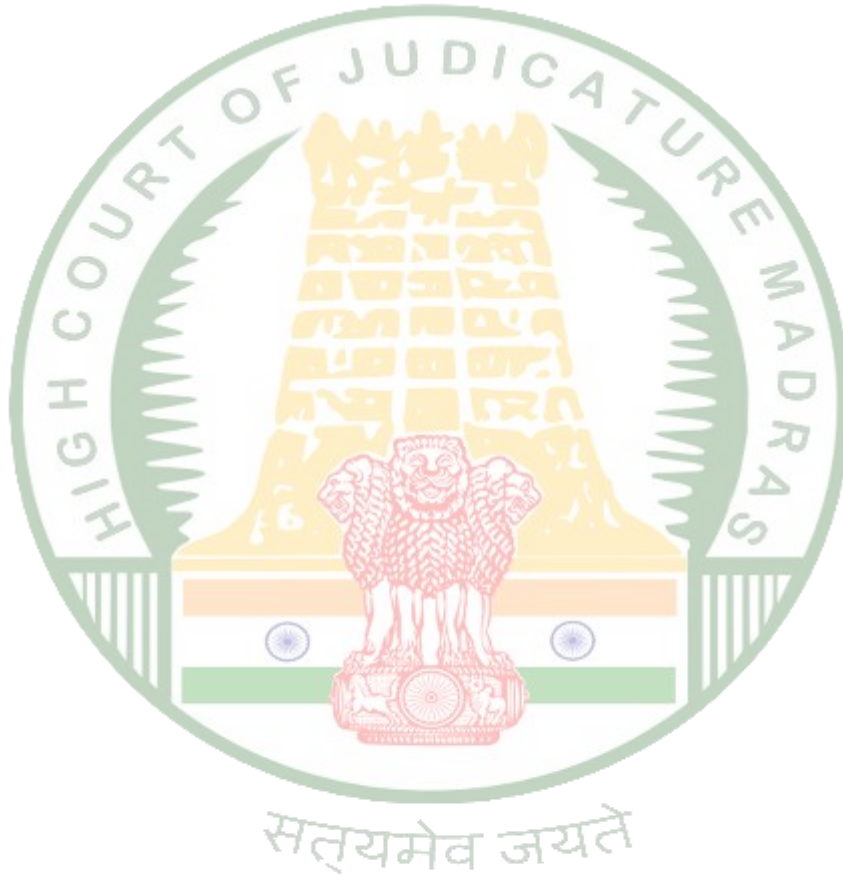
- 1.The Sessions Judge,
(Fast Track Mahila),
Namakkal.
- 2.The Inspector of Police,
Nallipalayam Police Station,
Namakkal District.
- 3.The Superintendent,
Central Prison, Coimbatore.
- 4.The District Judge,
Namakkal, Namakkal District(For information)
- 5.The District Collector,
Namakkal District.
- 6.The Superintendent of Police,
Namakkal District.
- 7.The Public Prosecutor,
High Court, Madras.
- 8.The Section Officer(Records)
Criminal Section,
High Court, Madras.

9.The Secretary Legal Service Authority,
High Court, Madras.

+1cc to M/s.Vasavi Sridevi , Advocate, S.R.No.20068

Cr1.A.No.804 of 2019

NRJK (CO)
CB(12/07/2021)



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