



BAIL SLIP

Crl.A.No.292 of 2019:

This Appellant herein Accused No.1 viz., Mohandass age 23 son of Rajendran was directed to be released on bail as per order of this court dated 04/07/2019 made in Crl.M.P 6760 of 2019.

Crl.A.No.762 of 2018:

These Appellents/Accused No.2 to Accused No.5

- 1)Rajendran, age 52 son of Arumugam,
- 2)Selvi, age 44 W/o. Rajendran,
- 3)Karnan, age 47 son of Arumugam,
- 4)Chitra @ Meri, age 26 W/o. Babu

were directed to be released on bail as per order of this court dated 06/12/2018 made in Crl.M.P 15873/2018.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.03.2021

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.Nos.762 of 2018 & 292 of 2019

1.Rajendran

2.Selvi

3.Karnan

4.Chitra @ Meri

5.Mohandass

...Appellants in Crl.A.No.762 of 2018

...Appellant in Crl.A.No.292 of 2019

-Vs-

The State, rep. by

Inspector of Police,

All Women Police Station, Namakkal,

(Sendamangalam P.S.Crime No.78/2016

Namakkal District).

...Respondent in both Appeals

COMMON PRAYER: Criminal Appeals filed under Section 374(2) of Code of Criminal Procedure, to allow this appeal by setting aside the judgment dated 20.11.2018 in Spl.C.C.No.38 of 2016 on the file of the Sessions (Fast Track Mahila) Judge, Namakkal.

For Appellants

in Crl.A.No.762 of 2018 : Mr.S.Shunmugavelayutham,  
Senior Counsel for  
Mr.K.T.S.Sivakumar



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For Appellant  
in Crl.A.No.292 of 2019 : Mr.S.Shunmugavelayutham,  
Senior Counsel for  
Mr.B.Vasudevan

For Respondent  
in both the Appeals : Ms.T.P.Savitha,  
Government Advocate [Crl. Side]

#### COMMON JUDGMENT

Both Criminal Appeals have been filed against the conviction and sentence imposed by the learned Sessions Judge (Fast Track Mahila), Namakkal in Special C.C.No.38 of 2016, dated 20.11.2018.

2.The respondent Police have registered a case in Crime No.78 of 2016, for offence under Section 366(A) IPC against the appellants on the complaint (Ex.P1) given by the mother of the victim child (PW1). During investigation, the respondent police altered Section into 366(A) IPC and Sections 3 r/w 4 of the Protection of Children from Sexual Offence Act, 2012 (hereinafter referred to as 'POCSO Act') and after completing the investigation, again altered the Sections into 366, 366 r/w 109, 366 r/w 114 and Section 5(1) r/w 6 and 17 of POCSO Act and Section 9 of Prohibition of Child Marriage 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.38 of 2016.

3.After completing the formalities under Section 207 Cr.P.C., since there was a prima facie material to frame charges against the appellants, the learned Sessions Judge, framed charges as follows:-

- A1-For offence under Section 366(A) IPC and Section 9 of Prohibition of Child Marriage Act and Section 5(1) r/w 6 of POCSO Act.
- A2-For offence under Section 366(A) IPC r/w 109 IPC and Section 5(1) r/w 6 r/w 17 of POCSO Act.
- A3-For offence under Section 366(A) IPC r/w 109 IPC and Section 5(1) r/w 6 r/w 17 of POCSO Act.
- A4-For offence under Section 366(A) IPC r/w 109 IPC and Section 5(1) r/w 6 r/w 17 of POCSO Act.
- A5-For offence under Section 5(1) r/w 6 r/w 17 of POCSO Act.



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

| Ac-cused | Conviction and Sentence                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|----------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| A1       | (i) For offence under Section 366(A) IPC to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.2,000/-, in default to undergo 6 months Rigorous Imprisonment.<br><br>(ii) For offence under Section 9 of the Prohibition of Child Marriage Act to undergo 1 year Rigorous Imprisonment.<br><br>(iii) For offence under Section 5(1) r/w 6 of POCSO Act to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.3,000/-, in default to undergo 8 months Rigorous Imprisonment. |
| A2 to A4 | (i) For offence under Section 366(A) r/w 109 IPC, to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.2,000/- each, in default to undergo 6 months Rigorous Imprisonment.<br><br>(ii) For offence under Section 5(1) r/w 6 r/w 17 of POCSO Act to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.3,000/-, in default to undergo 8 months Rigorous Imprisonment.                                                                                                       |
| A5       | For offence under Section 5(1) r/w 6 r/w 17 of POCSO Act to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.3,000/-, in default to undergo 8 months Rigorous Imprisonment.                                                                                                                                                                                                                                                                                                          |

5. Challenging the above said Judgment of conviction and sentence, the appellants have filed the present appeals before this Court.

6. For the sake of clarity, the appellants are referred to as accused as per their ranks in the Sessions Case in Special C.C.No.38 of 2016.

7. The learned senior counsel appearing for the appellants/accused would submit that the age of the victim child (PW2) was not proved by the prosecution. Since she had fell in love with A1, she had voluntarily gone with him. If at all A1 kidnapped the victim child (PW2) in the bus, she would have raised alarm or resisted A1. In this case, none of the



witnesses have stated that the victim child (PW2) has raised any alarm or shown her resistance. The learned senior counsel would further submit that the marriage of the victim child (PW2) was not proved by the prosecution. In the complaint (Ex.P1), the mother of the victim girl (PW1) has not stated that A1 has married her daughter and had sexual intercourse. Initially, the case was registered under Section 366(A) IPC and on further investigation, altered to Sections 366(A) IPC and Section 3 r/w 4 of the POCSO Act and after completing the investigation, again altered the Sections into 366, 366 r/w 109, 366 r/w 114 and Section 5(1) r/w 6 and 17 of POCSO Act and Section of 9 of Prohibition of Child Marriage Act.

8.The learned senior counsel for the appellants/accused would further submit that A2 to A5, who are family members of A1 have not involved in this case. Neither they kidnapped the victim girl (PW2) and nor abetted A1 to marry her. Since they belong to same family, A2 to A5 were falsely implicated in this case. Only both A1 and the victim girl (PW2) voluntarily decided to marry and went to Kozhikode, Kerala and got married. Further, A2 to A5 were not present at the time of alleged kidnapping and were also not present at the time of alleged marriage. During investigation, the prosecution did not examine the important witnesses and only examined the witnesses in pick and choose method. From the evidence of the victim girl (PW2), her statement recorded under Section 164 Cr.P.C., (Ex.P11) and in the complaint (Ex.P1), it could be seen that there is no repeated penetrative sexual assault and therefore, the offence under Section 5(1) r/w 6 of POCSO Act would not attract against the accused and the learned trial Judge failed to appreciate same. During the evidence, the victim girl (PW2) was tutored by her parents (PW1 and PW3) that she was subjected to repeated penetrative sexual assault by A1.

9.In order to prove the age of the victim girl (PW2), neither her birth certificate produced and nor any competent person has spoken about her age. Further, the victim girl (PW2) was not subjected to any Radiologist Test and the prosecution did not take any steps for the same during investigation. Therefore, in the absence of the age proof, it cannot be said that the victim girl (PW2) was not completed the age of 18 years. Hence, she is not a child under the definition of Section 2(1)(d) of POCSO Act and the conviction and sentence recorded under the provision of POCSO Act itself are not maintainable and the same are liable to be set aside against all the accused.

10.The learned senior counsel would further submit that the Village President (PW7), who is an independent witnesses in this case, has not supported the case of the prosecution and turned



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as hostile witness. The evidence of the victim child (PW2) has not corroborated by PW1, PW3 & PW4, who are her mother, father and grandmother and they are interested witnesses. Even in the evidence of the victim child (PW2) in every stage, there are lot of change of events and improvisation. Hence, it is unsafe to record the judgment of conviction based on the un-corroborative evidence of the victim girl (PW2). The Doctor, who treated the victim child was examined as PW13 and she has clearly opined that there was no symptoms for recent sexual intercourse. Hence, the evidence of the Doctor (PW13) was not corroborated with the evidence of the victim child (PW2). Therefore, the evidence of the victim girl (PW2) is not trustworthy and the learned trial Judge failed to appreciate the same in toto. Only based on the assumption and also on the ground of sympathy, the accused were convicted and sentenced by the trial Court. Further, there is no material evidence to show that A2 to A5 actively participated in the alleged kidnapping and alleged marriage and had vital role in this case in abetting A1 to marry the victim child (PW2). Since they are being the father (A2), mother (A3), uncle (A4) and cousin (A5) of A1 respectively, they were falsely implicated in this case. In the absence of the evidence and material against A2 to A5, the conviction and sentence recorded by the learned trial Judge warrants interference of this Court.

11.The learned senior counsel for the appellants/accused would further submit that the victim child (PW2) has stated that she was taken to Kozhikode, Kerala and stayed in the house of A4 and on the next day, A1 took her to Murugan Temple and tied Thali. But the prosecution has failed to prove that the victim girl (PW2) was forcibly kidnapped by A1 and A4 and none of the witnesses examined by the prosecution have not stated so. Further, the prosecution did not take any steps to examine any person in Kozhikode, Kerala where the alleged marriage was done. Hence, there is no evidence and material to show that A1 had aggravated penetrative sexual assault on the victim child (PW2) in the house of A5. In the absence of the same, the conviction and sentence recorded against A1 are unwarranted and the same are liable to be set aside.

12.Ms.T.P.Savitha, learned Government Advocate (Crl. Side) appearing on behalf of the respondent Police in both the appeals would submit that at the time of occurrence, the age of the victim child (PW2) was 17 years. During trial in chief examination, the victim child (PW2) herself has stated that she was only 17 years age at the time of occurrence. In order to substantiate the same, the age certificate of the victim child (PW2) was collected from the School where the victim girl was studied and the same was marked as Ex.P4. As per Ex.P4, the date of birth of the victim child (PW2) is 16.12.1999 and the



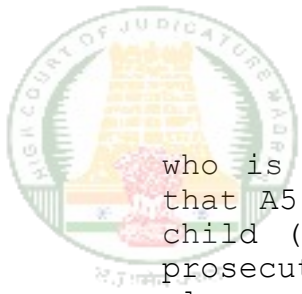
date of occurrence is 08.03.2016. Therefore, at the time of occurrence, the age of the victim girl (PW2) is only 17 years at any angle, she was not completed the age of 18 years and she was below 18 years and a child under the definition of Section 2(1)(d) of POCSO Act. The Doctor (PW13) who gave treatment to the victim child (PW2) in her evidence has also stated that the victim child (PW2) was above the age of 14 years. In order to disprove the same, the defence has not taken any steps to produce any evidence that she was completed the age of 18 years at the time of occurrence i.e., on 08.03.2016.

13.The Doctor (PW13), who conducted the medical examination on the victim child (PW2) has stated the age of the victim child at the time of medical examination was above 14 years and she was subjected to sexual intercourse and her hymen was not intact and the vagina admits two fingers. Though the Doctor (PW13) has stated that there was no symptoms of recent sexual intercourse, there was long gap between the date of A1 committing the sexual assault and the date of medical examination and further, at the time of medical examination, the victim child (PW2) was in menses period, that is the reason the Doctor (PW13) opined that he could not give opinion regarding the recent sexual assault. Therefore, the victim girl (PW2) who was not completed the age of 18 years was subjected to aggravated penetrative sexual assault by A1.

14.The learned Government Advocate would further submit that A1 had forcibly kidnapped the victim/minor girl (PW2) from the lawful guardian/parents under the pretext of marrying her and also informed the same to her parents and married her and had aggravated penetrative sexual assault in the house of A5. Therefore, A1 has committed the offence under Section 366(A) IPC and Section 9 of Prohibition of Child Marriage Act and Section 5(1) r/w 6 of POCSO Act.

15.A2 to A4, who are the father, mother and uncle of A1 respectively did not prevent A1 not to remove the custody of the victim child (PW2) from the lawful guardian/parents and did not inform the same to her parents. On the contrary, they abetted A1 to kidnap the victim child (PW2) and allowed him to marry her and kept them in the house of A4 and thereafter, in the house of A5. Further, when PW5, who is the uncle of the victim girl (PW2) had gone to the house of A4, A1 to A4 suppressed the marriage and refused to send the victim child (PW2) along with PW5. Hence, A2 to A4 have committed the offence under Section 366(A) IPC r/w 109 IPC and Section 5(1) r/w 6 r/w 17 of POCSO Act.

16.Further, A1 took the victim child (PW2) to the house of A5 and stayed there and forcibly had sexual intercourse. PW15,



who is the owner of the house where A5 was staying has stated that A5 informed him A1 is her brother and he married the victim child (PW5). The evidence of PW15 strengthen the case of the prosecution with regard to involvement of A5 in the occurrence along with A1. Hence, A5 has committed the offence under Section 5(1) r/w 6 r/w 17 of POCSO Act.

17. Therefore, all the accused have committed the above said offences and the evidence and materials produced by the prosecution are in conformity to the same. The learned trial Judge has rightly appreciated the same and convicted and sentenced them as stated above. Hence, there is no merit in the appeals and, are liable to be dismissed.

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

19. The case of the prosecution is that at the time of occurrence, the victim child was studying 12<sup>th</sup> STD in Government Girls Higher Secondary School, Kalappanaickenpatti, Namakkal District and staying in her grandmother's house (PW4). On the date of occurrence, the victim child (PW2) was a minor aged about 17 years. The father and mother of the victim child (PW1 & PW3) were residing at Mettupalayam. The victim child (PW2) used to go to school by bus from her grandmother's (PW4) house at Thuthikulam. A2, A3, A4 & A5 are father, mother, uncle and cousin of A1 respectively. A1 happened to see the victim child (PW2) in bus when she was going to school and he talked with her and got her phone number. Then, A1 frequently talked with the victim child (PW2) over phone and in person and developed a love affair. A1 proposed to take the victim child (PW2) to somewhere and marry her. When A1 informed the same to A2 to A4, they were also abetted him to kidnap the victim child (PW2) to somewhere and to perform marriage and keep her in safe for sometime. On 08.03.2016, at about 08.30 a.m., on the instigation of A2 to A4, A1 kidnapped the victim child (PW2) from Kalappanaickenpatti bus stop from her lawful guardian/parents for the purpose of marriage and for sexual assault with her. On 10.03.2016, at about 07.00 a.m., in Murugan Temple at Kozhikode, Kerala, A1 performed the marriage with the victim child (PW2) knowing very well that she is a minor and not completed the age of 18 years. Thereafter, A1 contacted the brother of the father of the victim child (PW5) and informed that he took away the victim child (PW2) and married her. On coming to know that A1 was at the house of A4 along with the victim child (PW2), the brother of the father of the victim child (PW5) and the Village President (PW7) were gone to the house of A4 to see the victim child (PW2). But the accused refused to show her to PW5 and shown her



to the President (PW7) and refused to send her along with them. When the father and mother of the victim child (PW1 & PW3) were gone to the house of A1 to see their daughter, the accused refused to show their daughter and also refused to send her along with them. Hence, the mother of the victim child (PW1) lodged a complaint to the respondent Police.

20. Based on the complaint (Ex.P1) given by the mother of the victim child (PW1), an FIR in Crime No.78 of 2016 was registered for offence under Section 366(A) against the appellant. After completing investigation, the respondent police altered the charges as stated above and laid a charge sheet before the learned Sessions Judge and the same was taken on file in Special C.C.No.38 of 2016.

21. During the trial, on the side of the prosecution, as many as 19 witnesses were examined as PW1 to PW19 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 by questioning under Section 313 Cr.P.C., they denied as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

22. After considering the evidence on record and hearing the arguments advanced on either side, the learned Sessions Judge, vide judgment dated 20.11.2018 in Special C.C.No.38 of 2016, convicted and sentenced all the accused as stated above.

23. 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.

24. Initially, the FIR in Crime No.78 of 2016 (Ex.P8) was registered for offence under Section 366(A) IPC based on the complaint given by mother of the victim child (PW1) and subsequently, after securing the victim child (PW2) and A1 and recording the statement of the victim child under Section 164 Cr.P.C., (Ex.P11), Section was altered into 366(A) IPC and Sections 3 r/w 4 of POCSO Act and on completion of investigation, again Sections were altered into 366, 366 r/w 109, 366 r/w 114 and Section 5(1) r/w 6 and 17 of POCSO Act and Section of 9 of Prohibition of Child Marriage Act. In order to prove the charges framed against the accused on the side of the prosecution, as many as 19 witnesses were examined and 13 documents were marked. Out of which, the victim child was examined as PW2.



25.Initially on the complaint (Ex.P1), the FIR was not registered for offence under Sections 366, 366 r/w 109, 366 r/w 114 and Section 5(1) r/w 6 and 17 of POCSO Act and Section 9 of Prohibition of Child Marriage Act for the reason that since the victim child (PW2) did not return to the house, the FIR has been registered only for offence under Section 366(A) IPC. Subsequently, the investigation reveals that A1 with the abettment of A2 to A5 forcibly kidnapped the victim child (PW2) against her consent and removed her from the lawful guardian/parents and tied Thali in Kozhikode, Kerala and had penetrative sexual assault in the house of A5. A1 knowingly well that the victim child (PW2) was a minor girl and not completed the age of 18 years. When the uncle of the victim child (PW5) and the Village President (PW7) came to the house of A4 to see the victim child (PW2), the accused refused to show her and also refused to send with them. Therefore, the respondent altered the Sections as stated above and filed the charge sheet before the trial Court.

26.The mother of the victim child was examined as PW1. She has deposed that at the time of occurrence, her daughter (PW2) was aged about 17 years and was studying 12<sup>th</sup> STD in the Government Girls Higher Secondary School, Kalappanaickenpatty. She further deposed that her daughter (PW2) at the time of occurrence, was staying in her grandmother house (PW4) and pursuing her studies and used to go to school by bus. A2, A3, A4 and A5 are the father, mother, uncle and cousin of A1 respectively. When the victim child (PW2) was studying 10<sup>th</sup> STD, A1 used to meet the victim girl in bus and also obtained her phone number and talked with her via cell phone and thereafter, he decided to marry her. A1 informed the same to A2 to A5, for which they induced and abetted A1 to kidnap the victim child (PW2). Based on the inducement, on 08.03.2016, at about 08.30 a.m., A1 kidnapped the victim child (PW2). On evening hours, the victim child (PW2) did not return to home and an information came from one person from Coimbatore through telephone that A1 took the victim child (PW2) and married her. Therefore, the mother of the victim child (PW1) gave the complaint to the respondent Police and the same was marked as Ex.P1 during trial. Further, the mother of the victim child (PW1) has spoken about the complaint (Ex.P1) given by her and also spoken about her daughter informed the happenings to the Police.

27.During trial, the victim child was examined as PW2. She has deposed that at the time of occurrence, she was 17 years of age and was studying 12<sup>th</sup> STD in the Government Higher Secondary School, Kalappanaickenpatty and her date of birth is 16.12.1999. On 08.03.2016, the victim child (PW2) to go to her friend's house, she boarded the bus from Thuthikulam Village. A1 and A4



were available in the bus. When she tried to take ticket, A1 prevented her from taking ticket to the place where she want to go and he took the ticket for her. When she tried to get down from the bus where she wanted to go, A1 threatened her for getting down from the bus and took her to Salem, from there they were gone to Kozhikode, Kerala, from there, they took the victim child (PW2) to the house of A1's friend, where the father (A2), mother (A3) and cousin (A5) were available. The victim child (PW2) had no knowledge whereabouts them, because it was a new place for her. On the next day, A1 threatened and took her to one Murugan Temple and tied Thali in her neck. At that time, A2 to A5 were also present. During the night hours, A1 had sexual intercourse with her. Thereafter, they had stayed for four to five days in Kozhikode, Kerala, at that time also A1 had sexual intercourse with her. Then, A1 took the victim child (PW2) to the house of A4, on coming to know about the same, the uncle of the victim girl (PW5) and the Village President (PW7) had gone to the house of A4. But A4 refused to send the victim child (PW2) to them. Thereafter, the father and mother of the victim child (PW1 & PW3) had gone to the house of A4 to see their daughter (PW2), but they refused to show her to them. Then, A1 took the victim child (PW2) to the house of A5 and had a sexual intercourse with her. When A1 and the victim girl (PW2) returned to Thuthikulam Village, near the bus stop of Senthamangalam Government Hospital the Police secured them.

28.The father of the victim child was examined as PW3 and he has reiterated the evidence of her wife (PW1). The uncle of the victim child was examined as PW5 and he has spoken about that he and the Village President (PW7) had gone to the house of A4 to see the victim child (PW2), at that time, the accused did not show her to PW5, but shown her to PW7 and also refused to send her along with them. Subsequently, the mother of the victim child (PW1) informed the Police and the Police asked the parents of the victim child (PW1 & PW3) to give a complaint and therefore, the mother of the victim child (PW1) gave a complaint (Ex.P1) to the respondent Police. Thereafter, the Police secured A1 and the victim child (PW2) near the bus stop of Senthamangalam Government Hospital.

29.The main contention of the learned counsel for the accused is that the person who informed the uncle of the victim child (PW4) about the victim child (PW2) was married by A1 through telephone, was not examined by the prosecution during trial and the call details have not collected to prove the same. Further, the respondent Police have not gone to Kozhikode, Kerala where the victim girl (PW2) was kidnapped and not examined any witnesses as to whether she was forcibly kidnapped by A1 to A5. However, the facts remains that the victim child (PW2) was studying 12<sup>th</sup> std at the time of occurrence. On



08.03.2016, the victim child (PW2) had gone to her friends house, but she did not return back to home. The evidence of the uncle of the victim girl (PW5) clearly shows that he received information about A1 kidnapped the victim child (PW2) and tied Thali in Kozhikode, Kerala. On coming to know about A1 and the victim child (PW2) came to the house of A4, PW5 and the Village President (PW7) had gone to the house of A4 to see her, but the accused refused to send the victim child (PW2) along with them. Subsequently, the mother of the victim child (PW1) lodged a complaint to the respondent Police and the Police secured the victim child (PW2) and A1 near Senthamangalam Government Hospital Bus Stop. Though the FIR (Ex.P8) initially filed under Section 366(A) IPC, from the evidence of the victim child clearly shows that A1 kidnapped her to an unknown place with the help of A2 to A4 and married her and had a sexual intercourse. Hence, during investigation the respondent Police have altered the charges (cited supra) and filed the charge sheet.

30.As far as the age of the victim child (PW2) is concerned, she herself has stated that her date of birth is 16.12.1999 and her age certificate (Ex.P4) substantiated the same. Further, the Doctor (PW13) evidence is also available in support of the same. Per contra, the learned counsel for the accused to disprove the same, did not produce any evidence or material during trial. Hence, there is no dispute with regard to the age of the victim child in this case.

31.The prosecution case is that when the victim child was going to her friend's house on 08.03.2016, A1 prevented her from taking ticket to the place where she wanted to go and also prevented her from getting down from the bus where she wanted to get down and forcibly took her to Salem from there to Kozhikode, Kerala. If at all, the victim child was kidnapped by the accused in the bus, definitely she would have raised alarm and she would have informed to the conductor or the passengers who were travelling in the bus. In this case, no evidence is available in respect of the same. Thus, the victim child did not give any resistance and did not take any steps to seek help of others. She might have gone voluntarily along with A1. But however, at the time of occurrence, the age of the victim child was below the age of 18 years and she was a minor as per the evidence of the victim child (PW2) and also her age certificate (Ex.P4). Even assuming that she had voluntarily gone along with A1, her consent is immaterial, since at the time of occurrence she was a minor and a child under the definition of Section 2(1) (d) of the POCSO Act. Therefore, once a girl under the age of 18 years was removed from the custody of the lawful guardian/parents without their consent for the purpose of marriage, the offence punishable under Section 366(A) IPC would attract.



32.From the evidence of PW5, who is the uncle of the victim child, it could be seen that the victim child was kept in the custody of A2 to A4 and also kept in the house of A5 for sometime. PW15, who is the house owner of A5 has clearly stated that A1 came along with one girl and when he asked about the same, A5 told that A1 married the girl and they were stayed for one week in the house of A5. Hence, in this case, PW15 is the independent witness, who has clearly spoken about A1 took the victim child to the house of A5 and stayed for one week. The victim child (PW2) has clearly stated that A1 kidnapped her with the help of A2 to A5 and he had penetrative sexual assault with her when she was in his custody.

33.The learned senior counsel for the appellants submitted that A1 alleged to have kidnapped the victim child on 08.03.2016 and the complaint (Ex.P1) came to be lodged on 14.03.2016 and there was six days delay in lodging the complaint. The uncle of the victim child (PW5) has stated that on coming to know about A1 and victim child were in the house of A4, he and the Village President (PW7) had gone there and asked them to send the victim child, but the accused refused to do so. Thereafter, the parents of the victim child (PW1 and PW3) have gone there to see their daughter, at that time also they refused to show their daughter (PW2). Then, having no other option, the mother of the victim child lodged a complaint to the Police on 14.03.2016. Therefore, the delay is not an explained one and it would not fatal to the case of the prosecution. The cases of this nature, the parents of the victim will not rush to the Police Station and lodge a complaint. First of all, they would think about the future of the victim and also the reputation of the family. A combined reading of the entire materials, the facts remains that A1 fell in love with the victim child (PW2). Even though the victim child also fell in love with A1, in this case A1 took her and subsequently married her and had sexual intercourse knowing well that she was a minor and not completed the age of 18 years. The Doctor (PW13) who treated the victim child also has clearly stated that the victim child (PW2) was subjected to penetrative sexual assault. Therefore, from reading of the entire materials, the victim was a child under the definition of Section 2(1)(d) of POCSO Act and she was subjected to penetrative sexual assault by A1. Therefore, the accused committed the offence as framed charge under the provisions of the POCSO Act.

34.From the evidence of the mother of the victim child (PW1), the victim child (PW2) and PW15, who is the house owner of A5, it could be seen that the victim child was staying in the house of A5 along with A1 and A5 told PW15 that A1 married the victim child (PW2). Even though the victim child (PW2) was not



raised alarm and was not informed the conductor or the passengers who were travelling at that time in the bus and voluntarily gone along with A1, her consent is immaterial for the reason that at the time of occurrence, the age of the victim child was below the 18 years and she was a child under the definition of Section 2(1)(d) of POCSO Act. Thus, A1 had removed the custody of the victim child with help of A2 to A4 who was a minor under the age of 18 years from the lawful guardian/parents without their consent. Therefore, A1 has committed the offence under Section 366(A) IPC and the prosecution has proved the same beyond reasonable doubt with cogent evidence. The learned trial Judge has rightly convicted and sentenced A1 for offence under Section 366(A) IPC and the same are confirmed.

35. In this case, the alleged marriage has not been proved by the prosecution in the manner known to law. In the complaint (Ex.P1), the mother of the victim girl (PW1) has not stated that A1 has married her daughter and had sexual intercourse. In order to substantiate the alleged marriage, the prosecution have not gone to Kozhikode, Kerala and did not examine any witnesses. PW5 has stated that he and the Village President (PW7) had gone to the house of A4 to see the victim child (PW2), at that time, the accused did not show her to PW5 and shown her to PW7 and also refused to send her along with them. But the Village President (PW7) has not stated that he saw the victim child (PW2) with Thali. The evidence of PW15, who is the house owner of A5 is that A1 came along with one girl and when he asked the same, A5 told that A1 married the girl. But he has not stated that he saw the victim girl (PW2) with Thali. Though PW15 has stated that A5 told A1 married the victim girl (PW2), however the prosecution has not proved the marriage between A1 and the victim girl (PW2) in the manner known to law. Even during the trial also, the victim girl (PW2) has not shown Thali to the Court or the prosecution has not marked Thali as Material Object. No other documents like registration certificate or receipt from temple was produced to prove the marriage. Therefore, the conviction and sentence passed against A1 for offence punishable under Section 9 of Prohibition of Child Marriage Act are not sustainable and are set aside.

36. As far as the offence under Section 5(1) r/w 6 of POCSO Act is concerned, neither, during the statement recorded under Section 164 Cr.P.C., the victim girl has stated that she was subjected to repeated penetrative sexual assault, nor in the complaint it has been stated that she was subjected to penetrative sexual assault, however only during chief examination, she has stated that she was subjected to repeated penetrative sexual intercourse, i.e., improvisation and the Doctor (PW13), who examined the victim child has also not opined



that there was a recent sexual assault and she was not in a position to give a opinion that the victim girl was recently subjected to sexual assault. Therefore, the offence committed by A1 would fall under Section 3(a) of the POCSO Act, which is punishable under Section 4 of POCSO Act, and not under Section 5(1) r/w 6 of POCSO Act, as observed by the learned trial Judge. In such view of the matter, this Court finds that the prosecution has not proved their case beyond all reasonable doubt for offence under Section 5(1) r/w 6 of POCSO Act, however, finds that the prosecution has proved the case only for offence under Section 3(a) r/w 4 of POCSO Act. Hence, the sentence of 10 years Rigorous Imprisonment is reduced to 7 years Rigorous Imprisonment.

37. In view of the above, CrI.A.No.292 of 2019 filed by A1 is dismissed with above modification.

38. A2 to A4, who are the father, mother and uncle of A1 knowing fully well that the victim child (PW2) at the time of occurrence not completed the age of 18 years, abetted A1 to kidnap the victim child (PW2) from the custody of the lawful guardian/parents without their consent. They did not prevent A1 to take the victim child (PW2) from the custody of the lawful guardian/parents. With the help of A2 to A4, A1 kidnapped the victim child (PW2) and committed sexual intercourse. Therefore, A2 to A4 have committed the offence under Section 366(A) r/w 109 IPC r/w 17 of POCSO Act and the prosecution has proved the same beyond reasonable doubt with cogent evidence. Therefore, this Court is not inclined to interfere with the conviction and sentence passed against A2 to A4. Even though the offence under Section 5(1) r/w 6 of POCSO Act not proved as against A1, however the offence under Section 3(a) r/w 4 of POCSO Act is proved. Therefore, the case against A2 to A4 for offence under Section 3(a) r/w 4 r/w 109 IPC r/w 17 of POCSO Act is proved by the prosecution. The sentence of imprisonment is modified from 10 years to 7 years which will meet ends of justice.

39. As far as A5 is concerned, PW15 is the house owner, where A5 was a tenant. PW15 has clearly stated that the victim girl (PW2) was staying with A1 in the house of A5 for a week. The victim girl (PW2) has clearly stated that she was staying in the house of A5 belongs to PW15. Therefore, the involvement of A5 in this case has been clearly spoken by the victim girl (PW2) and PW15 and she has committed the offence under Section 3(a) r/w 4 r/w 16 and 17 of POCSO Act and the prosecution has proved the same beyond reasonable doubt with cogent evidence. Hence, the sentence of 10 years Rigorous Imprisonment passed against A5 is modified to 7 years Rigorous Imprisonment which will meet ends of justice.



40. With the above modification, Crl.A.No.762 of 2018 filed by A2 to A5 stands dismissed.

41. In the result, both appeals are dismissed with the above modifications. The trial Court is directed to secure the accused for sufferance of the sentence if they are outside.

s/d-  
Assistant Registrar (CS VIII)

True Copy

Sub-Assistant Registrar

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To

1. The Sessions Judge,  
(Fast Track Mahila) Judge,  
Namakkal.
2. The Inspector of Police,  
All Women Police Station,  
Namakkal.
3. The Public Prosecutor,  
High Court, Madras.

+2 CC to Mr.K.T.S. Sivakumar, Advocate, Sr 19436,19525

Crl.A.Nos.762 of 2018 & 292 of 2019

VG-II (CO)  
LS (28/07/2021)