



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 03.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE **R.PONGIAPPAN**

Crl.A(MD)No.132 of 2016

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The State represented by
The Public Prosecutor,
High Court, Madras,
(Murappanadu P.S.,)
Crime No.259/2012.

: Appellant/Complainant

Vs.

Sriram

: Respondent/Accused

PRAYER: The Criminal Appeal is filed under Section 378 of the Code of Criminal Procedure, to set aside the order of acquittal, dated 03.02.2015 in Sessions Case No.158/2013 on the file of the Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi District and to convict the respondent/accused for the charges framed against him in the interest of justice.

For appellant : Mr.M.Muthumanikkam
Government Advocate (Crl.side)

For Respondent : Mr.A.Thiruvadikumar

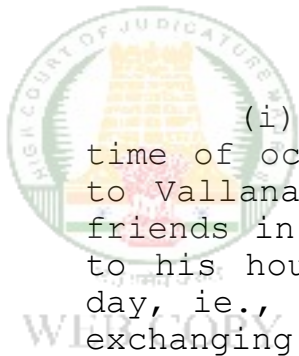
ORDER

The present appeal is directed against the judgment of acquittal, dated 03.02.2015 made in S.C.No.158 of 2013, on the file of the Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi.

2. The respondent is the sole accused. He stood charged for the offences under Section 366(A) of IPC and Section 4 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred as "POCSO Act"). The accused denied the charges and opted for trial. Therefore, he was put on trial on the charges.

3. After full-fledged trial, the learned Sessions Judge, Mahalir Neethimandram found the respondent/accused is not guilty for the offences under Section 366(A) of IPC and Section 4 of POCSO Act and acquitted the respondent/accused. Challenging the same, the appellant herein preferred this appeal praying to set aside the order of acquittal and to convict the respondent/accused in terms of Section 366(A) of IPC and Section 4 of POCSO Act.

4. The case of the prosecution in brief is as follows:-



(i) PW1-X- is the victim child, aged about 15 years at the time of occurrence. On 14.11.2012, at about 04.00 p.m., she went to Vallanadu, wherein, the accused found available along with his friends in the auto. By using the auto, the accused brought P.W.1 to his house and by forcing her committed sexual assault. Next day, i.e., on 15.11.2012, they went to Kualasekarapattinam and after exchanging the Garlands again they returned to the accused's house and on the night, the accused had sexual intercourse with P.W.1. On 16.11.2012, the police officers rescued her and left her in Muthukuvial Home and later her parents took her to their home. Thereafter, she went to the hospital and then lodged a complaint under Ex.P1. In the meanwhile, P.W.2-Muhammathu Sriysuf, who is the father of P.W.1, on receipt of information about her daughter, had lodged a complaint before P.W.8-Pal Isak under Ex.P2.

(ii) P.W.8-Pal Isak, the then Sub-Inspector of Police, Murappanadu Police Station, on 14.11.2012, at about 22.00 hours, received the complaint from P.W.2 and registered a case in Cr.No.259 of 2012 under the head of 'Girl Missing'. A printed FIR was marked as Ex.P.10. Immediately after registration of the case, he handed over the case records to the Inspector of Police, Murappanadu Police Station for investigation.

(iii) P.W.9-Selvam the then Inspector of Police, Murappanadu after receipt of the FIR from P.W.8 took the same for investigation. On 14.11.2012, at about 22.30 hours, he visited the scene of occurrence and in the presence of P.W.6-Anumantha Raj and one Sekar, prepared a Observation Mahazar under Ex.P.8. He drawn the Rough Sketch under Ex.P.11. He examined the witnesses and recorded their statements. On 16.11.2012, in the night hours, he identified P.W.1/child near to Thoothukudi Thenpagam Police Station and after securing her, handed over the child to Muthukuvial Children Home for safe custody. Further, on 19.11.2012, he produced the child in the Court and thereafter, the victim child was referred for medical examination.

(iv) P.W.4-Dr.Vinothini attached with Government Hospital, Srivaikundram, on 21.11.2012, at about 1.30 p.m., as per the reference issued by the Court, medically examined the victim child and found the following symptoms:-

"Ht-147 cm Wt-36 kg

Edges of OS- regular/No evidence of bleeding noted.

Breast - Nipple/Areola-Moderately developed.

Areola - pink coloured

No Ext.injuries /nail mark/swelling - noted in ext.genitalia nor elsewhere

Teeth - ® 7/7 (L) Calcificate incomplete in upper 2 second molars.

7/7



Age by Dental Examination:

- 12 to 14 yrs

Armpit Hair/ Pubic hair (+)

Questions

1) Age by dental exam - 12 to 14 yrs.

Adv - Radiological estimation of age by X-rays in
TKMCH, by

expert radiologist.

2) Pt. had recent sexual intercourse.

No evidence of violence noted.

3) Hymen - absent.

4) No ext. injuries anywhere in body.

Adv: Bld Grouping + Typing of Patient - A+ve

Urine Preg. Card test - Negative

Vaginal smear taken from all 4 walls- handed over to WPC to
be sent

for cytologic.Exam

Pt. is referred to TKMCH to assess/confirm Age by
Radiological examination."

According to him, in view of the growth of teeth, the victim child may be at the age of 12 to 14 years. In this regard, for determining the age of victim child, she has referred the victim child to the Radiologist and ultimately, she given an opinion that there was a symptom for recent intercourse. The certificate issued in this regard was marked as Ex.P.5.

(iv) In continuation of investigation, on the same day, ie., on 21.11.2012 P.W.9 altered the Section of law from Girl Missing to Section 366(A) of IPC and 376 of IPC and sent the alteration report to the Court concerned. The alteration report prepared by P.W.9 was marked as Ex.P.12, he visited the house, which belongs to one Sriram, wherein, the alleged occurrence had happened and in the presence of witness, he prepared an Observation Mahazar under Ex.P9. Further, he drawn the rough sketch under Ex.P13. Thereafter, since he was transferred from the said post, he handed over the case records to one P.W.10-Sridhar, who is the then Inspector of Police, Murappanadu Police Station, for further investigation.

(v) P.W.10- Sridhar, the then Inspector of Police, Murappanadu Police station on 28.11.2012, continued the investigation in this case and after receiving the information in respect of the surrender of the accused, he submitted an application on 23.01.2013 before the Court concerned and obtained permission for taking the accused to the police custody. In such a way, on 23.01.2013, he took the accused for police custody and recorded the confession statement given by the accused and the same was recorded in the presence of the witnesses. He has submitted an application before the Court for doing medical examination to the accused.



(vi) In turn, in view of the reference issued by the Court, P.W.5 Dr.Azeez, attached with Government Medical College Hospital, Srivaikundam, examined the accused and issued a certificate under Ex.P.7 stating that the accused is capable of committing intercourse. He collected the certificate from the Headmistress of the Victoria Higher Secondary School, wherein, the victim child was studied. The certificate issued by the Headmistress of the School was marked as Ex.P3. Ultimately, after perusing the evidence collected at the time of investigation, he came to a positive conclusion that the accused committed the offence under Section 366 (A) of IPC and Section 4 of POCSO Act and filed a final report accordingly.

5. Based on the above materials, the trial Court framed the charges against the accused under Section 366(A) of IPC and Section 4 of POCSO Act. The accused denied the same as false and opted for trial. Hence, in order to prove their case, on the side of the prosecution, the prosecution examined 10 witnesses as P.W.1 to P.W.10 and marked 13 documents as Ex.P.1 to Ex.P13

6. Out of the above-said witnesses, P.W.1-X is the victim child in the alleged occurrence. She speaks about the occurrence that on 14.11.2012 by using the auto the accused kidnaped her and thereafter, after exchanging the Garlands, he made sexual intercourse with her.

(i) P.W.2- Muhammathu Sriysuf, who is the father of the victim child, speaks about the occurrence that on 14.11.2012 at about 04.00 p.m., after receiving the information about missing of his daughter, he lodged a complaint before the police station.

(ii) P.W.3-Jeyapal was working as Headmistress in Victoria Higher Secondary School. Before the trial Court, she gave an evidence that as per the certificate issued by her, the date of birth of the victim child is 27.01.1998.

(iii) P.W.4- Dr.Vinothini, attached with Government Medical College Hospital, Srivaikundam speaks about the examination of victim child. According to her, the victim child is having recent sexual intercourse.

(iv) P.W.5- Dr.Azeez, attached with Government Medical College Hospital, Srivaikundam speaks about the examination of accused. According to him, the accused is a potent man and he is capable of doing sexual relationship with others.

(v) P.W.6- Anumantha Raj is a resident of Pakkapatti, he gave an evidence in respect of preparation of Observation Mahazar and rough sketch by P.W.9.



(vi) P.W.7-Karupayyee, is a resident of Tuticorin did not gave evidence in support of the case of the prosecution.

(vii) P.W.8-Pal Isak, the then Sub-Inspector of Police speaks about the receipt of complaint, securing the victim child, examination of witness and filing of the final report.

7. When the above incriminating materials were put to the accused under Section 313 Cr.P.C. the accused denied the same as false. However, he did not chose to examine any witness or mark any document on his side.

8. Having considered all the above materials, the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi, found the accused that he is not guilty for the offence under Section 366(A) of IPC and Section 4 of POCSO Act and ultimately, acquitted the accused from all charges.

9. I have heard Ms.M.Muthumanikkam, learned Government Advocate (Crl.side) appearing for the appellant/Complainant and Mr.A.Thiruvadikumar, learned counsel appearing for the respondent/accused. I have also perused the records carefully.

10. The learned Government Advocate (Crl.side) appearing for the appellant would submit that while at the time of acquitting the accused from the charges, the learned Sessions Judge, Mahalir Neethimandram, has held that the age of the child has not been proved and also the alleged offence committed by the accused only after getting consent from the victim child and therefore, it cannot be held that the accused had committed an offence under Section 366 (A) of IPC and Section 4 POCSO Act. He would further submit that for determining the age of the child before the trial Court, the Headmistress of the School, wherein, the victim child was studied, issued a certificate as during the relevant point of time, the victim child was not attained the age of '18'. Further, the consent obtained by the accused from the victim child is not a valid and legal consent under law. The learned Sessions Judge, without examining those aspects in a perspective manner, came to the conclusion that the prosecution has not proved their case. According to him, before the trial Court, the prosecution has proved their case beyond reasonable doubt.

11. Per contra, the learned counsel appearing for the accused/respondent would contend that the certificate issued by the Headmistress in respect of the age of the victim child is having lot of contradictions. The said certificate was issued without any materials. Further, P.W.1 herself admitted that during the relevant point of time, her age is 18 years and therefore, it cannot be said that the judgment rendered by the trail Court is having error. According to him, interference of this Court is not necessary in the

<https://hcservices.go.in/hcservices/> at by the trial Court.



12. I have considered the rival submissions made by the learned counsel appearing on either side.

13. Before the trial Court the victim child was examined as P.W.1. In her chief-examination, she has narrated the occurrence as alleged by the prosecution. On the other hand, in her cross-examination, she has specifically stated as before the occurrence, both herself and the accused fell in love with each other. Further, while during the time of conversation with the accused, she has stated about her age as 18 years. It is a specific evidence given by P.W.1 that P.W.2, who is the father of the victim child, did not raise any objection in respect to the relationship with the accused. Therefore, it is made clear that while at the time of committing the alleged offence, the accused is having the knowledge that the child is aged about 18 years. In the said circumstances, if the accused committed an offence upon belief that the child is crossed 18 years, ingredients for the offence under Section 4 of POCSO Act cannot be attracted.

14. In the said circumstances, before the trial Court, in order to prove the age of the child one Jeyapal, who is the Headmistress of the School, was examined as P.W.3. She has stated that as per the certificate maintained in the school, the date of birth of the victim child is 27.01.1998. On the other hand, it is an admitted fact that on 14.11.2012, the alleged occurrence had happened. In this regard, the learned counsel appearing for the accused raised a serious objection that the certificate issued by the Headmistress under Ex.P.3 is not sufficient to prove the age of the child. By considering the said submissions with relevant records Ex.P.3, P.W.3 has simply stated that the date of birth of the child is 27.01.1998 in otherwise, she does not show anything about the references ie., Transfer Certificate or Birth Certificate, in which, age of the child was mentioned as 27.01.1998. Therefore, I am of the opinion that the said certificate issued by the Headmistress of the School is not a bonafide one. Further, to corroborate the averments found in the said document, none of the witness examined on the side of the prosecution, has stated that the date of birth of the child is 27.01.1998. In fact, P.W.2, who is the father of the child is competent person to speak about the date of birth of the child. But in his evidence, he does not say the date of birth of his daughter. Therefore, in respect of the date of birth, the prosecution has not come forward with a clear case.

15. One another important fact which is necessary to decide in this appeal is that P.W.4, who is the Doctor examined the victim child, after made examination, referred the child for Radiologist for fixing the age of the child. But the child has not been referred to the Radiologist and through the radiological method, her



16. Therefore, in the absence of probable evidence in respect to the age of the victim child, we cannot come to the conclusion that during the relevant point of time, the victim child is below the age of 18 years and due to the same, Section 29 of the POCSO Act has also not come to the aid of prosecution. More than that the evidence given by P.W.1 established the fact that she has given consent for her marriage with the respondent by exchanging the garlands, further it is made clear that upon the faith that the victim child is crossed the age of 18 years, the respondent/accused committed the offence and therefore, if the alleged offence is engaged by accused in the said circumstances we cannot held that the accused alone held responsible for every act.

17. In the said occasion, it is necessary to refer the judgment of the Hon'ble Apex Court in **State of Rajasthan vs. Raja Ram** reported in **(2003) 8 Supreme Court Cases 180** wherein the Hon'ble Apex Court held as follows:-

"Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, on pointing to the guilty of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference."

Further, in the judgment in **Union of India and others vs. Sepoy Pravat Kumar Behuria** reported in **(2019) 10 Supreme Court Cases 220**, the Hon'ble Apex Court held as follows:-

"7. It is trite law that judgments of acquittal should not be disturbed unless there are substantial or compelling reasons. The substantial or compelling reasons to discard a judgment of acquittal were examined by this



Court in Ghurey Lal v. State of U.P., which are as follows:
(SCC p.477 para 70)

"70.....1.

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.,

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached- one that leads to acquittal, the other to conviction- the High Courts/appellate courts must rule in favour of the accused."

18. So, in view of the above, applying the principles reiterated in our Hon'ble Apex Court in the case on hand, here it is a case, a story put- forth by the prosecution in respect to the age of the victim child and in respect of the consent given by the child having full of suspicion.

19. Therefore, I am of the opinion that the trial Court, on analysis the evidence and materials, had given a well reasoned judgment of acquittal, which needs no interference.

20. In the result, the appeal is dismissed, confirming the judgment of the acquittal rendered by the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi in S.C.No.158/2013, dated 03.02.2015.

Sd/-

Assistant Registrar(CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)



To

1. The Sessions Judge, Mahalir Neethimandram
(Fast Track Mahila Court), Thoothukudi.
2. The Inspector of Police, Murappanadu Police Station in charge,
Thoothukudi.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

Copy to
The Section Officer, Criminal Section,
Madurai Bench of Madras High Court, Madurai. (2 copies)

+1 CC to M/s.A.THIRUVADIKUMAR, Advocate (SR-25124[F] dated
03/08/2021)

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03.08.2021

ns(CO)
TR(11.08.2021) 9P 7C