



Bail Slip

Naganathasethupathy, S/o.Krishnan, Male, aged about 29/2016 (Sole Accused is released on bail vide Court Order dated 19.01.2017 made in CrI. MP(MD) NO.10955 of 2016 in CrI A(MD) No.426 of 2016

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED ON : 04.08.2021

JUDGMENT DELEVERED ON : 09.08.2021

CORAM:

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

CrI.A(MD)No.426 of 2016

Naganathasethupathy : Appellant/Sole Accused

Vs.

State rep by

The Inspector of Police,
Kattanoor Police Station,
Virudhunagar District.

(Crime No.09 of 2013).

: Respondent/Complainant

PRAYER: The Criminal Appeal is filed under Section 374 (2) of the Code of Criminal Procedure, to call for the records and set aside the order of conviction and sentence, dated 07.09.2016 made in S.C.No.37 of 2015, on the file of the learned Fast Track, Mahila Court, Virudhunagar District at Srivilliputhur and allow this appeal and acquit the appellant/accused from the charge leveled against him.

For Appellant : Mr.G.Karuppasamy Pandian

For Respondent : Mr.E.Antony Sahayaprabahar

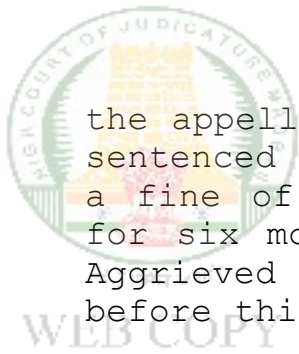
Government Advocate (CrI.side)

JUDGMENT

The present appeal is directed against the conviction and sentence, dated 07.09.2016, made in S.C.No.37 of 2015, on the file of the Fast Track Mahila Court, Virudhunagar District at Srivilliputhur.

2. The appellant is the sole accused. He stood charged for the offences punishable under Sections 366(A) and 376 of IPC and Section 3 r/w 4 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred as "POCSO Act"). The appellant/accused denied the charges as false and opted for trial.

3. After full-fledged trial, the learned Mahila Judge, Virudhunagar District at Srivilliputhur, convicted the accused under Section 366(A) of IPC and sentenced to undergo Rigours Imprisonment for 10 years and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for six months. Further,



the appellant was convicted under Section 3 r/w 4 of POCSO Act and sentenced to undergo Rigours Imprisonment for 7 years and to pay a fine of Rs.10,000/- in default to undergo Simple Imprisonment for six months. The sentences are directed to run concurrently. Aggrieved over the said conviction and sentence, the accused is before this Court, by way of filing the present Criminal Appeal.

4. The relevant facts of the case, which gave rise to filing of this appeal are necessary to be recapitulated for the disposal of this appeal:-

(i) PW3-X, is the victim child in the alleged occurrence. She is residing in Uluthimalai Village along with her mother viz., Keerani. Her father was stayed in Abroad and working there. On 11.05.2013 around 11.00 p.m., she left from her house for attending natural calls. While such a time, the accused came there and questioned the victim child as where are you going?. For which, the victim child has replied that she is going to attend the natural calls. After hearing the same, the accused invited the victim child to attend the temple festival at Manamadurai, for which, the victim child has refused to go with the accused. In the meantime, the accused pulled the hands of the victim child and by using the TATA-ACE vehicle, he brought the victim child to his friend house, wherein, the accused attempted to made sexual assault, for which, the victim child has not given any room. However, from there both the victim child and the accused went to Mukkudi Village and after receiving the money from his sister, the accused along with victim child went to Pappampatti, which is situated near to Coimbatore. In Coimbatore, both were joined as labourer in a Mill and stayed in the single room, which is provided by the Management of Mill. During such occasion, the accused introduced the victim child to others as she is his wife. Further, while such a time he had regularly committed sexual assault on the victim child. In due course, on 21.05.2013 both were left from Coimbatore and reached the Aruppukottai, wherein, the Police Officials attached with Narikudi Police Station secured them. After securing the victim child, the victim child was detained in a home and on the next day, she has been produced before the Doctor for Medical Examination. Ultimately, after completing the Medical Examination, she joined with her mother.

(ii) In the meanwhile, P.W.1-Tmt.Keerani, who is the mother of the victim child, on 11.05.2013 lodged a complaint before the respondent police under Ex.P1, wherein, she has stated that her daughter was missing and further stated that on enquiry, she came to know that the accused had brought her daughter in a vehicle. On receipt of the said complaint given by P.W.1, one Katturaja, the then Sub-Inspector of Police, Kattanur Police Station



registered a case in Cr.No.9/2013 under the caption for 'girl missing'. The printed FIR was marked as Ex.P6. After registration of the case, he forwarded the said FIR to the Inspector of Police, Narikudi Circle for investigation.

(iii) P.W.10-Guruvenkatraj, the then Inspector of Police, Narikudi Police Station, on receipt of copy of the FIR on 13.05.2013 around 19.00 hours, visited the scene of occurrence and in the presence of P.W.5-Karuppaiah and one Kalugan, prepared an Observation Mahazar under Ex.P2. He drawn the Rough Sketch and the same has been marked as Ex.P8. He examined the witnesses and recorded their statements.

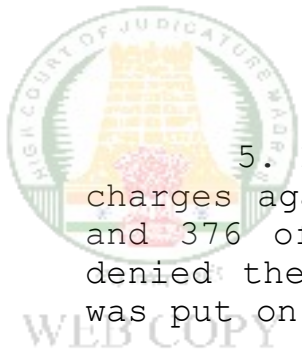
(iv) In continuation of investigation, on 21.05.2013 around 20.00 hours in Aruppukkottai Bus Stand he secured the accused and brought to the police station. Similarly, along with the accused, he secured the victim child and detained in the home. After securing them he made an enquiry and afterwards altered the section of law into 366(A) of IPC. The alteration report is marked as Ex.P7. He submitted an application before the Court concerned for sending the victim child and the accused for medical examination.

(v) P.W.8- Doctor Pothigai, attached with Government Hospital, Aruppukkottai, on 25.06.2013 after the receipt of requisition given by P.W.10, examined the victim child and issued a certificate as the victim child is capable of performing the sexual intercourse. In the said certificate, it has been stated that there was no symptom with respect to recent intercourse. Further, it was stated that there was no internal or external injury found in the body of the victim child. The copy of the Accident Register issued by P.W.8 was marked as Ex.P.4.

(vi) Similarly, P.W.9-Doctor Chandramouly, attached with Government Hospital, Aruppukkottai, on 17.06.2013 examined the accused and issued the certificate as the accused is capable of performing the sexual intercourse. The Accident Register issued by P.W.9 was marked as Ex.P5.

(vii) Further, in the process of determining the age of the victim child, P.W.7-Dr.Sivakami, who is the Radiologist, medically examined the victim child by taking X-rays and issued a certificate under Ex.P3 as the age of the victim child is probably in between 14 to 16 years.

(viii) In continuation of investigation, P.W.10 examined the doctors and recorded their statements. Ultimately, he came to the positive conclusion that the accused is liable to be charged under Sections 366(A) and 376 of IPC and Section 3 r/w 4 of POCSO Act and accordingly, he filed a final report.



5. Based on the above materials, the trial Court framed the charges against the accused for the offences under Sections 366(A) and 376 of IPC and Section 3 r/w 4 of POCSO Act. The accused denied the charges and opted for trial. Therefore, the accused was put on trial.

6. During the course of trial proceedings, in order to prove their case, on the side of the prosecution, 10 witnesses had examined as PW1 to PW10 and 8 documents were exhibited as Ex.P1 to Ex.P.8.

7. Out of the above said witnesses, PW1-Keerani, who is the mother of the victim child, speaks about the occurrence as during the relevant point of time, ie., on 11.05.2013 around 11.00 p.m., her daughter after attending the natural calls has not returned to the house. Thereafter, she lodged a complaint before the Kattanoor Police Station.

(i) P.W.2-Manavalan is a neighbour of P.W.1. He has stated that on 11.05.2013 around 11.30 hours when he was standing near to the Kattanur Vilakku, he saw the accused along with victim child, who travelled in TATA-ACE car, which proceeded to Manamadurai.

(iii) P.W.3 is the victim child. She has narrated the alleged occurrence as projected by the prosecution.

(iv) P.W.4-Pitchai, who is the relative of the accused, deposed before the trial Court that on 12.05.2013 around 09.00 p.m., both the accused and the victim child came to his house and on enquiry, the victim child has stated to him that the accused brought her to Manamadurai for seeing the temple festival.

(v) P.W.5-Karuppaiah is a resident of Ulukkimalai Village. He speaks about the preparation of Observation Mahazar in the occurrence place.

(vi) P.W.6-Thiru.Isac, who is the then Sub-Inspector of Police, Aaviyur Police Station, gave evidence as during the relevant point of time, he has produced the accused in the Government Hospital, Aruppukkottai for medical examination.

(vii) P.W.7-Dr.Sivakami attached with Government Hospital speaks about the determination of age to the victim child. Similarly, P.W.8-Dr.Pothigai speaks about the medical examination conducted to the victim child.

(viii) P.W.9-Dr.Chandramouli is also a Doctor attached with the same hospital speaks about the medical examination of the accused.

(ix) P.W.10-Guruvenkatraj, the then Inspector of Police, Narikudi Circle, gave evidence in respect to the receipt of the



complaint, registration of FIR, examination of witnesses, sent the victim child for medical examination and about the filing of final report.

8. 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.

9. The learned Fast Track Mahila Judge, Virudhunagar District at Srivilliputhur, after perusing all the above materials and on considering the arguments advanced by the learned counsel on either side, convicted and sentenced the appellant as stated supra. Aggrieved by the said conviction and sentence, the appellant is before this Court with this appeal.

10. I have heard Mr.G.Karuppasamy Pandiyan, learned counsel appearing for the appellant/accused and Mr.E.Antony Sahayaprabahar, learned Government Advocate (Crl.side) appearing for the State. I have also perused the records carefully.

11. The learned counsel appearing for the appellant challenges the conviction and sentence awarded by the trial Court on three fold:-

(i) The evidence given by P.W.3, especially, the fact that during the relevant point of time, she voluntarily eloped with the accused and stayed in Coimbatore. Therefore, such elopement is not comes under the definition of Section 366(A) of IPC.

(ii) Before the trial Court, in order to prove the age of the victim child, the certificate ie., Transfer Certificate, Mark Sheet, Birth Certificate have not been produced. On the other hand, the age certificate issued by the Radiologist is not a conclusive proof.

(iii) After securing the victim child and the accused, immediately, they have not referred to Medical Examination, which is violative of under Section 27 of the POCSO Act.

12. Further submission of the appellant's counsel is since the accused has charged under the provisions of Special Act ie., POCSO Act, for accepting the case of the prosecution strick proof is necessary. According to him, the prosecution has not proved their case beyond reasonable doubt. He prays to allow this appeal.

13. Per contra, the learned Government Advocate (Crl.side) appearing on behalf of the State would submit that before the trial Court, in order to prove the age of the victim child, the Radiologist, who issued the age certificate, was examined as P.W.7, her evidence is sufficient to hold that the age of the



victim child is between 14 to 16 years at the time of occurrence. He would further submit that due to the over burdening of work, the investigating officer in this case has not take a immediate efforts to send the victim child for medical examination. Therefore, the ground raised by the learned counsel appearing for the appellant is not sufficient to acquit the accused from the charges. According to him, the interference of this Court in the finding arrived at by the trial Court is not necessary.

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

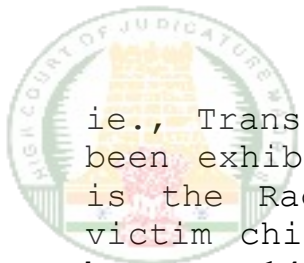
15. Initially, in respect of the first submission it is needless to say that for proving the offence under Section 366(A) of IPC the prosecution must show as during the time of occurrence, the minor girl was taking away with intent that she may be forced, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person. Applying the said definition with the case in our hand, here it is a case, wherein, the victim child eloped with the accused voluntarily without any inducement. Further, the accused herein taken away the victim child with intention to commit illicit intercourse by himself. Therefore, the story put-forth by the prosecution in respect of procuring of minor child is entirely different with the definition found in the Indian Penal Code.

16. In this occasion, it is useful to see the judgment of our Hon'ble Apex Court in **Sat Prakash vs. State of Haryana and another** reported in **2016(2) L.W (Cr1.) 365**, wherein, our Hon'ble Apex Court has held as follows:

"7. A perusal of the aforesaid section reveals, that the inducing of the minor to constitute an offence under Section 366A, should have been with reference to an intent to force or seduce her"... to illicit intercourse with another person....". In fact, there is no mention of any other person in the sequence of allegations levelled against the appellant. In the above view of the matter, we are satisfied, that the charge under Section 366A was also not sustainable against the appellant....."

17. Applying the ratio laid down in the above referred judgment, herein, the story put forth by the prosecution reveals the fact that during the time of occurrence, the appellant herein took minor girl with the intention to commit sexual assault himself. Therefore, in view of the above, the conviction and sentence under Section 366(A) of IPC is not sustainable.

18. In respect of the second submission of the learned counsel appearing for the appellant is concerned, it is not in dispute to prove the age of the victim child. The certificate

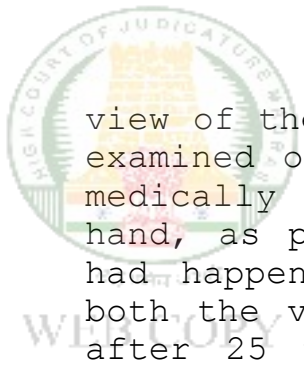


ie., Transfer Certificate, Birth Certificate, Mark Sheet have not been exhibited before the trial Court. In this regard P.W.7, who is the Radiologist, gave evidence that X-ray pertains to the victim child would establish that the age of the victim child is between 14 to 16 years. Except the said evidence, no materials has been produced by the prosecution to show that the minor child is below the age of 18 years at the time of occurrence. In the said circumstances, the victim child, when at the time of giving evidence as P.W.3, stated before the trial Court that she is aged about 18 years. Further, on the side of the accused, it was suggested before the investigating officer that the victim child has crossed the age of 18 years at the time of occurrence. Therefore, to decide this issue, it is necessary to analyse the evidence given by the Radiologist with care and caution.

19. In general, Medical evidence about age based upon epiphyses of bones is based on scientific test and is acceptable. But, if there is any conflicting evidence, e.g. Conflict between medical evidence and entry in school certificate, the benefit of the uncertainty as to age should go to the accused. Further, it is a settled law that there is a Margin of error in age ascertained by radiologist is two years on either side. Owing to the variations in climatic, dietetic, hereditary and other factors affecting the people of different State of India a uniform standard for determination of age by ossification test cannot be formulated. Further, the Medical evidence on age cannot be of mathematical precision and it is all the more risky to convict someone solely on the basis of medical evidence which is likely to vary.

20. In the trial Court, while at the time of giving evidence as P.W.1, the mother of the victim child has deposed that the alleged occurrence had happened after finishing the school exams by the victim child. Therefore, it is made clear that before the occurrence, the victim child has studied in the school. So, it is very easy for the Investigating Officer to obtain a necessary certificate from the School authorities to prove the age of the victim child. But, in this regard, the Investigating Officer while at the time of giving evidence has stated that since the occurrence had happened in the summer holidays, he is not in a position to obtain a certificate from the School authorities. The said evidence is sufficient to hold that the Investigating Officer has lethargically handled this case. Therefore, I am of the view that the evidence given by the Radiologist in fixing the age of the victim child is not within the parameter and the same has already been decided in various decisions.

21. In respect of the third submission made by the learned counsel appearing for the appellant is concerned, admittedly, in



view of the evidence given by P.W.8 the victim child was medically examined on 25.06.2013. Similarly, the accused in this case was medically examined by the doctor on 17.06.2013. On the other hand, as per the case of the prosecution, the alleged occurrence had happened on 11.05.2013. Therefore, it is made clearly that both the victim child and the accused had examined by the doctor after 25 to 35 days from the date of occurrence. In such a situation, it is necessary to extract Section 27 of the POCSO Act and the same is reads as follows:-

"27. Medical examination of a child: (1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164-A of the Code of Criminal Procedure, 1973 (2 of 1974)."

Further, Section 164(A) of Code of Criminal Procedure, 1973 reads as follows:-

"164-A. Medical examination of the victim of rape:- (1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence."

22. The said provision mandates that in this type of offences the victim child and the accused has to be produced before the Medical Officer immediately within 24 hours from the time on which they secured by the Investigating Officer. Here it is a case, in respect to secure the victim child, P.W.1 gave evidence as the victim child has returned to the home within three days from the date of missing. Further, P.W.10 the Investigating Officer has stated in his evidence as the victim child has been secured on 21.05.2013 and as per the evidence given by the Doctor the victim child has been produced for examination only on 25.06.2013 and therefore, the mandatory provisions required under Section 27 of the POCSO Act has not been complied with by the



Investigating Officer in this case.

23. In this occasion, it is necessary and useful to see the judgment of this Court in **Chellappan vs. State** reported in (2016) 4 MLJ (Cr1) 611, wherein, the Division Bench of this Court has held as follows:-

"The minor victim, who was subjected to a serious offence namely sexual violence, was not even sent for medical examination immediately, despite filing of the First Information Report on the very same day, rather, for the reasons best known to the prosecution, she was sent to medical examination belatedly. Similarly, the accused too was sent for medical examination belatedly. The prosecution has not come with any plausible explanation for the long delay in sending the victim and the accused for medical examination. Since there are contradictions and infirmities in the version of Pws.1 to 3, coupled with the fact that Ex.P1 complaint gives a different version, leaving a strong room for afterthought, as rightly pointed out by the learned counsel for the Appellant, it is not safe to rely on the evidence of the above witnesses to base conviction against the Appellant/accused."

24. In applying the said decision with the case on hand, herein also the non production of the victim child immediately before the Doctor for medical examination give rise suspicious over the case of prosecution.

25. Therefore, in the light of the above discussion, I am of the firm opinion that the prosecution fails an attempt to prove their case beyond reasonable doubt. The Criminal Appeal is allowed and the conviction and sentence imposed on the appellant/accused, by the learned Fast Track Mahila Court, Virudhunagar District at Srivilliputhur, made in S.C.No.37 of 2015, dated 07.09.2016, is set aside and the appellant/accused is acquitted of all the charges. The fine amount, if any, paid by him, shall be refunded to him.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To:-

- 1.THE JUDICIAL MAGISTATE,
ARUPPUKOTTAI
- 2.THE CHIEF JUDICIAL MAGISTRATE
VIRUTHUNAGAR AT SRIVILLIPUTHUR
- 3.THE JUDGE MAHILA FAST TRACK MAHILA COURT,
VIRUDHUNAGAR DISTRICT AT SRIVILLIPUTHUR.
- 4.THE SUPERINTENDENT CENTRAL PERSON, MADURAI.
- 5.THE INSPECTOR OF POLICE
KATTANOOR POLICE STATION, VIRUDHUNAGAR DISTRICT.
- 6.THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

COPY TO

The Section Officer,
Criminal Section (Record)
Madurai Bench of Madras High court,
Madurai. (2 copies)

**Judgment made in
Cr1.A(MD)No.426 of 2016**

09.08.2021

CN(16.08.2021) 10P 8C