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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON : 11.04.2022
DELIVERED ON : 25.04.2022
CORAM:
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Crl.A. (MD)No.98 of 2020

Arun alias Murugan

... Appellant / Sole Accused

Vs.

The State,
Rep. by the Inspector of Police,
All Women Police Station,
Sivagangai.
(Crime No.28/2015)

... Respondent / Complainant

PRAYER: Criminal Appeal filed under Section 374 of Cr.P.C. against the judgment of conviction and sentence passed by the Sessions Judge, Fast Track Mahila Court, Sivagangai made in Special S.C.No.17 of 2016 dated 21.11.2019.

For Appellant : Mr.G.Thalaimutharasu
For Respondent : Mr.A.Thiruvadikumar,
Additional Public Prosecutor.

JUDGMENT

R.SUBRAMANIAN, J.
AND
N.SATHISH KUMAR, J.

This appeal has been filed by the appellant / sole accused as against the conviction and sentence, dated 21.11.2019, made in S.C.No.17 of 2016, by the learned Sessions Judge, Fast Track Mahila Court, Sivagangai.

2. The appellant / sole accused stood convicted and sentenced to undergo imprisonment as detailed hereunder:

Conviction U/s.	Sentence	Fine amount
6 r/w 5(1), 5(j)(ii) of the Protection of Children from Sexual Offences Act, 2012	To undergo life imprisonment	To pay a fine of Rs.1,000/-, in default, to undergo one year rigorous imprisonment.



313 IPC

To undergo life imprisonment

To pay a fine of Rs.1,000/-, in default, to undergo one year rigorous imprisonment.

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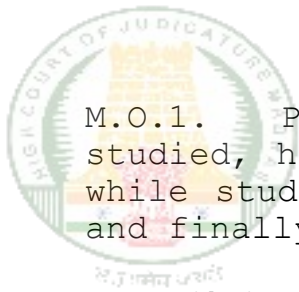
(Both the sentences were directed to run concurrently.)

3. The brief facts of the prosecution is as follows:

(i) P.W.2 is the victim girl. P.W.1 is the mother and P.W.3 is the father of victim girl. The victim was studying 12th standard in the Government Girls Higher Secondary School, Udaikulam staying at Adi Dravida Welfare Hospital, Udaikulam, Manamadurai. During holidays, she used to visit her native place. After alighting from the bus she has to walk certain distance to reach her home. Whenever she come to village, during holidays, after alighting from the bus, while she was proceeding to her home, the accused used to stalk her. On the date of occurrence, at about 8.00 p.m., the accused took her to the nearby area surrounded by the Prosopis Juliflora trees (Seemai Karuvelam Trees) and rapped her, as a result she became pregnant. After some time, when she went to school she complained of stomachache. P.W.1 mother asked her to complete the examination and come back. However, when P.W.2 alighted from the bus to go to the school, she developed pain and immediately P.W.3 father of the victim girl reached that place and took her to the hospital. The doctor suspected appendicitis and referred the patient to the Sivagangai hospital.

(ii) P.W.10-Medical Officer attached to the Government Medical College Hospital, Sivagangai while in duty on 15.12.2015, at about 8.30 p.m, the victim girl aged about 17 years was produced before her. On examination, P.W.2 has informed her that she had a sexual intercourse with a known person more than five times. P.W.10 on examination found that the fetus was aborted and she has also collected tissues for further examination and issued certificate Ex.P.5.

(iii) PW15-Inspector of police, after receipt of intimation from the hospital, went to the hospital, examined the victim, recorded her statement and registered a case in Crime No.28 of 2015 under Sections 5(1)(j)(ii) and 6 of the 'Protection of Children from Sexual Offences Act, 2012' (hereinafter referred to as 'POCSO' Act) under Ex.P.13, and also examined the witnesses and recorded the statement. P.W.12-Medical Officer examined the tissues forwarded to her and issued a certificate-Ex.P.11 stating that chorionic villi could not be made out in the section studied. P.W.11 has conducted ossification test and issued Ex.P.7 stating that the age of the victim girl must be around 17 to 18 years. X-ray was also filed as

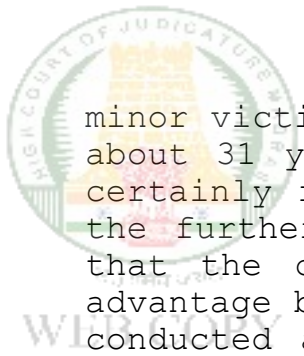


M.O.1. P.W.13-Headmaster of the school, where the victim girl studied, has issued Ex.P12 stating that her age was recorded as 17 while studying at 12th std. P.W.16 conducted further investigation and finally laid a final report against the accused.

(iv) The prosecution, in order to bring home the guilt of the accused, examined as many as 16 witnesses as P.W.1 to P.W.16, marked 16 documents as Ex.P.1 to Ex.P.16 and 1 material object as M.O.1. After analyzing the oral and documentary evidence, the trial Court has found the accused guilty and convicted the accused as referred above. Assailing the same, the present Criminal Appeal is filed.

4. The learned counsel appearing for the appellant would submit that the prosecution has not proved the age of the victim to show that P.W.2 is a minor at the relevant point of time. The prosecution has also not produced the birth certificate as well as transfer certificate in respect of the victim girl. He further submitted that though P.W.1 and P.W.3 admitted that birth certificate of the victim girl is available, the prosecution has not filed the same. It is also submitted by the learned counsel for the appellant that there was no evidence available on record to show that the victim was pregnant as a result of sexual assault. The evidence of P.W.12-Medical Officer do not prove the pregnancy and she did not give a definite opinion with regard to the pregnancy of P.W.2. Hence, the charge against the appellant under Section 313 IPC would not be attracted. As far as the evidence with regard to the sexual intercourse, it is the contention of the learned counsel appearing for the appellant that the evidence of the victim girl is highly improbable. The cross examination of P.W.1 to P.W.3 did not support the prosecution. Therefore, their evidence cannot be relied upon. In the FIR, it is stated by P.W.2 that she had a love affair with the accused for more than three years and had a sexual intercourse for several times, whereas in the evidence, there is a different story that the accused raped her. Therefore, the evidence of P.W.2 cannot be relied upon. There is no evidence to show that the victim girl was subjected to sexual assault repeatedly. Hence, conviction under section 5(1)(j)(ii) r/w Section 6 of POCSO Act is not maintainable. The punishment is also imposed on the basis of the amendment Act which is also not proper. Hence, he submitted that appellant is entitled to acquittal and prays for allowing of this appeal.

5. The learned Additional Public Prosecutor appearing for the State would submit that the evidence of the Headmaster, who issued a certificate to prove the age of the victim established the fact that the victim girl was a minor at the relevant point of time. He further submitted that there is evidence to show that there was a repeated sexual intercourse. Therefore, his contention is that the accused is certainly punishable. It is his further contention that though the FIR indicated that there was love affair between the



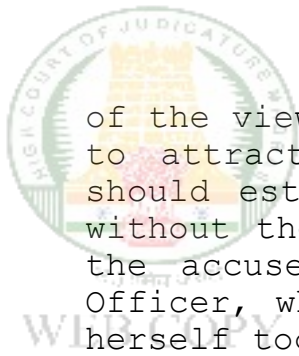
minor victim girl and the accused, the accused is a married man aged about 31 years at the relevant point of time. Therefore, his act certainly falls within the ambit of Section 5 of POCSO Act. It is the further contention of the learned Additional Public Prosecutor that the cross examination of P.W.1 to P.W.3 cannot be taken advantage by the appellant. Further, the cross examination has been conducted after two years of the occurrence. That itself clearly indicates that favourable answers have been obtained by winning over the witnesses. Hence, he submitted that the prosecution has proved the guilt of the accused. It is the further contention of the learned Additional Public Prosecutor that the medical evidence supports the pregnancy, the accused certainly punishable under Section 5 of the POCSO Act hence, prays for dismissal of this appeal.

6. We have given our anxious consideration to the entire materials available on record, and also the rival contentions made by the respective counsel.

7. The law was set in motion on the basis of FIR given by P.W.2 while she was in the hospital. Though it is stated in the FIR, as if she had an affair with the accused for three years, she had a sexual intercourse and on 12.12.2015, when she came to her village, the accused gave a tablet, which resulted in her developing pain, the victim in her substantive evidence has not stated the relationship with the accused. However, her evidence clearly indicates that the accused once had a sexual intercourse with the victim girl, as a result she became pregnant and after having tablet, she developed some pain and stomachache and the doctors informed that fetus was aborted. P.W.1 and P.W.3 parents of the victim girl also clearly spoken about the victim girl being treated in the hospital.

8. P.W.10-Medical Officer has examined the victim girl at Government Medical College Hospital, Sivagangai and the victim girl has told her that she herself has taken some medicine therefore, she developed pain and on examination P.W.10 found that there was miscarriage. The evidence of P.W.12-Medical Officer shows that she could not find any chorionic villi in the tissue which was collected by P.W.10. The evidence of P.W.10 clearly proves the fact that the victim has in fact become pregnant and fetus was aborted. Therefore, the fact that definite opinion could not be given by P.W.12 alone cannot be a ground to disbelieve the prosecution theory about the victim becoming pregnant. Though the victim has stated that the accused has given some tablet, her statement in this regard before the Medical Officer clearly indicates that she herself took some tablets.

9. In the absence of any concrete proof as to administering the tablet or miscarriage said to have been done by the accused, we are



of the view that the miscarriage cannot be attributed to the accused to attract the offence under Section 313 IPC. The prosecution should establish the fact that the accused has caused miscarriage without the consent of victim girl. Though P.W.2 has stated that the accused gave some tablets, her statement before the Medical Officer, which has been spoken by P.W.10 clearly indicates that she herself took some tablets. In the cross examination of P.W.2, which was conducted after two years, she has taken complete U-turn that itself clearly indicates that her version about the accused giving a tablet for causing miscarriage is highly doubtful. Though in the cross examination, P.W.2 has stated that she joined school at the age of 7 years, her evidence is a result of winning over her by the accused in later point of time. But the fact remains that the accused is a married man and the victim is aged about 17 years at the relevant point of time. P.W.13- Headmaster of the School where the victim girl studied has spoken that he issued a certificate Ex.P12 to prove her age. The victim girl was 17 years at the relevant point of time. A date of birth certificate from the school or the Matriculation or equivalent certificate from the concerned Examination Board, if available, is a best proof of age.

10. Section 94 of the Juvenile Justice (Care and Protection of Children) Act 2015, deals with the presumption and determination of age. Only in the absence of school records, the birth certificate given by the Corporation or the Municipal Authority can be taken as proof of age. It is also relevant to note that Section 34 of the POCSO Act, deals with the procedure in case of commission of offence by child and determination of age by the Special Court. It also stipulates that the procedure contemplated under Juvenile Justice (Care and Protection of Children) Act, 2015 to be followed while fixing the age of the child in conflict with law. We are of the view that the same procedure should be applied while fixing the age of the victim child. Similarly, in the absence of school records or birth certificate, then only the ossification test could be relied upon to determine the age. Once the age of the victim girl is proved by the production of the school record and the certificate issued from the school is also proved by the author, who issued such certificate, we are of the view that the school certificate is a best proof of age. Therefore, the evidence of radiologist who examined the victim and opined that she was aged about 17 to 18 years at the relevant point of time assumes insignificance particularly when the certificate from the school has been filed and proved.

11. In ***Jarnail Singh Vs. State of Haryana*** reported in **(2013) 7 SCC 263**, the Hon'ble Apex Court has held that the determination of age of the victim should be based on the document stipulated under Rule 12(3) of Juvenile Justice (Care and Protection of Children) Model Rules, 2016. Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 a rule of evidence for proof of



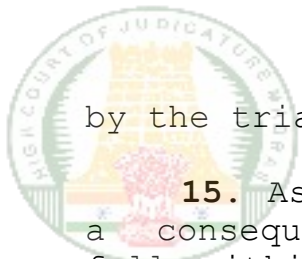
age. We are of the view that the certificate issued by the Headmaster has been proved by examining him. It is sufficient to establish the age of the victim. Accordingly, we hold that the victim was aged about 17 years and was a minor at the time of sexual intercourse with the accused.

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12. Though in the FIR, it is stated that she had affair with the accused more than three years, in her substantive evidence she has stated nothing about such affair. She has spoken about only one incident of sexual intercourse. Even assuming that she had affair and consented to such relationship, such consent is irrelevant, since she was a minor aged about 17 years. The above fact coupled with the Medical officers' evidence that there was evidence an abortion, proves the sexual intercourse with the accused. The victim while examined before the Court of law was 18 years of age. She stated that she had a sexual intercourse. She was raped once by the accused. Though she has not given minute details as stated in the FIR, her evidence coupled with the medical evidence proves that there was an aggravated sexual assault on the victim by the accused. As the victim has not spoken about the sexual assault more than once or repeatedly, the charge under Section 5(1) of POCSO Act would not be attracted. However, we are of the view that the evidence of P.W.10 clearly shows that the victim became pregnant and aborted. In view of the same the act of the accused certainly fall within the ambit of Section 5(j) sub-clause (ii) of the POCSO Act.

13. Further with regard to the evidence of P.W.1 to P.W.3, though they have given a different version after two years of examination in support of accused, we are of the view that such cross examination cannot be given much importance, since it is clear case of winning over the witnesses. A person coming from the rural background coming up with a different version after two years is normal. Therefore, we are of the view that such evidence cannot be given much importance. At the same time, on scanning the entire evidence, we are able to see the substratum of the prosecution for charge under Section 5(j)(ii) of POCSO Act is intact. In such view of the matter, we have no reason to disbelieve the version of P.W.2 victim girl and the evidence of P.W.1, P.W.3 and P.W.10-Medical Officer. Accordingly, we hold that the prosecution has proved the above charge alone.

14. As far as the charge under Section 313 IPC is concerned, as already we discussed above, the evidence of the victim girl itself indicates that miscarriage was not caused by the accused. Though she has stated in one line that the accused gave some tablets, a statement before the Medical Officer-P.W.10 clearly indicates that she herself took some tablets. Therefore, in the absence of any evidence to prove that the accused has voluntarily caused miscarriage, the accused cannot be punished for the offence under Section 313 IPC. Accordingly, we set aside the punishment imposed



by the trial Court for the offence under Section 313 of IPC.

15. As far as the punishment is concerned, as the pregnancy is a consequence of sexual assault, the act of the accused certainly fall within the ambit of Section 5(j) (ii) of POCSO Act. The occurrence took place in the year 2015, prior to the amendment Act No.25 of 2019. The punishment provided prior to the amendment should be for a term which shall not be less than 10 years but it may extend to imprisonment for life and also fine. The trial Court ought to have imposed the punishment as per law that stood prior to the amendment. Taking note of the age of the victim, she was studying 12th standard at the relevant point of time and the FIR indicates that there was some relationship with the accused, we are of the view that if the accused is convicted for the period of 10 years of rigorous imprisonment, the same will meet the ends of justice. Therefore, we are inclined to modify the sentence. Accordingly, the sentence alone is modified.

16. In the result, this Criminal Appeal is partly allowed in the following terms:

(i) The conviction passed by the Trial Court under Section 6 r/w 5(l), (j)(ii) is hereby confirmed. However, the substantive sentence of imprisonment imposed by the trial Court is modified and he is directed to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,000/-, in default, to undergo rigorous imprisonment for one year.

(ii) The conviction and sentence imposed by the trial Court under Section 313 IPC are set aside.

(iii) It is further directed that the period of sentence already undergone by the appellant/sole accused shall be set off under Section 428 of the Code of Criminal Procedure.

Sd/-

Assistant Registrar (CS-III)

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04/05/2022

Sub Assistant Registrar(CS)

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To

1.The Sessions Judge, Fast Track Mahila Court,
Sivagangai.

<https://hcservices.ecourts.gov.in/hcservices/>



- 2.The District Collector, Sivagangai.
- 3.The Principal District and Sessions Judge, Sivagangai.
4. The Superintendent of Police, Sivagangai.
- 5.The District Child Welfare Unit, Sivagangai.
- 6.The Superintendent,
Central Prison, Madurai.
- 7.The Inspector of Police,
All Women Police Station,
Sivagangai.
- 8.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

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25.04.2022

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