



BAIL SLIP

Appellant/Accused Viz., Sudalaimani, S/o. Murugaiya was already released on bail vide this court order dated 02.11.2016 in CRL.MP (MD).No. 8512 of 2016 in CRL.A.(MD).No. 223 of 2016.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED ON : 25.06.2021

JUDGMENT PRONOUNCED ON : 28.01.2022

CORAM:

THE HONOURABLE MR.JUSTICE **SATHI KUMAR SUKUMARA KURUP**

Crl.A.(MD) No. 223 of 2016

and

Crl.M.P.No.2131 of 2021

Sudalaimani

S/o. Murugaiya

: Appellant/Sole Accused

-vs-

State represented by

The Inspector of Police,

All Women Police Station,

Kadambur, Thoothukudi District.

Crime No.3 of 2015

: Respondent/Complainant

PRAYER:- Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, to call for the records in Special Sessions Case No.33 of 2015 on the file of the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi, Thoothukudi District and set aside the Judgment dated 21.04.2016 and acquit the Appellant of the charges levelled against him .

For Appellant : Mr.A.Thiruvadikumar

For Respondent : Mr.T.Senthil Kumar

Government Advocate (Crl.Side)

JUDGMENT

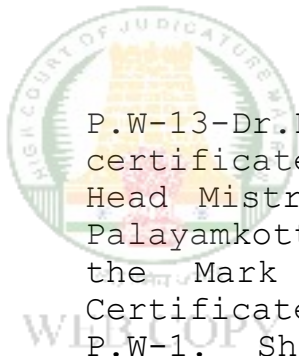
This Criminal Appeal has been filed against the Judgment and Conviction dated 21.04.2016 by the learned Sessions Judge, Fast Track Mahila Court, Thoothukudi, Thoothukudi District in Spl.S.C.No. 33 of 2015.

2. The brief facts stated by the prosecution which are relevant for consideration in this appeal are as follows:

2.1. The case of the prosecution is that P.W-1-victim girl was studying 11th standard at Marry Sargent Girls Higher Secondary School, Palayamkottai. The appellant herein who was the accused before the learned trial Judge is a relative of the victim. He is the maternal uncle's son to the victim. They had been in relationship for the past two years. On the date of occurrence i.e., on 14.08.2015, she was a student of 11th standard in Mary Sargent Girls Higher Secondary School.

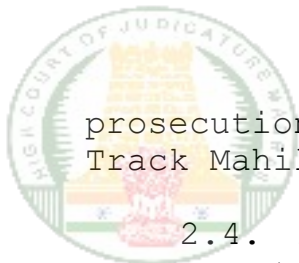


2.2. On 14.08.2015 by 10.00 p.m., the appellant/accused is alleged to have contacted the victim on her Mobile Nos. 9789373178 and 9524089160 from his mobile No.9698874916 and told her that he wanted to talk to her on an important matter. He asked her to come to his house. On the same night at 2.00 a.m., P.W-1-victim girl went to the house of the appellant/accused. On reaching the house of the appellant/accused, P.W-1 was talking with him for some time. The appellant/accused kissed her and thereafter involved in sexual intercourse with her and thereby committed sexual assault on the victim. Likewise, he had previously done the same, prior to the said occurrence date. The appellant/accused threatened her not to disclose the matter to others. When she wept over the same, he told her that he would take her to Tirunelveli and marry her. By morning 5.30 a.m., the accused/appellant brought P.W-1 to Deivaseyalpuram on a two wheeler belonging to one Murugan. P.W-1 got down from the two wheeler and boarded the bus to Samathanapuram Bus Stop, where the appellant/accused asked P.W-1 to wait at Samathanapuram Bus Stop. The appellant/accused asked P.W-1 to wait at Samathanapuram Bus Stop and assured her that he will get her new clothes, get some money and come back within a few minutes. By telling her such words, he left her at Samathanapuram Bus Stop. She contacted the accused on his mobile frantically. He did not respond till 09.00 a.m. She waited for two hours, but he did not return. Therefore, she contacted her parents through mobile and informed them about her. She was forced to contact her parents. Thereafter, she boarded a bus and reached her house by 10.45 a.m. By that time, the incident of taking the minor P.W-1 from the custody of the parents was known to the villagers. The parents of the victim and the village elders approached the family of the appellant/accused with the help of the village elders. The appellant/accused and his parents did not respond for the marriage proposal from the parents of P.W-1-victim. Therefore, P.W-1 approached the All Women Police Station, Thoothukudi on 22.08.2015. P.W-16-Annalakshmi, Sub Inspector of Police, All Women Police Station received the complaint of P.W-1 under Ex.P-1 and registered the case under Ex.P-11 in Cr.No.3 of 2015 under Sections 366 of IPC and Section 4 of Protection of Children from Sexual Offences Act (POCSO Act). She had forwarded the complaint of P.W-1 under Ex.P-1 and the FIR under Ex.P-11 to the Court of the learned Judicial Magistrate, Thoothukudi. The copies of the complaint and FIR were sent to the higher officials including P.W-17-Tamizh Selvi-Inspector of Police, All Women Police Station. On receipt of the FIR under Ex.P-11, P.W-17 went to the house of the victim, enquired the victim and recorded her statement. She had prepared Observation Mahazar under Ex.P-6 and Rough Sketch under Ex.P-12 in the presence of witnesses P.W-8-Pazhanichamy and one Arumugam. She had forwarded the victim girl along with P.W-14-Mahalakshmi-Woman Constable to the Government Hospital for medical examination with the requisition letter under Ex.P-8 to the duty Medical Officer to examine the victim and issue medical certificate.



P.W-13-Dr.Priya had examined the victim and issued the medical certificate under Ex.P-10. P.W-17 had also examined P.W-11-Malliga-Head Mistress of the Mary Sargent Girls Higher Secondary School, Palayamkottai regarding the age of P.W-1-victim. She had obtained the Mark Sheet under Ex.P-2 and attested copy of Transfer Certificate under Ex.P-3. P.W-17 had also recorded the statement of P.W-1. She had recorded the statements of witnesses and the Doctor who had examined P.W-1. She had arrested the accused and forwarded him to the Court of the learned Judicial Magistrate, Thoothukudi with remand request. She had sent requisition letter to the learned Judicial Magistrate to subject the accused to medical examination. Accordingly, the accused was forwarded to the duty Medical Officer, Government Hospital, Thoothukudi. P.W-17 had also sent requisition letter to the learned Chief Judicial Magistrate requesting to nominate a learned Judicial Magistrate to record the statement of victim under Section 164 of Cr.P.C., Accordingly, the learned Chief Judicial Magistrate had nominated the learned Judicial Magistrate, Tiruchendur. Since the learned Judicial Magistrate, Tiruchendur was transferred and the post fell vacant, P.W-15-Irudhayarani-learned District Munsif, Tiruchendur held additional charge of the learned Judicial Magistrate, Tiruchendur. The learned Chief Judicial Magistrate had nominated the learned Judicial Magistrate, Tiruchendur to record the statement of the victim under Section 164 of Cr.P.C. Accordingly, P.W-15 had recorded the statement of victim under Section 164 of Cr.P.C. and she had sent copies of the statement under Section 164 of Cr.P.C., to P.W-17- Investigation Officer and to the Court of learned Chief Judicial Magistrate and learned Principal Sessions Judge. P.W-17 had examined the witnesses and completed the investigation and laid final report under Section 173 of Cr.P.C., before the learned Sessions Judge, Fast Track Mahila Court, Thoothukudi. The learned Sessions Judge, Fast Track Mahila Court had taken cognizance of the offence and numbered the case as Special S.C.No.33 of 2015. The learned Sessions Judge, Fast Track Mahila Court had sent summons to the accused and on appearance of the accused, copies were furnished under Section 207 of Cr.P.C. After hearing arguments of the learned Public Prosecutor and the learned counsel for the accused, the learned Sessions Judge, Fast Track Mahila Court, had framed charges against the accused under Section 366 of I.P.C. and Section 4 of the Protection of Children from Sexual Offences Act (POCSO Act). The accused pleaded not guilty and claimed to be tried. Therefore, trial was ordered.

2.3. During trial, the prosecution had examined the witnesses P.W-1 to P.W-17 and marked documents under Ex.P-1 to P-13 and M.O-1-Two wheeler bearing Registration No.TN-72-AC-6078. On completion of prosecution evidence, the incriminating evidence were put to the accused under Section 313 of Cr.P.C., The accused had denied the incriminating evidence against him and stated that he had evidence to disprove the case of prosecution. Since he had not examined any witness, the arguments of the prosecution and the defence to the



prosecution arguments were heard by the learned Sessions Judge, Fast Track Mahila Court.

2.4. After hearing the prosecution and the defence and on assessment of entire materials available before the learned Sessions Judge, Fast Track Mahila Court had convicted the accused for the offences under Section 366 of IPC and Section 4 of Protection of Children from Sexual Offences Act (POCSO Act). For the offence under Section 366 of IPC the accused was convicted and sentenced to undergo Rigorous Imprisonment for one year and to pay a fine of Rs.1,000/- in default, to undergo Rigorous Imprisonment for one month and for the offence under Section 4 of Protection of Children from Sexual Offences Act, 2012 (POCSO Act), the accused was convicted and sentenced to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs.3,000/-, in default, to undergo Rigorous Imprisonment for one year. All the sentences was ordered to run concurrently. The period of detention already undergone by the accused during remand was set off under Section 428 of Cr.P.C.

3. Aggrieved by the judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Thoothukudi, the appellant/accused had preferred this appeal before this Court.

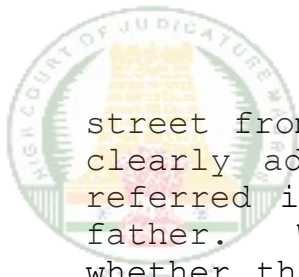
3.A. The learned counsel for the Appellant/Accused submitted that the victim girl and the Accused are close relatives. The Prosecutrix/victim's mother and the father of Accused are Sister and Brother. Sister's daughter and maternal uncle's son are married as per local customs as per Hindu law practiced in Tamil Nadu. Since the Parents of the Accused had not accepted the offer of marriage of Prosecutrix to the Accused by the Parents of the Accused, this case had been foisted. This is the defence of the Accused. This aspect of defence of Accused is admitted in cross-examination by the Prosecutrix in her evidence as P.W-1.

4. The argument of the learned counsel for the Appellant/Accused Thiru.A.Thiruvadi Kumar are as follows:-

On consideration of evidence of Prosecutrix, it is found unbelievable from the point of view of normal human conduct. When the clear evidence is assessed in the light of admission in cross-examination of P.W-1, P.W-2, P.W-3, in the light of the normal human conduct, the learned Sessions Judge, Mahila Court had ignored those aspects and mechanically applied the principles of POCSO Act and convicted the Accused which judgment is perverse and is to be set aside.

Whether the evidence of Prosecutrix is believable is the question raised by the learned counsel for the Appellant/Accused.

A teen aged girl going to the house of her maternal uncle to meet her uncle's son in the dead of night that too on the next



street from her house without anyone noticing on the way. She had clearly admitted in the cross-examination that the mobile number referred in complaint under Ex.P-1 belong to her father and grand father. When father and grand father had slept by 12.00 p.m., whether the Accused will call on mobile of father and grand father of Prosecutrix is to be considered from the normal human conduct. This aspect is to be viewed in the light of the normal human conduct. The learned Judge failed to consider this aspect. Therefore, as per submission of the learned counsel for the Appellant/Accused, the Judgment of the trial Court is perverse and is to be set aside.

Thiru.A.Thiruvadi Kumar, learned counsel for the appellant/accused invited the attention of this Court in the cross-examination of Prosecutrix as P.W-1, her mother as P.W-2 and her maternal uncle as P.W-3(Paternal uncle of Accused) and also filed his written arguments. As per his submissions, after the accused obtained bail from the High Court, during the pendency of this appeal, the accused and victim had contracted marriage with the blessings of elders in both family and they are living as husband and wife. They had two children. If the conviction of the learned trial Judge is confirmed the Appellant/Accused had to undergo imprisonment in which case the children born to the Prosecutrix and the Accused will be victimised in denying the love and affection of their father which case the provision of POCSO will be draconian in nature resulting in miscarriage of Justice. Therefore, sought the indulgence of this Court to acquit the accused. In support of his argument, the learned counsel for the appellant/accused had relied on the rulings of this Court in the case of **Vijayalakshmi and another Vs. State** reported in **(2021) 1 MLJ (Cr1) 494**. He further submitted that during the pendency of this appeal, the Appellant/Accused had filed petition in Crl.M.P.No.2131 of 2021.

5. Mr.T.Senthil Kumar, learned Government Advocate (Crl. Side) had submitted his oral arguments. As per his submissions, the learned trial Judge had on proper appreciation of evidence had arrived at a logical deduction that the charges against the Accused under Sections 366 of IPC and Section 4 of Protection of Children from Sexual Offences Act (POCSO Act) had been proved through the oral evidence of the Prosecutrix as P.W-1 and her mother as P.W-2. Further P.W-3 is her maternal uncle, the younger brother of P.W-2 and younger brother of father of the Accused. P.W-3 had clearly stated that the Accused is his brother's son and the Prosecutrix is his sister's daughter. The learned Government Advocate (Crl. Side) had further submitted that in cases of this nature, the defence of the Accused that there had been consensual sex cannot be accepted as the victim girl/Prosecutrix was aged 16 years, she was studying +1 at the relevant point of time and therefore there is no age of consent. If the learned trial Judge believes the case of the Prosecutrix then that will be sufficient in cases of this nature to



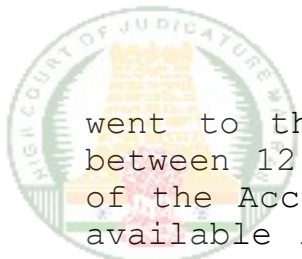
convict the Accused. Therefore, the learned trial Judge had rightly convicted the Accused. Further, as per the ruling of the Hon'ble Supreme Court it is a settled proposition of law that if the learned trial Judge had on proper appreciation of evidence had arrived at a conclusion either convicting or acquitting the Accused, the learned Appellate Judge shall not disturb the findings. The learned trial Judge had the advantage of observing the demeanour of the witnesses and the Accused which benefit is not available to the learned appellate Judge. The argument of the learned counsel for the Appellant/Accused is to be considered as fertile imagination which cannot be considered by this Court. Therefore, the appeal lacks merits and is to be dismissed. The Judgment of Conviction and Sentence of Imprisonment awarded by the learned trial Judge is to be confirmed.

6. Point for Consideration:

Whether the judgment of conviction recorded by the learned Sessions Judge, Fast Track Mahila Court, Thoothukudi in Special Sessions Case No. 33 of 2015 is perverse warranting interference by this Court as Appellate Court?

7. On perusal of the evidence of P.W-1-Prosecutrix, in her cross-examination she had admitted that she was in love with the appellant for two years and she voluntarily accompanied him to Tirunelveli. After leaving her in Samathanapuram bus stop, the Appellant/accused informed that he will return with money to purchase dress and they will go elsewhere and get married. She was waiting in the Samathanapuram bus stop but he did not return. The Prosecutrix had contacted the Appellant/Accused on his mobile, it was switched off. Therefore, the Prosecutrix contacted her parents and her parents came to the place where she was waiting and took her back home. Based on the said incident, the Prosecutrix and her parents had contacted the parents of the Accused and sought to arrange marriage between Prosecutrix and the Accused. The parents of the Accused did not accept the proposal from the parents of the Prosecutrix.

8. It is found that the Accused herein is a cousin of the Prosecutrix through her maternal uncle. Therefore, as per the local customs, the marriage between sister's daughter and the brother's son are accepted. Here in this case, the maternal uncle's wife did not accept the proposal. Therefore, the mother of the Prosecutrix and the Prosecutrix were forced to give a complaint under Ex.P-1 to the Police. That much of facts as valid defence of Accused is available in the cross-examination of P.W-1 and P.W-2. Therefore, as per the arguments of the learned counsel for the appellant/Accused, the evidence of the Prosecutrix that the Accused indulged in sexual assault on her is unbelievable as she had stated that the Accused called her on phone in the middle of the night she



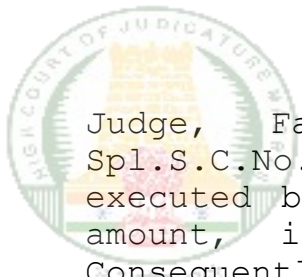
went to the residence of the Accused in the middle of the night between 12 and 2 O' Clock. The incident had occurred in the house of the Accused is a fertile imagination. The proof of the same is available in the evidence in the cross examination of P.W-1, P.W-1 had stated that she does not own any mobile phone. The numbers that were referred to in complaint under Ex.P-1 is the mobile number of the Prosecutrix's father and grand father. Therefore, the question of inviting the Prosecutrix to the house of the Accused by the Accused on mobile phone in the night is found unbelievable. Without her father's mobile or grand father's mobile, the Accused could not have contacted the Prosecutrix. As the Prosecutrix is a girl aged 16 years, either her father or grand father will not allow her to talk on mobile in the middle of the night. If the Accused had contacted on those mobile numbers, automatically either the father or grand father could have picked up the phone. Therefore, the claim of the Prosecutrix that on the basis of the call from the Accused, she went to the house of the Accused in the middle of the night is hard to believe from the angle of normal human conduct. The allegation that the Accused had indulged in sexual intercourse with her is also unbelievable. The fact that the Accused took her on a two wheeler to Samathanapuram and there she was asked to wait at a bus stop and later, he left. There are no eye witness for the incident.

9. Considering the same, it is a ploy adopted by the Prosecutrix and her parents to threaten the Accused and his family members. It is clear from evidence, from the cross-examination of the Prosecutrix that the parents of the Prosecutrix wanted the Prosecutrix to be married to the Accused which was not acceptable to the parents of the Accused. They demanded money and jewels. Therefore, this complaint under Ex.P-1 was lodged, is available in the cross-examination of P.W-1 and P.W-2. Apart from all those things, as rightly pointed out by the learned counsel for the Accused that in the complaint itself it is stated that the Police may summon the Accused to help the Prosecutrix to be married to the Accused. Therefore, this is a foisted case to settle scores with the Accused by the parents of the Prosecutrix. Therefore, on that ground, the appeal is to be allowed.

10. The point for consideration is answered in favour of the Appellant/Accused and against the Respondent/Prosecution. The judgment of conviction and sentence of imprisonment imposed on the accused by the learned Sessions Judge, Fast Track Mahila Court, Thoothukudi, in Spl.S.C.No.33 of 2015, dated 21.04.2016, is perverse warranting interference by this Court.

In the light of the above discussions, this Criminal Appeal is allowed.

The judgment of conviction recorded by the learned Sessions
<https://hcservices.ecourts.gov.in/hcservices/>



Judge, Fast Track Mahila Court, Thoothukudi District in Spl.S.C.No.35 of 2015 dated 21.04.2016 is set aside. The bail bond executed by the appellant, if any, shall stand discharged. Fine amount, if any paid, shall be refunded to the appellant. Consequently, Crl.M.P.No.2131 of 2021 is closed.

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Sd/-

Assistant Registrar (CS-III)

// True Copy //

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Sub Assistant Registrar(CS)

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To

- 1.The Sessions Judge,
Fast Track Mahila Court, Thoothukudi.
- 2.The Inspector of Police,
All Women Police Station,
Kadambur, Thoothukudi District.
- 3.The Commissioner of Police,
Thoothukudi District.
- 4.The superintendent
Central Prison,
Palayamkottai.
5. The Additional Public prosecutor,
Madurai Bench of Madras High Court, Madurai

Copy to

The Section Officer, (soft Copy)
Criminal Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.N.SUBRAMANI, Advocate (SR-3238[F] dated 31/01/2022)

+1 CC to M/s.S.GOKUL RAJ, Advocate (SR-2747[F] dated 28/01/2022)

Crl.A. (MD) No.223 of 2016
28.01.2022

KM(CO)

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