

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.10.2022

CORAM :

THE HONOURABLE MRS.JUSTICE J. NISHA BANU

and

THE HONOURABLE MR.JUSTICE N. ANAND VENKATESH

CRL.A.(MD)No.487 of 2019

M.Marimuthu

.. Appellant / Accused

Vs.

The State, through The Inspector of Police,

All Women Police Station,

Srivaikuntum,

Tuticorin District.

(Crime No.18 of 2015)

.. Respondent / Complainant

PRAYER: Criminal Appeal filed under Section 374 of the Code of Criminal Procedure, praying to call for the judgment, dated 10.09.2019 made in Spl.S.C.No.38 of 2016, on the file of the learned Sessions Judge, Mahalir Neethimandram, (Fast Track Mahila Court), Thoothukudi and set aside the same and allow this Criminal Appeal.

For Appellant	: Mr.V.Kathirvelan, Senior Counsel for Mr.K.Prabhu
For Respondent	: Mr.A.Thiruvadi Kumar, Additional Public Prosecutor

JUDGMENT

J. NISHA BANU, J.

AND

N. ANAND VENKATESH, J.

This Criminal Appeal has been filed against the Order and Judgment of the learned Sessions Judge, Mahalir Neethimandram, (Fast Track Mahila Court), Thoothukudi, made in Spl.S.C.No.38 of 2016, dated

10.09.2019, convicting and sentencing the appellant in the following manner :

Sl.No.	Provisions under which convicted	Sentence of imprisonment and fine amount
1.	5(j)(ii) r/w 6 of POCSO Act	To undergo life imprisonment and to pay a fine of Rs.5,000/- (Rupees Five Thousand only) and in default, to undergo six months rigorous imprisonment.
2.	506(ii) IPC	To undergo seven years rigorous imprisonment and to pay a fine of Rs.1,000/- (Rupees One Thousand only) and in default, to undergo six months rigorous imprisonment.

2. The case of the prosecution is that the victim girl was aged about 17 years and she was studying in 12th standard in Government High School. The appellant developed an affair with the victim girl and that a false promise was made to marry her and he had sexual intercourse with the victim girl several times. The victim girl also became pregnant on one occasion and she delivered a stillborn child on 12.01.2016.

3. The victim girl gave a complaint (Ex.P1) before the respondent police and an FIR (Ex.P21) was registered by P.W.14. The investigation was taken up by P.W.15 and on completion of investigation, the final report came to be laid before the Court below.

4. After serving copies to the appellant under section 207 of Cr.P.C., the Court below framed charges against the appellant for offence punishable under Section 5(j) (ii) r/w.6 of Prevention of Children from Sexual Offences Act, 2012 (herein after referred to as "the Act") and Section 506(ii) IPC.

5. The prosecution examined P.W.1 to P.W.15 and marked Ex.P1 to Ex.P23. The incriminating materials collected during the course of trial was put to the appellant while he was questioned under Section 313 (1) (b) Cr.P.C. and he denied the same as false.

6. The Court below, on considering the facts and circumstances of the case and on appreciation of evidence, came to the conclusion that the prosecution has proved the case beyond reasonable doubts and convicted and sentenced the appellant in the manner stated supra. Aggrieved by the same, the present Criminal Appeal has been filed before this Court.

7. Heard Mr.V.Kathirvelan, learned Senior Counsel for Mr.K.Prabhu, learned counsel appearing on behalf of the appellant and Mr.A.Thiruvadi Kumar, learned Additional Public Prosecutor appearing on behalf of the respondent.

8. We have carefully gone through the materials available on record and considered the submissions made on either side.

9. The relationship between the appellant and the victim girl and their indulgence in regular physical intercourse, are not in dispute and it has been substantially established before the Court below. In view of the

consensual sexual act between the appellant and the victim girl, there seems to be some understanding between the parties at a later point of time. That is the reason why, P.W.1, P.W.2 and P.W.3, who were recalled on 05.06.2017 completely went against the earlier evidence given by them and spoke in favour of the appellant.

10. The Court below rightly disregarded the subsequent stand taken by P.W.1 to P.W.3 and went by the earlier version of P.W.1 to P.W.3 and considered the same along with scientific evidence and came to a conclusion that the offence has been made out as against the appellant.

11. The main thrust of the argument of the learned Senior Counsel appearing on behalf of the appellant was that the prosecution failed to prove that the victim girl was a minor at the relevant point of time and Ex.P9 and Ex.P10 are not conclusive prove to confirm the age of the victim girl.

12. There is no doubt in our mind that the appellant and the victim girl were indulging in physical intercourse with consensus. Therefore, the only issue to be considered is as to whether the victim girl was a minor at the relevant point of time and whether the prosecution has established the said fact. If this fact has not been established, the offence against the appellant will not be made out.

13. For the purpose of considering this limited issue, this Court has to take into consideration Ex.P9 and Ex.P10 which were marked through P.W.8, who was working as the Headmistress of the Government School. Ex.P9 is the Secondary School Leaving Certificate of the victim girl where the date of birth is found as 29.03.1999. The same has also been certified by the Headmistress through Ex.P10. P.W.8, in her evidence, has stated that this date of birth was entered when the victim girl joined sixth standard in the School and her birth certificate was not called for, when this date of birth was entered in the School records.

14. It is now a settled law that in so far as ascertaining the age of a minor girl, there is no procedure under the POCSO Act and hence, only the procedure prescribed under the Juvenile Justice (Care and Protection of Children) Rules, 2007, has to be followed. The law and this issue was settled by the Division Bench of this Court in **Subramaniam .Vs. The State** reported in **2016(4) MLJ (Crl.) 385**.

15. Rule 12 (3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the Rules) reads as under :

“12. Procedure to be followed in determination of Age:-

(1) xxxxx

(2) xxxxx

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall

be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

16. It is clear from the aforesaid provision that the option that is available in the preceding clause will over-ride the option expressed in the subsequent clause. Accordingly, where the matriculation or equivalent certificate is available, no other options can be relied upon. Only in the absence of such certificate, the second option of considering the birth certificate as provided under clause a (ii) can be resorted to.

17. The Delhi High Court had an occasion to deal with Rule 12 in **State (Government of NCT of Delhi) Vs. Shailesh Kumar** reported in **2019 SCC online Delhi - 8318** and it was held as follows :

"16. The sole question for a decision in this case hinges on determining the age of a victim of crime. In *Jarnail Singh Vs. State of Haryana* reported as (2013) 7 SCC 263, the Supreme Court has held that Rule 12 of the JJ Rules though strictly applicable to a child in conflict with law, would also extend in cases where the

Court is required to determine the age of a child, who is a victim of a crime. Rule 12(3) lays down the procedure to be followed in determination of age and reads as follows:-

"12. Procedure to be followed in determination of Age.-...

(1) xxxxx

(2) xxxxx

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining:--

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will

declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence, whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

17. In the instant case, the matriculation or equivalent certificate of the victim is not available as she deposed that she gave up studies after 9th class. Rule 12(3)(a) contemplates that in the absence of the matriculation or equivalent certificate, the date of birth certificate from the school first attended can be used as evidence to determine the age of a child. Mr.Ashok Kumar Chaudhary (PW-3), a teacher in the school

where the victim has studied, had produced the school records, which showed that the victim was admitted in MC Primary School, Vikas Block Sirsia, District Sarawasti, UP in class-I on 12.08.2005. The school record notes her date of birth as 10.01.2000. However, PW-3 went on to state that there is no other record of admission of the victim available in the school and nor could he state as to what was the nature of the document submitted by the victim's parents at the time of her admission, for recording her date of birth in the school register.

18. It is well settled that an entry of the date of birth made in the school admission register would have evidentiary value only if there is material available based on which the age was so recorded. In the case of Brij Mohan Singh vs. Priya Brat Narain Sinha and Ors. reported as AIR 1965 SC 282, the Supreme Court held that an entry of birth recorded in the school register maintained by an illiterate Chowkidar, was not admissible and had no probative value within the meaning of Section 35 of the Indian Evidence Act. For ready reference, Section 35 of the Indian Evidence Act

is reproduced below:-

"35. Relevancy of entry in public [record or an electronic record] made in performance of duty.--An entry in any public or other official book, register or [record or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or [record or an electronic record] is kept, is itself a relevant fact."

19. In *Birad Mal Singhvi vs. Anand Purohit* reported as 1988 Supp. SCC 604, where a question arose with regard to eligibility of a candidate participating in an election to the State Legislative Assembly, in the context of attaining the age of 25 years as stipulated, the Supreme Court held as below:-

15.....Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined

by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. ..." (emphasis added)

20. The probative value of the entry regarding the date of birth made in a school register has come up for consideration by the Supreme Court and the High Courts in several other cases and the common view expressed is that no probative value can be attached to

such a record unless and until the parents are examined or the person on whose information the entry may have been made, is examined.

21. In *Sushil Kumar vs. Rakesh Kumar* reported as AIR 2004 SC 230, the Supreme Court held thus:-

"34. In the aforementioned backdrop the evidences brought on record are required to be considered. The Admission Register or a Transfer Certificate issued by a Primary School do not satisfy the requirements of Section 35 of the Indian Evidence Act. There is no reliable evidence on record to show that the date of birth was recorded in the school register on the basis of the statement of any reasonable person."

22. In *Satpal Singh vs. State of Haryana* reported as (2010) 8 SCC 714, the Supreme Court held that a document may be admissible under Section 35 of the Indian Evidence Act being a public document if prepared by a government official in exercise of his official duty but whether the entry contained therein has any probative value would still require to be

examined in the facts and circumstances of a particular case. Citing several earlier decisions, the Supreme Court held that even if the entry was made in an official record by the official concerned in discharge of his official duty, it may have weight, but would still require corroboration by the person on whose information the entry has been made and whether the entry so made has been exhibited and proved. The Supreme Court summarized the law in the following words:-

"28. Thus, the law on the issue can be summarised that the entry made in the official record by an official or person authorised in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the court/authority to examine its probative value. The authenticity of the entry would depend as to on whose instruction/information such entry stood recorded and what was his source of information. Thus, entry in school register/certificate requires to be proved in accordance with law. Standard of proof for the same remains as in any other civil and

criminal case." (emphasis added)

23. In the present case, the father of the victim, PW-5 deposed that he did not know the date of birth of his daughter as he was illiterate, nor was he in a position to state her current age. He stated that he got the victim admitted in the school in class-I in the village and at that time, she was about 3-4 years old. In his cross-examination, PW-5 admitted that he did not have any proof regarding his daughter's date of birth. It is therefore clear that the father of the victim had not submitted any document to the school at the time of getting his daughter admitted in class-I, on 12.08.2005, to establish her date of birth as 10.01.2000, as recorded by the school. He was candid enough to state that being illiterate, he did not know the date of birth of the victim and that she was between 3-4 years old when she was admitted in class-I.

24. In the absence of any primary material based on which the age of the victim was recorded in the school register, it is not possible to accept her date of birth as 10.01.2000. Moreover, even the teacher from

the school in question, who had appeared as PW-3, had stated that he had given a handwritten document to the police on 17.12.2014 (Ex.PW3/C), wherein he had recorded that when a child attains the age of 5+ years, the parents approach the school for their admission. If one goes by the said statement, then the testimony of the victim's father to the effect that he had got her admitted in class-I when she was about 3-4 years, cannot be accepted, as it is premised on mere guess work."

18. It is clear from the above judgment that while the School records the date of birth of the student, the same has to have the source from the certificate given by the School first attended by the student. In the absence of the same, whatever date of birth has been entered in Ex.P9 and certified in Ex.P10 can be taken to be the correct date of birth of the victim girl. In other words, the date of birth as found in Ex.P9 and Ex.P.10 does not have the primary material as is mandated under Rule 12(3)(a)(ii) of the Rules. Hence, mere production of the school records showing the date of birth of the victim girl would not suffice. Hence, this Court has to hold that

the prosecution has failed to discharge the burden cast on them to prove the age of the victim girl that she was below 18 years of age at the time of the alleged commission of offence. The Court below failed to take note of this vital fact and went wrong in convicting and sentencing the appellant for the offences for which he was charged.

19. In the result,

- (i) This Criminal Appeal stands allowed.
- (ii) The conviction and sentence imposed on the appellant, vide judgment and order, dated 10.09.2019, passed by the learned Sessions Judge, Mahalir Neethimandram, (Fast Track Mahila Court), Thoothukudi, in S.C.No.38 of 2016, is set aside and the appellant is acquitted from all charges.
- (iii) Fine amount, if any, paid by him, shall be refunded.

(iv) Bail bond, if any, executed by the appellant
and the sureties shall stand terminated.

[J.N.B., J.] & [N.A.V., J.]

18.10.2022

Index : Yes/No

Internet : Yes

rm

To

- 1.The Sessions Judge,
Mahalir Neethimandram,
(Fast Track Mahila Court),
Thoothukudi
- 2.The Inspector of Police,
All Women Police Station,
Srivaikuntum,
Tuticorin District.
- 3.The Additional Public Prosecutor
Madurai Bench of Madras High Court,
Madurai.
- 4.The Record Keeper,
Vernacular Records Section,
Madurai Bench of Madras High Court,
Madurai.

Crl.A(MD)No.487 of 2019

J. NISHA BANU, J.

AND

N. ANAND VENKATESH, J.

rm

JUDGMENT MADE IN

CRL.A.(MD)No.487 of 2019

18.10.2022