

CrI.A.(MD)No.214 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : **30.07.2025**

CORAM :

THE HONOURABLE **Dr. JUSTICE R.N.MANJULA**

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A.Sarathkumar

... Appellant / Sole
Accused

Versus

State by
The Inspector of Police,
Swamimalai Police Station,
Thanjavur District.
(Crime No.275 of 2015)

... Respondent /
Respondent

PRAYER : Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, to set aside the judgment and conviction of the appellant by the learned Mahalier Court (Fast Mahila Court) Thanjavur in Spl. Cases No.04 of 2016 dated 19.06.2017 and acquit the appellant.

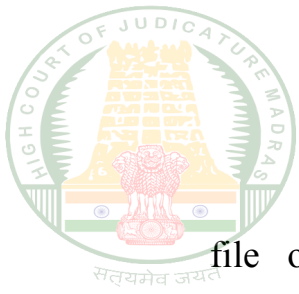
For Appellant : Mr.AN.Ramanathan

For Respondent : Mr.A.Albert James

Government Advocate (CrI.side)

JUDGMENT

This criminal appeal has been preferred by the sole accused as against the judgment dated 19.06.2017 passed in Spl. Cases No.04 of 2016 on the



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file of the Mahalier Court (Fast Mahila Court) Thanjavur, thereby convicting the accused.

2. The appellant is the sole accused, who has been found guilty for the offence under Section 376 IPC and Section 4 of POCSO Act, 2012 and convicted and sentenced to undergo seven years rigorous imprisonment along with fine of Rs.1,000/- in default to undergo imprisonment for 6 months simple imprisonment for the offence under Section 4 of POCSO Act, 2012.

3. The case of the prosecution is that the accused and the victim girl were in love with each other. On 05.08.2015, at about 2 a.m., when she was sleeping with her grandmother, the accused called her through phone and asked her to come out. After she came out, he took her to a river bank and compelled to have sexual intercourse with him. When the victim girl refused for the same, he persuaded by tying thaali and saying that she has become his wife and thereafter, he had sexually intercourse with her. Subsequently, the victim girl cried, and he told her that he would marry her after his sister's marriage and that she should not reveal that to anyone. But, he did not marry her.

4. Based on the complaint given by the victim girl, an FIR has been



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registered in Cr.No.275 of 2015 and the case was taken up for investigation.

After completion of investigation, a charge sheet has been filed for the offence under Section 376 IPC and Section 4 of POCSO Act, 2012. After furnishing copies to the accused, charges have been framed by the trial Court for the offence under Section 376 IPC and Section 4 of POCSO Act, 2012. As the accused denied his involvement and claimed to be tried, trial was conducted. At the conclusion of trial, he was found guilty for the offence under Section 376 IPC and Section 4 of POCSO Act, 2012 and he was convicted and sentenced as stated *supra*.

5. The learned counsel appearing for the appellant submitted that sexual relationship cannot be called as penetrative assault and the Doctor had assessed the age of the victim child and stated that the victim child has completed 17 years and her age could have been six months plus or minus and hence, the victim girl cannot be considered as minor for convicting the accused under Section 4 of the POCSO Act.

6. The learned Government Advocate appearing for the respondent further submitted that the date of birth in the school records of the victim has been entered as 05.07.1998 and the occurrence had taken place on 05.08.2015 and hence, it is claimed that on the date of the occurrence, the



victim girl has not become major and she has to be considered as child below 18 years and hence, he prayed for dismissal of this appeal.

7. Heard the learned counsel on either side and perused the materials placed before this Court.

8. The fact that the victim girl and the accused were known to each other is not denied. The victim, who has given the complaint has been examined as PW1 and she has stated in her evidence that herself and the accused were in love with each other. Without the knowledge of their parents, they had been conversing through cellphone. One day, during night hours, the accused asked the victim girl to come out and tied Thaali, he obtained her consent to have physical relationship with her and made her to believe that she was his wife and then, had sexual intercourse with her . After the said occurrence, he convinced her that he would marry her formally, after his sister's marriage. As the marriage between the accused and the victim girl did not happen and the parents of the accused refused for their marriage, a complaint has been given saying that the accused had committed penetrative sexual assault with the victim girl, who was a minor at the time of occurrence.

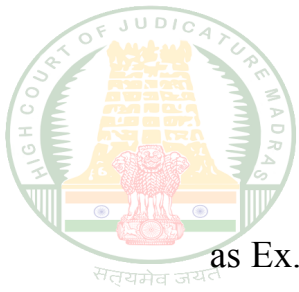


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9. In order to find the accused guilty for an offence committed under the POCSO Act, it has to be proved that the victim was below the age of 18 years at the time of occurrence and that, she comes under the definition of 'child' under Section 2(d) of the POCSO Act.

10. In the instant case, PW10, Headmaster of the school, in which the victim girl studied, has provided Ex.P5, certificate noting down the date of birth of the victim child as 05.07.1998. He has stated in his evidence that the victim girl had discontinued her studies, when she was studying 10th standard and she has got her Transfer Certificate also. He has also stated in his evidence that he has given the date of birth of the victim by verifying the xerox copy of her transfer certificate.

11. The investigating Officer, who was examined as PW16 has only stated in her evidence that she has sent a letter to the Headmaster of the school, in which the victim girl studied, seeking age certificate of the victim girl. As the original source certificate mentioning the date of birth of the victim child has not been verified by the Headmaster (PW10) and the Investigating Officer also had failed to find out whether the transfer certificate was in the custody of the victim girl, it is difficult to compute the age of the victim, based on the certificate given by PW10, which is marked



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as Ex.P5.

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12. In this regard, it is appropriate to cite the judgment of the Hon'ble Supreme Court, in the case of ***P.Yuvaprakash vs. State, Rep. By the Inspector of Police (2023 INSC 676)***, wherein it is held that if the school certificate is given, it should be on the basis of the source certificate and the source certificate should be produced before the Court. In the instant case, the source document has not been produced before the Court showing the date of birth of the victim as 05.07.1998.

13. The victim has also been examined by radiologist for assuming her age and the radiologist has been examined as PW9 and he has stated in his evidence that the radiological examination revealed that the victim girl has completed 17 years, but not completed 18 years. However, in his cross examination, he has stated that medical age could have been six months plus or minus. Hence, the victim could have completed 18 years at the time of occurrence. In view of the uncertainty in computing her age, as per the medical evidence, it can be concluded that she could have completed the age of 18 years.

14. In ***P.Yuvaprakash's*** case cited supra, it is held that the age proof



for the victim child as defined under Section 94(2)(i) of the 'Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)' (hereinafter referred to as 'JJ Act' for brevity) is not the extract given by the school authorities, but the extract of the admission register or transfer certificate. It actually refers to the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board.

15. In the instant case, the date of birth certificate has not been obtained from the school. As the victim has not appeared for any board examination, any board certificate is also not available to prove her age. As per Section 34 of the POCSO Act, if any offence is committed by a child, such child shall be dealt under the provisions of the JJ Act and if any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court.

16. The determination of age is done in accordance with Section 94 of JJ Act. As per the said provision, following three documents can be relied for the purpose of assessing the age of the child in conflict with law:-

“(i) the Date of Birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;



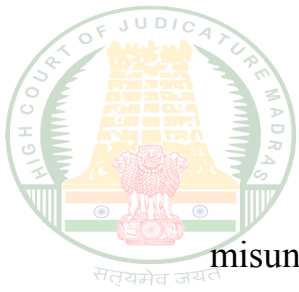
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(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board”.

17. The same procedure can be adopted for even assessing the age of the victim child. In the absence of any date of birth certificate obtained from the school or from the corporation or board examination certificate, the only possibility is to get ossification test done by medical committee or the medical board constituted for this purpose.

18. In the instant case, even the medical age determination was not done by the medical board constituted for this purpose and it was PW9, who has done radiological examination and given a report that the victim girl's age could be between 17 and 18, as the precise date of birth on the basis of any certificates is not available. The only recourse is to depend upon the medical evidence. In the instant case, even the age determination for the victim girl has not been done as per the procedure contemplated in this regard, as found under Section 94(2)(iii) of the JJ Act. The certificates required to be produced under Section 94(2)(ii) of the JJ Act is quite often



misunderstood as date of birth extract or transfer certificate issued by the school authorities. The Hon'ble Supreme Court has held that those documents are not actually mandated under Section 94(2)(ii) of the JJ Act. In this regard, it is relevant to extract paragraph No.19 of the ***P.Yuvaprakash's*** case cited supra, which reads as follows:-

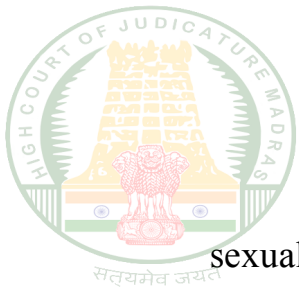
“19. It is clear from the above narrative that none of the documents produced during the trial answered the description of “the date of birth certificate from the school” or “the matriculation or equivalent certificate” from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim’s age was below 18 years as per Section 94(2)(iii) of the JJ Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating “that the age of the said girl would be more than 18 years and less than 20 years”. In the cross-examination, she admitted that M’s age could be taken as 19 years. However, the High Court rejected this evidence, saying that “when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor”. This finding is, in this court’s considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94 (2) (i) mandates; nor are they in accord with Section 94 (2) (ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only



piece of evidence, accorded with Section 94 of the JJ Act was the medical ossification test, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim's bones, stage of their development and opined that she was between 18-20 years; in cross-examination she said that the age might be 19 years. Given all these circumstances, this court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9."

19. Even the age of the victim has not been determined in the manner contemplated under Section 94(2)(iii) of the JJ Act and the certificates produced by the prosecution are also not in accordance with Section 94(2) of the JJ Act and hence, it can be concluded that the prosecution has failed to prove the age of the victim girl that she was below the age of 18 at the time of occurrence. As the Doctor, PW9 has stated in his evidence that the victim girl could have been six months plus or minus from the medical age assessed by him, the said benefit could be given to the accused and the age of the victim girl at the time of occurrence can be considered as 18.

20. Even if the victim is a major, the offence can still be punishable under Section 376 of IPC, if it is proved before the Court that consent of the victim girl was obtained by force or otherwise or she was subjected to

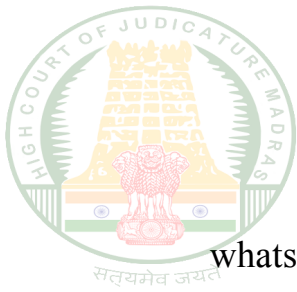


sexual intercourse without her consent. But, the accused and the victim girl are not strangers and they are known to each other and they have an affair between themselves. Even though the victim was reluctant to give their consent, after believing the words of the accused that he would marry her, she had given her consent. The physical relationship between the accused and the victim girl is out of consent and hence, it would not amount to rape.

21. At this juncture, the learned counsel appearing for the appellant submitted that the accused married the victim girl before seven years and they are now living as family for seven years and they have given birth of two children. Convicting the accused at this stage would only disturb their family equilibrium.

22. Now, it is clear that the subsequent conduct of the accused would also be prove that he did not have any intention to cheat the victim girl or abuse her by making use of his intimacy with her in the name of love. He had married the victim girl seven years ago and now, they are living happily as a family with their two children.

23. In order to ascertain the truth of the statement on the happy family life of the victim and the accused, they were asked to appear through



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whatsapp. They appeared in whatsapp through cellphone of one Ms.K.Kayalvizhi, WPC 955, All Women Police Station, Kumbakonam (Ph: 97519 00202). She identified the accused and the victim girl when they appeared through whatsapp.

24. On enquiry, the victim girl has stated that she had married the accused before seven years. Though there was some initial resistance, now they are living as one family with their two children and at this time punishing the accused by sending him to prison would affect her family peace. The victim girl has further stated that the complaint was given due to certain circumstance.

25. As the matter has been settled between the accused and the victim girl and also considering the fact that the age of the victim girl at the time of occurrence also not proved to be below 18, and also the facts reveal that the victim girl had given her consent in view of the affair between herself and the accused, I feel the judgment and conviction of the appellant by the learned Mahalier Court (Fast Mahila Court) Thanjavur in Spl. Cases No.04 of 2016 dated 19.06.2017 should be set aside.

26. In fine,

<https://www.mhc.tn.gov.in/judis>



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(i) This Criminal Appeal stands allowed.

(ii) The judgment of the learned Mahalier Court (Fast Mahila Court) Thanjavur in Spl. Cases No.04 of 2016 dated 19.06.2017, is hereby set aside.

(iii) The appellant is acquitted of all charges framed against him.

(iv) The fine amount, if already paid, shall be refunded to the appellant.

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Index : Yes/No

NCC : Yes/No.

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To:-

- 1.The Mahalier Court (Fast Mahila Court) Thanjavur.
2. The Inspector of Police,
Swamimalai Police Station,
Thanjavur District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.
- 4.VR Section.
Madurai Bench of Madras High Court,
Madurai.



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Dr.R.N.MANJULA, J.,

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