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*Crl.A.No.460 of 2023*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.02.2026

CORAM

**THE HONOURABLE MR.JUSTICE SUNDER MOHAN**

Crl.A.No.460 of 2023

Arulselvan

... Appellant

Vs.

State represented by  
The Inspector of Police,  
AWPS, Pennagaram,  
Eriyur Police Station.

Crime No.189 of 2016

... Respondent

Prayer: Criminal Appeal filed under Section 374 of Criminal Procedure Code, 1973, to call for the records and set aside the conviction and sentence imposed on the appellant/accused no.1 by the learned Sessions Judge, Fast Track Mahila Court, Dharmapuri, by a judgment dated 09.01.2023 in Spl.S.C.No.10 of 2017 by allowing this appeal.

For Appellant : Mr.R.John Sathyam  
Senior Counsel  
for Mr.K.R.Samratt

For Respondent : Mr.S.Raja Kumar  
Additional Public Prosecutor

**JUDGMENT**



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This Criminal Appeal challenges the judgment of conviction and sentence imposed by the learned Sessions Judge in Spl.S.C.No.10 of 2017 dated 09.01.2023 on the file of the Fast Track Mahila Court, Dharmapuri.

2. The appellant / A1 was convicted by the trial Court for the offences under Section 363 of IPC and under Sections 5(1) r/w 6 of Protection of Children from Sexual Offences Act, 2012 (*hereinafter referred to as POCSO Act*) and sentenced as follows:

| Offence under Section         | Sentence imposed                                                                                      |
|-------------------------------|-------------------------------------------------------------------------------------------------------|
| 363 of IPC                    | To undergo RI for 3 years and to pay a fine of Rs.5,000/-, in default to undergo SI for two months.   |
| 5(1) r/w 6 of POCSO Act, 2012 | To undergo RI for 10 years and to pay a fine of Rs.10,000/-, in default to undergo SI for six months. |

3. The case of the prosecution is that the appellant and the victim had love affair; that the appellant on the promise of marriage kidnapped the victim from the lawful guardianship of her parents on 14.08.2016 on a bike and stayed in the house of the second accused, who is the paternal uncle of the appellant; that on the complaint given by the mother of the victim, a case was registered under Section 366A IPC and thereafter, the victim was



secured. The FIR is marked as Ex.P3. Thereafter, P.W16 conducted the initial investigation and then transferred the investigation to P.W18. P.W18 made arrangement to record Section 164 (5) Cr.P.C statement of the victim and after examination of all the witnesses had filed the final report against the appellant (A1) and the second accused for the offences under Sections 5 (l) r/w 6, 16 r/w 17 of the POCSO Act and under Section 363 of IPC.

4. Before the trial Court, prosecution had examined 18 witnesses and marked Ex.P1 to Ex.P.36. The appellant neither marked any documents nor examined any witnesses. The trial Court acquitted the second accused of the offence under Section 16 r/w 17 of POCSO Act and found the appellant guilty of the offence under Section 363 IPC and Sections 5(l) r/w 6 of the POCSO Act and sentenced as stated above.

5. Mr.R.John Sathyam, learned Senior Counsel for the appellant would submit that the evidence of the victim as well as her parents would show that the relationship between the appellant and the victim was consensual; that the prosecution had not established the age of the victim in the manner known to law; that no ossification test was conducted to prove



her age; that it was suggested to the witnesses that the victim had married another person and given birth to a child which would show that the victim aged was more than 18 years. He would however fairly submit that the appellant had not probablised the said fact of marriage.

6. The learned Additional Public Prosecutor for the respondent, *per contra*, would submit that the prosecution had established through the evidence of P.W9, who is the Headmaster of the School that the victim was born on 21.06.2002; that on the date of alleged occurrence, she was 15 years old; that hence consent is immaterial; and that therefore, the impugned judgement convicting the appellant of the alleged offence is justified.

7. As stated above, the prosecution had examined 18 witnesses. P.W1 is the victim, P.W2 is the father of the victim and PW3 is the mother of the victim. P.W4 is the brother of the victim and is a hearsay witness, and he spoke about the victim missing from the house from 14.08.2016. P.W5 is a relative of the victim and witness to the observation mahazar, who was treated hostile by the prosecution. P.W6 is another witness to the observation mahazar, who was treated hostile by the prosecution. P.W7 is



also a witness to the observation mahazar, who was treated hostile by the prosecution. P.W8 is the witness to the seizure mahazar and treated hostile.

P.W9 is the Headmaster, where the victim is said to have studied and issued the Education Certificate Ex.P14, in which the date of birth of the victim is shown as 21.06.2002. P.W10 is the Constable, who had accompanied the appellant to the hospital for medical examination. P.W11 is the Constable, who had accompanied the victim for medical examination. P.W12 is the Constable, who accompanied the victim to the Magistrate for recording her Section 164 (5) Cr.P.C statement. P.W13 is the Doctor, who had first examined the victim and had made entries in the Accident Register Ex.P17. He had also marked Forensic Science Report Ex.P19. P.W14 is the Head of the Child Welfare Committee and speaks about the counseling given to the victim. P.W15 is the Doctor, who had examined the appellant and issued Potency Certificate Ex.P20. P.W16 is the Inspector of Police, who registered the F.I.R and conducted initial part of the investigation. P.W17 had signed as a witness in the confession statement of the appellant. P.W18 is the Investigating Officer.

8. Therefore, the prosecution seeks to establish its case through P.W1



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to P.W3, the victim and her parents, the Headmaster P.W9 and the Doctor, who had examined the victim. Admittedly, there is no Ossification Test conducted on the victim. The Doctor P.W13, who had examined the victim would state that the hymen was not intact and there was a possibility that the victim was subjected to sexual intercourse. P.W1, the victim would admit that she had love affair with the appellant and that she had voluntarily gone with the appellant on the date of occurrence. Her Section 164 (5) Cr.P.C statement is corroborated by her deposition in the Court. She would admit in the cross examination that her parents opposed her relationship with the appellant and that she had called the appellant to take her, since her parents were forcing her to get married to someone else. Similarly, P.W2 the mother of the victim would state that she was aware of the relationship of the appellant and her daughter. The deposition of P.W2 and P.W3 would also suggest that they were aware of the relationship and the appellant had not forcibly taken the victim. The evidence of P.W4, the brother of the victim would also suggest that the relationship was consensual. P.W18, the Investigating Officer would confirm that the relationship was consensual and the victim had gone with the appellant on her own. The relevant portion of P.W18 evidence is reads as follows:



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“அதனால் பாதிக்கப்பட்ட சிறுமியே 1ம் எதிரிக்கு  
போன் பண்ணி வரவழைத்தார் என்றால் சரிதான்.”

Thus, it is seen from the evidence that the relationship between the appellant and the victim was consensual and the evidence of the victim that she was subjected to forcible sexual intercourse is an afterthought.

9. However, consent is immaterial if the victim is a child. The prosecution seeks to prove the age of the victim through the evidence of P.W.1 as well as that of P.W.9, the Headmaster of the school where the victim is said to have studied at the relevant point of time. P.W1 does not refer to her date of birth in the statement given before the Magistrate under Section 164 (5) Cr.P.C. In her deposition, she would state that her date of birth is 17.05.2002. However, no document was marked through her to substantiate the said fact. Strangely, both P.W.2 and P.W.3, the parents of the victim do not speak about the date of birth. In fact, they admitted that they do not remember it. P.W9 is the Headmaster of the School where the victim and the appellant studied. P.W9 had issued a certificate called Education Certificate Ex.P14, in which date of birth is shown as 21.06.2002. A document titled as record sheet was also marked as Ex.P15 through P.W9,



which is said to have been issued by the Panchayat Union Primary School, Neruppur on 20.12.2016. Strangely, the prosecution had not examined the said Headmaster of the said School, who had issued the said certificate. The contents of the said document cannot therefore be proved by P.W9. In any case, P.W9 is not aware of the basis on which the date of birth was recorded in Ex.P15.

10. The Honble Supreme Court 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)”

11. This Court, after considering all the judgments on this aspect has held in Crl.(MD) No.487 of 2019 as follows:

“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.”

12. The observations made in the aforesaid judgments are squarely applicable to the facts of this case. Thus, it is seen that P.W.9 issued the certificate Ex.P14 on the basis of Ex.P15, a the document said to have been issued by the Headmaster of a primary school who was not examined. Therefore, the prosecution has not established the basis on which the date of birth of the victim was recorded in the School Register Ex.P15. The parents have not spoken about the date of birth. Further, the date of birth given by the victim is different from the date of birth found in Ex.P14 and Ex.P15. Therefore, this Court is of the view that the prosecution has failed to discharge their burden of proving the age of the victim and that she was a child at the time of the occurrence. As stated earlier, the evidence suggests that the relationship was consensual and in the absence of any acceptable evidence to prove that the victim was a child, the offence under Section 363 IPC and Section 5(1) r/w 6 of the POCSO Act cannot be sustained.



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13. In the result, this Criminal Appeal is allowed, and the appellant is acquitted of all the charges. The conviction and sentence passed in Spl.S.C.No.10 of 2017 on the file of the learned Sessions Judge, Fast Track Mahila Court, Dharmapuri, *vide* judgment dated 09.01.2023, is set aside. The fine amount, if any, paid by the appellant shall be refunded. Bail bond, if any, executed shall stand discharged.

**02.02.2026**

Index : Yes/No  
Speaking Order/Non Speaking Order  
*Mac*

To

1. The Fast Track Mahila Court, Dharmapuri,.
2. The Inspector of Police,  
AWPS, Pennagaram,  
Eriyur Police Station.
3. The Public Prosecutor,  
High Court, Madras.



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**SUNDER MOHAN, J.**

*Mac*

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