

HON'BLE SRI JUSTICE K.SURENDER

CRIMINAL APPEAL No.140 OF 2022

JUDGMENT:

1. The appeal is filed against the conviction of the appellant for the offences under Sections 366, 506, 496, 376 (2) (n) of Indian Penal Code and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO' Act).

2. Briefly stated, case of the prosecution is that PW2 who is father of PW1 having found that PW1 was missing after going to college on 10.02.2014, filed a complaint with the police under Ex.P1 on 15.02.2014. After enquiring with the relatives and other friends PW2 suspected the appellant to be the reason for his daughter missing. A complaint was registered as 'girl missing' and on 25.02.2014, having recorded the statement of one Shiva Kumar (PW3) who saw Appellant and Pw1 going together, the police altered the section of law to 366-A of Indian Penal Code. On 02.03.2014 PW1-Victim girl and the appellant went to the police station where the statement of

PW1 was recorded. Thereafter, the police obtained Date of Birth certificate of PW1 and on the basis of her statement, the section of law was altered and Sections 376 and 506 of Indian Penal Code were added. After completion of investigation, having found that PW1 was a minor, the police filed charge sheet for the offences under Sections 363, 366 A, 376 (2) (n), 506, 496 of Indian Penal Code and Section 5(l) read with Section 6 of the POCSO Act.

3. The appellant was charged for the said offences and after conclusion of trial the learned Sessions Judge found the appellant guilty for the offences under Section 6 of the POCSO Act and sentenced to undergo 10 years of Rigorous Imprisonment, under section 366 of IPC and sentenced to undergo 10 years of Rigorous Imprisonment, under Section 506 of IPC and sentenced to undergo 7 years of Rigorous Imprisonment; and under Section 496 of IPC and sentenced to undergo 7 years of Rigorous Imprisonment and all the sentences were directed to run concurrently.

4. Learned Counsel for the appellant argued that infact PW1 was not a child but a major on the date of alleged offence. As seen from the evidence she had accompanied the appellant on her own volition. When she went along with the appellant on her own volition, the question of using force by the appellant does not arise and further Ex.P3 and P4 produced by the prosecution to substantiate their claim that PW1 was 18 years, both appear to be fabricated and it cannot be relied upon to conclude that PW1 was below 18 years.

5. He relied upon the Judgment of High Court of Madhya Pradesh in ***Ashwani Kumar Saxena v. State of Madhya Pradesh***¹ and drew the attention of the court to para-7 which reads as follows;

“7. According to *Birad Mal Singhvi v. Anand Purohit, 1988 Supp SCC 604* Apex Court held that the entries in scholar’s register and secondary school examination records have no evidentiary value to prove age of a candidate in absence of evidence of any person on whose information the date of birth had been entered in the school records. The entry contained in the admission form or in the scholar’s register must be shown to be made on the basis of information given by parents or a person

¹ 2010 SCC OnLine MP 497

having special knowledge about the date of birth of the person concerned. In the present case, though the parents have been examined, but no evidence regarding the basis of date of birth was given by them and original admission form has not been called, so the learned CJM has rightly come to the conclusion that the petitioner was not a minor.”

6. The counsel also relied upon the Judgment of Madras High Court in ***Sabari v. Inspector of Police and others***² wherein on facts and circumstances, when the victim herself turned hostile to the case of prosecution, the Court acquitted the appellant from the charges of kidnapping and committing sexual assault.

7. Further, the counsel for appellant relied upon the Judgment of Honourable Supreme Court in ***Ashwani Kumar Saxena v. State of Madhya Pradesh***³ to impress upon this Court that an enquiry has to be conducted to know the exact age of the victim girl and the trial Court did not make any such attempt to determine the age of PW1 except relying upon the fabricated documents Exs.P3 and P4.

² 2019 (3) MLJ (Criminal) 110

³ (2012) 9 Supreme Court Cases 750

8. On the other hand, the learned Public Prosecutor submitted that the findings of the trial Court is based upon the evidence of PW1 and her evidence stands corroborated by the investigation done by the police. Further, the question of consent by minor does not arise and even assuming that consent is given by the minor, it is not consent as per Law, for the said reason, the conviction has to sustain.

9. As seen from the evidence of PW1, the victim girl stated that on 10.02.2014 while she was proceeding to the college the appellant followed her and asked her to accompany him on his motorcycle to go to Wardhannapet, though PW1 refused, the appellant allegedly forced her and threatened her of dire consequences. Due to the fear, PW1 accompanied the accused on his motorcycle to Thorrur and from there to bus stand to proceed to Vijayawada by boarding RTC bus. While going towards Vijayawada, both of them got down at Ibrahimpatnam and met his friend. From there they stayed in a temple at Kondapally village where the appellant tied 'Thali' on 12.02.2014. Thereafter,

both of them stayed in a room taken on rent for about 20 days and during the said period appellant committed rape on PW1. On knowing that PW2-her father filed a complaint against the appellant with the police, she called her father who came and took PW1 to the police station, Rayaparthi, where statement of PW1 was recorded. On the basis of the said statement, the section of Law was altered and accordingly, charge sheet was laid for the offences under Sections 363, 366-A, 376 (2) (n) and 496, 506 of Indian Penal Code and Section 5(1) read with 6 of POCSO, Act, 2012. After completion of trial, the appellant was convicted as mentioned above.

10. During the course of cross-examination of PW1, she admitted that she did not inform her parents about the accused following or his expression of love and intention to marry PW1. Further, she was acquainted with accused for two years prior to the complaint. PW1 further admitted that she did not cry for help while going on motorcycle with the appellant or while passing from Zaffergadh to Thorrur, they have passed through Wardhannapet, Rayaparthi and

that while proceeding she could also see police stations enroute. She also admitted that there was a police station and an outpost at Ibrahimpatnam. Further, she did not try to inform neither the police nor the people at bus stand about any kind of force by the appellant. Further, on questioning, PW1 stated that they were in a room taken on rent by the accused for nearly 20 days and they used to get food from outside. PW1 also admits that during her acquaintance of two years with appellant, she was using cell phone of her sister and father to send messages to the appellant. PW1 further admitted that her caste and caste of the accused are different and was not interested to lead marital life with the appellant. Further, she admitted that she was not confined by the accused in the room for 20 days where they stayed together.

11. From the events that transpired from 10.02.2014 till the girl called his father on cell phone informing to pick her up from Thorrur bus station, there is no element of doubt that PW1 accompanied the appellant on her own without any compulsion. As seen from the cross-examination it can

be safely inferred that at no point of time either while going on motorcycle or on the bus or at the temple where they allegedly got married and their subsequent stay in a rented house, that there was any kind of force that was used upon PW1 by the appellant. In fact, when the admissions made by PW1 are looked into in its totality, the only logical conclusion that could be drawn is that she had accompanied the accused on her own to all the places during the 20 days period.

12. The learned Assistant Public Prosecutor submits that even considering that PW1 was a consenting party, her consent is of no significance since she was below 18 years and the accused is liable under the provisions as sentenced.

13. Learned Counsel for the appellant drawing the attention to Exs.P3 and P4 argued that they firstly appear to be fabricated for the reasons of Ex.P3 being provided to the police after PW1 was traced on 02.03.2014 and according to PW4 the said certificate was given on

03.03.2014. Secondly, no credibility can be attached to Ex.P3 and P4 for the reasons of they being provided to the police and the original admission register was not produced before the Court. Further, Ex.P4 when looked at minutely, the name of PW1 is at Sl.No.1485 whereas the name of appellant is at Sl.No.1484 which is highly improbable and there is no explanation as to how the names of the accused and PW1 appear one after the other.

14. Though, there is no cross-examination on this aspect, a close scrutiny of the entries made in Ex.P4 at Sl.No.1484, 1485 casts any amount of suspicion regarding the document being correct in the background of not producing the original register during trial. How the register is maintained is not narrated by PW4. Further, as seen from the entries at Sl.NO.1484 appellant appears to have joined on 12.07.2007 (corrected as 2006) and the date of issuance of T.C for Sl.No.1484 is 15.06.2009 whereas for Sl.No.1485 is 18.06.2012.

15. In the background of the said discrepancies found in Ex.P4 and also for the reason of the father (PW2) neither asserting about the date of birth nor the prosecution placing any document such as certificate of birth issued at the time of birth by the hospital or any other authorities. It is not safe to place reliance upon Exs.P3 and P4 to conclude that the age of PW1 as projected by the prosecution as 16 years and 8 months at the time of incident as correct.

16. It is not the case of PW1 that a fraudulent process of marriage was adopted by Appellant to make her believe of a lawful marriage. Since there is no allegation from which it can be concluded that the appellant had any kind of dishonest or fraudulent intention of going through the ceremony of marriage knowing that he was not lawfully married, the charge under Section 496 has to fail.

17. Taking into consideration the peculiar facts of the case and the admissions made by PW1 and further in the

absence of any cogent evidence to determine the age of PW1, the finding of the trial Court needs to be set aside.

18. Accordingly, the appellant is found not guilty for the offences under Sections 366, 506, 496, 376(2) (n) of Indian Penal Code, Section 5(1) r/w Section 6 of the POCSO Act.

In consequence of the acquittal accorded on all counts, the appellant shall be set at liberty forthwith.

As a sequel thereto, miscellaneous petitions, if any, pending, shall stands closed.

Date: 26.04.2022
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K.SURENDER, J

HON'BLE SRI JUSTICE K.SURENDER

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