



Crl.A.(MD).No.428 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved On	:	20.12.2023
Pronounced On	:	12.03.2024

CORAM

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

CRL.A(MD).No.428 of 2022

K.Balamurugaraja

.. Appellant / Sole Accused

Vs.

1.The Deputy Superintendent of Police,
Virudhunagar Division,
Virudhunagar.

2.State through
Inspector of Police,
AWPS, Virudhunagar.
(Crime No.6 of 2018)

.. Respondent / Complainant

Prayer: This Criminal Appeal is filed under Section 374 (2) of Cr.P.C., to set aside the order of conviction and sentence dated 21.06.2022 passed by the learned Special Judge for trial of offences under POCSO Act, Virudhunagar District at Srivilliputhur in Spl.S.C.No.31 of 2018 for the charge under Sections 8 and 12 of the POCSO Act to undergo 3 years rigorous imprisonment and to pay



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a fine of Rs.10,000/- and in default to undergo 6 months simple imprisonment and to undergo 2 years rigorous imprisonment and to pay a fine of Rs.5000/- and in default to undergo 6 months simple imprisonment respectively with a direction to suffer the sentence concurrently and allow this Criminal Appeal in Crl.A(MD)428 of 2022 and acquit the appellant.

For Appellant : Mr.M.Michael Bharathi

For Respondents : Mr.T.Senthil Kumar,
Additional Public Prosecutor

JUDGMENT

The sole accused in Special Spl.S.C.No.31 of 2018 on the file of the learned Special Judge for trial of offences under POCSO Act, Virudhunagar District at Srivilliputhur is the appellant before this Court. The learned trial Judge convicted the appellant for the offence under Sections 8 and 12 of the POCSO Act and sentenced him to undergo 3 years rigorous imprisonment and to pay a fine of Rs.10,000/- and in default to undergo 6 months simple imprisonment for the offence under Section 8 of the POCSO Act and to undergo 2 years rigorous imprisonment and to pay a fine of Rs.5000/- and in default to undergo 6 months simple imprisonment for the offence under Section 12 of the



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POCSO Act. Challenging the above conviction and sentence imposed against him by the trial Court vide order dated 21.06.2022, the appellant has filed this appeal before this Court.

2. The appellant is a differently abled person. His right hand as well as the left leg is affected due to polio attack. He has a shop situated opposite to the school in which the victim girls P.W..4, P.W..5, P.W..6 and P.W..11 are studying. On 16.07.2018 at 04.45 p.m, P.W..4 went to his shop to purchase some grocery items and at that time, the appellant is said to have shown some obscene photographs from his cell phone. She refused to see the photographs. Further there is an allegation against the appellant that the remaining victim girls were also subjected to sexual harassment and sexual assault. According to the prosecution, he pinched the hand and hip of the victim girls. Therefore, the victim girls made a complaint to the Headmaster of the School and from the Headmaster information was communicated to P.W..4's father. P.W..4 gave a complaint before the respondent police and the case was registered in Crime No. 6 of 2018 for the alleged offence under Sections 8, 12 and 14 of the POCSO Act and 3 (1) (r) (4 counts) and 3 (1) (s) (4 counts) of the SC/ST (Prevention of Atrocities) Act. After the arrest of the accused, investigation was conducted by



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P.W..18 and he filed the final report before the Special Court for POCSO Act cases and the same was taken on file in Spl.S.C.No.31 of 2018. The learned special Judge summoned the accused and furnished the copies free of cost under Section 207 Cr.P.C. Thereafter, he framed necessary charges and questioned the appellant. The appellant pleaded not guilty and he stood for trial. The prosecution, to prove the case, examined P.W.1 to P.W.18 and marked Ex.P1 to Ex.P18 and produced the material objects viz., M.O1 to M.O3. The learned trial Judge, after considering the above materials questioned the appellant under Section 313 Cr.P.C by putting the incriminating materials available against him from the prosecution evidence. The accused denied the same as false. Thereafter, the case was posted for defence side evidence. But neither witness nor documents were marked on the side of the defence. The learned trial Judge, after considering the above evidence, convicted and sentenced the appellant for the offence under Sections 8 and 12 of the POCSO Act and acquitted the appellant of the offence under Section 14 of the POCSO Act and 3 (1) (r) (4 counts) and 3 (1) (s) (4 counts) of the SC/ST (Prevention of Atrocities) Act, vide judgment dated 21.06.2022. Challenging the same, the appellant filed this appeal.



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3. The learned counsel for the appellant made the following submissions:

3.1. In this case, the charge under the POCSO Act is not maintainable on the ground that there is no evidence adduced by the prosecution to prove the age of the victims. The prosecution produced only one document namely Ex.P15 to show the age of the victim, P.W.4. There are no documents to prove the age of the remaining victims. Hence, the conviction and sentence passed under the Act is not legally sustainable. The learned counsel for the appellant submitted that the victims' 164 Cr.P.C., statements were recorded and the same was marked as Ex.P5, Ex.P6, Ex.P8 and Ex.P9. In the said statements, there was no allegation of sexual harassment as deposed by the victims. Before the Court during their chief examination there is total improvement made by the victim girls over the statement under Section 164 Cr.P.C before the learned Judicial Magistrate which were marked as Ex.P5, Ex.P.6, Ex.P8 and Ex.P9. In the said statement, there is no trace of allegation against the appellant relating to the sexual assault and sexual harassment as deposed before this Court. In the said circumstances, the said improvement itself shows that they are not trustworthy witnesses and their evidence is to be considered carefully. On a careful analysis of the said evidence, there was no material adduced by the prosecution to prove the grave charge under the POCSO Act. In the said circumstances, the conviction passed against



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the appellant under Sections 8 and 12 of the POCSO Act is not maintainable.

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3.2. The learned trial Judge framed charges under the relevant provisions of the SC/ST Act and also Section 13(c) r/w 14(4) of the POCSO Act. The learned trial Judge acquitted the appellant under the SC/ST Act on the ground that there was no allegation in the 164 statement recorded by the learned Judicial Magistrate. The same principle is also applicable to appreciate the evidence of the victim relating to the allegation made against the appellant with regard to the sexual assault and harassment. In this aspect, the appreciation of evidence by the learned trial Judge itself is not in accordance with law. The learned counsel for the appellant further submitted that there was delay in lodging the complaint. The said delay was not properly explained. In the sexual offence case, delay is not material provided there is an explanation on the side of the prosecution. In this case, there was no explanation at all. In the said circumstances, considering the above facts, delay is material. The learned counsel for the appellant further submitted that among the victim girls, namely, P.W.4, P.W.5, P.W.6 and P.W.11, the victim girl P.W.5 never deposed about the harassment on the part of the appellant. Similarly, another victim girl also has not stated about the sexual harassment made by the appellant. The evidence of P.W.4, who is the main



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victim according to the prosecution is that she was subjected to the sexual harassment and the appellant asked her to see the obscene photographs from his cell phone. She specifically deposed before the Court that the same was not known to the remaining victims, namely P.W.5, P.W.6, P.W.7 and P.W.11. Therefore, P.W.5, P.W.6, P.W.7 and P.W.11 are only hearsay witnesses. In the said circumstances, the conviction passed against the appellant on the basis of the statement of the remaining victim girls is not legally correct. P.W.4 has substantially improved her version before the Court below. Hence, he seeks for acquittal of the appellant on the ground that there was no cogent and trustworthy evidence available against the appellant relating to the sexual harassment and sexual assault. The learned counsel further submitted that when the learned trial Judge acquitted the appellant for the offence under Section 13 (c) r/w 14(4) of the POCSO Act on the ground that there was no obscene photographs in the cell phone recovered from the appellant, the conviction for the sexual harassment on the ground that the appellant showed the obscene photographs is not legally maintainable. The learned counsel for the appellant also submitted that all the victim girls and other school students have account in the appellant's shop. Their parents paid the account amount for the purchase of the grocery and other school materials once in a month. One Santha a teacher running a business inside the



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premises of the school hostel was very much affected. Therefore, there is a motive at the instance of the said Santha teacher and all the school teachers conspired together and made the false complaint against the appellant. The same was also admitted by the prosecution witnesses. In view of the above motive, the case was falsely initiated against the poor differently abled person. Hence, he seeks for acquittal. The learned counsel further submitted that in the grave charge of sexual assault made against the appellant, it is the duty of the prosecution to prove the foundational facts in order to attract the offence and the presumption clause. In this case, the prosecution has not proved the foundational facts in view of the above discrepancy between the evidence and also when the trustworthiness of the witnesses is doubtful. The learned counsel for the appellant further submitted that the 164 statement is used for corroboration and contradiction. In this case, the omission in the 164 statement relating to the sexual assault and sexual harassment made by the appellant is apparent from Ex.P6, Ex.P7, Ex.P8 and Ex.P9. Hence, this Court applying the principle laid down by the Hon'ble Supreme Court in **2013 (14) SCC 266, 1998 (4) SCC 605** has to consider the contradiction and acquit the appellant. Hence, in all aspect, the prosecution failed to prove the case.



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3.3. Further, the learned counsel for the appellant submitted that in the course of the discussion, the learned trial Judge never considered the portion of the evidence. He simply stated that the victim girl undergone sexual harassment. He relied on the paragraph No.44 of the trial Court judgment and stated that the judgment has not properly discussed the offence and hence, the judgment rendered without giving specific reasoning is not a proper judgment at all. Hence, he seeks to consider Section 354 Cr.P.C and seeks to set aside the judgment for which he also relied number of judgements.

4. The learned trial Judge also committed error in convicting the appellant on the basis of the victim P.W.4's evidence accepting some portion and rejecting the majority of the portion. Hence, he seeks the interference of the judgment of the trial Court and seeks for acquittal.

5. Per contra, the learned Additional Public Prosecutor submitted that the delay in the case is not material. As per the Hon'ble Supreme Court judgment, in sexual cases, delay is not material. Acceptance of the reason furnished by the prosecution is rule and non acceptance is the exception. In this case, after the harassment on P.W.4 and the remaining victim girls, they disclosed the fact to the



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Headmaster of the School and thereafter the Headmaster informed to P.W.1, namely, father of P.W.4. Thereafter, the complaint was made. In the said circumstances, the delay is not material.

6. The learned Additional Public Prosecutor further submitted that the evidence of P.W.4, P.W.5, P.W.6 and P.W.11 are cogent and there was no reason to disbelieve their version. P.W.4 clearly deposed about the sexual harassment made by the appellant. She immediately communicated the said fact to P.W.5, P.W.6, P.W.7 and P.W.11. The said information culminated into 164 statement. Therefore, the evidence are admissible under the exception of the Section 6 of the Evidence Act, ie., the admissibility of the hearsay evidence. The learned Additional Public Prosecutor further submitted that P.W.4, P.W.5, P.W.6 and P.W. 11 clearly deposed about the sexual assault and the sexual harassment made by the appellant, ie., they specifically deposed before the Court that the appellant shall pinched the hands of the victim girl and their private parts. In the said circumstances, their evidence is trustworthy and the same was considered by the learned trial Judge and he correctly convicted the appellant. The acquittal with regard to the remaining charges namely SC/ST Act and Section 13(3) and 13(4) of the POCSO Act is not a ground to disbelieve the version of the victim girls



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relating to the offence under Section 8 and 11 of the POCSO Act, (sexual assault and sexual harassment). In the said circumstances, the Hon'ble Supreme Court in number of cases held that even if major portion of the evidence is disbelieved, conviction may be given on the basis of the remaining portion of the evidence provided that the said version is trustworthy. The learned trial Judge believed the version as trustworthy, and this Court has no jurisdiction to interfere with the judgment of the learned trial Judge. The learned Additional Public Prosecutor further submitted that even though the learned trial Judge not elaborated in the paragraph of the judgment but he stated that all the witnesses deposed and there is a proper compliance of the Section 354 Cr.P.C. As far as the motive aspect is concerned, there was no plea on the part of the appellant during the course of 313 Cr.P.C proceedings. Hence, the motive is an after thought. The learned Additional Public Prosecutor further submitted that of course the appellant is handicapped but P.W.4 also partially suffered some deformities in her hearing ie., she had some problem in hearing and also in speaking. In the said circumstances, the victim stands on higher pedestal than the appellant. Therefore, this Court need not interfere with the conviction and sentence passed by the trial Judge.



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7. The learned Additional Public Prosecutor also submitted that the age of the victim girl is not disputed by the appellant. Hence, it is not necessary to prove the age of the victim girl. All the victim girls stated that they are minors. The said plea is enough when there is no dispute relating to the age. Hence, the argument of the learned counsel for the appellant is without merit. The learned Additional Public Prosecutor further submitted that the prosecution clearly proved the case against the appellant beyond reasonable doubt. The learned trial Judge correctly convicted the appellant for the above said offence.

8. This Court has considered the rival submissions made by both side and the evidence adduced by them and also perused the records and impugned judgment and the precedents relied upon by them.

8.1. Now the question in this case is that whether the conviction and sentence passed against the appellant by the Court below under Sections 8 and 12 of the POCSO Act is in accordance with law?

9. In this case, P.W.4 is a partially disabled victim girl. The appellant is affected by Polio on his hand as well as his leg extensively. It is admitted



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case of the prosecution and also the victim girls that he is unable to walk and move without aid. His shop is situated opposite to the school and hostel of the victim girls. It is admitted case of the victim girls that P.W.4 has account in the said shop. Every month, she purchased the stationary and she has made the payment once in a month on credit basis. It is the case of P.W.4 that on 16.07.2018, when she was entered into the shop of the appellant, the appellant asked her to come inside the shop and he showed the obscene photographs through his cell phone. It is the further case of the victim girl that he “pinched her hands”. There was no further allegation in the deposition of P.W.4. In her 164 Cr.P.C., statement she never disclosed about the pinching of her hand. She only deposed about the appellant asked her to see the obscene photographs in the cell phone. The said contradiction is material and the same has not been properly considered by the learned trial Judge. For better appreciation, it is relevant to extract the 164 statement and the evidence of P.W.4 before the Court. It is extracted as follows:

Witness	164 Statement	Deposition before Court
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P.W.4

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எதிரி 16.07.2018ல் காட்டினார். நீ.று.கும் போது, கையை கிள்ளினார். செல்போனில் படத்தை காட்டினார். அந்த போனில் கட்டிப்பிடித்த மாதிரி படம் இருந்தது. வேண்டாம் என்று தள்ளிவிட்டேன். வேறு எதுவும் பார்க்கவில்லை.	என்னிடம் போனை பக்கத்தில் கையை செல்போனில் அந்த கட்டிப்பிடித்த இருந்தது. என்று வேறு பார்க்கவில்லை.	ஒருநாள் காலையில் ஸ்கூலுக்கு சென்று கொண்டிருந்தேன். 16.07.18ம் தேதி பள்ளிக்குடம் முடித்துவிட்டு மாலை 5.30 மணியளவில் பள்ளியை விட்டு வெளியே வந்தேன். அருகில் உள்ள கடையில் அன்னாசிப்பழம், மாங்கா, தண்ணீர்பழம் ஆகியவை வாங்கினேன். சக்தீஸ்வரி, அன்னபூர்ணம், சித்ரா ஆகியோர் உடன் இருந்தார்கள். அவர்களும் கடையில் வாங்கிக் கொண்டிருந்தார்கள். அப்போது கடையில் இருந்த பாலமுருகராஜா செல்போனை காண்பித்தார். அந்த செல்போனில் கட்டிப்பிடித்தது போல் படம் இருந்தது. திரும்ப திரும்ப செல்போனில் கட்டிப்பிடிப்பதை காண்பித்தார். நாங்கள் எங்களுக்கு பார்க்க பிடிக்கவில்லை என்று கூறிவிட்டு வீட்டிற்கு கிளம்பி விட்டேன். சுமார் ஒரு வாரமாக எங்களிடம் செல்போனை காண்பித்தார். நாங்கள் பிடிக்கவில்லை என்பதால் வேண்டாம் என்று சொல்லிவிட்டோம். 16ம் தேதிக்கு முன்புவரை செல்போனில் கட்டிப் பிடிப்பதை காண்பித்துக் கொண்டேயிருந்தார். 17ம் தேதி கடையில் இருந்த அந்த அண்ணன் செல்போனில் கட்டிப்பிடிப்பது போன்ற படத்தை காண்பித்தார். காலேஜ் பையனுடன் யார் போட்டோ எடுத்தார்கள் என டீச்சர் கேட்டார்கள். உண்மையைச் சொல்லுங்கள் என டீச்சர் கேட்டார். நான் செல்போனில் படம் காட்டியதை கூறினேன். கடைக்கு உள்ளே வனிதா, அன்னபூர்ணம், சக்தீஸ்வரி ஆகியோர் நின்று கொண்டிருந்தார்கள். நான் வெளியே நின்று கொண்டிருந்தேன். அவர்கள் சென்றவுடன் அந்த அண்ணன் செல்போனைக் காண்பித்தார். நான் வேண்டாம் என்று கூறி சென்றுவிட்டேன். எதிரி பாலமுருகராஜாவுக்கு கைகள் இரண்டும் ஊனம் என்றால் சரி தான். அதனால் அவருடைய மனைவி அவருக்கு துணைக்கு இருப்பார் என்றால் சரிதான்.
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10. Similarly P.W.5, P.W.6, P.W.7 and P.W.11 also stated with improvement over the 164 statement. To appreciate the same, it is relevant to extract the said portion of the evidence as follows:

Witness	164 Statement	Deposition before Court
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P.W.5	ஆபாச வீடியோவில் ஒரு பெண்ணும், ஒரு பையனும் ஆடையில்லாமல் இருந்ததாக பவித்ரா தேவி, என்னிடம் சொன்னார்.	கடந்த 16-07-18 ம் தேதி திங்கள் கிழமை பவித்ரா தேவி பக்கத்தில் உள்ள கடையில் சாமான்கள் வாங்கிக் கொண்டிருந்தார். நாங்களும் சாமான்கள் வாங்கினோம். பவித்ரா தேவியிடம் அந்த கடைக்காரர் செல்போனில் கெட்ட படம் காண்பித்ததாக பவித்ரா தேவி எங்கள் நால்வரிடமும் கூறினார். உடனே நாங்கள் தலைமை ஆசிரியருக்கு தெரிவித்தோம். போலீசாருக்கு தகவல் சொல்லி எங்களை விசாரித்தார்கள்.
P.W.6	நான், பவித்ரா தேவி, அன்னபூரணம், சித்ரா, சக்தீஸ்வரி ஆகியோர் போகும் போது ஒவ்வொரு நபர்களாக எதிரி கையை தொடுவது, மார்பை தொடுவது, இருப்பை பிடித்து கிள்ளுவது ஆகியவை செய்வார். நாங்கள் தொடர்புடைய என்று எதிரியிடம் சொல்லும்போது அதற்கு அவர் நீங்கள் பள்ளர் ஜாதி தான் என்று சொல்லுவார். அவ்வாறு சொன்னவுடன் எங்களுக்கு அசிங்கமானது. எதிரிக்கு இரண்டு கை ஊனமானது என்று சொன்னால் ஒரு கை ஊனமானதாகும்.	நானும், பவித்தாரா தேவி, சித்தரா, அன்னபூர்ணம், சக்தீஸ்வரி தினமும் பள்ளிக்கூடம் முடிந்தவுடன் மாலை 4.30 மணிக்கு ஒன்றாகத்தான் செல்வோம். போனமாதம் திங்கள் கிழமை நானும், சித்ரா, அன்னபூர்ணம், சக்தீஸ்வரி மற்றும் வீட்டிற்கு கிளம்பி விட்டோம். நாங்கள் எப்போதும் கடையில் பழங்கள், மிட்டாய்கள் வாங்கிக் கொண்டு செல்வது வழக்கம். அன்றையதினம் பவித்ரா தேவி கடைக்கு வந்தவுடன் அந்த கடைக்காரர் உள்ளே அழைத்து செல்போனில் படம் காட்டியதாக மறுநாள் பவித்ரா தேவி எங்கள் நால்வரிடமும் வந்து கூறினார். உடனே நாங்கள் தலைமை ஆசிரியையிடம் தெரிவித்தோம்.



P.W.7

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எதிரி, நாங்கள் கடைக்கு போய் திண்பண்டங்களை வாங்கும் போது கையை தொடுவார். மார்பை தொடுவார், கையை பிடித்து இழுப்பார் எனக்கு ஒரு மாதிரியாக இருக்கும். அதனால் ஹாஸ்டலுக்கு போய்விடுவேன். 16.07.2018 ம் தேதி 4.45 மணிக்கு பள்ளிக்கூடம் விட்டவுடன் எதிரியின் கடைக்கு நான், சித்ரா, அன்னபூர்ணம், பவித்ரா தேவி, வனிதா ஆகியோர் திண்பண்டங்களை வாங்குவதற்காக போனோம் அப்போது எதிரி பவித்ரா தேவியை மட்டும் தனியாக கூப்பிட்டார். கூப்பிட்டு போய் தனியாக ஆபாசமான படத்தை காட்டினார். அதை பார்த்து பவித்ரா தேவி வேகமாக ஓடி வந்தார். நாங்கள் ஏன் இப்படி ஓடிவருகீ.று.ய் என்று பவித்ரா தேவியிடம் கேட்டபோது எதிரி ஆபாசமான படத்தை காட்டியதாக சொன்னார். நாங்கள் ஹாஸ்டலுக்கு போய்விட்டோம்.

கடந்த 16-07-18ம் தேதி திங்கள் கிழமையன்று நான் ஹாஸ்டலில் இருந்து கடைக்கு சென்று திண்பண்டங்கள் வாங்கி சாப்பிட்டேன். அன்றையதினம் பவித்ரா தேவி கடையில் திண்பண்டங்கள் வாங்குவதற்காக சென்ற போது அந்த கடைக்காரர் தப்பு தப்பான படங்களை செல்போனில் காண்பித்ததாக மறுநாள் பவித்ரா தேவி எங்களிடம் வந்து கூறினார். நாங்கள் தலைமை ஆசிரியையிடம் தகவல் சொன்னோம். தலைமை ஆசிரியர் போலீசாரிடம் நடவடிக்கை எடுக்க சொன்னார்.

P.W.11

நான், சக்தீஸ்வரி, வனிதா, அன்னபூர்ணம், பவித்ரா ஆகியோர் மேற்படி பெட்டிக்கடைக்கு திண்பண்டங்கள் வாங்கி சாப்பிட செல்வோம். வீட்டுக்கு தெரியாமல் மேற்படி பெட்டிக்கடையில் கடன் வைத்திருந்தோம். அதனால் ஆஜர் எதிரி என்னிடம் நன்றாக பேசுவார். எதிரி, எங்களிடம் தவறாக பேசும் போது நாங்கள் அவரை திட்டிவிடுவோம். ஆஜர் எதிரி பெட்டிக்கடைக்கு செல்லும்போது எங்களது கையைபிடித்து இழுப்பார். இருப்பை பிடித்து கிள்ளுவார். மார்பகத்தை தொடுவார்.

கடந்த 16-07-18ம் தேதி நான், வனிதா, அன்னபூர்ணம் மற்றும் சக்தீஸ்வரி, ஆகியோர் கடையில் வெளியில் நின்று கொண்டிருந்தோம். அப்போது பவித்ரா தேவியை உள்ளே அழைத்து பாலமுருக ராஜா என்பவர் செல்போனில் படம் காண்பித்தார். நாங்கள் சாமான் வாங்கிவிட்டு சென்றுவிட்டோம். மறுநாள் பவித்ரா தேவி பயந்து கொண்டு கடைக்காரர் செல்போனில் படம் காட்டியது சம்பந்தமாக எங்கள் நால்வரிடமும் கூறினார். நாங்கள் உடனே தலைமை ஆசிரியையிடம் கூறினோம். அவர் உடனே நடவடிக்கை எடுக்கச் சொல்லிவிட்டார்.

11. From the reading of the above contradiction between the 164 statement and the deposition before the Court, it is clear that their evidence is not true and also not trustworthy. The improvement over the material portion is not considered by the learned trial Judge. As per the judgment of the Hon'ble



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Supreme Court reported in **2013 (14) SCC 266** and **1998 (4) SCC 605**, the 164 statement is used for both contradiction and corroboration. In this case, the same was used for the contradiction. The victim girl deposed before the Court entirely contradictory to the statement given before the learned Judicial Magistrate. In the said circumstances, their evidence is not trustworthy and hence, this Court is not inclined to rely on the evidence to sustain the conviction passed by the learned trial Judge. The argument that in this type of cases, discrepancy and the contradiction does not affect the case of the prosecution is not accepted. In this case, all the victim girls for the first time, deposed before the Court with respect to the sexual assault and sexual harassment. Even in the statement recorded by the learned Magistrate, they have not disclosed the sexual assault and harassment. Hence, this Court reasonably believes that the evidence was tutored by the relative to suit the case. In such circumstances, the appellant rightly placed the judgment of the Hon'ble Supreme Court reported in **2013 (1) SCC (Crl) 1027**, **2002 SCC (Crl) 1210**, **1993 SCC (Crl) 389**, **2019 2 SCC (Crl) 300** and **AIR 2021 SC 402** to disbelieve the victims' evidence on the ground that they are subjected to tutoring and there was no corroborative circumstances to substantiate their allegation de hors the inherent infirmities and improvement and contradiction in their testimony. In the said circumstances, this Court feels that



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there was a tutoring on the part of the witness to depose before the Court with embellishment over their version. The consistent case of the prosecution is that the appellant asked the victim girl namely P.W.4 only to see the obscene photographs from his cell phone. P.W.4 immediately informed to P.W.5, P.W.6, P.W.7 and P.W.11. To prove the said charge, the investigating agency has not sent the cell phone of the appellant to the Forensic Lab. They also categorically stated that there was no obscene photographs in the cell phone seized from the appellant. On that basis the learned trial Judge acquitted the appellant under Section 13(3) r/w 14(4) of the POCSO Act. In view of specific finding of absence of the obscene photographs in the cellphone seized by the investigating agency on the basis of the confession made by the appellant, the conviction imposed for the sexual harassment on the ground that the appellant had shown the obscene photographs is without material. There is a specific finding that when there was no obscene photographs in the cell phone, the question of the sexual harassment by showing the obscene photographs in the cell phone of the appellant is without any basic material. Hence, this Court has no hesitation to set aside the conviction passed against the appellant under Section 11 of the POCSO Act.



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12. The learned trial Judge relied the portion of the evidence of the victim girl to convict the appellant for the offence under Section 9 and 11 of the POSCO Act. The learned trial Judge failed to apply the principle for appreciation of the evidence of the victim girl to acquit the appellant for the alleged offence of SC/ST Act. In the deposition before the Court, the victim girl specifically stated that the appellant had shown the obscene photographs and the appellant pinched their hands and touched the private parts of the victim girls with criminal intention. The appellant also scolded the victim girls by using their caste name. The learned trial Judge disbelieved their version on two aspects namely showing the obscene photographs and also abusing them using caste name. But the learned trial Judge accepted the deposition of the victims that the appellant pinched their hands and hips.

13. According to the prosecution, the appellant called the name of the their caste and pinched their hands and hips. P.W.5 never deposed that the appellant called her by using her caste name and pinched her hands and hip. It is the specific evidence of P.W.4 that the appellant showed his phone with obscene photos. She further deposed that at that time the other victims namely, P.W.5, P.W.6, P.W.7 were not available. She informed the same to them. P.W.5, P.W.6



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and P.W.7 also deposed that they only heard the same from P.W.4. Therefore, P.W.5, P.W.6 and P.W.7 are the hear say witnesses. Further, P.W.4 in her deposition stated that she never stated during the recording of 164 Cr.P.C., that the above information was conveyed to P.W.5, P.W.6 and P.W.7. It is the specific case of P.W.4 that the appellant has deformity in his both hands and hence his wife always would be present along with him. P.W.5, P.W.6, P.W.7, P.W.11 never stated that the appellant pinched their hands and hips. In the nature of the sequence of the events, this Court feels that the testimonies of P.W.4, P.W.5, P.W.6 and P.W.7 are untrustworthy and their versions are not cogent and suffers inherent infirmities in the substratum of the prosecution case and their evidence are fully with embellishment and material improvement over the statement made before the learned Judge, recorded under Section 164 of Cr.P.C. The admitted case of the prosecution is that the appellant is affected by Polio attack in his hands and legs. In the said circumstances, the claim that he pinched with hands and also touched the private parts of the victim girls is not acceptable one. Considering the overall circumstances of this case, the conviction under Section 9 of the POCSO Act against the appellant on the ground that he committed the sexual assault by pinching the hands of P.W.4 and touching the hands of P.W.5, P.W.6, P.W.7 and P.W.11 is unbelievable one.



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14. The defence also established the strong motive to implicate the appellant in this case. All the victim girls examined on the side of the prosecution clearly stated that the management of the school strictly instructed not to purchase any goods from outside the school campus. The admitted case is that all the victim girls purchased goods from the appellant's stationery shop. In the said circumstances, the school shop owner, namely, Santha teacher and the other teachers of the school conspired together and falsely implicated the appellant by using the support of the victim girls. The victim girls are the instrument at the hands of the said Santha teacher to make a false case against the appellant. The same is established through the evidence on record. But the learned trial Judge has not properly considered the said motive projected by the defence through the material evidence. The most important factor in this case is the prosecution failed to establish the age of the each victim girls. Even no reliable documents were filed to show the age of the victim girls to prove the age of the victim girl namely P.W.4, they marked Ex.P15 to show that date of birth of the victim girl is 21.11.2000. To prove the Ex.P15 no evidence is adduced. As held by the Hon'ble Supreme Court in the judgment reported in **2023 SCC Online SC 846** in the case of (*Yuvaprakash Vs. The Inspector of Police*) the



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prosecution is duty bound to prove the age of the victim girl in order to sustain the conviction under the POCSO Act. The mere production of the certificate containing the age of the victim girls, is not deemed to be proved. The source of the information about date of birth on which basis the school authority made the entry in the School Register has to be proved. In this case, neither the school authority was examined nor the source of the entry adduced. Further, even though P.W.1, father of P.W.4 victim girl appeared before the Court but he has not produced any document namely the date of birth certificate and other authenticated certificate to show the age of the victim girl. So far as the evidence of P.W.5, P.W.6, P.W.7 and P.W.11 are concerned no documents were produced. Even in the examination they never stated about their date of birth. In the said circumstances, the charge framed against the appellant under the POCSO Act itself is illegal. Without proof of the age, the conviction and sentence passed under the POCSO Act is not legally maintainable. Hence, this Court holds that the learned trial Judge committed error in convicting the appellant for the offence under Sections 8 and 12 of the POCSO Act.

15. It is clear from the statement recorded under Section 164 of Cr.P.C., and deposition before the trial Court, the victim girls made the material



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improvement over their version and made the allegation that the appellant, a polio attacked person is said to have committed the sexual harassment is nothing but false and the victims have deposed as per the tutored version of their teacher who had business motive against the appellant. The same was not properly considered by the learned trial Judge and he has convicted the appellant against the evidence on record under Sections 8 and 12 of the POCSO Act, after acquitting the appellant under Section 13(3) r/w 14(4) of the POCSO Act and 3(1)(r), 3(1)(s) of the SC ST (POA) Act, 2015. Hence, this Court is inclined to interfere with the impugned judgment passed by the trial Court and set aside the conviction and sentence of imprisonment imposed against the appellant.

16. In the result, this Criminal Appeal is allowed and the judgment passed by the learned Special Judge for trial of offences under POCSO Act, Virudhunagar District at Srivilliputhur in Spl.S.C.No.31 of 2018 dated 21.06.2022 is hereby set aside. The appellant is acquitted from all the charges. The fine amount already paid, is directed to be refunded to the appellant. The bail bond executed by the appellant is hereby cancelled. The appellant is set liberty, unless his presence is required in any other case.



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12.03.2024

Internet: Yes/No

Index: Yes/No

NCC: Yes/No

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- 1.The learned Special Judge for trial of offences under POCSO Act,
Virudhunagar District at Srivilliputhur.
- 2.The Deputy Superintendent of Police,
Virudhunagar Division,
Virudhunagar.
3. The Inspector of Police,
AWPS, Virudhunagar.
- 4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
5. The Section Officer,
Criminal Section(Records),
Madurai Bench of Madras High Court,
Madurai.



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K.K.RAMAKRISHNAN,J.

PJL/sbn

Predelivery Judgment made in
CRL.A(MD).No.428 of 2022

12.03.2024