

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

TUESDAY, THE 3RD DAY OF NOVEMBER 2015/12TH KARTHIKA, 1937

CRL.A.No. 898 of 2015

**AGAINST THE JUDGMENT IN SC 901/2014 of D.C. & SESSIONS COURT, KASARAGOD
DATED 08-09-2015**

CRIME NO.503/2014 OF KUMBLA POLICE STATION, KASARAGOD

APPELLANT/ACCUSED :-

**RIZWAN RANA, AGED 20 YEARS,
S/O.GULSHAR @ LILLAKHAN, RESIDING AT HOUSE NO.303,
AMBETHARINDAR VILLAGE, GADIPIKTHA,
SHAMILI DISTRICT, UTHARPRADESH.**

BY ADV. SRI.KODOTH SREEDHARAN

RESPONDENTS/COMPLAINANT :-

**STATE OF KERALA,
REPRESENTED BY THE SHO, KUMBALA,
THROUGH THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM-682 031.**

R BY SMT. MADHUBEN, PUBLIC PROSECUTOR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

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P.UBAID, J.

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Crl.Appeal No.898 of 2015
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Dated this the 3rd day of November, 2015

ORDER

The appellant herein faced prosecution before the Court of Session, Kasaragod (Special Court for the trial of offences against women and children) on a charge under Section 376 (1) IPC, and under Section 5 read with Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, on the allegation that at about 1.30 p.m. on 02.10.2014 he sexually assaulted a small minor girl aged 12 years at her residence, and also subjected her to sexual intercourse, when he happened to visit the said house as part of his business as a trader of textile goods. The accused pleaded not guilty to the charge framed by the trial court, and claimed to be tried. The prosecution examined twelve witnesses including the victim of offence, and also proved the Ext.P1 to Ext.P13 documents. MO1 to MO3 properties

were also identified and marked during trial. When examined under Section 313 Cr.P.C., the accused denied the incriminating circumstances, and projected a defence of total denial. On an appreciation of the evidence, the learned trial Judge found the accused not guilty under Section 376(1) IPC, and also under Section 6 of the POCSO Act. However, he was found guilty of having committed the lesser offence defined under Section 7 of the POCSO Act, and was accordingly convicted under Section 8 of the POCSO Act. On conviction he was sentenced to undergo simple imprisonment for three years, and to pay a fine amount of Rs.25,000/- under Section 8 of the POCSO Act, by judgment dated 8.9.2015. Aggrieved by the judgment of conviction, the accused has come up in appeal.

2. When this appeal came up for hearing, the learned counsel for the appellant submitted that the conviction in this case without any corroborative evidence is illegal, that the victim of offence has not properly identified the accused during trial, and that when there is a finding of not guilty against him under Section 376 IPC, and also under Section 6

of the POCSO Act as alleged in the Court charge, a conviction under Section 8 of the POCSO Act is not possible under the law, in view of the bar under Section 222(4) Cr.P.C.

3. On facts, regarding the evidence given by the victim of offence, much arguments were not made by the learned counsel. However, let me see whether the evidence given by the victim as PW1 is convincing and acceptable. The victim was aged only 12 years on the date of the alleged incident. She has given definite and convincing evidence that when she was alone at her house, the accused came there for the sale of textile goods, and he asked for a glass of water. When she brought water, the accused caught hold of her right hand and forcibly embraced her. She somehow wriggled out, escaped from the accused, and ran to the adjacent house. This is the evidence given by the victim in examination in chief. As regards the offence of rape alleged by the prosecution also the victim gave evidence, but the said evidence was not accepted by the trial court. So let me confine the discussion to the factual aspects concerning the sexual assault alleged by the prosecution. As rightly found

by the trial court, the offence under Section 376 IPC stands not proved in this case by satisfactory and believable evidence. But on an appreciation of the evidence given by the victim as PW1, I find that the offence of sexual assault as defined under Section 7 of the POCSO Act stands well proved.

4. On an appreciation of the evidence given by the victim, I find that she was sexually assaulted by the accused. Sexual assault is defined under Section 7 of the POCSO Act, that whoever, with sexual intent, touches the vagina, penis, anus or breast of a child, or makes a child touch the vagina, penis, anus or breast of such person, or any other person, or does any other act with sexual intent which involves physical contact, is said to commit sexual assault. Section 8 of the POCSO Act prescribes the punishment for the offence defined under Section 7. The offence proved in this case comes under the second part of Section 7 of the POCSO Act, constituting any act done with sexual intent, involving physical contact. The victim of offence has given clear evidence that she was caught hold of and embraced by the

accused with sexual intent. This will very well come under Section 7 of the POCSO Act, punishable under Section 8.

5. One aspect argued by the defence is that the accused was not properly identified by the victim. On an examination of the evidence given by the victim, I find that the person who molested her was well identified by the victim during trial. She identified the accused in the dock. As regards identification of the accused, the position stands well settled by the Honourable Supreme Court. The argument made by the learned counsel is that test identification parade was not conducted in this case to identify the accused. It stands well settled that if the victim had sufficient time; to have the face and physical features of the assailant imprinted in her mind, identification of the assailant or accused made by the victim in Court cannot be assailed on the ground that test identification parade was not conducted. In this case, I am well satisfied that the victim had well seen, and identified the accused when he came at her residence. The victim had enough time to have the face and physical features of the accused imprinted in her mind. I

find that the assailant stands well identified by the victim in this case.

6. Now let me come to the legal aspect argued by the appellant. The learned counsel argued vehemently that when the finding on a charge under Section 6 of the POCSO Act is in favour of the accused, a conviction for the lesser offence punishable under Section 8 of the POCSO Act is not possible, in view of the bar contained in Section 222(4) of the Code of Criminal Procedure.

7. Sub Section (1) of Section 222 Cr.P.C. provides that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. The prosecution relies on Sub Section (1) to sustain the conviction in this case under Section 8 of the POCSO Act, that though the major offence is not proved by the prosecution, a lesser offence, meant under section 222 (1) Cr.P.C., stands proved, and so there is nothing illegal in

the conviction made by the trial court. Sub Section(4) of Section 222 Cr.P.C. provides that nothing in Section 222 shall be deemed to authorise a conviction for any minor offence where the conditions required for the initiation of proceeding in respect of that minor offence have not been satisfied. The purport of Sub Section (4) is very clear. Sub Section (1) authorises conviction for a minor offence or a lessor offence, when the major offence is not proved. But, Sub Section (4) contains a prohibition that if initiation of proceedings for the minor offence requires some procedural formalities, or some conditions, there cannot be a conviction for such lesser offence, when such requisite conditions are not complied with. For example, if a prosecution where the minor offence proved requires prosecution sanction, there cannot be a conviction for the minor offence under Section 222(1) Cr.P.C., when there is no such prosecution sanction. So also, when the minor offence found by the Court is one regarding which cognizance is not possible otherwise than on complaint, a conviction for the said minor offence is not possible under Section 222(1) Cr.P.C. Thus, the purport of Sub Section (4) is

very clear that a conviction for a minor offence as authorised under Section 222(1) is not possible in cases where initiation of proceeding for such minor offence requires some conditions precedent. Here, the major offence alleged by the prosecution is punishable under Section 6 of the POCSO Act, and the minor offence found by the trial court is punishable under Section 8 of the POCSO Act as a case of mere sexual assault defined under Section 7 of POCSO Act.

8. It is true that the Court charge is under Section 6 of the POCSO Act. The minor offence, or the lesser offence, meant under Section 222(1) Cr.P.C. is offence of the same nature but lesser in degree and gravity. No doubt, the offence of mere sexual assault defined under Section 7 of the POCSO Act is lesser in gravity and degree to the offence of penetrative sexual assault defined under Section 5. The offence defined under Section 11 of the POCSO Act, and made punishable under Section 12 is again lesser in gravity. Thus, on an examination of the scheme of the various provisions of the Protection of Children from Sexual Offence Act it can be seen that various types of offence are defined,

and one is made lesser to the other in gravity. On an examination of the various provisions including Sections 7 and 8 of the POCSO Act, I find that the offence defined under Section 7 is definitely lesser in degree and gravity than the offence of aggravated penetrative sexual assault defined under Section 5 and made punishable under Section 6 of the POCSO Act.

9. As observed and found earlier, the only purport of Sub Section (4) of Section 222 Cr.P.C. is that when initiation of proceedings or prosecution for the lesser offence found by the trial court requires compliance of certain pre-requisite conditions, the Court cannot enter a finding of guilty and make a conviction for the said lesser offence, if those pre-requisite conditions are not complied with. Initiation of prosecution for the offence of sexual assault punishable under Section 8 of the POCSO Act does not involve any such pre-requisite conditions. As regards the offences punishable under the POCSO Act cognizance by the Special Court directly on complaint, or on a police report, is authorised under Section 33 of the Act. Sub Section (1) of Section 33

provides that the Special Court may take cognizance of any offence without the accused being committed to it upon a complaint of facts which constitute such offence, or upon a police report of such facts.

10. The learned counsel for the appellant relies on the decision of the Madhya Pradesh High Court (Division Bench) in **Murlidhar Agarwal v. State of Madhya Pradesh [2011 Crl.Journal 3478]** under Section 222(4) Cr.P.C. That is a case where the lesser offence found by the trial court requires some pre-requisite conditions including a definite complaint for cognizance. As regards the lesser offence found by the trial court in the said case, the Madhya Pradesh High Court found that such a prosecution is possible only on a complaint, and not on police report, and so a conviction for the said lesser offence is bad in view of the Section 222(4) Cr.P.C. There is no such situation here. Cognizance can be taken by the Court of Session, or the Special Court either on police report or on complaint, directly, under Section 6 or under Section 8. Initiation of prosecution under Section 8 of the POCSO Act does not require any pre-requisite condition.

I find no substance in the arguments made by the learned counsel on this legal aspect.

11. As already found, the lesser offence punishable under Section 8 of the POCSO Act stands proved in this case, though the offence of rape, or the offence defined under Section 5 of the POCSO Act is not proved. I find that the accused was rightly convicted by the trial court under Section 8 of the POCSO Act, as authorised under Section 222 (1)Cr.P.C. On facts, a clear case of sexual assault defined under Section 7 of the POCSO Act stands well proved by the evidence of the victim. I find no ground or reason to interfere in the findings made by the trial court, or the conviction made by the trial court. This appeal is liable to be dismissed as meritless.

In the result, this Court is reasoned to dismiss this appeal as merit less.

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P.A. TO JUDGE

Sd/-
P.UBAID
JUDGE