

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.08.2016

PRONOUNCED ON : 27.04.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

and

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Criminal Appeal No.401 of 2015

Ganesan .. Appellant/Accused

Vs.

State, rep.by
The Inspector of Police,
Sathyamangalam Police Station,
Erode. (Crime No.244 of 2013) .. Respondent/Complainant

PRAYER: Appeal is filed under Section 374(2) of the Code of Criminal Procedure against the Judgment of conviction and sentence, dated 14.07.2014 made in S.C.No.123 of 2013 on the file of the learned Sessions Judge, Magalir Needhi Mandram (Fast Track Court), Erode.

For Appellant : Mr.V.C.Janarthanam,
Legal Aid Counsel

For Respondent : Mr.E.Raja,
Additional Public Prosecutor.

J U D G M E N T

(Judgment of the Court was delivered by S.Nagamuthu,J.)

This is a case of child abuse. The appellant herein is the sole accused in S.C.No.123 of 2013 on the file of the learned Sessions Judge, Magalir Needhi Mandram (Fast Track Court), Erode. He stood charged for the offences punishable under Section 3(a) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Section 506(i) of the Indian Penal Code. After trial, by Judgment dated 14.07.2014, the Trial Court has found the appellant guilty under both the charges, convicted thereunder and sentenced him to undergo

imprisonment for life and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for one for the offence under Section 3(a) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 and imposed a fine of Rs.1000/, in default to undergo simple imprisonment for one month for the offence under Section 506(i) of the Indian Penal Code. The trial court further directed the State Government to pay Rs.1,00,000/-, as compensation, from and out of the Victim Assistance Fund. Challenging the said conviction and sentence, the appellant is before this Court with this appeal.

2. The case of the prosecution, in brief, is as follows:

(a) The victim in this case is an young girl who at the time of occurrence was hardly 7 years old. Her biological parents are not known. When she was lying as a new born child, in front of a Government Hospital, P.W.1, a woman, who had already two sons, took her into her fold. Without knowing the legal consequences, she did not inform about the said fact to anyone. Instead, she kept the child (P.W.2) in her custody and treated her as her daughter. P.W.2 had grown and she was seven years old, doing 2nd standard in a Municipal School at Sathyamangalam in Erode District. The sons of P.W.1 got married already and they were living separately. Thus, P.W.1 was living along with P.W.2, the child, in a rental house, which is behind Sathyamangalam Police Station. The accused, aged more than 58 years, was residing in his own house just by the side of the rented house of P.W.1. Thus, P.W.1 had acquaintance with the accused.

(b) P.W.1 was eking out her livelihood by selling fruits, like apple and orange, in a make shift shop, by the side of the road, near Municipal Middle School. On 01.05.2013, in the evening, P.W.1 was in her fruit stall. The child, P.W.2, was with P.W.1. Around 7.00 p.m. to 7.30 p.m., it started raining. There was also a heavy wind. P.W.1 carried P.W.2 on her shoulders and stood near the shop. At that time, it is alleged that the accused came there, from east. He told P.W.1 that he would safely take P.W.2 and keep her at his house, so that she could come and take the child after the rain and wind stopped. Believing the words of the accused, P.W.1 allowed him to take P.W.2 with him. Accordingly, around 7.30 p.m., the accused took P.W.2-child from the shop under the pretext of taking her to his house for safety.

(c) After the rain had stopped, P.W.1 closed the shop a little before 9.00 p.m. and went to the house of the accused to take P.W.2 to her house. At that time, P.W.1 found P.W.2 very tired. P.W.1 did not take it seriously. P.W.2 did not make any complaint for about three days. On 04.05.2013, in the morning, when P.W.1 went to toilet to attend nature's call, she complained of pain in her private parts. P.W.1, at that time, noticed that there were injuries on the vagina of P.W.2. P.W.2 also complained of abdominal pain. When P.W.1 enquired P.W.2,

she told that the accused, on taking her to his house on 01.05.2013, made her to lie down, removed her clothes and lied on her and attempted to insert his penis into her vagina. In the said attempt, according to her, she sustained injuries.

(d) P.W.1, immediately, arranged for an 108 Ambulance and took P.W.2 to Government Hospital at Sathyamangalam. P.W.7, Dr.Kalapriya, examined P.W.2 at 3.00 p.m. on 04.05.2013, at the Government Hospital, Sathyamangalam. P.W.1 told her that P.W.2 was exploited by a neighbour on 01.05.2013 at 7.30 p.m. P.W.7, on examination, noticed the following injuries:

"1.Redness/swelling, both labia.

2.Blisters present on labia.

3.Tear on ? hymen."

Ex.P-4 is the Accident Register issued by P.W.7. She forwarded intimation to the Police.

(e) On receiving the intimation from the hospital, P.W.11, the then Inspector of Police, Sathyamangalam, went to the Government Hospital at Sathyamangalam. P.W.2, who was under treatment, was unable to speak, as she was under severe shock. Therefore, P.W.11 recorded the statement of P.W.1, returned to the Police Station and registered a case at 5.00 p.m. on 04.05.2013 in Crime No.244 of 2013, under Section 3 read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Section 506(ii) of the Indian Penal Code. Ex.P-1 is the complaint and Ex.P-13 is the FIR. He forwarded both the documents to court, which were received by the learned Judicial Magistrate at 1.30 a.m. on 05.05.2013.

(f) P.W.11, thereafter took up the case for investigation. At 5.45 a.m. on 05.05.2013, he went to the place of occurrence and prepared an observation mahazar and a rough sketch in the presence of P.W.5 and another witness. Then, P.W.11 examined P.Ws.1, 2 and few more witnesses and recorded their statements. On 05.05.2013, at 6.00 p.m., at Ayyappampalayam, Puliampatti Road, P.W.11 arrested the accused and forwarded him to the Court for judicial remand.

(g) On 06.05.2013, at 3.00 p.m., P.W.2 was taken to the Coimbatore Government Medical College Hospital for medical examination, with a police memo. P.W.8, Dr.Manonmani, examined her and found the following injuries.

"(i)Redness in upper and inner side of vagina.

(ii)0.5 x 0.2 cm aberration on the upper side of vagina;

(iii)Hymen was torn, in part;"

This doctor did not give any opinion regarding the injuries found on P.W.2. Neither any medical record pertaining to the examination conducted by P.W.8 has been produced in evidence.

(h) The accused was examined by P.W.10, on being produced by

the Police, on 08.05.2010. On examination, P.W.10, Dr.Senthilkumar, found him sexually potent to perform penile sexual intercourse with a woman. Ex.P-12 is the certificate issued by him. On completing the investigation, P.W.11 laid charge sheet against the accused.

3. Based on the above materials, the trial court framed charges against the accused, as detailed in paragraph No.1 of this judgment. The accused denied the same. In order to prove its case, the prosecution has examined as many as 11 witnesses, marked 18 documents and no material object was marked.

4. Out of the said witnesses, P.W.1, the mother of P.W.2-the victim, has stated that P.W.2 was lastly taken to his house by the accused at 07.30 p.m. on 01.05.2013. She has further stated that around 9.00 p.m., she went to the house of the accused to take P.W.2 and when she knocked at the doors of the house of the accused, the accused opened the door and ran away and then she took P.W.2 from the house of the accused. She has further stated that on 04.05.2013, P.W.2 complained of pain in her private parts and abdomen and then she noticed injuries and thereafter she took her to hospital and then made a complaint to the police.

5. P.W.2, the child in question, has stated that on the date of occurrence, she was in the shop of her mother, in the evening. She has further stated that at that time, it started raining and there was also heavy wind. Therefore, she went along with the accused to his house. On reaching the house, according to her, the accused made her to lie down and then inserted his male organ into her vagina. She has further stated that she cried. Thereafter, according to her, the accused closed her mouth with his hand and then he threatened her and warned her not to disclose about the same to anyone. She has further stated that the accused further warned her that he would kill her as well as her mother, if she disclosed the same to anyone. She has further stated that after few days, when she went to the washroom, while passing urine, she experienced pain and when her mother enquired, she told about the entire occurrence. P.W.1 has also stated that when she enquired, P.W.2 told about the entire occurrence and thereafter she took her to the hospital.

6. P.W.3 is a close relative of P.W.1. She was residing at Kumarapalayam. According to her, on the date of occurrence, she went to the shop of P.W.1 and at that time, P.W.2 was with P.W.1 and since it started raining and also there was heavy wind, the accused, who came to the said place, told P.W.1 that he would take the child and keep her safely at his house and believing the same, in her presence, P.W.1 allowed the accused to take P.W.2 with him. P.W.4 is a resident of Sathyamangalam. He has

stated that on the date of occurrence, around 7.30 p.m., when they were near a Vinayakar temple, near Sathyamangalam Police Station, they found the accused taking P.W.2 to his house and the accused told him that he was taking the child for safety because it was about to rain. P.W.5 has spoken about preparation of Ex.P-2, Observation Mahazar. P.W.6 is the Headmaster of Sathyamangalam Municipal Middle School, where P.W.2 was studying. According to him, in the school records, the date of birth of P.W.2 is stated as 08.01.2006. Ex.P-3 is the school certificate. P.W.7, Dr.Kalapriya, has stated that on 04.05.2013 at 3.00 p.m., when she was on duty at the Government Hospital, Sathyamangalm, P.W.2 was brought by P.W.1 for treatment and she was told by P.W.1 that P.W.2 was sexually exploited by a neighbour on 01.05.2013 at 7.30 p.m. She has further spoken about the injuries found on P.W.2. P.W.8, Dr.Manonmani, has stated that on being produced by the police on 06.05.2013 at 3.00 p.m., P.W.2 was examined by her. She has spoken about the injuries found on her but, she has not issued any certificate. P.W.9, Scientific Assistant, working in the Regional Forensic Lab at Coimbatore, has stated that he examined the vaginal smear and the dress materials collected from P.W.2 and found that there was no semen in the same. Ex.P-8 and Ex.P-9 are the certificates issued by him. P.W.10, Dr.Senthilkumar, has spoken about the medical examination conducted on the accused. He has stated that the accused was sexually potential and capable of performing penetrative sexual intercourse with a woman. P.W.11 has spoken about the registration of the case and the investigation done by him.

7. When the above incriminating materials were put to the accused under Section 313 of the Code of Criminal Procedure, he denied the same as false. On his side, he examined one Nagaraj as D.W.1. He has stated that he was the Taluk Surveyor of Sathyamangalam during the relevant period. He has produced the Field Measurement Plan as Ex.D-1 for Ward No.D, where the house of the accused and the house of P.W.1 are located. He has stated that the washroom of the house of the accused is just by the side of the house of P.W.1. The defence of the accused was a total denial.

8. Having considered all the above, the trial Court found the accused guilty, convicted and sentenced him as detailed in the first paragraph of this Judgment. Aggrieved by the same, the appellant is before this Court with this appeal.

9. The learned counsel for the appellant, who was originally on record, stopped making appearance, though this appeal came up for hearing on several occasions and finally this Court was thus, impelled to appoint a legal aid counsel. Accordingly, Mr.V.C.Janarthanam was appointed as legal aid counsel.

10. We heard Mr.V.C.Janarthanam, the learned counsel for the appellant and Mr.E.Raja, learned Additional Public Prosecutor and we have also perused the records, carefully.

11. In order to prove the guilt of the accused, the prosecution mainly relies on the evidence of P.Ws.1 to 3, in this case. P.W.1, the mother of P.W.2, in her evidence has stated that because there was rain and heavy wind, she allowed the accused to take P.W.2 to his house for safety. This was witnessed by P.W.3 also. P.W.2, the victim child, has also stated that she was taken by the accused to his house. Regarding this fact spoken by P.Ws.1 to 3, there can be no doubt because nothing has been elicited in the cross-examination of these three witnesses to doubt the said fact spoken by them. Neither P.W.1 nor P.W.3 had any grudge against the accused so as to suspect their credibility. They are as independent as the others are. Thus, from the evidence of P.Ws.1 to 3, it has been clearly established that this appellant/accused alone took P.W.2 with him to his house on the date of occurrence, around 7.30 p.m., under the guise of taking her to his house for safety purpose.

12. Around 9.30 p.m., on the date of occurrence, after closing her shop, P.W.1 had gone to the house of the accused. It is her evidence that when she knocked at the door of the accused, the accused opened the door and ran away. This fact is disputed by the accused, very seriously. According to the learned counsel for the appellant, it is not at all the case of the prosecution that the accused ran away from the house. It is the positive case projected by the prosecution that P.W.1 came to the house of the accused and took the child in the normal course. Though it is stated by P.W.1 that the accused ran away from the house, we find that there is no truth in the said allegation because it is only an improvement made by her during the course of trial as she had not stated so at all either in Ex.P-1 or during investigation. Therefore, we reject the evidence of P.W.1 only on the aspect that the accused ran away from the house, when she came to his house to take P.W.2. We conclude that P.W.1 took P.W.2 in the normal course, without having any slightest suspicion against the accused.

13. It is in evidence that from 01.05.2013 to 04.05.2013, P.W.2 led a normal life and there was no complaint at all. It was only in the morning of 04.05.2013, when P.W.2 went to toilet to answer nature's call, she felt severe pain, both in her vagina and in her abdomen, out of which she cried. P.W.1, at that time only noticed that there were injuries on the vagina of P.W.2. When she enquired, according to her, P.W.2 told her that after taking her to his house, the accused made her to lie

down, removed her dress and thereafter attempted to insert his penis into her vagina. P.W.2 has also stated that she made such a statement to P.W.1. Thus, the evidence of P.W.2 that she told P.W.1 about the occurrence is corroborated by P.W.1. Thus, it stands proved that P.W.2 told P.W.1 that she was sexually exploited by the accused on 01.05.2013. This is the earliest information passed on by P.W.2 to P.W.1.

14. Thereafter, P.W.2 was taken to the hospital. P.W.7, Dr.Kalapriya, examined her and found injuries on her vagina and other parts of the body. When she was taken to the Government Hospital at Coimbatore, P.W.8, Dr.Manonmani, also found such injuries. There were ruptures on hymen in the vagina of P.W.2 and there were injuries on her vagina, indicating that her vagina had been manipulated. But, unfortunately, neither P.W.7 nor P.W.8 had given any opinion that P.W.2 has been subjected to either full or partial sexual intercourse. It is unfortunate that the medical records pertaining to the examination conducted by PW.8 have not been proved in evidence. Neither any opinion was obtained from P.W.7 and P.W.8, in this regard. But, on that score, we cannot conclude that there is no proof that P.W.2 had been subjected to penetrative sexual assault. From the very fact that there were injuries such as extensive bruises, aberrations and contusions and also rupture of the hymen of the vagina of P.W.2, it could be safely concluded that P.W.2's vagina had been manipulated, manually by someone.

15. The next question is who manipulated her vagina and how? In order to prove that it was this accused who manipulated her vagina by inserting his penis into the same, the prosecution relies on the evidence of P.W.2. Once the evidence of P.W.2 is believed, there can be no difficulty in concluding that it was this accused who committed penetrative sexual assault on P.W.2, in terms of POCSO Act.

16. The Learned counsel appearing for the appellant would submit that the evidence of P.W.2 cannot be considered at all for any purpose, because the competence of P.W.2 was not at all examined by the trial court. He has taken us through the evidence of P.W.2. A perusal of the deposition of P.W.2 would go to show that P.W.2 was hardly seven years old at the time of giving evidence. The learned Sessions Judge did not make any endeavour to test her competence, as required under Section 118 of the Indian Evidence Act. In a mechanical fashion, the learned Sessions had administered oath on P.W.2, even without examining as to whether she was able to understand its nature. Thus, according to the learned counsel, the evidence of P.W.2 should be rejected in toto. But, the learned Additional Public Prosecutor would submit that of course it is true that the learned Sessions Judge had miserably failed to examine the competence of P.W.2 to be a witness and to test as to whether

P.W.2 was able to understand the nature of the oath which was administered on her. But, on that score, according to the learned Additional Public Prosecutor, the evidence of P.W.2 cannot be rejected. He would submit that from the narration of events by P.W.2 before the Court, it could be presumed that P.W.2 was competent, in terms of Section 118 of the Indian Evidence Act, to be a witness.

17. In order to resolve the above legal tangle, we may, first, refer to the proviso to Section 5 of the Indian Oaths Act, 1873, which reads as under:

"Provided that where the witness is a child under twelve years of age, and the Court or person having authority to examine such witness is of opinion that though he understands the duty of speaking the truth he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of S.6 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth."

The said proviso to Section 5 of the Indian Oaths Act, 1873, should be read along with Section 118 of the Indian Evidence Act, upon which reliance is made by the learned counsel for the appellant. Section 118 of the Indian Evidence Act reads as follows:

"118. Who may testify.--All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.--A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

18. These two provisions came to be considered by the Hon'ble Supreme Court in *Rameshwar, S/o.Kalyan Singh v. The State of Rajasthan*, reported in AIR 1952 SC 54, wherein, speaking for the Bench, Justice Vivian Bose held that an omission to administer, an oath, even to an adult, goes only to the credibility of the witness and not his competency. Thus, according to the Hon'ble Supreme Court, Section 5 of the Indian Oaths Act is all about the credibility of the witness and not of the competency of the said witness. As per the proviso to Section 5 of the Indian Oaths Act, in the case of a child below

the age of 12 years, the Court has to form its own opinion that though the witness may understand the duty of speaking the truth, he may not understand the nature of the oath or affirmation. If the court finds that the child is capable of understanding the nature of the oath or affirmation, then only oath can be administered on the child.

19. In this case, unfortunately, the learned Sessions Judge, without examining as to whether P.W.2 was capable of understanding the nature of the oath had, in a mechanical fashion, administered oath on P.W.2. In our considered view, since it relates only to the credibility of the witness, on the ground that the learned Sessions Judge had failed to examine the capability of P.W.2 to understand the nature of the oath, we cannot hold that the evidence of P.W.2 is inadmissible. Therefore, in our considered view, mere administration of oath on P.W.2 by the trial court, in a mechanical fashion, would not render the evidence of P.W.2 as inadmissible. It only leads to a further examination as to whether the evidence of P.W.2 is credible or not.

20. Competence of a witness is dealt with in Section 118 of the Indian Evidence Act. It is too well settled that every witness is competent unless the court considers that he is prevented from understanding the questions put to him or from giving rational answers by reason of tender age, extreme old age, disease, whether of body or mind, or any other cause of the same kind. From a plain reading of Section 118 of the Indian Evidence Act, as it has been consistently held by the Hon'ble Supreme Court, unless the Court considers otherwise, the witness is always competent. Since Indian Oaths Act has not added any additional ground of incompetency, Section 118 of the Indian Evidence Act must prevail and therefore the witness should pass the test of Section 118 of the Indian Evidence Act. In the above said judgment, the Hon'ble Supreme Court, while dealing with Section 118 of the Indian Evidence Act, referred to the Privy Council Judgment in Mohamed Sugul Esa v. The King reported in A.I.R.(33) 1946 P.C. 3 and held in paragraph 11 of the judgment as follows:

"11. I would add however that it is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate. In the

present case, it is plain that the learned Judge had the proviso in mind because he certified that the witness does not understand the nature of an oath and so did not administer one but despite that went on to take her evidence. It is also an important fact that the accused, who was represented by counsel, did not object. Had he raised the point the Judge would doubtless have made good the omission. I am of the opinion that Mr.Purni was a competent witness and that her evidence is admissible."

21. From the above judgment of the Hon'ble Supreme Court, it is crystal clear that mere omission by the trial judge to record a formal certificate that the witness was competent to be a witness would not result in an irresistible conclusion that she was incompetent. As we have already pointed out, a witness is always presumed to be competent. As held by the Hon'ble Supreme Court, had there been an objection raised by the learned counsel for the accused at the appropriate stage when P.W.2 was examined questioning her competency, the learned trial judge would have examined the same in further detail and then recorded a formal certificate. Learned counsel did not do so. Learned Trial Judge, from the various answers given by the witness, both during chief examination as well as during cross-examination, was of the view that the child was competent. This was in tune with the presumption, as provided under Section 118 of the Indian Evidence Act. To satisfy our judicial conscience, we have gone through the evidence of P.W.2 which runs to four pages. The narration of facts by her, with perfect cogency, the language of the witness and the quick flow of words without any break would all go to show that the presumption that she is competent to be a witness remains un-rebutted. In other words, we are fully convinced that P.W.2 was competent to be a witness. Though she was administered oath without examining the question as to whether she was capable of understanding the oath administered on her, on that score, we cannot reject the evidence of P.W.2, because her evidence, in our considered view, inspires the fullest confidence of this Court. Nothing has been brought on record to doubt the credibility P.W.2.

22. But, the learned counsel for the appellant would submit that for three days P.W.2 did not make any complaint nor did she disclose about the occurrence to P.W.1 or to anyone else. This is stated to be a delay on the part of P.W.2 in making the disclosure which, according to the learned counsel, would create doubts in the veracity of P.W.2. But, in our considered view, on this score, we cannot reject the evidence of P.W.2.

23. Sexual exploitation, in general, would render the victim to suffer unbearable pain both physical and mental and severe

trauma. If such a harm is caused to an adult, the victim may disclose about the harm to someone close to her or to the police. Even, the chances of an adult hesitating to disclose the same to someone out of fear for her future also cannot be stated to be uncommon. If the victim happens to be a child that too of seven years or less of age, she may not know that she has been harmed sexually by the assailant. Going by the experience with the knowledge of children, the maker of the Indian Penal Code thought it fit to exempt the children under the age of seven years from punishment. It is stated that an infant under the age of 7 years of age cannot be endowed with any discretion. Thus, the law itself presumes that a child of seven years may not know the consequences of what the child does or what has been done to the child. If the harm caused to the child causes bodily pain then only the child would cry and disclose the happenings to her. Since, the child would not experience any mental pain, naturally, she would not disclose about the harm caused to her to anyone. This presumption is based on the natural conduct of a child of seven years or less. Section 114 of the Evidence Act states that the Court may presume the existence of the fact from out of the natural human conduct. Thus, going by the natural human conduct of a child, at the age of seven against whom a bodily harm has been caused, in the instant case, we have to presume that there was nothing unnatural on the part of P.W.2 in not disclosing about the occurrence to either P.W.1 or anyone until she experienced pain on 04.05.2013. Of course, this presumption is rebuttable. But the accused has not brought on record anything to rebut the above presumption. Therefore, we hold that though there was delay on the part of P.W.2 in disclosing about the occurrence to P.W.1 and thus she kept silence for three days, that would not render her evidence doubtful.

24. The evidence of P.W.2 draws adequate corroboration from the evidences of P.Ws.1 and 3 and the medical evidence. Of course the doctor was not called upon to say as to whether P.W.2 would have been subjected to penetrative sexual assault. But going by the nature of injuries found on the vagina of P.W.2, even in the absence of medical opinion, it can be safely concluded that the said injuries were caused only in the attempt made by the accused to insert his penis into the vagina of P.W.2 as spoken by her. Thus, the prosecution has clearly proved that the accused had committed penetrative sexual assault on P.W.2.

25. Now let us turn to Section 29 of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act'), which reads as follows:

"29. Presumption as to certain offences.--Where a person is prosecuted for committing or abetting or attempting to commit

any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."

26. In the instant case, from the evidences of P.Ws.1 to 3, and the medical evidence, it shall be presumed as required under Section 29 of the POCSO Act that the accused had committed the offence of penetrative sexual assault. Of course, the said presumption is rebuttable but, the accused has not rebutted the same by means of any evidence, either direct or indirect.

27. The learned counsel for the appellant would submit that from the evidence of D.W.1 it is crystal clear that the houses of the accused and P.W.1 were situated adjacent to each other because there was some boundary dispute in respect of the same between P.W.1 and the accused, this false case has been foisted against the accused the learned counsel contended. This story coined by the accused is too big a thing to be swallowed. In our considered view, no one, with ordinary prudence, would go to the extent of making such false complaint putting the modesty of the child in peril. Therefore, we reject this argument.

28. The learned counsel would next contend that P.W.2 had been tutored to give evidence against the accused. The learned counsel would rely on the general presumption which has received the recognition of the Courts in this country that a child is prone to tutoring. It is true that a child, owing to immature understanding, is prone to tutoring. The child in such an event may depose like a parrot as to what was tutored to her. But it cannot be lost sight of that there is a vast difference between tutoring and counseling. Tutoring, in common parlance, means inducing a person to say something which is untrue or about which the person tutored has got no personal knowledge, whereas, counseling means encouraging a person to come out with the truth.

29. Even in an adult, sexual abuse will cause intense feeling of embarrassment, fear and humiliation. A survivor of sexual abuse may even be afraid that she would not be believed by her family members if the abuser happens to be either a family member or a close relative of the survivor. This fear can keep the victim under silence without disclosing the abuse to anybody. At times, the survivor may allow her to be exploited repeatedly under threat by the abuser that he would expose her. Thus, there are so many reasons for even adult survivors of sexual abuse to keep silent without disclosing about the harm caused to her. This is in effect, a psychological and emotional phenomenon. In order to relieve such survivors from the said

trauma, the survivor may need intensive counseling by experts and the family members or the persons in whom the survivor reposes confidence.

30. Similarly, in the case of a child victim, it is quite common for the child survivor of sexual abuse to keep silent either due to fear for the abuser or their relationship with the abuser or without understanding the consequences of the sexual abuse. In such cases, the child victim may not disclose the occurrence to anyone or may even go to the extent of saying that nothing had happened to her. If such earliest statements of the victims are given weightage, then, one more real victim shall be the truth. Therefore, in order to bring out the truth, the child needs to be counseled intensively either by the parents or by their family members, teachers or the others with whom the child is very affectionate and also with a skilled professional counselor. If the child as a result of such counseling, comes out with the truth by making a disclosure statement after being relieved from the above inhibition, the evidence of the said child cannot be discarded without understanding the difference between counseling and tutoring.

31. What makes the evidence of a child unbelievable is really tutoring and not counseling. Counseling does not play the spoil sport. It plays a vital role to bring out the truth to light. Applying these well known ground realities to the facts of this case, though it is true that P.W.2 did not disclose about the occurrence for three days, on that score, her evidence cannot be rejected. It is quite obvious that after an occasion arose for P.W.1 to enquire her when P.W.2 cried out of pain, she promptly disclosed about the occurrence. Thus, by applying the general presumption that a child is prone to tutoring, in this case, we cannot reject the evidence of P.W.2. We firmly believe that P.W.1 had not tutored P.W.2 to make any false statement. Instead, P.W.1 had only brought out the truth from the mouth of P.W.2 by counseling. Thus, in our considered view, the Courts of law who are required to appreciate the evidence of a child should find the benchmark between tutoring and counseling and doubt the evidence of the child if only the Court is fully convinced that the child has been tutored and not counseled. Therefore, we find no reason to reject the evidence of P.W.2.

32. Thus, from the evidence adduced by the prosecution, in particular, the evidence of P.W.2, the prosecution has proved that the accused had committed penetrative sexual assault on P.W.2. The trial Court has convicted the accused under Section 4 of the POCSO Act, though the accused had committed penetrative sexual assault on P.W.2 who was hardly seven years (See Section 5(m) of the Act). The trial Court ought to have framed a charge under Section 6 of the Act and convicted him accordingly. But, at this stage, when there is no appeal by the State, we can not

convict him under Section 6 of the Act. So, we are impelled to confirm the conviction under Section 4 of the Act. The Trial Court has rightly convicted the accused under Section 506(i) I.P.C.

33. Now turning to the quantum of punishment, at the time of occurrence, the accused was aged 57 years. He has got no bad antecedents. There are lot of chances for reformation. Driven by lust, the accused had committed this heinous crime. The jail life would have reformed him. Having regard to these aggravating as well as mitigating circumstances, we are of the view that sentencing the accused to undergo rigorous imprisonment for seven years and to pay a fine of Rs.20,000/- in default to undergo rigorous imprisonment for six months for the offence under Section 4 of the POCSO Act. And to sentence him to undergo rigorous imprisonment for one year and pay a fine of Rs.1000 in default to undergo rigorous imprisonment for four weeks for the offence under Section 506(i) I.P.C. would meet the ends of justice.

34. In the result, the Criminal Appeal is partly allowed, conviction of the accused under Section 4 of the POCSO Act and Section 506(i) I.P.C. are confirmed. We however modify the sentence imposed on him for these offences and sentence him to under rigorous imprisonment for seven years and to pay a fine of Rs.20,000/- in default to undergo rigorous imprisonment for six months for the offence under Section 4 of the POCSO Act and to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,000/- in default to undergo rigorous imprisonment for four weeks for the offence under Section 506(i) I.P.C. We direct that these sentences shall run concurrently and the period of sentence already undergone shall be given set off. If the accused has already paid the fine amount as imposed by the trial court, the same shall be adjusted towards the fine now imposed by this Court and the balance of fine amount, if any, shall be refunded to the accused. The entire fine amount shall be paid to P.W.2 through P.W.1 as compensation.

35. Before parting with this judgment, we would like to record our appreciation for the service rendered by Mr.V.C.Janarthanam, the learned counsel, who assisted this Court as Legal Aid Counsel. We also request the Legal Services Authority to pay his remuneration, as per the existing regulations.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

To

1.The Judicial Magistrate,
Sathyamangalam.

2.-do-thro'The Chief Judicial Magistrate,
Erode.

3. The Sessions Judge,
Magalir Needhi Mandram (Fast Track Court),
Erode.

4.The Principal and District Session Judge,
Erode.

5. The Inspector of Police,
Sathyamangalam Police Station,
Erode.

6.The Superintendent of Prisons,
Central Prison, Coimbatore.

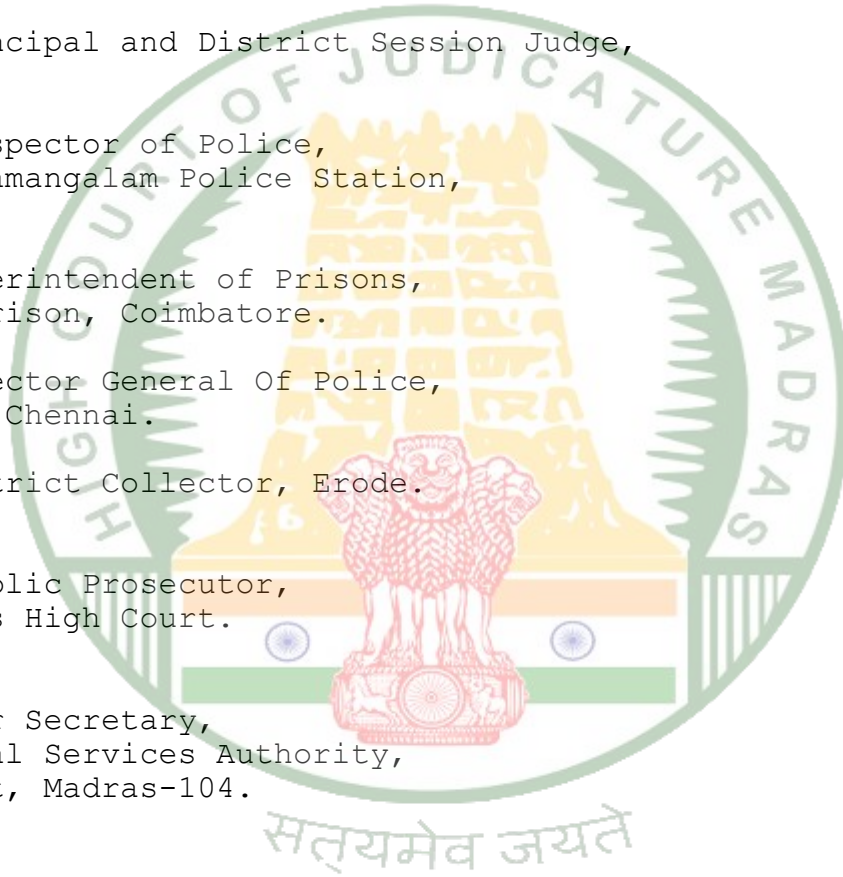
7.The Director General Of Police,
Mylapore, Chennai.

8.The District Collector, Erode.

9. The Public Prosecutor,
Madras High Court.

copy to:

The Member Secretary,
State Legal Services Authority,
High Court, Madras-104.



Cr1.A.No.401 of 2015

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