



WEB COPY



Crl.A.No.328 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.12.2022

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.A.No.328 of 2016

Pitchaipillai

.. Appellant

VS

The State rep. by
The Inspector of Police
Kuvagam Police Station
Ariyalur District.
(Crime No.121 of 2015)

.. Respondent

Prayer: Criminal Appeal filed under Section 374 of CRPC, to call for the records and set aside the conviction and sentence imposed against the appellant on 02.04.2016 in Spl.S.C.No.4 of 2016 (on the file of the Fast Track Mahila Court, Ariyalur) and acquit the appellant.

For the Appellant : Mr.P.Pugalenth

For the Respondent : Mr.R.Kishore Kumar
Government Advocate (Crl. Side)



Crl.A.No.328 of 2016

WEB COPY

ORDER

On 25.09.2015, when **P.W.9**, *Kala*, the Sub-Inspector of Police was on duty at Kuvagam Police Station, **P.W.1** appeared before her and lodged a complaint to the effect that she has a daughter (victim in this case), who is aged about 16 years and she cannot speak and she is differently abled. On 19.09.2015, her husband had gone out of town for work and she was not at home as she had gone for MNREGA work. At about 12.00 noon, when her daughter was alone in the house, the accused entered the house and attempted to rape her. Since the child raised an alarm, the neighbor by name, *Kalayaperumal* came to rescue the child. Her husband returned town from work only on 24.09.2015, hence, after his arrival, she is lodging the complaint. On the said allegations, a case in Crime No.121 of 2015 was registered for the alleged offences under Section 9(k) r/w Section 10 of the POCSO Act, 2012 and **P.W.9** completed the investigation and laid a final report, proposing the accused guilty of offences under Section 451 of the Indian Penal Code and under Section 9(k) r/w Section 10 of the POCSO Act, 2012.

2. The final report was taken on file as Spl.S.C.No.4 of 2016 by the



Crl.A.No.328 of 2016

WEB COPY

Magalir Fast Track Court, Ariyalur and on 23.02.2016, charges were framed under Section 451 of the Indian Penal Code and under Section 9(k) r/w Section 10 of the POCSO Act, 2012. Upon being questioned, the accused denied the charges and stood trial.

3. In order to bring home the charges, the prosecution examined one *Parvathy*, the mother of the victim child. She spoke about the fact that she came to the house in the evening and then the child cried to her and after ascertaining the facts from the child as well as from the neighbor, she waited for her husband to return to town from work and thereafter, lodged a complaint. The victim child was examined as **P.W.2**. The child was examined with the help of **P.W.3**, the Special Teacher. The victim child, though mentally retarded, she was able to speak in bits and pieces and the words spoken were understandable by the Court itself. The victim child identified the accused and deposed that he came inside the house and sexually assaulted her by pressing her breast, kissing on her mouth, etc. At that time, she had raised an alarm and the neighbor **P.W.4** came to her rescue. The victim child also identified the neighbor **P.W.4**.



Crl.A.No.328 of 2016

WEB COPY

4. One *Arokiyamary*, the Special Teacher, who was assisting the police in recording the statement and also was present in the Court while the child was examined, was examined as **P.W.3**. The said *Kaliyaperumal*, the neighbor who rescued the child and who admonished the accused for doing such an act to the child was examined as **P.W.4**. The father of the child was examined as **P.W.5**, who deposed that after returning home from work after four days, upon hearing the incident, he accompanied **P.W.1** in giving the complaint. One *Kannusamy*, who is the witness to the observation mahazar was examined as **P.W.6**. The Doctor, who examined the victim child was examined as **P.W.7**. One *Mangaiyarkarasi*, the Head Master of the Primary School, from where the school records of the child were summoned and marked was examined as **P.W.8**. The Investigating Officer was finally examined as **P.W.9**.

5. On behalf of the prosecution, the complaint was marked as **Exhibit P.1**. The 164 statement given by **P.W.1** before the learned Magistrate was marked as **Exhibit P.2**. The education qualification certificate of **P.W.3** was marked as **Exhibit P.3**. The passbook issued to the victim child at the Rehabilitation Centre which shows the mental



Crl.A.No.328 of 2016

WEB COPY

retardation level of the victim child is at 80%, was marked as ***Exhibit P.4.***

The rough sketch was marked as ***Exhibit P.5.*** The observation mahazar was marked as ***Exhibit P.6.*** The Accident Register copy for the treatment of the victim child was marked as ***Exhibit P.7.*** The application given on behalf of the child for admission into school was marked as ***Exhibit P.8.*** A copy of the admission register of the school was marked as ***Exhibit P.9.*** The transfer certificate extract was marked as ***Exhibit P.10*** and the First Information Report was marked as ***Exhibit P.11.*** Thereafter, upon being questioned about the material evidence and the incriminating circumstances on record, the accused denied the same as false. Thereafter, no evidence was let in on behalf of the defence.

6. The Trial Court, thereafter proceeded to hear the learned Special Public Prosecutor on behalf of the prosecution and the learned counsel for the accused and by a judgment dated 12.04.2016, held that when the school records have been marked, the prosecution has proved that the child was born on 03.05.1999 and thereafter held that the child was within the age of 18 years and rejected the contention of the accused based on the opinion given by the Dentist, who was not examined. The Trial Court



Crl.A.No.328 of 2016

WEB COPY

concluded that the victim child was a child as per Section 2(1)(d) of the POCSO Act, 2012. Thereafter, the Trial Court considered whether the charge against the accused is proved. Considering the victim child **P.W.2's** evidence and the evidence of **P.W.4**, coupled with the corroborative evidence of **P.W.1** and **P.W.7**, the Trial Court held that the prosecution proved the offences beyond reasonable doubt and found that the accused has committed the offences punishable under Section 9(k) r/w Section 10 of the POCSO Act, 2012. Since the accused had entered the house of the victim child for commission of the said offences, the Trial Court also found the accused guilty for the offences under Section 451 of the Indian Penal Code and imposed sentence of rigorous imprisonment for a period of one year and fine of Rs.1,000/- and for the offences under Section 10 of the POCSO Act, 2012, imposed a punishment of 5 years rigorous imprisonment and fine of Rs.5,000/- and in default of payment of fine, to undergo one year simple imprisonment. Out of the fine amount paid, a sum of Rs.5,000/- was ordered to be paid as compensation to the victim child. Aggrieved by the said punishment, this appeal is preferred by the appellant / accused.



Crl.A.No.328 of 2016

WEB COPY

7. Heard *Mr.P.Pugalenth*i, learned counsel for the appellant / accused and *Mr.R.Kishore Kumar*, learned Government Advocate (Crl. Side) on behalf of the prosecution.

8. *Mr.P.Pugalenth*i, taking this Court through the evidence on record, would contend that in this case, firstly, the prosecution has failed to establish that the child was below 18 years of age. **P.W.1**, the mother, has admitted in the cross examination that the child did not have a birth certificate and that they had approximately given the age of the child at the time of school admission. Even in the cross examination of **P.W.8**, Head Master, she also admitted that the entry in the school records were not made based on any birth certificate and there were chances that the parents of the child had given lesser age because the child was already mentally retarded. The learned counsel would further submit that when the Investigating Officer had therefore entertained the doubt and taken the help of the medical experts and when the Dentist had examined the child and had given a report that the child will be more than 18 years of age, which is clearly demonstrated in **Exhibit P.7**, and when the said Dentist is not examined and the prosecution is burking the said piece of evidence,



Crl.A.No.328 of 2016

the accused would be entitled to the benefit of doubt. The learned counsel submitted that by cross examining the parents of the child and the Head Master of the School, the defence has established that there is doubt in the date of birth of the child and that whether the victim was a child within the meaning of Section 2(1)(d) of the POCSO Act, 2012 and therefore, the appellant / accused is entitled for the benefit of doubt.

9. The learned counsel would also contend that the school records clearly shows that the child had scored more than 35 marks and in some subjects, have scored 65, 68, etc., which would cause very grave doubt as to whether the child is mentally retarded or not. As a matter of fact, **P.W.4** refers the child as “**உனமைப்பெண்**”, therefore, whether the child was having any hearing and speech impairment or whether the child was really mentally retarded is not clearly established in this case. He would further submit that the mere production of the passbook of the child issued by the Rehabilitation Centre itself is not enough. **P.W.7** Doctor, is not a competent Psychiatrist to ascertain whether the child was mentally retarded or not. Therefore, learned counsel would submit that this is a case in which, the prosecution has not established beyond doubt that the child



Crl.A.No.328 of 2016

WEB COPY

was mentally retarded and therefore, the Trial Court ought not to have convicted the petitioner for the offences under Section 9(k) r/w Section 10 of the POCSO Act, 2012 and therefore, would pray that the appeal be allowed and the accused be acquitted.

10. *Per contra*, Mr.R.Kishore Kumar, learned Government Advocate (Crl. Side) would submit that in this case, the prosecution has produced the school records of the child. The question whether the victim is a child or not, within the meaning of POCSO Act, is to be determined with the reference of the Rules framed under the Juvenile Justice (Care and Protection of Children) Act, 2015. As per the same, the first preference has to be given to the SSLC (10th Std.) certificate and if the same is not available, the school records and if the same is not available, birth certificate and if these records are not available, the medical opinion has to be resorted to. Even though, in this case, during the course of the investigation, the child was subjected to medical examination, since the school records were available, there was no necessity for examining the Dentist or proving the medical age of the child. When the school records, including the admission form which happened in the year 2004, well



Crl.A.No.328 of 2016

WEB COPY

before the commission of the offence in the year 2015, is produced, no doubt can be entertained at the insistence of the accused as to the school records. The entire records right from the admission of the child, up to the transfer certificate would provide the date of birth of the child. The date of birth is also entered in the passbook given to the child at the Rehabilitation Centre. Therefore, he would submit that by examining the school Head Master viz., **P.W.8**, the prosecution has proved beyond doubt the date of birth of the child.

11. The learned Government Advocate (Crl. Side) would submit that the Government has framed beneficial schemes for follow up, giving treatment and also rehabilitation of differently abled persons. Mentally retarded children are also included in the said category. The said Council has a Board of Doctors who examine and ascertain the nature of disability as well as the percentage of disability. The said competent Medical Board, which includes the appropriate expert also had examined the child and it is clearly stated in column No.4 of the **Exhibit P.4** passbook that the child is mentally retarded and the mental retardation of the victim child is 80%. The said evidence by itself is enough to establish that the child is mentally



Crl.A.No.328 of 2016

WEB COPY

retarded. To corroborate the same, **P.W.1**, the mother, **P.W.5**, the father also have clearly deposed that the child is mentally retarded. The said fact is also confirmed by **P.W.3**, the Special Teacher. Even the Trial Court while recording the evidence, observed that the child is mentally retarded and the manner in which the victim child behaved are all categorically recorded while recording the evidence. Therefore, he would submit that the prosecution has also proved that the child is mentally retarded. Once the above two factors are proved, by the evidence of **P.W.2**, the victim child and the evidence of **P.W.4 Kalaiyaperumal**, who caught the accused hiding himself in the pooja room in the victim's house and who also admonished him and passed on the information to the parents of the child, corroborated with the evidence of **P.W.1** mother, categorically prove the case and therefore, when the prosecution has proved the case beyond any doubt, the Trial Court has rightly convicted the petitioner and since only minimum punishment has been awarded, the judgment of the Trial Court does not need any interference.

12. I have considered the rival submissions made on either side and perused the material records of this case.



WEB COPY

13. The first question which arises for consideration in this appeal is that whether or not the prosecution has proved that the child is less than 18 years of age. In this case, the prosecution did not examine any Psychiatrist to prove the mental age of the child and therefore, this Court has to consider the physical age of the child. As per the prosecution, the child was less than 18 years of age. As rightly contended by the learned Government Advocate, as per the Act and the Rules framed thereunder, the provisions of the Juvenile Justice Rules has to be followed for the purpose of establishing the age of the victim child. In this regard, it is useful to refer to paragraphs 17 to 22 of the recent judgment of the Hon'ble Supreme Court of India in **XYZ vs Abhisheik and another¹**, which reads as follows:

“17. Before proceeding with our analysis, it is necessary to consider the relevant legal provisions. The Juvenile Justice (Care and Protection of Children) Act, 2015 is a sequel to the now repealed 2000 Act. Section 7-A of the 2000 Act provided the procedure to be followed when a claim of juvenility is raised before any court:

“7-A Procedure to be followed when claim of juvenility is raised before any court:

¹ 2022 SCC Online SC 1200



(1) Whenever a claim of juvenility is raised before any court or a court is of opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not on affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the Rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect.”

18. Rule 12(3) of the 2007 Rules provides the procedure for determining the age by a court or by the Juvenile Justice Board. The rule is extracted below:

“12. Procedure to be followed in determination of age

- (1) (2)

(3) In every case concerning a child or juvenile in



conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses a(i), (ii), (iii) or



WEB COPY



Crl.A.No.328 of 2016

in the absence whereof, clause (b) shall be conclusive proof of the age as regards such child or the juvenile in conflict with law.”

19. Rule 12(3)(a) of the 2007 Rules provides that for the purposes of the ‘age determination enquiry’ of a child or juvenile, evidence may be obtained by relying upon the following documents : (i) matriculation or equivalent certificates; (ii) date of birth certificate from school first attended; or (iii) birth certificate given by corporation or municipal authority or panchayat. At the end of sub-clauses (i) and (ii) of clause (a) the rule uses the expression “and in the absence whereof”. Moreover, in the absence of any of the abovementioned three documents, medical opinion could be sought from a duly constituted Medical Board.

20. In Ashwani Kumar Saxena v. State of Madhya Pradesh_a two-judge bench of this Court considered the provisions of Section 7-A of the 2000 Act along with rule 12(3)(a) of the 2007 Rules. The court held that it is only in cases where the documents stipulated under rule 12(3)(a) are found to be fabricated or manipulated that the court or the Board may direct a medical examination for age determination. The Court further laid down the guidelines for conducting the age determination



WEB COPY



Crl.A.No.328 of 2016

inquiry:

“32. “Age determination inquiry” contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.”

21. Thereafter, in Abuzar Hossain v. State of West Bengal a three-judge bench of this Court observed that the credibility and acceptability of the documents stipulated under rule 12(3)(a) would



WEB COPY



Crl.A.No.328 of 2016

depend upon the facts and circumstances of each case and no hard and fast rule as such could be laid down.

The court held:

“39.3. As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rules 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard-and-fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh [(2009) 7 SCC 415 : (2009) 3 SCC (Cri) 431] and Pawan [(2009) 15 SCC 259 : (2010) 2 SCC (Cri) 522] these documents were not found prima facie credible while in Jitendra Singh [(2010) 13 SCC 523 : (2011) 1 SCC (cri) 857] the documents viz. school leaving



WEB COPY



Crl.A.No.328 of 2016

certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the delinquent.”

(emphasis supplied)

22. The decision in Abuzar Hossain (supra) has been considered in successive decisions of this Court. In Parag Bhati v. State of Uttar Pradesh_a two-judge bench of this Court held that an enquiry for the determination of the age of a juvenile is permissible if there is any doubt or a contradictory stand is being taken by the accused. In this case, the Board disregarded date of birth of the accused recorded by the school on the ground that it was based on a forged transfer certificate. This Court did not find any illegality in the decision of the Board. The court observed that courts should be wary of adopting a casual or cavalier approach while deciding the juvenility of an accused in circumstances where a grave and heinous offence is committed.”



Crl.A.No.328 of 2016

WEB COPY

14. Therefore, in this case, the child did not study up to 10th standard and therefore, there is no 10th standard certificate for the child. In the absence thereof, the second option is to get the school records. The school records clearly and categorically establish that the child was born only on 03.05.1999 and therefore, since the occurrence happened on 19.09.2015, the child is less than 18 years of age and therefore, the prosecution has proved that the child is less than 18 years of age. It is the plea of the accused that the child was medical examined and the Dentist is of the opinion that the child may be of more than 18 years of age. First of all, it was not incumbent on the prosecution to examine the Dentist, because after collecting the relevant evidences, they have to go by the Rules and as such, since the school records were available, they need not go further and examine the Dentist. If the report was favourable to the defence, then the defence, which ought to have taken up the issue further, especially when the offence is under the POCSO Act, 2012. The defence while cross examining the mother have not taken the matter forward in establishing as to how the child did not have a date of birth certificate and therefore, the defence could not establish that the entry of the school



Crl.A.No.328 of 2016

WEB COPY

certificate is erroneous. Therefore, I hold that the prosecution has proved the age of the victim child as less than 18 years of age.

15. As far as the mental condition of the child is concerned, as rightly argued by the learned Government Advocate (Crl. Side), it can be seen from **Exhibit P.4**, the passbook, which clearly states that the mental retardation was more than 80% and the said book is issued on behalf of the Medical Board after examining the child. The only contention of the learned counsel is that the child appears to have taken good marks in the school records, which is evident from the school records. But, in this regard, no cross examination had been done when **P.W.3**, the Special Teacher was in the box or with the Head Master of the school. This apart, the kind of mental retardation and whether it would prevent the child from scoring marks are all the matters to be established on facts. Mentally retarded children, depending on their disability, are also capable of scoring marks. This apart, the child had underwent primary education up to 6th standard and thereafter, only the child's mental retardation became so abnormal, so that she could not continue in the school and therefore, in this context, the contentions of the learned counsel for the appellant is to



Crl.A.No.328 of 2016

be rejected. Therefore, I hold that the prosecution has also proved that the child is a mentally retarded child.

16. Further, from the evidence of **P.W.1** mother and **P.W.4** and **P.W.7** father, it is clear that the child was alone at home and therefore, the appellant / accused had tried to take advantage of the child's mental retardation while committing the offence and therefore, the prosecution has proved the ingredients under Section 9(k) of the POCSO Act, 2012. Once the above facts are proved, the act done by the accused is spoken to by the victim child, who is examined as **P.W.2**, she has clearly stated that the intention was sexual in nature. He has also touched her breasts and also kissed on her mouth. The accused was a man of 57 years of age as on the date of occurrence. The action done by the accused clearly amounts to sexual assault and therefore, the offence under Section 9(k) of the POCSO Act, 2012 is made out. Once the offence under Section 9(k) is made out, the offence under Section 451 is also made out, as the accused entered the house and committed the assault.

17. In view thereof, I find the conviction and sentence imposed by



Crl.A.No.328 of 2016

WEB COPY

the Trial Court is in order, as only the minimum sentence alone has been imposed. However, it is seen that except for ordering payment of Rs.5,000/- from the fine amount paid, no compensation is ordered from the scheme available to the child. Therefore, apart from the compensation amount awarded by the Trial Court, it is ordered that the victim child will also be entitled for compensation to the maximum limit permissible as per the relevant scheme framed and **P.W.1**, the mother will be entitled to make appropriate application before the concerned District Legal Services Authority and the same shall be examined as per the Rules and an endeavor shall be made to sanction and disburse the eligible compensation to the victim child.

18. With the above observations, finding no merits in the criminal appeal, the appeal is dismissed.

Index : yes/no
Speaking order/Non-speaking order

06.12.2022

drm



WEB COPY



Crl.A.No.328 of 2016

To

1. The Inspector of Police
Kuvagam Police Station
Ariyalur District.
(Crime No.121 of 2015)
2. The Public Prosecutor, High Court of Madras.



WEB COPY



Crl.A.No.328 of 2016

D.BHARATHA CHAKRAVARTHY. J.,

drm

Crl.A.No.328 of 2016

06.12.2022