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CRL A No.744 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.11.2022

Coram:

THE HONOURABLE **MR. JUSTICE P.VELMURUGAN**

Criminal Appeal No.744 of 2022

Balaji

... Appellant

Vs.

STATE: Represented by
The Inspector of Police
All Women Police Station
Kallakurichi
(Cr.No.1 of 2015)

... Respondent

Prayer : Criminal Appeal filed under Sections 374 (2) of Criminal Procedure Code, against the Judgment dated 04.04.2022 in Special Sessions Case No.02 of 2019 on the file of Sessions Judge, Special Court for Exclusive Trial of Cases under PCOSO Act, Villupuram.

For Appellant : Mr.Ramesh Kumar

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been filed against the Judgment dated 04.04.2022 in Special Sessions Case No.02 of 2019 on the file of Sessions Judge, Special Court for Exclusive Trial of Cases under PCOSO Act, Villupuram.

2.The respondent police registered the case in Crime No.1 of 2015 against the accused/appellant herein for the offences under Sections 294(b) and 506(1) IPC and also for the offence punishable under Section 8 of POCSO Act, 2012. After completing the investigation, they laid charge sheet before the Mahalir Neethimandram (Fast Track Mahila Court) Villupuram and the same was taken on file in S.C.No.08 of 2016. The learned Sessions Judge after completing the formalities, framed the charges against the accused for the offences under Sections 294(b) and 506(1) IPC and also for the offence punishable under Section 8 of POCSO Act, 2012.



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3. After framing the charges, in order to prove the case of the prosecution, during trial before the trial Court, totally 9 witnesses were examined as P.W.1 to P.W.9 and 8 documents were marked as Exs.P.1 to P.8 and no material object was exhibited.

4. After completing the examination of the prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C. However, the accused denied the same as false and pleaded not guilty. On the side of the defence, no oral or documentary evidence was produced.

5. Pending trial, as per the proceedings of learned Principal District and Sessions Judge, Villupuram, the case was transferred to the Special Court for Exclusive Trial of Cases Under POCSO Act, Villupuram, which was constituted newly and assigned new number as Spl.S.C.No.02 of 2019.



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6. On conclusion of trial after hearing the arguments advanced on either side and also considering the materials, the learned Sessions Judge, not found the guilt of the accused for the offence under Sections 294(b) and 506(1) IPC and thereby acquitted him from the said charges. However, found him guilty for the offence punishable under Section 8 of POCSO Act, 2012 and the learned Sessions Judge convicted the accused for the offence punishable under Section 8 of POCSO Act, 2012 and sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs.50,000/- in default to undergo simple imprisonment for a further period of six months. Challenging the said Judgment of conviction and sentence, the accused has filed this present appeal before this Court.

7. The specific case of the prosecution is that the victim has studied upto 9th standard. On 20.01.2015, at 10 a.m., she took her goats to the field of one President Venkatesan and was grazing her goats. At about 1.30 p.m., the appellant who came near the victim in a Hero Honda Red Colour Motor Cycle, stopped the motorcycle and asked the victim certain



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things. She thought that he was making some enquiry and she replied for all his questions. All of a sudden, the appellant came behind her, pulled her hand, pushed her down near the grass bush and sat on her and by gagging her mouth with his left hand, squeezed her breast with his right hand. When she raised noise, he threatened her using filthy language saying that he would kill her if she makes noise or discloses it to others. When she pushed him away, she got injured on her nose and the thumb of her left hand. When she shouted, one Angamuthu who was spraying pesticides in the nearby field, came by running, dragged the accused who was lying on the victim and pushed him down and lifted the victim and he made noise. On hearing the same, one Sekar from the same village, came and caught the accused. The said Angamuthu called her father over phone and after her father and mother came, the victim narrated the occurrence and subsequently, the victim gave a complaint before the respondent police.

8. The learned counsel for the appellant would submit that there was a communal dispute between two villagers in which, the victim belongs to one village and the appellant belongs to the opposite village. Hence, in



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order to wreck vengeance, a false case has been foisted against the appellant. He would further submit that there is no independent eyewitness to the said occurrence. Though P.W.3 is alleged to have gone to the occurrence place on hearing the noise of the victim and saw the offence committed by the appellant, he has turned hostile and he has not supported the case of the prosecution. Further, the mother of the victim was not examined. The victim who was examined as P.W.1 has not stated her date of birth in her evidence and even her father, who was examined as P.W.2 has not stated the date of birth of the victim. Further, both the victim and her father have not stated that the Investigating Officer/P.W.9 had obtained the school record sheet which shows the date of birth of the victim from them. Though the school record sheet has been marked through the Investigating Officer/P.W.9 as Ex.P.8, it is not a original document or certified copy issued by the Head Master concerned and it is only a true copy endorsed by the Investigating Officer/P.W.9 herself. Hence, as per Section 65 of the Indian Evidence Act, it is not admissible in evidence and it does not come under the secondary evidence. The main contention of the learned counsel for the appellant is that the prosecution has not proved the age of the victim and the prosecution has not taken any steps to ascertain the age of the victim



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through medical examination viz., ossification test or radiology test.

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Therefore, the prosecution first of all not proved the age of the victim to bring the offence under POCSO Act. Secondly, there are material contradictions regarding the injury alleged to have been sustained by the victim. P.W.1/the victim says she sustained injury on nose, whereas P.W.2 says otherwise. Further, in this case, there is no independent eyewitness or evidence to corroborate the evidence of victim and the other witnesses are only hearsay witnesses and their evidence are only hearsay evidence and therefore, their evidence cannot be unaccepted. In the absence of any corroborative evidence, it is unsafe to convict the appellant that too with a heinous offence such as POCSO Act. It is the duty of the prosecution to prove its case beyond all reasonable doubt and it is not the duty of the accused to prove his innocence. Under the fundamental principle of criminal jurisprudence, every accused is presumed to be innocent unless he is proved guilty by a competent Court of law. Therefore, it is the duty of the prosecution to prove the guilt of the accused. The defence has established the defence with probable evidence that there was enmity and dispute between the villagers of the victim and the appellant and in order to take vengeance against the villagers of the appellant, the head of the village of



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Cr.P.C., the age of the victim is mentioned as 17 years. In order to substantiate the age of the victim, Ex.P.8/school record sheet was marked through the Investigating Officer/P.W.9. Though it is not a original or certified copy, the Investigating Officer/P.W.9 in her evidence has clearly stated that at the time of sending the appellant for remand, the school record sheet of the victim was annexed with the remand report and sent to the Court and therefore, she marked the true copy of the school record sheet as Ex.P.8 after verifying the same with the school records of the victim. Since the primary document was already produced before the Court at the time of remand of the appellant, Ex.P.8 is very well admissible as secondary evidence under Section 65 of Evidence Act and the contention raised by the counsel for the appellant is not acceptable. He would submit that, the defence counsel had not raised any objection to mark the said document and that the said document was marked as Ex.P.8 before the Court below without any objection. Therefore, the age of the victim was proved that at the time of occurrence, the victim was aged about 17 years and she had not completed the age of 18 years and she was a child under the definition of POCSO Act. He would further submit that soon after the occurrence, during investigation, the victim was also produced before the Judicial Magistrate to



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record statement under Section 164 Cr.P.C. and the said statement was marked as Ex.P.7 in which, the victim has clearly narrated the entire occurrence. Even in the said statement, the age of the victim is mentioned as 17 years. Subsequently, when the victim was examined as P.W.1 before the trial Court, she has clearly narrated the entire incident. The father of the victim was examined as P.W.2. The victim was also produced before the Government Hospital, Kallakurichi and was treated as out patient on 21.01.2015. The duty doctor who conducted medical examination on the victim, was examined as P.W.8 and her report was marked as Ex.P.3 in which the injury sustained by the victim is clearly mentioned. Therefore, the evidence of the victim is corroborated with the medical evidence as well as other circumstantial evidence. Though the victim not named the accused, immediately soon after the occurrence, on hearing the hue and cry of the victim, surrounding people gathered and they caught hold of the appellant. Hence, there is no question of identification. Therefore the prosecution has proved its case beyond reasonable doubt that the victim who was aged about 17 years was subjected to sexual assault by the appellant which is punishable under Section 8 of POCSO Act. The trial Court rightly appreciated the evidence and not found the guilt of the accused for the



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offence under Sections 294(b) and 506(1) IPC and thereby, acquitted him from the said charges. However, found him guilty for the offence of sexual assault and thereby and convicted and sentenced him for the offence punishable under Section 8 of POCSO Act as stated above. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

10. Heard the learned counsel for the appellant and the learned Additional Public Prosecutor appearing for the respondent police and also perused the materials available on record.

11. Before the trial Court, in order to substantiate the charges against the appellant before the trial Court, on the side of the prosecution, totally 9 witnesses were examined and 8 documents were marked.

12. Out of the 9 witness, the victim was examined as P.W.1. During her examination, she has clearly narrated the entire incident and the appellant is the one who made the sexual assault on her.



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13. The father of the victim was examined as P.W.2 and he has clearly stated about the incident what he heard from her daughter and lodging complaint before the respondent police.

14. P.W.3 is the independent witness. At the time of occurrence, he is alleged to have rushed to the occurrence place on hearing the noise of the victim and rescued her from the appellant. However, subsequently he has turned hostile and in his chief examination, he has deposed that he knows P.W.1 and she belongs to his village and that he did not know the accused. In the year 2015, after 12.30 p.m., he was spraying pesticides at his field. On hearing noise, he went there where it was crowded and he did not know what had happened before he went there where the village people were making enquiry. Though he has turned hostile, his evidence need not be ignored in full. He has clearly stated that in the year 2015 after 12.30 p.m., there was some problem and the village people were making enquiry and to that extent, we can take the evidence of PW.3.

15. P.W.4 is an independent witness and he is relative of P.W.3. P.W.4 in his evidence has stated that on 20.01.2015 at about 10.30 hours, he was



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spraying pesticides at his uncle's field and his uncle had gone to the pond to bring water. Subsequently, his uncle called him from the place of occurrence and when he went there, the victim was crying and she had sustained injuries on her nose and fingers and there was bleeding. When the victim was enquired, she narrated about the sexual assault committed by the appellant.

16. Further, on the next day of occurrence, the victim was produced before the doctor for conducting medical examination and the doctor who conducted medical examination on the victim was examined as P.W.8 and she has deposed that the victim had sustained small abrasion on her nose and the medical report was marked as Ex.P.3. Therefore, the evidence of the victim was corroborated with medical evidence.

17. As far as the age of the victim is concerned, in the complaint itself, the age of the victim is mentioned as 17 years. Further, in the statement of the victim recorded by the Judicial Magistrate under Section 164 Cr.P.C. also the age of the victim is mentioned as 17 years. The learned counsel for the appellant contended that the school record sheet



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which was marked as Ex.P.8 to prove the age of the victim is inadmissible evidence as it is not a original or certified copy issued by the authority concerned. The Investigating Officer who was examined as P.W.9, has clearly stated that soon after the occurrence and even before remanding the appellant to the judicial custody, she obtained the school record sheet of the victim from the mother of the victim and enclosed the same along with the remand report and sent it to the Court in order to show that the victim had not completed the age of 18 years and the offence committed by the appellant falls under the POCSO Act. Subsequently, to prove the age of the victim before the trial Court, the Investigating Officer/P.W.9 marked the copy of the said document which was kept in the CD file by making endorsement as true copy. The learned Additional Public prosecutor submitted that even at the time of marking of the said document as Ex.P.8, the defence had not raised any objection or put any suggestion before the Investigating Officer. Even at the time of remand of the appellant, the Magistrate also satisfied with the age proof and that the appellant did not raise any question or disputed the age of the victim at the time of cross examination of the prosecution



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witnesses. The said document was marked without any objection.

Therefore, the contention of the learned counsel for the appellant that Ex.P.8 is not admissible in evidence under Section 65 of Indian Evidence Act, is not acceptable. This Court finds that Ex.P.8/true copy of the school record sheet of the victim is admissible in evidence and as per Ex.P.8, the date of birth of the victim is 01.04.1998. The date of occurrence is on 20.01.2015 and therefore, the victim had not completed the age of 18 years at the time of occurrence. Therefore, this Court finds that the victim was a child at the time of occurrence under the definition of Section 2(1)(d) of POCSO Act.

18. As far as the commission of offence is concerned, the victim was examined as P.W.1 and she has clearly narrated the incident and the injury sustained by her and that the appellant is one who committed sexual assault on her. Even in the previous statement recorded by the Magistrate under Section 164 Cr.P.C., the victim has clearly narrated sexual assault committed by the appellant. Further, the medical evidence also corroborated the evidence of the victim. It is not a case of penetrative sexual assault and it is only a sexual assault which is defined under Section 7 of POCSO Act and



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punishable under Section 8 of POCSO Act. Though there is no corroborative evidence for the occurrence, the victim is the sole witness who has clearly spoken about the entire occurrence. Though the victim not named the accused, immediately soon after the occurrence, on hearing the hue and cry of the victim, surrounding people gathered and they caught hold of the appellant. Hence, there is no question of identification. Therefore, the prosecution proved the charge for the sexual assault. Even otherwise, in the cases of this nature, one cannot expect corroborative evidence since the culprits always take advantage of the aloofness of the children or take the children to a secluded place and exploit them sexually.

19. In the cases of this nature, if the Court finds that the evidence of the prosecutrix is natural, cogent, consistent and inspires the confidence of the Court and no reason to discard the evidence of the prosecutrix, the Court can safely convict the accused.

20. In this case, this Court also does not find any reason to discard the evidence of the victim. When the evidence of the victim matches with the evidence of the doctor, this Court finds that there is no reason to



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disbelieve the evidence of the prosecutrix. The learned counsel for the appellant projected his defence mainly on the ground that there was a communal dispute between two villagers and the victim belongs to one village and the appellant belongs to the opposite village and in order to take vengeance on their dispute, the victim was made as a tool. Admittedly, some of the prosecution witnesses during cross examination have admitted that there is a dispute between the two villages. However, it cannot be accepted that in order to take vengeance on their dispute against the opposite village, one would spoil the reputation of a girl from their own village that too by foisting a case as against a single person from the opposite village. Therefore, the defence is not acceptable which is without any substance.

21. Under these circumstances, this Court being an appellate Court and final Court of fact finding, while re-appreciating the entire evidence, comes to the independent conclusion that the prosecution has proved the charge of sexual assault against the appellant and the trial Court rightly appreciated the evidence and convicted the appellant as stated above. This Court does not find any merit in the appeal and the appeal is liable to be dismissed.



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22. Accordingly, this Criminal Appeal is dismissed. The respondent police is directed to secure the appellant to undergo the remaining period of sentence if any.

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Index: Yes/No



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To

1. The Sessions Judge, Special Court for
Exclusive Trial of Cases under PCOSO Act, Villupuram.
2. The Inspector of Police
All Women Police Station
Kallakurichi
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.



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P.VELMURUGAN, J

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