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Crl.A.No. 730 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.11.2022

Coram

**THE HON'BLE MR. JUSTICE P.VELMURUGAN**

**Crl.A.No. 730 of 2022**

Anithkumar

...Appellant

-Vs-

State rep. By  
The Inspector of Police,  
All Women Police Station,  
Coimbatore.

..Respondent

**PRAYER :** Criminal Appeal filed under Section 374(2) Cr.P.C., praying to set aside the conviction and sentence imposed in judgment dated 29.03.2022 made in Spl. Sessions Case No. 85/2020 on the file of Sessions Judge, Special Court for Exclusive trial of cases under POCSO Act, Coimbatore.

For Appellant : Mr.P.G.Perumal Pandian  
Legal Aid Counsel.

For Respondent : Mr.S.Sugendran, APP

### **ORDER**

This Criminal Appeal is filed challenging the judgment of conviction



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and sentence, dated 29.03.2022 made in Spl. Sessions Case No. 85/2020 on the file of Sessions Judge, Special Court for Exclusive trial of cases under POCSO Act, Coimbatore.

2. The respondent police registered a case against the appellant in Crime No.23 of 2019 for the offences under Section 451, 294(b) of IPC and also under Section 7 punishable under Section 8 of POCSO Act. The respondent police, after investigation, laid the charge sheet before the Sessions Judge, Special Court for the offences registered under POCSO Act, Coimbatore . The Sessions Court taken the case on file in Special S.C.No. 93 of 2019 and after completing all formalities, framed charges against the appellant for the offences under Section 451, 294(b) of IPC and under Section 7 punishable under Section 8 of POCSO Act. Subsequently, after framing charges and completing formalities, during trial before the trial Court, in order to substantiate the charges framed against the appellant, on the side of the prosecution, totally eight witnesses were examined as PW1 to PW8 and eleven documents were marked as Exhibits P1 to P 11. After examining the prosecution witnesses, the incriminating circumstances culled out from the



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evidence of the prosecution witnesses were put before the accused/ appellant and questioned under Section 313 of Cr.P.C and he denied all the incriminating circumstances as false and pleaded not guilty

3. On the side of the defence, two witnesses were examined as DW1 and DW2 and marked 5 documents as Exhibits D1 to D5.

4. On completion of trial, hearing of arguments advanced by the learned counsel on either side and based on the entire materials, the trial Court found the appellant guilty for the offences under Section 7 punishable under Section 8 of the POCSO Act, convicted and sentenced to under go five years rigorous imprisonment and pay a fine of Rs 10,000/- , in default to under further period of six months rigorous imprisonment. The appellant was also found guilty for the offences under Section 451 IPC and convicted and sentenced to under go two years rigorous imprisonment and pay a fine of Rs.5,000/-, in default to undergo three months rigorous imprisonment. However the appellant was found not guilty for the offence under Section 294(b) IPC and acquitted from the said charges.



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5. Challenging the said judgment of conviction and sentence, the appellant/accused has filed the present criminal appeal before this court.

6. It is the specific case of the prosecution that the victim is aged 14 years. On 05.06.2019 due to illness, the victim girl was sleeping in her house. The appellant belongs to the same area, had trespassed into the house of the victim girl and touched the breasts and private parts of the victim girl and also tried to hug her forcefully. The victim woke up and raised alarm, the brother of the victim came to the house and informed to their grand mother about the incident. The grand mother scolded the appellant and sent him away from the place and informed the same to the mother of the victim and lodged a complaint before the jurisdictional police station and registered a case against the appellant for the offences as stated above. Subsequently a charge sheet was filed and the same was taken on file by the trial Court and on completion of trial, the trial Court convicted the appellant and imposed sentence of imprisonment and fine as stated above.



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7. The learned counsel for the appellant would submit that a false case has been foisted against the appellant and there are no ingredients under Section 7 punishable under Section 8 of POCSO Act would attract. Though the victim was examined by the Judicial Magistrate and recorded statement under Section 164 Crpc, during trial before the Judicial Magistrate, the victim has not stated anything about the mis behaviour as alleged to have committed by the appellant on the victim. But during examination before the trial Court as PW2, she has improvised the statement which was already made before the Judicial Magistrate, therefore there is material contradiction between the statement recorded under Section 164 Crpc and the evidence before the trial Court, which will vitiate the case of the prosecution. Further even the defacto complainant has not specifically spoken about any allegation against the appellant, which attracts Section 7 punishable under Section 8 of POCSO Act.

8. The grand mother of the victim was examined as PW5, but she turned hostile, she has not spoken any thing adverse against the appellant



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before the trial Court. When the victim was not subjected to medical examination and in the absence of any injuries, Section 7 of the POCSO Act would not attract. When the victim has not specifically spoken before the Judicial Magistrate, subsequently during giving evidence before the trial Court she made certain improvement which cannot be taken into consideration, it is only a material contradictions. Based on the uncorroborative evidences, the appellant cannot be convicted and the trial Court unfortunately failed to appreciate the evidence and erroneously convicted the appellant.

9. The learned counsel for the appellant would further submit that the defacto complainant/ mother of the victim has not stated the date of birth of the victim. The best person to inform about the date of birth of a child is the mother. It is contended by the learned counsel for the appellant that when the mother of the victim has not spoken about the date of birth, the bonafide certificate issued by the Headmistress of the School/PW7 mentioning the date of birth of the victim, cannot be treated as actual date of birth which is not genuine. Therefore, the prosecution failed to establish the date of birth of the



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victim, therefore the alleged commission of offence under POCSO Act would not attract. The prosecution failed to prove the date of birth of the victim and the trial Court without considering the said facts, erroneously convicted the appellant and imposed sentence, which required interference of this Court and the conviction and sentence awarded by the trial Court are liable to be set aside.

10. On the other hand, learned Additional Public Prosecutor has submitted that the date of the occurrence is on 05.06.2019, the date of birth of the victim is 23.07.2006, therefore on the date of occurrence, the victim is only 14 years. In order to prove the age of the victim, the Bonafide Certificate issued by the school authorities is marked as Ex.P7. The Headmistress of the School was examined as PW6, in which the victim was studying, therefore, as per the evidence of the PW6 and Ex.P7, the prosecution has proved the age of the victim as 14 years, therefore the victim is a child under the definition of Section 2(1) (d) of POCSO Act.

11. As far as the commission of offence under Section 451 IPC is concerned, the victim was examined as PW2 who has spoken about the tress



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pass of the appellant and the brother and grand mother of the victim were examined as PW5 & PW7 respectively. They have also spoken about the tress pass committed by the appellant. Even in the previous statement of the victim recorded under Section 164 Crpc, marked as Ex.P3, the victim has clearly stated that while sleeping in the house, the appellant came into the house and touched the private parts of the victim, hence the prosecution proved the offence committed by the appellant on the victim. The evidence of PW5/brother of the victim, who has deposed that while playing on the street, the appellant enquired about the availability of family members in his house and after knowing that none was available in the house except the victim, the appellant entered into the house. Immediately, the PW5 informed the same to his grand mother, after she entering into the house, the appellant left the house. Therefore, the evidence of PW5 corroborated with the evidence of the victim/PW2, hence it is proved that the appellant has committed offence punishable under Section 8 of POCSO Act.

12. Once the prosecution has proved the offence committed by the appellant/accused that he entered into the house of the victim and touched the private parts of the victim, the Section 29 would come into play, therefore it is



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for the appellant to rebut the presumption that he has no sexual intention to touch the victim.

13. Heard Mr.P.G.Perumal Pandian, Legal Aid Counsel appearing for the appellant and Mr.S.Sugendran, learned Additional Public Prosecutor for the respondent police and perused the materials available on record.

14. It is the specific case of the prosecution that the appellant entered into the victim's house and touched the private parts of the victim. In order to substantiate the case of the prosecution, on the side of the prosecution totally 8 witnesses were examined, out of which victim was examined as PW2 and the victim was also previously produced before the Judicial Magistrate and a statement was recorded under Section 164 Crpc, which is marked as Ex.P3.

15. A combined reading of evidence of PW2 and the previous statement of the victim/Ex.P3 would clearly reveal that the victim has clearly narrated the entire incident. Though the learned counsel for the appellant vehemently contended that the statements of victim before the trial Court are



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improved and exaggerated version of the statement made before the Judicial Magistrate, a careful reading of the evidence of the victim and Ex.P3/previous statement, she has clearly stated in her previous statement in a dignified manner that while she was sleeping, the appellant touched her body here and there, whereas in her evidence, she has specifically mentioned the places where the appellant touched in her body on the date of occurrence. The Judicial Magistrate also recorded the said statement in a dignified manner. Therefore, there may not be any exaggeration or improved version of the statement of the victim as alleged by the learned counsel for the appellant. Therefore, as per evidence of PW2 and Ex.P3, this Court does not find any contradiction or improvisation of version or exaggeration of statement of the victim. The victim girl was aged about 14 years, obviously she would get nervous and shy to speak about the private parts of her body to a stranger. Therefore, non mentioning of the private parts alleged to have touched by the appellant/accused before the Judicial Magistrate while recording statement under Section 164 Crpc of the victim may not be a sound ground to discard and disbelieve the evidence of the victim. However, the victim girl has stated and showed the parts of the body in a dignified manner before the Judicial



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Magistrate and the same was recorded, therefore it cannot be treated as contradictory statement.

16. Further PW5 is the brother of the victim and PW7 is the grand mother of the victim. Though they are not eye witnesses, they have also clearly stated that on the date and time of the occurrence, the appellant entered in their house. As per their statement, on the date of the occurrence, the appellant approached PW5/brother of the victim and enquired about the availability of family members in the home, and after confirming to the fact that none was there in their house, he sent the brother of the victim out of the house and committed the offence and left the house immediately after raises the alarm by the victim. Immediately on knowing the occurrence, PW5 informed the same to his grand mother/PW7. She arrived the house and questioned the appellant. Therefore, the date and time of the occurrence was corroborated by the evidence of PW5 & PW7. Since the occurrence has happened within four walls, the Court cannot expect any eye witness and independent witness, if the statement of victim is natural, cogent and consistent and the conviction can be recorded solely on the evidence of the



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victim alone. Further it is also proved that at the time of the occurrence, except the appellant and the victim girl, no one was available in the house.

Therefore, this Court does not find any reason to discard the evidence of the victim, who is a prosecutrix and the evidence of the victim inspires the confidence of this Court. The defence taken by the appellant is not substantiated. All the defence put forth by the appellant are after thought to escape from the clutches of law. Despite bonafide certificate issued by the Headmistress of the school/PW6 was marked as exhibit P7 on the side of the prosecution to prove the date of birth the victim, the appellant has not examined PW6 to substantiate the said fact and not disputed the date of birth of the victim. Once the bonafide certificate has been issued by the school authorities and the same has not been challenged even otherwise, this Court presumes that as per Section 94 (2) of Juvenile Justice Act, the said documents are genuine. The date of occurrence was on 05.06.2019, as per exhibit P7, the date of birth of the victim is 23.07.2006, therefore on the date of occurrence, the victim was only 14 years at the time of occurrence and it is proved that the victim was a child under the definition of Section 2 (1) (d) of POCSO Act. Since it is proved that the appellant had trespassed the house



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of the victim and touched her private parts and breasts, the said offence would fall under Section 451 of IPC and under Section 7 punishable under Section 8 of the POCSO Act.

17. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding especially for the offences punishable under Section 451 IPC and also for the offences under Section 7 punishable under Section 8 of the POCSO Act. Even though the learned counsel for the appellant has pointed out some contradictions, the same are minor in nature, which would not go to the root of the case of the prosecution. Once, this Court finds the evidence of the victim is natural, cogent and consistent which inspired the confidence of the Court, this Court can safely record the conviction based on the evidence of the prosecutrix, unless this Court finds any reason to discard or disbelieve the evidence of the prosecutrix. Therefore, under these circumstances, this Court has come to the conclusion that the trial Court has rightly appreciated the evidence of the victim who is a minor girl aged about 14 years that the appellant has trespassed into the house of the victim and committed sexual



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assault. This Court does not find any mitigating circumstances to reduce quantum of sentence imposed by the trial Court.

18. In fine, the conviction and sentence imposed by the trial Court in judgment in Spl.SC.No. 85 of 2020 dated 29.03.2022 are confirmed and the present Criminal Appeal is dismissed.

**15.11.2022**

Index: Yes/No  
Speaking order/Non-speaking order  
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To

1. The Inspector of Police,  
All Women Police Station,  
Coimbatore.
2. The Sessions Judge,  
Special Court for Exclusive trial  
of cases under POCSO Act,  
Coimbatore.



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**P.VELMURUGAN, J**  
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**Crl.A.No.730 of 2022**

**15-11-2022**