



Crl.A.No.934 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.11.2022

Coram:

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

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Selvam

... Appellant

Vs.

The State

Rep. by Inspector of Police

Kullanjavadi Police Station

Crime No.602 of 2020

Cuddalore District

... Respondent

Prayer: Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code, praying to set aside the order of conviction and sentence against the appellant dated 23.04.2022 passed by the Special Court (POCSO Cases), Cuddalore in Spl.SC.No.54 of 2020 and acquit the appellant and direct to refund of all the fine amount paid by him.

For Appellant : M/s.V.Mythili Srinivas

For respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been filed seeking to set aside the Judgment of conviction and sentence against the appellant dated 23.04.2022 passed by the Special Court (POCSO Cases), Cuddalore in Spl.SC.No.54 of 2020 and acquit the appellant and also direct to refund of all the fine amount paid by him.

2. The respondent police initially registered the case in Crime No.602 of 2020 under Section 4 of Girl Missing and during enquiry, it was found that the appellant who is the Chithappa (uncle) of the victim, under the guise of marrying the victim, took her to his friend's house and stayed there during which, he had penetrative sexual intercourse with her for more than once. Hence, the case was altered into Sections 366 IPC and 5(1) and 5(n) read with 6 of POCSO Act, 2012 and after completing the investigation, the respondent police laid the charge sheet before the Special Court for Exclusive trial for POCSO Cases, Cuddalore, for the offences under Sections 451, 366, 344, 376(3), 376(2)



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(n) IPC and 5(l) and 5(n) punishable under Section 6 of POCSO Act, 2012 and the same was taken on file in Spl.S.C.No.54 of 2020. The learned Special Judge, after completing the formalities, framed the charges against the accused for the offences under Sections 451, 366, 344, IPC and 5(l), 5(n) punishable under Section 6 of POCSO Act, 2012 read with 376(2)(f) of IPC.

3. After framing the charges, in order to prove the case of the prosecution during trial, totally 16 witnesses were examined as P.W.1 to P.W.16 and 18 documents were marked as Exs.P.1 to P.18 besides 2 materials objects were marked as M.O.1 and M.O.2 on the side of the prosecution.

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, 3 witnesses were examined as DW.1 to DW.3 and one document was marked as Ex.D1.



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5. On conclusion of trial after hearing the arguments advanced on either side and also considering the materials, the Special Court found the guilt of the accused for the offences under Sections 451, 366, 344 IPC and Section 5(l) and (n) punishable under Section 6 of POCSO Act read with 376(2)(f) IPC and convicted and sentenced to undergo 2 years rigorous imprisonment and to pay fine of Rs.1000/- in default to undergo simple imprisonment for a further period of three months for the offence under Section 451 IPC; to undergo 10 years rigorous imprisonment and to pay fine of Rs.2000/- in default to undergo simple imprisonment for a further period of three months for the offence under Section 366 IPC; to undergo three years rigorous imprisonment and to pay fine of Rs.1000/- in default to undergo simple imprisonment for a further period of three months for the offence under Section 344 IPC; to undergo 10 years rigorous imprisonment and to pay fine of Rs.2000/- in default to undergo simple imprisonment for a further period of six months for the offence under Sections 5(l) and 5(n) punishable under Section 6 of POCSO Act read with 376(2)(f) IPC.



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6. The case of the prosecution is that on 22.07.2020, the victim girl was found missing. Hence, initially the case was registered under Section 4 of Girl Missing. Subsequently, on 05.08.2020, the victim was secured by the respondent police along with the appellant herein and on enquiry, it was found that the appellant who is the Chithappa (uncle) of the victim, under the guise of marrying the victim, took her to his friend's house and stayed there till 04.08.2020 and during their stay, he committed penetrative sexual assault on the victim for more than once. Hence, the case was altered as stated above by implicating the appellant herein.

7. The learned counsel for the appellant would submit that the prosecution has not proved the foundational fact that the appellant committed the charged offences. It is the bounden duty of the prosecution to prove its case beyond all reasonable doubt. Further, the prosecution has not proved the age of the victim. Even P.W.4 who is the brother of the victim has stated that the victim is his elder sister. At the



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time of giving evidence on 28.04.2021, the age of P.W.4 was mentioned as 18 years. The occurrence is said to have taken place on 22.07.2020. Since P.W.4 has stated that the victim/P.W.1 is his elder sister, then the victim/P.W.1 must have completed the age of 18 years at the time of alleged occurrence and therefore, the victim was not a child under the definition of POCSO Act. Further, the prosecution has not produced any authenticated documents like Birth Certificate etc. and also not summoned the authority who registered the date of birth of the victim to prove the age of the victim. Therefore, the prosecution first of all not proved the age of the victim and also not proved that the victim was a child at the time of occurrence under the definition of POCSO Act. He would further submit that the father and mother of the victim have not specifically stated who is elder and who is younger. Further the school documents viz., Ex.P.11/certified copy of admission register, Ex.P.12/Record Sheet and Ex.P.16/school certificate are not admissible in evidence as they are not public documents. The school authority had not seen the birth certificate of the victim and they have only produced the



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records which were available in the school. Therefore, no presumption can be drawn with the inadmissible documents that the victim was a child at the time of occurrence under the definition of Section 2(1)(d) of POCSO Act.

7(a). The learned counsel for the appellant placed reliance of the Judgments of the Hon'ble Supreme Court and submitted that mere marking of a document as exhibit by the Court cannot be held to be a due proof of its content. Its execution has to be proved by admissible evidence. The prosecution should have produced the birth certificate of the victim girl and in the absence of same, the radiology test report has to be considered. In this case, authenticated birth certificate was produced by the prosecution and they have also not produced the radiological test report and that they have not examined the doctor who conducted radiology test on the victim girl. Therefore, he intend to file a petition to receive additional evidence regarding ossification test report of the victim and the same has to be taken into consideration. He would submit that if the ossification test report is accepted by this Court as additional



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evidence, it would clearly show that the victim had completed the age of 18 years at the time of occurrence and the offence under the POCSO Act would not attract against the appellant.

7(b). The learned Counsel for the appellant would further submit that the victim in her previous statement and also in her evidence has stated that the appellant took her to the house of his friend at Reddichavadi. But the Investigating Officer has not located the occurrence place said to have taken place at Reddichavadi. Further, he has not traced out the friend of the appellant who is alleged to have provided the house for the appellant and the victim and the prosecution has not examined any persons in the said locality to prove that the appellant and the victim stayed together in the said house at the relevant point of time. Therefore, the prosecution has not laid the foundational fact and failed to prove where the occurrence actually taken place. He would further submit that the victim at the first instance when she was produced before the doctor has stated that the appellant took her to



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Madurai, whereas subsequently when the victim was produced before the Magistrate for recording statement under Section 164 Cr.P.C. and also before the trial Court, she has stated that the appellant took her to his friend's house at Reddichavadi and the prosecution has not given any explanation for the said contradictions. The learned counsel for the appellant would further submit that the victim had voluntarily left along with some other person and the appellant only secured and brought her back. The appellant had entrusted money to the father of the victim and he had not repaid the same and claimed interest for the amount already borrowed by the appellant and therefore, there was a dispute between them due to which, a false case has been foisted against the appellant. In order to substantiate the money dispute between the appellant and the father of the victim/P.W.3, on the side of the defence, 3 witnesses were examined and all the witnesses have clearly stated that there was a dispute between the appellant and father of the victim regarding repayment of money. Therefore, the defence has been substantiated with probable defence that there was a motive between the appellant and the



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father of the victim and therefore, they have foisted a false case against the appellant.

7.(c) The learned counsel for the appellant would further submit that the prosecution has not proved its case beyond reasonable doubt that the appellant is one who committed penetrative sexual assault on the victim. Even as per the prosecution, in the month of February, the appellant alleged to have kissed the victim and on seeing the same, the brother of the victim/P.W.4 has beaten the appellant. When that be the case, in the month of July i.e. 22.07.2020, the victim has informed her mother that she was going to the grandfather's house who is none other than the father of the appellant which clearly shows that no such occurrence was taken place in the month of February and the appellant never misbehaved with the victim. If at all the earlier incident had actually taken place, no parent would send their daughter to the disputed place. Therefore, the prosecution case is not believable. The prosecution has not proved its case beyond all reasonable doubt even in proving the age of the victim and in proving the allegation that the appellant



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forcefully took the victim to the place of occurrence.

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7(d). The learned counsel for the appellant would further submit that as per the victim, there was a telephonic conversation between the appellant and the victim during which, the appellant is alleged to have stated that he is in love with the victim. But the Investigating Officer has not recovered both of their cell phones and also not produced the call details and proved as to whether there any such telephonic conversation between them during the relevant period. The prosecution has withhold the best evidence. The non recovery of cell phones and none establishment of call details regarding the conversation between them, is fatal to the case of the prosecution. Therefore, the prosecution not proved the foundational fact. Like other criminal cases, it is always the bounden duty of the prosecution to prove the foundational fact and prosecution cannot escape from the responsibility just because it is an offence under POCSO Act. In this case, the prosecution has not proved the foundational fact that the victim was a child and the appellant had kidnapped her and



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had sexual intercourse with her. Since the prosecution failed to prove its case beyond all reasonable doubt, the presumption under Section 29 of POCSO Act would not attract. Only when the prosecution proves the foundational fact that the appellant kidnapped the victim who was a child and had penetrative sexual assault, the burden of proof will shift on the accused and the accused has to rebut the presumption under Section 29 of POCSO Act. In this case there is no question of rebutting the presumption since the prosecution has not proved that the appellant committed the charged offences. The trial Court has failed to appreciate the same and erroneously convicted the appellant which warrants interference. To support his defence, the learned counsel for the appellant placed reliance of the Judgments of this Court, the Hon'ble Supreme Court and also various other High Courts as stated below;

1. In Alamelu and Another Vs. State reported in (2011) 2 SCC 385
2. In Suresh Vs. State reported in MANU/TN/6551/2021
3. Crl.O.P. (MD) No.16805 of 2022 dated 26.09.2022



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4. In M.Abbas Vs. State of Kerala reported in (2001) 10 SCC 103
5. In Rajeevan and Another Vs. State of Kerala reported in (2003) 3 SCC 355
6. In State of Gujaraj Vs. Jayrajbhai Punjabhai Varu reported in (2016) 14 SCC 151
7. In Joubansen Tripura Vs. State of Tripura reported in 2021 SCC Online Tri 176
8. In Manoj Vs. The State (Govt. of NCT) of Delhi reported in Manu/DE/2228/2020
9. In Rajak Mohammed Vs. State of Himachal Pradesh reported in (2018) 9 SCC 248
10. In Tomaso Bruno and Another Vs. State of Uttar Pradesh reported in (2015) 7 SCC 178
11. In Ashraff Ali Vs. State reported in MANU/TN/2565/2022

8. The learned Additional Public Prosecutor appearing for the respondent police would submit that at the time of occurrence, the victim was only 14 years old and she had not completed the age of 18 years. In



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order to prove the age of the victim, the copy of the school admission register, record sheet and School certificate of the victim were marked as Exs.P.11, P.12 and P.16 and the Head Master of the School in which the victim was studying was examined as P.W.15. Further, in the earlier statement of the victim recorded by the Magistrate under Section 164 Cr.P.C. in the year 2020, the victim has stated that her age was 14 years, her date of birth is 20.12.2006, she was going to 9th standard and she has got one brother who is elder to her. Thereafter, when she was examined as P.W.1 in the year 2021 before the trial Court, she has clearly deposed that her age was 15 years and her date of birth is 20.12.2006 and she has got one elder brother who has completed 12th Standard. Therefore, it is clear that at the time of occurrence, the victim was only aged about 14 years and therefore, she was a child under the definition of Section 2(1)(d) of POCSO Act. Further, when the mother and father of the victim were examined as P.W.2 and P.W.3, they have clearly stated that they have got one son and one daughter, son has completed 12th standard and the victim was studying 9th standard which itself would clearly show that



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the son is elder and the victim is younger. Further, when the victim was produced before the doctor/P.W.7, the victim has stated her age as 14 years and the medical certificate/Ex.P.5 also shows the age of the victim as 14 years. Further, the medical report/Ex.P.5 shows that as per radiologist opinion, the victim has completed 17 years and not completed 18 years. Therefore, the prosecution proved its case that the victim was a child at the time of occurrence.

8(a). The learned Additional Public Prosecutor would further submit that the appellant is the close relative of the victim and he is “Chithappa” (uncle) in relation. In the month of February, when the victim was in her house, the the appellant kissed the victim and on seeing the same, the brother of the victim/P.W.4 beaten the appellant. Thereafter on 22.07.2020, the appellant took the victim to his friend's house at Reddichavadi and stayed there till 04.08.2020 and during such period, the appellant had penetrative sexual intercourse with the victim forcefully on several occasions. A combined reading of the evidence and



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statement of the victim would clearly show that the appellant who is the relative of the victim fell in love with the victim and under the guise of marrying the victim, took her to his friend's house where they stayed for more than 10 days during which, the appellant by stating that if they don't have sexual intercourse, their parents would not accept their marriage, had penetrative sexual intercourse with her for more than once. He would further submit that the mother, father and brother of the victim have clearly spoken about the earlier occurrence happened in the month of February and the victim/P.W.1 has clearly stated that the appellant is the one who took her away from her house and had penetrative sexual intercourse with her. Even the doctor/P.W.7 who conducted medical examination on the victim has clearly stated that the victim was subjected to penetrative sexual assault and her hymen was not intact and the medical certificate of the victim was marked as Ex.P.5. As per the medical report, though there was no external injuries on the body of the victim, the medical report clearly shows that the victim was subjected to penetrative sexual assault. Further, the doctor who conducted medical



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examination on the appellant was examined as P.W.9 and he has clearly stated about the Potency of the appellant and the medical certificate of the appellant was marked as Ex.P.6. Therefore, from the evidence of P.W.1 to P.W.4 and P.W.7/doctor and Ex.P.5/medical report of the victim, Ex.P.11/certified copy of school admission register, Ex.P.12/Record Sheet and Ex.P.16/school certificate, the prosecution proved its case that the victim who was a child was subjected to penetrative sexual assault by the appellant. The trial Court rightly appreciated the evidence and convicted the appellant and there is no merit in the appeal and the appeal is liable to be dismissed.

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

10. In order to substantiate the charges framed against the appellant, on the side of the prosecution, before the trial Court, totally 16 witnesses were examined as P.W.1 to P.W.16 out of which, the victim was

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examined as P.W.1. Previously, the victim was produced before the Magistrate for recording statement under Section 164 Cr.P.C. and the said statement was marked as Ex.P.1.

11. A combined reading of the evidence of the victim/P.W.1 and the statement of the victim/Ex.P.1 shows that the victim has clearly narrated the incident and she has stated that even prior to the occurrence, one day when the victim was in her house, the appellant kissed her and on seeing the same, her elder brother/P.W.4, beaten the appellant. Further, she has stated that on 22.07.2020, the appellant took her to his friend's house at Reddichavadi under the guise of marrying her, where they stayed for more than 10 days and during their stay, the appellant forcibly had penetrative sexual intercourse with her on several times.

12. The mother and father of the victim were examined as P.W.2 and P.W.3 respectively and they have deposed what they heard from the victim/P.W.1. Further, the brother of the victim was examined as P.W.4



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and he has spoken about the earlier incident of the appellant kissing the victim for which, he warned the appellant.

13. This Court being an appellate Court final Court of fact finding, has to re-appreciate the entire evidence and to give its findings independently. Accordingly, this Court re-appreciated the entire evidence and give its findings independently.

14. The main defence taken by the learned counsel for the appellant is that Ex.P.2/the birth certificate of the victim was only marked through the victim girl and the prosecution has failed to produce the authenticated birth certificate of the victim and therefore, the prosecution has failed to prove that the victim was a child at the time of occurrence. His further contention is that the occurrence is alleged to have taken place in the year 2020 and when the brother of the victim who was aged about 18 years, was examined as P.W.4 before the trial Court in the year 2021, he has stated that the victim is his elder sister and therefore, the



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victim must have completed the age of 18 years at the time of occurrence which is alleged to have taken place in the year 2020. Therefore, the victim was not a child and therefore, the offence under the POCSO Act would not attract.

15. As per the prosecution at the time of alleged occurrence, the victim was aged about 14 years. The date of birth of the victim is 20.12.2006 and the date of occurrence on 22.07.2020 and therefore the age of the victim was about 14 years at the time of occurrence and she was a child under the definition of Section 2(1)(d) of POCSO Act. In order to substantiate the same, the birth certificate of the victim was marked as Ex.P.2 wherein, the date of birth of the victim is clearly mentioned as 20.12.2006 and therefore, the prosecution proved that the victim was about 14 years at the time of occurrence. Even otherwise, the Head Master of the school in which the victim studied was examined as P.W.15 and the school records of the victim were marked as Ex.P.11/certified copy of admission register, Ex.P.12/Record Sheet and



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Ex.P.16/school certificate which also show that the date of birth of the victim is 20.12.2006 and the defence had not put any suggestion that the date of birth of the victim mentioned in Exs.P.11, P.12 and P.16 are concocted and created for the purpose of this case to show that the victim was a child. Further, when the victim was produced before the Magistrate soon after the occurrence on 20.08.2020, the victim has stated her date of birth was 20.12.2006 and she was aged 14 years. She has further stated that she has completed 8th Standard and going to 9th Standard. Even before the trial Court, when the victim was examined as P.W.1, the Court put a question as to what is her date of birth for which, she replied as 20.12.2006. Thereafter, when the parents of the victim were examined as P.W.2 and P.W.3 before the trial Court, they have stated that they have got one son and one daughter. Though the learned counsel for the appellant contended that they have not specifically mentioned as to who is elder and who is younger, no such doubt arose during their examination and the defence had not put any suggestion before the parents of the victim as to who is elder and who is younger. Though the learned counsel for the



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appellant pointed out that P.W.4 has stated that the victim is his elder sister, the victim in her evidence has clearly stated that prior to the occurrence, the appellant kissed her and on seeing the same, the P.W.4 who is her elder brother attacked the appellant. Even the father and mother of the victim have also clearly stated that they have got one son and one daughter; Son completed 12th Standard and daughter studying 9th std. Even P.W.4 has clearly stated that he has completed 12th Standard and studying for police job from home and that the victim was studying 9th Standard. Even P.W.8 who is the brother of P.W.3 has stated that the victim has completed 8th standard and prior to the occurrence, one day when the appellant kissed the victim in her house, the elder brother of the victim warned him. Therefore, the arguments advanced by the learned counsel for the appellant has no force. Further, the appellant counsel has not put any suggestion before any of the witnesses as to whether P.W.4 is younger than the victim or whether the victim has completed 18 years. Atleast, the defence should have summoned the birth certificate of P.W.4 to prove that the victim is elder than P.W.4. Therefore, the contention of



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the counsel for the appellant cannot be accepted for any reason and he has not substantiated his defence. Further, when the victim was produced before the doctor/P.W.7 on 05.08.2020 for medical examination soon after securing the victim, the victim has stated that she was aged 14 years and she was studying 9th Standard. The medical records/Ex.P.6 also shows that the victim was 14 years old at the time of occurrence. Even as per the radiological test report produced by the prosecution shows that the victim is between 17 to 18 years and the same was also not disputed by the defence and no evidence or witnesses have stated that the victim has completed 18 years. Therefore in any angle, the prosecution or the Investigating Officer did not get any doubt over the age of the victim. Therefore, the contention of learned counsel for the appellant that the prosecution not proved the age of the victim is not sustainable either in law or on facts. Therefore, the contention of the learned counsel for the appellant that the victim was not a child is rejected. This Court finds from the oral and documentary evidence that the victim was aged about 14 years at the time of occurrence and the defence also had not disputed



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any of the documents marked before the trial Court. Therefore, undisputedly the prosecution proved that the age of the victim was about 14 years at the time of occurrence and she was a child under the definition of Section 2(1)(d) of POCSO Act and the trial Court also rightly found that the victim was a child at the time of occurrence. As per Section 94(2) of Juvenile Justice (Care and Protection of Children) Act, if any document is produced by the school authority, the same can be presumed that the age mentioned in the said certificate is a genuine one and it is for the accused to rebut the presumption in the manner known to law. In this case, as stated above, from the oral and documentary evidence, the prosecution proved the foundational fact that the victim was only aged about 14 years and she was a child at the time of occurrence under the definition of Section 2(1)(d) of POCSO Act. But the defence has not rebutted the presumption in the manner known to law by producing any documents contrary to the documents produced by the prosecution. As per Section 94(2) of Juvenile Justice (Care and Protection of Children) Act, if any age proof certificate is issued by the



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local body or school authority, the same is presumed to be genuine and the Court can rely on the said certificate produced by the authority. If the prosecution has not produced the birth certificate of the victim, then only we can go for proof of age in other method and rely on radiology test certificate or ossification certificate. In this case, Ex.P.2 is the birth certificate of the victim. Therefore, there is no need to examine the doctor as additional evidence. Under the said circumstances, the contention of the learned counsel for the appellant is not acceptable and the same is rejected and the petition to receive additional evidence for examining the doctor is unnecessary .

16. As far as the charge under Section 451 IPC is concerned, the victim has clearly stated that prior to the occurrence, the appellant entered into her house and kissed her and the same was also corroborated by the evidence of P.W.2 to P.W.4 and P.W.8. Therefore, the prosecution proved that the appellant committed the offence under Section 451 IPC.



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17. As far as the charge under Section 366 IPC is concerned, as already stated above the victim was a child at the time of occurrence and the victim has clearly stated that on 22.07.2020, the appellant under the guise of marrying her, took her to his friend's house at Reddichavadi where they stayed for more than 10 days and during their stay, the appellant forcibly had penetrative sexual intercourse with her on several times. Since the appellant removed the custody of the victim who was a child, from her lawful guardian without their consent, the act committed by the appellant falls under Section 366 IPC. Therefore, the prosecution proved its case from the evidence of the victim/P.W.1. The contention of the learned counsel for the appellant is that when the victim was produced before the doctor, she has stated that the appellant took her to Madurai and subsequently, when she was produced before the Magistrate and also before the trial Court, she stated that she was taken to Reddichavadi by the appellant and therefore, the prosecution failed to prove that where the victim was actually taken by the appellant and therefore, the prosecution failed to prove its case beyond all reasonable

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doubt. Admittedly, the victim in her statement recored by the Magistrate under Section 164 Cr.P.C. and also in her evidence given before the trial Court has stated that she was taken by the appellant to Reddichavadi and before the doctor, she has stated as Madurai. Since the victim was a child she might have not known the actual place where the appellant took her and as a child she could only say that she was taken out from her house. Once the prosecution proved that on 22.07.2020, the appellant removed the custody of the victim from her lawful guardian without the consent either Madurai or to Reddichavadi or to any other place, still it is an offence since the victim was a child. Though there are discrepancies and contradictions with regard to place of occurrence, the contradictions are not material contradictions which would go into the root of the prosecution. The prime question is that whether the victim was removed from the custody of her lawful guardian by the appellant without their consent or not. Though there are discrepancies with regard to place of occurrence, the fact remains that the custody of the victim was removed by the appellant from 22.07.2020 to 04.08.2020 and the victim was



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secured only on 05.08.2020. Till then, the victim was along with the appellant. Under these circumstances, the act committed by the appellant falls under Section 366 IPC. Therefore, the prosecution proved its case beyond reasonable doubt.

18. As far as the charge under Sections 344 IPC is concerned, as stated above, the victim was secured only on 05.08.2020 by the respondent police along with the appellant. As stated above, the victim has clearly stated that the appellant took her to his friend's house and they stayed there from 22.07.2020 to 04.08.2020. Since the appellant had kept the victim under illegal confinement for more than 10 days from 22.07.2020 to 04.08.2020, the act committed by the appellant falls under Section 344 IPC.

19. As far as the charge under Section 5(l), 5(n) punishable under Section 6 of POCSO Act read with Section 376 (2)(f) IPC is concerned, as stated above, at the time of alleged occurrence, the victim was a child



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and she had not completed the age of 18 years. The victim in her evidence before the trial Court as well as in her previous statement given before the Magistrate, has clearly stated that the appellant took her to his friend's house and they stayed there for more than 10 days and during their stay, the appellant committed penetrative sexual assault on her on several occasions. Even the doctor/P.W.7 who conducted medical examination on the victim has clearly stated that the hymen of the victim was not intact and there is a possibility for sexual intercourse and the medical report of the victim was marked as Ex.P.5. Therefore, the evidence of the victim/P.W.1 was corroborated by the medical evidence that the victim was subjected to sexual intercourse by the appellant. Though the evidence of the doctor and the medical evidence show that there is no forceful sexual assault and no injury was found on the victim, the doctor has clearly stated that the hymen of the victim was not intact and there is a possibility of sexual intercourse. Even assuming that the victim had not resisted the act of the appellant or given consent to the appellant for the sexual relationship, since the victim was a child at the



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time of occurrence, the consent is immaterial and the non resistance also immaterial. Since, the appellant committed penetrative sexual assault on the victim who was a child, the offence committed by the appellant falls under Section 3 punishable under Section 4 of POCSO Act. Since the appellant committed sexual assault on the victim for more than once, the offence falls under Section 5(l) punishable under Section 6 of POCSO Act. Further, from the evidence of P.W.1 to P.W.4 and P.W.8, it is clearly seen that the appellant is the close relative of the victim and he is Chithappa (uncle) in relation. Since the appellant being the relative of the victim committed penetrative sexual assault on the victim, the offence committed by the appellant falls under Section 5(n) punishable under Section 6 of POCSO Act. Therefore, the prosecution proved its case insofar as the charges under Sections 5(l), 5(n) punishable under Section 6 of POCSO read with Section 376 (2)(f) IPC. Therefore, the trial Court from the oral and documentary evidence rightly found the guilt of the accused and convicted as stated above.

20. The learned counsel for the appellant vehemently contended



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that it is the duty of the prosecution to prove the foundational fact that the accused has committed the charges offences beyond all reasonable doubt like any other criminal cases and the POCSO case is not an exception for that. There is no quarrel with the proposition of law. It is the fundamental jurisprudence in the criminal law that it is the duty of the prosecution to prove its case beyond all reasonable doubt. But once the foundational fact is proved by the prosecution, since this case is under the POCSO Act, there is a statutory presumption under Section 29 of the Act then it is for the accused to rebut the statutory presumption that he has no sexual intent or culpable mental state in the manner known to law.

21. Further, insofar as the citations referred to by the learned counsel for the appellant is concerned, there is no quarrel with the proposition of law laid down by the Hon'ble Supreme Court and the same was followed by various High Courts as referred to by the learned counsel for the appellant. However, in criminal cases, there is no precedent. Every case has got its own unique facts and circumstances and therefore, every case has got to be dealt with its own fact and



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circumstances and the evidence placed before the Court has to be appreciated in the manner known to law. Once the Court finds that the prosecution proved its case beyond all reasonable doubt, then the Court can safely record conviction.

22. It is a settled proposition of law that the prosecution has to prove its case regarding the commission of offence. As stated above, this Court finds that the prosecution has proved the foundational fact that at the time of occurrence, the age of the victim was about 14 years and she had not completed the age of 18 years and therefore, she was a child under the definition of Section 2(1)(d) of POCSO Act and the defence has not proved contrary to that. As far as penetrative sexual offence is concerned, the victim is the prime witness and she has clearly stated that on the specific date viz., 22.07.2020, the appellant took her to his friend's house where they stayed till 04.08.2020 and during such period, she was subjected to penetrative sexual assault by the appellant. Even the evidence of the doctor/P.W.7 and medical report of the victim/Ex.P.5 clearly shows that the victim was subjected to penetrative sexual assault.



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Therefore, the prosecution proved its case that the victim who was a child, was subjected to penetrative sexual assault by the appellant.

23. In this case, it is not the case of the appellant and the prosecution that both the appellant and the victim are not known to each other. The appellant and the victim are relatives and they know each other from their childhood. Before the trial Court, the defence had put a suggestion to P.W.1 and P.W.3 that the victim had voluntarily left the house along with some other person and the appellant only secured and brought her back. However, he has not substantiated from where and whom he secured the victim. Further, from the said suggestion, it is clearly seen that the appellant was found along with the victim at the time of securing the victim. Therefore, the prosecution has established its case that the appellant is the one who took the victim. Once the medical evidence supported the evidence of the victim, then the prosecution proved the foundational fact that the appellant has committed penetrative sexual assault on the victim.

24. In the case of this nature, if the evidence of the prosecutrix is



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natural, cogent and consistent and also inspired the confidence of the Court, then the Court can record conviction based on the evidence of the prosecutrix alone and no corroborative evidence is necessary. Further in the cases of this nature, no other corroborative evidence can be expected as the culprits would take advantage of the innocence and aloofness of the children and commit the offence. Further, since the victims are children, the consent is immaterial and the non resistance is also immaterial and non mentioning of a specific place and time may not be a sole ground to reject the evidence of the victim.

25. In this case, the victim has clearly stated that the apapellant took her from her house and promised to marry her and therefore, she did not raise any objection for the penetrative sexual intercourse. However, still it is an offence. Since the victim was a child, even assuming that she has given her consent, the consent is immaterial. Therefore, the consent is not lawful and the consent of the victim cannot be accepted. Once the prosecution proved the foundational fact that the appellant committed penetrative sexual intercourse on the victim, as per Section 29 of POCSO



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Act which is a statutory presumption, the Court can draw a presumption and it is for the accused to rebut the presumption in the manner known to law that he had no sexual intention and there was no physical relationship with the victim.

26. In this case, the defence has examined three witnesses only to show the fact that there was some money dispute between the appellant and the father of the victim/P.W.3 and no other defence was taken before any of the witnesses. Even at the time of proceedings under Section 313 Cr.P.C., the victim has made a special statement and even during that statement, the appellant had not disputed the age of the victim and he has also not disputed the allegation of penetrative sexual assault on the victim. His main defence is that there was a money dispute between him and the father of the victim due to which, they have filed the false case against the appellant. Except this defence, no other particular defence was taken at the time of proceedings under Section 313 Cr.P.C.

27. It is settled proposition that the accused need not take any



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defence or the accused need not come to the witness box and let any oral or documentary evidence to substantiate his defence. It is for the prosecution to prove its case beyond all reasonable doubt. In this case the prosecution has proved its case beyond all reasonable doubt in the manner known to law by producing oral and documentary evidence, whereas the appellant has not rebutted the statutory presumption under Sections 29 and 30 of the POCSO Act.

28. This Court being the appellant Court as a final Court of fact finding, re-appreciated the entire evidence and finds that the prosecution has proved its case beyond all reasonable doubt. The defence has not rebutted the statutory presumption in the manner known to law. Under these circumstances, this Court does not find any merit in the appeal and the appeal is liable to be dismissed.

29. Accordingly, this Criminal Appeal is dismissed.

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P.VELMURUGAN
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To

1. The Special Court (POCSO Cases), Cuddalore
2. The Inspector of Police
Kullanjavadi Police Station
Cuddalore District
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.

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