



Crl.A.No.288 of 2021

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Date: 10.10.2022

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Criminal Appeal No.288 of 2021

State represented by
The Inspector of Police,
All Women Police Station,
W-26 Ashok Nagar,
Chennai.
(Crime No.02/2016)

... Appellant

vs.

Kathir

... Respondent

Prayer: Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to set aside the judgment passed in S.C.No.340 of 2017 dated 25.04.2019 by the learned Sessions Judge, Mahila Court/Special Court for Cases under POCSO Act/Children's Court, Chennai.

For Appellant : Mr.S.Sugendran,
Additional Public Prosecutor

For Respondent : Mr.P.R.Dineshkumar



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JUDGMENT

Aggrieved over the judgment of acquittal passed by the learned Special Judge under POCSO Act dated 25.04.2019 in S.C.No.340 of 2017.

2 Originally, the appellant/Police has registered a case against the respondent in Crime No.2 of 2016 for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 [hereinafter called as "POCSO Act"] and Section 506(ii) of IPC. After investigation, they laid a charge sheet against the respondent before the learned Sessions Judge, Mahila Court/Special Court for Cases Under the POCSO Act/Children's Court, Chennai, since the offence charged against the respondent was against woman, especially a child falls under the POCSO Act. The learned Sessions Judge, had taken cognizance of the charge sheet in S.C.No.340 of 2017 and framed the charge against the respondent.



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3 In order to prove the case of the prosecution, on the side of the prosecution, as many as 8 witnesses were examined as P.Ws.1 to 8 and marked 12 documents as Exs.P1 to 12. After completion of examination of prosecution witnesses, when incriminating circumstances culled from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C., he denied the same as false and pleaded not guilty. On the side of the defence, no one was examined and no document was marked.

4 After completing trial and hearing of arguments advanced on either side, the learned Special Judge found not guilty of the respondent for any of the charges framed against him and thereby, acquitted him. Challenging the said judgment of acquittal passed by the learned Special Judge, the State has filed this appeal.

5 Mr.S.Sugendran, learned Additional Public Prosecutor appearing for the appellant/State would submit that the learned trial Judge acquitted the respondent on the main ground that the evidence of P.Ws.2 & 3 parents of the victim child, P.W.1 the victim child are not



consistent, cogent and trustworthy and there are lot of contradictions and came to the conclusion that based on their evidence conviction cannot be recorded against the respondent/accused and prosecution failed to prove its case beyond all reasonable doubts. The finding of the trial Court is completely erroneous and that, in cases of aggravated sexual assault on a child, who was aged about only 3 years, sole evidence of the victim would suffice to record conviction, if it is trustworthy.

6 The learned trial Judge has failed to appreciate the evidence of the prosecution witnesses and wrongly applied the provisions of law and erroneously acquitted the respondent stating that the prosecution has failed to prove its case. The victim girl was produced before the learned Magistrate for recording statement under Section 164 Cr.P.C., at the time of occurrence, the victim girl was only aged about 3 years and she has clearly narrated the sexual assault committed by the respondent/accused, which clearly proves that the respondent/accused has committed aggravated penetrative sexual assault on the child, who was only aged about 3 years at the time of occurrence.



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7 As far as appreciation of the evidence of prosecution witnesses is concerned, the trial Court held that the evidence of P.Ws.2 & 3 cannot be relied on for the reason that the same is not consistent, cogent and trustworthy and the victim child was tutored, as there was no corroboration of the fact, but it is seen that the trial Court has miserably failed to appreciate the fact that the corroboration is not always required if there are circumstances to dispense with such requirement.

8 The learned Public Prosecutor would further submit that P.W.1 has clearly narrated the incident to her grand mother, which corroborates with the evidence of P.Ws.2 & 3 parent of the victim. But the trial Court has omitted to consider the same in a right perspective and has failed to consider the corroborative evidence of the prosecution witnesses. On reading of the statement of the victim recorded under Section 164 Cr.P.C., at the earliest point of time, it is proved that the accused committed the offence as narrated in the complaint. Under these circumstances, there is sufficient circumstantial evidence to corroborate the fact that there was sexual assault on the victim child.



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9 Per contra, the respondent/accused led no evidence whatsoever to rebut the presumption under Section 29 of the POCSO Act and considering the totality of the facts and circumstances, there is sufficient evidence beyond reasonable doubt to convict the accused. The impugned judgment has however error by failing to consider the above evidences and not properly appreciated the evidence of the prosecution witnesses, which resulted in unmerited acquittal of the respondent/accused. Therefore, the judgment of the trial Court is liable to be set aside and the appeal may be allowed.

10 The learned counsel appearing for the respondent/accused would submit that the learned trial Judge has rightly and carefully analysed the evidence of prosecution witnesses, namely, P.Ws.1 to P.W.3 and heard the arguments of both sides and acquitted the respondent/accused from all the offences charged against him.



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11 There are many contradictions in the evidence of P.Ws.1 to 3 regarding date, time and place of occurrence. P.W.3 mother of the victim child has clearly stated that within 10 to 15 days of living in the house, the alleged occurrence had taken place and she stated that she does not know anyone living in the compound, even though more than 15 families are living in the compound, but she would talk to the brother of the accused and the respondent/accused warned P.W.3. Further wherever P.W.1 and P.W.2 goes, they would create some problem with the neighbours, which was proved through the evidence of P.W.4.

12 On 10.04.2016 there was altercation between the accused and P.W.2 father of the child and the accused lodged complaint for the same and gets treatment for his injuries, which was admitted by the Investigating Officer. Thereafter only P.W.2 and P.W.3 lodged the present counter complaint that too at 11.40 midnight on 11.04.2016, even though the alleged brawl between the accused and P.W.2 took place on 10.04.2016. Therefore the present complaint was lodged to ventilate their grievance, for which they used their own child and has stooped to the



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level of tutoring the child to give false evidence against the respondent/accused and convict him for a dastardly offence due to previous enmity. The medical evidence let in by the prosecution also did not point to any acts of sexual abuse.

13 According to prosecution story, the victim child has narrated the alleged incident firstly to the Grandmother Mallika, mother of P.W.3 and she is a crucial witness, but the prosecution purposely did not examine her, even though her name was included in the list of witnesses. Even the witnesses viz., P.Ws.1 to 3 did not state anything about the information being heard by the Grandmother of the child, who in fact conveyed the alleged incident to P.W.3 and thereafter P.W.3 informed the same to P.W.2, who was working as painter in Mumbai at the relevant point of time. The above exclusion of the Grandmother even by the child is the most vital and clinching factor as it clearly shows that the child, which is amenable to tutoring is subjected to tutoring and the child too states that she told the incident to her mother and father and did not utter anything about stating it to the grandmother which is the foundation of the prosecution case. The Hon'ble Supreme Court and this Court have



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held in many judgments that the child witness should be analyzed with caution as they may be easily amenable to tutoring.

14 Further the Grandmother also on knowing that the child was sexually abused by the accused at 1.00 p.m. remained mute when the mother P.W.3 came for lunch by 1.30 p.m. and only at 6.00 p.m., she told P.W.3 about the incident, which is clear deviation from normal human behaviour, which is to inform the mother immediately after the occurrence when she saw her.

15 The evidence of P.W.1 and P.W.3 are not cogent and consistent and there are lot of contradictions between the complaint and 164 statements and also deposition made before the Court during examination. Therefore, there are material contradictions and the prosecution has failed to substantiate its case and the medical evidence also not supported the case of the prosecution and there is delay in filing the complaint. The trial Court has rightly considered the oral and documentary evidence, acquitted the respondent / accused and hence, there is no merit in the appeal and the appeal is liable to be dismissed.



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16 Heard the learned Additional Public Prosecutor appearing for the appellant/State, the learned counsel appearing for the respondent and perused the materials available on record and also carefully perused the judgment of the trial Court.

17 Since this Court, being an appellate Court is a final Court of fact finding in this case and it has to independently re-appreciate the entire evidence and give independent finding, accordingly, this Court also thoroughly gone into the entire materials and re-appreciated the entire evidence on record.

18 The case of the prosecution is that on 10.03.2016, the complainant had been to Mumbai by leaving his wife and the victim child under the custody of his mother-in-law viz Malliga. On 26.03.2016, when his wife went for work, the child was with his mother-in-law. At about 1.00 p.m. she found that the victim was missing and when she came out in search of the victim child, the victim came out from the house of the accused by crying. She enquired the victim child, the victim



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told that the accused had licked over her mouth, lips, hip and private parts. P.W.1 came to know about the occurrence and after he returned from Mumbai, he enquired the accused. The accused abused P.W.1 and threatened that he should leave the issue and if he proceeded to take any action, he would murder the victim child. Therefore the present case has been registered against the respondent/accused for the offence punishable under Section 6 of the POCSO Act and under Section 506(ii) of IPC.

19 Out of 8 witnesses examined, on the side of the prosecution, the father of the victim child was examined as P.W.2 and the mother of the victim child was examined as P.W.3. The victim child, who was only 3 years old at the time of occurrence, was examined as P.W.1 and she has clearly narrated the incident and the offence committed by the respondent/accused. In this case, victim girl is the only eye witness and the other witnesses are only circumstantial witnesses. Ex.P3 is the Birth Certificate of the victim child, from which, it is clear that the victim child was 3 years at the time of occurrence. Therefore, the victim was a child at the time of occurrence under the definition of Section 2(1)(d) of the POCSO Act.



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20 Even though, there is delay in filing the complaint, the same was properly explained by the prosecution. Admittedly, at the time of occurrence, P.W.2 father of the victim child was not in the station and he went to Mumbai for his job. After he came back to home, the complaint was lodged. Therefore, delay in filing the complaint is not a fatal to the case of the prosecution.

21 Now it has to be seen that whether the prosecution has substantiated that the victim child was subjected to aggravated penetrative sexual assault, for which, it is useful to refer Section 3 of the POCSO Act.

3. Penetrative sexual assault:

A person is said to commit "penetrative sexual assault" if-
(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or



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- (b) *he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or*
- (c) *he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or*
- (d) *he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.*

It is also useful to extract the statement of the victim child recorded under Section 164 Cr.P.C., which is the earliest statement of the victim child soon after the occurrence.

“கதிர் என்ற வீட்டிற்கு அருகில் உள்ள அங்கிள் தன்னை வாய், உதடு, பல்லா (பெண் உறுப்பு) ஆகியவற்றில் நக்கினார். கத்தாதே என்று முடியே பிடித்து கழுத்தை நெறித்தார்”.



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22 Even though, the learned counsel for the respondent vehemently contended that the child was tutored by her mother P.W.3, whose evidence also not consistent, cogent and trustworthy, the fact remains that P.W.1 the victim child, during recording of statement under Section 164 of Cr.P.C., which was the earliest version, has clearly narrated the incident. Further, when she was produced before the Doctor, who was examined as P.W.5, she has clearly reiterated the statement given before the Magistrate and finally when she was produced before the Court also she has clearly stated that the accused has committed the offence, which falls under the POCSO Act. Therefore, for the said reason we cannot throw away the evidence of the victim child, who in fact subjected to sexual assault by the respondent/accused.

23 The learned counsel for the respondent/accused contended that medical evidence has not supported the case of the prosecution. In the case of aggravated penetrative sexual assault, it is not necessary for the victim to sustain injuries, and it cannot be concluded that since there



was no injuries, the occurrence could not have take place.

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24 On a careful reading of the evidence of the defacto complainant P.W.2, it reveal that there may be some exaggerations, but, as far as the sexual assault committed by the accused is concerned, it is proved through the sole evidence of P.W.1 the victim child. Therefore for the reason that there are some exaggerations, it cannot be concluded that entire case of the prosecution has been set up by P.Ws.1 and 2 the parent of the victim child.

25 The defence taken by the accused is that due to previous enmity, P.Ws.1 and 2 foisted false case using their own child. But, the learned counsel for the respondent is not in a position to establish the motive for P.Ws.1 and 2 to lodge a false complaint against the respondent by examining the brother of the accused to whom it was alleged that P.W.2 having frequent telephonic conversations. Without any strong reason, no mother will go to the extent of making allegations of this nature by using her own 3 years old child. Hence the contention of the learned counsel for the respondent regarding enmity is not acceptable.



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26 On reading of evidence of P.W.1, it clearly shows what had happened to the victim child. No mother would rush to the Police Station immediately soon after the occurrence. Naturally, the mother would think about the future of the child and reputation of the family. The evidence of P.W.2/ father of the victim child clearly reveals that P.W.3 informed him about the occurrence and thereafter when he came back to home, complaint was lodged against the respondent/accused.

27 In this case, there is no other eye-witness and the victim child was only 3 years old, she has clearly stated about the act of the accused to her grandmother, who has conveyed the same to P.W.3 and she informed the same to P.W.2. Cases like this, mere delay in filing the FIR, is not fatal to the case of the prosecution and the contradictions pointed out by the learned counsel for the respondent/accused are not material contradiction to the case of this nature, which would affect the case of the prosecution. Further, the victim child P.W.1 was not cross examined and her evidence was not testified by the defence. In the absence any of challenge of the evidence of the victim, this Court cannot brushed aside the evidence of the victim girl, who has clearly narrated



the event without any hesitation. In a cases of this nature, the sole evidence of the victim is a vital document to be considered. Since there is a penetrative sexual assault and the sexual assault is against the child, who aged about 3 years i.e. below 12 years, the offence falls under Section 5(m), which is aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act.

28 The trial Court failed to appreciate the evidence of the victim child and also has not given any valid or sound reason to disbelieve the evidence of the victim child and the Court below placed great emphasise on the technical grounds, which is not the object of POCSO Act. Therefore, mere delay in filing the complaint and contradictions in the evidence of the witnesses should not lead to unmerited acquittal and due to the fault of the other witnesses and defect in investigation are not the grounds to acquit the accused, when the Act is clear that the evidence of the victim would suffice to convict the accused, if it is trustworthy. The Court has to see the evidence of the victim child whether it is trustworthy and if the Court finds there is no reason to discord or disbelieve the evidence of the victim child, the Court



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can record conviction against the accused and should not place emphasise on the evidence of other witnesses.

29 In the present case on hand, the trial Court has failed to understand the object of the POCSO Act and omitted to appreciate the evidence of the victim child. As per the provisions of Section 29 of the POCSO Act, once a person is prosecuted for the offences under Sections 3, 5 7 and 9 of the POCSO Act, there is a statutory presumption that the accused has committed the offence. Therefore, the accused has to rebut the presumption under Section 29 of the POCSO Act. Therefore, the trial Judge has failed to understand the scope and object of the POCSO Act.

30 The culprits are escaping for the technical reason and unfortunately Investigation Wing also not upto the standard and due to either defect in investigation or fault in investigation, most of the cases, the culprits are escaping. Therefore, mere technicalities should not be allowed to stand in the way of administration of justice.



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31 The trial Courts also, sometimes not applying their minds and searching for proof beyond all reasonable doubt and taking advantage of the flaw in the investigation, giving the benefit of doubt to the accused. But cases like this, we cannot give much importance to the technical ground of proof.

32 Now, this Court has come to the conclusion that the respondent / accused has committed the offence and the Court has invoked presumption clause and it is for the accused to rebut the presumption in the manner known to law. Though it is settled proposition of law that the accused need not come into the witness box and prove his innocence, however, this is not an offence comes under IPC, this is the offence comes under the POCSO Act. The POCSO Act itself designed in such a way that once the prosecution proved the offence and the Court drawn the presumption under Section 29 of the POCSO Act, it is for the accused to rebut the presumption. In this case, this Court finds that the respondent / accused has committed the offence of aggravated penetrative sexual assault and draw presumption under Section 29 of the



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POCSO Act and also finds that the respondent / accused has not rebutted the presumption. Therefore, this Court finds that the accused committed the offence under Sections 5(m), which is punishable under Section 6 of POCSO Act and this Court finds the respondent/accused not guilty for the offence under Section 506(ii) of IPC and the acquittal of the respondent for the offence under Section 506(ii) is hereby confirmed. The judgment of the trial Court dated 25.04.2019 acquitting the respondent/accused for the offence punishable under Section 6 of the POCSO Act is hereby set aside.

33 Accordingly, this Criminal Appeal is allowed. The judgment of acquittal passed in S.C.No.340 of 2017 dated 25.04.2019 by the learned Sessions Judge, Mahila Court/Special Court for Cases under POCSO Act/Children's Court, Chennai, is hereby set aside.

34 Since it is a reversal judgment and it is necessary to direct the respondent / accused to appear before this Court for asking question of sentence to be imposed against him. Accordingly, the respondent/accused is directed to appear before this Court on



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10.10.2022

Speaking Order/Non Speaking Order

Index : Yes / No

Internet : Yes

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To

- 1.The Sessions Judge, Mahila Court/Special Court for Cases under POCSO Act/Children's Court, Chennai.
2. The Inspector of Police, All Women Police Station, W-26 Ashok Nagar, Chennai.
- 3.The Public Prosecutor, High Court, Madras.



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WEB CO **P.VELMURUGAN, J.**

This Court, on 10.10.2022 while convicting the accused, directed the matter to be posted on 13.10.2022 “for questioning of sentence”.

2. Today, when the matter is taken up for hearing the appellant/State secured the accused and produced before this Court. On questioning, the respondent/accused has stated that he has not committed any offence as stated by the prosecution and has stated that recently he got married and his family depends on him. He has also stated that the *de-facto* complainant is in the habit of giving complaints and creating problems with the neighbours and making false complainants for the purpose of collecting money. Hence, he request this Court award lesser punishment.

3. Heard the respondent/accused and the learned counsel on either side.

4. Since the age of the victim child is only three years at the time of occurrence, the offence falls under Section 5(m) which is punishable under Section 6 of the POCSO Act, which is serious in nature, this Court finds that there is no mitigating circumstances to award lesser punishment and as per the POCSO Act prior to the amendment 2019,



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minimum punishment for the offence under Section 6 of the POCSO Act, is ten years and maximum is life.

5. Considering the age of the appellant and also considering the fact that he has recently got married and hence, minimum sentence of 10 years, which meets ends of justice. Therefore, the respondent is convicted under Section 5(m) which is punishable under Section 6 of POCSO Act and shall undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for a period of one year. However, the respondent is acquitted from the offence under Section 506(ii) IPC.

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Note :

- (i) Registry is directed to issue copy of the judgment by today itself **(i.e, on 13.10.2022).**
- (ii) Appellant/Police is directed to secure the custody of the respondent/ accused to execute the period of imprisonment.

Copy to: The Superintendent of Jail, Central Prison,
Puzhal, Chennai.



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