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CRL A No.882 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.11.2022

Coram:

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

Criminal Appeal No.882 of 2022s

Agniveeran

... Appellant

Vs.

State by
The Inspector of Police
Parangipettai Police Station
Parangipettai
Cuddalore District
Cr.No.696 of 2020

... Respondent

Prayer : Criminal Appeal filed under Sections 374 (2) of Criminal Procedure Code, praying to set aside the order passed in Spl.S.C.No.69 of 2020 dated 26.11.2021 on the file of the Special Court (POCSO Act Cases), Cuddalore, Cuddalore District.

For Appellant : Mr.C.Prakasam

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been filed seeking to set aside the order passed in Spl.S.C.No.69 of 2020 dated 26.11.2021 on the file of the Special Court (POCSO Act Cases), Cuddalore, Cuddalore District.

2.The respondent police registered the case in Crime No.696 of 2020 against the accused/appellant herein for the offence punishable under Section 6 of POCSO Act, 2012 and after completing the investigation, laid charge sheet before the Special Court (POCSO Act Cases), Cuddalore, for the offences under Section 5(m) punishable under Section 6 of POCSO Act, 2012 and 376(A,B) IPC, and the same was taken on file in Spl.S.C.No.69 of 2020. The learned Sessions Judge after completing the formalities, framed the charges against the accused for the offences under Section 5(m) punishable under Section 6 of POCSO Act, 2012 read with Section 376(A,B) IPC.

3. After framing the charges, in order to prove the case of the prosecution, during trial before the trial Court, totally 8 witnesses were



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examined as P.W.1 to P.W.8 and 10 documents were marked as Exs.P.1 to P.10 and one material object was exhibited as M.O.1.

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. On conclusion of trial after hearing the arguments advanced on either side and also considering the materials, the learned Sessions Judge, found the appellant guilty for the offence under Section 5(m) punishable under Section 6 of POCSO Act, 2012 read with Section 376(A,B) IPC and convicted and sentenced to undergo rigorous imprisonment for 20 years and to pay fine of Rs.5,000/- in default to undergo simple imprisonment for a further period of three months for the offence under Section 5(m) punishable under Section 6 of POCSO Act, 2012 read with



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Section 376(A,B) IPC. Challenging the said Judgment of conviction and sentence, the accused has filed this present appeal before this Court.

6. The case of the prosecution is that on 24.07.2020 at about 04.00 p.m., the mother of the victim went to the house of the appellant by searching her daughter. At that time, she heard crying sound of her daughter at the backside house of the appellant which was under construction and when she went there, she found her daughter's dress were removed and the appellant who was sitting on the daughter of the defacto complainant, was pressing his private part into the private part of the victim child.

7. The learned counsel for the appellant would submit that a false case has been foisted against the appellant due to personal enmity between the appellant and the mother of the victim girl. He would submit that there is no eyewitness to the occurrence and the victim girl was aged only 3 years and 10 months at the time of alleged occurrence and she may not know what was happening around her and even she may not



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know what is good touch and what is bad touch. The appellant is the neighbour and also known person to the defacto complainant. The appellant had causally took the victim child. But due to previous enmity, the defacto complainant has foisted a false case against the appellant and that no such occurrence took place as projected by the prosecution. He would further submit that the prosecution not proved that with sexual intent, the appellant committed such alleged offence. The trial Court also failed to consider the evidence of the doctor/P.W.7 who conducted medical examination on the victim girl wherein, the doctor/P.W.7 has clearly deposed that there was no injury either on the body or in the private part of the victim girl which itself proves that no penetrative sexual assault was committed on the victim girl as projected by the prosecution. Therefore, the offence under the POCSO Act would not attract. Further he would submit that one day when the appellant went to boat for fishing at 11 p.m., the defato complainant was found speaking with one Logu and the same was questioned by the appellant. Hence, the the defacto complainant on fear that the appellant may inform about her illegal affair with the said Logu, to her husband, she staged a drama as if,



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the appellant committed such an offence on her daughter. In this background, the false case was foisted by the mother of the victim girl against the appellant. The trial Court failed to appreciate the medical evidence which is not corroborated with the evidence of the victim girl and other witnesses and erroneously convicted the appellant and imposed sentence of 20 years which is not proportionate even assuming that the charge was proved against the appellant. Therefore, the Judgment of the trial Court is liable to be set aside.

8. The learned Additional Public Prosecutor appearing for the respondent police would submit that the date of occurrence is on 24.07.2020. The date of birth of the victim is 04.09.2016. In order to prove the age of the victim, the birth certificate of the victim was marked as Ex.P.2. As per Ex.P.2, the date of birth of the victim is 04.09.2016. Therefore, at the time of occurrence, the victim was completed only 3 years. Therefore, the victim was a child under the definition of POCSO Act. The appellant is residing opposite to the house of the victim. The victim used to play with the grand children of the appellant in the house of the appellant. On the date of occurrence, the mother of the victim went



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to the house of the appellant in searching of her daughter wherein, she heard crying sound of her daughter at the backside house which was under construction and when she went there, the appellant was found sitting on the daughter of the defacto complainant and was pressing his private part into to the private part of the victim child. Hence, the mother of the victim set the law into motion by filing the complaint against the appellant and based on the complaint, FIR was registered and the same was marked as EX.P.6. After investigation, the respondent police laid charge sheet before the Court concerned. The trial Court, on conclusion of trial, based on the materials, convicted the appellant for the charged offences viz., Section 376 (A,B) IPC and Section 5(m) punishable under Section 6 of POCSO Act. Earlier, 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 wherein, the victim has clearly narrated the offence committed by the appellant. Even while giving evidence before the trial Court as P.W.1, the victim has clearly narrated the offence committed by the appellant. Therefore, from the evidence of P.W.1/victim, P.W.2/mother of the victim and P.W.7/doctor and Ex.P.1 to



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P7, the prosecution proved its case beyond reasonable doubt. Therefore, there was a presumption under Section 29 of POCSO Act that the Court can draw the presumption of sexual intention of the accused. Admittedly, the said presumption is a rebuttable presumption. But the appellant did not rebut the presumption in the manner known to law. The trial Court rightly appreciated the evidence of the prosecution witnesses and convicted the appellant as stated above. Therefore, 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. Admittedly P.W.2 is the mother of the victim who set the law into motion by lodging the complaint/Ex.P.3 before the respondent police. Based on the complaint, FIR in Crime No.696 of 2020 was registered under Ex.P.6 for the offence under Section 376(A,B) IPC and Section 5(m) punishable under Section 6 of POCSO Act. The respondent police after completion of investigation, laid charge sheet before the Court



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concerned and based on the charge sheet, the trial Court framed charges against the appellant for the offences under Section 5(m) punishable under Section 6 of POCSO Act read with Section 376(A,B) IPC.

11. In order to substantiate the charges framed against the appellant, on the side of the prosecution, totally 8 witnesses were examined and 10 documents were marked besides one material object was marked as M.O.1. On the side of the defence no oral or documentary evidence was produced.

12. Out of the 8 witnesses, the victim girl was examined as P.W.1 and the previous statement of the victim recorded by the Magistrate under Section 164 Cr.P.C. was marked as Ex.P.1.

13. Perused Ex.P.1/statement of the victim child recorded by the Magistrate under Section 164 Cr.P.C. wherein the victim child has clearly stated that she used to play with her neighbourhood friends who are at the house of the appellant. One day, the appellant by holding the hands of the victim, took her to a newly constructed house, threatened her,



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removed her dress and undergarment and pressed his private part into the private part of the victim girl. On several occasions, he used to take her like this and done the same thing and every time, he used to beat her on her head, back and her private part stating not to shout and call any one. He also threatened not to inform the same to any one. Thereafter, the appellant by pulling her hair, made her to lie and he lied on the victim child and again pressed into her private part. At one point of time, she bit his hand and also scratched his neck by nail. Since the appellant beaten the victim, the private part of the victim child became reddish. When the mother of the victim who came by searching for the victim, saw the appellant threatening the victim and was pressing his private part into the private part of the victim child. Hence, she slapped the appellant with Slipper and took the victim to her house. Thereafter, the mother of the victim applied medicine to the victim.

14.The victim child was subsequently examined as P.W.1 before the trial Court, wherein the victim child has deposed that she has got a younger sister, her father is in Saudi Arabia and her mother goes to 100 days work. She knew the appellant and his house is situated opposite to



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her house wherein, her friends Kanishni and Thasmithan are there and she used to play with them. When she was watching T.V., the said Thasmithan and Kanishni went to shop to get snacks. The appellant took her to the Kitchen room and pressed his private part into the private part of the victim child. He removed the dress of the victim and also the threatened the victim by showing his finger. When her mother came for searching her, she slapped the appellant with Slipper and took the victim to her house. The appellant threatened the victim by showing his hand. Therafter, the victim informed her mother that the appellant pressed his private part into her private part. The mother of the victim advised the victim not to go to the house of the appellant. Therefore, the victim was taken to the Court wherein she narrated the incident and she was also taken to the hospital, wherein she was subjected to medical examination and she also narrated everything to the police when she was enquired.

15. The mother of the victim was examined as P.W.2 and she also narrated the act committed by the appellant and the evidence of P.W.2 is corroborated with the evidence of the victim child/P.W.1.



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16. The doctor who conducted medical examination on the victim child was examined as P.W.7 and he has deposed that the mother of the victim informed him that her neighbour attempted to commit penetrative sexual assault on the victim child by removing her dress and he also threatened and beaten the victim child. The doctor has stated that the hymen of the victim was intact and there was no external or internal injuries on the body and private part of the victim however, that it cannot be stated that there was no penetrative sexual assault. The medical certificate issued by the doctor was marked as Ex.P.7.

17. Perused Ex.P.7/medical certificate of the victim wherein, the history of the case is mentioned as alleged sexual assault of victim girl on 24.07.2020 at 4 p.m. in assailant Agniveeran at his house. Victim mother was searching for the child and found the assailant engaging in attempts to undress and force her to engage in intercourse. However, in the medical certificate, the doctor has given opinion that no physical injuries, no genital injuries, no evidence to suggest possibility of recent intercourse. However, sexual violence cannot be ruled out.



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18. The evidence of P.W.1 and P.W.2 and Ex.P.1/previous statement of the victim recorded by the Magistrate shows that the victim was subjected to penetrative sexual assault by the appellant. Though the doctor/P.W.7 has deposed that the hymen of the victim was intact, there was no external or internal injuries on the body and private part of the victim and no evidence to suggest possibility of recent intercourse, the doctor has opinion that sexual violence however cannot be ruled out.

19. Admittedly, in this case, no independent witnesses were examined. In the evidence, the victim child has clearly stated that her friends Thasmithan and Kanishni are there in the house of the appellant and she used to play with them. When she was watching T.V., the said Thasmithan and Kanishni had gone to shop to get snacks. At that time, the appellant took her to the Kitchen room, removed her dress and pressed his private part into the private part of the victim child and he has also threatened the victim child not to tell the same to anyone which clearly shows that in the absence of others, the appellant has committed the offence on several occasions. P.W.2/the mother of the victim is



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eyewitness to one such occurrence.

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20. In the cases of this nature, the Court cannot expect any independent eyewitness since the culprits always take advantage of the weakness and aloofness of the children and exploit them sexually either by threatening them or induce them with sweet quoted words by offering them likely things. Therefore, mere non examination of any independent witness is not fatal to the case of the prosecution. If the evidence of the prosecutrix is cogent, consistent, natural and inspired the confidence of the Court, the Court can safely record conviction based on the sole evidence of the prosecutrix.

21. This Court being appellate Court and final Court of fact finding while re-appreciating the entire evidence, does not find any reason to discard or disbelieve the evidence of the victim child.

22. The main defence taken by the appellant is that the defacto complainant who is the mother of the victim had illegal affair with another person and since the appellant saw the same and questioned her,



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the defacto complainant on fear that the appellant may inform the same to her husband, has made allegation of sexual assault on her daughter. However in order to substantiate the defence, no evidence was putforth. Mere bald defence without any substance, cannot be a sole ground to disbelieve the evidence of the victim child. Eventhough the defence counsel putforth a suggestion before the mother of the victim that one Logu used to come to her house frequently and she had affair with the said Logu, no one was examined on the side of the defence to substantiate the same. The appellant's house is opposite to the house of the defacto complainant and if at all the said Logu used to come to the house of the defacto complainant frequently, definitely some other persons who are living in the same street would have also come to know about the same. But the defence has not examined any such witness to prove that the defacto complainant had intimacy with the said Logu and in order to screen the same, she has foisted the false case against the appellant. Therefore, the defence taken by the appellant is not acceptable.

23. Further no mother would go to that extent and spoil the



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reputation and future of her own daughter at the tender age in order to escape from the alleged intimacy. More over, a child cannot be tutored at the tender of age of $3\frac{3}{4}$ years to say all these things naturally. The evidence given by the victim child before trial Court and the statement of the victim child made before the Magistrate under Section 164 Cr.P.C. are cogent, consistent and also natural. Unless she directly affected by the act of the appellant, she could not have stated all these things so naturally.

24. Therefore, the defence put forth by the appellant that in order to escape from the illegal intimacy, the mother of the victim has set up the victim child and tutored her to foist the false case against the appellant, is not acceptable and the same was also not substantiated by the defence.

25. Therefore, from the evidence of P.W.1, P.W.2, P.W.7 and Ex.P.1 to P.7, this Court finds that the victim was a child under the definition of POCSO Act at the time of occurrence and she was subjected to penetrative sexual assault by the appellant. The trial Court rightly



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appreciated the evidence and convicted the appellant as stated above.

Since the victim was aged about 3 years at the time of occurrence, the act committed by the appellant is a heinous crime and grievous in nature.

However, the trial Court has awarded only the minimum sentence of 20 years. Therefore, this Court finds no mitigating circumstances to alter the sentence and there is no merit and the appeal is liable to be dismissed.

26. Accordingly, this Criminal Appeal is dismissed.

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Index: Yes/No

To

1. The Special Court (POCSO Act Cases),
Cuddalore, Cuddalore District.

2. The Inspector of Police
Parangipettai Police Station
Parangipettai
Cuddalore District

3. The Public Prosecutor Officer, High Court, Madras

4. The Section Officer, Criminal Section, High Court, Madras.

P.VELMURUGAN, J



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