



CRL A No.557 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	:	04.11.2022
Pronounced on	:	08.12.2022

Coram:

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

Criminal Appeal No.557 of 2021

Saravanan @ Jayakumar

... Appellant

Vs.

State represented by
The Inspector of Police
W18, All Women Police Station
M.K.B. Nagar
Chennai-39

... Respondent

Prayer : Criminal Appeal filed under Sections 374(2) of Criminal Procedure Code, praying to call for the records in S.C.No.480 of 2018 on the file of learned Sessions Judge, Special Court for Exclusive Trail of Cases under POCSO Act, Chennai – 600 104 and set aside the Judgment of conviction and sentence passed by the trial Court on 12.07.2021 for offence under Section 8 and 12 of POCSO Act and 506(ii) IPC.

For Appellant : Mr.A.K.Sriram for
M/s.A.S.Kailasam & Associates

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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J U D G M E N T

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This Criminal Appeal has been filed seeking to set aside the Judgment of conviction and sentence passed in S.C.No.480 of 2018 dated 12.07.2021 for offence punishable under Sections 8 and 12 of POCSO Act and Section 506(ii) IPC on the file of the learned Sessions Judge, Special Court for Exclusive Trail of Cases under POCSO Act, Chennai.

2. The respondent police registered the case against the appellant in Crime No.845 of 2015 for the offence punishable under Section 8 of POCSO Act, 2012 and Section 506(ii) IPC and after completing the investigation, laid the charge sheet for the offences punishable under Sections 8 and 12 of POCSO Act and also under Section 506(i) IPC before the Mahila Cum Children Court and the same was taken cognizance in S.C.No.480 of 2018. During pendency of the case, on constitution of the Special Court, the case was transferred to the Sessions Judge, Special Court for Exclusive Trail of Cases under POCSO Act, Chennai, and the learned Special Judge, after completing the formalities, framed the charges against the the accused for the offences punishable under Sections 8 and 12 of POCSO Act, 2012 and Section 506(ii) IPC.



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3. After framing the charges, in order to prove the case of the prosecution during trial, totally 9 witnesses were examined as P.W.1 to P.W.9 and 7 documents were marked as Exs.P.1 to P7 and no material object was exhibited.

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

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 punishable under Sections 8 and 12 of POCSO Act 2012 and Section 506 (ii) IPC and convicted and sentenced to undergo 5 years imprisonment and to pay fine of Rs.5,000/- in default to undergo simple imprisonment for a further period of one



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month for the offence punishable under Section 8 of POCSO Act 2012; to undergo 3 years imprisonment and to pay fine of Rs.5,000/- in default to undergo simple imprisonment for a further period of one month for the offence punishable under Section 12 of POCSO Act 2012, to undergo 2 years imprisonment for the offence under Section 506(ii) IPC. Challenging the said Judgment of conviction and sentence, the accused has filed the present appeal before this Court.

6. The case of the prosecution is that due to difference of opinion, the mother and father of the victim separated each other and the mother of the victim is living separately along with her son and daughter/victim. The appellant had illegal intimacy with the mother of the victim and he used to visit the house of the victim frequently. While so, on 29.08.2015 at about 2.30 p.m., the appellant went to the house of the victim and questioned her as to why she went to the marriage along with her father. Further, the appellant removed his dress and sat in a naked position and also threatened the victim and her mother to sit in naked position and also pulled the breast of the victim girl. At that time, the mother of the victim intervened and warned the appellant and pushed the victim girl out



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of the house. Thereafter, the victim girl went to her neighbour's house in the upstairs from where she called her uncle/P.W.6 over phone and informed the incident who in turn informed the same to the father of the victim. Thereafter, the father of the victim lodged the complaint on 01.09.2015.

7. The learned counsel for the appellant would submit that the victim has no sterling character and the father of the victim girl has made use of the victim girl as a tool to evade the repayment of amount of Rs.10 lakhs which was borrowed by him from the appellant herein. Though the mother of the victim was cited as eyewitness to the occurrence, she did not support the case of the prosecution and during her examination as P.W.3, she turned hostile Further, the alleged occurrence is said to have taken place on 29.08.2015 in the presence of the mother of the victim. However, the mother of the victim did not lodge any complaint and the complaint has been lodged only by the father of the victim that too, after 2 days from the date of occurrence i.e. on 01.09.2015. Further, even though the case was registered on 01.09.2015 at 10 p.m., the complaint was sent to the Court only after 24 hrs. i.e. on 02.09.2015 at 3.30 p.m.



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The delay in lodging the complaint and the delay in sending the complaint to the Court have not been properly explained. He would further submit that in the FIR, the offences are mentioned as Section 8 of POCSO Act, 2012 and Section 506(i) IPC, whereas in the arrest card and memo of arrest intimation, the offences are mentioned as Sections 354(A) and 506(i) IPC. Further, in the memo of arrest intimation, the name of the mother of the victim is mentioned as relative of the accused in the column to whom the intimation was given. Therefore, there are material contradictions and the very genesis of the complaint itself is doubtful. Further, the trial Court has ignored the evidence on record in favour of the appellant more particularly, the appellant had filed a written statement under Section 233(2) read with 313 Cr.P.C. which would falsify the foundational facts of the prosecution case. Likewise, the trial Court failed to look into the various vital materials in the cross examination elicited by the appellant herein. He would submit that a false complaint has been lodged by P.W.2 who is the father of the victim against the appellant by using her daughter/P.W.1 to evade the repayment of loan amount of Rs.10 lakhs borrowed by him from the appellant herein. The said loan transaction was not within the knowledge of the victim and the statement



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of the victim recorded by the Magistrate under Section 164 Cr.P.C., is a tutored version by the father of the victim. The mother of the victim has categorically admitted in her chief examination that she and her husband/P.W.2 had borrowed a sum of Rs.10 lakhs from the appellant herein in the year 2013 as loan for constructing their house. Further she has admitted that they failed to repay the loan amount to the appellant and therefore, some quarrel took place between the father and mother of the victim in connection with the repayment of loan amount to the appellant. He would submit that once the mother of the victim herself did not support the case of the prosecution and was declared as hostile witness, it creates considerable doubt about the prosecution case. Further he would submit that the other independent witnesses viz. P.W.4 and P.W.5 have also not supported the case of the prosecution. In this case, P.W.6 is the uncle of the victim and brother of the victim's father. Both P.W.6 and P.W.2 were not present at the time of alleged occurrence and they are only hearsay witnesses. Further, they are interested witnesses and therefore, the evidence of P.W.6 and P.W.2 are not reliable. The witnesses, P.W.1/victim, P.W.2/ father of the victim and P.W.6/uncle of the victim have improved their versions step by step with a sole aim to



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foist a case against the appellant. More over, their evidences were mutually contradictory with each other with respect to alleged occurrence and the manner in which the father and uncle of the victim came into existence to foist the case against the appellant. Therefore, the evidence of P.W.2 and P.W.6 who are the father and uncle of the victim are untrustworthy of credit which all create doubt about the case of the prosecution. Further the Investigating Officer/P.W.7 also not conducted the investigation properly and she has admitted in the cross examination that the loan transaction of Rs.10 lakhs was existing between the appellant and the father of the victim. Further, the victim was not subjected to medical examination with respect to the pain alleged to have been caused by the appellant, to support the case of the prosecution which all would go to show that no such incident took place and the appellant has been falsely implicated in this case to evade the payment of Rs.10 lakhs received by the parents of the victim as loan in the year 2013. The trial Court failed to appreciate that the investigation conducted by P.W.7 to P.W.9 did not inspire the confidence of the Court to incriminate the appellant in this case. More particularly, the Inspector/P.W.9 Tmt.Jothi Lakshmi admitted in her cross examination that there are vital



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discrepancies in the provisions of law viz., in the FIR/Ex.P.4, complaint/Ex.P.3, arrest card, memorandum of arrest intimation, remand requisition and charge sheet which are all create considerable doubt about the veracity of the prosecution case with respect to commission of offence by the appellant. He would further reiterate that there is a delay of two days in lodging the complaint and there is inordinate delay of 3 years in producing the victim before the Magistrate and recording her statement under Section 164 Cr.P.C. which would clearly show that the father of the victim, in order to evade the repayment of the said loan amount of Rs.10 lakhs, has foisted the false case against the appellant by making use of his daughter as a tool. In the absence of cogent evidence brought on record to establish the prima facie of the foundational facts, the conviction of the appellant may not be based solely on the presumption of guilt, premised on the precincts of the doctrine of reverse burden. Therefore, the prosecution failed to substantiate the charges framed against the appellant for the offences under Sections 8 and 12 of POCSO Act and Section 506(ii) IPC. The trial Court further failed to appreciate the entire evidence properly and erroneously convicted the appellant for the above said offences, which warrants interference of this Court.



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8. The learned Additional public prosecutor would submit that at the time of occurrence the victim was only aged about 17 years and the same was not disputed by defence side. Therefore the victim was a child under the definition of POCSO Act. Further, he would submit that the mother of the victim had illegal intimacy with the appellant herein and therefore, there was some dispute between the mother and father of the victim and subsequently, they both separated each other and the mother of the victim is living separately along with her son and daughter/victim and that the father of the victim is living separately. On the date of occurrence, when the victim was in her house, the appellant went to her house and questioned her as to why she went to a marriage function along with her father. Further, the appellant removed his dress and sat in naked position and also asked the victim and her mother to sit in the same naked position and also puled the breast of the victim girl. At that time, the mother of the victim intervened and warned the appellant and pushed the victim girl out of the house. Thereafter, the victim girl went to her neighbour's house in the upstairs from where she called her uncle/P.W.6 over phone and informed the incident who in turn informed



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the same to the father of the victim. Therefore, the father of the victim called the victim and asked her to come to Perambur Railway Station from where she took the victim to her grandmother's house at Vellore and thereafter, lodged the complaint. In the evidence, the victim/P.W.1 has clearly stated that the appellant sat in a naked position in front of the victim and her mother and also compelled them to sit in naked position in front of him and threatened with dire consequences and also pulled the breast of the victim. Therefore, the offence committed by the appellant false under Section 12 and 8 of POCSO Act and Section 506(ii) IPC. P.W.2 who is the father of the victim, in his evidence has stated that the victim had initially called his brother/P.W.6 and informed about the incident who in turn informed the same to him. P.W.6 who is the uncle of the victim has also clearly stated that on the date of occurrence, the victim had called him over phone and told that she was in a trouble and wanted to talk to her father and in turn, he informed the same to the father of the victim and thereafter, the father of the victim called the victim girl and after talking to the victim girl, the father of the victim informed P.W.6 that the appellant has misbehaved with the victim. Therefore, the evidence of the victim is corroborated by the evidence of P.W.2/father of the victim



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and P.W.6/uncle of the victim. He would submit that since there was no penetrative sexual assault, the victim was not subjected to medical examination and though there are discrepancies relating to the arrest memo and other documents relating to the Sections of offence, that may not be fatal to the case of the prosecution. The trial Court rightly appreciated the evidence of the prosecution witnesses and convicted the appellant and there is no perversity in the Judgment of the trial Court. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

9. Heard the learned counsel appearing 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 as many as 9 witnesses were examined and 7 documents were marked.

11. Out of the 9 witnesses, the victim girl was examined as P.W.1.



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The father and mother of the victim were examined as P.W.2 and P.W.3 respectively. The uncle of the victim was examined as P.W.6. The statement of the victim recorded by the learned Judicial Magistrate under Section 164 Cr.P.C. was marked as ExP.2.

12. This Court being an Appellate Court as a final Court of fact finding, it has to necessarily re-appreciate the entire evidence and to give its findings independently. Accordingly, this Court re-appreciated the entire evidence and gives its findings independently.

13. As far as the age of the victim is concerned, at the time of occurrence, the victim was aged about 17 years. In order to prove the age of the victim, the birth certificate of the victim was marked as Ex.P.1 through the victim/P.W.1 and the defence side not disputed the age and birth certificate of the victim. As per Ex.P.1, the date of birth of the victim is 28.10.1997. As per the complaint and evidence of the victim, the date of occurrence is on 29.08.2015. Therefore, at the time of occurrence, the victim was aged about 17 years and she had not completed the age of 18



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years and therefore, she was a child under the definition of Section 2(1)(d) of POCSO Act, at the time of occurrence.

14. As far as the commission of offence is concerned, the victim girl while examining as P.W.1, stated that on the date of occurrence, the appellant came to her house and slapped her and pulled her from the bedroom to the hall and questioned as to why she had gone to the marriage along with her father and thereafter, the appellant sat in a naked position and also insisted the victim and her mother to sit in the same position in front of him and also pulled the breast of the victim. Further, the victim stated that immediately after the occurrence, on the same day i.e. 29.08.2015, she called her uncle and informed the same and subsequently informed to her father. However, the complaint was lodged only on 01.09.2015 at 10 a.m. after 2 days from the date of occurrence. Further, the complaint has been sent to the Court after 24 hrs. i.e. on 02.09.2015 and that the reasons for the delay in lodging the complaint and sending the complaint to the Court were not explained properly. Further, the victim was produced before the Magistrate for recording statement under Section 164 Cr.P.C. only on 17.09.2018 which is after 3



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years from the date of occurrence and the prosecution has not explained as to why the victim was not produced before the Magistrate for recording statement under Section 164 Cr.P.C. immediately after the occurrence or within a reasonable time. Further, the prosecution has also not explained as to why the victim was not subjected to medical examination. The father of the victim alleged that the mother of the victim had illegal intimacy with the appellant and therefore, the appellant used to come to the house of the victim frequently. If at all, the appellant is such a character, it is not known as to why P.W.2/the father of the victim had not obtained the custody of the victim when he separated from his wife on the ground of adultery and why did he allow the mother to retain the victim with her. Though the mother of the victim was said to have been present along with the victim at the time of occurrence, she did not support the case of the prosecution and she did not lodge any complaint in respect of the alleged occurrence. Even the Inspector/P.W.9 in her evidence admitted that there are discrepancies in the provision of law in the FIR, complaint, arrest card, memo of arrest intimation, remand requisition and that the charge sheet, FIR and complaint were sent to the Court belatedly which also creates reasonable doubts.



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15. The contention of the appellant is that the father of the victim had borrowed a sum of 10 lakhs from the appellant for constructing house and the same was not repaid by him and in order to evade the repayment of the said amount of Rs.10 lakhs, a false case has been foisted against the appellant. P.W.3/the mother of the victim has admitted in her evidence that they had borrowed a sum of Rs.10 lakhs from the appellant and the father of the victim/P.W.2 did not repay the same to the appellant and therefore, there was some quarrel between the father of the victim and the appellant. Therefore, the borrowal of Rs.10 lakhs from the appellant and the non repayment of the said amount is proved by the defence.

16. As per P.W.2/the father of the victim, there was illegal intimacy between the appellant and his wife/the mother of the victim and therefore, the father and mother of the victim were living separately. But the father of the victim has not given any complaint or obtained divorce on the ground of adultery prior to the alleged occurrence. As per the learned counsel for the appellant, in order to take vengeance against the appellant



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over the illegal intimacy between the appellant and the wife of P.W.2 and also to evade the repayment of loan received from the appellant, P.W.2/the father of the victim made use of the victim as a tool and foisted the false case against the appellant when the victim was staying with her mother. None of the witnesses viz., P.W.2/father of the victim, P.W.3/mother of the victim or P.W.6/uncle of the victim have stated that on earlier occasion also the appellant either misbehaved or attempted to misbehave with the victim. Even the victim has not stated that the appellant used to misbehave with her on earlier occasions. If at all the appellant had sexual intent, definitely he could have misbehaved with the victim on earlier occasions. But it is not the case that even on earlier occasions, the appellant had misbehaved with the victim.

17. Admittedly the father of the victim is an Advocate clerk. Therefore, he must be having relationship with legal fraternity and therefore, it creates doubt that as contended by the learned counsel for the appellant, after deliberation, in order to bring the appellant into the clutches of law, the father of the victim has foisted the false case against the appellant. Especially, when the father of the victim/P.W.2 and uncle of



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the victim/P.W.6 came to know about the occurrence immediately on the same day, neither the father nor the uncle of the victim, filed the complainant immediately and it has been lodged only after 2 days. Further, the complaint was not sent to the Court immediately and it has been sent to the Court only after 24 hrs. which are create doubt. Though the victim was alleged to have been sexually assaulted by the appellant, the victim was not subjected to medical examination. More particularly, the victim was produced before the Judicial Magistrate for recording statement under Section 164 Cr.P.C. only after 3 years from the date of occurrence and there is no explanation as to why, the victim was not produced before the Judicial Magistrate immediately soon after the occurrence or within a reasonable time. Further, the mother who is said to be the eye witness as per the victim/P.W.1, has turned hostile and she has not supported the case of the prosecution. Normally, if any man commits this type of offence to her daughter, no mother would keep quiet and naturally, the mother would lodge a complaint immediate against the accused. But in this case, the mother of victim has not given any complaint and she has not supported the case of the prosecution which all create doubts.



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18. Normally in the cases of this nature, eyewitness may not be available. Therefore, those cases can be substantiated only by the evidence of the prosecutrix and corroborative evidence need not be expected, whereas in this case, as per the prosecution, the mother of the victim is the eyewitness to the occurrence and she is said to have been present along with the victim at the time of occurrence in the occurrence place. But unfortunately, the mother of the victim has not supported the case of the prosecution. Further, the victim/P.W.2 in her evidence has stated that at the time of occurrence, her mother questioned the appellant and pulled the victim out of the house and sent her to her neighbour's house in the upstairs and from there she contacted her uncle over cell phone and informed the incident. In turn, the uncle of the victim contacted the father of the victim over phone and informed about the incident, whereas the said neighbour was not examined to corroborate the same and the phone call details were also not recovered and produced to prove that at the relevant point of time, there were phone conversations between the victim and her uncle and subsequently, between the uncle and the father of the victim. Since the mother of the victim not supported



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the case of the prosecution for one or other reason, the prosecution should have proved the case of the prosecution by examining the said neighbour who alleged to have helped the victim to make phone call to her uncle. Even otherwise, the prosecution should have collected the call details to prove that at the relevant point of time there were cell phone conversations between the victim and her uncle and subsequently, between the uncle and the father of the victim, which also create reasonable doubt. In the absence of examining the neighbour and not collecting the call details of the above said persons would vitiate the case of the prosecution.

19. In this case, the defence side clearly established their contention that the mother of the victim admitted in her evidence that there was a loan transaction between the appellant and father of the victim and the said loan was not repaid to the appellant. Further, the prosecution has stated that there was illegal intimacy between the mother of the victim and the appellant. There are sufficient reasons to believe that P.W.2/father of the victim has animosity over the appellant to lodge a false complaint against the appellant. Further, the victim has stated that



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the appellant told that he came out from jail but the prosecution has not established as to whether the appellant has got any other case and whether he was involved in any other offences. If that be the case, then how the father of the victim borrowed money from the appellant.

20. Under the above said circumstance, this Court finds that the prosecution has not proved the foundational fact that the alleged occurrence said to have taken place on 29.08.2015 and in the absence of the same, Section 29 of POCSO Act, would not attract. Once the prosecution has not proved the foundational fact beyond reasonable doubt or preponderance of probability, then the Court cannot draw the presumption that with sexual intent, the appellant has committed the offence.

21. In this case, the charged offences have not been proved by the prosecution beyond all reasonable doubts. This Court finds that the trial Court has failed to appreciate the contradictions and discrepancies pointed out by the accused and the very genesis of the complaint itself is doubtful for the reasons observed as above. Now the victim has got



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married some other person and she has settled with her husband. Under these circumstances, the Judgment of conviction and sentence passed by the trial Court is liable to be set aside.

22. Accordingly, this Criminal Appeal is allowed. The appellant is acquitted from all the charges in S.C.No.480 of 2018 and the conviction and sentence passed by the learned Sessions Judge, Special Court for Exclusive Trail of Cases under POCSO Act, Chennai, in S.C.No.480 of 2018 dated 12.07.2021, is set aside.

23. Bail bond, if any, executed by the appellant shall stand cancelled and fine amount if any paid by the appellant shall be refunded to the appellant.

08.12.2022

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Index:Yes/No



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P.VELMURUGAN, J

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To

1. The Special Court for Exclusive Trial of Cases under POCSO Act,
Chennai – 600 104
2. The Inspector of Police
W18, All Women Police Station
M.K.B. Nagar
Chennai-39
3. The Public Prosecutor Officer, High Court, Madras
4. The Section Officer, Criminal Section, High Court, Madras.

**Pre-Deliver Order in
Criminal Appeal No.557 of 2021**

08.12.2022