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CRL A No.1068 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:28.10.2022

Coram:

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

Criminal Appeal No.1068 of 2022

and

Crl.M.P.No.14383 of 2022

Kumar

... Appellant

Vs.

State by

The Inspector of Police,
Neyveli Thermal Police Station,
Cuddalore District.
(Crime No.146 of 2017)

... Respondent

Prayer : Criminal Appeal filed under Sections 374(2) of Criminal Procedure Code, praying to call for the records in Spl.S.C.No.47 of 2018 on the file of learned Mahila Court, Cuddalore dated 28.11.2018 and set aside the Judgment dated 28.11.2018 made in Spl.S.C.No.47 of 2018.

For Petitioner : Mr.P.Muthamizhselvakumar

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGMENT

This Criminal Appeal has been filed seeking to set aside the Judgement of conviction and sentence passed in Spl.S.C.No.47 of 2018 on the file of Mahila Court, Cuddalore dated 28.11.2018.

2.The respondent police registered the case against the appellant in Crime No.146 of 2017 for offence under Sections 376 and 354 of IPC @ 6 of POCSO Act and subsequently, altered into Section 3 punishable under Section 4 and 14 of POCSO Act and Section 506(i) of IPC. After completing the investigation, the respondent police laid charge sheet before the Sessions Judge, Mahila Court, Cuddalore, and the learned Sessions Judge after completing the formalities, taken up the charge sheet on file in Spl.S.C.No.47 of 2018 and framed charges against the the appellant for offence punishable under Sections 4, 12 and 14 of POCSO Act 2012 and Section 506(ii) of IPC.

3. After framing the charges, in order to prove the case of the prosecution during trial before the trial Court, totally 12 witnesses were



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examined as P.W.1 to P.W.12 and 11 documents were marked as Exs.P.1 to P.11 and 1 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 convicted the accused for offence punishable under Sections 4, 12 and 14 of POCSO Act 2012 and Section 506(ii) of IPC and sentenced to undergo 12 years of rigorous imprisonment and to pay fine of Rs.5,000/- in default to undergo simple imprisonment for a further period of 2 years for the offence punishable under Section 4 of the POCSO Act, 2012; to undergo 2 years of simple imprisonment and to pay fine of Rs.3,000/- in



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default to undergo simple imprisonment for a further period of 6 months for the offence punishable under Section 12 of POCSO Act, 2012; to undergo 10 years of simple imprisonment and to pay fine Rs.5,000/- in default to undergo simple imprisonment for a further period of 2 years for the offence punishable under Section 14 of POCSO Act, 2012; to undergo 2 years of simple imprisonment and to pay fine of Rs.2,000/- in default to undergo simple imprisonment for a further period of 6 months. 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 28.07.2017, the wife of the appellant came to the house of the victim child and told that there was some quarrel between her and her husband/the appellant herein. Thereafter, she sent the victim child to her house to see what her husband/the appellant herein is doing. When the victim went to the house of the appellant, the appellant invited the victim child to his house and told her that he would show some movies in his cell phone and when the victim went inside, the appellant showed some obscene clippings and



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removed her nightly and started filming her obscene. The appellant thereafter, closed her mouth and committed penetrative sexual assault on her and also threatened her with dire consequences.

7. The learned counsel for the appellant would submit that there was a delay in filing the complaint and the said delay has not been properly explained and that the unexplained delay is fatal to the case of the prosecution. Even though, the appellant is said to have been chased and caught hold by the villagers immediately soon after the occurrence, he was produced before the police only after 9 p.m. and no reason was given for the same. Though P.W.1 is the complainant, he is not eyewitness to the occurrence. Even the victim has not stated that she narrated the incident to P.W.1/defacto complainant and she has only stated that soon after the occurrence, she informed about the incident to her sister in-law namely Senthamarai but, the said Senthamarai who is best person to speak as to whether the victim had informed her about the incident immediately after the occurrence to her or not, was not examined as prosecution witness. The non examination of the said



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Senthamarai is fatal to the case of the prosecution. Further the medical evidence does not corroborate with the evidence of the victim girl. The doctor who conducted medical examination on the victim, has given opinion that there was no recent forceful intercourse which is entirely contra to the evidence of the victim. Further the Investigating Officer has not recovered the nighty of the victim said to have been wore by her at the time of occurrence, to prove as to whether there was any foreign body or semen stain in the nighty of the victim. The non recovery of the nighty and not sending the same for chemical analysis is also fatal to the case of the prosecution. Further, originally the respondent police registered the case only under Section 376 and 354 IPC since the defacto complainant/P.W.1 had stated that the age of the victim was about 20 years and subsequently, in order to bring the appellant under the POCSO Act, they collected documents as if, the victim had not completed the age of 18 years and she was a child under the definition of POCSO Act at the time of occurrence. However, they did not produce the birth certificate of the victim. Even the Head Mistress/P.W.7, who issued the School Certificate and certified copy of the concerned page of the School



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Admission Register, has stated that she did not know who made entry regarding the date of birth of the victim in the school records. Therefore, she is not a competent person to speak about the date of birth of the victim. Eventhough, based on the X-ray report, the doctor has given opinion that the victim has completed the age of 14 years and not completed the age of 15 years, during cross examination, the doctor/P.W.8 who was examined on behalf of the doctor who conducted medical examination on the victim, admitted that the age determined through X-ray, may be either lesser or more than 2 years. Therefore, it cannot be taken as a proof to show that the victim was a child at the time of occurrence. Since, there is no direct proof to show that the victim was a child at the time of occurrence, the offence alleged to have been committed by the appellant, would not attract POCSO Act. The prosecution failed to prove its case beyond all reasonable doubt. The trial Court out to have acquitted the appellant by giving benefit of doubt in favour of the appellant since there is no direct evidence to prove that the age of the victim was below 18 years at the time of occurrence and also there is no proof to show that the victim was subjected to forceful



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penetrative sexual assault by the appellant. Further, though the appellant was convicted for the offence punishable under Section 12 of POCSO Act, the cell phone said to have used for showing obscene and taking obscene photographs of the victim, was not subjected to any test to prove as to whether, it was used for taking obscene photographs of the victim or whether it was containing any pornography materials. In the absence of sending the same cell phone for examination and obtaining expert opinion, is fatal to the case of the prosecution. Further, the confession/Ex.P.3 is not admissible in evidence as it was not recorded properly as contemplated under Section 27 of Indian Evidence Act. Further, the Mahazar and rough sketch also do not show that the occurrence place viz., the house of the appellant, has got a back door and the prosecution not properly established the place of occurrence. The trial Court erroneously failed to appreciate the evidence of the prosecution witnesses properly and convicted the appellant without any substance for the offence punishable under Section 12 of POCSO Act and in any angle, the prosecution failed to prove all the charges against the appellant beyond all reasonable doubt which warrants interference of this Court.



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8. The learned Additional Public Prosecutor appearing for the respondent police would submit that the date of birth of the victim is 13.04.2001 and the date of occurrence is on 28.07.2017 and therefore, the age of the victim was only about 17 years at the time of occurrence 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. The victim was examined as P.W.2 and she has clearly narrated the entire incident. Admittedly, there is no other eyewitness to this case. Immediately soon after the occurrence, the victim informed the same to the villagers and subsequently, the villagers caught hold of the appellant and produced before the police. P.W.3 and P.W.4 are independent witnesses who belong to the same village of the victim and they have clearly spoken about hearing of the incident and catching of the appellant and producing him before the police. Though they are not eyewitnesses for the sexual assault made by the appellant on the victim, soon after the occurrence, the victim escaped from the appellant and informed the same to her relative and subsequently, the villagers gathered and chased the appellant and



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caught hold of him. In order to prove the age of the victim, the school certificate issued by the Head Mistress of the school in which the victim studied, was marked as Ex.P.5 and the certified copy of the concerned page of Admission Register was marked as Ex.P.6 wherein, it is clearly mentioned that the date of birth of the victim is 13.04.2001. Further, based on the x-ray taken on the victim, the doctor who conducted medical examination on the victim has given opinion that the victim completed the age of 14 years and not completed the age of 15 years. Therefore, from the School Records and medical report, the prosecution has proved that the victim was below the age of 18 years at the time of occurrence. Further the medical evidence of the victim clearly shows that her hymen was not intact and therefore, it is proved that the victim was subjected to penetrative sexual assault. Admittedly, P.W.1 who lodged the complaint is not an eyewitness to the occurrence. Though he was not present at the place of occurrence at the time occurrence, based on the information given by the villagers, immediately after the occurrence, when he went to the house and made enquiry with the victim girl, she informed him about the entire incident. Subsequently, the appellant was



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caught hold by the villagers and after discussion with the villagers, he lodged the complaint and also produced the appellant before the police. Therefore, the delay is properly explained. Even otherwise, mere delay in lodging the complaint is not fatal to the case of the prosecution. Therefore, the prosecution proved its case from oral and documentary evidence. The trial Court rightly appreciated the evidence and convicted the appellant and there is no ground to interfere with the judgment of the trial Court.

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

10. In order to substantiate the charges framed against the appellant, as stated above, on the side of the prosecution totally 12 witnesses were examined and 11 documents were marked. Out of the 12 witnesses, the victim was examined as P.W.2 and the defacto complainant who is the uncle of the victim, was examined as P.W.1.



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11. P.W.1 is the defacto complainant and he is the uncle of the victim girl. He has spoken about hearing of the incident through through the victim and lodging the complaint.

12. In the evidence, P.W.2 who is the victim, has clearly spoken that on the date of occurrence, the wife of the appellant came to her house and told that there was some quarrel between her and her husband/the appellant herein and therefore, she asked the victim to go to her house and see what her husband/the appellant herein is doing in the house and when the victim went to the house of the appellant, the appellant asked her to come to him stating that he would show pictures in the cell phone and subsequently, pushed her inside, removed her dress and took nude photos. Further, the appellant closed the mouth of the victim by using her Nighty and had penetrative sexual intercourse with her and also threatened her with knife and attempted to burn her with Beedi butt. Subsequently, on hearing some noise, the appellant went backside. At that time, the victim escaped from there and informed the same to others. On hearing the same, the uncle of the victim/P.W.1 and



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other villagers, chased the appellant and caught hold of him and produced before the police.

13. P.W.3 and P.W.4 are the villagers and they have spoken that soon after coming to know about the incident, on the same day, the villagers chased the appellant and detained him in the village and subsequently, produced him before the police. Therefore, the evidence of P.W.1 is corroborated with the evidence of P.W.3 and P.W.4.

14. P.W.7 is the Headmistress of the school in which the victim studied. She has spoken about the issuance of school certificate/Ex.P.5 based on the school records and also the certified copy of the concerned page of the School Admission Register/Ex.P.6 in which, the date of birth of the victim is mentioned as 13.04.2001.

15. P.W.6 is the doctor who was examined on behalf of the doctor who conducted clinical examination on the victim girl. He has stated that the doctor who conducted medical examination on the victim has given



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opinion that the hymen of the victim was not intact and there was no forceful intercourse. Further, the victim has completed the age of 14 years and not completed the age of 15 years.

16. 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.

17. The specific case of the prosecution is that 28.07.2017, when the victim went to the house of the appellant, the appellant under the guise of showing movies in his cell phone, showed obscene clippings to the victim and removed her nightly and started filming her obscene. The appellant thereafter, closed her mouth and committed penetrative sexual assault on her and also threatened her with dire consequences.

18. Though initially the case was registered for the offence under Section 376 and 354 IPC as if, the victim was a lady, subsequently after



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the complaint, during investigation, it was found that the victim was a child and she had not completed the age of 18 years at the time of occurrence and therefore, the offences were altered for the offences punishable under POCSO Act as stated above.

19. A reading of the entire evidence of the victim/P.W.2 wherein, she has clearly narrated that she was subjected to penetrative sexual assault by the appellant. In order to substantiate the same, the victim was produced before the Medical Officer and the Medical Officer who conducted clinical test on the victim, confirmed that the hymen of the victim was not intact. Further, from the school records/Ex.P.5 and Ex.P.6 and medical evidence, the prosecution proved that the victim was below the age of 18 years at the time of occurrence and therefore, she was a child at the time of occurrence.

20. Further, as per the prosecution, on the date of occurrence, the wife of the appellant went to the house of the victim and asked her to go to her house and to see what the appellant was doing in the house and



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hence, the victim had gone to the house of the appellant. The said fact was not denied by the appellant either by way of suggestion from the victim or from any other witnesses. Even the appellant has not examined his wife as a witness on his side to deny the said fact.

21. A careful reading of entire materials and the evidence of the the victim clearly show that the appellant committed penetrative sexual assault on the victim. Even the medical evidence clearly shows that the victim was subjected to penetrative sexual assault and therefore, the foundational fact has been proved by the prosecution. Though the learned counsel for the appellant contended that even as per the opinion of the doctor who conducted medical examination on the victim, there was no forceful sexual intercourse, since because there was no forceful sexual intercourse, it is not a ground to disbelieve the entire evidence of the victim. The fact remains that the victim who was a child was subjected to penetrative sexual intercourse. Even assuming that there was no forceful sexual intercourse and the victim had given consent to the appellant for the sexual intercourse or she did not resist the act of the appellant, the



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consent is immaterial and the non resistance is also immaterial, since the victim was a child under the definition of Section 2(1) (d) of POCSO Act at the time of occurrence. Further, in this case, it is not the case of the defence that the victim is a stranger and that the appellant and the victim are not known to each other. The appellant is residing opposite next to the house of the victim and therefore, there are possibilities of access and nexus between the appellant. Therefore, mere non revealing of the entire incidents to every one, is not fatal to the case of the prosecution.

22. In this case the learned counsel for the appellant took several defence. But all the defences may be good for some of the offence under India Penal Code and not for the offence under POCSO Act since the offence under the POCSO is against children who are incapable of taking decision and revealing the entire things to others. There may be so many reasons for not revealing the entire things to others. Unfortunately, in our country, girl children are not coming out immediately to disclose their grievances even to their parents or to their kith and kin. Because they feel that it as a shameful one and at the same time, on fear of Society, future,



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comments of the neighbours and also the threat made by the accused, they do not reveal the incident immediately to others and sometimes, they reveal only part of the incidents due to the reasons stated above. Therefore, as stated above, mere non revealing of the entire incidents to every one, is not fatal to the case of the prosecution.

23. As far as the delay in lodging the complaint is concerned, in the cases of this nature, especially in villages, normally the victim will not rush to their kith and kin and disclose the incident immediately after the occurrence. Even the parents and other family members of the victim, will not approach the police immediately after they coming to know about the occurrence. They may not know what to do and whom to approach. Hence, naturally it will take time. Further, as stated above, on fear of Society and the future of the victim child, they would discuss with the elders in the family and also with the villagers and after discussion they would lodge complaint. Therefore, mere delay in lodging the complaint in this nature of offences, may not be fatal to the case of the prosecution.



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24. Once the Court comes to the conclusion that the evidence of the victim inspires the confidence of the Court and there is no reason to disbelieve or discard the evidence of the victim, the Court can safely convict the accused.

25. Admittedly, as contended by the learned counsel for the appellant the material evidence viz., Nighty of the victim and the dress of the appellant which were worn by them at the time of occurrence, were not recovered and sent for chemical analysis to show as to whether, any other foreign materials were found in that. Further, the cell phone alleged to have taken obscene of the victim was also not sent to any test to find out as to whether it contains any pornography materials. However, it is the defect on the part of the investigation. Unfortunately, in our State, especially, for the cases of this nature, we do not have a competent investigating agency to complete all the procedures as contemplated in the POCSO Act. Mere defect on the part of the investigation, is not a sole ground to discard and disbelieve the evidence of victim especially for the offence under POCSO Act. Time and again, this Court has made



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several comments regarding the investigation and also made adverse comments as against the Investigating Officers. Still the Investigating Officers have not changed their way of investigation and the Investigating Agencies have not developed their efficiencies to that level. However, for mere defect on the investigation, the victim and the innocent people should not suffer. Already, many of the parents are not revealing their grievances immediately soon after the occurrence; Many of the School teachers or school authorities are not communicating the grievance of the children immediately to their parents; Even the Social Welfare Officers have not been updated properly and therefore, the parents of the victim are not coming to the Court. In this nature of offences, the victims are innocent children. Therefore, as stated above, mere delay in filing the complaint, not revealing of the entire incidents by the victim children and defect in the investigation will not be a sole ground to disbelieve the evidence of the victim and on that score, the accused are not entitled to get acquittal based on the benefit of doubt.



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26. Section 94 of Juvenile Justice (Care and Protection of Children) Act, speaks about that the presumption and the determination of age of a person who claims to be a juvenile. If any document recorded by legally competent authority or issued by the school authority to prove the date of birth of a person, then the age mentioned in the said document may be presumed as genuine. In this case, from the evidence of the victim/P.W.2, P.W.8/doctor, medical evidence/Ex.P.8, School records/Ex.P.5 and Ex.P.6, the prosecution proved that the victim was a child under the definition of Section 2(1) (d) of POCSO Act and she had not completed the age of 18 years at the time of occurrence.

27. In IPC offence, the prosecution has to prove the guilt of the accused beyond all reasonable doubt and the accused need not come to the witness box to prove his innocence. Unless it is proved by the prosecution, the accused presumed to be innocent, whereas in the offence under POCSO Act, if the prosecution substantiated the foundational fact that the victim was a child under the definition of Section 2(1)(d) of POCSO Act and she was subjected to penetrative sexual assault by the



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accused, then the reversal burden of proof would shift on the accused.

Section 29 and 30 of POCSO Act clearly say that once the prosecution proved that there was a sexual assault on the victim made by the accused, then it is the onus of the accused to rebut the presumption or reverse the onus in the manner known to law. In this case, as stated above, the prosecution has proved that the victim was a child and she was subjected to penetrative sexual assault by the appellant. But the appellant has not rebutted the presumption in the manner known to law.

28. Therefore, this Court finds that the prosecution has proved the foundational fact that the appellant has committed offence under Section 3 punishable under 4 of POCSO Act and also offences punishable under Sections 12 and 14 of PCOSO Act. Therefore, the conviction and sentences passed by the trial Court for the offences punishable under the POCSO Act, are confirmed.

29. As far as the charge under Section 506 (ii) IPC is concerned, as contended by the learned counsel for the appellant, there are



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contradictions in the statements of the prosecution witnesses in respect of threatening the victim with knife. Further, the prosecution also not recovered any knife. Even the medical evidence shows that there was no forceful sexual intercourse. Therefore, this Court finds that the prosecution has not proved the charge under Section 506(ii) IPC beyond all reasonable doubt. Therefore, the conviction and sentence passed by the trial Court for the offence under Section 506(ii) IPC alone is set aside.

30. Accordingly, the conviction and sentence passed by the trial Court for the offences punishable under POCSO Act, are hereby confirmed. The conviction and sentence passed by the trial Court for the offence under Section 506(ii) IPC alone is set aside. With the above modification, this Criminal Appeal is partly allowed. Consequently, connected Miscellaneous Petition is closed.

31. The learned counsel for the appellant submitted that the appellant who is in prison, suffering with some ailments and therefore, he



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needs medical assistance. Hence, the Prison Authority is directed to take care of the treatment of the appellant and in case, if there is no sufficient facilities in the prison hospital, the Prison Authority shall provide better treatment to the appellant from outside hospital as contemplated under the Prison Rules.

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Index: Yes/No



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To

1. The Sessions Judge, Mahila Court,
Cuddalore.
2. The Inspector of Police,
Neyveli Thermal Police Station,
Cuddalore District.
3. The Superintendent
Central Prison, Cuddalore
4. The Public Prosecutor Officer, High Court, Madras
5. The Section Officer, Criminal Section, High Court, Madras.



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P.VELMURUGAN, J

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