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Crl.A.No.706 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.11.2022

CORAM:

THE HON'BLE Mr. JUSTICE P.VELMURUGAN

Criminal Appeal No.706 of 2021
and Crl.M.P.No.14195 of 2021

B. Gnanam

... Appellant/Accused

Vs.

The Inspector of Police,
Venganur Police Station,
Ariyalur District.

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Cr.P.C. to set aside the order of conviction passed by the learned Sessions Judge, Fast Track Mahila Court at Ariyalur in Spl.S.C.No.25 of 2018 dated 10.11.2021 under Section 6 of POCSO Act, 2012, for the rigorous imprisonment of ten years and to pay a fine of Rs.5,000/- in default to undergo imprisonment of six months by allowing the present Criminal Appeal.

For Petitioner : Mr.R. Sankarasubbu

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



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ORDER

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This Criminal Appeal has been preferred challenging the judgment of the learned Sessions Judge, Fast Track Mahila Court at Ariyalur passed in Spl.S.C.No.25 of 2018 dated 10.11.2021.

2. The respondent/Police registered a case against the appellant/accused in Crime No.37 of 2018 for the offence under Sections 3(a), 5(l), 5(m) and 6 of the Protection of Child from Sexual Offences Act, 2012 (hereinafter called as POCSO Act) and after completing the investigation, filed a charge sheet before the learned Sessions Judge, Fast Track Mahila Court at Ariyalur. The learned Sessions Judge had taken the case on file in Spl.S.C.No.25 of 2018 and the charges were framed against the appellant/accused for the offence under Section 3(a) read with Section 4 of POCSO Act and for the offence punishable under Section 6 of POCSO Act.

3. During the course of the trial, on the side of the prosecution, 13 witnesses were examined as P.W.1 to P.W.13; 12 documents were marked as Exs.P1 to P12; one Court document was marked as C.1 and no Material



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Objects were displayed. When the incriminating part of evidence surfaced from the evidence of the victim was put to the appellant/accused under Section 313 Cr.P.C., he denied his involvement and pleaded not guilty. On the side of the appellant/accused, no witness was examined and no document was marked.

4. At the conclusion of the trial, after hearing the arguments advanced on either side and on considering the materials available on record, the learned Sessions Judge found the appellant/accused guilty and convicted him for the offence punishable under Section 6 of POCSO Act and sentenced him to undergo 10 years of Rigorous Imprisonment and to pay a fine of Rs.5,000/- in default to undergo 6 months Simple Imprisonment and to pay a compensation of Rs.5,000/- to the victim boy. Aggrieved over the said order, the appellant/accused has filed the present Criminal Appeal before this Court.

5. The case of the prosecution is that on 10.04.2018, the mother of the victim boy had sent her son to her sister's house to get some milk. While the victim boy was going to his aunt's house, the appellant/accused



stopped him on the way and took him to a hidden place/unused building and asked the victim boy to suck his private part and thereafter, the appellant/accused sucked the private part of the victim boy and thereby, committed an offence under Section 3(a) r/w Section 4 and under Section 6 of the POCSO Act.

6. The learned counsel for the appellant/accused would submit that the prosecution has not proved the charges as projected by them and the place of occurrence was also not proved by the prosecution. Further, no independent eye-witness and medical evidence was corroborated by the prosecution and thereby, a false case has been foisted against the appellant/accused.

7. The learned counsel would further submit that there are material contradictions in the statement made by P.W.1 – victim boy under Section 164 of Cr.P.C and in the statement made before the learned Sessions Judge at the time of examination. He would further submit that P.W.1 informed the Doctor that the appellant took him into the dark house and only threatened him for oral sex and no sexual act took place between the victim



boy and the appellant and the same was clearly recorded in Ex.P8 – Accident Register and therefore, the Trial Court failed to consider Ex.P8 and erroneously convicted the appellant.

8. Further, the learned counsel would submit that the evidence of the victim boy and her mother are not cogent and are contradictory to each other and the statement of the victim boy is totally based on the statement of his mother and is tutored by his mother, who was examined as P.W.2. The victim boy admitted in his evidence that there was a civil dispute between his family and the relatives of the appellant and the Trial Court failed to consider that the mother of the victim boy with the connivance of the respondent/Police, to take revenge on the appellant and his family, foisted a false case against the appellant. He would further submit that there are serious flaws in the investigation which resulted in total mockery of justice, as P.W.1 – victim boy in his evidence and statement recorded under Section 164 of Cr.P.C., had stated that the appellant took him behind the house of Soosai and the alleged occurrence is said to have taken place there. However, contrary to statement of P.W.1, Ex.P3 - Rough Sketch, drawing of the scene of occurrence depicts the scene of crime as the rear room in the



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unused house and therefore, the scene of crime in Ex.P3 establishes that the investigation is flawed and motivated. Further, the learned counsel would submit that P.W.1 has given contradictory statement before the learned Magistrate, before the Doctor and before the Trial Court and the Trial Court failed to consider the inconsistent statement of the victim boy.

9. Further, the learned counsel would submit that P.W.1 – victim boy in his chief examination stated that he felt giddiness and he informed the appellant and came back to home and informed the same to his mother. Thereafter, the mother took him to Government Hospital and then they went to the Police Station. He vomited the next morning. The statement of P.W.1 establishes that the mother took the victim boy to the hospital and to the Police Station on the day of the alleged occurrence i.e., on 10.04.2018 itself, but from the evidence of P.W.1, it is seen that the F.I.R., was registered on 11.04.2018 and Ex.P8-Accident Register, is also dated 11.04.2018, which establishes that the case is cooked up by the prosecution.

10. The learned counsel would further submit that P.W.3 to P.W.6



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are not eye-witnesses and their statements were only hearsay. The contrary statement made by P.W.13, who is Inspector of Police, clearly shows that the investigation was not conducted in a fair manner. Further, he would submit that the medical evidence has corroborated the evidence of P.W.1 – victim boy.

11. The learned counsel for the appellant placed reliance on the following judgments of the Hon'ble Supreme Court:-

<i>S.No.</i>	<i>Dated</i>	<i>Judgment Cause Title</i>	<i>Citations or Case Numbers</i>
1.	22.07.2021	Somesh Chaurasia Vs. State of M.P. & another	Crl.A.Nos.590 & 591 of 2021 @ SLP (Crl) Nos.4998 & 4999 of 2021
2.	30.01.2018	Sivakumar @ Ramesh Vs. State Rep. by Inspector of Police	Crl.A.No.424 of 2017
3.	09.10.2001	Dilip & another Vs. State of M.P.	AIR 2001 SCC 3049
4.	18.01.2011	Alamelu & another Vs. State Rep. by Inspector of Police	Crl.A.No.1053 of 2009 etc., batch
5.	14.02.2020	Santosh Prasad Vs. State of Bihar	(2020) 3 SCC 443
6.	29.08.2018	Dolia @ Dolagobinda Pradhan & another Vs. State of Odisha	(2018) 18 SCC 695
7.	03.06.2022	Mahendra Singh & others Vs. State of Madhya Pradesh	(2022) 7 SCC 157
8.	12.04.1957	Vadivelu Thevar Vs. State of Madras	1957 AIR 614
9.	17.02.1982	Mohanlal Gangaram Gehani Vs. State of Maharashtra	1982 AIR 839
10.	21.02.2006	Yerumalla Latchaiah Vs. State of A.P.	(2006) 3 SCC (Cri) 373



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12. The learned counsel for the appellant would further submit that the medical evidence of the Doctor is that there was no external injury in the private part and the medical record also does not show that the victim boy was subjected to sexual assault, as alleged by the prosecution. Though the victim boy had stated that he got pain in his throat due to crushing of his neck by the appellant, there is no material to show that there was any injury on his neck. Further, there is no corroborating evidence and the evidence of the victim boy is untrustworthy and that the evidence of the victim boy alone is not sufficient to convict the appellant.

13. Further, the learned counsel would submit that the prosecution has not proved the age of the victim boy, which is the primary duty of the prosecution. The prosecution has not produced any admissible document such as birth certificate of the victim boy and has only produced the school bonafide certificate, which is not a reliable document. Further, the Doctor has clearly stated that there are no external or internal injuries. Therefore, the prosecution has neither proved the age of the victim boy nor the commission of the offence punishable under Section 6 of POCSO Act. Though the statement of the victim boy clearly states that the offence was



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not complete and only an attempt was made by the appellant, the Trial Court erroneously convicted him for the offence under Section 6 of the POCSO Act, which is against the settled principles of law and the elementary principles of criminal jurisprudence. Therefore, the judgment of the Trial Court is liable to be set aside and the appeal has to be allowed by acquitting the appellant.

14. The learned Additional Public Prosecutor appearing for the respondent would submit that the age of the victim boy was 11 years at the time of occurrence. As per Ex.P7 – bonafide certificate issued by P.W.8 - Headmaster of the school in which, the victim boy studied, the date of birth of the victim boy is mentioned as 16.10.2007 and as per the complaint, the date of occurrence is 10.04.2018, which clearly shows the age of the victim boy at the time of occurrence as 11 years. Therefore, through the evidence of P.W.8 and Ex.P7, the prosecution has proved the age of victim boy as 11 years at the time of occurrence. Further, he would submit that out of 13 witnesses, the victim boy was examined as P.W.1 and the mother of the victim boy was examined as P.W.2. The evidence of P.W.2 – mother shows that she is a widow, who was living with her daughter and son. On



10.04.2018, at about 06.00 – 6.30 p.m., when P.W.2 came from her work place, the victim boy was playing at home. After cooking the rice, P.W.2 sent the victim boy to her sister's home to get some gravy and when he did not return back even after half an hour, she went to her sister's home and the sister has informed her that the victim boy did not come to her house. When P.W.2 went back to her home, she found her son sitting at the corner of the house. On inquiring him, he informed that the appellant took him to the unused house where he made the victim boy to suck his penis and the appellant/accused also sucked the penis of the victim boy. Since he started crying and told the appellant that he is feeling giddiness, the appellant threatened him not to tell about the occurrence to anyone and the victim boy came back to his house. After coming back home, the victim boy vomited and told his mother that he is feeling giddiness. She immediately took her son to the hospital along with her mother and informed the Police about the incident over phone. Since the occurrence took place in the evening, the widow could not go to Police Station for giving the complaint immediately. However, the next day, she gave the complaint and the case was registered. Subsequently, the investigation was completed and the victim was examined as P.W.1 and he clearly narrated the incident. As the scene of occurrence



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was a newly constructed unused building, the appellant took the victim boy there at around 06.30–07.00 pm and committed the offence.

15. The victim boy has clearly stated in his statement before the Doctor, the Police and the Magistrate about the commission of offence that the appellant/accused forced the victim boy to suck his private part and he also sucked the private part of the victim boy. The mother of the victim boy also at the time of investigation, in her examination, stated the said facts and therefore, there is no contradiction in the statement of P.W.1-victim boy and P.W.2 – mother, as contended by the learned counsel for the petitioner. Though the Doctor has stated that there is no external injury, it does not mean the offence was not committed by the appellant/accused, as the victim had clearly stated before the Doctor that the appellant/accused had committed the sexual assault on him. Even though there was no eye-witness, the evidence of the victim boy and his mother is sufficient to prove the same. The mother of the victim boy clearly stated in her examination that on the day of occurrence itself, she went to the house of the appellant/accused and questioned him about the act committed by him. The appellant/accused also threatened the mother of the victim boy. Thereafter,



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on the next day, she went to the Police Station to give complaint and the

Police took the victim boy to the Hospital for medical examination.

Therefore, the prosecution has proved his case beyond reasonable doubt and the evidence of the victim boy is trustworthy. Though the charges framed against the appellant/accused were under Section 3(a) which is punishable under Section 4 of POCSO Act and for the offence punishable under Section 6 of POCSO Act, since the victim boy is below 12 years, it is aggravated penetrative sexual assault, the Trial Court has convicted the appellant/accused for the offence under Section 6 of POCSO Act. Hence, there is no merit in the Appeal and the same is liable to be dismissed.

16. Heard the learned counsel for the appellant/accused and the learned Additional Public Prosecutor appearing for the respondent/Police.

17. The specific case of the prosecution is that the victim boy was aged about 11 years. During the relevant period on 10.04.2018, at about 06.30–07.00 pm, when the mother of the victim boy has sent him to her sister's home to bring some gravy, the appellant/accused took the victim boy to the newly constructed unused incomplete building situated in the next



street of his house and forced the victim boy to suck the penis of the appellant/accused and thereafter, the appellant/accused also sucked the penis of the victim boy. When the victim boy started crying, the appellant/accused threatened him that if he tells about the incidence to anyone, he would kill the victim boy. The victim boy and the appellant/accused were neighbors. Thereafter, a complaint was lodged by the mother of the victim boy. In order to prove the case of the prosecution, the victim boy was examined as P.W.1 and even soon after the occurrence, the victim boy was examined by the Doctors and thereafter, by the learned Magistrate under Section 164 Cr.P.C., and the statement was marked as Ex.P1. Ex.P1 itself shows that the victim boy had narrated the occurrence and had also identified the appellant/accused and he was also examined before the Trial Court as P.W.1. The evidence of the victim boy itself is enough to convict the appellant/accused and there is no reason to discard the evidence of P.W.1- victim boy and the mother of the victim boy – P.W.2, who is the widow.

18. In order to prove the age of the victim boy that he has neither completed 12 years nor 18 years, Ex.P7 - Bonafide Certificate was obtained



from P.W.8, who is the Headmaster of the School in which the victim boy studied, which clearly shows that the age of the victim boy was 11 years at the time of occurrence.

19. Dr.Reena, who admitted the victim boy was examined as P.W.7. Since the victim was a boy and P.W.7 was a lady Doctor, in her deposition, she has clearly stated that she referred the victim boy to one Doctor namely Bharath, who conducted the medical examination on the victim boy and had sent report to P.W.7. After obtaining the report from Dr. Bharath, who conducted the medical examination, she gave medical certificate which was marked as Ex.P6 and stated the opinion in the certificate that the victim was not subjected to sexual assault and there is no external injury.

20. The specific allegation is that there was only an oral sexual assault. The victim boy has clearly stated that the appellant/accused during the night hours at about 06.30-07.00 p.m., when it was dark, took the victim boy to a secluded place which was not a dwelling house and was under construction, made the victim boy to suck his private part and thereafter, the appellant/accused also sucked the private part of the victim



boy. Therefore, there is no possibility of any external injury as the sexual assault was an oral sexual assault.

21. It is not the case of the prosecution that due to the sexual assault, the victim boy sustained injury. Though the learned counsel for the appellant/accused pointed out that the victim boy has stated that the appellant crushed his neck and therefore, he sustained injury on his neck, the Doctor has not stated about the injuries on the neck of the victim boy and even on reading of the evidence of the victim boy, it is clear that the victim boy got hesitant to say that since he was made to suck the private part of the appellant/accused due to which, he got vomiting and irritation in his throat.

22. Being 11 years old boy, he might have felt that if he reveals the aforesaid occurrence to somebody, it may affect the boy's reputation and therefore, he might have stated about the crushing of his neck before the learned Magistrate but the medical examination does not show the same. During the examination, though there may be some discrepancies or contradictions in the statement of the victim boy, but which are not material



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contradictions.

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23. According to this Court, there are no material contradictions and as the appellant/accused committed an oral sex with the victim/boy, the victim boy would have felt shameful to reveal the same to anyone and could not have informed about the occurrence openly to everyone. But the evidence of the victim boy clearly shows that the appellant/accused committed an oral sexual assault on the victim boy and that the learned counsel for the appellant/accused vehemently contended that the age of the victim boy was not proved as the prosecution did not produce the birth certificate of the victim boy. However, vide Ex.P7, it was clear that the age of the victim boy at the time of occurrence was 11 years and his date of birth was 16.10.2007. Therefore, he was a child under Section 2(1)(d) of POCSO Act, at the time of occurrence.

24. It is a settled proposition of law that when there is a discrepancy in the evidence of the injured witness and medical evidence, then the injured/eye-witnesses will prevail over the medical evidence.



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25. In the present case, since the Doctor has stated that there is no external injury, that does not mean that there is no occurrence has taken place. Since the nature of allegations and findings show that the offence is only an oral sexual assault i.e., sucking of a private part and is not one of which includes biting, the same would not have resulted in any external injury. Further, on reading of the evidence of the victim boy, it is clear that the offence had taken place in a secluded place which was not a dwelling house and therefore, no eye-witness could be expected to witness the offence. In the cases of this nature, children are the victim and the culprit extorts the innocence of the victim children and takes them to secluded places and exploit them sexually and therefore, mere non-examination of the independent/eye-witnesses, are not fatal to the case of the prosecution.

26. The various judgments on which the reliance has been placed on by the learned counsel for the appellant/accused, are entirely different and distinct from the present case on hand. In all the above cases referred to by the learned counsel, the offence includes the penetrative sexual assault and also, the forceful rapes, which will naturally cause external as well as internal injuries to the victim and therefore, the Court cannot come to a



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conclusion that the sexual intercourse was intended by the victim, whereas, in the present case, the fact is entirely different. Both the victim and the appellant/accused are male and the appellant/accused committed an oral sexual assault i.e., sucking of a private part, which will not cause any external injury.

27. In these circumstances, considering the oral and documentary evidence, this Court finds that the prosecution has proved its case beyond reasonable doubt and mere contradictions and discrepancies in the medical record and the statement of the victim boy as contended by the learned counsel for the appellant/accused, cannot make the Court to disbelieve the statement of the victim boy.

28. It is contended by the learned counsel for the appellant/accused that the commission of offence is only an oral sexual assault and not that too was completed and that the evidence of the victim boy in his complaint also states that the appellant/accused made an attempt of an oral sexual assault and the offence was not completed, therefore, at the worst, the appellant/accused should be punished only under Section 18 of the POCSO



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Act and not under Section 6 of the POCSO Act.

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29. Under the aforesaid facts and circumstances of the case and after a careful perusal of the records available, the evidence of PW1- the victim boy and Ex.P1- the statement recorded under Section 164 Cr.P.C., clearly proves that the appellant/accused has committed the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act 2012. If the evidence of sole witness is cogent, credible and trustworthy, conviction is permissible. In cases of this nature, presence of eye-witnesses is mostly improbable. Therefore, under these circumstances, as the Appellate Court is a final Court of fact finding and this Court also has come to the conclusion that the appellant/accused has committed the offence punishable under Section 6 of the POCSO Act, 2012.

30. Therefore, this Court finds that the judgment and conviction passed by the Trial Court does not require any interference and there are no merits in the appeal and there is no reason to interfere with the judgment of the conviction passed by the Trial Court.



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31. In view of the above, this Criminal Appeal stands dismissed.

Connected criminal miscellaneous petition is closed.

22.11.2022

Speaking Order/Non Speaking Order

Index : Yes/No

Internet: Yes/No

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To

- 1.The Inspector of Police,
Venganur Police Station,
Ariyalur District.
- 2.The Sessions Judge,
Fast Track Mahila Court,
Ariyalur.



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P.VELMURUGAN, J.

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