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Crl.A.No.607 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.11.2022

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

Crl.A.No.607 of 2018

and

Crl.M.P.No.7588 of 2020

Dhanaraj

....

Appellant

Vs

State rep by
Inspector of Police,
All Women Police Station,
Virudhachalam,
Cuddalore District.

....

Respondent

Prayer: Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, to set aside the conviction and sentence imposed upon the accused/appellant by the learned Sessions Judge (Mahila Court), Cuddalore in Spl.S.C.No. 21 of 2018 dated 09.08.2018 and allow the appeal.

For Appellant : Mr.S.Manuraj

For Respondent : Mr.A.Gopinath
Government Advocate (Crl.side)



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JUDGMENT

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This Criminal Appeal is directed as against the Judgment passed in Spl.S.C.No.21 of 2018 on the file of the Sessions Judge, Mahila Court, Cuddalore, thereby convicted the appellant for the offence punishable under Section 506(ii) of IPC and Section 6 of POCSO Act 2012.

2. The case of the prosecution is that the victim is a relation to the accused and her mother already died. Using the said circumstances, the accused intended to have physical relationship with her. On 20.05.2016 at about 7.00 p.m., the accused had taken the victim to a nearby sugarcane field and forcibly committed penetrative sexual assault on the victim. Thereafter, he threatened her with dire consequences if she discloses to anybody. Hence, the complaint.

3. On receipt of the said complaint, the respondent registered an FIR for the offence under Section 294(b), 506(ii) and 313 of IPC and Section 6 of POCSO Act 2012. After completion of the investigation, the respondent filed final report and the same has been taken cognizance by the Trial Court in Spl.S.C.No. 21 of 2018.

4. On the side of the prosecution, they examined P.Ws.1 to 10 and



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marked Exs.P1 to 9. On the side of the accused, no one was examined and no document was marked.

5. On perusal of the oral and documentary evidence, the Trial Court found the appellant guilty for the offence punishable under Section 6 of POCSO Act and Section 506(ii) of IPC and he was sentenced to undergo twelve years Rigorous Imprisonment and to pay a fine of Rs.20,000/- in default to undergo simple imprisonment for a period of two years for the offence punishable under Section 6 of POCSO Act and he was sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs.5,000/- in default to undergo simple imprisonment for a period of six months for the offence punishable under Section 506(ii) of IPC. Aggrieved by the same, the present appeal.

6. The learned counsel appearing for the appellant submitted that the prosecution failed to prove the age of the victim in the manner known to law. There are complete contradictions between P.Ws. 1 to 3 in respect of alleged date and the time of complaint. There is absolutely no clinching and trustworthy evidence adduced by the prosecution to connect the appellant for



the offence under Section 6 of the POCSO Act. When the prosecution failed to prove the age of the victim, it is fatal to the case of the prosecution, especially when the offence alleged is one under Section 6 of the POCSO Act. Even according to the prosecution, the victim fell in love with the accused and had physical relationship. It is not believable that the prosecutrix deposed that she was compelled to come to sugarcane field by the accused and on compulsion, the accused had physical relationship. She deposed in her chief examination that she was asked to come at 7.00 p.m on the date of occurrence. Whereas, in the complaint, it was stated that she had gone to sugarcane field at 7.p.m. The complaint also had so many corrections and additions. Therefore, the entire case of the prosecution is nothing but only to wreck vengeance as against the appellant, a false case has been foisted.

7. He further submitted that the medical report, which was marked as Ex.P3, revealed that there was no injuries on her external genitals and there was no mark or presence of any spermatozoa or semen in the vagina. There was no mark of violence noted on her private part or any other parts of the body. It shows that there is absolutely no evidence of rape. The prosecution



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marked Exs.P5 and P6, in order to prove the age of the victim as 17 years. It also differs from one another. As per the charge, the victim was born on 14.05.1999, whereas Ex.P5 and P6 revealed that she was born on 25.05.2001. However, the school records cannot be relied upon to prove the age of the victim without production of the birth certificate. In support of his contention, he relied upon the Judgment of the Hon'ble Division Bench of this Court in the case of Criminal Appeal No.518 of 2019 dated 18.10.200 and Criminal Appeal No.487 of 2019 dated 18.10.2022.

8. Per contra, the learned Government Advocate (Criminal Side) appearing for the respondent submitted that the victim was a minor at the time of occurrence. The accused is none other than her owned paternal uncle, since the victim lost her mother she was growing up with the support of her paternal uncle, viz., the accused. Thus, the accused using the circumstances and had committed penetrative sexual assault on the victim. In order to bring home the charge, the prosecution had examined the victim as P.W.1 and her father was examined as P.W.2 and her sister was examined as P.W.3. They categorically supported the case of the prosecution and the Trial Court rightly convicted the appellant. Therefore, it does not warrant



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any interference by this Court.

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9. Heard, Mr.S.Manuraj, learned counsel appearing for the appellant and Mr.A.Gopinath, learned Government Advocate (Criminal Side) appearing for the respondent and perused the materials available on record.

10. Admittedly, the accused is none other than the paternal uncle of the victim. She fell in love with the accused. She was compelled to come to sugarcane field and there, the accused committed penetrative sexual assault on her. A perusal the deposition of P.W.1 reveals that P.W.1 had love affair for the past one year before the date of occurrence. On the date of occurrence, she was compelled to come to sugarcane field at about early morning 3.00 a.m. and they had physical relationship. Thereafter, once in three days he had physical relationship with the victim. Therefore, she got pregnant and thereafter, the accused had given tablets to abort the child. It shows that the victim had love affair and had physical relationship with the accused.



11. The learned counsel for the appellant vehemently contended that the prosecution failed to prove the age of the victim. In order to prove the age of the victim, the prosecution produced Exs.P5 and P6. The school certificate of the victim was marked as Ex.P5. Admission register was marked as Ex.P6. Though the prosecution has produced the school certificate, it failed to prove that the admission of the victim to the school was made on production of date of birth certificate and the date of birth entered in the school register is the correct date of birth of the victim. Further the victim did not produce any date of birth certificate and the prosecution failed to produce any other documents to show that the victim was born on 25.02.2001. In fact, it is also contradictory to the charge since the charge framed against the accused shows as though the victim was born on 14.05.1999. In order to ascertain the age of the minor girl, there is no procedure as contemplated under the POCSO Act. Therefore, the procedure as contemplated under Section Juvenile Justice (Care and Protection of Children) Rules, 2007 should come to surface. In this regard, the law has been settled by the Hon'ble Division Bench of this Court as well as the Hon'ble Supreme Court of India that the procedure prescribed under the Juvenile Justice (Care and Protection of Children) Rules, 2007 has to be



followed.

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12. It is relevant to extract Rule 12(3) of the Juvenile Justice (Care and Production of Children) Rules, 2007 reads as follows :

“12. Procedure to be followed determination of Age :-

(1) xxxxxx

(2) xxxxxx

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining :-

(a)(i) the matriculation or equivalent certificates, if available, and in the absence whereof ;

(ii) the date of birth certificate from the school (other than a play school) first attended ; and in the absence whereof ;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat ;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare



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the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and, while passing orders in such case shall, after taking into considerations such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile to conflict with law.

13. In the case on hand, admittedly, the prosecution failed to prove the date of birth of the victim and also failed to produce any evidence to show that the victim was admitted in the school by producing the birth certificate. It is well settled that an entry of the date of birth made in the school admission register would have evidentiary value only if there is material available based on which the age was so recorded. The Hon'ble Division Bench of this Court in Criminal Appeal No.487 of 2019 in the case of M.Marimuthu Vs. The State, represented by the Inspector of Police, All Women Police Station, Srivaikuntum, Titicorin dated 18.10.2022 held as



follows :

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“17. In the instant case, the matriculation or equivalent certificate of the victim is not available as she deposed that she gave up studies after 9th class. Rule 12(3)(a) contemplates that in the absence of the matriculation or equivalent certificate, the date of birth certificate from the school first attended can be used as evidence to determine the age of a child. Mr.Ashok Kumar Chaudhary (PW-3), a teacher in the school where the victim has studied, had produced the school records, which showed that the victim was admitted in MC Primary School, Vikas Block Sirsia, District Sarawasti, UP in class-I on 12.08.2005. The school record notes her date of birth as 10.01.2000. However, PW-3 went on to state that there is no other record of admission of the victim available in the school and nor could he state as to what was the nature of the document submitted by the victim"s parents at the time of her admission, for recording her date of birth in the school register.

18. It is well settled that an entry of the date of birth made in the school admission register would have evidentiary value only if there is material available based on which the age was so recorded. In the case of Brij Mohan Singh vs. Priya Brat Narain Sinha and Ors. reported as AIR 1965 SC 282, the Supreme Court held that an entry of birth recorded in the school register maintained by an illiterate Chowkidar, was not



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admissible and had no probative value within the meaning of Section 35 of the Indian Evidence Act. For ready reference, Section 35 of the Indian Evidence Act is reproduced below:-

"35. Relevancy of entry in public [record or an electronic record] made in performance of duty.--An entry in any public or other official book, register or [record or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or [record or an electronic record] is kept, is itself a relevant fact."

19. In Birad Mal Singhvi vs. Anand Purohit reported as 1988 Supp. SCC 604, where a question arose with regard to eligibility of a candidate participating in an election to the State Legislative Assembly, in the context of attaining the age of 25 years as stipulated, the Supreme Court held as below:-

15.....Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied,



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firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. ..." (emphasis added)

20. The probative value of the entry regarding the date of birth made in a school register has come up for consideration by the Supreme Court and the High Courts in several other cases and the common view expressed is that no probative value can be attached to such a record unless and until the parents are examined or the person on whose information the entry may have been made, is examined.

21. In Sushil Kumar vs. Rakesh Kumar reported as AIR 2004 SC 230, the Supreme Court held thus:-

"34. In the aforementioned backdrop the evidences brought on record are required to be considered. The Admission Register or a Transfer Certificate issued by a Primary



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School do not satisfy the requirements of Section 35 of the Indian Evidence Act. There is no reliable evidence on record to show that the date of birth was recorded in the school register on the basis of the statement of any reasonable person."

14. Thus, it is clear that the entry of the birth record in the school register is not admissible under Section 35 of the Evidence Act. Therefore, the prosecution failed to prove the age of the victim whether she was minor at the time of occurrence. The evidence shows that the victim fell in love with the accused and had physical relationship. If the accused had committed penetrative sexual assault on the victim, once, it can be construed that the accused committed penetrative sexual assault on the victim. Whereas, in the case on hand, so many times the accused had physical relationship with the victim. In fact, she also got pregnant and thereafter in order to abort the child, she had taken pills, which is also evident from Ex.P3, medical records of the victim, which reads as follows :

"8. Opinion : I am of the opinion that :
(1) Age estimation as per radiologist opinion
(2) Yes she might have undergone intercourse
(3) No, she is not pregnant at present.



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(4) No there is no marks of violence noted.”

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15. Thus, it is clear that there was no injury or any evidence for rape. Therefore, the prosecution failed to prove its case beyond any doubt and as such, the conviction cannot be sustained as against the appellant. That apart, already the appellant is in incarceration for more than 4 ½ years.

16. In the result, this Criminal Appeal is allowed and the judgment of conviction and sentence dated 09.08.2018 made in Spl.S.C.No.21 of 2018 on the file of the learned Sessions Judge, Mahila Court, Cuddalore, by convicting and sentencing the appellant for the offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and Section 506(ii) of IPC is hereby set aside. The appellant/ accused is acquitted of all charges in Spl.S.C.No.21 of 2018 on the file of the learned Sessions Judge, Mahila Court, Cuddalore.

17. The appellant/accused is directed to be set at liberty forthwith unless his custody is otherwise required in connection with any other case. Fine amount, if any paid, shall be refunded to the appellant forthwith. Bail bonds, if any executed, shall stand cancelled. Consequently, connected



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miscellaneous petition is closed.

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Index : Yes/No
Internet : Yes/No
Speaking/Non Speaking order
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To

1. The Sessions Judge (Mahila Court),
Cuddalore

2. The Inspector of Police,
All Women Police Station,
Virudhachalam,

3. The Public Prosecutor,
High Court, Madrs.

G.K.ILANTHIRAIYAN. J.



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