



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT  
RESERVED ON : 29.03.2022  
DELIVERED ON : 13.04.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN  
and  
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR  
Crl.A. (MD)No.618 of 2019

WEB COPY

Ashraff Ali

... Appellant/Sole Accused

Vs.

State Rep. by:  
The Inspector of Police,  
All Women Police Station,  
Alangudi, Pudukkottai District.  
In Crime No.7 of 2018

... Respondent/Complainant

**PRAYER:** Criminal Appeal filed under Section 374(2) of Cr.P.C. against the judgment of conviction and sentence passed by the learned Principal Sessions Judge (Mahila Court), Pudukkottai, made in Special Session Case No.28 of 2018 dated 03.08.2019.

For Appellant : Mr.S.Sivasubramanian  
for Mr.E.Somasundaram

For Respondent : Mr.A.Thiruvadi Kumar,  
Additional Public Prosecutor.

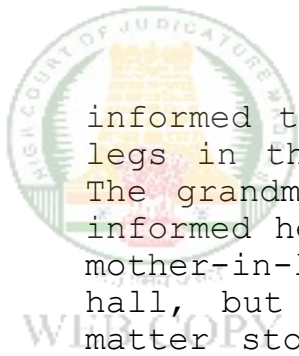
**JUDGMENT**

**R.SUBRAMANIAN, J.**  
**AND**  
**N.SATHISH KUMAR, J.**

Aggrieved over the life sentence imposed by the learned Principal Sessions Judge (Mahila Court), Pudukkottai, under Section 6 of the Protection of Children from Sexual Offences Act, 2012, by Judgment dated 03.08.2019 in Special Session Case No.28 of 2018, the present appeal came to be filed by the appellant.

**2.** The brief facts of the prosecution is as follows:

**(i)** P.W.1 is the elder sister of P.W.2. P.W.2 is the mother of P.W.3, who is the victim child. After marriage, P.W.2 was residing in the joint family along with her mother-in-law, father-in-law, sister-in-law and brother of her mother-in-law in the matrimonial home along with her daughter-P.W.3, the victim child. P.W.2's husband was working in abroad. On 03.09.2018, P.W.3 victim child complained a pain in her private parts to P.W.2. P.W.2 suspecting she has some infections, gave water with sugar. P.W.3 also



informed that the accused took her to his room tied her hands and legs in the night hours and repeatedly pressed her private parts. The grandmother of the victim girl untied her hands and legs and informed her to not to inform to any one. P.W.2 also requested her mother-in-law to allow them to sleep in the room and not in the hall, but the same was refused by her mother-in-law. When the matter stood thus, P.W.1, the sister of P.W.2 used to visit the house of P.W.2 and on one occasion, in the year 2018, P.W.3, the victim child informed P.W.2 that the accused is frequently abusing her sexually causing pain in her private parts. P.W.1 immediately required P.W.2 to not to allow the child to sleep in the hall. However, P.W.2, expressed her inability, since she is residing in the joint family. After some time, when P.W.2 brought the victim girl to her house in Trichy, the child developed unusual conduct and whenever some other person went near her, she got frightened and cried in panic. Since P.W.3 complained of pain in her genital organs, P.W.1 took her to Government Hospital, Trichy on 08.01.2018.

**(ii)** P.W.8-the Doctor, Assistant Professor of MGM Government Hospital, Trichy examined P.W.3 on 08.10.2018 at about 11.14 hours. On examination, she found hymeneal tear over 1 'o' clock and 8 'o' clock position and issued AR copy-Ex.P9 in this regard. P.W.3 victim child has stated that the accused used to lift her to his room and used to press her genital organs with his hands.

**(iii)** P.W.9, the Inspector of Police, on receipt of the intimation from Government Hospital, Trichy, recorded the statement from P.W.1 and registered a case in Crime No.7 of 2018 for the offences under Sections 5(l), 5(m) 5(n) and 6 of the 'Protection of Children from Sexual Offences Act, 2012' (hereinafter referred to as 'POCSO' Act) under Ex.P-10-FIR and forwarded the FIR to the Court. He thereafter, examined P.W.2 and the victim child and forwarded the child to the hospital for taking treatment.

**(iv)** P.W.7-the Doctor working in the Government Hospital, Pudukkottai examined the child at 9.00 p.m. on 10.10.2018 and she did not find any external injury and issued Accident Register Copy-Ex.P8 in this regard.

**(v)** P.W.9, after concluding investigation, laid a final report against the accused under Sections 5(l), 5(m), 5(n) r/w Section 6 of POCSO Act.

**(vi)** The prosecution, in order to bring home the guilt of the accused examined as many as 9 witnesses as P.W.1 to P.W.9, marked 12 documents as Ex.P1 to Ex.P12 and one material object as M.O.1. After analyzing the oral and documentary evidence, the trial Court has found the accused guilty under Sections 5(i), 5(m) and 5(n) and thereby convicted the accused under Section 6 of POSCO Act, 2012. Assailing the same, the present appeal is filed.



3. The learned counsel appearing for the appellant would submit that the accused has been falsely implicated due to some other motive at the instance of P.W.1. It is his contention that the title deed relating to the property of P.W.2 was taken back from P.W.1 and thereafter, pledged with one Abdul Kadhar, that is the reason for false implication. It is the further contention of the learned counsel appearing for the appellant that there are serious contradictions in the evidence of the victim child before the Medical Officer, 164 Cr.P.C statement before learned Judicial Magistrate and also in the substantive evidence before the Court. The above contradictions clearly show that the prosecution case is nothing but false implication. Before the Medical Officer, P.W.3 has stated that she was administered with some tablet, which is contradictory to the other statement. Therefore, the statement of the child is highly doubtful. The statement given by the two Medical officers are contradictory to one another. P.W.8 while examining the child has noted some hymenal tear, whereas P.W.7, who examined the child after two days, did not find any external injuries. Therefore, it is his contention that the entire prosecution theory is highly doubtful. During the investigation, none of the other family members were examined by the prosecution. The same clearly indicates that the entire case is falsely implicated. It is his further contention that the presumption under Section 29 of POCSO Act does not absolve the prosecution from discharging the burden to prove the guilt beyond reasonable doubt. In support of his contention, he has relied upon the following judgments:

(i) ***Latu Das Vs. State of Assam*** reported in ***(2021) 1 Gauhati Law Reports 70;***

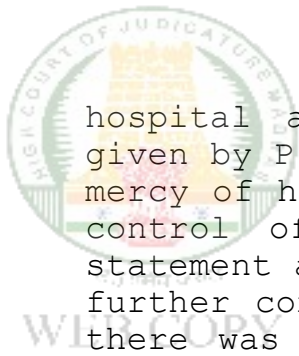
(ii) ***Saiful Islam Vs. State of Assam*** and Anr. reported in ***(2021) 4 Gauhati Law Reports 430;***

(iii) ***Swapan Mondal Vs. State*** reported in ***2021 SCC OnLine Cal 2007;*** and

(iv) ***Atender Yadav Vs. State Govt. of NCT of Delhi*** in ***Crl.A.No.1340 of 2010, dated 29.10.2013.***

4. It is further stated by the learned counsel appearing for the appellant that the learned trial Judge has imposed punishment based on the amended act, whereas the alleged occurrence said to have been taken place on 03.09.2018. Therefore, the punishment imposed by the learned trial Court is against law. He further submitted that the accused has been falsely implicated in this case and prays for allowing of this appeal.

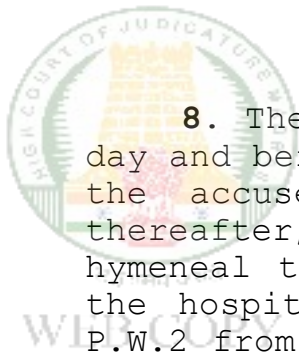
5. The learned Additional Public Prosecutor appearing for the State would submit that Ex.P1 itself indicate that the moment the child was taken to the hospital on 08.10.2018 and examined by the Medical Officer, the mother in law of P.W.2 took the child from the



hospital along with P.W.2. Thereafter, the complaint-Ex.P1 was given by P.W.1. Hence, it is his contention that P.W.2 was under the mercy of her husband's family members and she was totally under the control of her family members. Therefore, her sister gave a statement and thereafter, the entire crime came to light. It is the further contention of the learned Additional Public Prosecutor that there was no motive for false implication. The accused not even offered any explanation as to why he has been implicated falsely. Therefore, merely making some suggestions and denial, the statutory presumptions contained in Sections 29 and 30 of the POCSO Act will not get rebutted. Further, the evidence of P.W.1, P.W.2 and P.W.3 clearly shows that the child was subjected to sexual assault by the elder member in the family. It is the further contention of the learned Additional Public Prosecutor that the evidence of victim child itself clearly indicates that it is natural and does not suffer from any tutoring. There are bound to be some contradictions in statements made by a child, who is aged about 7 to 8 years at the time of occurrence, such minor contradictions should not be given much importance. Hence, the judgment of the trial court is well balanced and does not require any interference.

6. We have given our anxious consideration to the entire materials available on record, and also the rival contentions made by the respective counsel.

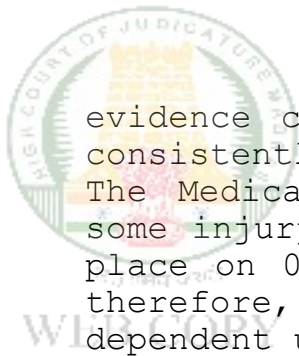
7. From the analysis of evidence particularly on analysis of the entire evidence of P.W.2, it is clear that she was under the control of her mother-in-law and lived in a joint family, where the accused was residing. The accused is none other than the brother of P.W.2's mother-in-law. P.W.2's husband was working in abroad and P.W.2 was totally dependent upon her mother-in-law and other family members and was residing along with them. Her evidence further indicates that at the time of occurrence, the child was studying 2<sup>nd</sup> Std., and aged about 7 years. The age of the child is also proved by the birth certificate filed before the Court under Ex.P4. P.W.3 the victim has informed P.W.2 about the pain in her private parts and also informed that the accused had pressed her private parts frequently by taking her to his room. As P.W.2 is totally dependent upon her mother-in-law, she did not take it seriously and in fact, she gave water mixed with sugar to relieve the pain and she has also requested her mother-in-law to allow them to sleep in the room and not in the hall. However, her mother-in-law refused to let them sleep in a room. When P.W.1 occasionally visited P.W.2's house, the child has complained of the same thing. When P.W.1 took the child to her house at Trichy, the child's behavior was abnormal. The child started crying in panic in her sleep. As the child also complained of pain in her genital organs, P.W.1 immediately took the child to the Govt. Hospital, Trichy on 08.10.2018.



8. The medical Officer-P.W.8 has examined the child on the same day and before the Medical Officer, the victim child has stated that the accused gave some tablet and took her to his room and thereafter, she did not know what has happened. P.W.8 has found hymeneal tear, issued Ex.P9 and immediately, admitted the child in the hospital. However, P.W.2's mother-in-law took the child and P.W.2 from the hospital. In the meanwhile, on information from the hospital, P.W.9 went to the Trichy hospital. P.W.9 tried to examine P.W.2 and child, but P.W.2 refused to give any statement. Only on seeing the AR copy, P.W.9 examined P.W.1 and recorded her statement and law was set in motion. P.W.2's evidence, in this regard also clearly shows that the mother-in-law of P.W.2 took P.W.2 and the victim child from the hospital without the permission of the doctors. When P.W.9-Investigating Officer asked P.W.2 to come to the police station, her mother-in-law threatened her not to divulge anything and threatened her saying if she divulges anything to the police, she will arrange a second marriage to her son. Therefore, P.W.2, at the first instance, did not divulge anything to the police.

9. Further, the evidence of P.W.2 clearly indicates that she was under the control of her mother-in-law and being a pardanashin lady, she was afraid of her family members. The evidence of P.W.1 and P.W.2 clearly indicate that the child was complained some pain in the private parts and there was some injury also noted by P.W.8. The victim child in her examination has also clearly stated that the accused used to put his hand on her private parts besides penetrating a small stick into her vagina. Even in the cross examination of the victim child nothing could be elicited by the accused. It is the case of the accused that there was some motive against the accused for P.W.1 and P.W.2. Much emphasis was given to the evidence of P.W.7- the Medical Officer, who was examined the child on 10.10.2018, wherein she did not find any external injuries. But the fact remains that right from the inception the child has stated before P.W.8 and P.W.7 that her genital organ was pressed by the accused. The child has clearly spoken about the same in her substantive evidence, though in a different manner.

10. Further, 164 Cr.P.C. statement recorded by the Judicial Magistrate also indicates that the child has given statement accusing the accused that he used to press her private parts. The evidence was recorded after satisfying the child had the ability to depose. The learned Trial Court after assessing the competence of the child to depose to the fact, recorded evidence. Therefore, when the Court found that the child competent to depose to the facts and such evidence does not suffer from any tutoring, there is no bar for the Court to act upon the evidence of the child of tender age. Therefore, we are of the view that merely because there are some inconsistencies in the statements of the child before the Medical Officer, 164 Cr.P.C. statement and her substantive evidence, her



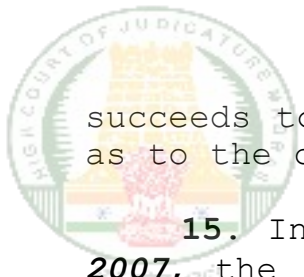
evidence cannot be ignored. The fact remains that the child has consistently spoken about the sexual abuse committed by the accused. The Medical Officer's evidence also clearly shows that there was some injury. Further, it is argued that though the occurrence took place on 03.09.2018, the child was examined only on 08.10.2018 and therefore, no injury could be found. The finding of the injury is dependent upon the proper examination by the Medical Officer.

**11.** P.W.8-Medical Officer attached to the Government Hospital Trichy has examined the victim child thoroughly and issued AR copy which clearly shows the nature of the examination done by her. However, P.W.7-Medical Officer who examined the child after two days did not find any external injuries. Merely because one of the doctors did not find any external injuries, we cannot conclude that there was no sexual abuse at all. The presence or absence of injury cannot be a detrimental factor. P.W.7-the Medical Officer, who examined the child after two days of the first examination, examined casually at 9.00 p.m. and there was no evidence to the effect that the child was admitted in the hospital, whereas P.W.8 has examined the child properly after admitting the child and found the injury. Therefore, we are of the view that even *de hors* the injury, when there is no other circumstances established on record for false implication or tutoring of the minor child, her evidence cannot be rejected in toto. Though it is stated that there was a motive for P.W.1 to implicate the accused, the nature of the motive and the enmity said to have existed between them have not even been suggested. The only suggestion was that P.W.1 was holding the document of the property and the same was taken back from her and mortgaged with a distant relative.

**12.** It is relevant to note that it is not the case of the accused that he was instrumental for such mortgage etc. Even in the examination under Section 313 of Cr.P.C, the accused was silent about the case. Therefore, in the absence of rebuttal evidence, the presumption under Section 29 of the POCSO Act makes it mandatory for the Court to presume that the accused has committed an offence. No contra evidence is placed on record or brought on record by way of cross examination.

**13.** In ***Latu Das Vs. State of Assam*** reported in **(2021) 1 Gauhati Law Reports 70**, the Gauhati High Court has held that Section 29 of the POCSO Act creates a restriction on the accused's right to remain silent and the presumption under Section 29 of the POCSO Act does not absolve the prosecution from its usual burden to prove the guilt of the accused beyond reasonable doubt.

**14.** In ***Saiful Islam Vs. State of Assam and Anr.*** reported in **(2021) 4 Gauhati Law Reports 430**, the Gauhati High Court has held that no accused can be saddled with the reverse burden by virtue of presumption under Section 29 of POCSO Act, unless the prosecution



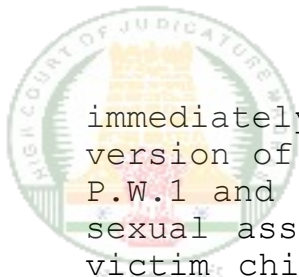
succeeds to establish the foundational fact beyond reasonable doubt as to the commission of offence.

15. In **Swapan Mondal Vs. State** reported in **2021 SCC OnLine Cal 2007**, the Calcutta High Court has held that unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under the POCSO Act, the presumption under Section 29 of the said act would not operate against the accused. Even if the prosecution establishes such facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution witnesses through cross-examination demonstrating that the prosecution case is improbable or absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption. In either case, the accused is required to rebut the presumption on the touchstone of preponderance of probability.

16. The Division Bench of the Delhi High Court in **Atender Yadav Vs. State Govt. of NCT of Delhi [Crl.A.No.1340 of 2010, dated 29.10.2013]**, dealing with the offence under Section 376 (2) (f) of the Indian Penal Code 1860 and acquitted the accused mainly on the ground that the case was falsely implicated due to matrimonial dispute between the mother and father. Therefore, the above cases cited by the appellant's counsel will not be helpful to decide the case on hand.

17. As the evidence of the child appears to be natural and she had repeatedly complained pain which has also been spoken by P.W.1, the Medical Officer's evidence clearly shows that there was a hymeneal tear and the child has also spoken about how she was subjected to such assault. The mere inconsistency in her statement will not destroy the prosecution case. The victim was aged about 7 to 8 years at the time of occurrence and she was of very tender age. Therefore, it cannot be expected from the victim child to give minute details as to what was transpired inside the house. The conduct of the mother-in-law and father not coming to the box and not co-operating with the prosecution also assumes significance. Therefore, mere inconsistency in the statement of the child cannot be given much importance to destroy the entire prosecution case.

18. As narrated above, the child and her mother were under the control of the family of her husband. The victim is aged about 7 to 8 years and at such a young age, she is unlikely to give minute details about the occurrence. The mother of the child was under the apparent control of her mother-in-law and other family members, since her husband was working abroad. All these facts cannot be ignored all together. The study of child abuse also reveals that child abuse and sexual assault on the minor child are more by near relatives. The social background of the victim is also to be taken note of. Therefore, merely because the crime has not been reported



immediately by P.W.2, it cannot be a ground to disbelieve the version of the child, which has been corroborated by the evidence of P.W.1 and P.W.2. Therefore, we are of the view that the offence of sexual assault as defined under Section 7 of the POCSO Act on the victim child has been clearly established on record. The accused residing in the same house as relative and an aged person, his act certainly falls within the ambit of Section 9 of sub-clause (1) of the POCSO Act. Therefore, he is certainly liable to be punished under Section 6 of the POCSO Act. The trial Court has imposed the conviction for life till his natural life with the fine of Rs.1,000/-. It is relevant to note that the occurrence took place in the year 2018, prior to the amendment of Section 6 of the POCSO Act 25 of 2019, which came into effect from 16.08.2019. Prior to the amendment Section 6 of the POCSO Act reads as follows:

***"6.Punishment for aggravated penetrative sexual assault:***

*Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than 10 years but which may extend to imprisonment for life and shall also be liable to fine."*

The above provision makes it clear that the punishment provided prior to the amendment should be for a term which shall not be less than 10 years but it may extend to imprisonment for life and also fine. Therefore, the action of trial Court convicting the accused for life imprisonment till his natural life is not according to law. The trial Court ought to have imposed the punishment as per law that stood prior to the amendment. Taking note of the over all circumstances and the fact that the accused is already 70 years, we are of the view that if the accused is convicted for the period of 10 years of rigorous imprisonment, the same will meet the ends of justice. Therefore, we are inclined to modify the sentence. Accordingly, the sentence alone is modified.

**19.** In the result, this Criminal Appeal is partly allowed in the following terms:

(i) The conviction passed by the Trial Court under Section 6 of the POCSO Act against the appellant/Sole Accused is hereby confirmed. However, the substantive sentence of imprisonment imposed by the trial Court is modified and he is directed to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,000/-, in default, to undergo rigorous imprisonment for three months.

(ii) It is further directed that the period of sentence already undergone by the appellant/sole accused shall be set off under Section 428 of the Code of Criminal Procedure.



(iii) In all other respects, the judgment of the trial Court is confirmed.

20. We also noted that the trial Court has failed to ensure that the identity of the child is not disclosed during trial, which is contrary to the mandate of the POCSO Act. Section 33 of sub-clause (7) of POCSO Act makes it mandatory for the Special Court not to disclose the identity of the child during the trial. The trial Court have not maintained the same in the judgment and while recording the evidence, the child name has been typed in the deposition form without adhering to the mandatory provisions. The trial Courts must be more cautious in future and adhere to the provision of the statute.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

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Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

- 1.The Principal Sessions Judge (Mahila Court),  
Pudukkottai.
- 2.The Inspector of Police,  
All Women Police Station,  
Alangudi,  
Pudukkottai District.
- 3.The Superintendent/ Jailor,  
Central Prison, Trichy.
- 4.The Additional Public Prosecutor,  
Madurai Bench of Madras High Court,  
Madurai.
- 5.The Section Officer,Criminal Section,  
Madurai Bench of Madras High Court,Madurai.



+1 CC to M/s.E. SOMASUNDARAM, Advocate ( SR-18538[F] dated  
13/04/2022 )

**Crl.A. (MD) No. 618 of 2019  
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