



Crl.A.No.243 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.07.2023

CORAM

THE HONOURABLE MR.JUSTICE **M.SUNDAR**
and
THE HONOURABLE MR.JUSTICE **R.SAKTHIVEL**

Crl.A.No.243 of 2023

Sembulingam

.. Appellant

Vs

The State by Inspector of Police,
All Women Police Station,
Gobichettipalayam,
Erode District.

.. Respondent

Appeal filed under Section 374 (2) of Cr.P.C. to call for the records relating to the judgment dated 23.06.2017 made in Spl.S.C.No.05 of 2017 on the file of learned Additional Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court), Erode.

For Appellant	:	Mr.N.Manokaran
For Respondent	:	Mr.A.Gokulakrishnan Additional Public Prosecutor

JUDGMENT

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[Judgment of the Court was delivered by **M.SUNDAR, J.,**]

This judgment will now dispose of captioned Criminal Appeal.

2. This judgment has to be read in conjunction with and in continuation of earlier proceedings made in Crl.M.P. No.6125 of 2023 in Crl. A. No.243 of 2023 {for suspension of sentence under Section 389(1) of the 'The Code of Criminal Procedure, 1973 (2 of 1974)' [hereinafter 'Cr.P.C' for the sake of brevity and clarity]} on 15.06.2023 which reads as follows:

This order will now dispose of the captioned 'Criminal Miscellaneous Petition' [hereinafter 'Crl.MP' for the sake of convenience and clarity].

2. This order has to be read in conjunction with and in continuation of earlier proceedings made in the previous listing on 07.06.2023 which reads as follows:

'Captioned main Criminal Appeal is a regular appeal under Section 374(2) of 'The Code of Criminal Procedure, 1973 (2 of 1974)' [hereinafter 'Cr.P.C' for the sake of brevity and clarity] and it is predicated against 'conviction and sentence dated 23.06.2017 made in Special S.C.No.5 of 2017 on the file of the Court of the Additional Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court), Erode District' [hereinafter 'impugned conviction and sentence' and 'trial Court' respectively for the sake of convenience and clarity].

2. To be noted, the conviction is under Section 366 of 'The Indian Penal Code (45 of 1860)' [hereinafter 'IPC' for the sake of convenience and clarity], Section 4 of 'The Protection of



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Children from Sexual Offences Act, 2012 (32 of 2012)' [hereinafter 'POCSO Act' for the sake of brevity] besides Section 506(ii) of IPC. The conviction and sentences are as follows:

Conviction	Sentence
Section 366 IPC	10 Years Rigorous Imprisonment with Rs.5000/- fine and two years Simple Imprisonment in the event of default in paying fine
Section 4 of POCSO Act	Life Imprisonment with Rs.5000/- fine and two years Simple Imprisonment for default in payment of fine
Section 506(ii) of IPC	7 years Rigorous Imprisonment with Rs.5000/- fine and two years Simple Imprisonment in the event of default in paying fine

It is further to be noted that the sentences are to run concurrently.

3. Mr.N.Manokaran, learned counsel for appellant and Mr.E.Raj Thilak, learned Additional Public Prosecutor for the State are before us.

4. This Bench is informed that there were four accused in all in the trial Court (including the appellant) and all four were convicted. The other three accused carried the conviction and sentence in appeal to this Court and this Court allowed the appeal in the case of other three accused. To be noted, appellant in the main criminal appeal is A1 and other three are obviously A2, A3 and A4. The details of the appeal of the other accused and the dates of orders are as follows:

Sl. NO.	Rank of Accused	Crl.A.No.	Date of this Court order allowing the appeal
1	A2 (Special S.C.No.8 of 2017)	Crl.A.No.125 of 2022	09.01.2023



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Sl. NO.	Rank of Accused	Crl.A.No.	Date of this Court order allowing the appeal
2	A3 (Special S.C.No.9 of 2017)	Crl.A.No.424 of 2017	30.01.2018
3	A4 (Special S.C.No.10 of 2017)	Crl.A.No.558/ of 2019	29.07/.2021

5. The aforementioned factual matrix and the trajectory the matter has taken as regards the other accused is not subjected to disputation or contestation and in any event they are all matters of record. Learned counsel submits that Hon'ble Division Benches of this Court have disbelieved the deposition of the victim (PW2) in not one but three appeals. Therefore, the benefit would enure to the appellant in the case on hand also is his further say. Learned counsel went on to submit that when one of the aforementioned appeals, namely Crl.A.No.125 of 2022, preferred by A2 was heard, Hon'ble Division Bench requisitioned appellant herein to appear virtually on a videoconferencing platform on 09.01.2023. The appellant (A1) did appear virtually. Learned counsel submitted that Hon'ble Division Bench was inclined to extend the benefit of acquittal to A1 also as A1 submitted that he could not prefer the appeal only owing to how he was circumstanced and economic situation.

6. However, counsel for A1 in the trial Court had cross-examined separately is what the Prosecutor informs this Bench. In this regard, we are informed by the Prosecutor that final report i.e., charge sheet is common but there were four separate Special Sessions cases as there were different occurrences, the trial of four Sessions cases was simultaneous, and Chief was common but cross-examination was independent qua each of the four accused. To be noted, all this is captured in paragraph 4 of judgment dated 29.07.2021 in Crl.A.No.558 of



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2019.

7. Learned counsel for appellant submitted that aforementioned 'Criminal Miscellaneous Petition' [Crl.MP for the sake of brevity] is with a prayer for suspension of sentence under Section 389(1) of Cr.P.C and learned counsel submitted that there is enough and more palpable /tangible materials to demonstrate that the appellant has fair chances of acquittal. Learned counsel went as far as submitting that in the light of the aforementioned peculiar trajectory of the case, the appellant cannot but be acquitted.

8. Considering that there is life sentence at least for one of the charges, 10 years sentence for another charge, it is imperative that that Prosecutor is given an opportunity to show cause in writing against release. To be noted, this is owing to first proviso to Section 389(1) of Cr.P.C which kicked in on and from 23.06.2006.

9. Therefore, the matter will stand over by one week for a counter from the Prosecutor. In the interregnum, parties can arrange for the paper book so that possibility of hearing out the main appeal in the next listing will also be explored. If that not be so, the captioned Crl.MP for suspension of sentence will be heard out in the next listing which shall be peremptory.

List one week hence. List on 14.06.2023.'

3. Aforementioned proceedings captures the factual matrix in a nutshell and it also captures the trajectory the appeals of the co-accused have taken in this Court thus far.

4. Adverting to aforementioned proceedings, Mr.N.Manokaran, learned counsel on record for petitioner submitted that the case on hand is a fit case for suspension of sentence as he verily believes that the main appeal of petitioner will also gravitate towards acquittal as in the case of co-accused.

5. Mr.R.Muniyapparaj, learned Additional Public Prosecutor (assisted by learned counsel Mr.Sylvester John) submitted to the contrary. Learned Prosecutor submitted that the trial Court has rightly convicted and sentenced the petitioner after scrutinizing evidence and prosecution witnesses.



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6. We carefully considered the aforementioned submissions.

7. We are of the view that this is a case where prima facie possibility of acquittal in the appeal of petitioner in captioned Crl.MP is palpable. The reason is, deposition of PW2 which constitutes a substantial chunk of the substratum of conviction and sentence of trial Court has been disbelieved not just in one but three appeals by another coordinate Hon'ble Bench of this Court.

8. This bench now applies **Omprakash** principle [**Omprakash Sahni Vs. Jai Shankar Chaudhary & another** reported in **2023 SCC OnLine SC 551**]. As already alluded to supra, a prima facie possibility of acquittal in the appeal is palpable and such prima facie view emerges from earlier proceedings without need for resorting to re-appreciation of evidence.

9. In the light of the narrative, discussion and dispositive reasoning thus far, the following order is passed :

(i) The sentence qua judgment and conviction dated 23.06.2021 in Special S.C.No.5 of 2017 on the file of the trial Court i.e., Court of Additional Sessions, Magalir Neethimandram, (Fast Track Mahila Court), Erode is suspended. In other words, the impugned conviction and sentence made by trial Court is suspended pending appeal and the bail is subject to conditions which are set out in other sub-paragraphs to follow infra;

(ii) The petitioner shall be enlarged on bail on executing own bond;

(iii) The petitioner shall report before the All Women Police Station, Gobichettipalayam, Erode District on the first working day of every month at 10.30 a.m. pending disposal of the appeal; and

(iv) The petitioner shall not leave Erode District without intimating the aforementioned police station;

Captioned Crl. MP is disposed of in the aforesaid manner with the aforesaid directives.'



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3. The aforementioned earlier proceedings captures essential facts (qua captioned Criminal Appeal) which are imperative for appreciating this judgment.

4. The aforementioned earlier proceedings also captures the trajectory the captioned Criminal Appeal and the connected three Criminal Appeals preferred by A2, A3 and A4 in the Trial Court (to be noted captioned Criminal Appeal has been preferred by A1 in the Trial Court) have taken.

5. This Bench deems it appropriate to extract and reproduce the proceedings made by Hon'ble Co-ordinate Division Bench on 09.01.2023 also in one of the aforementioned connected criminal appeals being Crl. A. No.125 of 2022 (preferred by A2) and the same is as follows:

'During the course of hearing in Crl.A.No.125 of 2022 filed by Murugesan @ Murugan, we noticed that in a connected case in Spl.S.C.No.5 of 2017, the accused therein, by name Sembulingam was also convicted and sentenced on 23.06.2017. However, he had chosen not to file any appeal in this Court. Therefore, we directed the production of Sembulingam before us from the



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Central Prison, Coimbatore, via video conferencing.

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2. Today, Sembulingam was produced before us as directed supra. When we enquired him, he stated that he is aware of the fact that two of the other accused have already been acquitted by this Court, but, for paucity of funds, he has not been able to engage an Advocate for filing an appeal before this Court.

3. We apprised him of his right to have free legal aid and also informed him that we will nominate a competent Advocate to take up his case pro bono, for which, he agreed.

4. Therefore, we nominated Mr.N.Manoharan (Enrolment No.821/1995; Mobile No.9444170271), who had earlier filed appeals for Murugesan @ Murugan, Sivakumar and Vijayakumar, to take up the case of Sembulingam.

5. When we enquired Sembulingam as to whether, he has a free copy of the judgment that was supplied to him by the trial Court after he was sentenced, he stated that he was indeed given a copy of the judgment, but, he had handed it over to his daughter, who had unfortunately died thereafter. Therefore, he stated that he does not even has the copy of the judgment of the trial Court.

6. However, Mr.M.Babu Muthumeeran, learned Additional Public Prosecutor produced a web copy of the said judgment from case diary.

7. We furnished a photocopy of the same to



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Mr.N.Manoharan, Advocate, for the purposes of filing an application for dispense with and for filing an application for condonation of delay in filing the criminal appeal for Sembulingam.

The Madras High Court Legal Services Committee is directed to pay a sum of Rs.10,000/- as remuneration to Mr.N.Manoharan. Of course, we are passing final judgment in Crl.A.No.125 of 2022 separately.'

6. Mr.N.Manokaran, learned counsel for appellant submitted that separate judgments made in aforementioned three criminal appeals qua A2, A3 and A4 would apply in all fours to the appellant and the appellant will also be entitled to benefit of similar judgment.

7. Therefore, we deem it appropriate to reproduce the judgments made in all the three aforementioned criminal appeals. (Tabular column of which has been set out in our 07.06.2023 proceedings in Crl.M.P. No.6125 of 2023 in captioned Criminal Appeal which in turn has been captured in aforementioned 15.06.2023 proceedings).

'Judgment in Crl.A.No.125 of 2022:

This criminal appeal is directed against the judgment and order of conviction and sentence dated 23.06.2017 passed by the



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Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, in Spl.S.C.No.8 of 2017.

2. This being a case under the Protection of Children from Sexual Offences Act, 2012 (for brevity “the POCSO Act”), we deem it necessary not to refer to the name of the victim girl and instead, refer to her as “X”.

3. The prosecution case is as follows:

3.1. “X” is the daughter of Shanthi-Ravi couple. Shanthi is said to be mentally retarded. The date of birth of “X” as per her school records is 05.06.2003 and accordingly, she was 14 years old during the alleged occurrence. “X” was living with her grandmother Backiyalakshmi in Periyapuliyur village and was studying in 8th standard in the Government Higher Secondary School in Periyapuliyur.

3.2. In September 2016, after the quarterly examination, “X” had holidays and so, her aunt Meenakshi (P.W.1) took her to her village, Kaalingarayanpalayam, which is about 10 kms. from Periyapuliyur. After reaching the house of Meenakshi (P.W.1), “X” complained of body pain and when Meenakshi (P.W.1) enquired her, she stated that she wanted to confide in her certain things and said that she was sexually abused on various occasions by four persons, of whom, she named three persons, Sembulingam, Murugesan @ Murugan and Sivakumar @ Ramesh of Periyapuliyur village. As regards the fourth person, she stated that he is from Kaalingarayanpalayam and that she can identify him. Immediately, Meenakshi (P.W.1) brought these revelations by “X”



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to the notice of the elders in the house and on 25.09.2016, Meenakshi (P.W.1) gave a written complaint vide Ex.P1 narrating what "X" had told her.

3.3. On the said complaint, Nagamani (P.W.21), Sub-Inspector of Police, All Women Police Station, Gobichettipalayam, registered a case in Crime No.6 of 2016 on 25.09.2016 for the offences under Sections 366 IPC, 5 r/w 6 of the POCSO Act and 506(II) IPC against Sembulingam, Murugesan @ Murugan, Sivakumar @ Ramesh, all residents of Periyapuliyur and one, not named, but an identifiable person being a resident of Kaalingarayanpalayam and prepared the printed First Information Report (Ex.P24), which reached the jurisdictional Magistrate on the same day at 10.30 p.m.

3.4. Investigation of the case was taken over by Gayathri (P.W.22), Inspector of Police, who arrested Sembulingam, Murugesan @ Murugan, Sivakumar @ Ramesh and Vijayakumar (appellant) on 25.09.2016 at 15.15 hours in Gobichettipalayam Bus Stand.

3.5. All the arrested accused were medically examined by Dr.Sivasankar (P.W.3), Assistant Medical Officer, Government Hospital, Gobichettipalayam, on 25.09.2016 at 07.15 p.m. and certificates were issued, of which we are concerned with the one relating to the appellant herein, viz., Ex.P5, wherein the following final opinion has been given:

'FINAL OPINION'

Mr.Murugesan @ Murugan 37/M



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Based on clinical examination, there is nothing to suggest that the male examined is not capable of performing sexual act.'

3.6. The appellant was further examined, his semen collected and it was sent to Tamil Nadu Forensic Sciences Department for examination. The final opinion (Ex.P8) given by Dr.S.Vijayakumar (P.W.4) reads as under:

'FINAL OPINION

The result for grouping test is inconclusive. There is no evidence to suggest he is impotent.'

3.7. Dr.Kalyani (P.W.5), Senior Assistant Medical Officer, examined "X" on 26.09.2016 for determining her age and after conducting necessary radiological tests, she gave a report (Ex.P9) opining that "X" has completed 14 years of age and is less than 15 years of age.

3.8. Dr.Kalapriya (P.W.6) medically examined "X" on 25.09.2016 and took her vaginal smears, which were sent to the Tamil Nadu Forensic Sciences Department for chemical examination. The chemical examination report showed absence of spermatozoa in the vaginal smears. Thereafter, Dr.Kalapriya (P.W.6) gave her final opinion (Ex.P13), wherein she stated that the hymen was torn; no spermatozoa was detected in the vaginal smears; and that it is possible for "X" to have been subjected to coitus.



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3.9. "X" was admitted as an inpatient on 31.12.2016 in the Government Head Quarters Hospital, Erode, for psychological assessment. Dr.Jayaprakash (P.W.13), Psychiatrist, conducted several psychological screening and administered the following tests:

1. Vineland social maturity scale
2. Woodern Form Board Test
3. Binet Kamat Test of Intelligence
4. Mental Status Examination
5. Psychopathological Screening Test

and submitted a detailed report which has been marked as Ex.P23.

3.10. After examining various witnesses and collecting the reports of the experts, Gayathri (P.W.22), Inspector of Police, completed the investigation and filed a single final report against four accused viz., Sembulingam (A1), Murugesan @ Murugan (A2), Sivakumar @ Ramesh (A3) and Vijayakumar (A4) for the offences under the POCSO Act and IPC in the Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, which is designated as the Special Court under the POCSO Act.

4. The learned Special Judge carefully analysed the final report and found that the offences allegedly committed by the four accused were not committed in the course of the same transaction and therefore, he split up the case qua each accused and assigned separate case numbers to conduct the trials



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simultaneously and not jointly. The details of the case numbers are as under:

Sembulingam	-	Spl.S.C.No.5 of 2017
Murugesan @ Murugan (Appellant herein)	-	Spl.S.C.No.8 of 2017
Sivakumar @ Ramesh	-	Spl.S.C.No.9 of 2017
Vijayakumar	-	Spl.S.C.No.10 of 2017

4.1. The trial Court framed charges under Section 6 of the POCSO Act and Section 506(II) IPC for intimidating “X”. When questioned, the appellant pleaded “not guilty”.

4.2. To prove the case, the prosecution examined 22 witnesses and marked 27 exhibits. When the appellant was questioned u/s.313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same. No witness was examined from the side of the appellant nor any document marked.

4.3. After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 23.06.2017, convicted the appellant of the offence u/s.4 of the POCSO Act and Section 506(II) IPC and sentenced him as under :

Provision under which convicted	Sentence
Section 4 of POCSO Act	Life imprisonment and fine of Rs.5,000/-, in default, to undergo two years simple imprisonment.
Section 506(II) IPC	Seven years rigorous imprisonment and fine of Rs.5,000/-, in default, to undergo two years simple imprisonment.
The aforesaid sentences were ordered to run concurrently.	



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Challenging the aforesaid conviction and sentences, the appellant has preferred the present appeal.

5. It is pertinent to state here that the other three accused viz., Sembulingam, Sivakumar @ Ramesh and Vijayakumar were also convicted and sentenced on the same day by three separate judgments.

6. Heard Mr.N.Manokaran, learned counsel for the appellant and Mr.M.Babu Muthu Meeran, learned Additional Public Prosecutor appearing for the respondent State.

7. At the outset, Mr.N.Manokaran, learned counsel for the appellant, contended that a Division Bench of this Court has allowed the appeals in Crl.A.No.424 of 2017 on 30.01.2018 that was filed by Sivakumar @ Ramesh and Crl.A.No.558 of 2019 on 29.07.2021 that was filed by Vijayakumar against the judgment and order in Spl.S.C.No.9 of 2017 and Spl.S.C.No.10 of 2017, respectively, by disbelieving the evidence of "X" and therefore, the present appellant viz., Vijayakumar should also be given the same benefit.

8. We find that the chief-examination of all the prosecution witnesses is common to the four cases but only the cross-examination differs. The trial Court cannot be faulted for adopting such a procedure in the peculiar facts and circumstances of the present case. The defence has not disputed the age of "X" nor other facts like the potency of the appellant.



They have also not disputed the inter se relationship of “X” with Meenakshi (P.W.1) and Vasuki (P.W.15). The medical evidence does not, in any manner, implicate the accused.

9. The whole prosecution case is posited on the testimony of “X”. According to the complaint (Ex.P1), “X” spilled the beans to Meenakshi (P.W.1) on 23.09.2016 when PW-1 brought her to her house during the post quarterly examination holidays. “X” told Meenakshi (P.W.1) that one month after she attained puberty, Sembulingam pulled her to his house saying that he would give her chocolates, closed the door, removed her chudidhar and sexually abused her; he further threatened her saying that she should not disclose this to anyone; he also repeated this act four times later; four months ago, while she was going to the fields for attending to the nature’s call, Murugesan @ Murugan sexually abused her; he did this three times later while she was on her way to ease herself; in the mean while, one day, when she was playing with Aswathi in her house, when Aswathi went to the rest room, her father Sivakumar @ Ramesh sexually abused her.

10. Coming to the allegations against the appellant, it was contended that the evidence of P.W.1 is totally unbelievable, since she has stated that “X” informed about the incident on 23.09.2016 and the complaint was given on 25.09.2016. Whereas, it is clear from the evidence of P.W.17 that P.W.1 knew about the incident as early as on 18.09.2016 itself. That apart, P.W.15 stated that the incident had taken place on 25.09.2016.



In the light of these material contradictions, the manner in which the prosecution has projected this case, has been questioned.

11. It was also brought to our notice that the most natural witness, who could have spoken about the incident was Backiyalakshmi, grandmother of "X" with whom she stayed and her father Santhanam. Curiously, both of them were not examined by the prosecution. P.W.1, who was only the aunt of "X", has come forward to give a complaint, which sounds doubtful and unnatural.

12. The evidence of P.W.7 and P.W.13 were also brought to the notice of this Court, in order to understand the mental status of "X", whose intelligence quotient was found to be between 64 and 66 and "X" was incapable of retaining in memory of the incidents for more than six months. Hence, it was contended that "X" can be easily tutored and a reading of her evidence shows that she was completely tutored by P.W.1.

13. As mentioned supra, the chief-examination of all the prosecution witnesses was common in all the four cases and only the cross-examination differs. The evidence tendered by the witnesses was already appreciated by this Court, in the earlier criminal appeals filed by Sivakumar @ Ramesh in Crl.A.No.424 of 2017 and Vijayakumar in Crl.A.No.558 of 2019. It will be more relevant to take note of the appreciation of the evidence that was undertaken in Crl.A.No.424 of 2017, since the allegation is almost similar and the appellant in the present case was stated



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to be the second person after Sembulingam (A1), to have sexually assaulted “X”.

14. There is absolutely no clarity, as to when the incident took place or where it actually took place. “X” is said to have attained puberty in the year 2016 and the sexual assault is alleged to have been committed by four accused persons thereafter. Individual sexual assault has been attributed against each person and that is the reason why, the Court below has taken up the case of each accused person independently.

15. “X” was residing with her grandmother Backiyalakshmi and her father Santhanam. If at all, such a serious crime had taken place against “X”, they must be the one, who should have known about it and should have taken action against the accused persons. Curiously, they are not even examined on the side of the prosecution. This sounds completely unnatural. P.W.1 claims to be a relative of “X” and she was the one, who had set the law in motion by lodging the complaint.

16. According to P.W.1, she took “X” to her house during quarterly examination holidays and “X” narrated about the sexual abuse committed by four accused persons. The narration of events is said to have been taken place on 23.09.2016 and whereas, the complaint came to be filed only on 25.09.2016. The claim made by P.W.1 gets even more doubtful, since P.W.17 has deposed that P.W.1 came to know about the incident as early as on 18.09.2016 itself. This was also admitted by the Investigating Officer, who was examined as P.W.22. The



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confusion gets confounded with the evidence of P.W.15, who stated that “X” spoke about this incident on 29.05.2016 itself.

17. In a case of this nature, the Courts are expected to act upon the evidence of the victim girl and not to search for any corroboration, if the evidence does not lack credibility. However, in the present case, the evidence of the doctors viz., P.W.7 and P.W.13 shows that the intelligence quotient level of “X” is below average and she is not even capable of remembering things which happened six months back. Keeping the same in mind, we have to necessarily assess her evidence with more care and caution. While undertaking this exercise, this Court, in Crl.A.No.424 of 2017 and Crl.A.No.558 of 2019, has found that “X” has a poor intellectual capacity and there is a possibility of tutoring her. That apart, the medical examination of “X” does not reflect the fact that she was subjected to repeated sexual assault by four persons. Even the medical officer, who was examined as a witness was not able to give definite opinion, as to whether “X” was subjected to repeated penetrative sexual assault.

18. In the light of the above, it will not be safe to rely upon the evidence of “X” and the same coupled with the patently contradicting versions given by P.W.1, P.W.15 and P.W.17, it will be unsafe to sustain the conviction of the appellant. We are aware of the fact that there is a reverse burden provided under Sections 29 and 30 of the POCSO Act and hence, there is a legal presumption against the accused persons.



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These presumptions will come into operation, only when the prosecution places a reasonably probable story before the Court and not otherwise. That apart, this Court has appraised the evidence of “X”, P.W.1, P.W.15 and P.W.17 and has given sound reasons for rejecting their testimonies.

19. In view of the same, we have to concur with those findings and we are of the view that it will be highly unsafe to convict the appellant with a grave crime, when the evidence available on record is wholly unreliable.

In the result, this Criminal Appeal is allowed and the appellant is acquitted of all the charges. The conviction and sentence imposed on the appellant by the Additional Sessions Judge, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, in Spl.S.C.No.8 of 2017 vide judgment and order dated 23.06.2017, are set aside. The appellant is directed to be released forthwith, unless his presence is required in connection with any other case.'

'Judgment in Crl.A.No.424 of 2017:

Appellant, arrayed as A-3 in the Charge Sheet, was tried separately in Spl.SC.No.9/2017 on the file of the Court of the learned Additional Sessions Judge, Mahalir Neethimandram, Fast Track Court, Erode, for offences u/s.366 IPC and section 6 of the Protection of Children from Sexual Offences Act, 2012 [in short POCSO Act] read with section 506[ii] IPC. The Trial Court, under impugned Judgment dated 23.06.2017, acquitted the



appellant/accused of the sections u/s.366 and 506[ii] IPC and found him guilty of offence u/s.4 of POCSO Act, 2012 and sentenced him imprisonment for life and a fine of Rs.5,000/-, with a default sentence of 2 years simple imprisonment. Aggrieved over the said conviction and sentence, the present appeal came to be filed by the appellant/accused.

2 The brief facts of the prosecution case, are as follows:-

[a] Since the alleged victim is a minor, we are not proposed to refer her name in the Judgment. She is, hereinafter referred to as "Y".

[b] Y was aged about 14 years in the year 2016. She had attained puberty in the said year and she was residing with her grandmother – **Backiyalakshmi** at Periyapuliyur Village. After she attained puberty, she was sexually abused by one **Sembulingam**, an old man in the village and had sexual intercourse with her by offering some sweets. He continued such activities with Y twice or thrice. Similarly, one **Murugesan @ Murugan**, also abused her sexually in a similar manner as that of Sembulingam. Likewise, one **Sivakumar @ Ramesh**, the appellant/accused herein and one **Vijayakumar**, had also abused Y sexually.

[c] As far as the appellant/accused is concerned, on 08.09.2016, Y was playing with the appellant/accused daughter **Aswathi-D.W.1**, and when D.W.1 went to washroom, the appellant/accused abused Y-victim **[P.W.2]**.



[d] P.W.1-Meenachi, is the relative of P.W.2-victim and Backiyalakshmi. When P.W.1 took P.W.2 to her house on 23.09.2016 during Quarterly Exams Holidays, P.W.2 informed P.W.1 about the sexual abuse meted out by her by four persons. Immediately, P.W.1 informed the same to her brother **Vijayakumar-P.W.17** and Backiyalakshmi and lodged the **First Information** under **Ex.P.1** with the All Women Police Station, Gobichettipalayam.

[e] P.W.21-Nagamani, **Sub Inspector of Police** attached to the respondent Police Station, received Ex.P.1 from P.W.1 and registered the crime in **Cr.No.6/2016** for offences **u/s.366 and 506[ii] IPC** and **sections 5 and 6 of the POCSO Act** under **Ex.P.24-FIR**.

[f] P.W.22-Gayathri, **Inspector of Police** attached to the said Police Station, on receipt of Ex.P.24-FIR, took up the case for investigation and examined the victim **Y** and recorded her statement. The victim, thereafter, was taken by **Indumathi**, **Grade I PC**, for medical examination, along with a requisition. P.W.22 went to the place of occurrence and prepared **Ex.P.22-Observation Mahazar [Xerox copy]** and **Ex.P.25-Rough Sketch [Xerox copy]**. On receipt of secret information, she effected the arrest of all the four accused ; recorded the voluntary confession statement given by A-1-Sembulingam, in the presence of **P.W.14** and one Prakasam. The accused were sent for medical examination.

[g] P.W.3-Sivasankar, **Medical Officer** attached to the Government Hospital, Gobichettipalayam and he examined one



Sembulingam, aged 66 years ; Sivakumar @ Ramesh, aged 41 years [the appellant/accused herein] ; Vijayakumar, aged 34 years ; and Murugesan @ Murugan, aged 31 years under **Requisition-Ex.P.3** and issued **Accident Registers-Ex.P.4** and **Ex.P.7** and **Final Opinion-Ex.P.5** and **Ex.P.8**, wherein he had opined that **there is nothing to suggest that the accused is impotent.**

[h] P.W.5-Dr.Kalyani, Senior Assistant Surgeon, attached to the Government Hospital, Gobichettipalayam, examined the victim-Y [P.W.2], a minor Radiologically and issued the **Age Certificate [Xerox copy]** under **Ex.P.9**, wherein she had opined that the victim is aged about 14 – 15 years.

[i] P.W.6-Dr.Kalapriya, Senior Civil Surgeon, examined P.W.2-victim on 25.09.2016 and found that Hymen was not intact and there is a possibility of sexual abuse on the body of the minor. After collecting the vaginal smear for test, she had issued **Accident Register – Ex.P.12** and **Final Opinion** under **Ex.P.13**, wherein she had opined that there is a possibility of the victim being subjected to sexual abuse.

[j] P.W.7-Dr.Anandakumar, Assistant Surgeon attached to the Government Headquarters Hospital, Erode, also examined the victim girl and issued the **Report [Xerox Copy]** under **Ex.P.15**, wherein he had given his opinion that the IQ level of the victim [P.W.2] is less and her mental age is below 13 years [as per the Psychologist Screening Report] and she is having a mild mental retardation.

[k] P.W.8-Parthasarathy, Scientific Officer issued **Ex.P.16-Report [Xerox copy]** regarding the Vaginal Smear of



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the Victim, wherein it has been opined that no detection of spermatozoa on the vaginal smear and **Ex.P.17-Report** to forward the semen of the appellant/accused to the Director of Forensic Science Department, Chennai.

[I] P.W.9-Mrs.Malliga, Headmistress of the Government High School, Periyapuliyur, has issued **Ex.P.19-Course Certificate [Xerox Copy]** and **Ex.P.20-Progress Report [Xerox copy]** to prove the age of the victim-P.W.2. **P.W.11-Hariharan** attested the Observation Mahazar.

[m] P.W.12-Selvaraj, a resident of Periyapuliyur, had seen the victim – P.W.2, standing in front of the house of one Sembulingam and she was crying at that time.

[n] P.W.13-Dr.Jayaprakash, Psychiatrist attached to the Government Headquarters Hospital, Erode, examined the victim and found that the mental age of the victim is less and it is about 64 – 66% only. He issued the **Report [Xerox Copy]** under **Ex.P.23** in that regard.

[o] P.W.14-Vadivel had spoken about the arrest of the accused persons. **P.W.15-Vasuki** is a relative of P.W.2 and on 29.05.2016, she along with Backiyalakshmi went to see the horoscope of the victim, leaving victim at home and when they came back, they saw the victim coming out of one Vijayakumar's house. On enquiry, though initially she told nothing ; subsequently, she informed one Ruchika, granddaughter of P.W.15 about being sexually abused by the said Vijayakumar. Ruchika, in turn, informed of the same to Nandheeswaran, son of P.W.15 and he informed P.W.15. P.W.15 enquired the victim-P.W.2 and



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Vijayakumar, who refuted the allegation.

[p] P.W.16-Mrs.Arulmani, deposed that she saw the victim coming near the toilet in the village, in a crying manner and at that time, one Murugesan @ Murugan, was also coming from that side. **P.W.17-Vijayakumar**, a resident of the same village deposed that the victim [P.W.2] had informed one Mageswari, wife of P.W.17's maternal uncle, about the sexual abuse. Mageswari, in turn, had informed the same to her husband Santhanam. On 20.09.2016, Santhanam contacted P.W.17 and narrated the incident to him and asked P.W.17 to enquire about it. On 23.09.2016, P.W.17 asked P.W.1 to enquire the victim. On coming to know of the happening of the sexual abuse meted out by P.W.2 by four accused, P.W.17 went along with P.W.1 and lodged a complaint, as dictated by P.W.1.

[q] P.W.22, the Investigating Officer, in continuation of her investigation, examined the witnesses ; recorded their statements ; collected various documents relating to the case including the Medical Reports and on completion of investigation, filed the Final Report **u/s.366 and 506[ii] IPC and section 4 of POCSO Act** against Sembulingam and the appellant/accused and **u/s.366 and 506[ii] IPC and section 6 of POCSO Act** against Murugesan @ Murugan and Vijayakumar, before the Trial Court.

[r] Though the prosecution has filed charge sheet against four persons for different occurrences, allegedly committed as against the victim-P.W.2, each accused were tried separately by



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the Trial Court after splitting of the cases and the case, insofar as the appellant/accused is concerned, was tried in SC.NO.9/2017. The Trial court issued summons to the appellant/accused and on his appearance, furnished him the copies of the documents u/s.207 Cr.P.C. and framed the charges as stated above and questioned him. The appellant / accused pleaded not guilty to the charge framed against him.

[s] The prosecution examined P.Ws.1 to 22 and marked Exs.P.1 to 27.

[t] The appellant/accused was questioned under section 313 [1][b] Cr.P.C., with regard to the incriminating circumstances against him in the evidence rendered by the prosecution and he denied it as false. On the side of the defence, **D.W.1-Aswathi** [daughter of the appellant/accused] ; **D.W.2-Karuppusamy** [father of the appellant/accused] ; and **D.W.3-Jayapal** [Maintenance Manager of School Buses in Reliance Matric Higher Secondary School] were examined.

[u] **D.W.1-Aswathi** deposed that she never played with the victim [P.W.2] as there exist enmity between two families on account of breeding of dog and a false case has been foisted against her father, the appellant/accused herein. **D.W.2-Karuppusamy**, deposed that the entire complaint was written by P.W.17-Vijayakumar at the instructions of police. **D.W.3-Jayapal** deposed that the appellant/accused, working as Cleaner, attended duty on 08.09.2016 and he has also produced **Ex.C.2-Attendance Register** pertaining to Non-Teaching Staff, wherein it is seen that the appellant/accused had signed the Attendance Register.



[v] The Trial Court, on consideration and appreciation of the oral and documentary evidence and other materials, has acquitted the appellant/accused of the offences u/s.366 and 506[ii] IPC and convicted and sentenced the appellant/accused for the offence u/s.4 of POCSO Act, 2012, and hence, this appeal.

3 Mr.N.Manokaran, learned counsel appearing for the appellant made the following submissions:-

- The entire prosecution case is doubtful and the appellant/accused and other accused were made as scapegoats and they were falsely implicated, due to personal motive of one Backiyalakshmi, grandmother of the victim-P.W.2.
- A careful reading of the evidence of P.W.2, so-called victim of sexual abuse, would clearly show that this is a clear case of false implication.
- Ex.P.1 was registered with an undue delay and it is the result of due deliberation of the interested witnesses.
- The prosecution has not examined the father and the grandmother of the victim-P.W.2. This throws a serious doubt about the entire occurrence.
- The medical evidence though suggest that the hymen was not intact in the body of the victim, the same would clearly reveal that the alleged sexual abuse repeatedly by adult persons, 4 in number, is highly improbable.
- P.W.2 is a girl of less intelligence and her IQ level is below average. Besides, she is also suffering from mild mental retardation, as evidenced from the medical evidence. This would amply prove that the prosecution case is a foisted one for the reason that giving of minute details about the alleged occurrence by P.W.2, having such mental illness, is not possible. This would show that P.W.2 was tutored by the vested interest one, in order to get conviction of the appellant/accused.



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- *The evidence of P.W.2 is also vague and nowhere in her evidence, she had mentioned about the date and time of the alleged occurrences of sexual abuse by each of the accused persons.*
- *The prosecution has not proved the charge of sexual abuse against the appellant/accused beyond reasonable doubt. The specific charge against the appellant/accused is that on 08.09.2016, while the victim girl was playing with the daughter of the appellant/accused, he sexually abused her and committed penetrative sexual assault. But, absolutely there is no evidence on record to show that the victim went to the house of the appellant/accused on 08.09.2016. On the contrary, the presence of the appellant/accused for duty in the School was amply substantiated from the evidence of D.W.3 supported by Ex.C.2 – Attendance Register, wherein, the appellant/accused had signed the same.*
- *It is the further contention of the learned counsel that merely because the charges and allegations are severe in nature and connected with sexual abuse of the children, that by itself is not a ground to presume the charge, particularly, when the evidence suggest false implication.*
- *Admittedly, the appellant/accused is a deaf and dumb person and therefore, he reposing confidence on P.W.2 and subjecting her to sexual intercourse, is highly improbable and the prosecution version is highly doubtful in this regard and hence, prayed for allowing of this criminal appeal.*

4 *Mr.V.Arul, learned Additional Public Prosecutor fairly conceded before this Court that the father and grandmother of the victim – P.W.2 has not been examined and they have not given any complaint and Ex.P.1 was given by P.W.1-aunt of P.W.2 with much delay and due deliberation. However, the learned Additional Public Prosecutor submitted that the victim is having less IQ level and therefore, the possibility of sexual abuse is more and she has given*



evidence and the appreciation of evidence and reliability of the same, would depend upon the other facts and circumstances of the case. Hence, he prays for dismissal of the criminal appeal.

5 We have perused the entire materials and evidence on record.

6 In the light of the above submissions, we have to analyse whether the prosecution was able to bring home the guilt of the appellant/accused beyond all reasonable doubt.

7 The appellant/accused faced trial for the offences u/s.366 and 506[ii] IPC and section 6 of POCSO Act, 2012. The specific charge against the appellant/accused framed by the Trial Court is as follows:-

“மேற்கண்ட 1 ஆவது குற்றச்சாட்டில் கண்ட குற்றச் செய்கையைத் தொடர்ந்து 08.09.2016 அன்று உமது மகள் அசுவதியுடன் விளையாடுவதற்காக குழந்தை கனிமொழியை அழைத்து வந்திருந்தபொழுது, உமது மகள் அசுவதி பாத்ரூம் சென்ற நேரத்தில், நீர் குழந்தை கனிமொழியிடம் தப்பு செய்யலாம் என்று கேட்டுள்ளீர். அதற்கு குழந்தை கனிமொழி செய்யக்கூடாது என்று சொல்லியுள்ளார். அதற்கு நீர், அப்படித்தான் செய்வேன் என்று சொல்லி குழந்தை கனிமொழியை கீழே தள்ளி படுக்க வைத்தபோது, கத்த முயன்ற குழந்தை கனிமொழியின் வாயை துணியை வைத்து அடைத்து, அவரது மார்பை கசக்கி, சுடிதார் பேண்டை கழற்றி எறிந்துவிட்டு, குழந்தை கனிமொழியின் மீது படுத்தி, அவரது பெண் உறுப்பில் உமது ஆண் உறுப்பை வைத்து அழுத்தி, அவரது விருப்பத்திற்கு மாறாக பாலியல் உள்நுழைத்தல் செய்துள்ளீர். அதன் பின்னரும் குழந்தை கனிமொழியின் வீட்டிற்கு பின்னால் வைத்து, 2 முறை அவருடன் பாலியல் உள்நுழைத்தலில் ஈடுபட்டுள்ளீர். அதன் மூலம் நீர் பிரிவு 6 பாலியல் குற்றங்களிலிருந்து குழந்தைகளை பாதுகாக்கும் சட்டம் 2012 இன் கீழ் தண்டிக்கத்தக்கதும் இந்நிதிமன்றத்தால் விசாரிக்கத்தக்கதுமான குற்றத்தை புரிந்துள்ளதாகவும்,”

8 It is the specific charge of the prosecution that on 08.09.2016 while P.W.2-victim girl was playing with D.W.1, the appellant/accused called the minor girl and sexually abused her.



P.W.2, referred to as Y, in her evidence before the Court, had stated that her age is 14 years and she has narrated several incidents and once such incident is, while the victim was playing with D.W.1-daughter of the appellant/accused, D.W.1 left for washroom and at that time, the appellant/accused had abused her by placing his private part over the private part of P.W.2 and pressed her chest. Though P.W.2 is aged 14 years, she has not mentioned the date on which the alleged occurrence took place. But her evidence, when considered along with other materials, shows it clear that she attained puberty in the year 2016. The law was set in motion under Ex.P.1, lodged by P.W.1. P.W.1 claims to be a relative of P.W.2. According to P.W.1, she took P.W.2 to her house during Quarterly Holidays and P.W.2 narrated the sexual abuse made by four persons, viz., Sembulingam, aged 66 years ; Sivakumar @ Ramesh, aged 41 years [the appellant/accused herein] ; Vijayakumar, aged 34 years ; and Murugesan @ Murugan, aged 31 years. It is the evidence of P.W.1 that on 23.09.2016, she was informed by P.W.2 about the alleged sexual abuse But, P.W.1 did not lodge a complaint immediately to the police. Whereas, the complaint came to be filed only on 25.09.2016. The conduct of P.W.1 in not rushing to the police station immediately, after hearing of the serious sexual abuse meted out by P.W.2, creates some doubt about the origin of the occurrence itself. This doubt is further fortified by the evidence of the Investigating Officer- P.W.22. In cross, P.W.22 had categorically admitted that P.W.1- Meenachi ; and P.W.17-Vijayakumar came to know about the alleged occurrence on 20.09.2016 itself. Similarly, one Mageswari



and her husband Santhanam also claimed to have become aware of the alleged occurrence on 20.09.2016. From the evidence of the Investigating Officer, it is crystal clear that the fact of P.W.1 becoming aware of the alleged occurrence only on 23.09.2016, as evidenced from her evidence, falls to ground and it throws considerable doubt on the evidence of P.W.1. But, Ex.P.1-First Information came to be lodged only on 26.09.2016. This also, once again cause a serious doubt about the genesis of the occurrence.

9 *It is further to be noted that admittedly, P.W.2-victim was residing with her grandmother Backiyalakshmi and her father. The said Backiyalakshmi and the father of P.W.2 did not even make any attempt whatsoever, to bring to the notice of the police about the serious sexual assault on P.W.2. There was no reason whatsoever given by the prosecution for the non-examination of the grandmother and father of P.W.2 before the Court of law.*

10 *P.W.1 claims to be the close relative of P.W.2 and in her cross-examination, she has stated that she is only a distant relative of P.W.2. This aspect also throws some doubt in the genesis of the crime. If P.W.1 was a distant relative, P.W.2 accompanying P.W.1 for holidays, is also highly doubtful. The normal human conduct and the immediate reaction of the grandmother or the father of the victim girl when they come to know of the alleged sexual abuse committed by four persons/adults repeatedly, would be to lodge a police complaint. But, neither P.W.2's father nor her grandmother had whispered the same to anyone. These aspects cannot be ignored altogether.*



Though P.W.2, in her evidence, had narrated about the repeated sexual abuse committed by four persons, viz., Sembulingam, aged 66 years ; Sivakumar @ Ramesh, aged 41 years [the appellant/accused herein] ; Vijayakumar, aged 34 years ; and Murugesan @ Murugan, aged 31 years, after she attained puberty, her evidence when carefully scanned would reveal that after every sexual abuse, she was threatened by the accused persons not to disclose the same to anyone and one cannot expect such a minute details from a minor girl, particularly, when the victim in the instant case has less intelligence and her IQ level is also below average. As per the evidence of the doctors-P.W.7 and P.W.13, this Court may also accept the version of the prosecution to certain extent that the victim cannot give minute details about the incidents ; but at the same time, a perusal of the entire medical evidence, particularly, the evidence of P.Ws.7 and 13, we are of the view that the narration of the incidents by the victim itself, is highly impossible. As per the prosecution version the alleged occurrence took place immediately after the victim's attainment of puberty in the month of April 2016. The complaint was lodged during September 2016. Further, where P.W.2 is having below average intelligence, besides suffering from mild mental retardation, as per the evidence of the Medical Officers under Exs.15 and 23, she could not remember the alleged occurrences meticulously. This aspect also creates a serious doubt. In fact, P.W.13-Psychiatrist has clearly admitted that when he examined P.W.2, she was not in a position to remember things which has happened six months back. When such being the position, it is not safe to place



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reliance upon the evidence of P.W.2 narrating incidents said to have taken place six months back, particularly, she is in a position to repeat whatever tutored to her. P.W.13 in his evidence has stated that the victim-P.W.2 is capable of repeating whatever tutored to her. Hence, the evidence of P.Ws.7 and 13 coupled with the medical evidence under Exs.P.15 and 23, cannot be given less weightage. The possibility of tutoring cannot be ruled out in this case, particularly, when the delay in filing the FIR is analysed along with the conduct of the father and grandmother of P.W.2, in not approaching the police/lodging the complaint immediately on coming to know of the alleged occurrences. It is worthwhile to note that P.W.2 is residing all along with her grandmother and father only. This vital aspect of their non-giving of the complaint to the police, cannot be ignored altogether.

11 *Further, the medical evidence shows that Hymen was not in tact when the victim was examined. Merely because the hymen was not in tact, we cannot presume penetrative sexual assault. If really P.W.2 was repeatedly subjected to sexual intercourse by four persons, taking advantage of her mental illness/retardation and mental age, as projected by the prosecution, there should have been some symptoms on the body of the victim or at least the doctor could have found out that she was subjected to sexual intercourse regularly. Whereas the medical evidence does not even suggest that vagina admits a finger and except the absence of hymen, the Medical Officer was not able to give any definite opinion about the repeated penetrative sexual assault.*



12 *It is the version of the prosecution that all four accused had committed such heinous act more than twice or thrice. The above version is also not supported by the medical evidence. Of course, when the evidence of the victim is strong and inspires the confidence of the Court, the medical evidence assumes insignificance. But, as discussed, in the instant case, the question of placing reliance and credence upon the evidence of P.W.2 does not arise, particularly, when taking into consideration, the medical evidence about her mental age and her capacity and having regard to the same, this Court finds it difficult to place reliance on her version and the same is highly doubtful. Also, the conduct of the father and grandmother of P.W.2 and other witnesses, allegedly knowing the occurrence on 20.09.2016 itself and remaining silent all along and lodging the complaint on 23.09.2016, creates a serious doubt about the prosecution version. Except the official witnesses, all other witnesses are highly connected and related to each other. There exists enmity between the grandmother of P.W.2 and the family of the appellant/accused, as evidenced from the statements of D.Ws.1 and 2 – daughter and father of the appellant/accused. Therefore, the possibility of implicating the appellant/accused by P.W.1 and other witnesses, cannot be ruled out.*

13 *Of course, sexual offences, particularly against children are heinous and any perpetrator, who commits such heinous offence on the young and tender children, should be punished severely. But, at the same time, merely because the*



charges are severe in nature, that itself cannot be a ground to charge a person, especially, when there is no ample evidence to substantiate the said charge against the said person. The prosecution has to bring home the guilt of the accused beyond all reasonable doubt. Even to apply the statutory presumption under the POCSO Act in the instant case, the initial onus of the prosecution, to prove the charges, will not be relieved. Admittedly, in this case, the specific charge of the prosecution is that the appellant/accused had committed the said offence on 08.09.2016. In fact, the appellant/accused was charged for an offence u/s.6 of POCSO Act, whereas the Trial Court has convicted the appellant u/s.4 of the Act without any charge being framed against the appellant/accused. Even There is no evidence available on record to attact the ingredients of section 3 of POCSO Act, in order to convict him u/s.4 of the Act. The evidence of P.W.2, the so-called victim coupled with the medical evidence, throws a serious doubt on the very charge itself. In fact, the evidence of D.W.3-Jayapal, Maintenance Manager of the vehicles of the Reliance School, examined on the side of the appellant/accused would reveal that the appellant/accused was very much available at the work place and to substantiate the same, he has also produced Ex.C.1- Attendance Register. There was no reason whatsoever for D.W.3 to create a document in favour of the appellant/accused. This aspect also clearly establish the fact that the appellant/accused went to his job on 08.09.2016. Hence, the prosecution theory projected as if the appellant/accused committed the offence on 08.09.2016, falls to ground.



14 The yet another aspect shown in Charge No.2 is that when the victim was playing with D.W.1-daughter of the appellant/accused, the appellant/accused took her inside and committed sexual assault. Merely because a defence witness supports the accused, the evidence of the said witness cannot be rejected in toto and the same should be analysed carefully along with the other material aspects. In the instant case, on a careful perusal of the evidence of D.W.1, it is seen that she has clearly and categorically stated in her evidence that she never played with the victim-P.W.2 and she does not know P.W.2 at the relevant point of time. Further, the appellant/accused is a deaf and dumb person. Therefore, when such is the position of the appellant/accused, his calling P.W.2 and reposing confidence on her and committing sexual assault, particularly, when his own daughter is also playing in the same place, is also high improbable.

15 Therefore, in view of the series of improbabilities, infirmities and discrepancies coupled with the factum of delay in lodging the FIR and also the abnormal conduct of the father and grandmother of P.W.2 and the unusual conduct of P.W.1 and others in approaching the police belatedly, viz., after a week, even after coming to know of the alleged occurrence earlier, we are of the view that it is highly unsafe to convict the appellant/accused with the grave crime.

16 In the result, the criminal appeal is allowed and the conviction and sentence imposed on the appellant/accused by the Trial Court vide impugned Judgment in Spl.SC.No.9/2017 dated 23.06.2017 are set aside and he is acquitted of all charges levelled



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against him.

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17 *It is reported that the appellant/accused is in jail. Hence, he is directed to be released forthwith unless his presence / custody is required in connection with any other case/proceedings.'*

'Judgment in Crl.A.No.558 of 2019:

This criminal appeal is directed against the judgment and order of conviction and sentence dated 23.06.2017 passed by the Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, in Spl.S.C.No.10 of 2017.

2. This being a case under the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act”), we deem it necessary not to refer to the name of the victim and instead, refer to her as “X”.

3. The prosecution case is as follows:

3.1. “X” is the daughter of Shanthi-Ravi couple. Shanthi is said to be mentally retarded. The date of birth of “X” as per her school records is 05.06.2003 and accordingly, she was 14 years old during the alleged occurrence. “X” was living with her grandmother Backiyalakshmi in Periyapuliyur village and was studying in 8th standard in the Government Higher Secondary School in Periyapuliyur.

3.2. In September 2016, after the quarterly examination, “X” had holidays and so, her aunt Meenakshi (PW-1) took her to



her village, Kaalingarayanpalayam, which is about 10 kms. from Periyapuliyur. After reaching the house of Meenakshi (PW-1), “X” complained of body pain and when Meenakshi (PW-1) enquired her, she stated that she wanted to confide in her certain things and said that she was sexually abused on various occasions by four persons, of whom, she named three persons, Sembulingam, Murugesan @ Murugan and Sivakumar @ Ramesh of Periyapuliyur village. As regards the fourth person, she stated that he is from Kaalingarayanpalayam and that she can identify him. Immediately, Meenakshi (PW-1) brought these revelations by “X” to the notice of the elders in the house and on 25.09.2016, Meenakshi (PW-1) gave a written complaint vide Ex.P1 narrating what “X” had told her.

3.3. On the said complaint, Nagamani (PW-21), Sub-Inspector of Police, All Women Police Station, Gobichettipalayam, registered a case in Crime No.6 of 2016 on 25.09.2016 for the offences under Sections 366 IPC, 5 r/w 6 of the POCSO Act and 506(II) IPC against Sembulingam, Murugesan @ Murugan, Sivakumar @ Ramesh, all residents of Periyapuliyur and one, not named, but an identifiable person being a resident of Kaalingarayanpalayam and prepared the printed First Information Report (Ex.P24), which reached the jurisdictional Magistrate on the same day at 10.30 p.m.

3.4. Investigation of the case was taken over by Gayathri (PW-22), Inspector of Police, who arrested Sembulingam, Murugesan @ Murugan, Sivakumar @ Ramesh and Vijayakumar



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(appellant) on 25.09.2016 at 15.15 hours in Gobichettipalayam Bus Stand.

3.5. All the arrested accused were medically examined by Dr.Sivasankar (PW-3), Assistant Medical Officer, Government Hospital, Gobichettipalayam, on 25.09.2016 at 07.15 p.m. and certificates were issued, of which we are concerned with the one relating to the appellant herein, viz., Ex.P5, wherein the following final opinion has been given:

'FINAL OPINION:-

Mr.Vijaya Kumar 34/M

Based on clinical examination, there is nothing to suggest that the male examined is not capable of performing sexual act.'

3.6. The appellant was further examined, his semen collected and it was sent to Tamil Nadu Forensic Sciences Department for examination. The final opinion (Ex.P8) given by Dr.S.Vijayakumar (PW-4) reads as under:

'FINAL OPINION:-

The result for grouping test is inconclusive. There is no evidence to suggest he is impotent.'

3.7. Dr.Kalyani (PW-5), Senior Assistant Medical Officer, examined "X" on 26.09.2016 for determining her age and after conducting necessary radiological tests, she gave a report (Ex.P9) opining that "X" has completed 14 years of age and is less than



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15 years of age.

3.8. Dr.Kalapriya (PW-6) medically examined “X” on 25.09.2016 and took her vaginal smears, which were sent to the Tamil Nadu Forensic Sciences Department for chemical examination. The chemical examination report showed absence of spermatozoa in the vaginal smears. Thereafter, Dr.Kalapriya (PW-6) gave her final opinion (Ex.P13), wherein she stated that the hymen was torn; no spermatozoa was detected in the vaginal smears; and that it is possible for “X” to have been subjected to coitus.

3.9. “X” was admitted as an inpatient on 31.12.2016 in the Government Head Quarters Hospital, Erode, for psychological assessment. Dr.Jayaprakash (PW-13), Psychiatrist, conducted several psychological screening and administered the following tests:

1. Vineland social maturity scale
2. Woodern Form Board Test
3. Binet Kamat Test of Intelligence
4. Mental Status Examination
5. Psychopathological Screening Test

and submitted a detailed report which has been marked as Ex.P23.

3.10. After examining various witnesses and collecting the reports of the experts, Gayathri (PW-22), Inspector of Police, completed the investigation and filed a single final report against



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four accused viz., Sembulingam (A1), Murugesan @ Murugan (A2), Sivakumar @ Ramesh (A3) and Vijayakumar (A4) for the offences under the POCSO Act and IPC in the Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, which is designated as the Special Court under the POCSO Act.

4. The learned Special Judge carefully analysed the final report and found that the offences allegedly committed by the four accused were not committed in the course of the same transaction and therefore, he split up the case qua each accused and assigned separate case numbers to conduct the trials simultaneously and not jointly. The details of the case numbers are as under:

<i>Sembulingam</i>	<i>-</i>	<i>Special S.C.No.5 of 2017</i>
<i>Murugesan @ Murugan</i>	<i>-</i>	<i>Special S.C.No.8 of 2017</i>
<i>Sivakumar @ Ramesh</i>	<i>-</i>	<i>Special S.C.No.9 of 2017</i>
<i>Vijayakumar (Appellant herein)-</i>		<i>Special S.C.No.10 of 2017</i>

4.1. The trial Court framed charges u/s.366 IPC (2 counts) in respect of the alleged incident on 29.05.2016 and 30.05.2016; Section 6 of the POCSO Act and Section 506(II) IPC for intimidating “X”. When questioned, the appellant pleaded “not guilty”.

4.2. To prove the case, the prosecution examined 22 witnesses and marked 27 exhibits. When the appellant was questioned u/s.313 Cr.P.C. on the incriminating circumstances



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appearing against him, he denied the same. No witness was examined from the side of the appellant nor any document marked.

4.3. After considering the evidence on record and hearing either side, the trial Court, by judgment and order dated 23.06.2017, acquitted the appellant of the offence u/s.366 IPC, but convicted him of the offence u/s.4 of the POCSO Act and section 506(II) IPC and sentenced him as under :

<i>Provision under which convicted</i>	<i>Sentence</i>
<i>Section 4 of POCSO Act</i>	<i>Life imprisonment and fine of Rs.5,000/-, in default, to undergo two years simple imprisonment.</i>
<i>Section 506(ii) IPC</i>	<i>Seven years rigorous imprisonment and fine of Rs.5,000/-, in default, to undergo two years simple imprisonment.</i>

Challenging the aforesaid conviction and sentences, the appellant has preferred the present appeal.

5. It is pertinent to state here that the other three accused viz., Sembulingam, Murugesan @ Murugan and Sivakumar @ Ramesh were also convicted and sentenced on the same day by three separate judgments.



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6. *Heard Mr.N.Manoharan, learned counsel for the appellant and Mr.M.Babu Muthu Meeran, learned Additional Public Prosecutor appearing for the respondent State.*

7. *At the outset, Mr.N.Manoharan, learned counsel for the appellant, contended that a Division Bench of this Court has allowed the appeal in Crl.A.No.424 of 2017 on 30.01.2018 that was filed by Sivakumar @ Ramesh against the judgment and order in Special S.C.No.9 of 2017, by disbelieving the evidence of “X” and therefore, the present appellant should also be given the same benefit.*

8. *It appears that after all the four accused were convicted and sentenced, only Sivakumar @ Ramesh filed an appeal in Crl.A.No.424 of 2017 and the others resigned to their fate. After the appeal of Sivakumar @ Ramesh was allowed by this Court on 30.01.2018, the present appellant filed this appeal with a delay of 727 days, which was condoned by this Court and the appeal was taken up for hearing. We understand that the other accused viz., Sembulingam and Murugesan @ Murugan have not preferred any appeal so far.*

9. *We find that the chief-examination of all the prosecution witnesses is common to the four cases but only the cross-examination differs. The trial Court cannot be faulted for*



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adopting such a procedure in the peculiar facts and circumstances of the present case. The defence has not disputed the age of “X” nor other facts like the potency of the appellant. They have also not disputed the inter se relationship of “X” with Meenakshi (PW-1) and Vasuki (PW-15). The medical evidence does not, in any manner, implicate the accused.

10. The whole prosecution case is posited on the testimony of “X”. According to the complaint (Ex.P1), “X” spilled the beans to Meenakshi (PW-1) on 23.09.2016 when PW-1 brought her to her house during the post quarterly examination holidays. “X” told Meenakshi (PW-1) that one month after she attained puberty, Sembulingam pulled her to his house saying that he would give her chocolates, closed the door, removed her chudithar and sexually abused her; he further threatened her saying that she should not disclose this to anyone; he also repeated this act four times later; four months ago, while she was going to the fields for attending to the nature’s call, Murugesan @ Murugan sexually abused her; he did this three times later while she was on her way to ease herself; in the mean while, one day, when she was playing with Aswathi in her house, when Aswathi went to the rest room, her father Sivakumar @ Ramesh sexually abused her.

10.1. Coming to the allegations against the appellant, the First Information Report (Ex.P24) states as follows:

That, three months ago, “X” went with her grandmother



to the house of her aunt Vauski (PW-15) in Kaalingarayanpalayam; her grandmother and Vasuki (PW-15) went to consult an astrologer with her horoscope; at that time, she was playing with the local children in front of her aunt Vasuki's (PW-15's) house; after sometime, the children, who were playing with her, went to play elsewhere; at that time, a person, whom she can identify, pulled her hand to his house, made her lie on her back and sexually abused her; on the next day, while she ("X") was in the terrace of her aunt Vasuki's house (PW-15), the same person called her down, took her to the house of an old lady and sexually abused her; thereafter, he threatened her saying that she should not disclose this to anyone; while she and that person came out of the house, her aunt Vasuki (PW-15) saw them.

10.2. "X" was examined as PW-2 and she identified the sole accused standing in the dock as the person who sexually abused her when she had gone to her aunt Vasuki's (PW-15's) house in Kaalingarayanpalayam. Of course, in her examination in chief, she has also spoken to about the allegations against the other three accused, which we are not dwelling into, as those accused are not before us in this appeal.

10.3. Admittedly, "X" did not reveal the name of the appellant to her aunt Meenakshi (PW-1) on 23.09.2016. Had the name of the appellant been revealed, it would have found a



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place in Column No.7 of the First Information Report. As stated above, in Column No.7 of the First Information Report, the names of Sembulingam, Murugesan @ Murugan and Sivakumar @ Ramesh find place and as regards the fourth person, it is recorded as 'identifiable person, Kaalingarayanpalayam'. The moot question is how did the police fix the appellant as the unnamed person.

10.4. Gayathri (PW-22), Inspector of Police, in her evidence, has stated that after registering the First Information Report, she went along with her team in search of the accused; on intelligence, she went to Gobichettipalayam bus stand and near a flower shop, she found Sembulingam, Murugesan @ Murugan, Sivakumar @ Ramesh and Vijayakumar, who were identified by "X" and she arrested them on 15.15 hours on 25.09.2016. This sounds unbelievable and incredible for the following reasons:

- Sembulingam, Murugesan @ Murugan and Sivakumar @ Ramesh were from Periyapuliyur, whereas, the appellant was from Kaalingarayanpalayam. There is no shred of material to show that the appellant was known to the other three. Kaalingarayanpalayam is 8 kms. away from Periyapuliyur and Gobichettipalayam bus stand from where all the four were said to have been arrested, is 28 kms. away. There is no reason for the appellant to go along with the other three accused of Periyapuliyur Village to Gobichettipalayam bus stand.*



- *The easiest way to identify the fourth person, unnamed in the First Information Report, was to have taken “X” to Kaalingarayanpalayam and asked her to show the house where she was allegedly abused. Based on the showing of the place of occurrence by “X”, it would have been easier for the police to zero in on the perpetrator of the offence. The police could have sent “X” along with Meenakshi (PW-1) and Vasuki (PW-15) or with the members of the local Child Welfare Committee or with any other respectable persons to go around Kaalingarayanpalayam for identifying the perpetrator. Instead, saying that, on intelligence, they went to Gobichettipalayam bus stand, found all the four accused near a flower shop and arrested them on the identification of “X”, defies credulity.*

10.5. Meenakshi (PW-1), in her evidence, has stated that she is a resident of Kaalingarayanpalayam and a distant relative of Backiyalakshmi/ grandmother of “X”; that on 23.09.2016, she went to Backiyalakshmi’s house at Periyapuliyur and brought “X” to her house as “X” was having holidays after her quarterly examination; in her house, “X” confided to her that she was subjected to sexual abuse by Sembulingam, Murugesan @ Murugan, Sivakumar @ Ramesh in Periyapuliyur and by an identifiable person in Kaalingarayanpalayam; after “X” revealed all this, she (PW-1) shared this information with her brother Vijayakumar (PW-17), Backiyalakshmi (not examined) and other



relatives; then, she went to Gobichettipalayam Police Station and lodged the complaint (Ex.P1).

10.6. Thus, it is crystal clear from her evidence that even at the time of lodging the complaint, the name of the fourth person was not known. Admittedly, Meenakshi (PW-1) and Vasuki (PW-15), the aunt of “X”, were from Kaalingarayanpalayam. They did not take any steps to identify the fourth person of Kaalingarayanpalayam with the help of “X”. Of course, we cannot blame them for this, because they themselves would have been in a state of bewilderment and that they would not have known as to how they should go about after “X” complained to Meenakshi (PW-1) on 23.09.2016.

10.7. Had the prosecution remained content with the story that only on 23.09.2016 “X” spilled the beans for the first time, then, we would have had little hesitation in disbelieving their version albeit the incongruity in the identification and arrest of the appellant by the police on 25.09.2016 at Gobichettipalayam bus stand. What spoiled the prosecution case was the evidence of Vasuki (PW-15) and Vijayakumar (PW-17). The evidence on record shows that “X” attained puberty on 04.09.2016, for which, a function was held in a marriage hall in Kaalingarayanpalayam.

10.8. Vasuki (PW-15) has stated that she is a resident of Kaalingarayanpalayam and is related to the family of “X”; on 29.05.2016, Backiyalakshmi came with “X” to their house in Kaalingarayanpalayam for consulting an astrologer; so, they both left “X” to play with other children and went at 10’0 clock to



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meet the astrologer with “X’s” horoscope; they returned to Kaalingarayanpalayam around 1.30 p.m.; while they were all sitting to have their lunch, she found that “X” was not there; when they called out for her, she came from near the house of Vijayakumar (appellant); after having her lunch, “X” blinked bizarrely and when questioned, she refused to say anything; thereafter, she told her (PW-15’s) granddaughter Ruchika that Vijayakumar (appellant) had sexually abused her; Ruchika, in turn, informed this to Vasuki (PW-15) and when she (PW-15) questioned “X”, who confirmed the same; when she confronted Vijayakumar (appellant), the latter denied; she told this to Backiyalakshmi, grandmother of “X”, who counseled that the matter may not be blown out of proportion as it will affect the marriage prospects of “X”; therefore, she did not make an issue of it; when she heard that similar incidents had taken place in Periyapuliyur also, she went to the police station and complained about Vijayakumar (appellant).

10.9. Thus, from the evidence of Vasuki (PW-15), it appears that on 29.05.2016 itself the family came to know about the alleged sexual abuse of “X” by the appellant. Of course, the explanation given by Vasuki (PW-15) for not making an issue out of it does appear plausible. However, Meenakshi (PW-1), in her evidence, has stated that, after “X” disclosed about all the incidents to her on 23.09.2016, she informed this to all the relatives, including Backiyalakshmi/grandmother of “X” and her brother Vijayakumar (PW-17) and only thereafter, they went to



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the police station on 25.09.2016 and lodged the complaint. If the version of Vasuki (PW-15) that on 29.05.2016 itself, she and Backiyalakshmi knew about the involvement of the appellant, is true, then the name of the appellant, who hails from Kaalingarayanpalayam would have found place in the complaint (Ex.P1) that was lodged by Meenakshi (PW-1) on 25.09.2016.

10.10. Superadded to this confusion is the evidence of Vijayakumar (PW-17), the brother of Meenakshi (PW-1). Vijayakumar (PW-17) has stated that “X’s” puberty function was held on 04.09.2016 in Saraswathi Marriage Hall, Kaalingarayanpalayam, for which, his son Santhosh was the photographer; after some days, in the same marriage hall, the puberty function of one Darshini, daughter of Murugan of Kaalingarayanpalayam, was held; “X” attended that function and told his uncle Santhanam’s wife Maheswari that Sembulingam, Sivakumar @ Ramesh, Murugesan @ Murugan and Vijayakumar had sexually abused her; Maheswari, in turn, informed this to her husband Santhanam and in turn, Santhanam contacted him (PW-17) on 20.09.2016 and shared with him the disclosures that were made by “X” to Maheswari; in turn, Vijayakumar (PW-17) shared the information with his sister Meenakshi (PW-1) and asked her to enquire; accordingly, Meenakshi (PW-1) brought “X” to her house in Kaalingarayanpalayam on 23.09.2016 and enquired with “X”; “X” disclosed everything to Meenakshi (PW-1) and thereafter, the police complaint was given.

10.11. Thus, going by the evidence of Vijayakumar (PW-



17), the name and the alleged involvement of the appellant was known to Vijayakumar (PW-17) and Meenakshi (PW-1) on 20.09.2016 itself. Strangely, the name of the appellant has not been given in the complaint (Ex.P1).

10.12. Further, on gleaning the evidence of Vasuki (PW-15) and Vijayakumar (PW-17), it appears that the name and involvement of the appellant was known to Ruchika (not examined), Vasuki (PW-15), Backiyalakshmi (not examined/grandmother of "X"), Maheswari (not examined), Santhanam (not examined), Vijayakumar (PW-17) and Meenakshi (PW-1) much before 25.09.2016. Strangely, Meenakshi (PW-1) has not stated that her brother Vijayakumar (PW-17) apprised her of everything on 23.09.2016 and that is why she fetched "X" from Periyapuliyur for the purpose of enquiring her. In her evidence, she has stated that she brought "X" to her village on 23.09.2016 as "X" was having school holidays and after coming to her house, "X" disclosed that she was sexually abused by Sembulingam, Murugesan @ Murugan, Sivakumar @ Ramesh and an identifiable person. "X" herself, in her evidence, has not stated that she disclosed these facts to Ruchika, Vasuki (PW-15), Backiyalakshmi and Maheswari.

10.13. Finally, Dr.Jayaprakash (PW-13), Psychiatrist, under whose observation and treatment "X" was in the Government Head Quarters Hospital, Erode, in his evidence as well in his report (Ex.P23), has stated that "X" was suffering from mild



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mental retardation and low intellectual functioning. He has further stated that “X” cannot properly recount incidents that happened six months ago and that she would give incoherent answers. He has also stated that she is capable of repeating whatever has been told by others to tell and that her understanding of ‘what is right and what is wrong’ is low.

10.14. In the teeth of the evidence of the expert with regard to the mental condition and poor intellectual capability of “X” coupled with the patently conflicting versions proffered by Meenakshi (PW-1), Vasuki (PW-15) and Vijayakumar (PW-17) concerning the kernel of the prosecution case, it would be unsafe to sustain the conviction of the appellant, albeit, the presumptions under sections 29 and 30 of the POCSO Act. These presumptions will come into operation only when the prosecution places a reasonably probable story before the Court and not otherwise. That apart, in the appeal (Crl.A.No.424 of 2017), that was filed by Sivakumar @ Ramesh, this Court has appraised the evidence of “X” and has given sound reasons for rejecting her testimony. We also concur with them, of course, for our own reasons. In our view “X” has either been tutored to implicate a whole lot of persons or “X” has allowed her flight of imagination to weave stories and venture on an implicating spree.

In the result, this Criminal Appeal is allowed and the appellant is acquitted of all the charges. The conviction and sentence passed in Spl.S.C.No.10 of 2017 on the file of the Additional Sessions Court, Magalir Neethi Mandram (Fast Track



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Mahila Court), Erode, vide judgment and order dated 23.06.2017, are set aside. The appellant is directed to be released forthwith unless his presence is required in connection with any other case.'



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8. Mr.A.Gokulakrishnan, learned State Additional Public Prosecutor pointed out that cross-examination has been done separately by A1, A2 , A3 and A4. Therefore, we looked into the typed set of papers prepared by the Registry in the captioned Criminal Appeal. Two points come to the fore. One is the aforementioned three criminal appeals have been allowed by a Hon'ble Co-ordinate Division Bench primarily by disbelieving P.W.2 i.e., the victim. To be noted the victim deposed as P.W.2 in all the four sessions cases i.e., S.C.Nos.8 of 2017, 9 of 2017, 10 of 2017 and 5 of 2017 and the captioned Criminal Appeal arises out of S.C.No.5 of 2017. We also carefully read the cross-examination of P.W.2 by learned counsel for A1 (appellant in captioned Criminal Appeal) and there is nothing demonstrable to say that a different view needs to be taken. In other words, the view taken by the other Hon'ble Co-ordinate Division Bench would apply in all fours to the case on hand. The sequitur is, captioned Criminal Appeal also deserves to be allowed on the same ground by applying judgments dated 09.01.2023, 30.01.2018 and 29.07.2021 in Crl.A.Nos.125 of 2022, 424 of 2017 and 558 of 2019 respectively.



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9. As the deposition of P.W.2 stands discredited i.e., disbelieved, the captioned Criminal Appeal is allowed and the appellant is acquitted of all the charges. The conviction and sentence passed in Spl.S.C.No.05 of 2017 on the file of the Additional Sessions Court, Magalir Neethi Mandram (Fast Track Mahila Court), Erode, vide judgment and order dated 23.06.2017, are set aside. The bail bond shall stand cancelled and the fine amount, if paid, shall be refunded.

(M.S.,J.) (R.S.V.,J.)
19.07.2023

Index : Yes/No
Neutral Citation : Yes/No
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To

- 1.The learned Additional Sessions,
Magalir Neethi Mandram (Fast Track Mahila Court),
Erode.
- 2.The Inspector of Police,
All Women Police Station,
Gobichettipalayam,
Erode District.
- 3.The Public Prosecutor,
High Court, Madras.

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**M.SUNDAR, J.,
and
R.SAKTHIVEL, J.,**

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