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R.T. No.2 of 2022 & Crl.A. Nos.427 and 392 of 2



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	07.11.2023
DELIVERED ON	21.11.2023

CORAM:

THE HON'BLE MR. JUSTICE S.S.SUNDAR
and
THE HON'BLE MR. JUSTICE SUNDER MOHAN

R.T. No.2 of 2022 and
Crl.A. Nos.427 and 392 of 2023

R.T. No.2 of 2022:

State Rep. By
The Inspector of Police,
W21, All Woman Police Station,
Guindy, Chennai – 600 032
(Cr.No.3 of 2020)

... Petitioner/complainant

vs.

1. xxx Father of the victim child
2. xxx Mother of the victim child
*[The identity of the accused are not disclosed
under Section 33(7) of the POCSO Act]*

... Accused No.1
... Accused No.2

Crl.A. No.427 of 2023:

xxx Father of the victim child
*[The identity of the accused is not disclosed
under Section 33(7) of the POCSO Act]*

... Appellant/Accused No.1



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VS.

State Rep. By
The Inspector of Police,
W21, All Woman Police Station,
Guindy, Chennai – 600 032
(Cr.No.3 of 2020) ... Respondent / Complainant

Crl.A. No.392 of 2023:

xxx Mother of the victim child
*[The identity of the accused is not disclosed
under Section 33(7) of the POCSO Act]* ... Appellant/Accused No.2

VS.

State Rep. By
The Inspector of Police,
W21, All Woman Police Station,
Guindy, Chennai – 600 032
(Cr.No.3 of 2020) ... Respondent / Complainant

R.T. No.2 of 2022:

Referred Trial under Section 366 Cr.P.C., on the judgment and order dated 29.04.2022 passed in Special S.C.No.52 of 2021 on the file of the learned Sessions Judge, Special Court for exclusive trial of cases under POCSO Act, Chennai.

Crl. A. No.427 of 2023:

Criminal Appeal filed under Section 374(2) Cr.P.C. seeking to set aside the judgment of conviction and sentence dated 29.04.2022 passed in



R.T. No.2 of 2022 & Crl.A. Nos.427 and 392 of 2

Special S.C.No.52 of 2021 on the file of the learned Sessions Judge, Special Court for exclusive trial of cases under POCSO Act, Chennai.

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Crl. A. No.392 of 2023:

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Criminal Appeal filed under Section 374(2) Cr.P.C. seeking to set aside the judgment of conviction and sentence dated 29.04.2022 passed in Special S.C.No.52 of 2021 on the file of the learned Sessions Judge, Special Court for exclusive trial of cases under POCSO Act, Chennai.

For petitioner in R.T. and : Mr.Hasan Mohammed Jinnah
respondent/ State State Public Prosecutor
in Crl.Appeals Assisted by
Ms.J.R.Archana, M.Sumai Arnice
Mrs.A.Sahana Fathima

For R1 in R.T. and appellant
in Crl.A.No.427/2023 :Mr.R.Rajarathinam, Sr.Counsel
for Mr.A.Ashwinkumar
For R2 in R.T. and appellant
in Crl.A.No.392/2023 :Mr.Abudukumar Rajarathinam,
Sr. Counsel
for Mr.S.Ashok Kumar

COMMON JUDGMENT

SUNDER MOHAN, J.

For the sake of convenience, the parties are referred to as per their ranking before the trial Court. The victim for the sake of anonymity is referred to as 'victim'.



2. The brief facts leading to the institution of the Referred Trial and the Criminal Appeals, are as follows:

2.1. Case of the Prosecution:

It is the case of the prosecution that the accused are the father(A1) and mother (A2) of the victim-PW2; that the father-A1 had committed the offence of penetrative sexual assault on the minor daughter ever since she was 7 years old, till she attained her puberty at the age of 12; that A1 always insisted that the minor daughter should sleep next to him without dress and would remove her clothes, sexually abused her by squeezing her breast, putting his mouth on her breast, putting clips used for drying clothes on her vagina, penetrating his hands into her vagina, inserted small bottles and small pipes into her vagina; that after the victim attained 12 years A1 also abused the victim child by penetrating his penis into her mouth and thereby committed inappropriate sexual abuses to the victim child; that thereafter, committed penetrative sexual assault on several occasions; that the victim minor child informed the same to her mother-A2, who did not care to take any action on that; that due to repeated penetrative sexual assault, the victim child got pregnant once; that to abort the foetus, A1 kicked on her back and



harassed her by punching on the pillow kept on her lower abdomen; that since there was no miscarriage even after that, both the accused gave a tablet to the minor child, to cause miscarriage; that the victim girl told her classmate about the sexual assaults made by her father-A1; that she in turn suggested to the victim girl, to inform their teacher-PW3; that the victim informed PW3; that PW3 informed the Child Helpline; that PW1 a member of the Child Helpline Group enquired the victim and lodged a complaint; and that thereafter, an FIR was registered in Cr.No.3 of 2020, against A1 for the offence punishable under Sections 354, 354B, 376 AB, 376(3), 506(i) of Indian Penal Code (hereinafter referred as IPC) and Section 5(j)(ii)(l)(m)(n) r/w 6 of Protection of Children from Sexual Offences Act, 2019 (hereinafter referred as POCSO Act) and against A2 for the offence punishable under Sections 376 AB, 376(3) r/w 114 of IPC and 17 r/w 6 of POCSO Act.

2.2. The victim girl first informed about the alleged sexual assaults to her classmate and then to PW3, who was working as a teacher in a school, where the victim was studying. The victim along with her friend is said to have met PW3 on 03.02.2020 and told PW3 that the victim was not willing



to go back to her house. When PW3 questioned the victim, as to why she refused to go to her house, she initially informed that her father-A1 had beaten her and showed her the injury marks; on further enquiry by PW3, the victim is said to have told PW3 about the sexual abuses committed by her father; and that her mother, initially questioned her father and thereafter, she did not do anything to save the minor child, due to her father's threat.

2.3. PW3 thereafter informed about the victim's complaint to the Headmistress of the school. It appears that the said Headmistress had informed the Chief Educational Officer, Chennai, who in turn advised the Headmistress complain to the Child Helpline.

2.4. PW1 is a Member of the Child Helpline Group, who had received a call on 03.02.2020 at about 4.00pm from PW3 informing her about the victim's complaint; PW1 thereafter went to the school where the victim was studying and enquired with the victim. The victim is said to have stated about the sexual abuses committed by her father and about the helplessness of her mother. PW1 took the victim to the respondent police and gave a



complaint Ex.P1. On receipt of the complaint, the respondent registered an FIR in Cr.No.3 of 2020 against A1 and A2 for the offences stated above and the FIR was marked as Ex.P10.

2.5. Thereafter, the victim was taken by PW1 to a Home in Tambaram and later, the victim was taken to the Child Welfare Committee, Chengalpattu, who in turn took the child to a Home at Adyar.

2.6. On registration of the FIR, PW7 took up the investigation. PW7 examined the victim girl. On the same day i.e. 03.02.2020, she visited the place of occurrence in the presence of one Karthick Raja and Kumaresan (not examined) and prepared Observation Mahazar (Ex.P5) and Rough Sketch (Ex.P11). At 8.00 pm, PW7 arrested both the accused outside Phoenix Mall at Velacherry. She recorded the confession statement of the accused. She then sent the victim girl to Kasturibai Gandhi Maternity Hospital for medical examination.



2.7. On 28.02.2020, PW7 sent a requisition letter to the Court to examine A1 and on the orders passed by the trial Court, PW7 sent A1 on 20.03.2020 to Royapettah Government Hospital, for medical examination.

2.8. On 29.04.2020, PW8 took up further investigation. On 11.05.2020, PW8 made a request to the Court, to record the victim's statement under Section 164 Cr.P.C. On 08.07.2020, on the orders passed by the trial Court, the victim was produced before the learned IX Metropolitan Magistrate, Saidapet, for recording Section 164 statement and the victim had given the 164 statement before the learned Magistrate, which was marked as Ex.P4. Thereafter, PW8 collected the Birth Certificate of the victim and ascertained her date of birth and on examination of the other witnesses, filed the final report against both the accused for the offence under Sections 354, 354B, 376 AB, 376(3), 506(i) r/w 114 of IPC and Section 5(j)(ii)(l)(m)(n) 17 r/w 6 of POCSO Act in the Special Court for POCSO Act Cases, Chennai, which was taken on file as Special S.C.No.52 of 2021.



2.9. On the appearance of the accused, the provisions of Section 207

Cr.P.C., were complied with and the trial Court framed the following five charges against the accused.

(a) The first charge was against A1 under Section 6 of the POCSO Act, for having committed the offence of penetrative sexual assaults on the victim.

(b) The second charge was against A1 under Section 506(i) IPC, for committing the offence of criminal intimidation on the victim.

(c) The third charge was against both the accused for the offence under Section 75 of the Juvenile Justice (Care and Protection of Children) Act (hereinafter referred to as JJ Act), for assaulting and for committing cruelty to child, by kicking her on the stomach and her back, for causing miscarriage of the foetus.

(d) The fourth charge was against A2 for the offence under Section 6 r/w 17 of the POCSO Act, for abetting the acts of A1 in the commission of an offence under Section 6 of the POCSO Act.

(e) The fifth charge was against A2 for an offence under Section 21(1) of the POCSO Act, for not reporting about the offence committed by A1.



WEB COPY 2.10. When questioned, the accused pleaded “not guilty”.

2.11. To prove the case, the prosecution examined witnesses viz., PW1 to PW8 and marked 13 documents viz., Ex.P1 to Ex.P13. On the side of the accused, no oral or documentary evidence was let in.

2.12. PW1 as stated earlier, is a Member of the Child Helpline Group and her evidence discloses that she received a telephonic call from PW3 at about 4 pm on 03.02.2020 stating that a girl studying in the said school had complained that her father had abused her; that she went to the school to enquire the victim and came to know during enquiry that the father had abused her in many ways and had committed penetrative sexual assault on more than six occasions; that on one occasion she became pregnant and she informed her mother, who in turn found out that the victim was pregnant and bought and gave tablets to cause miscarriage; that the victim also told that even after that her father had committed penetrative sexual assault; that



PW1 thereafter, took the victim to the police station and lodged the complaint-Ex.P1 and took steps to admit the victim girl in a Home.

2.13. PW2 is the victim, whose name is redacted in view of Section 33 (7) of the POCSO Act. PW2 narrated the instances of sexual abuses / harassment committed by her father/A1, from the age of 7 years. She had stated that her date of birth is 10.04.2004 and had marked the 10th standard Marksheet [Ex.P2]. In her deposition, she would state that her father would apply oil on her chest and thighs and press her hands and legs; that he would make her sleep naked and abuse her; that he would also insert articles such as plastic bottles, handle of the screw driver, plastic clip used for drying clothes in her private part; that after she attained puberty, A1 committed penetrative sexual assault with his private part; that A1 would also ensure that he assisted the victim while she took bath; that A1 would justify the said act stating that it is common in Western countries and therefore, there is nothing wrong in that and that A1 always insisted that he slept with the victim.



2.14. When PW2 informed A2, the mother about the incident and asked her for support, A2 had ignored the same; that whenever A1 took the victim to the bathroom for assisting her in taking bath, A2 would peep into the bathroom to see if A1 was doing anything untoward; that during the 10th public examination, the victim became pregnant and a urine test was taken at home with a kit; that when A1 and A2 found that the victim was pregnant, the mother /A2 had beaten A1; that thereafter, in order to cause miscarriage when the victim was fast asleep, A1 used to punch the victim on her stomach, make her lie in a prone position, pressed his stomach with full strength; that A1 also made her to eat papaya fruit to ensure miscarriage; that since none of them worked, A1 attempted to buy medicine for causing miscarriage; that since the medical stores refused to give medicine, A1 took A2 along with him and bought tablets saying that it was meant for A2; that A1 called one Kalaipriyan (not examined), the cousin brother of the victim and informed about the victim's pregnancy, due to his sexual assault and asked for his help; that the said Kalaipriyan had scolded A1 for misbehaving with his own daughter/victim; that thereafter, due to the tablets, there was a miscarriage and the victim started bleeding; that even thereafter, A1 is said



to have abused the victim sexually on several occasions; that A2 was aware of the above acts of A1 and used to warn A1, however, A1 would abuse A2 and insisted on continuing his abuses; that unable to bear the torture further, PW2 had stated about the incidents to her classmate, who in turn asked PW2 to inform their teacher PW3 and that thereafter, on the phone call made by PW3 to the Child Helpline, the complaint was filed.

2.15. PW2 would further add that when she was kept in a Home after the complaint, A2 visited her and requested her to withdraw the complaint; thereafter, PW2 returned to her house on the advice of the Rev. Father of Pope John's Garden, who took care of the victim and both A1 and A2 behaved well with her and that thereafter, A1 is said to have repented for his actions and prayed for pardon. The victim further stated that both the parents tried to brainwash her to withdraw the complaint.

2.16. PW3, as stated earlier is the teacher, to whom the victim first complained about the acts of her father and her mother. PW3 would also add that the victim had told her that A2 had initially protested and when A1



threatened her with dire consequences if she disclosed this fact, A2 also kept quiet. PW3 would reiterate what the victim told her initially.

2.17. PW4 who was working as a State Co-ordinator of the Child Helpline would state that on receiving the information from the Headmistress of the school, she had sent PW1, a Committee Member of the Child Helpline to the school to obtain a statement from the victim. Her evidence corroborates the evidence of PW1.

2.18. PW5 is the Doctor who was working as an Assistant Professor at Kasthuribai Gandhi Maternity Hospital. She deposed that on 08.02.2020 around 3.20 pm, the victim was brought by the police and she had examined the victim. According to PW5, the victim told her that her father committed penetrative sexual assault on several occasions ever since she turned 12 and that between the ages of 7 and 12, he had subjected her to several other sexual assaults. The doctor further deposed that PW2 informed her that the victim was beaten by her father and she became pregnant once and the father bought medicine to cause miscarriage. She would also state that the



vaginal swab and the pubic hair were sent to the Forensic Science Laboratory and it was found that there were no traces of semen. The Accident Register was marked as Ex.P6. The relevant portion of Ex.P6 is extracted here for better appreciation of the statement made by the victim to the Doctor [PW5].

“Alleged h/o multiple sexual intercourse by her own father at home started after attained menarche at 12 yr. He has been sexually assaulting her like pressing breasts, touching her genitals, applying clips on the genitals, inserting screwdriver and small cups inside her vagina since she was 7 year old. She got pregnant, when she was studying 10th. Her father bought tablets for aborting the pregnancy. She took them and had severe bleeding but was not taken to the hospital. He had sexual intercourse several times after this also. He beat her if she refuses. Last act -2 weeks back.” *[emphasis supplied]*

The Doctor also issued a Medico-legal Examination Report of Sexual Violence, marked as Ex.P7. The Doctor had made the following observations on examination.

“Pubic hair normal. Hymen not intact. Easily permits 2 fingers. Cervix pointing downwards, Uterus Anteverted, normal size, Fornices free, No bleeding (Repeat examination)

After obtaining the Forensic Science Laboratory report, the Doctor in her final report had opined as follows:

“There is e/o (evidence of) penetrative sexual intercourse”



WEB COPY 2.19. PW6 is the Doctor who had examined A1 and issued Ex.P9-Certificate, in which he had opined as follows:

“There is nothing to suggest that he is incapable of performing the sexual act”

2.20. PW7 is the Inspector of Police, who had registered the FIR and conducted the investigation. We have narrated the details of the investigation conducted, in the earlier portion of the judgment.

2.21. PW8 is the Investigation officer who filed the final report after she took over the investigation from PW7.

2.22. When the accused were questioned under Section 313 Cr.P.C., on the incriminating circumstances appearing against them, they denied the same. However, for the last question, A1 would state that the victim was probably aggrieved since he was very strict with her and since he refused to buy her a mobile phone. A2 also would state that she used to be strict with



the victim as she did not study properly; that she refused to give the phone; and that she was not aware as to why the victim was angry with her.

2.23. The trial Court after appreciation of the oral and documentary evidence convicted and sentenced the accused as follows:

<i>Rank of the Accused</i>	<i>Offence under which convicted</i>	<i>Sentence imposed</i>
A1	U/s.6 of POCSO Act, 2019	Sentenced to Death and that he is hanged by the neck till he is dead subject to confirmation by the Hon'ble High Court of Madras.
	U/s.75 of JJ Act	Sentenced to imprisonment for three years
A2	U/s.6 r/w 17 of POCSO Act, 2019	Sentenced to imprisonment for the remainder of natural life without any remission/commutation with the fine of Rs.10,000/- in default to undergo simple imprisonment for 3 months
	21(l) of POCSO Act, 2019	Sentenced to imprisonment for six months.
	U/s.75 of JJ Act	Sentenced to imprisonment for three years

3. Since it is a Referred Trial, this Court issued notice to the accused, as they had not filed appeals against the conviction. After notice, both the



accused were produced before this Court and they both submitted that they did not have any means to engage an Advocate to defend them. Therefore, this Court by an order dated 28.02.2023 appointed Mr.A.Ashwin Kumar for A1, as counsel on record and Mr.R.Rajarathinam, Sr. Counsel to lead him. Likewise, this Court appointed Mr.S.Ashok Kumar for A2, as counsel on record and Mr.Abudukumar Rajarathinam, Sr. Counsel to lead him. Thereafter, the accused preferred Criminal Appeals viz., CrI.A.No.427 of 2023 for A1 and CrI.A.No.392 of 2023 for A2.

Submission of the learned Public Prosecutor:

4.1. Mr.Hasan Mohammed Jinnah, the learned Public Prosecutor who opened the case for the prosecution submitted that the evidence of the victim was cogent, clear and inspired confidence. Her evidence is corroborated by the evidence of PW3, her teacher and the Member of Child Helpline-PW1. The Medico-Legal Examination Report [Ex.P7] and the Accident Register [Ex.P6] further corroborate the version of PW2. PW2's evidence is natural and the suggestion made by the defence that the parents were strict and



therefore PW2 had stated lies, is far fetched. The defence has not brought out any material or evidence to doubt PW2's version.

4.2. The learned Public Prosecutor took us through the evidence of PW1 to PW3, and submitted that they are cogent and corroborate each others' version. He relied upon the judgment in **(2020) 10 SCC 573** [*Ganesan Vs. State represented by its Inspector of Police*], in support of his submission that when the evidence of the victim inspires confidence, the conviction can be passed on the sole evidence of the victim and there is no necessity to look for corroboration of her testimony. The learned Public Prosecutor also pointed out to the observations made by the Hon'ble Supreme Court in **(2012) 4 SCC 257** [*Ramnaresh and others Vs. State of Chhattisgarh*], wherein the principles relating to the award of death sentence have been reiterated, following the judgments of the Hon'ble Supreme Court in **(1980) 2 SCC 684** [*Bachan Singh vs. State of Punjab*] and **(1983) 3 SCC 470** [*Machhi Singh vs. State of Punjab*].

Submission of the learned Senior Counsel appearing for A1:



5.1. Mr.R.Rajarathinam, learned Senior Counsel appearing for A1/appellant in Crl.A.No.427 of 2023 submitted primarily that the accused did not have an effective representation as could be seen from the nature of cross examination and from the fact that vital questions were not put to the witnesses and material contradictions have not been elicited.

5.2. The learned senior counsel submitted that the appointment of a legal aid counsel must not be an empty formality and the Court has to ensure that the accused gets a fair, just and reasonable trial in a criminal case and for that purpose, the Court should ensure that the accused is defended by an effective counsel trained to handle criminal trials, especially in a case of this nature, where the learned trial Judge thought it fit to award death sentence.

5.3. The learned senior counsel also pointed out several procedural irregularities which would not only suggest that the accused did not get a fair trial, but, it would also vitiate the trial. According to the learned senior counsel, Rule 51 of Criminal Rules of Practice stipulates how the evidence



of a witness through video conferencing has to be recorded, so that the possibility of tutoring is ruled out; and that the learned trial Judge in the instant case failed to take adequate safeguards to prevent tutoring.

5.4. The learned senior counsel further pointed out the following violations of the procedural safeguards provided under the POCSO Act, JJ Act and Cr.P.C., in the instant case. The submissions of the learned senior counsel are typed in 'italics'.

(a) Section 24(2) of the POCSO Act – The police officer while recording the statement of the victim should not be in uniform. *In the instant case, no such procedure was adopted.*

(b) Section 26(1) of the POCSO Act - the statement of the victim child should be recorded in the presence of parents or in any other person in whom the child has trust or confidence. *In this case, admittedly, the victim's statement was not recorded in the presence of parents, which is obvious because they both are accused. However, in this case, there was*



no other person with the child, in whom the child had trust or confidence, when her statement was recorded by the police.

(c) 26(4) of the POCSO Act – the Magistrate or the police officer shall ensure that the statement of the child shall be recorded by audio-video electronic means, wherever possible. *However, in the instant case, they have not adopted the said procedure.*

(d) Section 27(1) of POCSO Act and Section 164-A (1) Cr.P.C., is violated. Section 27 (1) provides that medical examination of the child shall be conducted in accordance with Section 164A of Cr.P.C. Section 164-A(1) of Cr.P.C., provides that the victim child should be accompanied by a person competent to give consent on behalf of the child, whom shall be sent to such registered medical practitioner within 24 hours from the date of receiving the information relating to commission of such crime. *However, in the instant case, it is admitted that PW2 was sent to Kasthuribai Gandhi Maternity Hospital by the police. No other person accompanied the child and*



therefore, this violates the mandatory provisions relating to medical examination.

(e) Rule 54(13)(1)(iv) of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 provided that the statement of the child under Section 164 Cr.P.C., should be recorded either in the Children's room or if possible in the child's place of residence, including the home or institution, where he or she is residing. *In the instant case, no such procedure was adopted.*

(f) Section 33 (4) of the POCSO Act provides that the Special Court shall ensure a child friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust and confidence, to be present in the Court. *In the instant case, it is seen that the trial court had recorded that one Smt.Kanyababu, a founder of an NGO was present with PW2, when she was examined in a child-friendly deposition room. There is no material to show that the child had trust or confidence in the said person. The said Kanyababu is also not examined by the trial court.*



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5.5. The learned senior counsel further pointed out that PW2 had referred to certain persons who were aware of the acts committed by A1 viz., one Kalaipriyan who is her cousin brother, Rev. Father of Pope John's Garden, Manali, who had sponsored for her college studies, the employees of Seva Samaj Home, where the victim was staying after the occurrence and A2 had allegedly met her there and attempted to brainwash her to withdraw the complaint, the brother of PW2 and the friend of PW2 to whom PW2 first confided about the occurrence, were not examined by the prosecution. He submitted that the non examination of the above mentioned material witnesses would render the prosecution case and the version of PW2, doubtful.

5.6. The learned senior counsel further pointed out that the version of PW2 about the insertion of the handle of a screw driver and plastic clips in the private part is improbable and that it is a matter of common sense that if A1 had a sexual desire he would not have harassed the victim in such a manner. Further, PW2 had in her deposition stated that when PW1 came to



the school to enquire about PW2, a video was taken by PW3, her teacher.

However, no such video was produced by the prosecution. He submitted that the evidence of the Doctor-PW5 and her certificate shows that she conducted a 'two finger' test, which was found to be barbaric and unconstitutional by the Hon'ble Supreme Court in **AIR 2013 (SC) 1784 [Lillu @ Rajesh vs. State of Haryana]** and therefore her evidence that the victim was subjected to sexual assault has to be discarded. Further, the medical evidence did not corroborate PW2's version that she had suffered a miscarriage due to the pills given by A1 and A2. Therefore, the learned senior counsel submitted that given the above contradictions and violations of the mandatory provisions and the fact that the trial court did not ensure that the accused were effectively represented, the appellant (A1) is entitled to acquittal.

Submission of the learned Senior Counsel appearing for A2:

6.1. Mr.Abudukumar Rajarathinam, learned senior counsel for A2/appellant in CrI.A.No.392 of 2023 reiterated the submissions of the learned senior counsel for A1 that the accused were not effectively



represented before the trial Court. The learned senior counsel pointed out the contradictions in the 164 statement of the victim and her deposition and submitted that unfortunately, the defence counsel had not brought out these material contradictions in the evidence.

6.2. Further, the learned senior counsel submitted that the trial Court had committed another error in not appointing a separate counsel to defend A2, whose case is different from that of A1. The defences taken by A2 and A1 are different and ought not to have been represented by the same counsel. The absence of any effective independent counsel for A2 had vitiated the trial and the learned senior counsel relied upon the judgment reported in **(2012) 2 SCC 584** [*Mohd. Hussain alias Julfikar Ali vs. State (Government of NCT of Delhi)*], in support of his submission.

6.3. The learned senior counsel further submitted that the evidence of the victim even if accepted to be true, would at best suggest that A2 had silently suffered the abuses committed by A1 on the victim child, but was



not guilty of any acts which would bring them within the definition of 'abetment'.

6.4. The learned senior counsel pointed out the evidence of the victim to show how A2 though had initially protested, did not take any steps to give a complaint because of her helplessness. She in any case has been convicted for the offence of non reporting the commission of POCSO offence under Section 21(1) of the POCSO Act and has suffered a sentence of six months.

6.5. The learned senior counsel further submitted that A2 cannot be said to have consented to the commission of the offence by A1 if it is shown that it was under fear and referred to Section 90 of IPC. Thus, he submitted that the appellant (A2) is entitled to acquittal.

Discussion:

7. We have carefully considered the evidence on record and the rival submissions. As stated by the learned Public Prosecutor, it is a trite position of law that if the evidence of a sole witness or the victim of a sexual offence,



inspires confidence, the Court need not look for corroboration. We have broadly summed up the evidence of PW2 in the earlier portion of our judgment.

8. PW2 has stated about the various acts committed by her father between the ages of 7 and 12; that after she attained 12 years, A1 had committed penetrative sexual assault on several occasions. She also deposed that she became pregnant once when she was studying in 10th standard and her father had pressed and kicked her stomach to ensure miscarriage and that when he failed in those attempts, he along with his wife /A2 went to the medical shop and bought a tablet which she took. PW2's version is that she complained of all the acts of A1 to A2, her mother and A2 had expressed her helplessness though, she did not approve of the conduct of A1.

9. PW2 informed her friend and then her teacher-PW3, about the occurrences which are normal and natural conduct. PW3 is PW2's teacher in the school and on hearing the victim's version, she had informed the Headmistress of the school, who in turn called the Child Helpline. PW3's



version that the child informed her about the various sexual abuses committed by her father, corroborates the version of PW2. Further, PW1's statement that she went to the school on the phone call made by the Headmistress of the school to the Child Helpline and enquired the girl child, also corroborates the version of PW2. Therefore, PW1 and PW3 corroborate PW2's version of her confiding about the abuses suffered by her to her friend first and thereafter to PW3.

10. In the Medico-Legal Examination Report [Ex.P7] issued by PW5- the doctor, as stated earlier, has said that there is evidence of penetrative sexual intercourse. However, we notice regrettably that two finger test had been conducted in the instant case, though the Hon'ble Supreme Court and this Court in several cases have repeatedly held that such a test is neither acceptable nor desirable to ascertain whether the victim was subjected to sexual intercourse. We take this opportunity to remind the Doctors that if they conduct any test in contravention of the directions of the Hon'ble Supreme Court in the *State of Jharkhand Vs. Shailender Kumar @ Pandav Rai*, reported in (2022) 14 SCC 289, they shall be guilty of



misconduct as held by the Hon'ble Supreme Court. However, in the instant case, we are of the considered opinion that PW2's evidence is cogent and convincing and can be the sole basis to determine the guilt or otherwise of the accused and the absence of any corroboration would hardly make any difference. Therefore, even if the expert opinion of the Doctor is ignored, there is nothing to doubt PW2's version.

11. PW2 has been consistent in her stand throughout. She would also state that after the registration of the case, she went to her parent's house and that A1 had sought pardon and also requested PW2 to withdraw the complaint. However, it is seen that PW2 stuck to her version throughout and though it is pointed out that some contradictions were not elicited by the defence counsel during the trial, this Court is of the view that PW2's evidence, inspires confidence and there is absolutely no material / evidence to doubt her version.

12. Though the learned senior counsels appearing for both accused, pointed out violations of statutory provisions, this Court is of the view that



the violations that we have already elaborated earlier are meant to ensure that the victim is provided with a child-friendly atmosphere while recording the statement during the investigation and while recording her evidence in the trial. These provisions also are to ensure that the accused gets a fair trial. It is needless to say that procedure is a handmaid of justice. If in a given case, it is found that the procedural lapses have not impacted or caused any dent in the prosecution case or while appreciating the evidence of the victim, then those procedural lapses would not vitiate the trial. We are not for a moment suggesting that these procedures need not be followed. The procedures prescribed are with a purpose and the prosecution and the person concerned, are bound to follow them scrupulously. But in the instant case, we are of the view that those procedural lapses cannot be said to have caused any prejudice to the accused or had rendered the evidence of PW2 doubtful.

13. As stated earlier, since PW2's evidence inspires confidence, non examination of witnesses, who according to the prosecution were also aware of the abuses, such as PW2's cousin brother (Kalaipriyan), to whom A1 is



said to have asked for advice when PW2 became pregnant and the Rev. Father of Pope John's Garden, who helped PW2 to pursue her studies, in our view, would not make any difference. We may also add here that the witnesses have not been effectively cross examined. However, that by itself in our view cannot lead to an inference that the accused did not get a fair opportunity in the trial. Merely because the counsel has not put certain questions to the witnesses, the trial would not be vitiated. However, we remind the trial Courts about the observations made by the Hon'ble Supreme Court in **Mohd. Hussain's case** [cited supra], to ensure that the accused had defended effectively. The relevant observations read as follows:

“16. In my view, every person, therefore, has a right to a fair trial by a competent court in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of charge in a criminal case.

17. This Court, in the case of *Zahira Habibullah Sheikh (5) Vs. State of Gujarat* (2006) 3 SCC 374 has explained the concept of fair trial to an accused and it was central to the administration of justice and the cardinality of protection of human rights. It is stated :

"35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties,



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which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice--often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in



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mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson's eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.""



14. We are aware of the scope of enquiry in a referred trial. If further enquiry or additional evidence has to be taken to ascertain the guilt or innocence of the convicted person, we may conduct such enquiry or take such additional evidence under Section 367 Cr.P.C. However, having regard to the fact that the victim was a minor child and had suffered offences under the POCSO Act, and bearing in mind the provisions of Section 33 (5) of the POCSO Act, which provides that the victim shall not be called to the Court repeatedly, we refrain ourselves from conducting further enquiry or taking additional evidence though there are certain minor contradictions between the statement of victim under Section 164 Cr.P.C., and her deposition before the trial Court, which have not been brought out during cross-examination. We are convinced that the victim/PW2 has spoken the truth and there is no reason to disbelieve her. We are convinced that A1 had committed the offence of aggravated penetrative sexual assault punishable under Section 6 which fall under Sections 5(j)(ii), 5(l) and 5(n) of the POCSO Act.



15. Therefore, we are of the view that the prosecution has established that PW2 had suffered the offences committed by A1 and we are therefore inclined to hold that A1 is guilty of the offence under Section 6 of the POCSO Act, 2019. Considering the nature of the cruelty committed by A1 on the victim, we also hold that A1 is guilty of an offence under Section 75 of the JJ Act, 2018. As regards the second charge against A1 for the offence under Section 506(i) IPC, the learned trial Judge has found him not guilty. We confirm the said finding as there is no evidence that A1 has committed any offence of criminal intimidation on the victim.

Role of A2:

16. The victim's version as regards the role played by A2 and her knowledge of the abuses committed by A1 is also natural and in consonance with normal human conduct.

17. PW2 in her evidence had stated that A2 was aware of the acts committed by A1. The reference made by PW2 in her deposition as regards



the role played by A2 is extracted hereunder for a better understanding / appreciation of her evidence as regards the involvement of A2.

“.....என் அம்மா பாவம் பாப்பா இப்படி எல்லாம் பன்னாதிங்க என்று திட்டுவார். எனது அப்பா எனது அம்மாவை திட்டி, அடித்து வலுக்கட்டாயமாக அவ்வாறு செய்வார்.....”

“.....நான் எனது அம்மாவிடம் அப்பாவை நான் போலீசில் மாட்டிவிட்டால் நீ எனக்கு சப்போட் செய்வாயா என்று கேட்டேன் அதற்கு எனது அம்மா போய் வேற வேலை ஏதாவது இருந்தால் பார் என்று கூறினார். எனது அப்பா என்னை குளிப்பாட்டும்போதெல்லாம் எனது அம்மா, ஏனது அப்பா என்னை ஏதாவது செய்கிறாரா என்று வந்து எட்டி எட்டி பார்ப்பார்.....”

“.....அதெல்லாம் செய்தும் எனது உடல் ஸ்டென்தால் அது கரையாததால் எனக்கு மாத்திரை வாங்கி கொடுப்பதற்காக எனது அப்பா மெடிக்கல் ஸ்டோர்ஸ் சென்று யாரும் மாத்திரை கொடுக்காததால் எனது அம்மாவிற்கு என்று சொல்லி மாத்திரை வாங்குவதற்காக எனது அம்மாவையும் கூட்டிச்சென்று எனது அம்மா பெயர், வயதை சொல்லி மாத்திரை வாங்கிவந்து ஸ்கூல் எக்ஸ்சாமிற்கு போவதற்கு முன்பு எனக்கு மாத்திரையை கொடுத்தார்கள்.....”

18. After the victim had reported the incident to PW3, which culminated in the filing of the complaint, as stated earlier, the victim was in a Children's Home and A2 is said to have met PW2 in the Home and insisted



that she had to withdraw the complaint filed by her. The relevant portion of that evidence is extracted hereunder.

“.....எனது அம்மா ஒவ்வொரு முறை வரும்போதும் அழுது அழுது இந்த பிரச்சினை எல்லாம் நமக்கு வேண்டாம் டா வந்துவிடு என்று கூறி எனது அப்பாவை பற்றியே பேசுவார். கேஸிலிருந்து வாபஸ் வாங்கு என்று கூறுவார். இதனால் தம்பி வாழ்க்கை கெடுகிறது. தம்பியை பற்றி யோசித்தாயா என்று தம்பியை காரணம் கூறி என்னை வாபஸ் வாங்க கூறுவார்.....”

19. The above extracts of the evidence and the narration of facts stated earlier would show that A2 was also aware of the abuses committed by A1. The evidence of PW2 cannot be doubted, on this aspect also and there is no reason to do so. However, the question is as to whether A2 had committed the offence for which she was charged in the instant case.

20. A2 was charged and convicted for the offence under Section 6 r/w 17 of the POCSO Act. The evidence of PW2 has to be appreciated to see if the allegation against A2 would amount to abetment of the offences under the POCSO Act. 'Abetment' is defined under Section 107 IPC, which is incorporated in Section 16 of the POCSO Act. However, Explanation III has



been added to the definition of abetment in Section 16 which is not there in

Section 107 of IPC. Section 16 of the POCSO Act reads as follows:

“16. Abetment of an offence.- A person abets an offence, who-

First – Instigates any person to do that offence; or

Secondly. - Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuant of that conspiracy, and in order to the doing of that offence; or

Thirdly. - Intentionally aids, by any act or illegal omission, the doing of that offence.

Explanation I. - A person who, by wilful misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence.

Explanation II. – Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Explanation III. – Whoever employs, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of any offence under this Act, is said to aid the doing of that act.”



21. From the definition of 'abetment', we can see that there are three ways of abetment, i.e.,

(a) Firstly it is by instigating any person to do that offence. ***The evidence of PW2 does not suggest in any manner that A2 instigated A1 to commit the offence under the POCSO Act. On the contrary, the evidence only suggests that A2 protested and fought with A1, though she did not take any steps to lodge a complaint.*** As to what would amount to instigation has been explained by the Hon'ble Supreme Court in *Ramesh Kumar Vs. State of Chhattisgarh*, reported in (2001) 9 SCC 618. The Hon'ble Supreme Court had stated that 'instigation' is a goad, urge forward, provoke, incite or encourage to do 'an act'. ***However, in the instant case, the evidence does not disclose that the conduct of the A2 would amount to instigation.***

(b) Secondly, abetment can be by engaging with one or more person or persons in any conspiracy for the doing of that offence. ***The evidence does not disclose that A2 had engaged in a conspiracy with A1 for the commission of the offences under the POCSO Act.***



(c) Thirdly, it is by intentional aiding of any act or illegal omission by doing of that offence. Explanation III to Section 16 of the POCSO Act, stipulates the list of activities that would amount to “aiding” an act. Even assuming that the conduct of A2 would amount to aiding the act of her husband A1 by illegal omission, to attract clause 'thirdly' of Section 16 of the POCSO Act, the aiding must be 'intentional'.

22. It is trite that intention is one of the culpable mental states prescribed under the IPC.

23. Amongst the culpable mental states, 'intention' is the gravest. Knowledge is another culpable mental state. The knowledge of certain consequences that would follow a particular act is distinct from the intention to cause it. The prosecution at best had established that A2 knew about A1's sexual abuse of their child. Clause 'thirdly' of Section 16 of the POCSO Act and Section 107 of IPC, employs the word, 'intentionally' and not 'knowingly'. Intention presupposes knowledge and a desire to have the intended result. Mere knowledge of the wrongful act is insufficient to



invoke clause 'thirdly' of Section 16 of the POCSO Act. In addition to the knowledge, the desire to do the act is necessary. In the instant case, to hold that A2 intended to do the act, it must be proved that she desired and was willing to have the intended result without any justification or excuse. In this regard, it would be useful to refer to the observations of the Hon'ble Supreme Court in *Shri Ram Vs. State of U.P.*, reported in **AIR 1975 Supreme Court 175**, which reads as follows:

“6. The question which then arises for consideration, a question to which the Sessions Court and the High Court have not paid enough attention, is whether the only inference which arises from the fact that Violet gave the particular shout is that by so doing, she intended to facilitate the murder of Kunwar Singh, Section 107 of the Penal Code which defines abetment provides to the extent material that a person abets the doing of a thing who "Intentionally aides, by any act or illegal omission, the doing of that thing." Explanation 2 to the section says that

"Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to and the doing of that act."

Thus, in order to constitute abetment, the abettor must be shown to have "intentionally" aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of Section 107. A person may, for example, invite another casually or for a friendly purpose and that may facilitate the murder of the invitee. But unless the invitation was extended with



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intent to facilitate the commission of the murder, the person inviting cannot be said to have abetted the murder. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Intentional aiding and therefore active complicity is the gist of the offence of abetment under the, third paragraph of Section 107.”

24. PW2's evidence vis-a-vis, the role played by A2 does not suggest that she had any intention to aid A1 in committing the sexual offences. The prosecution evidence discloses that A2 had protested, at every stage and A1 had abused and beaten A2, besides intimidating her of dire consequences. Therefore, A2's knowledge of the illegal acts and her omission to prevent it or complain about it would not amount to “intentional aiding”.

25. Under the General Law, there is a presumption that the person/accused intended the probable consequences of his act. That apart, Section 30 of the POCSO Act, also states that in any prosecution for an offence which requires a culpable mental state, the Court shall presume the existence of such culpable mental state. The evidence adduced by the prosecution in the instant case clearly points out that A2 had not



intentionally aided A1. Therefore, the general law presumption and the statutory presumption have been rebutted in this case.

26. The only portion of PW2's evidence where there is reference to both A1 and A2, is purchasing a tablet for causing miscarriage. This is an improvement from the earliest version given by PW2 to the Doctor. We find from the statement made by the victim to Doctor-PW5, which is recorded in the Accident Register-Ex.P6 (which we have extracted earlier) that the victim had told the Doctor that her father bought the medicine for causing miscarriage and there is no reference to A2. Therefore, we find that A2's involvement in so far as administering tablets for miscarriage cannot be believed. We are unable to believe this portion of PW2's evidence, though we accept the other portions of her testimony. It is trite that the maxim *falsus in uno, falsus in omnibus* (false in one respect, false in all) is not applicable in our country.

27. The other averments made by PW2 against A2 is that after the complaint was lodged, A2 requested PW2 to withdraw the complaint. Such



an act would at best amount to non-reporting a grave POCSO offence and cannot be said to be an act of abetment.

28. The learned senior counsel for A2 submitted that the general exception incorporated under Section 90 of IPC would apply to A2. It is nobody's case that A2 gave consent to A1 to commit the acts. That apart, A2 is nobody to give consent to such an offence on the minor child. Only if there is a consent, the question of invoking the general exception under Section 90 of IPC would arise. Therefore, the applicability of Section 90 of IPC does not arise. In any case, we have held that in the instant case, abetment is not made out for the reasons stated earlier.

29. Therefore, we are of the view that charge No. 4 as against A2 under Section 6 r/w Section 17 of the POCSO Act has not been established. However, we are of the view that A2 is guilty of the offence under Section 21(l) of the POCSO Act, 2019 because she had not reported the commission of an offence and it is trite, ignorance of the law, is not an excuse. Further, we also find that the evidence suggests that A2 had exposed the child to



mental and physical suffering, due to the act of A1, which is an offence under Section 75 of the JJ Act, 2018 and therefore, we hold her guilty for the said offence.

Sentence:

Accused No.1:

30. Now coming to the sentence to be imposed on the accused, we find that A1 has been convicted for an offence under Section 6 of the POCSO Act, 2019 and awarded the death penalty. We are convinced that this case does not fall within the category of 'rarest of rare cases'. The trial Court however was carried away by the act of the father who had committed grave sexual offences against his daughter. There is no doubt that the act committed by A2 is gruesome. However, it would not fall within any of the parameters laid down by the Hon'ble Supreme Court in ***Bachan Singh's case and Machhi Singh's case*** [cited supra], which had been reiterated by the Hon'ble Supreme Court in other cases.

31. The Hon'ble Supreme Court had considered the principles relating to imposition of death penalty in *Ram Naresh and others vs. State of*



Chhattisgarh, reported in **(2012) 4 SCC 257**. One of the aggravating circumstances mentioned in the said decision is that where the victim is a child and the father is the perpetrator of the crime against her. The trial Court it appears was carried away by the said fact. However, it is also settled law that merely because a crime is heinous *per se* may not be a sufficient reason for the imposition of the death penalty without considering the mitigating factors and other circumstances.

32. (a) The sentence of death can be imposed only in the rarest of rare cases. In other words, it can be imposed only in exceptional cases. Therefore, the imposition of the sentence of life imprisonment is the rule. Considering the nature of evidence let in by the prosecution and the conduct of A1 after the occurrence, we are of the view that it is not a case which would fall under, the 'rarest of rare' category. There is nothing on record to show that A1 is a menace to society and there is no possibility of reformation at all. We find from the evidence of PW2 herself that A1 had sought pardon and had behaved properly after the complaint was lodged and when she lived in the parent's house for a short while. Hence, we modify the



sentence of death penalty imposed on A1 into one of life imprisonment with a fine of Rs.25,000/- in default to undergo rigorous imprisonment for three months for the offence under Section 6 of the POCSO Act.

(b) However, the sentence of imprisonment for three years imposed against A1 for the offence under Section 75 of the JJ Act, by the trial Court is confirmed for the reasons stated therein.

Accused No.2:

33. (a) For the reasons stated above, A2 is acquitted of the charge under Section 6 r/w 17 of the POCSO Act.

(b) However, she is convicted for the offence under Section 21(l) of the POCSO Act and as regards the sentence of imprisonment for the said offence under the said section, we confirm the sentence of six months imposed by the trial Court.

(c) As regards the sentence for the offence under Section 75 of the JJ Act, considering the offence, the nature of the allegation against A2, the circumstances in which she was living and the fact that she was in a helpless situation as has been brought out in the evidence, we are inclined to reduce the sentence imposed by the trial Court, to the period of sentence already undergone.



(d) Therefore, we direct A2 (appellant in Crl.A.No.392 of 2023) to be set at liberty forthwith, unless her detention is required in connection with any other case.

34. In the result, the reference made by the learned Public Prosecutor is answered accordingly and the Criminal Appeals are disposed of on the terms set out in paragraph Nos.32 and 33, *supra*.

35. We would like to record our appreciation to Mr.Hasan Mohammed Jinnah, the State Public Prosecutor and to the learned counsels on record Mr.A.Ashwinkumar and Mr.S.Ashok Kumar, and the learned senior counsels Mr.R.Rajarathinam and Mr.Abudukumar Rajarathinam, who appeared *pro bono*, for their valuable assistance rendered by them in this case.

Index: Yes/No
Speaking/Non-speaking order
Neutral Citation: Yes/No.
ars

(S.S.S.R., J.) (S.M., J.)
21.11.2023

S.S.SUNDAR, J.
and
SUNDER MOHAN, J.

ars

To



1. The Sessions Judge,
Special Court for exclusive trial of cases under POCSO Act,
Chennai.

2. The Inspector of Police
W21, All Woman Police Station,
Guindy, Chennai – 600 032

3. The Superintendent,
Special Prison for Woman,
Puzhal, Chennai.

4. The Public Prosecutor
High Court of Madras
Chennai 600 104

Pre-delivery Common judgment in
R.T. No.2 of 2022 &
Crl.A.Nos.427 and 392 of 2023

21.11.2023