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CRL.A.NO.249 OF 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 18 / 07 / 2023

JUDGMENT PRONOUNCED ON: 09 / 08 / 2023

CORAM:

**THE HON'BLE MR.JUSTICE M.SUNDAR
AND
THE HON'BLE MR.JUSTICE R.SAKTHIVEL**

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Duraisingham

... Appellant

Versus

State by:

The Inspector of Police
All Women Police Station North
Tiruppur.
(Crime No.8 of 2017)

... Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, praying to set aside the conviction of the appellant in Special Sessions Case No.31 of 2017 dated 28.09.2018 by the Magalir Neethimandram (Fast Track Mahila Court) Tiruppur.

For Appellant : Mr.M.Saravanakumar

For Respondent : Mr.A.Gokulakrishnan
Additional Public Prosecutor



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JUDGMENT

WEB CC **R.SAKTHIVEL, J.**

This Criminal Appeal is preferred under Section 374(2) of the Code of Criminal Procedure, 1973 [hereinafter shall referred to as 'Cr.P.C' for the sake of convenience and clarity] by the sole accused in Spl. S.C.No.31 of 2017 on the file of Magalir Neethimandram (Fast Track Mahila Court) Tiruppur, assailing the judgment awarded by the trial court on 28.09.2018, in which he was convicted for the offences under Sections 5(l) r/w 6 and 5(n) r/w 6 of Protection of Children From Sexual Offences Act, 2012 [hereinafter shall referred to as 'POCSO Act' for the sake of convenience and clarity] and sentenced to undergo Rigorous Imprisonment for Life, with fine of Rs.10,000/- for each of the offences under Sections 5(l) r/w 6 and 5(n) r/w 6 of POCSO Act, in default of payment of fine, to undergo additional Rigorous Imprisonment for one year for each of the offences.



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2.The case of the prosecution in brief is as follows:

2.1.The victim (ZZ) was a minor girl aged 13 years at the time of occurrence i.e., between 08.03.2017 and 18.03.2017. Victim is the daughter of the defacto complainant (YY). The defacto complainant (YY) who is mother of the victim was residing along with her husband (XX), her daughter (ZZ) and her son who is a blind and aged 15 years at the time of occurrence. While so on 08.03.2017, the defacto complainant / mother of the victim (YY) and her husband (XX) went out to attend their work. The victim (ZZ) and her brother alone were at home. At about 02.00 pm., the accused took the victim (ZZ) to the half constructed building near his house, hugged her, placed his male organ into the victim's mouth and asked her to suck the same. The accused also penetrated his finger into her vagina and has sexually harassed the victim daily in the afternoon. On 10.03.2017 at about 02.00 pm, the accused penetrated the male organ into the victim's vagina and committed penetrative sexual assault over the minor victim girl. On 14.03.2017 at about 07.00 pm., the accused committed penetrative sexual assault over the victim.



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On 18.03.2017 at about 02.00 pm, when the accused called to victim to have sexual intercourse with her, as the victim refused, the accused caused criminal intimidation on her by saying that he will do away with her if she discloses about the occurrence to anybody. The accused committed the said offences from 08.03.2017 to 18.03.2017 several times when the accused used to come home during the lunch hours. On 18.03.2017 (Saturday), the victim disclosed the offence to defacto complainant / mother (YY). Immediately, after coming to know about the occurrence, the victim's mother (YY) asked the accused and enquired about the offences. At that time, the accused pushed the victim's parents and ran out. The mother of the victim (YY) went to the police station and lodged a complaint to the Sub-Inspector of Police on 19.03.2017 at 09.00 am. Based on the complaint, the Sub-Inspector of Police took investigation and after completion of investigation, filed charge sheet under Sections 5(l)(n) read with Section 6 of POCSO Act and 506(ii) of IPC.

2.2. With a view to prove the case, the prosecution examined 9 witnesses as P.W.1 to P.W.9 and marked 10 documents as Ex.P1 to Ex.P10 and marked three material objects as M.O.1 to M.O.3. On the side of the



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appellant / accused, neither witnesses were examined nor documents were marked.

2.3.After hearing both sides, the learned Sessions Judge found the appellant / accused guilty and thus by judgment dated 28.09.2018 convicted and sentenced him as follows:

<i>Appellant's Rank</i>	<i>Provision under which convicted</i>	<i>Sentence</i>
Sole accused	Sections 5(l) r/w 6 and 5(n) r/w 6 of POCSO Act	To undergo Rigorous Imprisonment for Life, with fine of Rs.10,000/- for each of the offences under Sections 5(l) r/w 6 and 5(n) r/w 6 of POCSO Act, in default of payment of fine, to undergo additional Rigorous Imprisonment for one year for each of the offences.
		The accused was found not guilty under Section 506(ii) of IPC and he was acquitted under Section 235(i) of Cr.P.C.
		The above sentences are to run consecutively and the period of sentence already undergone by the accused was ordered to be set off under Section 428 of Cr.P.C.

3.Feeing aggrieved with the judgment, the appellant / accused preferred this Criminal Appeal under Section 374(2) of Cr.P.C.



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4.The point that arises for consideration in the appeal are:

(i)Whether the prosecution has proved the charges against the appellant / accused under Section 5(l) read with 6 and 5(n) read with 6 of POCSO Act?

(ii)Whether the conviction and sentence awarded by the trial court on the appellant / accused is to be interfered by this Court?

Discussion and Decision to Point No.(i) :

5.The learned counsel for the appellant argued that the appellant did not commit any offence as alleged by the prosecution; that the trial court has not appreciated the evidence in proper perspective; that the trial court has not considered the defense put forth by the appellant; that the medical evidence does not support the case of the prosecution; that there is no eye witnesses except the interested witnesses namely P.W.1 and P.W.2; that the prosecution did not cite or examine any other person to connect the offence



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with the appellant; that the prosecution did not establish the fact that the appellant came to his house for lunch during the material point of time; that the prosecution has not explained why the brother of the victim and the mother of the appellant has not been examined in this case. Non-examination of the brother of the victim, non-examination of the school teacher where the victim is said to be studied creates a grave suspicion over the prosecution case. Learned counsel further submitted that there is every possibility of tutoring the P.W.1 and hence, P.W.1 and P.W.2s' evidences are not reliable and trustworthy. Accordingly, learned counsel prays to allow the appeal and acquit the appellant by granting benefit of doubt to him.

6.Per contra, learned Additional Public Prosecutor has submitted that P.W.1 is the victim and hence, there is no reason to reject the evidence of the victim girl. Further the evidence of P.W.1 has been corroborated by her mother P.W.2. In this case, investigation has been conducted meticulously and there was no lack on the part of the investigation. He further submitted that the prosecution has established that on the date of occurrence i.e., between 08.03.2017 and 18.03.2017, the victim (ZZ) was a minor and the appellant



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has committed penetrative sexual assault on the victim girl. The prosecution has established the said fact by examining the victim girl and the victim's evidence has been corroborated by the Doctor who examined her. He further submitted that since the prosecution has established / proved the foundational facts, the prosecution is entitled the presumption stated in Sections 29 and 30 of the POCSO Act. Further, the appellant did not rebut the presumption as per law. The trial court after carefully considering and evaluating the materials and evidences, comes to the conclusion that the appellant committed the offence and rendered a conviction judgment. Hence, there is no necessity to interfere with the trial court judgment. Accordingly, he prays to dismiss the appeal.

7.This Court considered the submissions made on either side and also perused evidences and other materials in detail.

8.The victim ZZ was examined as P.W.1. She deposed that at the time of occurrence, she was aged 13 years and was studying in 7th Standard. The accused is her father's friend. Initially, the victim and her family were



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residing at Aathupalayam as the landlord asked to vacate house, they went to their mother's friend's house at Anupparpalayam and stayed there for one week. Later, the accused informed that there is a vacant house available nearby his home and took them to his home. In fact, no house was vacant nearby the accused house. The accused asked the defacto complainant and her family members to stay his house. In the accused home, mother of the accused alone was residing. Hence, P.W.1 and P.W.2 accepted to stay in the accused home until they get a suitable rental house. The victim's parents used to go for work. Victim and her brother, who was aged 15 years, mother of the accused were staying in the home at the time of occurrence. As the victim's school was far away from the said house, she did not go to the school. On 08.03.2017, the victim (XX) and his brother and the accused mother alone were at home. Near the accused house, there was a half constructed building which is behind One Balaji house.

8.1.On 08.03.2017 at about 02.00 pm, the accused came home and asked victim to go and see whether Balaji was at home. She went there and stated that Balaji was not at home. As the accused mother was not doing



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well, she was inside the home. The victim's brother was also inside the home.

At the time the accused caught hold of her hand and hugged her. The accused put and pressed his penis on the vagina of the victim. The accused also penetrated his finger into her vagina and he asked her to suck his male organ. He did the same from 08.03.2017 to 18.03.2017 several times when he used to come home during lunch hours. On one Saturday, when her mother returned home on seeing P.W.1, she was found to be pale. Her mother enquired P.W.1 but P.W.1 at first did not disclose about the occurrence to her. When her mother insisted she stated about the occurrence to her mother. As P.W.1 was scared she did not disclose about the occurrence to her mother earlier. In the said house, there are two rooms. On that night immediately after coming to know about the occurrence her mother knocked the door and woke up the accused and enquired him how he could do such an act to her daughter. At that time, the accused pushed her mother (P.W.2) and ran out. Later, P.W.2 went to police station and gave a complaint (Ex.P1) against the accused. P.W.1 has deposed that her date of birth is 29.05.2005 and that at the time of occurrence she was wearing an yellow colour Chudidhar.



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8.2.The mother of victim (YY) was examined as P.W.2. She deposed that at the time of occurrence, her daughter ZZ was 15 years old and she was studying 7th Standard. At first, they were residing at Aathupalayam as they were asked to vacate the house, they went to their mother's friend's house at Anupparpalayam and stayed there for one week. Later, the accused stated that there is a vacant house available near his home and took them to his home. But no house was vacant nearby the accused home. The accused asked P.W.2 and her family members to stay in his home until they get a suitable rental house. Hence, the victim's family went to the home of the accused and stayed there for 15 days. The accused mother alone was there at his house. P.W.2 and her husband used to go for work at 09.00 am and will return home at night. During day time, only accused and his aged mother, victim (ZZ) and victim's brother were used to be at home. Since they went to the accused home, victim did not go to the school as it was far away from the said place. On 18.03.2017 when P.W.2 returned home, P.W.1 was found to be pale. When she enquired, her daughter stated that the accused has misbehaved with her for the past two weeks. On 08.03.2017 at about 02.00 pm, the accused caught hold of her hand and hugged her. The accused put and pressed his



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penis on the vagina of the victim. The accused also penetrated his finger into her vagina and he asked her to suck his male organ. He did the same from 08.03.2017 to 18.03.2017 several times when he used to come home during lunch hours. On 18.03.2017 night immediately after came to know about the occurrence her mother knocked at the door and woke up the accused and enquired him how he could do such an act to her daughter. But accused denied and pushed them and ran out of the home. Later, P.W.2 went to the police station and lodged the complaint against the accused. The said complaint was drafted by husband of P.W.2 in which P.W.2 affixed her signature which is marked as Ex.P1. P.W.2 has further deposed that her daughter kept her dress for washing. When P.W.2 took the same for washing, she found blood stains in the same. When she enquired her daughter, she stated that the said blood stains has occurred in her dress as the accused misbehaved with her.

8.3.P.W.3 is the Doctor who examined the victim. She deposed that on 19.03.2017 when she was on duty at Government Headquarters Hospital, Tirupur, the victim (ZZ) aged 13 years was brought for medical



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examination through Woman Police Constable Kamakshi. She further deposed that on enquiry, the victim stated that from 08.03.2017 to 17.03.2017 daily between 02.00 and 02.30 pm, she was sexually harassed and assaulted by a known person. She further deposed that on her examination, hymen was not intact and no external injuries were seen over the victim. In order to ascertain the age of the victim, she referred victim (ZZ) to Coimbatore Medical College Hospital for the opinion of the Radiologist, as the Radiologist in her hospital was on leave. She further deposed that she collected vaginal smear from the victim and the same was sent to the Forensic Sciences Laboratory, Coimbatore for chemical analysis. She issued Medical Certificate which is marked as Ex.P2.

8.4.P.W.4 is the Headmaster of Anupparpalayam Union Middle School. She deposed that as per the school records, the victim's date of birth is 29.05.2005. To that effect, she issued a certificate which is marked as Ex.P3. In her cross examination, she deposed that the date of birth was entered as 29.05.2005 based on the Transfer Certificate issued to the victim by the school in which she last studied prior to joining her school.



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8.5.P.W.5 is the Tutor in Forensic Medicine, Coimbatore Medical College Hospital, Coimbatore. After conducting necessary tests, she opined that the victim is between 13 and 14 years at the time of alleged occurrence. The certificate issued by P.W.4 is marked as Ex.P4.

8.6.P.W.6 is the Doctor who examined the accused and opined that there is no anatomical reason to say that the accused is impotent and issued certificate to that effect which is marked as Ex.P5.

8.7.P.W.7 is the Observation Mahazar witness. He deposed that the Inspector of Police visited the scene of occurrence and prepared observation mahazar and rough sketch and he witnessed the same. The Observation Mahazar is marked as Ex.P6 and the Rough sketch is marked as Ex.P8.

8.8.P.W.8 is the Sub-Inspector of Police, All Women Police Station North, Tiruppur who received complaint from the defacto complainant and registered an FIR in Crime No.8 of 2017 under Sections 5(l), 5(n), 6,



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9(l), 9(n) and Section 10 of POCSO Act and Section 506(ii) of IPC. FIR is marked as Ex.P7.

8.9.P.W.9 is the Investigating Officer. On 19.03.2017, she examined the witnesses YY, ZZ, XX, Senthil, Selvam, Chinnadurai, Parvathi, Velladurai, Elumalai and recorded their statements. P.W.9 sent the victim for medical examination to the Government Hospital, Tiruppur through the Woman Police Constable Kamakshi. After investigation, she produced the accused before the learned Judicial Magistrate. On 19.03.2017, P.W.9 seized the yellow colour Chudidhar top, which is marked as M.O.1 and the yellow colour Chudidhar pant, which is marked as M.O.2 produced by the defacto complainant in Mahazar. The seizure mahazar is marked as Ex.P9 and 164 Cr.P.C., statement of the victim is marked as Ex.P10. The statement from the victim was recorded through video also. M.O.3 is the Compact Disc (CD) which contain the victim's statement. After completion of the investigation, she filed charge sheet under Sections 5(l)(n) read with 6 of the POCSO Act and Section 506(ii) of the Indian Penal Code .



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9.As per the deposition of P.W.1 and P.W.2, the prosecution has established the fact that on the material point of time between 08.03.2017 and 18.03.2017, P.W.1, P.W.2, P.W.2's husband and P.W.2's son were staying in the accused house. P.W.1 in her evidence has stated that at the time of offence, she was 13 years old. P.W.2 in her evidence has deposed that at the time of occurrence, victim is 15 years old. The prosecution examined the Headmaster as P.W.4 where the victim girl was studying. She deposed that as per the school records, the victim was born in the month of May 2005. She deposed that based on the transfer certificate where the victim girl was last studied, the said entry has been made. Admittedly, the prosecution did not file the birth certificate. The prosecution examined the Doctor – P.W.5 Tutor in Forensic Medicine, Coimbatore Medical College Hospital, Coimbatore and as per her evidence, the victim was 13 to 14 years. The appellant / accused did not deny the said fact. Hence, in view of the evidence of P.W.1 and P.W.2 and medical evidence trial court has decided that at the time of alleged occurrence, the victim was 13 years old. There is no reason to reject the evidence of P.W.1 and P.W.2. The evidence of P.W.1 and P.W.2 in this regard inspires confidence of the Court.



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10. Admittedly, P.W.1's brother is a blind and accused mother is a age old woman. Hence, non-examination of the brother of P.W.1 does not fatal to the prosecution case. Medical evidence corroborates the evidence of victim and her mother (P.W.1 and P.W.2). The Doctor (P.W.3) who examined the victim deposed that on 19.03.2017 when she was on duty at Government Headquarters Hospital, Tirupur, the victim (ZZ) aged 13 years was brought for medical examination through Woman Police Constable Kamakshi. She further deposed that on enquiry, the victim stated that from 08.03.2017 to 17.03.2017 daily between 02.00 and 02.30 pm, she was sexually harassed and assaulted by a known person. She further deposed that on her examination, hymen was not intact and no external injuries were seen over the victim. In order to ascertain the age of the victim, she referred the victim to Coimbatore Medical College Hospital for the opinion of the Radiologist, as the Radiologist in her hospital was on leave. She further deposed that she collected vaginal smear from the victim and the same was sent to the Forensic Sciences Laboratory, Coimbatore for chemical analysis. She issued Medical Certificate which is marked as Ex.P2.



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11.As per medical evidence, no external injuries were found on the victim but the hymen was not intact. Doctor admits that for a person involved in sports activities there are chances for the hymen tear.

12.Learned counsel for appellant drew our attention to the above medical evidence. If really the victim was subjected to penetrative sexual assault from 08.03.2017 to 18.03.2017, then she would have sustained external injuries. Since there are no external injuries found on the victim, it creates a doubt over the prosecution case. Learned counsel further argued that blood stained clothes said to have been worn by the victim at the time of occurrence has not been seized in the presence of independent witnesses and the blood stained clothes seized are not sent for chemical examination to the Forensic Science Laboratory.

13.This Court has carefully considered the appellant's side above arguments. As stated supra, the prosecution has proved the foundational facts by examining P.W.1, P.W.2 and Doctor. There is no reason to disbelieve the said evidences. In view of the facts and circumstances of the case i.e., offences



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took place between 08.03.2017 and 18.03.2017, naturally there may not be any blood stain over the cloth of the victim. Merely because no external injuries found, the appellant cannot contend that no offence was happened. Hence, this Court is not inclined to accept the appellant's side above line of arguments.

14.It is apposite to mention Sections 29 and 30 of the POCSO Act, which reads as follows:

'29. Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence



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for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.'

15.The defense of the appellant is that the victim's father used to take the TVS 50 belonging to the accused and ride the same. P.W.2 has also admitted the same in her cross examination. Thereafter, the husband of P.W.2 sold the said vehicle without the knowledge of the accused and also committed theft of Rs.3,000/- from the accused pocket and when the accused questioned about the same, in order to escape from the clutches of law, he has lodged a false complaint against the accused through his wife. The appellant has to substantiate his defense by examining himself or by producing any documents or by way of examination of the prosecution witnesses.



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16. In the absence of any material evidence adduced by the appellant, this Court holds that appellant has not established his defense. In view of the above, the appellant failed to rebut the presumption under Sections 29 and 30 of POCSO Act. The victim's evidence is cogent and clear. The victim's evidence has been corroborated by her mother P.W.2. So the trial court, after considering all the materials and evidences on record, has rightly decided that the prosecution has proved the charges under Sections 5(l) r/w 6 and 5(n) r/w 6 of Protection of Children From Sexual Offences Act, 2012 and hence, there is no necessity to interfere with the conviction recorded by the trial court. The point no.(i) is answered accordingly against the appellant / accused and in favour of the prosecution.

Discussion and Decision to Point No.(ii) :

17. The learned Sessions Judge convicted the appellant for the offences under Sections 5(l) r/w 6 and 5(n) r/w 6 of Protection of Children From Sexual Offences Act, 2012 and sentenced him to undergo Rigorous Imprisonment for Life, with fine of Rs.10,000/- for each of the offences under



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Sections 5(l) r/w 6 and 5(n) r/w 6 of POCSO Act, in default, payment of fine, to undergo additional Rigorous Imprisonment for one year for each of the offences. The Trial Court further directed that the Life sentences shall run consecutively.

18.As stated in point no.(i) supra, prosecution has proved the charges under Section 5(l) read with 6 and 5(n) read with 6 of POCSO Act and conviction recorded by the trial court is in order. Hence, there is no necessity to interfere with the said decision. As regards to the sentences imposed by the trial court is concerned, the trial court awarded Life imprisonment for each of the offences. That decision is also correct.

19.This Court is of the view that order to run the Life sentences one after another is not desirable one in view of the Constitutional Bench judgment of the Hon'ble Supreme Court reported in **2016 (8) SCC 313 [MUTHURAMALINGAM AND OTHERS VS. STATE REPRESENTED BY INSPECTOR OF POLICE]**. Whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he



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has been tried in a single trial, the Hon'ble Apex Court answered the question in negative as follows:

'34.In conclusion our answer to the question is in the negative. We hold that while multiple sentences for imprisonment for life can be awarded for multiple murders or other offences punishable with imprisonment for life, the life sentences so awarded cannot be directed to run consecutively. Such sentences would, however, be super imposed over each other so that any remission or commutation granted by the competent authority in one does not ipso facto result in remission of the sentence awarded to the prisoner for the other. '

Conclusion:

20.In view of the Apex Court decision, consecutive Life sentences awarded by the trial court is not in accordance with law. Hence, in that extent, the trial court judgment is to be interfered by this Court. Point no.(ii) is answered accordingly.



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21.As far as offence under Section 506(ii) of IPC is concerned, the trial court rendered finding that the prosecution has not proved the charge against the accused and the accused is found not guilty under Section 506(ii) of IPC. Since the prosecution did not file appeal against the same, the same attained finality.

22.Resultantly, the Criminal Appeal is partly allowed and the conviction passed in judgment dated 28.09.2018 in Spl.S.C.No.31 of 2017 by the learned Magalir Neethimandram (Fast Track Mahila Court) Tiruppur is confirmed. However, the sentence imposed by the Trial Court is modified to the following effect:

<i>Appellant's Rank</i>	<i>Provision under which convicted</i>	<i>Sentence</i>
Sole accused	Sections 5(l) r/w 6 and 5(n) r/w 6 of POCSO Act	To undergo Rigorous Imprisonment for Life, with fine of Rs.10,000/- for each of the offences under Sections 5(l) r/w 6 and 5(n) r/w 6 of POCSO Act, in default of payment of fine, to undergo additional Rigorous Imprisonment for one year for each of the offences.
	The above sentences are directed to run CONCURRENTLY and the period of sentence already undergone by the accused is ordered to be set off under Section 428 of Cr.P.C.	



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In all other aspects, the judgment dated 28.09.2018 passed in Spl.S.C.No.31 of 2017 by the learned Magalir Neethimandram (Fast Track Mahila Court) Tiruppur remains the same / unaltered.

(M.S., J.)

(R.S.V., J.)

09 / 08 / 2023

Index : Yes
Speaking
Neutral Citation : Yes
TK

To

- 1.The Sessions Judge
Magalir Neethimandram
(Fast Track Mahila Court)
Tiruppur.
- 2.The Inspector of Police
All Women Police Station North
Tiruppur.
- 3.The Public Prosecutor
High Court of Madras.

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M.SUNDAR, J.
AND
R.SAKTHIVEL, J.

TK

PRE-DELIVERY JUDGMENT MADE IN
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