



Crl.A(MD)Nos.221, 278 of 2019, 335 of 2020 and 542 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 10.01.2023

Pronounced on : 27.01.2023

CORAM

**THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN
AND
THE HONOURABLE MR. JUSTICE SUNDER MOHAN**

Crl.A.(MD).Nos.221, 278 of 2019, 335 of 2020 and 542 of 2022
and

Crl.M.P.(MD).No.8957 of 2022

Crl.A.(MD).No.221 of 2019

Chiranjeevi

....Appellant/ Accused No.5

VS.

The State, through
The Inspector of Police,
All Woman Police Station,
Sivagangai,
Sivagangai District.
Cr.No.3/2018

....Respondent / Defacto Complainant

Prayer : Criminal Appeal filed under Sections 374(2) of Criminal Procedure Code to set aside the sentences and conviction in Special Sessions Case No.10 of 2019, on the file of the Sessions Judge, Mahalir Neethimandram, Madurai, dated 05.04.2019, by allowing this Criminal Appeal.



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Crl.A(MD)Nos.221, 278 of 2019, 335 of 2020 and 542 of 2022

For Appellant : Mr.C.Arul Vadivel @ Sekar
for Mr.G.Bhagavath Singh

For Respondent : Mr.A.Thiruvadikumar
Additional Public Prosecutor

Crl.A.(MD).No.278 of 2019

Prabhakar

....Appellant/ Accused No.3

vs.

State through
The Inspector of Police,
All Women Police Station,
Sivagangai,
In Crime No.3 of 2018

....Respondent / Complainant

Prayer : Criminal Appeal filed under Sections 374(2) of Criminal Procedure Code to call for the records from the Lower Court and set aside the conviction and sentence imposed on the appellant by the learned Sessions Judge, Mahalir Neethimandram, Madurai in S.C.No.10 of 2019 dated 05.04.2019.

For Appellant : Mr.N.Ananthapadmanabhan
for M/s.APN Law Associates

For Respondent : Mr.A.Thiruvadikumar
Additional Public Prosecutor

Crl.A.(MD).No.335 of 2020

Sulaiman

....Appellant/ Accused No.4

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Crl.A(MD)Nos.221, 278 of 2019, 335 of 2020 and 542 of 2022

vs.

State through
The Inspector of Police,
All Women Police Station,
Sivagangai,
Sivagangai District.
(In Crime No.03 of 2018)

....Respondent / Complainant

Prayer : Criminal Appeal filed under Sections 374 of Criminal Procedure Code to call for the entire records connected with the judgment rendered by the Hon'ble Sessions Judge, Mahalir Neethimandram, Madurai in Special Sessions Case No.10 of 2019 dated 05.04.2019 and set aside the same and consequently acquit the appellant.

For Appellant : Mr.K.Samidurai
(Legal Aid Counsel)

For Respondent : Mr.A.Thiruvadikumar
Additional Public Prosecutor

Crl.A.(MD).No.542 of 2022

1.Pandi @ Burma Pandi @ Durai Pandi

2.Selvam @ ArulpandianAppellants/Accused Nos.1 and 2

vs.

State
represented by Inspector of Police,
All Women Police Station,
Sivagangai,
Sivagangai District.
(Crime No.3/2018)

....Respondent / Complainant



CrI.A(MD)Nos.221, 278 of 2019, 335 of 2020 and 542 of 2022

Prayer : Criminal Appeal filed under Sections 374(2) of Criminal Procedure Code to call for records and set aside the judgment and conviction dated 05.04.2019 in Special S.C.No.10 of 2019 on the file of the learned Sessions Judge (FAC), Mahila Court, Madurai and acquit the appellants and thus render justice.

For Appellants : Mr.R.Manickaraj
for Mr.S.Arockiya Selva Ramesh

For Respondent : Mr.A.Thiruvadikumar
Additional Public Prosecutor

COMMON JUDGMENT

SUNDER MOHAN, J.

The appellants have preferred the above appeals aggrieved by the judgment of conviction and sentence imposed by the learned Sessions Judge (Fast Track) FAC, Mahila Court, Madurai in S.C.No.10 of 2019 dated 5th April 2019.

2. The following chart would indicate the offences for which the appellants were convicted and sentenced by the Trial Court.



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S. No.	Criminal Appeal No.	Accused	Convicted for offences	Sentence
1.	542/2022	1.Pandi @ Burma Pandi @ Durai Pandi (A1)	a) Section 366(A) IPC	10 years of rigorous imprisonment and a fine of Rs.10000/- and in default to undergo one year simple imprisonment
			b) Section 10 r/w Section 9(g) of the POCSO Act	7 years of rigorous imprisonment and a fine of Rs.5000/- and in default to undergo 6 months simple imprisonment
			c) Section 6 r/w 5(h) and 5(g) of POCSO Act	Life imprisonment and a fine of Rs.10,000/- and in default to undergo one year simple imprisonment (Section 376 D IPC invoked for sentence) No separate sentence for offence under Section 6 r/w 5(h) of POCSO Act
			a) Section 352 IPC	3 months rigorous imprisonment and a fine of Rs.500/- and in default to undergo two weeks simple imprisonment
			b) Section 366(A) IPC	10 years rigorous imprisonment and a fine of Rs.10000/- and in default to undergo one year simple imprisonment



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S. No.	Criminal Appeal No.	Accused	Convicted for offences	Sentence
2.	278/2019	Prabhakar (A3)	a) 366(A) IPC	7 years rigorous imprisonment and a fine of Rs.5000/- and in default to undergo 6 months simple imprisonment
			b) Section 10 r/w Section 9(g) of POCSO Act	5 years rigorous imprisonment and a fine of Rs.5000/- and in default to undergo 6 months simple imprisonment
			c) Section 6 r/w 5(g) of the POCSO Act	25 years rigorous imprisonment and a fine of Rs.10000/- and in default to undergo one year simple imprisonment. (Section 42 of POCSO Act and Section 376 D IPC invoked)



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S. No.	Criminal Appeal No.	Accused	Convicted for offences	Sentence
3.	335/2020	Sulaiman (A4)	a) Section 366(A) IPC	7 years rigorous imprisonment and a fine of Rs.5000/- and in default to undergo 6 months simple imprisonment
			b) Section 10 r/w Section 9(g) of POCSO Act	5 years rigorous imprisonment and a fine of Rs.5000/- and in default to undergo 6 months simple imprisonment
			c) Section 6 r/w Section 5(g) of POCSO Act	25 years rigorous imprisonment and a fine of Rs.10000/- and in default to undergo one year simple imprisonment (Section 42 of POCSO Act and Section 376 D IPC invoked)



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S. No.	Criminal Appeal No.	Accused	Convicted for offences	Sentence
4.	221/2019	Chiranjeevi (A5)	a) 366(A) IPC	5 years rigorous imprisonment and a fine of Rs.5000/- and in default to undergo 6 months simple imprisonment
			b) Section 17 r/w Section 6 and 10 of POCSO Act	20 years rigorous imprisonment and a fine of Rs.10000/- and in default to undergo one year simple imprisonment (Section 42 of POCSO Act and Section 376 D IPC invoked)

3. a) The case of the Prosecution is that on 10.02.2018 at about 11.00 PM, the accused five in number were discussing amongst themselves that it would be nice if they had girls for satisfying their sexual needs; that A1 and A2 told the others that they can call the daughters of one Perumal, who lived in an isolated house near Peranipatti at Indira Nagar; that at about 11.15 PM, all the accused went in a car to the victim's house; A2 and A3 got down from the car and when the victim's mother, P.W.2 saw them with the help of mobile torch light and asked them as to why they came at that hour,



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A2 said to have abused her in filthy language; thereafter A2 attacked the sister of the victim and took away the victim in the TATA Indica car bearing Registration No.TN 59 1766; that all the five accused took the victim minor girl in the said car and took her to a coconut grove situated on the road between Keelapungudi and Melur and thereafter, A1 to A4 committed gang penetrative sexual assault on the victim.

b) It is further the case of the prosecution that after the occurrence, P.W.1, victim came back to her house and informed about the incident to P.W.2 and P.W.3, her mother and sister respectively. P.W.2 called one Illayaraja, who is the son of her husband's first wife, to give a complaint. The said Illayaraja informed them that he would come the next day morning as there were no bus facilities at that time. Thereafter, on arrival of the said Illayaraja, P.W.1 victim, P.W.2 gave a complaint to the respondent Police at 12.00 noon on the same day. In the said complaint, P.W.1 had named A1 and A2 and stated that three others had taken her in a TATA Indica car bearing Registration No.TN 59 1766 and four persons committed gang penetrative sexual assault on her. P.W.22, the Investigating Officer registered the complaint in Crime No.3 of 2018 for the offences under Section 366 (A), 376(2)(g), 376(2)(i) IPC and Section 5(g) r/w 6 of the



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POCSO Act and commenced investigation. The complaint is marked as Ex.P1 and the printed FIR is marked as Ex.P43. The victim was thereafter sent along with her mother to the hospital for medical examination. P.W.15 is the Doctor, who had examined the victim and gave a certificate marked as Ex.P24. In the said certificate, P.W.15, Doctor, had stated that she had collected vaginal smear slides for forensic examination and gave the following opinion:

“(i) Hymen not intact. vagina admits two fingers.

(ii) No external injuries in the external genitalia

No internal injuries in the cervix or vagina”

c) P.W.22 went to the house of the victim and prepared observation mahazar, Ex.P2. She had examined the victim and others and seized M.O.1 nighty worn by the victim at the time of occurrence by Ex.P3, seizure mahazar. Thereafter, P.W.2 visited the second place of occurrence, namely, where the alleged gang penetrative sexual assault took place, along with the Assistant Director, Forensic Science Department on identification of the place by the victim. She prepared Ex.P4 observation mahazar and Ex.P45 rough sketch of the occurrence. Thereafter, she seized a red colour underwear of the victim from the scene of occurrence identified by the



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victim and took soil sample under seizure mahazar, Ex.P5. The Assistant

Director, Forensic Science Department prepared report marked as Ex.P46.

d) On 12.12.2018, P.W.22 made a request to the learned Judicial Magistrate No.I, Sivagangai for recording the statement of victim under Section 164 CrPC. On 14.02.2018 at about 10.00 AM, P.W.22 arrested A1 in the presence of one Prabhu. On his confession, a green colour lungi and a navy blue full shirt and a red colour poomex underwear worn by the first accused at the time of occurrence was seized under Ex.P8, seizure mahazar. P.W.22 thereafter filed Ex.P47, a report for altering the offences to Section 366(A) IPC, 5(g) r/w 6 of POCSO Act, 294 (b) IPC, 323 IPC, 376 (2)(a)(i) and 506(ii) IPC. On 15.02.2018, she produced the victim before the Judicial Magistrate, Sivagangai for recording the 164 CrPC statement. The 164 CrPC statement of the victim is marked as Ex.P34.

e) On the same day, she arrested A3, Prabhakar and A5, Chiranjeevi at Semabanoor bus stop at about 20.00 hours. On his confession, P.W.22 recovered the dress worn by A3 under Ex.P10, seizure mahazar. She prepared Ex.P12, seizure mahazar for seizure of TATA Indica car bearing Registration No.TN 58 AW 3855 and an iron aruval under Ex.P12, seizure mahazar.



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f) On 16.02.2018, she forwarded the vaginal smear taken from the victim to the Regional Forensic Science Laboratory. She arrested A4, Sulaiman at about 4.00 PM on 18.02.2018. She seized the dress worn by the said Sulaiman under Ex.P14, recovery mahazar.

g) On 27.02.2018, test identification parade was conducted for accused 3 to 5 in the presence of Judicial Magistrate, Thiruppathur, PW21. The victim P.W.1 identified A4, Sulaiman thrice. However, she could not identify A5. The test identification parade for A3 could not be conducted since he had bandage in the left leg and the right wrist. P.W.2 could not identify any of the accused. On 07.03.2018, the accused 1 to 5 were subjected to medical examination at the Government Medical Hospital, Sivagangai, by P.W.16, Dr.Senthil Kumar. On 24.04.2018, test identification parade was conducted for identification of A3 by P.W.1 and P.W.2. Both the victim P.W.1 and P.W.2 could not identify A3. Thereafter, P.W.22 concluded the investigation and filed the final report before the Trial Court.

4. Eight charges were framed against the accused by the Trial Court. The prosecution examined P.W.1 to P.W.22 and marked Exhibits P1 to P55 to prove their case. The accused denied their involvement when they were



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questioned under Section 313 CrPC and stated that they were falsely implicated. They had marked Exhibits D1 to D5 through cross-examination of P.W.22 in support of their case. P.W.1 is the victim. P.W.2 is the mother of the victim. P.W.3 is the sister of the victim. P.W.4 is the witness to the observation mahazar and seizure mahazar prepared at the house of the victim. P.W.5 is the Revenue Inspector, who was the witness to the arrest of A1 and seizure of his dress materials. P.W.6 and P.W.7 speaks about the arrest of A3 and A5. They speak about the seizure of car and the other articles on the confession of A3, Prabhakar. P.W.8 speaks about the arrest of A2. P.W.9 to P.W.11 are the Police Constables, who assisted in the investigation. P.W.12 is the Headmaster of Government Higher Secondary School of Keelapungudi, who issued Ex.P21 certificate evidencing the date of birth of the victim. P.W.13 and P.W.14 are the constables, who assisted in the investigation. P.W.15 is the Doctor, who had examined the victim. P.W.16 is the Doctor, who issued Ex.P26 certificate and opined that the victim's age was between 15 and 17 years on radiological examination. He had also examined the accused persons and opined that they were not impotent. P.W.17 is the Scientific Assistant, who issued Ex.P32 certificate, wherein, he had stated that he detected spermatozoa on all the three smears.



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P.W.18 and P.W.19 are the Constables, who assisted in the investigation.

P.W.20 is the Judicial Magistrate, who recorded the 164 CrPC statement of the victim. P.W.21 is the Judicial Magistrate, who conducted the test identification parade. P.W.22 is the Investigating Officer.

5. The Trial Court found that the prosecution has established the major offences charged. It acquitted all the accused for the charge under Section 120-B IPC. It acquitted the Accused No.2 of the charge under Section 294(b) IPC. As regards the other charges, the Trial Court convicted and sentenced the accused to imprisonment as elaborated earlier.

6. Mr.R.Manickaraj, learned counsel for A1 and A2 submitted as follows:

a) that the prosecution has suppressed the genesis and origin of the occurrence. In Ex.P24, which is the medical examination report of the victim, it is recorded as follows:

“Alleged to have been raped by 4 unknown persons at Kotanathampatti on 10.02.2018”.



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This report would falsify the prosecution case which is that the victim knew A1 and A2. That apart, the place of the alleged gang rape mentioned in Ex.P24 is totally different and 10 kilometres away from the place of occurrence as per the prosecution case.

b) The evidence of P.W.1 to P.W.3 would show that police officials from Madhagupatti Police Station came to the house of the victim on 11.02.2018 at 5.00 AM and conducted an enquiry. Therefore, Ex.P1 cannot be said to be the first information given to the respondent Police. The presence of police officials much prior to the time of lodging Ex.P1 complaint would not only make the complaint inadmissible but highly suspicious.

c) It is the case of the prosecution that the respondent Police came to know the place of occurrence of gang rape only after the victim pointed out the place at 8.00 PM on 11.02.2018. However, in Ex.P46, which is the report made by the Assistant Director, Mobile Forensic Science Department called the “scene of crime visit report” dated 13.02.2018, it is shown that the mobile unit visited the scene of occurrence at about 15.30 hours on 11.02.2018. This report belies the prosecution case that the respondent came to know about the place of occurrence only at 8.00 PM on 11.02.2018



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on the pointing out of P.W.1 victim. This further establishes that the prosecution had falsely created a scene of occurrence.

d) The recovery of TATA Indica car bearing Registration No.TN 58 AW 3855 is highly doubtful. In any case, the said car has nothing to do with the alleged offence. It is the case of the prosecution that car bearing Registration No.TN 59 1766 was used for the occurrence. The prosecution's story that a number plate containing the above registration number was fixed in TN 58 AW 3855 cannot be believed. In Ex.P12, seizure mahazar, there is no reference to seizure of two number plates. However, these two number plates were added in Form-95 marked as Ex.P52. This shows that the investigation attempted to create records to somehow substantiate its case. That apart, the two number plates did not have holes on either side and therefore, could not have been affixed and shows manipulation in the investigation.

e) The conduct of the victim's mother in not complaining about the alleged occurrence of kidnapping to neighbours and not giving a complaint immediately throws a serious doubt in the prosecution case. Further, the printed FIR, Ex.P43 reached the Court only on 12.02.2018 at about 15.47 hours. The delay in registration and sending the FIR show that the



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respondent manipulated the case.

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f) Further, the prosecution not only changed the scene of occurrence of gang rape but also changed the victim's residence to suit their convenience. The Ex.P1 complaint, Ex.P34 164 CrPC statement of victim and the Aadhaar Card of the victim, all would show that the victim stayed at Peranipatti Village, Sivagangai Taluk. However, the prosecution had shifted the residence of the victim to a village at Nalukottai, which comes under separate Panchayat, only to show that there were no nearby houses. The prosecution had done this only to explain the conduct of P.W.2, the mother of the victim in not informing the neighbours about the alleged occurrence of kidnapping. The prosecution has also not examined any independent witnesses to prove the alleged kidnapping of the minor girl. Further, no injuries were found in the private parts of the victim and hence gang rape is improbable.

g) It is the prosecution case that the car was taken on hire from a travels company. The owner of the vehicle has not been examined by the prosecution to establish the fact that the car was taken on hire. Hence, their story that TN 58 AW 3855 was used with fake number plates is improbable.



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7. a) Mr.N.Ananthapadmanabhan, learned counsel for A3 and the appellant in Crl.A.(MD).No.278 of 2019 submitted that above A3 and A5 were arrested on 15.02.2018 in the presence of P.W.6 at 10.00 AM. A3's name was not known to the victim and hence she had not mentioned his name in Ex.P1 complaint. However, when she gave the 164 CrPC statement at 7.00 PM on 15.02.2018, she mentioned A3's name for the first time. This makes her version highly doubtful.

b) Further, P.W.1 and P.W.2 could not identify A3 in the test identification parade and identified the accused for the first time in Court. Even that identification was not done during her first examination but only on a subsequent day when the prosecution sought permission to examine the victim in chief again.

c) The learned counsel further submitted that the answer given by the accused under Section 313 CrPC may be taken into consideration. The accused had stated that he was arrested on 11.02.2018 and police obtained signatures in blank papers and he had nothing to do with the offence. Further, his arrest was made only in the accident case registered in Ilayankudi along with A5. The learned counsel for A3 submitted that the accused sustained injury because of the ill treatment and assault by the



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Police and his hand was fractured. An enquiry was conducted by the Assistant Commissioner of Police, Central Crime Branch and the enquiry report would show that the prosecution case is false. He further stated that this Court had directed the learned Public Prosecutor to submit the enquiry report when this case was earlier listed for hearing.

8. Mr.K.Samidurai, learned counsel for A4 submitted that the victim had not named A4 in the FIR, 164 CrPC statement and in the chief examination done on 10.08.2018. Though she had identified the accused in the test identification parade, the statement made by the accused before the learned Judicial Magistrate conducting test identification parade that the accused was shown at Sivagangai Police Station both to P.W.1 and P.W.2 prior to the conduct of test identification parade ought to be taken into consideration. The accused also was not identified when the victim was first examined on 10.08.2018, but identified only after she was recalled by the prosecution on 01.10.2018. The fact that there are no injuries on the victim would show that she was not subjected to forcible penetrative sexual assault.



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9. Mr.C.Arul Vadivel @ Sekar, learned counsel for A5 would submit

that it is the consistent case of the prosecution that A5 was not involved in the alleged gang penetrative sexual assault. The accused also cannot be held guilty of abetment and there is no evidence to suggest that he had abetted the alleged crime. In fact, the Trial Court had rightly found that the charge under Section 120-B IPC has not been established by the prosecution. A5 is a stranger to the other accused. He was introduced by one Vinoth to the third accused. However, the said Vinoth was not examined by the prosecution for the reasons best known to the prosecution. The learned counsel further submitted that the accused had nothing to do with the car bearing Registration No.TN 58 AW 3855. He was not the driver of the car as could be seen from the records in Crime No.36 of 2018 on the file of Ilayangudi Police Station under Section 304(ii) IPC. The FIR would also show that he has nothing to do with the offence. The learned counsel had also filed an application under Section 391 CrPC in Crl.M.P. (MD).No.8957 of 2022 praying for marking of the records in Crime No.36 of 2018 on the file of Ilayangudi Police Station including the final report.

10. Mr.A.Thiruvadikumar, learned Additional Public Prosecutor



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appearing for the respondent submitted as follows:

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a) That this is a case under the POCSO Act, wherein, the Court shall presume the commission of the offence if the foundational facts have been established by the prosecution as per Section 29 and 30 of the Act. The accused have not rebutted the said statutory presumption.

b) The evidence of the victim is cogent and clear. The victim had no axe to grind against the accused. There was no necessity for her to give a false complaint.

c) The entries made in Ex.P24 is sought to be projected as a serious dent in the prosecution case. The Hon'ble Apex Court and this Court have time and again reiterated that entries made by the Doctor about incidents which have no relevance for the medical examination need not be given much weightage so as to disbelieve the victim's evidence. Further, the place of occurrence mentioned in the Ex.P24 also does not affect the prosecution case. P.W.1 was in a state of shock and it is possible that she could not identify the exact place of occurrence which happened during night. She was taken in the car after the occurrence and dropped in a bus stand. Therefore, there is every possibility of her making a genuine mistake as regards the place of occurrence.



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d) The number plates bearing Registration No.TN 59 1766 were not shown in Ex.P12 seizure mahazar, since the number plates were only subsequently found inside the car and thereafter shown in Form-95, Ex.P52. If the investigation really intended to manipulate the records, nothing prevented them from including the number plates in Ex.P12 mahazar itself. Therefore, nothing can be inferred from the fact that seizure of number plates is not mentioned in Ex.P12 seizure mahazar.

e) The Scientific Officer, P.W.17 have clearly opined that the vaginal smear taken from the victim contained spermatozoa. The said evidence would suggest that the victim was subjected to penetrative sexual assault. Further, the stains found in the nighty of the victim also contained sperms though it did not specifically match with that of the accused.

f) Ex.P46 report mentions about first going to the house of the victim and then going to the scene of occurrence. The exact time of going to the scene of occurrence, which is the place where the alleged gang rape took place has not been mentioned. Therefore, it cannot be said that the report falsifies the prosecution case, which is that the Police went to the scene of occurrence only at 8.00 PM.

g) The learned Additional Public Prosecutor further submitted that the



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Trial Court had considered all these points raised by the appellants and had considered and answered all these points elaborately, which does not call for any interference.

11. Heard the learned counsels appearing for the appellants and the learned Additional Public Prosecutor appearing for the respondent.

12. We have given our anxious consideration to the contentions of the learned counsels and the Prosecution. The Prosecution seeks to prove the offence of Section 366-A IPC, namely, procuration of minor girl and the offence of gang penetrative sexual assault, which are the primary offences, through the evidence of P.W.1 to P.W.3, besides medical evidence and other connected documents. The learned defence counsels have raised several points, which according to them, are lapses in investigation which throws a serious doubt in the prosecution case. It is trite that lapses in investigation *ipso facto* cannot be the sole basis to disbelieve the prosecution case. The lapses must be such that they create a reasonable doubt in the prosecution case. In the light of the above principle, let us analyze the evidence on which the prosecution case rests and the points raised by the defence



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counsels.

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13. Firstly, it has to be seen whether the offence of gang rape has been established and secondly as to who are the perpetrators of the said crime.

a) P.W.1, the victim had lodged the complaint, Ex.P1 at 12.00 noon on 11.02.2018. The complaint has been lodged ten hours after the occurrence. The printed FIR reached the Court on 12.02.2018 at about 15.47 hours. In the said complaint, P.W.1 had stated that four persons except the driver of the vehicle committed rape. She had also stated that she knew A1 and A2 already and that she could identify the other three accused. P.W.1 further stated that the accused came in an Indica car bearing Registration No.TN 59 1766 and took her to a coconut grove situated between Keelapungudi and Melapungudi. She was dropped after the occurrence by the accused at Keelapungudi bus stop. She came walking to her house and reached the house at about 2.00 AM in the morning. In her deposition, she had reiterated the version stated in the complaint. In addition, she had also mentioned about the name of A3, Prabhakar, as one of the persons, who had raped her. She had also stated about the name of



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Prabhakar in the 164 CrPC statement given to the Magistrate on 15.02.2018.

P.W.1 had not identified the accused in Court when she was first examined on 10.08.2018, but she had identified the accused on 01.10.2018 when she was recalled by the prosecution for further chief examination. P.W.2, the mother of the victim had stated about the accused taking the victim in a car and about the verbal abuse of A2, Selvam. Elaborate cross-examination has been done questioning P.W.2's conduct in not informing the neighbours and Police immediately after the occurrence. P.W.3 is the sister of the victim, who also speaks about the offence of procurement of minor girl by the accused. P.W.15, the Doctor, who examined P.W.1 and gave Ex.P24 report had stated that the hymen was not intact and about the fact of taking the vaginal smear and sending it for examination by the Forensic Science Department. In her report, which has been extracted in the earlier part of the judgment, she had opined that it was possible that the victim was subjected to rape. P.W.17 is the Scientific Officer, who opined in his report, Ex.P32, that he deducted spermatozoa in all the three smears, thereby suggesting that the vaginal smears taken from the victim contain sperms.

b) The prosecution further sought to establish the age of the victim by



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examination of P.W.12, the Headmaster of the school, where the victim studied from VI to VIII standard. He had issued Ex.P21 certificate, which was based on the school records stating that the date of birth of the victim is 10.06.2004. P.W.16, the Doctor, on radiological examination of victim issued Ex.P26 certificate in which he opined that the age of victim could be between 15 and 17 years.

c) The learned counsels mainly relied upon Exhibits P24 and P46 to show that the version of the prosecution witnesses is highly improbable. In Ex.P24, two aspects have been recorded as said to have been stated by the victim. One is relating to the place of occurrence, namely, Kotanathampatti and the other relating to four unknown persons committing gang rape. It is the case of the defence that these two entries made in Ex.P24 is completely contrary to the prosecution case. The prosecution case is, as stated earlier, that the occurrence took place in a coconut grove situated between Keelapungudi and Melauangudi Villages and the prosecutrix knew two accused, namely, A1 and A2 and the remaining two were unknown. P.W.1 would state in her evidence that she had not stated that she was raped by four unknown persons before the Doctor. Though P.W.15 in her evidence would state that the victim had told her that she was raped at



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Kotanathampatti forest, the said statement in our view would not throw doubt on the evidence of P.W.1, since this was a night occurrence and the victim was taken in a car. There is every possibility of her making a mistake with regard to the actual place of occurrence. Merely because, a wrong place has been stated as the place of occurrence by mistake, the other evidence produced by the prosecution to establish the offence cannot be disbelieved. She had pointed out the place of occurrence to the Investigation Officer later in the evening on the same day. Further, it is settled law that the entries made by the Doctor as to who caused the occurrence, whether it was known or unknown persons has to be appreciated in the facts of a given case. There cannot be a universal rule that such entries will have a bearing on the prosecution case. In the instant case, we cannot lose sight of the fact that the victim was hardly 15 years at the time of occurrence and even if she had stated that four unknown persons had committed rape erroneously, her consistent stand right from the complaint and in her deposition before Court, which is corroborated by her 164 CrPC statement that she knew A1 and A2 cannot be brushed aside.

d) Ex.P46 is the report given by the Assistant Director of Mobile Forensic Science Laboratory, Sivagangai District. The fifth accused would



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state that his name was not known to the victim as per Ex.P1 complaint, which was on 11.02.2018. However, his name is found in the Ex.P46 report prepared on the same day. Therefore, according to the learned counsels, the prosecution has created Ex.P46 report to suit their case. Further, Ex.P46 reached the Court only on 18th March 2018. That apart, the defence counsel would further submit that Ex.P46 report states as if the Police in the presence of Forensic Science Department went to scene of occurrence dated 11.02.2018 at 15.30 hours and the prosecution case is quite contrary to the said report. The Investigating Officer went to the scene of occurrence only at 8.00 PM on 11.02.2018 when the victim took them to the scene of occurrence. Firstly on a reading of Ex.P46 report, we find that the Assistant Director mentions that they first went to the victim's house and thereafter went to the scene of occurrence. In Column 8, though it is mentioned that the time of visit of scene of occurrence is 15.30 hours, an overall reading of Ex.P46 report would show that the time corresponds to the visit made to P.W.1's house. The report is silent as to when they visited the scene of occurrence. Further, the discrepancy in the time of visit to the scene of occurrence in the facts and circumstances of the case even if accepted to be true does not affect the prosecution case in any manner. The defence could



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have very well called the Officer, who prepared Ex.P46 report and confronted him with the alleged discrepancies. The prosecution had dispensed with his examination by invoking Section 293 CrPC. Further, as to the name of the driver of the vehicle mentioned in Ex.P46 report, it is the case of the prosecution that P.W.1 had subsequently informed about the driver's name during the examination by Police. In any event, it is the report of the Assistant Director and any discrepancies in the said report ought to have been confronted with him by the defence. Thus, in our view, the entries in Ex.P46 report does not affect the prosecution case with regard to the offence of rape.

e) The next primary contention of the defence is that P.W.2's conduct in not seeking help of the neighbours and not complaining about the incident to the police officials immediately. It has to be borne in mind that P.W.2 is a poor villager and a single woman who was bringing up two daughters and two sons all by herself. One cannot ignore the reality and practical difficulties in a situation like this. She had informed one Illayaraja, who is the son of her husband's first wife. Even he could not meet the victim because of lack of bus facility. The victim, her mother and the other siblings of the victim had poor living conditions and hence the



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delay and non-examination of neighbours or the conduct of P.W.2 in not raising an alarm and seeking the help of the neighbours does not, in our view, affect the prosecution case in the given circumstances.

f)The presence of Madhagupatti Police Station has been admitted by all the witnesses at 5.00 AM in the morning. The prosecution has not explained the reason for the presence of Madhagupatti Police Station early in the morning. Again considering the over all circumstances of the case, in our view, their presence had not adversely affected the prosecution case. It is true that where the genesis and origin is suppressed a doubt may arise in the prosecution case. However, this again has to be appreciated in the facts and circumstances of the case. In view of the consistent stand of P.W.1 and the fact that she knew A1 and A2 rules out any false implication by the victim as against A1 and A2. As stated earlier, the victim was subjected to penetrative sexual assault and in such circumstances, her version that A1 and A2 and two others subjected her to penetrative assault cannot be disbelieved.

g) The learned defence counsels further submitted that Ex.P12 seizure mahazar did not contain the two number plates, which, according to the prosecution, was the connecting link between M.O.7 car bearing



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Registration No.TN 58 AW 3855 and the car number stated by the victim in

Ex.P1 complaint. However, we find in Ex.P52, Form-95, that these two number plates are mentioned though the prosecution has not explained as to when and how these two number plates were found by them. This is certainly a lacuna in the prosecution case. The learned Additional Public Prosecutor would submit that subsequently the Police had found the number plates inside the car and they had sent it to the Court by Form-95, Ex.P52. However, the said explanation is not borne out by records. The question however is as to how this lacuna can affect the victim's statement. Even assuming that the M.O.7 car was not the car used for the purpose of kidnapping and the investigation was not done in a proper manner on that aspect, it does not affect the version of the victim minor girl in the facts of the instant case as regards the fact of kidnapping and gang rape.

h) The defence relied upon Exhibits D1 to D5 in support of their submission that the seizure mahazars prepared for recovery of articles from the accused pursuant to the confession were fabricated. The documents supplied to them by the detaining authority when they were detained under Act 14 of 1992 and the documents supplied to them by the prosecution differ from each other. We agree that this is a serious discrepancy which



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has not been explained by the prosecution. However, we find that the recoveries of dress materials were not important in the facts and circumstances of the case. Even without those recoveries, the prosecution has established the case of penetrative sexual assault. Therefore, though this error committed by the Investigating Officer is certainly condemnable, but it does not have the effect of disbelieving the entire prosecution case. The defence counsel further submitted that most of the accused were arrested and kept in illegal detention from 11.02.2018 and the arrest was shown on record subsequently. Apart from the suggestions in the cross-examination and the answers given in the examination under Section 313 CrPC, there is nothing to substantiate the said version. This Court had perused the enquiry report in respect of a complaint given by A3 that he was subjected to custodial violence by the Investigating Officer in this case and by Sub-Inspector of Police, Ilayangudi Police Station. The enquiry report reveals that A3 had consistently stated before the learned Magistrate at the time of remand and before the Doctor that he sustained injury due to an accident for which a case in Crime No.36 of 2018 was registered under Section 304(ii) IPC. Therefore, the Assistant Commissioner on enquiry felt that no further action was required. This report therefore is also not in



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favour of the accused.

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i) The next submission of the defence counsel is that the prosecution had deliberately shifted the scene of occurrence with regard to the offence under Section 366-A IPC. P.W.1 had stated in Ex.P1 complaint and before the learned Magistrate that she was a resident of Peranipatti and her Aadhaar card would also substantiate the said statement. However, the prosecution had now shifted the place to Nalukottai Village only to explain the conduct of P.W.2 in not taking the help of neighbours and to explain the non-examination of independent witnesses. In our view, this submission also appears to be far-fetched. It is no doubt true that Nalukottai Village and Peranipatti Village belong to two different Panchayats. However, P.W.1, P.W.2 and P.W.3 in their deposition have stated that they belong to Nalukottai Village. The entries made in the Aadhaar card and earlier statements of P.W.1 can be explained as rightly contended by the learned Public Prosecutor. The entries made in Aadhaar card are not conclusive evidence to show the actual place of residence. Further, in Ex.P44 rough sketch, the place of occurrence is shown as a place between Keelapungudi and Nalukottai and therefore, one cannot presume that the occurrence took



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place at Nalukottai Village though the witnesses and the prosecution have stated the place of occurrence as Peranipatti and Nalukottai alternatively.

The rough sketch as stated earlier indicates that it happened in a place which is between the two villages. Therefore, the alleged discrepancy with regard to the place of occurrence has not adversely affected the evidence of P.W.1. These lapses are in our view lapses in the investigation which do not render P.W.1's evidence doubtful. At this juncture, we have to point out that the lapses in the investigation only establish the perfunctory nature of the investigation in a case of this nature and nothing beyond that.

j) Further, the defence counsels submit that since there were no injuries, gang rape could not have happened. We have to bear in mind that the child victim was under threat and it is highly probable that she offered no resistance. In such circumstances, absence of injury does not advance the case of the defence.

k) So for the above reasons, we hold that the prosecution has established through the evidence of P.W.1 to P.W.3, medical evidence and the report given by the Forensic Science Department that the victim was subjected to gang penetrative sexual assault. The prosecution had also established that the victim was aged 15 years at the time of occurrence.



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The points raised by the defence and the above findings on the points raised have also been rendered bearing in mind the statutory presumption in Section 29 and 30 of the POCSO Act.

14. The next question is with regard to the involvement of the accused. It is the consistent stand of the victim that A1 and A2 had committed penetrative sexual assault and they were known to her. We have no hesitation to hold that A1 and A2 are guilty of the offence of gang penetrative sexual assault for the reasons elaborated earlier.

15. As regards A3, we find that his name was not found in Ex.P1 complaint. His name was first stated by P.W.1 while she was examined under Section 164 CrPC and thereafter, she had mentioned the name of A3 in her deposition before the Trial Court. P.W.1's evidence with regard to the involvement of A3 has to be appreciated in the light of the above facts. We find that A1 was arrested on 14.02.2018 and A3 was arrested on 15.02.2018 at 11.30 AM. P.W.1 had given 164 CrPC statement at 7.00 PM on 15.02.2018. We are of the view that there is every possibility of tutoring by the respondent as regards A3's name before she gave 164 CrPC



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statement. If P.W.1 had known the name of A3, there is no reason why she had not mentioned his name in Ex.P1 complaint. The belated version coupled with the fact that it came after the arrest of A1 and A3 throws a doubt about A3's involvement in the occurrence. Further, the facts narrated above would show that A3 was not identified by P.W.1 during investigation in the test identification parade. She did not identify the accused when she was first examined in chief on 10.08.2018. She identified him much later when she was recalled for further chief examination on 01.10.2018. The first time identification in Court that too during further chief cannot be the sole basis to convict A3, who was not a known person to the victim. Therefore, A3's involvement is highly doubtful.

16. As regards A4, the victim did not mention his name in any of her earlier statements and in her deposition before Court. However, she had identified A4 in the test identification parade and in the subsequent examination report. The identification of A4 in the test identification parade is not substantiate evidence. P.W.1 did not identify A4 when she was first examined in Court. She identified him only on further chief examination conducted two months after the first examination. Such



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identification alone in our view cannot be the sole basis for convicting A4 for the alleged offences considering that there is no other evidence against A4 connecting him to the crime.

17. The charge against A5 is that he drove the car in which the accused had taken the minor girl for the purpose of gang rape. There is no charge of gang rape as against him. However, he is alleged to have abetted the crime. The victim had not named A5 in the first information report and in the 164 CrPC statement as well. She could not identify the fifth accused. She had not named the driver in her chief examination. However, she had named the said accused in the cross-examination. Further, in Ex.P46 report filed by the Assistant Director, his name is found. It is not clear as to how his name finds place. A faint attempt was made by the prosecution to suggest that the victim had informed the Investigating Officer before the Ex.P46 report was prepared. However, if that had been the case, the victim would have mentioned A5's name in her 164 CrPC statement given five hours later before the Magistrate. The victim identified for the first time A5 during her further chief examination on 01.10.2018. It is highly unsafe to convict A5 on the basis of such evidence. It is needless to say that first time



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identification in Court that too two months after she was first examined in chief does not inspire confidence. Further, even if the prosecution case is accepted to be true, we find that the conduct of A5 is such that his acts could not amount to intentional aiding for the offence of gang rape. Therefore, we hold that A5 is not guilty of the offence under Section 366 -A IPC and for the offence under Section 17 r/w 6 and 10 of POCSO Act.

18. We find that P.W.1's evidence as regards the involvement of A1 and A2 has been clearly established. *Falsus in uno is falsus in omnibus* has no applicability in our country. We find that the version of P.W.1 as regards the involvement of A3 to A5 is highly doubtful. The P.W.1 for the first time had named A4 and A5 during cross examination and she identified A3 to A5 during further chief examination. The lapses in the investigation pointed out earlier coupled with the fact of belated naming of the accused and their identification will enure in favour of A3 to A5. Therefore, we hold that A3 to A5 are not guilty of the offences charged against them.

19. Therefore, in fine, A1 is guilty of the offences under Section 366-A IPC, Section 10 r/w 9(g) of the POCSO Act and Section 6 r/w 5(g) and 5(h) of the POCSO Act. A2 is guilty of the offences under Section



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352 IPC, 366-A IPC, Section 10 r/w 9(g) of the POCSO Act and Section 6

r/w 5(g) of the POCSO Act. The other accused are found not guilty of all the offences charged against them. However, as regards sentence, considering the facts and circumstances of the case, we are of the view that a minimum sentence of 20 years imprisonment with a fine of Rs.5000/- (Rupees Five Thousand only) and in default to undergo one year simple imprisonment is appropriate. Though Section 6 provides for a minimum sentence of ten years, since the offence committed by the accused is also an offence punishable under Section 376 D of IPC, which provides for a greater degree of punishment, which has to be imposed by virtue of Section 42 of the POCSO Act. The sentence imposed by the Trial Court for the offences under Section 10 r/w 9(g) of the POCSO Act is sustained, namely, the sentence of seven years rigorous imprisonment and a fine of Rs.5000/- and in default to undergo six months simple imprisonment. As regards the offence under Section 366-A IPC, A1 and A2 are sentenced to rigorous imprisonment of five years and with a fine of Rs.10000/- and in default to undergo one year simple imprisonment. The conviction and sentence for the offence under Section 352 IPC as against A2 imposed by the Trial Court is confirmed. The period of sentence shall run concurrently. Period of



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sentence already undergone shall be set off.

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Name of the accused	Convicted for offence	Sentence
1. Pandi @ Burma Pandi @ Durai Pandi (A1)	a) Section 366-A IPC	5 years rigorous imprisonment and a fine of Rs.10000/- and in default to undergo one year simple imprisonment.
	b) Section 10 r/w 9(g) of the POCSO Act	7 years rigorous imprisonment and a fine of Rs.5000/- and in default to undergo 6 months simple imprisonment
	c) Section 6 r/w 5(g) and 5(h) of the POCSO Act	20 years rigorous imprisonment and a fine of Rs.5000/- and in default to undergo one year simple imprisonment No separate sentence for offence under Section 6 r/w 5(h) of POCSO Act.



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Name of the accused	Convicted for offence	Sentence
2. Selvam @ Arulpandian (A2)	a) Section 352 IPC	3 months rigorous imprisonment and a fine of Rs.500/- and in default to undergo two weeks simple imprisonment
	b) Section 366-A IPC	5 years rigorous imprisonment and a fine of Rs.10000/- and in default to undergo one year simple imprisonment.
	c) Section 10 r/w 9(g) of the POCSO Act	7 years rigorous imprisonment and a fine of Rs.5000/- and in default to undergo 6 months simple imprisonment
	d) Section 6 r/w 5(g) of the POCSO Act	20 years rigorous imprisonment and a fine of Rs.5000/- and in default to undergo one year simple imprisonment

20. In the result,

(i) The Criminal Appeal in Crl.A.(MD).No.542 of 2022 filed by A1 and A2 is partly allowed with the above modification in sentence alone.

(ii) The Criminal Appeals in Crl.A.(MD).Nos.221, 278 of 2019 and 335 of 2020 filed by A5, A3 and A4 respectively are allowed.

(iii) A3, A4 and A5 are directed to be set at liberty. Bail bonds, if any shall stand cancelled. Consequently, connected miscellaneous petition stands closed.



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[G.J.,J.] [S.M.,J]

27.01.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
Lm

To

- 1.The Sessions Judge,
Mahila Court,
Madurai.
- 2.The Inspector of Police,
All Women Police Station,
Sivagangai, Sivagangai District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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DR.G.JAYACHANDRAN, J.

and

SUNDER MOHAN, J.

Lm

Judgment made in
**Crl.A.(MD).Nos.221, 278 of 2019,
335 of 2020 and 542 of 2022**

27.01.2023