



CrI.A(MD).No.342 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on: 11.09.2023

Pronounced on: 03.11.2023

CORAM:

THE HONOURABLE MR. JUSTICE P.DHANABAL

CrI.A(MD) No.342 of 2016

Rajkumar

...Appellant.

Vs.

State by Inspector of Police,
All Women Police Station, Karaikudi.
(Crime No.22/14)

...Respondent

Prayer:Criminal Appeal filed under Section 374(2) Cr.P.C. to call for the records relating to the judgment passed in S.C.No.72/14 the learned Sessions Judge Mahila Fast Track, Sivagangai dated 10.02.2016 and set aside the same and acquit the appellants/accused from the charges leveled against him.

For Appellant

: Mr.P.Aju Tagore

For Respondent

: M.Aasha (Govt. Advocate CrI.Side).

JUDGMENT

This Criminal Appeal has been preferred as against the judgment and conviction passed in Session Case No.72 of 2014 on the file of the Learned



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Sessions Judge Mahila Fast Track, Sivagangai dated 10.02.2016. Wherein the Trial Court had convicted the accused under Section 3 r/w Section 4 of the Protection of Children From Sexual Offences Act, 2012 (in short "POCSO" Act, 2012) and sentenced the accused to undergo 10 years of rigorous imprisonment and to pay a fine of Rs.5,000/- in default to undergo 6 months of rigorous imprisonment. As against the conviction and judgment passed by the trial Court, the present appeal has been filed by the appellant.

2. The case of the prosecution is that on 23.09.2013 at about 5.00 P.M when the de-facto complainant was in her house the labours who were working laying pipe line, asked her to give water, in turn the de-facto complainant asked her daughter (victim girl) to give water to them, accordingly the victim was taken water to the said labours and then she was there for sometime. At that time the accused had conversation with the victim girl and had taken to Cholan Kadu Canal and dragged her in to the pipes and removed her skirt when she shouted, he dragged her and pulled her legs and throttled her and then removed her dress and committed penetrative sexual assault. The victim became unconscious and the victim also sustained injuries on her neck and legs. Thereafter the de-facto complainant searched the victim, at that time the witness PW4 named Lakshmi stated that the victim was taken by the accused, immediately the de-facto complainant made a search and



found that the victim was in unconscious stage in the place of occurrence and then she had taken the victim to the house and then she was admitted in the hospital. Thereafter she gave a complaint/Ex.P1 and based on the aforesaid complaint, PW15 has registered an FIR/Ex.P16 for the offences punishable under Section 376 of IPC and Section 5 (i) (m) read with Section 6 of the POCSO Act, 2012. Thereafter, P.W.15 investigated the case and then P.W.16 conducted further investigation and filed final report as against the accused under section 376 IPC and section 5 r/w. 6 of POCSO Act.

3. Thereafter the Trial Court has furnished the copies of records relied on by the prosecution under Section 207 of the Cr.P.C. Thereafter the Trial Court framed charges as against the accused for the offence under section 5 (i) (m) r/w. Section 6 of POCSO Act, 2012 and the charges were read over and explained to the accused and he denied the charges levelled against him. Thereafter the prosecution has examined PW1 to PW16 and marked Ex.P1 to P14 and also marked M.O.1 to M.O.6. On the side of the accused no witnesses were examined and no documents were marked. After completion of prosecution witnesses the accused was examined under Section 313 (1) (b) of Cr.PC with regard to the incriminating evidence found against him and he denied the same. The Trial Court after considering the evidence, adduced on either sides and hearing both sides found the accused guilty for the offences



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under Section 3 read with Section 4 of POCSO Act and punished the accused to undergo 10 years rigorous imprisonment and to pay a fine of Rs.5,000/- in default to undergo 6 months rigorous imprisonment.

4. As against the above said judgment and conviction the appellant has preferred this appeal on the following grounds:-

(i) Judgment of the court below is against law and weight of evidence and opposed to the facts of the case.

(ii) The Trial Court has framed the charges under Section 5 (1), 9 (1) and Section 21 of the POCSO Act, 2012 but the Trial Court convicted for under Section 3 r/w 4 of the POCSO Act, 2012 without altering the charges.

(iii) The Trial Court failed to consider the absence of age proof for the victim to prove that she was child at the time of occurrence. Though the victim was school going child and the prosecution failed to produce any school certificates.

(iv) The Trial Court committed the error in accepting the evidence of PW13 to confirm the age of victim and the Trial Court failed to consider the medical evidence is an opinion and it is not substantive piece of evidence.

(v) The Trial Court ought to have disbelieved the identity and was not proved by the prosecution as the PW2 victim not properly identified the accused and she in cross-examination stated that in the hospital at about 9



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p.m., police came and recorded her statement and she also put her signature.

While so the said FIR and the statement recorded by the police was suppressed. The evidence of PW2 is totally contra to the statement under recorded under Section 164 of Cr.PC.

(vi) The Trial Court failed to consider the place of occurrence that has not been proved by the prosecution and the prosecution failed to collect the blood stains at the place of occurrence. According to the evidence of PW4 the place of occurrence is two kilometres away from the house of victim but according to the evidence of PW1 and PW2, the place of occurrence is very near to the house of victim. Therefore, the Trial Court failed to consider the aforesaid discrepancy.

(vii) The Trial Court failed to consider that the evidence of victim is not corroborated with the medical evidence. As per the medical evidence there were no injuries found in the private part of the victim. The Trial Court failed to consider the delay in sending the FIR to the Court and no independent witnesses were examined from the place of occurrence. The Trial Court failed to consider that the prosecution has failed to prove the case beyond all reasonable doubts. The Investigating Officer failed to send the dress material of the accused for medical analysis, therefore, the Trial Court judgment and conviction are liable to be set aside.



5. The Learned Counsel appearing for the appellant would contend that the prosecution has suppressed the genesis of the case, as per the evidence of PW11 who is the Doctor has stated that information was given to the Karaikudi South Police and they came to the hospital and asked about the case and PW4 also admitted that Karaikudi Police came to the house of victim at about 8 to 8.30 p.m. and enquired them but the FIR has been registered by the All Women Police Station, Karaikudi, therefore the above said material fact with regard to the First Information given by the Doctor to the Karaikudi South Police has not been brought to the knowledge of the Court. The evidence of victim is inconsistent and the same was tutored by somebody. The victim girl during her cross-examination admitted that when she came to the Court in previous occasion, the police also accompanied with her and stated about the case, therefore, it reveals that she was tutored. However, the chief-examination of the victim is totally contra to the statement recorded under Section 164 of the Cr.PC and also statement recorded by the Investigating Officer during investigation. The evidence of PW1 and PW2 are contradict to each other and the evidence of PW4 also not tallied with the evidence of PW1 in respect of place of occurrence. The age of the victim has not been proved by the prosecution. The medical records alone were produced by the prosecution and the same are not sufficient to prove the age of the victim. Therefore, the prosecution has failed to prove the age of the victim. As per the evidence of



PW.11 the victim at the time of medical examination told that the occurrence took place near the Cholan Kadu but in the evidence of PW7 and Ex.P17, it is nowhere stated about the residential place. However PW2 also stated that the occurrence took place at Madai. In one place the prosecution stated that near the canal in another place the prosecution stated that near the Madai but there is a difference between Canal and Madai. Therefore, the prosecution failed to prove the correct place of occurrence.

5.1. The identification of the accused also is doubtful. PW1, PW2 and PW4 have also stated that the accused person is not known to them prior to the date of occurrence. If so how they identified the accused also creates doubts over the prosecution but the Trial Court failed to consider the same. PW12 who is scientific expert has also stated that he examined 6 articles and 3 items which were found blood stains and item 4 has no blood stains, no sperms found in 1 to 6 items. The blood found in 1 to 3 items are human 'B' group. But no evidence that the blood group belongs to the accused. Therefore the evidences adduced by the prosecution is not sufficient to prove the case of the prosecution. The prosecution failed to recover all the clothes in accordance with law. The medical evidence are also not in support of the prosecution and PW10 and 11 have deposed about the medical examination of the victim. The Medical evidence is also not incriminating against the accused. The evidence



of the prosecution witnesses are contrary to each other with regard to the identification of accused and the place of occurrence, therefore, the prosecution has failed to prove the case beyond reasonable doubts. The trial Court has failed to put specific questions at the time of examination under Section 313 (1) (b) of Cr.P.C, thereby the incriminating circumstances have not been properly explained to the accused. Therefore, the prosecution has failed to prove the charges levelled against the accused.

6.The learned Government Advocate (CrL.Side) for the respondent would contend that the accused committed penetrative sexual assault towards the victim who was 12 years old and a school going girl. In order to prove the age of the victim the prosecution examined as PW13 who conducted the medical examination of the victim and she deposed about age of the victim. PW1 is the de-facto complainant and she deposed about the lodging of the complaint and seeing the victim in unconscious stage and then taken her to the hospital and the Doctors PW11 and 13 who treated the victim have also deposed about the treatment given to the victim in the hospital. The PW2 who is the victim also categorically deposed about the occurrence and PW4 is neighbour and she also deposed about the fact that the accused had taken the victim soon before the occurrence. PW15 and PW16 have also deposed about the registration of FIR and the investigation of the case and filing of final



report. The prosecution has also examined PW1 to PW16 and marked Ex.P1 to P14 and also marked M.O.S.1 to 6 and thereby the prosecution has proved the charges leveled against the accused and the Trial Court also elaborately discussed about the evidence adduced by both the sides and fairly came to the conclusion that the accused found guilty, under Section 3 read with Section 4 of the POCSO Act and convicted the accused there under. As per Section 29 of the POCSO Act, the accused has to prove the contrary, since the case is falling under Section 3 read with Section 4 of the POCSO Act. In order to prove the contrary, there is no sufficient evidence adduced by the accused and the Trial Court has correctly convicted the accused and thereby this appeal is liable to be dismissed.

7. Heard both sides and perused the materials on record. Upon hearing on both sides and perusing the records, the judgment of Trial Court and grounds of appeal, the points for determination in this appeal are:-

(i). Whether the prosecution has proved the charges levelled against the accused for the offence under Section 3 read with Section 4 of the POCSO Act.

(ii) Whether the judgment and conviction passed by the Trial Court in S.C.No.72 of 2014 are sustainable in law and on facts.



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8. In order to prove the case of prosecution the mother of victim was examined as PW1 and she in her evidence stated that the victim was aged about 12 years on the date of occurrence and the victim girl in this case PW2 has also in her evidence stated that she was aged about 12 years on the date of occurrence. PW3 who is the father of the victim also, in his evidence stated about the age of the victim. Further the prosecution has examined PW13/Doctor and he deposed before the Trial Court that he conducted medical test for the victim based on the requisition made by the Court and as per the medical examination conducted by PW13, the victim was aged about 10 to 12 years. But the prosecution has failed to collect any records from the school, where the victim studied and further failed to collect any certificates from the parents of the victim.

9. As per Section 34 of POCSO Act,

(i) where any offence under this act is committed by a child, such child shall be dealt with under the Provisions of Juvenile Justice (Care and Protection of Children) Act.

(ii) If any question arises in any proceedings before the Special Court whether a person is a child or not, such questions shall be determined by the



Special Court after satisfying itself about the age of such person and its a record in writing its reasons for such determination.

9.1 Further the Hon'ble Supreme Court in the case of Jamil Singh Vs. State of Haryana 2013 CrI. L.J 3976 held that age of the victim or rape should be determined in the manner provided under Rule 12 of Juvenile Justice (Care and Protection of Children) Rules 2007. There is no difference as regards minority between child in conflict with law and the child who is victim of crime. Under Rule 12(3), preference is to be given to the school documents in determination of age of the victim, only in the absence of the school documents, the opinion of the medical expert is permissible. Rule 12(3) reads as follows:

12(3)(a) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining (i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended, and in the absence whereof, (iii) the birth certificate given by a corporation or a municipal authority or a Panchayat

12(3)(b) : And only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact



assessment of the age cannot be done, the Court or the Board, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year; and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

9.2. But in this case the Investigating Officer failed to collect any documents as mentioned in the Juvenile Justice (Care and Protection of Children) Act. The prosecution has examined P.W.13 who conducted medical test to the victim to ascertain the age and he stated that he conducted age test by taking X-ray and issued certificate Ex.P13 that she was aged 10 to 12 years. But the same P.W.13 during cross examination admitted that there are certain rules to take X-ray depending upon the age of a person and for example elbow pelvis bone x-ray has to be taken for the age group of 13 to 16 years and knee and elbow bone x-ray to be taken for the age group of 16 to 17. But in this case, there is no reference about which test was conducted. Further it is well settled that the medical test with regard to age is only an opinion and it varies



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plus or minus 2 years. It is also well settled that if two views are possible the view in favour of the accused has to be taken into consideration. Therefore, this Court has taken the age as mentioned in Ex.P13 it is maximum age of 12+ 2 years. i.e., 14 years.

10. In this context the learned counsel appearing for the accused has argued that the prosecution has failed to prove the age of the victim. The evidence of victim/P.W.1 and Ex.P1 and statement recorded under section 164 of Cr.P.C., never disclosed the date of birth of the victim and it is admitted by P.W.1 and 2 that while victim was studying in 7th standard, the occurrence was happened. But no documents were produced. Medical report is not admissible and Rule 12 of Juvenile Justice (Care and Protection of Children) Act has to be followed. But in this case, no such procedure was followed. Hence, the accused is entitled for acquittal.

10.1. To support his contention, he relied the judgement in P.Yuvaprakash Vs. State represented by Inspector of Police made in Crl.A.No. 1898 of 2023. Wherein the Hon'ble Supreme Court of India held in para 19 as follows:

"19. It is clear from the above narrative that none of the documents produced during the trial answered the description of the date of birth certificate from the school"



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or "the matriculation or equivalent certificate from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victims age was below 18 years as per Section 94(2)(iii) of the II Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating that the age of the said girl would be more than 18years and less than 20 years. In the cross-examination, she admitted that Ms age could be taken as 19 years. However, the High Court rejected this evidence, saying that "when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor". This finding is, in this courts considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94 (2) (i) mandates; nor are they in accord with Section 94 (2) (ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the]] Act was the medical ossification test, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victims bones, stage of their



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development and opined that she was between 18-20 years; in cross-examination she said that the age might be 19 years. Given all these circumstances, this court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9."

On a careful perusal of the said judgment it is clear as per section 94(2) of Juvenile Justice (Care and Protection of Children) Act 2015, the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred, in the absence of which the birth certificate issued by the corporation or municipality or panchayat and it is only thereafter in the absence of these such documents, the age is to be determined through an ossification test or any other latest medical age determination test conducted on the order of the concerned authority. In the case on hand also the prosecution failed to collect documents as stated under section 94(2) of Juvenile Justice (Care and Protection of Children) Act 2015 and only complied condition of 94(2)(iii) of Juvenile Justice (Care and Protection of Children) Act. In this case, the occurrence took place in the year 2013 and Rule 12(3) of Juvenile Justice (Care and Protection of Children) Act 2007 also equivalent to section 94(2) of Juvenile Justice (Care and Protection of Children) Act 2015. In view of the said Rule 12(3), this Court also relied



the medical evidence to determine the age of the victim since no documents of school certificates produced by the prosecution.

11. Moreover, the accused has not denied that the victim was a child on the date of occurrence and no cross-examination done by the accused by denying the childhood of the victim. Therefore, this Court is of the opinion that the prosecution has failed to prove that the victim was aged about below 12 years but proved that the victim was child on the date of occurrence. At the time of the Trial also the Trial Court examined the victim by following the procedures of examination for child and the accused also not denied the childhood of the victim and this shows that the victim was child at the time of occurrence. Therefore, the POCSO act would attract in this case.

12. PW2 who is the mother has deposed before the Trial Court that in or about 1.5 year ago when the victim was studying 7th Standard, the occurrence was happened. While so she would have completed the age of 12 above years, therefore, the victim was aged above 12 years on the date of occurrence. The Trial Court has elaborately discussed in its judgment that the Investigation Agency failed to collect the document with regard to the age and then came to the conclusion that the victim was not aged about below 12 years



13.As far as the offence of penetrative sexual assault is concerned, PW1 who is the mother of the victim in her evidence stated that about 1.5 year ago when the victim was studying in 7th standard, she was in her house, at that time near to her house, some labourers were doing pipeline work, one of the labours asked water from the mother of the victim girl, immediately PW1 instructed the victim to take water to the labours and accordingly the victim had taken water to the said Pipe Laying Labours. Thereafter the victim was not returned back for more than 30 to 40 minutes. Immediately, PW1 searched her daughter, at that time PW4 told her that one Raj Kumar had taken her daughter. When she was searching her daughter she heard murmuring sound, immediately she saw her daughter/victim girl in the place of occurrence and she sustained injuries on her cheek and neck, and she asked her daughter about the injuries. At that time the victim told that Raj Kumar took her to the canal and beaten her brutally and penetrated his male organ in to her private parts by lifting her skirt. Further she told that she complained pain over her private parts and also she shown the blood stains on her skirt. When she was taking her daughter to the road side, his brother Palanisamy came there and asked about the same and she told about the occurrence. Thereafter the victim was taken to the Government Hospital Karaikudi and there he gave a complaint before the Police. The said complaint was marked as Ex.P1, and the same also reveals the manner of occurrence.



WEB COPY 14. PW2 who is the victim herein also in her evidence stated that on 23.09.2013, she was taking water to the labours and then she was listening the pipeline work. After some time one Raj Kumar came there and enquired about her. Thereafter he told that his mother wanted to see her and due to leg pain to her mother, she was unable to come there. Thereafter, the accused taken her to the bridge by holding her hands and then pushed down and throttled her and again dragged in to bridge and removed her dress and penetrated his private part in to her private part. Thereafter she became unconscious. Therefore, the evidence of P.W.2 reveals that the accused had penetrative sexual assault towards the victim. P.W.4 who is said to be the eye witness to the fact that the accused soon before the time of occurrence had taken the victim has deposed that on 23.09.2013 at about 5.00 p.m., she was proceeding near the channel, at that time, the victim was taking water to the pipeline workers. After some time, the accused had taken the victim by talking with her. Then the mother of victim asked about the victim and she told P.W.1 that the accused taken her daughter near to channel.

15. Therefore, from the evidence of PW2 and PW4 they reveal that the accused had taken the victim and committed Penetrative Sexual Assault with the victim. In this context, the learned counsel appearing for the accused



argued that the evidence of P.W.2 is inconsistency, contradictory and tutored one. At the time of cross of P.W.2, she stated that while coming to Court, the police also accompanied with her and they demonstrated how to say before the Court. Further the victim during investigation stated before the police that she don't know whether she saw the accused earlier. Further no identification parade was conducted by the police. On a careful perusal of the evidence of P.W.2 it reveals that the victim/child was cross examined at length and being a child, she could not concentrate for a long time and due to lengthy cross and the above said aspects are minor discrepancies and no way dent the prosecution case, thereby the arguments of the learned counsel for the appellant are not acceptable.

16. Further the learned Counsel appearing for the appellant would contend that the victim was not knowing about the accused, therefore, mentioning the name of the accused by PW2 created a serious doubt in the case, therefore the evidence of PW2 is liable to be rejected and thereby prosecution failed to prove the case against the accused. Further he drew the attention of this court that during the cross-examination, the victim stated that whether she during examination by the Police stated about the accused, for that, she stated that she was not aware.



16.1.Further the learned counsel appearing for the accused relied the judgement as follows:

1.Pappu Vs.State of Delhi reported in 2009 CrI.L.J.3342. Wherein the Hon'ble Delhi High Court held in para 27 as follows:

"27. If this be so, it assumes all the more significance that P.W.1 has been found to be speaking half truths, as projected in the argument of learned counsel for the appellant, with which we concur, and hence we did not re-note the same. That no blood was detected on the vaginal swabs of the prosecutrix and on her underwear totally belies the testimony of P.W.1 that she saw blood on the underwear and the clothes of the prosecutrix, That the prosecutrix admits that whatever she stated in the Court is at the behest of her mother is also suggestive of her being tutored and thus affords good ground to accept the defence taken by the appellant at the first instance i.e. of false implication; motivated by the father of the prosecutrix to settle scores with the appellant as the father of the prosecutrix believed that he was having an illicit relationship with the mother of the prosecutrix."

2. Senthilkumar Vs.State made in CrI.A.No.790 of 2018, wherein this High Court held in para 29 as follows:

"29. when the offence against the children have to be viewed seriously, the Court should also be cautious of the fact that the offender has got a huge responsibility for proving his innocence. Because of the draconian nature of



the Special Act, the punishment is very grave. Hence due consideration should be given to the improbabilities or other material weaknesses found in the evidence of the prosecution. There are patent contradictions even between the evidence of the complainant/P.W.1 and his daughter P.W.2. If these material contradictions and lack of clarity in the evidence of the prosecution is over looked and not given due weight as rebuttal proof, that might defeat the ends of justice. Due to the above stated reason I feel that the judgment of the learned trial Judge warrants interference."

3.Suresh Vs.State made in Crl.A.No.806 of 2016, wherein this High Court held that in para 27 as follows:

"27. In a criminal trial, an accused person starts with the presumption of innocence in his favour and the presumption holds the field till the prosecution succeeds in establishing the guilt of the accused beyond all reasonable doubt. A moral conviction regarding the guilt of an individual has no place in criminal jurisprudence. The prosecution must give satisfactory proof that the offence has been committed by the accused. But in this case, prosecution failed. Therefore, the conviction and sentence passed by the trial Court has to be set aside and the accused is entitled for acquittal."

4. Ganesan Vs. State represented Inspector of Police reported in (2022) 3 MLJ (Crl) 569. Wherein this Court held in para 15 as follows:



"15. When the evidence of the victim as well as the other circumstantial evidence are unimpeachable and inspires the confidence of the Court, one need not search for medical evidence. However, in this case, neither the victim nor the other witnesses for prosecution could place before this court the true fact and convince the Court that they are reliable witnesses. the case of the prosecution from the inception bristles with infirmity. The accident Register is marked as (Ex.P7) which happen to be recorded at 11.30 a.m., and the FIR registered on the information given by P.W.1, who is admittedly not an eye witness to the occurrence. The testimony of witnesses basically contradicts each other. After the alleged occurrence how and where the victim girl was found is not been consistently spoken neither by the victim nor her mother nor the so called independent witnesses namely P.W.3 and P.W.4. This infirmity in the prose case cumulatively leads to a conclusion that though the accused has discharged the burden by preponderance of probability, the prosecution has failed to prove the guilt of the accused."The doctor who treated the victim also stated in her evidence that on 23.09.2013, she examined the victim girl and she was subjected for sexual assault and she sustained injuries. Therefore, from the evidence of PW2 and PW13, they revealed that the victim sustained injuries on her private parts. The victim categorically stated about the accused and during her cross examination by the accused also stated the name of the accused is that Raj Kumar."



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On a careful perusal of above said judgments, they will not be applicable to the present facts of the case, because in this case, the doctor who treated the victim also stated in her evidence that on 23.09.2013, she examined the victim girl and she was subjected for sexual assault and she sustained injuries. Therefore, from the evidence of PW2 and PW13, they revealed that the victim sustained injuries on her private parts. The victim categorically stated about the accused and during her cross examination by the accused also stated the name of the accused is that Raj Kumar.

16.2. Further the victim categorically deposed about the name of the accused and the occurrence. While so there is no defects in the cross-examination with regard to the identification of the accused and thereby the contention of the counsel that the victim has not identified the accused is not acceptable, the victim categorically deposed about the manner of the occurrence and involvement of the accused and the evidence of the victim is cogent and it cannot be discarded in anyway.

17. In order to corroborate the evidence of PW2 the doctor deposed that the victim was subjected for sexual assault, therefore, as per Section 29 of the POCSO Act, presumption is in favour of the prosecution and the prosecution



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has proved the foundational fact with regard to the commission of offence and thereby the accused has to prove the contrary but in this case there is no contrary evidence adduced by the accused.

18. The Learned Counsel appearing for the accused has drawn the attention of this court that the genesis of the case was suppressed and as per the prosecution witnesses, Complaint was lodged on 23.09.2013 at about 10.00 p.m. but already the PW11, doctor informed to the Karaikudi South Police Station and the Police came to the hospital and the same was suppressed. As per the prosecution the victim was sent to the hospital and as per the Ex.P9, the victim was brought to the hospital at about 9 pm and thereafter the complaint was lodged before the concerned police station. Moreover, the statement of victim was also recorded in Ex.P9 and the complaint was lodged at 10.15 p.m. thereby the contention of the counsel for the appellant to this regard is not acceptable.

18.1. Further the learned counsel appearing for the appellant has argued that scientific evidence and medical evidences are not supported the prosecution and recovery of cloths become doubtful. In this context P.W.12 in his evidence, stated that since the sample blood was not sent to him, he unable to say that the blood stains found in the dress belongs to victim. It is true that



the prosecution failed to sent the sample blood of the victim to the lab, but it is well settled that the medical evidence is corroborative piece of evidence and when the victim herself clearly stated about the occurrence, the said aspect will not affect the case of prosecution. Further the learned counsel would contend that as per evidence of P.W.6, the victim and the accused were talking but plan and mahazar, the place of occurrence shown as bridge. Per Contra prosecution case is that the place of occurrence is near water tank. P.W.8 also deposed that the pipes are width of 2 feet radius and 3/4th feet was fixed in the earth, thereby no chance to commit such occurrence. In this context P.W.15 in her evidence stated that she went to place of occurrence and prepared mahazar and sketch, the said sketch was marked as Ex.P17. On perusal of Ex.P17, it reveals that the Investigation Officer went to the place of occurrence and seized some articles and also mentioned the height of pipe as 2 feet. Therefore, the contention of the learned counsel for the accused that since the pipe was fixed 3/4 feet into the earth and thereby, no chance to commit such offence is not acceptable one.

19. As far as the POCSO case is concerned the evidence of victim alone is sufficient when the same is cogent and reliable. In this case, the evidence of P.W.2/victim girl is cogent and natural and it cannot be discorded in any way.

Therefore, this Court need not give much importance to the minor



discrepancies. Further it is well settled that due to defective investigation, the case of the prosecution cannot be disbelieved. More over the presumption under section 29 of the POCSO Act is in favour of the prosecution and the accused has to prove the contrary.

20. Further the learned counsel appearing for the accused relied the judgment as follows:

1.Mousam Singha Roy and others vs.State of West Bengal made in CrI.A.No.231-234 of 2002, wherein the Hon'ble Supreme Court held in para No.28 and 29 as follows:

"28. Before we conclude, we must place on record the fact that we are not unaware of the degree of agony and frustration that may be caused to the society in general and the families of the victims in particular, by the fact that a heinous crime like this goes unpunished, but then the law does not permit the Courts to punish the accused on the basis of moral conviction or on suspicion alone. The burden of proof in a criminal trial never shifts, and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence. In a similar circumstances this Court in the case of Sarvan Singh Vs. The State of Punjab stated thus:

"It is no doubt a matter of regret that a foul cold-blooded and cruel murder should go unpunished. There may also be an element of truth in the prosecution story against



the accused. Considered as a whole, the prosecution story may be true; but between may be true and must be true there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted.

29. It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused."

2.Sagar Dinanath Jadhav Vs. State of Maharashtra made in Crl.A.No. 212 of 2017, wherein the Hon'ble Bombay High Court (Nagpur Bench) held in para 18 as follows:

"18. The said defence raised by the appellant when read along with the medical evidence would show that the presumption raised against the appellant in the present case under section 29 of the POCSO Act could be said to have been rebutted on preponderance of probabilities by the appellant. In the present case, the clothes of the victim did not show any traces of semen at all. Even the underwear of the victim did not show any blood or semen. This fact has been brushed aside by the trial Court only by accepting the contention of the prosecution that there was strong likelihood of the underwear having been washed due to which no traces of semen could be found. But, a perusal of the medical examination report Exh.41 shows that the victim had not changed clothes or taken bath from the time



of the incident till the medical examination and seizure of the clothes. Therefore, there was no question of the clothes having been washed due to which no stains of semen could be found. Apart from this, there was no evidence of any Injuries on the body of the victim or that his clothes were torn or there being any other sign of the appellant having forced himself upon the victim as claimed by the prosecution. These aspects were not appreciated by the trial Court in the correct perspective and the rebuttal of presumption on preponderance of probabilities was not examined while passing the impugned judgment and order. The trial Court has proceeded on the basis that the victim was a young boy who would never have lodged a false report with a serious charge against the appellant merely because of a small dispute. But, the crucial aspect in the facts and circumstances of the present case with the nature of evidence on record was whether the defence had been able to make out a probable case to rebut the presumption raised under Section 29 of the POCSO Act."

3. Rekman Choudhury Cachar Vs. The State of Assam made in Crl.A. (J).No.106 of 2018, wherein the Gauhati High Court held in para 22 as follows:

"22. The effect of the presumption under Section 29 of the POCSO cannot be held to be sheolote. Presumptions are rules of evidence and do not conflict with the presumption of innocence of the accused, for the burden on the presumption to prove its case beyond all reasonable



doubts subalets till the end of the trial. Every accused is presumed to be innocent until he is proved guilty. The statutory presumption under Section 29 comes into operation only if the prosecution proves the foundational facts. If the accused is able to create serious doubt on the veracity of the prosecution case by drawing attention to contrary nature of the prosecution evidence by making it possible to infer that the prosecution version might not be the only possibility the presumption gets weakened. The evidence led by the prosecution to establish the foundational facts in the instant case, more particularly, in view of contrary nature of the ocular evidence of the victim vis-à-vis the medical evidence are found to be inconsistent. Though the statutory presumption get operational with the launching of the prosecution, the accused can discharge the onus shifted to him by the standard of preponderance of probabilities and he is not required to meet the standard of beyond all reasonable doubts."

4. Vijayakumar Vs. State made in Crl.A.No.558 of 2019, wherein this Court held in para 10.14 as follows:

"10.14. In the teeth of the evidence of the expert with regard to the mental condition and poor intellectual capability of "X" coupled with the patently conflicting versions proffered by Meenakshi (PW-1), Vasuki (PW-15) and Vijayakumar (PW-17) concerning the kernel of the prosecution case, it would be unsafe to sustain the conviction of the appellant, albeit, the presumptions under



sections 29 and 30 of the POCSO Act. These presumptions will come into operation only when the prosecution places a reasonably probable story before the Court and not otherwise. That apart, in the appeal (Crl.A. No. 424 of 2017), that was filed by Sivakumar Ramesh, this Court has appraised the evidence of "X" and has given sound reasons for rejecting her testimony. We also concur with them, of course, for our own reasons. In our view "X" has either been tutored to implicate a whole lot of persons or "X" has allowed her flight of imagination to weave stories and venture on an implicating spree."

On a careful perusal of those judgements, it is clear that the presumptions under section 29 of POCSO Act will come into operation only when the prosecution places a reasonably probable story before the Court and not otherwise. The presumptions are rules of evidence and do not conflict with the presumption of innocence of the accused, for the burden on the presumption to prove its case beyond all reasonable doubts subsists till the end of the trial. In the case on hand, the prosecution has proved the case through sufficient evidence thereby, the said case laws will not be helpful to the case of appellant.

21. The Learned Counsel brought to the knowledge of this court that the evidence of PW1 and PW2 are contra to the statement of PW4 with regard to the identity of the accused and the evidence of PW1, PW2 and PW4 clearly



shows that the accused is unknown to them. But during the course of cross-examination before the court, the witnesses categorically stated about the accused, and further the witnesses knew the accused previously since the accused was residing in the nearest village, therefore, the above said contention is also not an acceptable one.

21.1. In this context, the learned counsel appearing for the appellant has relied the judgement in Gopal Singh and others vs. State of Madhya Pradesh held in para 23 as follows:

"23. The High Court has also ignored the fact that there was no evidence to show as to when special report had been dispatched to or received by the Magistrate. The inference drawn by the trial Court, therefore, that the first information of 1 p.m., had been suppressed by the prosecution as the names of the assailants were not known and that there was no evidence to confirm the time of the recording of the FIR shortly after 4.45 p.m. as there was no evidence of the dispatch or delivery of the special report, which cast clearly suspicion even on this part of the prosecution story, has not been dealt with by the High Court"

On careful perusal of the said judgment it will not be applicable to the present facts of the case, because in this case, the prosecution witnesses clearly stated about the identity of the accused since he is near by village.



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22. As far as the place of occurrence is concerned, the learned Counsel appearing for the appellant stated that the home of the victim is one kilometre away from the place of the occurrence, but PW1, PW2 and PW4 stated in their evidences that the place of occurrence is near to the house of victim further the place of occurrence mentioned in one place as a canal and another place stated as Madai. In this context there is no vast difference between the Madai and the canal, it is depending upon understanding of the individual. Both the Madai and Canel are water passages and thereby the names used as Madai/Canal cannot affect the prosecution case and particularly the case is a very serious offence. While so these are the minor discrepancies and they no way dent the case of the prosecution. Therefore the arguments advanced by the Counsel for the appellant are not acceptable. Per contra the prosecution witnesses clearly deposed about the manner of the occurrence and involvement of the accused. Therefore, the prosecution has proved the charges levelled against the accused in accordance with law. Thereby, the Trial Court has correctly come to the conclusion that prosecution has proved the case against the offence under Section 3 r/w Section 4 of the POCSO Act. Initially the charges were framed for the offences under Section 5 read with Section 6 of the POCSO Act but the prosecution failed to prove the age of the victim that she is aged about below the age of 12 years. Thereby the Trial Court convicted the accused for the



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offence under Section 3 read with Section 4 of the POCSO Act.

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23. In this context, learned Counsel appearing for the appellant argued that without altering the charges, the conviction under Section 3 read with Section 4 of POCSO Act is not acceptable. As per Section 222 of the CrPC, the Court can convict the accused, for the lesser offence when the charges framed for major offence. In this case also the charges framed under Section 5 (i) (m) read with Section 6 of the POCSO Act for the major offences, the conviction was for the lesser charge for the offence under Section 3 read with Section 4 of the POCSO Act. Therefore, as discussed above this Court is of the opinion that no infirmity was found or perverse in the judgment of the Trial Court and thereby no warrant for interference. In this case, this Court noticed that the trial Court has mentioned the name of victim and disclosed the identity of victim and failed to adhere the Provision under section 33(7) of POCSO Act.

24. In the result, this appeal is dismissed, the judgment and conviction passed by the Trial Court in S.C.No. 72 of 2014 on the file of Sessions Judge, Mahalir Fast Track Court, Sivagangai are confirmed and the bail bond



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executed by the accused shall stands cancelled and the trial court is directed to
secure the accused as per law.

03.11.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
mpa

To

1. The Sessions Judge Mahila Fast Track, Sivagangai.
2. The Inspector of Police,
All Women Police Station,
Karaikudi.



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