



Crl.A.(MD)No.595 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 27.07.2023

CORAM

**THE HONOURABLE MR.JUSTICE M.S.RAMESH
AND
THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR**

Orders Reserved On 03.07.2023	Orders Pronounced On 27.07.2023
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D.Ganadurai

... Appellant/Sole Accused

Vs.

State, Rep. by the
Deputy Superintendent of Police,
Cheranmahadevi Police Station,
Tirunelveli District.
(Crime No.24 of 2013)

... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of Cr.P.C., to set aside the conviction and sentence passed by the learned Principal Sessions Judge (Mahila Court), Tirunelveli, Tirunelveli District, in Spl.S.C.No.21 of 2016, dated 03.09.2019 and acquit the appellant/sole accused of the charge.

For Appellant

:

Mr.S.Sivasubramanian
for Mr.E.Somasundaram



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For Respondent : Mr.A.Thiruvadikumar
Additional Public Prosecutor

JUDGMENT

M.NIRMAL KUMAR, J.

This appeal has been filed by the appellant/sole accused as against the conviction and sentence, dated 03.09.2019, made in S.C.No.21 of 2016, by the learned Principal Sessions Judge (Mahila Court), Tirunelveli, Tirunelveli District.

2. The appellant / sole accused stood convicted and sentenced to undergo imprisonment as detailed hereunder:-

Conviction under Section	Sentence	Fine amount
u/s.363 I.P.C.	To undergo seven years rigorous imprisonment	To pay a fine of Rs.10,000/-, in default, to undergo three months simple imprisonment
u/s.4 of the Protection of Children from Sexual Offences Act, 2012	To undergo life imprisonment	To pay a fine of Rs.1,00,000/-, in default, to undergo one year simple imprisonment



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u/s.4 of Tamil Nadu Prohibition of Harassment of Woman Act, 1998	To undergo three years of rigorous imprisonment	To pay a fine of Rs.10,000/-, in default, to undergo three months simple imprisonment
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The Trial Court has acquitted the appellant/accused for the commission of the offence under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Trial Court further ordered the sentences to run concurrently and also granted set-off under Section 428 Cr.P.C. The accused/appellant challenging the legality of the conviction and sentence awarded by the Trial Court vide impugned judgment, has filed this Criminal Appeal.

3. The facts leading to the filing of this appeal, necessary for the disposal of this criminal appeal, are as follows:-

3.1. P.W.3, who is a mentally retarded child, is the victim girl. P.W.1, who is the maternal grandmother of the victim girl, deposed that on 27.01.2013 at about 09.00 a.m., when the victim girl was standing near her paternal grandmother's house, the appellant/accused took the victim girl in his auto to a forest area, sexually assaulted her. After knowing about the



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same from one Chandra [P.W.2], a neighbour, P.W.1 along with P.W.7, P.W.10 and others went in search, rescued the victim, caught the appellant/accused, proceeded to the Police Station, Cheranmahadevi, and lodged a complaint under Ex.P.1.

3.2. P.W.2 a neighbour of P.W.1 deposed about the abduction of the victim girl by the appellant/accused in his Auto.

3.3. P.W.4 younger sister of the victim girl deposed that the victim girl studied upto 6th Standard and due to her mental illness, the victim girl discontinued her studies.

3.4. P.W.5 neighbour of P.W.1 turned hostile.

3.5. P.W.6 son of P.W.2 turned hostile.

3.6. P.W.7 a neighbour of P.W.1, is the witness, attested Ex.P.1 complaint.

3.7. P.W.8, Radiologist, examined the victim girl and gave Ex.P.3 X-ray report stating that the victim girl was under the age of 16 to 18 years on the date of examination and X-rays marked as M.O.2 Series.

3.8. P.W.9 father of the victim girl, who deposed that the victim girl is his daughter and she studied upto 4th Standard and due to her mental illness, she discontinued her studies. He came to know about the



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incident from one Raj [P.W.19] through Cellphone and immediately, he rushed to the Police Station.

3.9. P.W.10 and P.W.11, who are the nearby residents of P.W.1, turned hostile.

3.10. P.W.12, who is the neighbour of P.W.1, rescued victim girl and handed over the appellant/accused to the Police Station.

3.11. P.W.13 and P.W.14, who are the nearby residents of P.W.1, signed as witnesses to the confession statement of the appellant/accused [Ex.P.4] and Seizure Mahazar [Ex.P.5] in respect of the Auto [M.O.3].

3.12. P.W.15 - Dr.Arumugaselvi, the Assistant Surgeon attached to the Government Headquarters Hospital, at Tirunelveli, examined the victim girl/P.W.3 and gave Ex.P.8 Wound Certificate, noting the following features:-

"Spermatozoa were not detected on the smear.

Semen was not detected on items.

Based on the above facts, I am of the opinion that she is not a virgin. No external injuries at the time of examination and there is no chance of recent sexual intercourse."



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3.16. P.W.16, the then Deputy Director of Regional Forensic Sciences Laboratory, Madurai, examined M.Os.1 and 4 to 9 and gave Ex.P.10 blood report, which is inconclusive.

3.17. P.W.17 – Dr.Selvamurugan, Associate Professor, attached to the Government Headquarters Hospital, Tirunelveli, examined the appellant/accused at about 12.00 p.m. on 29.01.2013 and noticed the following injuries:-

"1.Abrasion of size 5 x 1 cm seen in top of right shoulder.

2.Contusion of size 4 x 2 cm over inner aspect of left upper arm near to left axilla.

3.Contusion of size 2 x 1 cm over inner aspect of left upper arm 5 cm below injury No.2

4.Dark red colour contusion of size 30 x 15 cm seen in both gluteal regions.

5.Palmar aspect of both hand fingers found contused and swollen."

He also gave an opinion that there is nothing to suggest that the appellant/accused is impotent and there is no evidence of recent sexual act and there is no injury or foreign hair in his genitals and nail or bite marks in his body and it was marked as Ex.P.11.



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3.18. P.W.18 and P.W.19, who turned hostile, are the witnesses to the Observation Mahazars and the Rough Sketchs, which are marked as Exs.P.22, P.24 and 23 and 25 respectively.

3.19. P.W.20, Special Dy. Tahsildar (Stamps) gave a Community Certificate to the victim girl stating that she belongs to SC Community, which is marked as Ex.P.18.

3.20. P.W.21 Zonal Dy. Tahsildar gave a Community Certificate to the appellant/accused stating that he belongs to Backward Community, which is marked as Ex.P.19.

3.21. P.W.22, Special Sub Inspector of Police attached to the said Police Station, on receipt of the complaint under Ex.P.1 from P.W.1, registered a case in Crime No.24 of 2013 against the appellant/accused for the offences under Sections 366(A), 376 and 511 I.P.C. and Section 4 of TNPWH Act, 1998 r/w. Section 3(2)(v) of the SC/ST (PoA) Act, 1989, at about 13.00 hours on 27.01.2013. Printed F.I.R. is marked as Ex.P.20. P.W. 22 forwarded the original complaint [Ex.P.1] and the Printed FIR [Ex.P.20] to the jurisdictional Magistrate.



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3.22. P.W.23 the aunt of the victim girl [sister of victim girl's mother], deposed that the appellant/accused attempted to rape her elder sister's daughter/victim girl, who was in an unconscious stage.

3.23. P.W.24 - Balasubramanian, Deputy Superintendent of Police attached to the said Police Station, on receipt of the complaint [Ex.P.1] and F.I.R. [Ex.P.20], took up investigation, proceeded to the place of abduction, in which, the appellant/accused took the victim girl, in the presence of Ramesh [P.W.18] and Raj [P.W.19], prepared Observation Mahazar and Rough Sketch, which are marked as Exs.P.22 and P.23 respectively. Thereafter, P.W.23 proceeded to the scene of occurrence, found the Auto, bearing Registration No.TN-72-P-4627 [M.O.3], in the presence of the very same witnesses namely, Ramesh [P.W.18] and Raj [P.W.19], prepared Observation Mahazar and Rough Sketch, which are marked as Exs.P.24 and P.25 respectively. Thereafter, P.W.24 examined the witnesses and recorded their statements under Section 161[3] Cr.P.C.

3.24. Thereafter, P.W.24 obtained community certificate of the victim girl [Ex.P.18] and the community certificate of the appellant/accused [Ex.P.19]. After completion of investigation, he filed a final report against the appellant/accused for the offences under Sections 366-A and 376 read



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with Section 511 IPC; Section 4 of Tamil Nadu Prohibition of Harassment of Woman Act, 1998; Sections 4 and 7 of the Protection of Children from Sexual Offences Act, 2012; and Section 3(2)(v) of the SC/ST (PoA) Act, 1989 and forwarded the same to the jurisdictional Court.

3.25. Thereafter, the learned Sessions Judge (Mahila Court), Tirunelveli, took the case on file in Spl.S.C.No.21 of 2016 and issued summons to the appellant/accused and on his appearance, framed charges under Sections 363 I.P.C.; Section 4 of the Protection of Children from Sexual Offences Act, 2012; Section 3(2)(v) of the SC/ST (PoA) Act, 1989; and Section 4 of Tamil Nadu Prohibition of Harassment of Woman Act, 1998 and questioned the appellant/accused and he pleaded not guilty for the charges levelled against him.

3.26. The prosecution, in order to prove their case, examined the witnesses namely, P.Ws.1 to 24 and marked Exs.P.1 to P.26 as well as M.Os.1 to 9.

3.27. The appellant/accused was questioned under Section 313[1][b] Cr.P.C., with regard to the incriminating circumstances made out against him in the evidences rendered by the prosecution and he denied it as false. The appellant/accused did not file any documents nor let in any oral



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evidence.

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3.28. The Trial Court, on consideration and appreciation of oral and documentary evidences and other materials, convicted and sentenced the appellant/accused as stated above and hence, this appeal.

4. Mr.S.Sivasubramanian, learned counsel for the appellant submitted that the Trial Court ought to have disbelieved the version of P.W.1, who is the maternal grandmother of victim girl, as she did not see the occurrence. According to P.W.1, Sub Inspector of Police P.W.22 and P.W.24 Deputy Superintendent of Police enquired her and the victim girl in the Police Station, obtained her signature, which is in violation of Section 24 of the POCSO Act.

4.1. The learned counsel for the appellant submitted that the Trial Court ought to have disbelieved the evidence of P.W.2 on the ground that she saw the occurrence on 27.01.2013 at about 09.00 a.m. through a window hole, which is a far away place, nearly 100 meters away from the place of abduction from where the victim girl was taken by the appellant in Auto. If she really seen the abduction, she would have raised alarm,



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inviting attention of nearby people, on the contrary, she deposes, after some time, she had gone to the house of P.W.1 and informed the abduction of P.W.3 by the appellant.

4.2. The learned counsel for the appellant further submitted that the Trial Court ought to have disbelieved the statement of the victim girl [P.W.3], as she deposed before the Trial Court in contrary to her earlier statements. She could not identify the accused and states that the accused having grey hair. She also deposed that she did not go to the Police Station, which is contrary to the evidence of P.W.22 and P.W.24. Whereas, P.W.1 stated that she went to Police Station along with the victim girl. The victim girl [P.W.3], P.W.7 and P.W.12 are tutored by the Police, how to depose in the Court. Accordingly, they made statements before the Trial Court and therefore, the Trial Court ought to have disbelieved their evidence.

4.3. The learned counsel for the appellant further submitted that in this case, P.W.5 and P.W.6 had not supported the case of prosecution. P.W.7 admitted that he went to the Police Station along with P.W.1, where the complaint was written by the Writer. However, according to P.W.1, the



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complaint was written by the Sub Inspector of Police, who was present in the Police Station. It is admitted by P.W.7 that he is a close relative of P.Ws. 1 and 3 and he resides in Chennai.

4.4. The learned counsel for the appellant further submitted that in this case, P.W.1 admits that P.W.3 studied upto Class - 5 in a Government School at Cheranmahadevi. The Investigating Officer had failed to collect the School Certificate, which would be primary document to confirm the age of the victim whether at the time of occurrence she was minor or not. More so, when P.W.8 Radiologist in evidence states that the victim might be between 16 and 18 years, which is speculative. Further, P.W.9 father of the victim states that he was informed about the occurrence by P.W.10 and thereafter, he reached the Police Station. P.W.10 and P.W.11 not supported the case of prosecution and turned hostile. P.W.12 lorry cleaner admitted that he is a close relative of P.W.1 to P.W.3 and he was tutored by the Police.

4.5. The learned counsel for the appellant further submitted that the Trial Court, on its own, had convicted the appellant for penetrative sexual



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assault, when the medical evidence and other evidences, including P.W.3 is otherwise.

4.6. The learned counsel for the appellant further submitted that the victim girl was produced before P.W.15 - Dr.Arumugaselvi only on 29.01.2013 at 07.00 p.m., which is in violation of Section 27 of the POCSO Act. Further, she gave a report of the victim girl stating that no external injuries on the victim girl. Further, the appellant/accused was examined by P.W.17, who gave opinion that there is no evidence of recent sexual assault.

4.7. The learned counsel for the appellant further submitted that the prosecution failed to prove the age of the victim girl. In order to attract the statutory presumption under Section 29 of the POCSO Act, the factual foundations with regard to the ingredients of the offence under Section 6 of the said Act, to be established in the first place. In the present case, nothing placed on record by the prosecution to show that the victim was a minor at the time of occurrence. Neither the birth certificate nor the school records endorsing the age of the victim girl produced in the present case. No ossification test conducted with regard to the age of the victim girl in order



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to establish that she is a minor. Nothing to presume, the victim was a minor, the inherent weakness and/or patent contradictions in the prosecution case render the statutory presumption not applicable.

4.8. In support of his contentions, the learned counsel relied on the judgment of the High Court of Calcutta rendered in **Ganesh Orang vs. State of West Bengal and another** reported in **2022 SCC Online Cal 255**, for the point that, to attract the statutory presumption under Section 29 of the POCSO Act, the factual foundations with regard to the ingredients of the offence under Section 6 of the said Act require to be established in the first place. Further, for non-production of the birth certificate or any school records of the victim, to the principle that when the accused is expected to prove the contrary fact, it is for the prosecution to first establish such fact by leading evidence for the aforesaid statutory presumption and thereafter only, the onus is on the accused to prove contrary.

4.9. The learned counsel for the appellant further relied on the judgments of the Hon'ble Supreme Court in **Jarnail Singh vs. State of Haryana** reported **2013 (7) SCC 263** and **Mahadeo vs. State of**



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Maharashtra and another reported in **2013 (4) SCC 637** for point that it is for the prosecution to establish the age of the victim on the basis of Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007.

4.10. The learned counsel for the appellant further relied on the judgment of the Hon'ble Supreme Court in **Rajak Mohammed vs. State of Himachal Pradesh** reported in **2018 (9) SCC 248** for the point that a radiological examination may not be an accurate determination of the victim's age and sufficient margin either way has to be allowed.

4.11. The learned counsel for the appellant further relied on the judgment of the Allahabad High Court in **Vikas Singh and others vs. State of U.P. and another** reported in **2019 SCC Online All 4064** and submitted that in this case, the victim is a mentally retarded child and Section 38(2) of the POCSO Act has not been followed.

4.12. The learned counsel for the appellant also relied on the judgments of the Hon'ble Supreme Court in **Gireesan Nair and others vs. State of Kerala** reported in **2023 (1) SCC 180** and **Ranvir Singh etc. etc.**



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vs. **State of Madhya Pradesh** reported in **2023 SCC Online SC 94** for not holding test identification parade and in the absence of the same, conviction cannot be sustained.

4.13. The learned counsel for the appellant further submitted that there is an inordinate delay in sending the F.I.R. to the Magistrate and there is no explanation for the delay.

4.14. The learned counsel for the appellant also submitted that the presence of the appellant/accused in the scene of occurrence and the recovery of the Auto are highly doubtful and hence, the conviction and sentence awarded by the Trial Court are liable to be set aside.

5. Mr.A.Thiruvadikumar, learned Additional Public Prosecutor submitted that on 27.01.2013 at 09.00 a.m., when the victim girl, who is mentally retarded child, was returning to her home from her paternal grandmother's house, the appellant/accused, pulled her by hands and forcibly taken her in an Auto to a river Channel at Cheranmahadevi, and lifted her nighty and skirt and touched her private parts and committed



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penetrative sexual assault and thereby, attempted to rape her, caught red handed and arrested.

5.1. The learned Additional Public Prosecutor further submitted that P.W.24 – Balasubramanian, Deputy Superintendent of Police, Cheranmahadevi, conducted investigation in this case and arrested the appellant/accused on 27.01.2013 at 16.15 hours in the presence of witnesses, namely, C.Arighandran [P.W.13] and K.Perumal [P.W.14]. The admissible portion of the confession of the appellant/accused is marked as Ex.P.4 and the Auto is marked as M.O.3. The victim clearly stated about sexual assault by the appellant on her. Before the Trial Court and to the Doctor, the evidence of victim alone is sufficient to prove the case. Based on the statements of the witnesses and confession statement, P.W.24 had laid a charge sheet against the appellant/accused on 15.05.2013.

5.2. The learned Additional Public Prosecutor submitted that as per the Forensic Laboratory Reports [Exs.P.9 and P.10], semen was detected in the Lungi [M.O.8] worn by the appellant/accused.



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5.3. The learned Additional Public Prosecutor further submitted that sufficient evidence, both oral and documentary were placed before the Trial Court, which, on proper appreciation, found to be true, proved by the prosecution and convicted the appellant/accused.

5.4. It is the contention of the learned Additional Public Prosecutor that the evidence of the victim girl, P.W.3, is cogent and convincing and once the evidence of the victim is found to be trustworthy and believable, the same would be sufficient to hold that the appellant/accused is guilty of the charges levelled against him, which the Trial Court held and rightly too.

5.5. In fine, it is submitted by the learned Additional Public Prosecutor that the appellant/accused has not probalised his innocence. The Trial Court, on cogent and convincing reasons and based on oral and documentary evidence, has found the appellant/accused guilty of the charges levelled against him and rightly convicted and sentenced him and, therefore, no interference is called for with the conviction and sentence recorded by the Court below.



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6. This Court carefully considered the submissions made on either side and also perused the oral and documentary evidence, to which its attention was drawn.

7. In this case, P.W.3 is the victim, who is a mentally retarded child and attended only Class 5 and thereafter, due to her health ailments, she discontinued her studies. P.W.1 maternal grandmother of the victim, presently residing with her daughter, had clearly deposed that daily at 08.00 a.m. the victim girl used to have coffee in the nearby paternal grandmother's house and return back at 09.00 a.m. The victim's health condition is confirmed by the evidence of P.W.1, P.W.4 sister of the victim and P.W.9 father of the victim. P.W.2 a neighbour had seen the victim girl taken away by the appellant/accused in his Auto and the Auto proceeded to a secluded place. Immediately, P.W.2 informed the same to P.W.1. P.W.1 had called her neighbours namely, P.W.7 and P.W.10, rushed in the direction of the Auto, followed by others in the Village. On their way, P.W.10 enquired P.W.11, who was taking bath in the nearby channel, he informed about the direction of the Auto. Thereafter, they proceeded there and found the Auto parked in an isolated place. Though P.W.10 and P.W.11 had been treated as



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hostile, P.W.12 confirms the enquiry made by his brother [P.W.10] to P.W.11 about the victim girl, when P.W.11 was taking bath in the channel.

Thus, the evidence of P.W.12 is corroborated with the evidence of P.W.10.

8. Further, from the evidence of P.W.1, it is seen that P.W.1 along with P.Ws.7 and 10 had gone to the isolated place, identified the Auto and they removed the side screen of the Auto and found dress of P.W.3 had been lifted upto her hip and the appellant/accused found lying over her, attempting to commit penetrative sexual assault. On seeing them, the appellant/accused attempted to flee from the scene and he was chased by the Villagers and thereafter, he was taken to the Police Station and produced before P.W.22, Special Sub Inspector of Police. The kidnapping and sexual assault had taken place after 09.00 a.m. and thereafter, the appellant/accused was produced before the respondent Police. The respondent Police, on receipt of the complaint [Ex.P.1], had registered a case at about 12 noon. Hence, there is no delay between the occurrence, rescuing the victim girl and securing of the accused. This fact clearly spoken by P.W.1, P.W.3 and P.W.7. P.W.22 immediately on registration of the F.I.R., placed the same before the higher officials and sent the same to the Court. P.W.24 confirms



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the same. The F.I.R. reached the Court on the same day at about 10.30 p.m.

Considering the nature of offence and the sequence following the same, it cannot be said that there has been delay in registering the F.I.R.

9. The evidence of P.Ws.1, 2, 3 and 7 conclusively prove the case. P.W.7 confirms that he was along with P.W.1 in the Police Station and attested the complaint [Ex.P.1] and his attestation is Ex.P.2. Though the appellant attempted to discredit this witness, for the reason that, he admits that he does not know the contents of the complaint, it is seen that, in this case, P.W.1 is an illiterate and she had only affixed her left thumb impression in Ex.P.1 complaint. In her evidence, P.W.1 stated that she had given only oral complaint and it has been reduced into writing and thereafter, she affixed her left thumb impression and P.W.7 signed as Attestor. Minor discrepancies are natural and there is nothing on record to discredit the witnesses.

10. P.W.9, the father of the victim girl on coming to about the incident, immediately rushed to the Police Station, where he saw his mother-in-law [P.W.1] and other Villagers and also the appellant/accused. P.W.12, the Villager confirms about the search made by P.W.1 along with



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P.W.7 and others. He confirms that he and his brother P.W.10 enquired P.W.11, who had given the direction of Auto passing by. P.Ws.13 and 14 are the witnesses for the arrest and confession statement of the appellant/accused [Ex.P.4] and the Mahazar for recovery of Auto [Ex.P.5], bearing Registration No.TN-72-P-4627, in which the victim girl was kidnapped. The evidence of P.Ws.13 and 14 and Exs.P.4 and 5 confirms the recovery of Auto [M.O.3] near the scene of occurrence. The evidence of these witnesses is natural and nothing has been elicited to discredit them. It is seen that the Auto was found in an isolated place, wherein the attempt for penetrative sexual assault was made by the appellant/accused. Thus, the actual happenings of forcible abduction of the victim girl taking advantage of her mental condition, witnessed by P.W.2, who informed the same to P.W.1 and thereafter, P.W.1 along with the Villagers P.Ws.7 and 10 and others went in search of the Auto and the direction of the Auto has been given by P.W.11. Thereafter, the victim girl was rescued and the appellant/accused was caught red handed and produced before P.W.22 Sub-Inspector of Police. All these facts confirmed by cogent evidence. The recovery of Auto from the secluded place is confirmed by the evidence of P.Ws.13 and 14 and also Exs.P.4 and P.5.



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11. P.W.24 visited the place of abduction, prepared Observation Mahazar and Rough Sketch, collected materials and thereafter, visited the scene of occurrence, prepared Observation Mahazar and Rough Sketch and examined witnesses and seized the Auto. Though the witnesses P.Ws.18 and 19 turned hostile, their evidence is only to the effect of drawing Rough Sketch and Observation Mahazar for the place of abduction and the scene of occurrence, which does not affect the case in any manner. P.W.2 categorically deposed about the abduction of the victim girl in his Auto by the appellant/accused and she witnessed the same. The Auto belongs to the appellant/accused and the same not denied by him. The appellant/accused was a school van driver and he used to pick up and drop the school children, in between time, he used to ply Auto.

12. The victim was a minor and aged about 17 years as spoken by P.Ws.1, 7 and 9 and other witnesses, which was confirmed by the Radiologist P.W.8, who examined the victim girl and gave Ex.P.3 X-ray Report. After examination of M.O.2 X-ray series, she stated that the victim aged about between 16-18 years on the date of examination. The age is affirmed by Ossification Test by studying the fusion of bones, which is



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almost certain. Ossification Test is based on the formation of bone, its fusion and its growth. During the cross-examination, a specific question has been put to P.W.8 Radiologist stating that the victim was more than 18 years, which has been categorically denied by her. Thus, the victim girl was a minor at the time of occurrence. As per Section 34(2) of the POCSO Act, whether a person is a child or not, shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination. No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it. The appellant though made a vehement submission before this Court with regard to determination of age of the victim, the same ought to have been raised before the Trial Court and the Trial Court found no reason to dispute the age of the victim girl, had given a clear finding that the victim girl was a minor, aged about 17 years at the time of occurrence. In view of the same, this Court is of the opinion that the victim girl was a minor at the time of occurrence and there is no reason to doubt the same.



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13. In this case, the appellant/accused was caught red handed by P.W.1 and P.W.7 from the scene of occurrence and produced before the Police and therefore, there is no necessity to conduct test identification parade.

14. Now, with regard to the sexual assault, this Court to determine whether it is a case of penetrative sexual assault or aggravated sexual assault.

15. The victim girl would come under Section 9(k) of the POCSO Act. The appellant/accused was regularly visiting the area of the victim girl and parked his Auto there. The victim girl though grown up, her mental maturity is not to her age. That is the reason why, she could not continue her education, which has been confirmed by the evidence of P.Ws.1, 4, 9 and 23 and others. The contention of the appellant that the victim girl is a mentally retarded person and hence, no much weightage to be given to her evidence. P.W.3 admits that a man with white hair had taken her in the Auto, but on the same breath, she affirms to a question that she could not identify the person, who had misbehaved with her and also affirms that prior to the



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chief-examination, she was instructed by the Police and the Police had instructed her to depose.

16. The evidence of P.W.3 is natural without any exaggeration or any tutelage. The questions have been put by the Trial Court to confirm the mental capability and her capacity to understand the questions and answer the same and thereafter only, she had been examined and her evidence was recorded in the presence of her mother, which is in compliance to Section 36 of the POCSO Act. As per Section 24 of the Mental Health Act, 1987, the Magistrate shall examine the person to assess his capacity to understand whether the person is mentally ill person. P.W.3 might be a mentally retarded child, but certainly not a child of mental insanity. P.W.3 had narrated the sequence naturally what had happened, how she forced to get into the Auto and thereafter, she was taken to an isolated place and she had been molested and thereafter, her dress removed and she was subjected to sexual assault. She further states that but for the timely intervention of her maternal grandmother P.W.1, P.W.9 and P.W.10 and others, she would have faced worse situation. P.W.3 further states that she also went to the Police Station along with P.W.1. She, in her evidence, more than once, confirms



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that she had not been tutored by anybody to depose in a particular manner.

She had also given the relationship details of her mother, sister, maternal grandmother and paternal grandmother. During the chief-examination on 27.06.2016, she identified the appellant/accused. On 08.09.2016, during the course of cross-examination, she again identified and re-confirmed the appellant/accused. It is natural that a person with such condition will give 'yes' answer and that to for two questions, she had given 'yes' answer. There is no material to discredit the evidence of P.W.3, which is natural, truthful and trustful. Further, the evidence of P.Ws.1, 7 and 10 that they reached the occurrence place immediately, caught the appellant/accused, rescued the victim girl and thereafter, proceeded to the Police Station are further corroborated and fortified the version of P.W3.

17. P.W.15, Doctor, who examined P.W.3 on the next day i.e., on 28.01.2013, in the Accident Register - Ex.P.7, clearly recorded about the time of victim girl being taken in the Auto to an isolated place near a foothill and there, she was subjected to physical sexual assault. In Ex.P.8 Wound Certificate, it is recorded that there is no external injuries, marks of any violence and the external genitalia being normal. Further, no semen



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was detected. In the Wound Certificate, though it is recorded that she is not a virgin, no external injuries at the time of examination and there is no evidence of recent sexual intercourse, affirming that there have been no penetrative sexual assault on 27.01.2013 by the appellant/accused. On perusal of Ex.P.7 and evidence of P.W.15 Doctor, it is seen that aggravated sexual assault has been committed by the appellant/accused, but she cannot be conclusively stated that there was penetrative sexual assault. P.W.17 Doctor, who examined the appellant/accused, issued Ex.P.11 Medical Certificate stating that on examination of the appellant/accused on 29.01.2013, he found around five injuries namely, abrasion, contusions and other injuries on the appellant/accused and gave an opinion that there is no evidence of recent sexual act, thereby no penetrative sexual assault committed by the appellant/accused. Further, the witnesses, P.Ws.1, 4, 7 and 23 gone to the scene of occurrence and enquired with P.W.3 and came to know that aggravated sexual assault has been made on her. P.W.3 in her evidence, does not state about any penetrative sexual assault. There is no evidence to show, infer and confirm that there was any penetrative sexual assault.



18. The phrase "penetrative sexual assault" is defined under Section 3

of the POCSO Act in the following manner:

"3. Penetrative sexual assault. - A person is said to commit "penetrative sexual assault" if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

19. While construing the aforesaid provision, a person is said to have committed a sexual assault if the perpetrator penetrates his penis into any opening of the child's body or the perpetrator inserts any other part of the body into any opening of the child's body or manipulates any part of the



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child's body so as to cause penetration into the body. In all these three instances, the presence of penetration is required to attract the provision. sub-section (d) relates to the perpetrator using his mouth on the body of the child, where the act of penetration is absent. Thus, the act of penetration is a mandatory requirement for commission of penetrative sexual assault under Section 3 (a), (b) and (c) of the Act and the act of an oral usage of the perpetrator's mouth on the child's body would amount to penetrative sexual assault under sub-section (d).

20. The Stedman's Medical Dictionary defines 'penetrate' as follows:-

Penetrate – to pierce; to pass into the deeper tissues or into a cavity.

21. From the evidences available in the present case, both oral and documentary, there is nothing incriminating to substantiate that the appellant had caused penetration in any manner on the child. Nor does the evidences reveal of any acts by which he had used his mouth on the child's body. In view of the same, this Court finds that there is no penetrative sexual assault, as defined under Section 3 of the Act, committed by the appellant/accused on P.W.3. Thus, the judgment of the Sessions Court,



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convicting and sentencing the appellant/accused under Section 4 of the POCSO Act cannot be sustained.

22. On the other hand, from the evidences available on record in general and the testimony of P.Ws.1, 4, 9 and 23 in particular, it stands substantiated that the child had some mental condition, which was not normal as that of a child of a sound mental status. As already observed by us, she certainly was not a child of mental insanity. When any person takes advantage of a child, which did not have a sound mental status, and commits sexual assault on the child, he is deemed to have committed “aggravated sexual assault”. The term “aggravated sexual assault” is defined under Section 9 of the Act and the sexual assault on such a child with a mental condition falls under sub-section (k). Section 9(k) of the Act reads as follows:

“9.Aggravated sexual assault.

(k) whoever, taking advantage of a child’s mental or physical disability, commits sexual assault on the child; or”



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23. On an overall appraisal of Section 3 read with the definition of 'penetrate' from the Stedman's Medical Dictionary and Section 9(k) of the Act, we are of the affirmed view that the appellant/accused had not caused penetrative sexual assault, but has committed aggravated sexual assault only under Section 9(k) of the Act. Consequently, the appellant/accused is liable to be punished for aggravated sexual assault under Section 10 of the Act.

24. In view of the above, this Court finds that finding of the Trial Court against the appellant/accused for penetrative sexual assault under Section 4 of the POCSO Act is not sustainable. Hence, the conviction is modified into aggravated sexual assault under Section 10 of the POCSO Act. As per Section 10 of the POCSO Act, whoever commits aggravated sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine. Therefore, the appellant/accused is sentenced to undergo seven years rigorous imprisonment alone, without any fine amount.



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25. With regard to conviction under Section 363 I.P.C and Section 4 of TNPWH Act, the conviction and sentence of the Trial Court stands confirmed. This Criminal Appeal is partly allowed. All the sentences are directed to run concurrently and the period of imprisonment already undergone by the appellant/accused shall be given set-off under Section 428 Cr.P.C.

Index : Yes

Internet: Yes

Neutral Citation: Yes
smn2

(M.S.R., J.)

(M.N.K., J.)

27.07.2023

To

- 1.The Principal Sessions Judge (Mahila Court),
Tirunelveli, Tirunelveli District.
- 2.The Deputy Superintendent of Police,
Cheranmahadevi Police Station,
Tirunelveli District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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M.S.RAMESH, J.
AND
M.NIRMAL KUMAR, J.

smn2

Pre-delivery judgment made in

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27.07.2023