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Crl.A.No.342 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.07.2024

CORAM :

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

Crl.A.No.342 of 2018

State represented by
The Public Prosecutor,
High Court, Madras - 104.
(Kuttalam Police Station
Crime No.189/2015)

... Appellant

vs.

Rajesh

... Respondent

PRAYER: Criminal Appeal filed under Section 378 (i) (b) Criminal Procedure Code, 1973, to set aside the judgment and orders dated 22.09.2017 passed in S.C.No.14 of 2015 by the Sessions Judge (Mahila Fast Track Court), Nagapattinam.

For Appellant : Mr.S. Rajakumar
Additional Public Prosecutor.

For Respondent : Mr.P.Muthamizhselvakumar



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JUDGMENT

WEB COPY Challenging the order of acquittal dated 22.09.2017 passed by the Sessions Judge (Mahila Fast Track Court), Nagapattinam in S.C.No.14/2015, the State has filed the present appeal.

2.The respondent stood charged for the offences punishable under Section 6 r/w. 5(l)(m) and (j)(ii) and Section 10 r/w. 9(l)(m) of the Protection of Children from Sexual Offences Act, 2012 (in short POCSO Act) by the trial court in S.C.No.14/2015.

3.The case of the prosecution as could be discerned from the oral and documentary evidence is as follows:

3.1. The victim (P.W.1) is residing with her parents and her siblings at Kandiyur Village, Kutthalam Taluk, Nagapattinam District. She was studying VIII standard in 2013. According to P.W.1, her parents are daily wagers. The date of birth of the victim is 03.06.2001 as per the Transfer Certificate (Ex.P3) issued by the Government Higher Secondary School, Kutthalam. P.W.1 in her deposition had stated that during 2013, she attained puberty and the respondent, who was her neighbour, used to come down to her house whenever she was alone. He also sexually



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assaulted her and forced himself upon her. This had continued for more than two years. On 13.06.2015, since she had severe stomach pain, her mother (P.W.2) took her to Government Periyar Hospital, Mayiladuthurai and when she was in the outpatient ward, she delivered a female child. P.W.2, the mother of the victim questioned her daughter (P.W.1) who in turn informed her that the respondent used to have sex with her. P.W.1 did not inform P.W.2 about the incident, immediately, fearing repercussions. The victim was admitted as an inpatient in Government Hospital, Mayiladuthurai.

3.2. Dr.Aarthi (P.W.5) examined P.W.1 on 13.06.2015 at about 9.15 a.m. The victim informed the doctor that she had sexual intercourse with a known person, as a result of which, she became pregnant and that she was not married. According to P.W.2, the victim delivered a female child weighing 2 kg on the same day in the hospital. The Accident Register was marked as Ex.P6.

3.3. On intimation from the hospital, Tmt.Suguna (P.W.7), the then Sub Inspector of Police, All Women Police Station, Mayiladuthurai went to the Government Hospital, Mayiladuthurai on 13.06.2015,



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examined the victim child, recorded her complaint statement (Ex.P1) and obtained her signature on it. She also obtained her mother's (P.W.2) signature on the complaint statement. Thereafter, she came down to the police station and handed over the complaint statement (Ex.P1) to Thiru.Rajamanickam (P.W.10), the then Sub Inspector of Police, Kutthalam Police Station.

3.4. Thiru.Rajamanickam (P.W.10) registered FIR (Ex.P10) in Crime No.189/2015 against the respondent for the offences punishable under Sections 4 and 6 of POCSO Act, 2012 on 13.06.2015. He then placed the records before the Inspector of Police, Kutthalam Police Station.

3.5. Thiru.Kulothungan (P.W.11), the then Inspector of Police, I/C of Kutthalam Police Station, took up investigation in Crime No.189/2015, went to the scene of occurrence, prepared an observation mahazar (Ex.P4) and a rough sketch (Ex.P11) in the presence of the witnesses Jayaraman (P.W.3) and Moorthy (not examined). He then went to Mayiladuthurai Government General Hospital and examined the victim (P.W.1), her mother (P.W.2) and her grandmother Amsam (not



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examined) and recorded their statements individually under Section

161(3) Cr.P.C.

3.6. P.W.11 arrested the respondent on 14.06.2015 and recorded his confessional statement in the presence of the witnesses Durairaj (P.W.4) and Veeramani (not examined). He collected the blood samples of the victim (P.W.1), the new born child and the respondent and sent the same to forensic lab for DNA test, through court.

3.7. Tmt. Thara (P.W.8), Scientific Officer, Forensic Sciences Laboratory, Chennai, examined the blood samples and submitted her report (Ex.P8) stating the following :

- i. the cumulative probability of paternity of Mr.R.Rajesh for being the father of the child Anusuya is found to be 99.99999995%.
- ii. the cumulative chance of exclusion of any random man from the paternity of the child Anusuya is 99.99999999999999%.

3.8. In the meanwhile, P.W.10 subjected the respondent to medical examination. Dr.Tamzhilmani (P.W.6) examined the respondent on 20.06.2015 and opined that there is nothing to suggest that he is



impotent. His opinion was marked as Ex.P7.

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3.9. P.W.1 in her evidence had stated that the respondent used to come to her house and have sex with her. She had also stated that when she missed her monthly periods, she informed the same to the respondent and from then on the respondent stopped talking to her. He also started having an affair with another woman who was residing on the same street.

3.10. P.W.1 was kept in a Home at Mayiladuthurai, after she was discharged from the hospital. She was subsequently produced before Tmt.Saraswathi (P.W.9), the then Judicial Magistrate No.I, Nagapattinam, for recording her statement under Section 164 Cr.P.C. The learned Judicial Magistrate after observing necessary legal formalities recorded the statement (Ex.P9) of the victim on 02.07.2015. The videograph was marked as MO.1.

3.11. P.W.2, the mother of the victim corroborated the versions of P.W.1 in all material particulars.



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3.12. P.W.11 handed over the records before the regular Inspector of Police Thiru.Anandhathandavam (P.W.12) who took up further investigation and examined the doctors and the Scientific Officer, Forensic Sciences Laboratory, Chennai. He also obtained the DNA report. After completing investigation, he laid a final report before the Mahila Court, Nagapattinam in Spl.S.C.No.14/2015 against the respondent for the offences punishable under Sections 6 r/w. 5(l)(m) and (j)(ii) and 10 r/w. 9(l)(m) of POCSO Act.

3.13. In order to bring home the guilt of the respondent, the prosecution examined 12 witnesses, marked 13 documents and 1 Material Object.

3.14. The respondent when questioned under Section 313 Cr.P.C with regard to the incriminating circumstances appearing in evidence against him, denied of having committed any offence. However, he did not examine any witness on his side.

3.15. The trial court judge after analysing the oral and documentary evidence on record found the accused not guilty of the



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aforesaid offences and acquitted him under Section 235(1) Cr.P.C, vide his judgment and orders dated 22.09.2017, on the sole ground that since the victim child had deposed that she had sex with the respondent during the year 2013, she could not have delivered a female child in the year 2015.

3.16. Aggrieved over the judgment and orders passed by the trial court judge, State has filed the present appeal.

4. Heard Mr.S. Raja kumar, learned Additional Public Prosecutor appearing for the State and Mr.P.Muthamizhselvakumar, learned counsel for the respondent.

5. It is seen from the evidence of P.W.1 that she was subjected to sexual assault by the respondent since the year 2013 and this continued on several occasions. The victim child had in fact delivered a female child on 13.06.2015. According to the victim, she did not inform anyone since the respondent promised to marry her. She had also stated that when she missed her monthly menstrual periods, she informed the same to the respondent. However, the respondent stopped talking to her. He also had



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an affair with another woman who was residing on the same street. Her evidence is amply corroborated by the evidence of her mother (P.W.2).

The medical records and the evidence of Dr.Aarthi (P.W.5) clearly show that the victim delivered a girl child on 13.06.2015 at Government General Hospital, Mayiladuthurai. The age of the victim child was 12 years in the year 2013 and 14 years in the year 2015 when she delivered the child. There is no dispute with regard to the age of the victim. The victim child had also narrated the sequence of events cogently in the trial court.

6. The learned counsel for the respondent / accused relied on a decision of Division Bench of this Court in ***Chandra Mohan v. State of Tamil Nadu*** in ***Crl.A.No.538 of 2023*** and contended that the courts cannot sustain the conviction on the basis of the DNA test reports alone in the absence of evidence regarding drawing of samples and packing. He also relied on another similar decision of Division Bench of this Court in ***Indiran v. State represented by the Inspector of Police, Thudiyulur Police Station, Coimbatore District. (Crime No.23/2017)*** in ***Crl.A.No.372 of 2020***. In both the cases, there was absolutely no



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evidence on record to convict the accused under POCSO Act and in such circumstances, it was held that based on the DNA test report alone the accused cannot be convicted especially when the samples were not properly drawn. However, in the instant case, the accused did not raise any objection at the time of marking DNA report in the trial court. Even assuming that the accused is not the father of the child born to the victim in the year 2015, the evidence of the victim is overwhelming that she was subjected to sexual assault by the accused. This was continuing since the year 2013. As already observed she had narrated the incident cogently and had also withstood the testimony of cross examination.

7. Mr.P.Muthamizhselvakumar, learned counsel for the respondent / accused also pointed out that the statement under Section 164 Cr.P.C. of the victim girl made before the Judicial Magistrate - I, Nagapattinam, did not exactly mention the year from when she has been sexually exploited by the respondent. According to the learned counsel, such bland statement cannot be supportive of the prosecution case. This contention cannot be accepted because P.W.1's deposition before the court had categorically implicated the respondent and it is amply corroborated with P.W.2's deposition. P.W.1 had asserted that the respondent is the father



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of her child. P.W.1 in fact in her 164 Cr.P.C. statement has asserted that the respondent sexually abused her on several occasions and that he is the father of her child. This fits in with her evidence before the court as well as her complaint (Ex.P1). Minor discrepancies cannot be blown out of proportion since 164 Cr.P.C. statement itself is not a substantive piece of evidence and an order of acquittal / conviction cannot be based on it.

8. It is pertinent to point out that victim child was examined in chief on 06.04.2016 but was not cross examined on the same day. The trial court judge allowed Section 311 Cr.P.C. petition subsequently and P.W.1 was recalled on 14.12.2016 and was cross examined. The Supreme Court took note of such dilatory tactics adopted by the accused in the trial Courts and in *Vinod Kumar vs. State of Punjab (2015) 3 SCC 220*, issued a direction to all the trial Courts that they should ensure that cross-examination of a witness is done immediately without delay after he is examined in chief. Following the directions issued by the Supreme Court, the Registrar General of this Court has issued a circular dated 18.12.2015 to all the trial Courts to strictly adhere to the directions of the Supreme Court in *Vinod Kumar (supra)*. Further, the Supreme Court, in *Rajaram Prasad Yadav vs. State of Bihar [(2013) 14 SCC 461]* and



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State (NCT of Delhi) vs. Shiv Kumar Yadav [(2016) 2 SCC 402], has clearly held that the petition to recall a witness under Section 311 Cr.P.C. should not be mechanically allowed unless there are sound and convincing reasons to justify the same. To nip such dilatory tactics in the bud, the Parliament, in its wisdom, has laid down as under in Section 33(5) of the POCSO Act.

"33. Procedure and powers of Special Court:

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the Court.?"

The trial court has not followed the dictum laid down by the Hon'ble Supreme Court and the circular issued by this court.

9. In his judgment dated 22.09.2017, the trial court judge had stated that if victim had been sexually assaulted in the year 2013, she would have given birth to a child within 10 or 11 months and the fact that she had given birth to the child only in the year 2015 shows that she was not at all sexually assaulted by the respondent. This observation of the trial court is highly shocking. P.W.1 in her evidence had categorically stated that she was sexually assaulted by the respondent since the year 2013 and when she missed her menstrual periods she informed the



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respondent in this regard. However, he did not listen to her and also stopped talking to her. When the evidence of P.W.1 is very clear, it is not known as to how the trial court had come to a decision that the victim never had sexual intercourse with the respondent ten months prior to delivery of a female child. This plea was not even taken by the accused himself. It is relevant to extract Section 29 of the POCSO Act, which read thus :

"29. Presumption as to certain offences.—

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

10. The observations and conclusions of the trial court are appalling, to say the least. The trial court judge had either no understanding of law or deliberately chose to tread a mysterious path. It is not a case of low standard of delivery of justice but rather it is travesty of justice where basic tenets of law have been buried deep to enable the culprit go scot free. It is brought to the knowledge of this Court that the Judicial Officer retired in the year 2020 itself.



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11. It is also sad to know that the respondent had disowned his own female child even after the DNA report. It is heart wrenching to know that the small child is left in an orphanage now. The victim herself was a child aged 14 years at the time of delivery of a baby girl.

12. The very objective of POCSO Act was to protect children from a slew of sexual offences and introduce child friendly judicial mechanisms for dealing with such offences. Despite existence of such comprehensive laws the scale of such abuse is staggering and in majority of the cases, the perpetrators are known to the victim leading to reluctance on the victim's part to seek redressal.

13. Such incidents leave a permanent blot on the society and create a doubt regarding the awareness on sexual education amongst grown up children. On one side, knowledge of “good touch and bad touch“ is imparted to younger children and on the other, we find older children also becoming victims of sexual exploitation. P.W.1 had kept all the incidents to herself without sharing her problem. Had the victim given some hint about the alleged misbehaviour of the respondent to even her peers, the



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victim could have been saved from the severe trauma of becoming a mother of a child when she herself was a child. The act of the respondent does not deserve any sympathy because even after knowing the age of the victim, he continued to repeatedly abuse her. Whether the sexual act was consensual or forced is immaterial as far as the present case is concerned because of the age of the victim.

14. For the reasons aforesaid, I set aside the order of acquittal dated 22.09.2017 made in Spl. S.C.No.14/2015 passed by the Sessions Judge, Mahila Court, Nagapattinam, and convict the respondent for the offences punishable under Sections 6 r/w. 5(l)(m) and (j)(ii) and 10 r/w. 9(l)(m) of POCSO Act.

15. The prosecution is directed to produce the accused on 31.07.2024 for questioning him with regard to the sentence to be imposed upon him.

29.07.2024

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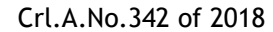
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3. The offence committed by the accused is very serious as the girl was aged just 12 years and delivered a child at the age of 14 years. In such circumstances, the sentence should be deterrent and commensurate with the gravity of the offence. Therefore, I convict and sentence the accused as given in the tabular column below.



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<i>S.No.</i>	<i>Conviction</i>	<i>Sentence</i>
1.	Section 6 r/w. 5(l)(m) and (j)(ii) of POCSO Act	Rigorous imprisonment for a period of ten years and to pay a fine of Rs.2,000/-, in default, to undergo simple imprisonment for a period of six months.
2.	Section 10 r/w. 9(l)(m) of POCSO Act.	Rigorous imprisonment for a period of seven years and to pay a fine of Rs.2,000/-, in default, to undergo simple imprisonment for a period of six months.
		Total fine amount Rs.4,000/-
Both the sentences shall run concurrently and the period of sentence already undergone by him shall be set off under Section 297 BNSS.		

4. The Registry is directed to prepare committal warrant against the accused and issue a copy of the judgment by today itself (i.e, on 21.08.2024).

5. The Inspector of Police, Kutthalam Police Station, Mayiladuthurai District, shall take the accused into custody and commit him to prison for undergoing the sentence.

6. In the result,

- the Criminal Appeal is allowed.
- the judgment and orders dated 22.09.2017 passed in S.C.No.14 of 2015 by the Sessions Judge (Mahila Fast Track Court), Nagapattinam, is set aside.
- the accused is convicted for the offences punishable under Sections



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6 r/w. 5(l)(m) and (j)(ii) and 10 r/w. 9(l)(m) of POCSO Act.

iv. he is sentenced as detailed hereunder :

<i>S.No.</i>	<i>Conviction</i>	<i>Sentence</i>
1.	Section 6 r/w. 5(l)(m) and (j)(ii) of POCSO Act	Rigorous imprisonment for a period of ten years and to pay a fine of Rs.2,000/-, in default, to undergo simple imprisonment for a period of six months.
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		Total fine amount Rs.4,000/-
Both the sentences shall run concurrently and the period of sentence already undergone by him shall be set off under Section 297 BNSS.		

21.08.2024

Index : yes/no

Speaking /Non speaking Order

mtl

Issue order copy on 21.08.2024



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Copy to:
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The Superintendent of Jail, Central Prison,
Mayiladuthurai District.

To

1. The Sessions Judge (Mahila Fast Track Court), Nagapattinam.
2. The Public Prosecutor, High Court, Madras.
3. The Section Officer, Criminal Section, High Court, Madras



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கேள்வி :- உமக்கு வழங்கப்பட இருக்கும் தண்டனை குறித்து நீர் என்ன கூற விரும்புகிறீர்?

விடை :- நான் வேறு பெண்ணை திருமணம் செய்துவிட்டேன். குறைந்த தண்டனை விதிக்க வேண்டுகிறேன்.

குற்றவாளி கையொப்பம்

தீர்ப்பு நகலை பெற்றுகொண்டேன்.



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