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CRL. A. No.181/2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
25.07.2024	28.08.2024

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THE HONOURABLE MR. JUSTICE M.DHANDAPANI

CRL. A. NO. 181 OF 2023

Manikandan

.. Appellant

- Vs -

State by the
Inspector of Police
All Women Police Station
Tiruvannamalai
Tiruvannamalai District.

.. Respondent

Criminal Appeal filed u/s 374 (2) Cr.P.C. to call for the entire records in connection with Spl. S.C. No.77/2019 on the file of the learned Special Court (under POCSO Cases), Sessions, Judge, Tiruvannamalai, Tiruvannamalai District and set aside the judgment dated 31.01.2023.

For Appellant : Mr. V.Parthiban, for
Mr. E.Kannadasan

For Respondent : Ms. G.V.Kasthuri, APP



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JUDGMENT

The conviction and sentence imposed on the appellant by the learned Sessions Judge, Special Court under POCSO Cases, Tiruvannamalai, in Spl. S.C. No.77/2019, is assailed by the appellant by filing the present appeal.

2. The appellant stood charged and tried for the offences u/s 6 r/w 18 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and Section 323 IPC and after trial, the Court below found the appellant guilty and convicted him under both the offences, sentenced him u/s 6 r/w 18 of POCSO Act to rigorous imprisonment for a period of 10 years together with a fine of Rs.5,000/- (Rupees Five Thousand only) in default to undergo simple imprisonment for a period of one year and for the u/s 323 IPC sentenced him to rigorous imprisonment for a period of one year. The sentences were ordered to run concurrently and the period of incarceration already undergone was directed to be set off u/s 428 Cr.P.C. Aggrieved by the said conviction and sentence, the present appeal has been filed.



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3. The brief facts necessary for the disposal of this appeal are as under :-

P.W.s 1 and 2 are the father and mother of the victim. P.W.s 3 and 4 are relatives of P.W.s 1 and 2. On 17.01.2018 when P.W.s 1 and 2 were sitting in front of their house and conversing with each other, at that time, the appellant came and enquired about the status of P.W.s 1 and 2 and insisted that P.W.s 1 and 2 take care of the victim and not to allow her to go outside. The appellant further enquired P.W.1 as to whether the victim would take biscuits so that he can procure the same and give to the victim, however, P.W.1 declined stating that the victim would not eat and asked the appellant to leave the place. Thereafter, P.W.s 1 and 2 came inside the house. After coming inside the house, as P.W.1 heard some running noise upstairs, P.W.1 went upstairs and at that time found that the appellant had removed all the clothes of the victim and was trying to lie on top of the victim after removing his inner garments. P.W.1 questioned the act of the appellant in misbehaving with the victim, who was mentally challenged. At that time, the appellant informed P.W.1 that the victim had bitten him and slapping P.W.1 on the face, ran away from the place. P.W.2 on hearing the commotion came upstairs along with another woman, who was residing



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nearby. Thereafter, P.W.1, along with his relatives went and questioned the parents of the appellant about the act of the appellant with the victim, the appellant's parents chastised them and informed that they will give a complaint against the victim for having bitten the appellant. Thereafter, P.W.1 came to the Disabled Welfare Office and informed the happening and with their assistance, P.W.1 lodged the complaint Ex.P-1, against the appellant.

4. P.W.10, the Inspector of Police of All Women Police Station, Tiruvannamalai, while on duty at about 4.00 p.m. on 17.01.2018, P.W.1 appeared before him and gave the written complaint, Ex.P-1, which was received by P.W.10 and P.W.10 registered a case in Crime No.1/2018 against the appellant for the offences u/s 354 (B), 376 r/w 511 IPC and Section 8 of POCSO Act by preparing printed FIR, Ex.P-5. The printed FIR, Ex.P-5 and the complaint, Ex.P-1 were forwarded to the Fast Track Mahila Court.

5. P.W.10 took up investigation of the case and examined the witnesses one Sudha and P.W.6 and recorded their statements. Since the victim was dumb and mentally challenged, P.W.10 did not record the statement of the victim.



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Upon examination of the witnesses, as P.W.10 came to know that the appellant had committed the offence, P.W.10 arrested the appellant at about 18.30 hours on the same day after informing his parents and he was brought o the police station by about 7.00 p.m. Since the appellant was injured, he was sent to Government Hospital, Tiruvannamalai, for treatment. Thereafter, the appellant was produced before the Court and was sent for judicial remand.

6. P.W.10 also issued memo and sent the victim along with Constable No.585 for the purpose of medical examination. On 18.01.2018, P.W.10 visited the scene of occurrence and prepared rough sketch, Ex.P-6 in the presence of witnesses. P.W.10 also examined P.W.s 3, 4, 5, 7 and other witnesses and recorded their statements. On 20.01.2018, P.W.10 examined P.W.8, the doctor, who examined the victim and issued the medical opinion and recorded her statement. P.W.10 also examined the constable, who took the victim to the hospital for examination and recorded her statement. P.W.10 obtained the aadhar care, Ex.P-8 and also the certificate, Ex.P-7 issued by the Disability Welfare Board certifying the victim to be suffering from 60% disability and submitted the original and copy before the court. The copy was handed over to



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the parents of the victim along with court seal. Thereafter, P.W.10 changed the section of offence to one u/s 354 (B), 323, 376 r/w 511 IPC and Section 8 of the POCSO Act and prepared alteration report, Ex.P-9. On completing the investigation, P.W.10 filed the final report against the appellant before the court.

7. To establish the charges levelled against the accused, the prosecution examined P.W.s 1 to 11 and marked Exs.P-1 to P-11.

8. On completion of the evidence on the side of the prosecution, the accused was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him in the evidence tendered by the prosecution witnesses. He denied all the incriminating circumstances. On the side of the defence, neither any oral evidence was adduced nor any document was marked.

9. The trial court, on consideration of oral and documentary evidence and other materials found the accused guilty and convicted him for the offence u/s 6



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r/w 18 of the POCSO Act and u/s 323 IPC and sentenced him as above aggrieved by which the present appeal has been preferred by the appellant.

10. Learned counsel appearing for the appellant submits that the testimony of the prosecution witnesses bristles with very many contradictions and, therefore, it is wholly unsafe to rely on the said evidence to find the appellant guilty of the offence.

11. It is the further submission of the learned counsel that even P.W.s 1 and 2, the parents of the victim have deposed diametrically opposite to each other. While P.W.1 had deposed that the appellant went and brought biscuits for the victim, P.W.2 had deposed that the appellant took the victim along with him and purchased biscuits for her. It is the further submission of the learned counsel that if the appellant was allowed access to the victim by P.W.s 1 and 2, the further evidence of P.W.1 to his wife, P.W.2, about the manner of the appellant and advice given to P.W.2 to safeguard the victim is a clear improvisation from his earlier statement before the police. Further, the appellant and P.W.s 1 and 2 are relatives, but the said fact has been shielded by P.W.1 in his evidence, who



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has deposed that the appellant is not related. The falsity of the testimony of P.W.1 makes the veracity of his evidence unbelievable. P.W.2 has admitted that the appellant is related to P.W.s 1 and 2. It is the further submission of the learned counsel that the whole case of the prosecution is premised on the testimony of P.W.s 1 and 2 and the contradictions in their evidence is of such a magnitude that it would not be in the interest of justice to rely on their evidence.

12. It is the further submission of the learned counsel that the defence has taken a stand that the appellant had gone upstairs only to save the child from being electrocuted by the high voltage electric line. When there is a clear defence on the side of the appellant, the prosecution has not in any manner dislodged the said evidence. It is the further submission of the learned counsel that all the independent witnesses, who have been examined to corroborate the evidence of P.W.s 1 and 2 have turned hostile, which clearly shows that it is unsafe to rely on the evidence of P.W.s 1 and 2 to render a finding with regard to the culpability of the appellant in the commission of the offence.



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13. It is the further submission of the learned counsel that the delay in filing the complaint on 17.1.2018 in respect of an offence, alleged to have been committed on 16.1.2018, creates a grave doubt on the veracity of the complaint, more so, when P.W.s 1 and 2 have not approached the law enforcing agency, but rather have approached the Disabilities Welfare Board for Physically Challenged and are alleged to have lodged the said complaint on their advice. The said act of P.W.s 1 and 2, being the father and mother of the victim, is nothing but an attempt on their part to fasten the guilt on the appellant in view of the animosity between the two families.

14. Topping all of the above submissions, it is the contention of the learned counsel that the non-examination of the victim is fatal to the prosecution case, as Section 164 Cr.P.C. mandates examination of the victim before the Magistrate and during the course of trial, a duty is cast on the prosecution to examine the victim as provided for u/s 25 of the POCSO Act. It is the further submission of the learned counsel that in case of mentally challenged victim, the law provides additional safeguards while recording the statement of the mentally challenged victim. Particular reference was drawn to sub-section (3) of Section



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26 of the POCSO Act by the learned counsel to demonstrate that in case of a child having a mental or physical disability, the assistance of a special educator or person familiar with the manner of communication of the child or an expert in that field be taken. In the case on hand, it is not only the case of the prosecution that the child was mentally challenged, but in the same breath, but diametrically opposite, it is the case of the prosecution that the child has attended school, as could be evidenced from the deposition of P.W.11, the headmaster of the school in which the victim is alleged to have studied between classes 6 to 9. However, curiously, the necessary materials have not been placed before the court by P.W.11, with regard to the studies of the victim. The non-examination of the victim, inspite of a mandatory provision found u/s 26 of the POCSO Act definitely has to be held against the prosecution and the appellant is entitled for an acquittal.

15. With equal vigour, it is the submission of the learned counsel that there is no material to establish the charge u/s 323 IPC except for the statement of P.W.1, who has alleged that the appellant has slapped his face. Without the said evidence being corroborated by any material, the offence cannot be said to



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have been established and the conviction and sentence thereof does not deserve to be sustained. Accordingly, he prays for acquittal of the appellant.

16. Per contra, learned Addl. Public Prosecutor appearing for the respondent submitted that mere improvisations and embellishments in the evidence of the witnesses cannot be a ground to reject their deposition in toto, as due to passage of time, there is bound to be embellishments and improvements in the evidence, as human mind is prone to act in such a fashion. It is therefore the submission of the learned Addl. Public Prosecutor that so long as the evidence of the prosecution witnesses corroborate on material particulars, it would be sufficient for the trial court to return a verdict of guilt on the accused and accordingly, in the present case as well, the court below had found the accused guilty, which cannot be found fault with.

17. It is the further submission of the learned Addl. Public Prosecutor that the delay in lodging the complaint cannot be put against the prosecution, as the cultural background of our country desists the parents from immediately rushing to the police station to lodge a complaint and they resort to means to have their



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grievance ventilated in some other form or keep it within themselves. It is the submission of the learned Addl. Public Prosecutor that P.W.s 1 and 2 and the appellant being related, necessarily, as prudent parents, P.W.s 1 and 2 have gone to the parents of the appellant to speak about his perverted act on the victim, but the parents of the appellant had castigated P.W.s 1 and 2 and the other persons, who accompanied them, whereinafter, P.W.s 1 and 2 have gone and given the complaint on the advice of the Disabilities Welfare Board. The said act of P.W.s 1 and 2, being rustic villagers, cannot be found fault with, more so, their child being a mentally challenged child. Therefore, the said delay in giving the complaint cannot have any far reaching consequences so far as the appellant is concerned.

18. It is the further submission of the learned Addl. Public Prosecutor that insofar as the contention of the appellant with regard to non-examination of the victim, the said non-examination cannot be held to be fatal to the prosecution, as there is a direct eye witness to the occurrence in the form of P.W.1, who is none other than the father of the victim. There is no rhyme or reason for P.W.1, who is the father of the victim, to blame the appellant, that too, by importing



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allegation that he had attempted to commit sexual assault on the victim.

Therefore, when there is an eye witness to the occurrence, there is no necessity for the prosecution to examine the victim and more so in the present case, the victim being a mentally challenged child, it is within the domain of the police authorities to examine the witnesses and record their statements either u/s 161 or 164 Cr.P.C. Therefore, in the backdrop of the aforesaid position, the non-examination of the victim is in no way detrimental to the case of the prosecution.

19. It is the further submission of the learned Addl. Public Prosecutor that the offence u/s 323 IPC against the appellant for slapping P.W.1 has been clearly spoken to by P.W.1 in his evidence in chief and inspite of searching cross examination, the defence has not made any inroads into the said evidence and, therefore, the said offence stands completely established and rightly appreciating the said evidence, conviction has been recorded by the court below u/s 323 IPC, which requires no interference.

20. In fine, it is the submission of the learned Addl. Public Prosecutor that the evidence of the prosecution is not only trustworthy, but it corroborates each



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other on all material particulars and the minor embellishments does not in any way affect the prosecution case and the court below has carefully gone through the entire evidence while convicting the appellant and, therefore, no interference is warranted with the conviction and sentence imposed on the appellant.

21. This Court gave its anxious consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record.

22. A perusal of the depositions of P.W.s 1 and 2 reveal that their depositions, in sum and substance corroborate each other. It is the deposition of P.W.1 that on 17.01.2018 when P.W.s 1 and 2 were sitting in front of their house and conversing with each other the appellant came and enquired about the well being of P.W.s 1 and 2 and while cautioned P.W.s 1 and 2 to take care of the victim, further asked P.W.1 whether the victim would consume biscuit and the appellant procured biscuits and dipping the same in water, gave it to the victim. However, P.W.1 desisted the appellant from giving the biscuit stating that the victim would not eat and asked the appellant to leave the place. It is the further



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deposition of P.W.1 that thereafter, both P.W.s 1 and 2 came inside the house.

After coming inside the house, P.W.1 heard some running noise upstairs, which prompted P.W.1 to go upstairs and he found the appellant in a compromising position with the victim such that he had removed all the clothes of the victim and was trying to lie on top of the victim after removing his inner garments. P.W.1 raised alarm and also questioned the act of the appellant in misbehaving with the victim, who was mentally challenged and the appellant, slapping P.W.1, rushed away from the scene of occurrence. The said deposition of P.W.1 has been corroborated in sum and substance by P.W.2.

23. In this regard, it is the stand of the appellant that there are glaring discrepancies in the evidence of P.W.s 1 and 2, which would be unsafe to be relied upon to convict the appellant.

24. In this regard, the Supreme Court, in a catena of decisions has held that minor contradictions or inconsistencies, which does not affect the root and genesis of the prosecution case, are not to be given undue weightage for the purpose of discarding the evidence in toto. In this regard, useful reference can



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be had to the decision of the Supreme Court in **Waman – Vs - State of Maharashtra, (2011 (7) SCC 295)**, wherein it has been held as under :-

*“33. In **Gurbachan Singh v. Satpal Singh [(1990) 1 SCC 445 : 1990 SCC (Cri) 151]** this Court has held that despite minor contradictions in the statements of prosecution witnesses, the prosecution case therein has not shaken and ultimately accepting their statement set aside the order of acquittal passed by the High Court and restored the sentence imposed upon them by the trial court.*

*34. In **Sohrab v. State of M.P. [(1972) 3 SCC 751 : 1972 SCC (Cri) 819]** about minor contradictions in the statements of prosecution witnesses, Their Lordships have held in para 8 as under:*

*“8. ... It appears to us that merely because there have been discrepancies and contradictions in the evidence of some or all of the witnesses does not mean that the entire evidence of the prosecution has to be discarded. It is only after exercising caution and care and sifting the evidence to separate the truth from untruth, exaggeration, embellishments and improvement, the court comes to the conclusion that what can be accepted implicates the appellants it will convict them. This Court has held that **falsus in uno falsus in omnibus** is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In*



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most cases, the witnesses when asked about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered though where the substratum of the prosecution case or material part of the evidence is disbelievable it will not be permissible for the court to reconstruct a story of its own out of the rest."

35. It is clear that not all the contradictions have to be thrown out from consideration but only those which go to the root of the matter are to be avoided or ignored. In the case on hand, as observed earlier, merely on the basis of minor contradictions about the use and nature of weapons and injuries, their statements cannot be ignored in toto. On the other hand, we agree with the conclusion of the trial court as affirmed by the High Court about the acceptability of those witnesses, and accordingly, we reject the claim of the appellants as to the same."

(Emphasis supplied)

25. In the case on hand, as argued on behalf of the appellant, there are few interpolations and contradictions in the evidence of P.W.s 1 and 2 and P.W.s 5 and 6, who are independent witnesses have turned hostile. But the mere



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hostility of P.W.s 5 and 6 would not take away the weight of the evidence of P.W.s 1 and 2.

26. The discrepancies in the evidence of P.W.s 1 and 2 are not material discrepancies affecting the substratum of the prosecution case. The discrepancies are mere errors, omissions or commissions in the evidence, which is otherwise relating to the relationship of the appellant with P.W.s 1 and 2. It is only P.W.1, who is an eye witness to the occurrence and P.W.2 is a mere hearsay evidence so far as seeing the occurrence is concerned. All the knowledge obtained by her is on the basis of what has been spoken to by P.W.1.

27. In this regard, this Court has to test the deposition of P.W.1 against the complaint, Ex.P-1 and the non-examination of the victim to find out whether the said deposition is sufficient to establish the guilt of the appellant. As aforesaid, the deposition of P.W.1 is in line with his complaint, Ex.P-1, which is the earliest document, which has come into existence. In the said complaint, P.W.1 has clearly stated what he has deposed in court at the time of chief examination.



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28. The next document, which had come into existence, after the complaint, is the Ex.P-3, the accident register, in which there is a clear recording by the Medical Officer that the victim was sexually assaulted by a known person and the name of the appellant is also recorded. Therefore, from the deposition of P.W.1 coupled with the complaint Ex.P-1 and Ex.P-3, the accident register, a cogent pattern emerges, which unerringly point to the appellant as the aggressor having committed the offence.

29. True it is that P.W.s 5 and 6, who are independent witnesses have turned hostile. But could their hostility affect the deposition of P.W.1 requires to be considered. P.W.5, in her deposition in chief, has stated that on the date of occurrence, at about 4.30 p.m., when she was in her house, she heard commotion outside the house of P.W.2. Though she has deposed that her husband had asked her to go inside, however, the fact remains that there was commotion near the house of P.W.2, which clearly runs parallel to the deposition of P.W.1 that the commotion was due to the conduct of the appellant with the victim, which has resulted in the commotion between P.W.1, the appellant and P.W.2.



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30. The defence had taken a plea that the appellant rushed to save the victim from being electrocuted, as she was standing near a high tension electric pole. However, a careful perusal of Ex.P-6 reveals that there is no running high tension wire from the pole, near the place where the victim is said to have been standing. Even otherwise, if the defence taken by the appellant is to be accepted, its sans logic, as the natural course for the appellant would have been to alert the parents of the victim, viz., P.W.s 1 and 2, who were inside the house or to raise an alarm so as to ward off the victim from near the electric pole. However, the reason for the appellant running upstairs, that too, when the stairs were on the back side of the house of the victim, is too big a pill to swallow, if really the defence put forth is to be believed.

31. Be that as it may. Reverting back to the deposition of the witnesses, P.W.8, the doctor, who had examined the victim, on the requisition of P.W.10, and had issued Ex.P-4, had categorically stated in Ex.P-4 that the victim was alleged to have been sexually assaulted by a known person on 16.1.2018. In the



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said medical opinion, P.W.8 had opined that sexual assault may have occurred.

Further, the doctor had also opined that the victim is mentally retarded.

32. The above opinion of the doctor finds corroboration from Ex.P-7, the Pass Book issued by the District Disabled Welfare Officer, Government of Tamil Nadu, Tiruvannamalai, who has issued Ex.P-7, fixing the percentage of disability of the victim at 60%. In fact, there is a clear mention in Ex.P-7 that the victim is mentally retarded and that the percentage of retardation is 60%. From the above documents, it is stood proved that the victim is a mentally challenged person.

33. The age of the victim has been established through the school documents, viz., Exs.P-10 and P-11, the transfer certificate and school attendance register, which show that the victim was admitted in the school in the year 2014 and that she had discontinued her schooling in the year 2017 and that the date of birth of the victim is 17.6.2002. This clearly shows that the victim was only 16 years of age on the date of occurrence and, therefore, the offences under the POCSO Act stands made out. Though contention was advanced that P.W.11 was



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examined without the appellant being put on notice and that the appellant was not permitted to cross examine P.W.10, the investigating officer with regard to the deposition of P.W.11, however, the fact remains that P.W.11 was not the Headmaster at the point of time when the victim joined the school and discontinued her studies. It is only the documents, which have been placed before the court through P.W.11 and the deposition of P.W.11 is only to the limited extent of establishing the said documents. In the aforesaid scenario, not permitting cross examination of P.W.10, the investigating officer with regard to the deposition of P.W.11, would in no way be against the interest of the appellant or in detriment to the appellant as it is only the documentary evidence, which forms the basis of the said evidence and P.W.11 also having been allowed to be cross-examined by the defence, the said contention does not require any further deliberation.

34. Now, the only issue that requires the determination of this Court is whether the non-examination of the victim, either u/s 25 r/w 26 of POCSO Act either before trial or during trial, vitiates the case of the prosecution.



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35. For appreciating the aforesaid contentions, it would be useful to extract Sections 25 and 26 of the POCSO Act, which is as hereunder :-

“25. Recording of statement of a child by Magistrate.—

(1) If the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, 1973 (2 of 1974) (herein referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child:

Provided that the provisions contained in the first proviso to sub-section (1) of section 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case.

(2) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code.

26. Additional provisions regarding statement to be recorded.—

(1) The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.

(2) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on



payment of such fees as may be prescribed, while recording the statement of the child.

(3) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.

(4) Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means.”

36. Normally, the statement of a victim, in case of offences under the Indian Penal Code is recorded u/s 164 (5) Cr.P.C. by the Magistrate. In such cases, when the victim is produced before the Magistrate by the police, following the provisions of the Criminal Procedure Code, and the statement of the victim is recorded. However, in cases under the POCSO Act, which are similar to the offences under the Indian Penal Code and where the offence is perpetrated against a child of tender age, the recording of statement as is provided under Section 164 (5) of Cr.P.C. is telescoped into the POCSO Act.



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37. In cases of such nature, where the child victim had suffered ignominy at the hands of the perpetrator of the crime and is under a mental trauma due to the aforesaid act, the Courts, foreseeing the trauma that would be faced by the child, if the child were to be questioned once over about the very same occurrence which it has already gone through, had provided for a mechanism in and by which the statement could be recorded by the Magistrate before trial and the said evidence could be used as substantive piece of evidence in chief during trial on which the defence would be permitted to cross examine the child. The abovesaid mechanism has been designed only to safeguard the mental health of the child, as the trauma faced by the child due to the sexual assault is not continually rewind thereby destabilising the morale of the child.

38. The appellant has laid great emphasis on Section 26 (2) & (3) of POCSO Act to submit that the victim in the case ought to have been examined with the assistance of a person familiar with the manner of communication of a mentally or physically challenged child and in the absence of such a recording, it is the submission of the learned counsel that there is no evidence which could form the basis for coming to the conclusion that such an occurrence had taken place and,



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therefore, the non-examination of the victim is fatal to the case of the prosecution as the occurrence proper has not been established.

39. Though such a contention on the face of it looks attractive, however, a perusal of Section 26 (1) of POCSO Act reveals that while recording the statement of a child victim, the presence of the parents of the child or person in whom the child has trust or confidence is made mandatory. Thus there is a clear intent of the Parliament that the presence of parents or any other person alone would infuse trust or confidence in the child to speak about what had happened. Thus, the intent of the Parliament is very clear as is evident from the inclusion of the parents of the child or any other person in whom the child has trust or confidence to be present during recording of statement of the child, as acts which the child victim complains of, which has been spoken to by the child victim to its parents, based on which the criminal machinery had been set in motion is only within the knowledge of the child and, therefore, the child victim would be at ease if the parents of the child victim is present during the recording of the statement.



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40. From the above, it transpires beyond a pale of doubt that the Parliament has visualised the scenario that sexual abuse is being perpetrated on a child in seclusion and not in front of any witnesses and, therefore, the child victim, which has spoken about the abuse caused to him/her to their parents, the necessity of the parents to be along with the child infuses confidence in the child victim to speak out freely and detail the happenings while its statement is recorded by the Magistrate. Therefore, where an offence has been perpetrated on a child victim in confines without any witness, there arises a necessity to record the statement of the child victim by the Magistrate, as the child alone is the witness to the offence against him/her, in the presence of its parents or any other person in whom the child has trust or confidence, but where the offence is perpetrated on the child victim for which there is/are eye witness to the said offence, making the examination of child victim with regard to recording its statement would be nothing but causing mental trauma to the child victim once over, which has been the basis on which the Courts have held that the statement of the child victim, which is recorded by the Magistrate would be substantive piece of evidence and there is no necessity to examine the child witness at the time of trial and cross examination on the said statement would suffice.



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41. However, when a person, other than the child victim, who had faced the consequences of the act, could speak about the same, as he had witnessed the occurrence with regard to the offence perpetrated on the child victim, the necessity for putting the child victim once again through the rigours of recording the evidence would not arise, as the person, who had witnessed the occurrence could speak about the occurrence. The above principle would be in consonance with the various decisions of the Apex Court and also this Court on the need for recording the statement of the child victim.

42. Accordingly, this Court holds that the recording of the statement of the physically/mentally challenged child victim would be mandatory in terms with Section 25 r/w 26 of the POCSO Act where there are no eye witnesses to the occurrence and that the child victim alone is the witness/victim and where there are eye witnesses to the occurrence, there would arise no necessity for recording the statement of the child victim by the Magistrate by putting the physically/mentally challenged child victim through the rigours of recounting the incident once over under Section 26 of the POCSO Act, as the evidence of the eye



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witness would suffice, so long as the presence of the eye witness at the scene of occurrence is proved and that the evidence of said eye witness withstands the onslaughts of cross-examination.

43. Keeping the above in mind, a dissection of the evidence of P.W.1, the father of the victim, as has been done above, reveals that not only the presence of P.W.1 at the scene of occurrence has been proved by the prosecution, as the occurrence had taken place in the upstairs of the house of P.W.1 but the evidence of P.W.1 is cogent and convincing and has been corroborated by the evidence of P.W.2 as also the doctor, P.W.8. the doctor, who had examined the victim. Further, it is to be pointed out that it is always within the domain of the prosecution with regard to examination of witnesses and the law enforcing agency, finding that there is clear eye witness testimony in the form of P.W.1 to speak about the occurrence had thought it fit not to examine the victim, who is a mentally challenged person, as could be seen from Ex.P-4 and P-7 respectively, which have been issued by P.W.8 and the Director, Disabilities Welfare Board, by not putting the victim through the rigours of the occurrence, as that would cause mental instability to the victim, who is already mentally deranged, the eye



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witness testimony conclusively establish the involvement of the appellant in the commission of offence against the victim.

44. Further, when the defence has not made inroads into the evidence of P.W.1 during cross examination and the defence put forth by the appellant has not been properly established, the mere fact that a defence has been put up by the appellant would not suffice to doubt the evidence of P.W.1 when the defence has not made any specific allegation that P.W.1 has axe to grind against the appellant and his family, the resultant of which is the present case. The eye witness testimony of P.W.1, the father of the victim, clearly proves the commission of offence by the appellant.

45. As has been discussed above with regard to the evidence of P.W.s 1 and 2 and the contradictions thereof which have been pointed out by the appellant, with which this Court has already dealt with and held that they do not affect the substratum of the prosecution case as there is no material to suggest that P.W.s 1 and 2 have any axe to grind against the appellant and further that there is no necessity for P.W.s 1 and 2 to rope in the victim, who is their



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daughter, into such an ignominious situation by implicating the appellant insofar as the offence u/s 6 r/w 18 of the POCSO Act and this Court finds no reason to take a view different from the one taken by the trial court to acquit the appellant as there are no convincing materials, which absolves the appellant from the commission of the offence.

46. Insofar as the offence u/s 323 IPC is concerned, though P.W.1 has stated that the appellant, while running away from the place of occurrence upon being caught red-handed by P.W.1 at the time of attempting to commit the offence, however, except for the said evidence of P.W.1, there is no other material which substantiates the case of the prosecution for convicting the appellant u/s 323 IPC. Therefore, in the absence of sufficient corroboration for the evidence of P.W.1 with regard to the offence u/s 323 IPC as alleged against the appellant, this Court is of the view that the offence u/s 323 IPC against the appellant has not been established and, therefore, the conviction and resultant sentence u/s 323 IPC, imposed on the appellant by the trial court cannot be sustained.



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47. Now, coming to the question of deciding the sentence that is to be imposed on the appellant, the court below has sentenced the appellant to rigorous imprisonment for a period of 10 years along with fine. The appellant has been convicted for the offence u/s 6 r/w 18 of POCSO Act. Section 6 of the POCSO Act deals with aggravated penetrative sexual assault. Section 18 relates to punishment for attempt to commit an offence.

48. In the present case, no case of aggravated sexual assault has taken place. However, the appellant was in the act of committing an offence, which clearly falls u/s 18 of the POCSO Act and, therefore, squarely, the act of the appellant would fall u/s 18 of the POCSO Act and aid of Section 6 for the purpose of committing the said offence would stand attracted to the case on hand.

49. Towards punishment for attempt to commit an offence u/s 18, the punishment prescribed is as under :-

“18. Punishment for attempt to commit an offence :

Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence,



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shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both."

50. The aforesaid provision provides for imprisonment for one-half of life or one-half of the longest term of imprisonment. For committing aggravated penetrative sexual assault, the punishment provided for u/s 6 is rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death. However, the said amendment to the punishment was with effect from 16.8.2019 and prior to that the punishment stood at rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable for fine. Therefore, prior to 16.8.2019, the offence u/s 18 would attract only a sentence of ten years.



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51. In the case on hand, the occurrence is alleged to have taken place on 17.01.2018, which is a case pre-amendment. In this backdrop, what is one-half of imprisonment of life that is spelt out in Section 18 of the POCSO Act so as to enable this Court to decide the sentence that could be imposed on the appellant. This aspect has been considered by the Bombay High Court in the case of **Suresh @ Pintya Kashinath Kamble – Vs – State of Maharashtra (Crl. A. No.272/2017 – Dated : 21.09.2022)**, wherein the Bombay High Court has held as under :-

“9. Section 2(2) of the POCSO Act reads thus:

“2. Definitions.--

(1) xxxx

(2) The words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860), the Code of Criminal Procedure, 1973 (2 of 1974), the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) and the Information Technology Act, 2000 (21 of 2000) shall have the meanings respectively assigned to them in the said Codes or the Acts.”

10. Hence, for the words and expressions not defined under POCSO Act they will have to be given meaning in consonance with their meaning in IPC. The wording ‘life imprisonment’ is not defined under POCSO Act. However, those words are used under IPC and, therefore, reference will have to be made to IPC provisions and they will have to be relied on. In this particular



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question, the quantum of sentence is to be looked at. When it is mentioned that it should be one-half of the life imprisonment then the exact meaning will have to be found from IPC and there IPC provides the answer under Section 57, which reads thus :

“57. Fractions of terms of Punishment.— In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years.”

This section leaves no scope of doubt, ambiguity or confusion as to how the term should be calculated when the accused is sentenced to suffer half of the life imprisonment. It provides that in such case when the fractions of imprisonment for life is to be calculated then life imprisonment should be reckoned as equivalent to imprisonment for twenty years. Thus, half of life imprisonment in such cases would mean imprisonment for ten years.

11. This particular aspect is already decided by this Court in the case Chandrakant Pawar (supra). Paragraphs-31 & 32 of the said judgment read thus :

“31. As noted above, minimum sentence of imprisonment for the offence of rape under section 376(2)(a) is rigorous imprisonment for 10 years. Therefore, the minimum sentence which may be awarded for attempt to commit rape would be rigorous imprisonment for five years. However, the maximum sentence for the offence of rape under section 376(2) (a) of the Penal Code, 1860 is



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life imprisonment. Therefore, the maximum sentence for attempt to commit rape could be half of life imprisonment.

32. Section 57 of the Penal Code, 1860 provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. In view of this, for the offence of attempt to commit rape punishable under section 376(2)(a) read with section 511 maximum sentence would be rigorous imprisonment for 10 years."

52. Therefore, one-half of the sentence, which is prescribed u/s 18 of the POCSO Act as referable to Section 6 of the POCSO Act, provides for ten years as the minimum sentence prior to 16.8.2019. In the case on hand, the offence is alleged to have been committed prior to coming into force of the amendment to Section 6, viz., prior to 16.8.2019 and, therefore, the minimum sentence would be 10 years.

53. In this backdrop, it is prayed on behalf of the appellant that this Court may take into account the family background of the appellant and also the affidavits of P.W.s 1 and 2 for the purpose of setting the appellant at liberty.



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However, it should not be lost sight of that the offence is not compoundable, but this Court could show leniency with regard to sentence that is to be inflicted on the appellant on the basis of the submissions made with regard to reduction in sentence.

54. Taking into consideration the fact that the appellant is married and is having children and also considering the fact that post the hearing of the matter the parents of the victim, who are also related to the appellant have appealed to the Court to consider the plight of the family and they are not insistent with regard to convicting the appellant, but nevertheless, this Court is not clothed with any power to compound the offence, this Court is of the considered view that the sentence imposed on the appellant may be reduced from 10 years to 5 years for the offence u/s 6 r/w 18 of the POCSO Act. Accordingly, while this Court is of the considered view that the conviction recorded by the trial court u/s 6 r/w 18 of the POCSO Act requires to be confirmed, however, the sentence could be reduced from 10 years to 5 years. However, the conviction and sentence recorded u/s 323 IPC deserves to be set aside.



CRL. A. No.181/2023

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55. Accordingly, this criminal appeal is allowed in part by confirming the conviction imposed on the appellant by the trial court for the offence u/s 6 r/w 18 of the POCSO Act but the sentence of rigorous imprisonment imposed on the appellant is reduced from 10 years to 5 years. However, the conviction and sentence recorded u/s 323 IPC on the appellant is set aside. Fine amount imposed by the trial court on the appellant u/s 6 r/w 18 of POCSO Act is also confirmed. It is reported that the appellant is in jail. The period of incarceration already undergone by the appellant shall be set off u/s 428 Cr.P.C.

28.08.2024

Index : Yes / No

GLN

To

1. The Sessions Judge
Special Court for Trial of POCSO Act Cases
Tiruvannamalai
Tiruvannamalai District.

2. Inspector of Police
All Women Police Station
Tiruvannamalai
Tiruvannamalai District.



CRL. A. No.181/2023

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3. The Public Prosecutor
High Court, Madras.



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CRL. A. No.181/2023

M.DHANDAPANI, J.

GLN

**PRE-DELIVERY JUDGMENT IN
CRL. A. NO. 181 OF 2023**

Pronounced on



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CRL. A. No.181/2023

28.08.2024