



Crl.A.No.367 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Reserved on</i>	<i>23.07.2024</i>
<i>Pronounced on</i>	<i>02.08.2024</i>

CORAM :

THE HONOURABLE MR. JUSTICE M.S. RAMESH
AND
THE HONOURABLE MR. JUSTICE SUNDER MOHAN

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Muthu @ Muthukumar

... Appellant/A1

Vs.

The State rep. by,
The Inspector of Police,
Thirubuvanai Police Station,
(Crime No.1/2013)
subsequently taken over by
The Inspector of Police,
CBCID Police Station,
Puducherry.

... Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code to call for the records relating to the Special Sessions Case No.2 of 2014 from the file of learned Special Judge (under the POCSO Act) – cum – The Principal Sessions Judge, Puducherry and set aside the judgment of conviction and sentences dated 04.02.2016 imposed on the appellant/accused A1 herein by allowing the appeal.

For Appellant : Mr.R.Sankara Subbu



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For Respondent : Mr.K.S.Mohan Das
Public Prosecutor (Puducherry)

JUDGMENT

M.S.RAMESH,J.

The appellant herein, who was arrayed as the first accused, was convicted and sentenced to undergo imprisonment, through a judgment of the learned Special Judge (under the POCSO Act), Puducherry, passed in Spl.S.C.No.2 of 2014 dated 04.02.2016, in the following manner:-

<i>Conviction</i>	<i>Sentence</i>
under Section 363 IPC	7 years rigorous imprisonment along with a fine of Rs.5,000/- in default to undergo 1 year simple imprisonment;
under Section 5(g) of POCSO Act punishable under Section 6 of POCSO Act r/w. 34 of IPC	Life imprisonment along with a fine of Rs.5,000/-. Total fine: 10,000/-

2. The aforesaid judgment of the learned Special Judge is put under challenge in the present appeal.

3. In the final report filed by the jurisdictional Police before the



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learned Judicial Magistrate – I, Puducherry, it is recorded that between 12.00 hours on 01.01.2013 and 06.00 hours on 02.01.2013, the first accused/appellant along with Venkatachalapthy/second accused kidnapped P.W.1, the minor victim girl, without the consent of her guardian and thus, both the accused had committed the offence punishable under Section 363 IPC r/w. 34 of IPC. Further, the charge against them was that, after kidnapping the minor victim girl, they had taken her to a thatched house belonging to the second accused and in furtherance of their common intention, committed aggravated gang penetrative sexual assault, as defined under Section 5(g) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act') on the minor victim girl and thus, had committed the offence punishable under Section 6 of POCSO Act r/w. Section 34 of IPC.

4. The final report was taken on file by the learned Judicial Magistrate – I, Puducherry and after compliance of the requirement under Section 207 Cr.P.C., the case was committed to the learned Principal Sessions Judge, Puducherry and it was thereafter made over to the learned



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III Additional Sessions Judge, Puducherry and subsequently, the same was transferred to the Special Court for trial of offences under the POCSO Act.

5. As against the first accused, the Trial Court had framed charges under Section 363 of IPC and against the second accused, under Section 363 of IPC r/w. 34 of IPC. For the offences under Section 5(g) of POCSO Act, punishable under Section 6 of POCSO r/w. Section 34 of IPC, charges were framed against both the accused. When the charges were read over and explained to both the accused, they denied the charges.

6. To substantiate the charges against both the accused, the prosecution had examined 35 witnesses as P.W.1 to P.W.35 and marked 71 documentary evidences as Ex.P1 to Ex.P71, along with 29 material objects as M.O.1 to M.O.29. On the side of the accused, 5 witnesses namely D.W.1 to D.W.5 were examined and 10 documents as Ex.D1 to Ex.D10 were marked.

7. On conclusion of the trial, the accused were questioned under



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Section 313 Cr.P.C., with respect to the incriminating circumstances against them, to which they claimed that a false case has been foisted against them.

8. On completion of the trial and after appreciation of the oral and documentary evidences on record, the Trial Court found both the accused guilty and sentenced them to the imprisonment as aforesaid, through its judgment dated 04.02.2016 passed in Spl.S.C.No.2 of 2014 by the learned Special Judge, Puducherry,

9. Incidentally, the second accused had challenged the judgment of the Trial Court made in Spl.S.C.No.2 of 2014, insofar as the conviction and sentence imposed against him, before a Co-ordinate Bench of this Court in Crl.A.No.109 of 2017. The Hon'ble Co-ordinate Bench had threadbare analyzed the evidences that were available before the Trial Court and concurred with the findings of the Trial Court in convicting the second accused for the offences under Section 363 IPC r/w. 34 of IPC, as well as the findings under Section 5(g) punishable under Section 6 of POCSO Act. However, the Hon'ble Co-ordinate Bench had taken into



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consideration certain aggravating and mitigating circumstances in the case and reduced the punishment under Section 6 of POCSO Act from life imprisonment to 10 years along with a fine of Rs.50,000/- in default to undergo 3 months rigorous imprisonment. Likewise, the sentence imposed by the Trial Court for the offence under Section 363 r/w. 34 IPC for 7 years rigorous imprisonment alone with fine of Rs.5,000/- in default to undergo 1 year simple imprisonment was reduced to 5 years of rigorous imprisonment and to pay a fine of Rs.5,000/- in default to undergo rigorous imprisonment for one week.

10. The learned counsel for the appellant submitted that the judgment of the Co-ordinate Bench have become final and therefore, the findings rendered therein, with regard to the role played by the second accused, would equally apply to the first accused/appellant herein, as well. In view of the same, he submitted that since the role of both the first and second accused are similar, insofar as it relates to the commission of the charged offences, the reduction of the maximum sentence may also be extended to the appellant herein.

11. The learned Public Prosecutor (Puducherry), however would



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submit that the second accused in this case, was an Engineering student and was aged about 22 years and therefore, he would stand in a different footing than that of the first accused/appellant herein, who was aged about 27 years, a school drop out and was employed as a bus conductor at the time of commission of the offence.

12. In this case, we do not intend to deal with each and every oral and documentary evidences available on record since such exercise has already been made by the Hon'ble Co-ordinate Bench of this Court in its judgment rendered on 24.04.2017. Thus, it would suffice if the narration of the facts and the appreciation of the evidences done by the Co-ordinate Bench is adopted as the same would apply to the case of the first accused/appellant herein as well, whose overt act touching upon the commission of the offences, is similar to the case of the second accused. The relevant portion of the judgment of the Co-ordinate Bench, confirming the Trial Court's verdict in the case of the second accused, reads as follows:-

“... 2.The case of the prosecution in brief is as follows:



(a) P.W.1, a young girl, hailing from Puducherry State, was doing 12th Standard in a local school. P.W.9 is the father of P.W.1 and P.W.8 is the brother of P.W.9. P.W.1 was admittedly a child in terms of the POCSO Act. Her date of birth is 17.08.1995. P.W.1 used to go to her school everyday from her house in a bus. On one occasion, the first accused told her that he had fallen in love for her. But P.W.1 did not positively reciprocate, as she did not like to love him. In order to avoid him, she, thereafter, stopped going in the said bus to the school, instead, she used to travel in a different bus.

(b) P.W.2 is her classmate and a friend. P.W.2 herself is another child. Two-three days before 1st January 2013, P.W.1 wanted to go to a Church with P.W.2. She informed her family members and then went to the house of P.W.2 and from there, both of them went to the Church. When they were returning from the Church, P.W.1 found the first accused standing somewhere near the said place. P.W.1, with a view to avoid him, silently walked fast from the said place. P.W.2 went alone in a bus to her village. On reaching the bus-stop, P.W.1 was waiting for a bus to go to her village. At that time, the first accused came to the bus stop and informed her that her mother had seriously fallen ill and she was taken to the hospital. P.W.1



believed the said words. She was shocked to hear the said news. The first accused assured that he would take her to the hospital. The second accused also joined the first accused. Both of them took P.W.1 in a bus and after travelling for some time, they changed the bus also. P.W.1 was very anxious to see her mother. The first accused told her that nothing untoward has happened to her mother. Thus, the accused 1 and 2 took P.W.1 to the bus-stand at Pondicherry. In the bus itself, P.W.1 felt sleeping and after some time, she had fallen asleep in the bus itself. Then, she did not know what had happened to her.

(c) It later on came to light that the accused 1 and 2 had taken her to a thatched shed belonging to the second accused in Pondicherry. P.W.1 awakened. She wanted to go home. But the first accused told that since it was too late, she should stay at the said house, so that she could go on the next day. In the said house nobody was there. When she enquired, the first accused told her that his parents were all in the neighbouring house and they were sleeping. Thereafter, the first accused, by force, against her resistance, had sexual intercourse with her; following him, the second accused, by force tried to have sexual intercourse. P.W.1, by way of resistance, even went to the extent of



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biting him twice. Despite the same, the second accused succeeded in having forcible intercourse with her. Thus, according to the case, these two accused had committed gang rape on P.W.1.

(d) After the above occurrence was over, it is alleged that the accused took P.W.1 to Villupuram bus-stand and abandoned her. P.W.1 thereafter, informed her mother over phone that she was in Villupuram bus-stand. Immediately P.Ws.8 and 9 rushed to Villupuram bus-stand and found P.W.1 sitting in the bus-stand. Her dress were all torn. Then P.W.1 was taken to the Government Hospital, from there to Rajive Gandhi Women and Child Care Hospital. P.W.33, the then Sub-Inspector of Police, received intimation from the Rajiv Gandhi Women and Child Care Hospital, at 3.45 p.m. on 2.1.2013. Then, he reached the said hospital and recorded the statement of P.W.1 and on returning to the Police station, at 8.00 p.m., registered the case in Crime No.1 of 2013, under Sections 363, 376(2)(g) IPC. Ex.P.60 is the statement of P.W.1 and Ex.P.61 is the FIR. Then the case was taken up for investigation by the Inspector of Police.

(e) P.W.34, the then Inspector of Police, took up the case for investigation. In order to apprehend the accused, he instructed the Sub Inspector of Police one



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Mr.Loganathan to go in search of the culprits. Around 8.30 p.m., he came with an information that the accused was in Gandhikuppam Village. He instructed the Sub-Inspector of Police to arrest the accused and bring him to the Police Station. P.W.34 went to the place of occurrence and prepared an observation mahazar and a rough sketch. He examined P.Ws.1 and 2 and other witnesses. The Sub-Inspector of Police Mr.Loganathan arrested the first accused and further informed P.W.34 that the other culprit was also identified. Accordingly A1 was arrested at 12.15 a.m., on 3.1.2013. The Sub-Inspector of Police produced the accused before P.W.34. While in custody, the first accused made a statement. At 8.00 a.m., he arrested the second accused, who was also brought to the Police Station by the Sub-Inspector of Police. During interrogation, P.W.34 found that in the jetty worn by the second accused, there were stains of semen. P.W.34 recovered the same. Then, he forwarded both the accused to the hospital for medical examination. The examination revealed that the accused 1 and 2 were sexually potential to perform sexual intercourse with a woman. He obtained medical certificate for P.W.1, which revealed that P.W.1 had been subjected to sexual intercourse. Then, the investigation was transferred to



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the CBCID and therefore, he handed over the case diary to P.W.35.

(f) P.W.35 commenced the investigation on 4.1.2013. He examined P.Ws.1, 2 and other witnesses. Then, examined the doctors and collected the medical records. He forwarded the material objects for chemical examination and received the report. At his request, Test Identification Parade was conducted to identify the second accused. Accordingly, in the Test Identification Parade held, the second accused was identified by P.W.1. On completing the investigation, he laid charge-sheet against both the accused.

3. Based on the above materials, the trial Court framed charges as detailed in the first paragraph of this judgement. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 35 witnesses have been examined and 71 documents and 29 material objects were marked. Out of the said witnesses, P.W.1, the victim girl has spoken about the entire occurrence in a vivid fashion. P.W.2, a friend of P.W.1, has stated that when P.W.1 and P.W.2 were returning from a Church at Villianur, the first accused was found standing near a Mariamman Temple. She has further stated that from the bus-stop



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she went to her village in a bus. P.W.1 alone was there in the bus-stop, waiting for the bus to her village. Later, the mother of P.W.1 enquired around 10.30 p.m., about the whereabouts of P.W.1. P.W.3 is the President of a Women Association in Puducherry. She has stated that on 2.1.2013, she came to know about the occurrence. She went to the hospital and enquired P.W.1.

4. P.W.4 is a resident of Thiruvennainallur Village, Villupuram District. According to him, on 2.1.2013, around 4.30 a.m., he went for answering nature's call. At that time, he found a girl standing alone. Since her movement was suspicious, P.W.4 followed her and enquired her. She told that she belonged to Puducherry. She also told her name. She further said that she had come to the house of the first accused. Thereafter, he entrusted the girl to one Sundari, whose house was located somewhere near the said place. Thereafter, the first accused came, took the girl to the bus-stop. But, P.W.4 has not identified P.W.1 as the girl who was taken by the first accused.

5. P.W.5 is also a resident of Thiruvennainallur Village. He has stated that on 2.1.2013, around 5.30 a.m., when he was near Gandhikuppam bus-stand, the



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first accused was standing with another girl. At that time, the first accused told that the girl was his friend. Then, the first accused and the girl got into the bus proceeding to Villupuram and went away. He has not identified P.W.1. P.W.6 has stated that on 2.1.2013, around 4.30 a.m., P.W.4 brought one girl and entrusted to her. Then, the first accused came and took the girl into his custody. She has also not stated anything about the identity of the girl. P.W.7 was a conductor in a bus. The said bus stopped at the Villanur Ezai Mariammal bus stop at 2.30 p.m., on 1.1.2013. At that time, the first accused got into the bus along with a girl. Then, at Pathukannu bus-stop, both of them got down from the bus. He has also not identified P.W.1.

6. P.W.8 is the uncle of P.W.1. He has stated that the father of P.W.1 informed him that P.W.1 was missing. He has further stated that later P.W.1's mother received a phone call that P.W.1 was in Villupuram bus-stand. Therefore, he, along with the father of P.W.1, went to the Villupuram bus-stand and found P.W.1 sitting with the dress torn. They brought her to the hospital. P.W.9 is the father of P.W.1. He has also stated about the missing of P.W.1 and the phone call received by his wife from P.W.1. He has further stated that he



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went along with P.W.8 to Villupuram bus-stand and brought P.W.1 to the hospital.

7. P.W.10 has turned hostile and he has not supported the case of the prosecution. P.W.11 is yet another Conductor. His bus was plying between Pondicherry to Chettipattu via., Mettupalayam Village. On 1.1.2013, at around 1.35 p.m., according to him, at Pathukannu bus-stop, two boys and a girl got into the bus. They wanted to go to Thirukannur Village. Accordingly, they got down at Thirukannur bus-stop. He has not identified either the accused or P.W.1. P.W.12 is yet another Conductor of the bus plying the route Pondicherry to Chettipattu. He has also stated that two boys and a girl got into the bus on 1.1.2013 at 4.30 p.m., at Usuteri bus-stop and got down at Pondicherry. P.W.13 has turned hostile. P.W.14 has spoken about the arrest of the accused, the confessions made and the consequential recoveries made from them. P.W.15 has also spoken about the arrest of the accused, the confessions made by them and the consequential recoveries of material objects. P.W.16 has spoken about the recovery of the clothes of P.W.1. P.W.17 has spoken about the recoveries of the material objects, on the confessions made by them. P.W.18 has



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also spoken about the same facts as spoken by P.W.17. P.W.19 has stated that he was running a petty shop at Arasamaram Pillaiyar Koil Street at Pondicherry. According to him, on 1.1.2013, two un-known boys came to his shop and purchased condoms.

8. P.W.20-Dr.Ramesh is an important witness for the prosecution. He examined the bite marks on the second accused and took impressions of the same, which was compared with the teeth of P.W.1 and submitted his report under Ex.P22. According to him, the bite marks found on the second accused were made with the teeth of P.W.1.

9. P.W.22, yet another Doctor, has also stated about the treatment given to the second accused. P.W.23 was a Doctor at the Rajive Gandhi Women and Child Care Hospital at Pondicherry. He has stated that at 12.30 p.m. on 2.1.2013, P.W.1 was admitted in the said hospital. He has stated that the dress materials worn by P.W.1 were recovered in his presence. He has further stated about the collections of vaginal smear from P.W.1. P.W.24-Dr.Meenakshi has stated about the treatment given to P.W.1, at the Rajive Gandhi Women and Child Care Hospital. P.W.25, yet another Doctor,



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has also spoken about the treatment given to P.W.1. According to this Doctor, there was no external injuries found on the body, breast, nipple and thigh of P.W.1. He has further stated that her vagina admitted two fingers freely. He further opined that P.W.1 had been subjected to sexual intercourse.

10. P.W.26-Dr.Balaraman has stated that he has examined A2 and found that he was sexually potential to perform sexual intercourse with a woman. He has further stated that he has collected blood samples of the accused for the purpose of further examination. P.W.27 was the then Scientist at the Central Forensic Science Laboratory at Hyderabad. According to him, as requested by the Judicial Magistrate, he examined 1.A Panty, 2.A Polyester Chudiar Pant, 3.A Polyester Chudiar Top, 4.A polyester Thupata, 5.A Bra, 6.A Full Pant, 7.A Full Sleeved shirt, 8.An underwear, 9.A full pant, 10.A full sleeved shirt, 11.An underwear, 12.An used condom, 13.Polythese Carrybage, 14.Blood stain of Vishnu Priya on blotting papers, 15.Pubic hair of Vishnupriya, 16.Two Vaginal swabs of Vishnupriya, 17.Two Vaginal smear slides of Vishnupriya, 18.Blood stain of Muthu @ Muthukumaran, 19.Blood stain of Vengadachalapathy. On chemical and microscopic



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examination, he found that human blood was detected in the Panty, Polyester Churidhar Pant and underwear and unused condom. In the other material objects there was no blood stains noticed. Human semen was detected in the underwear(this underwear belonged to A2) and in the unused condom. Semen was not detected in the other material objects. The source of Semen stain found in the unused condom was that of the first accused and the source of blood stain on the Panty and Polyester Churidhar Pant and the vaginal smear of P.W.1 belonged to P.W.1. The observations of this witness are as follows:

"Observation: (a) A Human female Genetic profile was generated from the DNA recovered from the Exs.1,2 (blood stains) and 16(Vaginal Swab) which were found identical with the profile generated from Ex.23(Source Vishnupriya). (b) A Human male Genetic profile generated from the Semen positive swab of Ex.12 was found matching with the profile generated from Ex.24(Source Blood stain gauze of Muthukumaran) but not with that of Vengatachalapathy. (c) The blood stain on Exs.8, 12 and semen stain on Ex.11 were found refractory to PCR amplification.



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Conclusion: Based on the above observation it can be concluded that

1.The source of Semen stain on Ex.12 is Muthukumaran

2.The Source of blood stain on Ex.1 and 2 and the Source of Vaginal swab Ex.16 is Vishnupriya."

11. P.W.28 has spoken about the photographs taken in connection with this case. P.W.30, a Constable, has stated that he assisted the Inspector of Police in the matter of investigation. P.W.31, the Sub-Inspector of Police, has spoken about the arrest of the accused. P.W.32, the then Judicial Magistrate has spoken about the statements of witnesses recorded under Section 161 Cr.P.C. P.W.33, the Sub-Inspector of Police, has spoken about the registration of the case. P.Ws.34 and 35 have spoken about the investigation done and the final report filed.

12. When the above incriminating materials were put to the accused, they denied the same as false. On their side, they have examined five witnesses and marked 10 documents. D.W.1- Mrs.Selvi is a resident of Gandhikuppam Village. The house of the second



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accused is situated somewhere near the said house. There is also a rice mill by the side of the said house. She has identified as many as 12 photographs taken at the said place as Ex.D6 series. A compact disc, vide Ex.D7, has been shown to her. She has identified her house, the house of the second accused and the rice mill in these photographs. She has stated that no such occurrence, as it is alleged by P.W.1, has occurred in the house of the second accused. She has further stated that during the relevant time, she was very much available in her house and to her knowledge, there was no such occurrence. She has further stated that the police came and took the accused 1 and 2. She has further stated that by the side of the house of the second accused, there is a play ground and as such, there is no occasion for any such occurrence. D.W.2 is a resident of Gandhi Nagar. He has identified six photographs as Ex.D6 series. According to him, on 1.1.2013 between 10.00 a.m. to 1.00 p.m., Volleyball match was conducted. In that match, the accused 1 and 2 participated. The game went on up to 6.00 p.m. Even after that there was a crowd of boys at the said place. Thus, according to this witness, there was no such occurrence as it is projected by P.W.1 happened at the house of A2. D.W.3 is the Editor of Malai Malar Tamil



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Daily. He has produced the Malai Malar daily editions dated 03.01.2013 and 04.01.2013. In those newspaper reports, it is stated that three people raped P.W.1 and they were taken into custody. According to him, in the newspaper, dated 03.01.2013 at page No.3, the photograph of the second accused has appeared as one of the assailants. D.W.4 is the mother of the first accused. She has stated that on 1.1.2013, the first accused went out of the house at 8.00 O'clock and played Volleyball till 1.00 O'clock. Again at 3.00 p.m., he went to the playground and played till 6.00 p.m. Her evidence also is that there was no occasion for any such occurrence as it is alleged by P.W.1. D.W.5 is the mother of A2. She has also stated that on 1.1.2013, the second accused is very much at his house. In the morning, he went to the playground and played Volleyball and in the afternoon he returned home and slept. On 2nd also, he went for playing game. At that time, the police came and enquired about the second accused.

13. Having considered all the above, the trial Court convicted the accused as detailed in the first paragraph of this judgement and that is how, the second accused alone has come up with this appeal.



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14. *We have heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.*

15. *At the outset, we should state that the evidence of the prosecutrix, if inspires the confidence of the Court, in the absence of any corroboration, the same by itself could be the foundation for conviction. Therefore, in the instant case, primarily we will examine as to whether the evidence of P.W.1 could be believed and whether the same could inspire the confidence of this Court as against the second accused. P.W.1 has stated that both the accused took her in buses and at last taken her to the house of A2, where the first accused raped her first, following him the second accused raped her. She has identified the second accused during the Test Identification Parade also. The second accused was not previously known to P.W.1. Thus, she had no grudges against the second accused. But the learned counsel for the appellant would submit that the photograph of the second accused appeared in the newspaper and therefore, no weightage could be given to the Test Identification Parade, in which, P.W.1*



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identified the second accused. But we find no force in the same, because, there is no evidence that the said photograph of the second accused, which appeared in one of the newspapers, was seen by P.W.1 at any stage before going for Test Identification Parade. Simply because the photograph of the second accused, after his arrest, appeared in the newspaper, would not go to rise an inference that the identification made by P.W.1, in the Test Identification Parade, was because of the same. Therefore, this argument is rejected.

16. P.W.1 is a young girl, who was admittedly a child at the time of occurrence in terms of the POCSO Act. Her evidence is duly corroborated by the medical evidence also. The undergarments recovered from the second accused contain semen. From these evidences, the prosecution, in our considered view, has clearly established that the second accused joined the first accused and confined P.W.1 in his house and raped her.

17. The evidence of P.W.2 would duly corroborate the evidence of P.W.1. She is a friend of P.W.1. She had stated that when P.Ws.1 and 2 were returning from a Church and when they were in the bus-stop near a temple, she found the first accused



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standing there. Thereafter, P.W.2 went to her village in a bus; whereas, P.W.1 was waiting in the bus stand for the bus to her village. According to P.W.2, later on, the mother of P.W.1 enquired her about the whereabouts of P.W.1. Thus, the evidence of P.W.2 also would corroborate the evidence of P.W.1.

18. The evidence of P.W.4 would also support the case of the prosecution as corroborating piece. P.W.4 has stated that one girl, who was not previously known to him, was in the village. He took her and entrusted to P.W.6. Thereafter, according to P.Ws.4 and 6, the first accused came and took the said girl. But unfortunately neither P.W.4 nor P.W.6 was called upon by the prosecution to identify P.W.1. Thus, except to the extent that the first accused took a girl from the house of P.W.6, the evidence of these two witnesses would not be of any help to the prosecution.

19. P.W.5 has stated that he found the first accused on the day of occurrence in a bus proceeding to Villupuram. A girl accompanied him. Unfortunately, this witness also was not called upon to identify P.W.1. Thus, the evidence of this witness would be of no help to the prosecution. It serves a limited purpose to prove



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that the first accused was in the bus proceeding to Villupuram on the day of occurrence with a girl.

20. P.W.7 is a Conductor of a bus, in which, according to the case of the prosecution, the first accused and P.W.1 travelled from Ezai Mariamman bus-stop to Villianur. But unfortunately, this witness also was not called upon by the prosecution to identify P.W.1. This evidence of P.W.7 would also go to serve limited purpose to prove that the first accused was with a girl in the bus.

21. P.W.8, is the uncle of P.W.1. According to him, the mother of P.W.1 received a phone call from P.W.1 that she was lying in Villupuram bus-stand. Accordingly, he along with the father of P.W.1, went to the Villupuram bus-stand and brought P.W.1 and admitted her at the hospital. The father of P.W.1, namely, P.W.9 has also spoken the same facts. From the evidences of PWs.8 and 9, the prosecution has further established that P.W.1 was abandoned and was lying in the Villupuram busstand. They further found that her clothes were torn. At that time itself, P.W.1 narrated about the entire occurrence to them. Then, they brought P.W.1 to the hospital and admitted her. She told the Doctor that on 1.1.2013, after the Prayer was over in



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the Church, when she was alone waiting for the bus, at Villianur bus-stop, after her friend had left, one Conductor working in Kalpana bus, came near her and told her that her mother had met with an accident. He took her in a bus. She was not aware of the bus. She further told the Doctor that inside the bus, after sitting beside her, he touched her and started to misbehave. She has further stated to the Doctor that she tried to shout, but that person closed her mouth in the running bus. After that, according to her, she did not know what happened. When she became conscious, she found herself in a dark house with the Conductor and another un-known person. Both of them touched her all over the body and also touched her external genitalia. She has not experienced what had happened to her actually. She was crying to the Doctor. She told that they touched her external genitalia without removing her undergarments. She was not aware of the time of the incident. On the next day morning, the other un-known person brought her to Villupuram bus-stand and left her there. She borrowed one rupee coin from somebody and rang up to her mother. This statement of P.W.1 to the Doctor had been duly recorded by the Resident Medical Officer, Rajive Gandhi Women and Child Care Hospital, Puducherry and the same has been marked as



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Ex.P23. This statement of P.W.1, which was recorded by an independent authority, namely, the Doctor in the hospital, being a formal statement, could go to corroborate the evidence of P.W.1. At the time when the said statement was made, even one of the assailants was not known. The conduct of P.W.1 in sobbing, crying and wailing while making the statement to the Doctor, would stand testimony to the fact that there was truth in the allegations made by her. Thus, this formal statement of P.W.1 made to the Doctor, which forms part of the hospital records and the evidences of P.Ws.8 and 9 would clearly go to corroborate the evidence of P.W.1 to the extent that she was found in the dark room and P.Ws.8 and 9 went to the bus-stand at Villupuram, on receiving telephonic information from P.W.1.

22. P.W.11 is a Conductor of a bus between Puducherry and Chettipattu. According to him, on 1.1.2013, at 1.35 p.m. at Pathukannu bus-stop two boys and a girl got into the bus. They went up to Thirukanur in the said bus. But unfortunately, he has not identified either the accused or P.W.1. Thus, the evidence of this witness is totally irrelevant and the same deserves no consideration.



23. *P.W.12 yet another Conductor has stated that two boys and a girl travelled in the bus, bearing Registration No.TN.PY 01 AB 9229 between Pondicherry and Chettipattu. He also was not called upon to identify either the accused or P.W.1. This evidence of P.W.12 is also of no use, as the same has got no relevance.*

24. *P.W.20's evidence is very important for the prosecution. He was the then Dean of M.G.P.G.I. He examined the second accused, after his arrest, as requested by the investigating officer. He found two bite marks on the body of the second accused. He took photographs of the same and preserved. Then, the teeth of P.W.1 were photographed. He being an expert, compared both the the photographs and submitted a report under Ex.P22. According to him, the bite marks which were found on the second accused would have been caused by biting, by P.W.1. We find no reason to reject this expert's opinion. The second accused has got no explanation to offer as to how the bite marks on his body came into being. Thus, the evidence of this expert clearly corroborates the evidence of P.W.1, wherein, she has stated that at the time when the second accused tried to sexually assault her, she bite him. This, in our*



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considered view, is a very strong piece of evidence, which duly corroborates the evidence of P.W.1.

25. The medical evidence that the hymen in the vaginal cavity of P.W.1 was found ruptured, would also go to further corroborate the evidence of P.W.1. P.W.26, Dr.Balaraman, had examined the second accused and has stated that he was sexually potential to perform sexual intercourse with a woman. These medical evidences also would duly corroborate the evidence of the victim-P.W.1.

26. Now turning to the evidence of the defence witnesses, they are either family members or the neighbours of the accused. They have stated that the accused were very much in their respective houses and on the crucial date, they played Volleyball game and there was no occasion for any such occurrence in the house of A2, as it is projected by P.W.1. We find it difficult to believe these witnesses not because they are defence witnesses, but because of the overwhelming evidences available against these accused.

27. Now let us look into the legal presumption, which could be raised in this case, under Section 29 of



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the POCSO Act. According to this provision, the Court shall presume that the accused had committed the offence, if there is prosecution. In the instant case, simply because, the second accused had been prosecuted for the offence under Section 6 of the POCSO Act, we do not propose to rise the presumption that he had committed the said crime. As we have already discussed elaborately there are overwhelming evidences to prove that the second accused had joined the first accused and committed gang rape of P.W.1. From these facts, a presumption under Section 29 of the POCSO Act that the second accused had committed the crime could also be raised. The said presumption is, ofcourse, rebuttable. But neither there is any direct evidence nor circumstantial evidence to rebut the said presumption. Thus, by means of this unrebutted presumption also, the prosecution has proved the guilt of the accused.

28. From the foregoing discussions, we hold that the trial Court was right in convicting the second accused for the offence under Section 363 read with Section 34 IPC and Section 6 of the POCSO Act.....”

13. Though the charge against the second accused was for the



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offence under Section 363 IPC r/w. 34 IPC, the first accused was charged for the offence under Section 363 IPC alone. The second charge against both the accused was that they had committed the offence under Section 5(g) punishable under Section 6 of POCSO Act r/w. 34 IPC and both the accused were convicted and sentenced to life imprisonment, along with fine of Rs.5,000/- each. For the offence under Section 363 of IPC, they were convicted and sentenced to undergo 7 years rigorous imprisonment, along with a fine of Rs.5,000/- each, in default to undergo 1 year simple imprisonment.

14. The charges against both the accused are almost one and the same. Thus, on an overall appreciation of the documentary evidences, the case of the second accused by the Hon'ble Co-ordinate Bench of this Court in Crl.A.No.109 of 2017, will also apply to the case of the first accused/appellant herein.

15. Accordingly, the judgment of the Trial Court, convicting the first accused for the offence under Section 363 IPC and Section 6 of POCSO Act, is upheld.



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16. Insofar as the sentences imposed by the Trial Court on the second accused is concerned, the Hon'ble Co-ordinate Bench had discussed about the aggravating and mitigating circumstances involved in his case and reduced the punishment in the following manner:-

“...29. Now turning to the quantum of punishment, the second accused was hardly aged about 22 years at the time of occurrence. He was doing Engineering course in a local college. He had no bad antecedents. Driven by lust and activated by the inducement made by the first accused, at his young age, he had involved in the said crime. There are lot of chances for his reformation. At the same time, it cannot be likely viewed, as the accused has committed a gang rape. Considering these aggravating and mitigating circumstances, we are of the view that sentencing the second accused to undergo rigorous imprisonment for ten years and to pay a fine of Rs.50,000/-, in default, to undergo rigorous imprisonment for three months for the offence under Section 6 of the POCSO Act would meet the ends of justice.

30. So far as the punishment for the offence under Section 363 read with Section 34 IPC is concerned, in our



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considered view, sentencing him to undergo rigorous imprisonment for five years and to pay a fine of Rs.5000/-, in default, to undergo rigorous imprisonment for one week, would meet the ends of justice.

31. In the result, the appeal is partly allowed. The conviction of the appellant/second accused for the offence under Section 363 read with Section 34 IPC and Section 6 of POCSO Act are confirmed. However, the sentences imposed for these offences are reduced and he is sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.5,000/- (Rupees Five Thousand only), in default, to undergo rigorous imprisonment for one week for the offence under Section 363 read with Section 34 IPC and to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.50,000/- (Rupees Fifty Thousand only), in default, to undergo rigorous imprisonment for three months. The above sentences shall run concurrently. The period of sentence already undergone by the appellant/second accused shall be given set off as required under Section 428 Cr.P.C. On realization of the fine amount of Rs.55,000/- (Rupees fifty five thousand only), by the lower Court, the same shall be paid to P.W.1 as compensation. Connected miscellaneous petition is closed.”



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17. During the oral submission, the learned Public Prosecutor claimed that the first accused was aged about 27 years and therefore, he cannot be equated to the facts of the case of the second accused, who was 22 years at the time of commission of the offence. This submission seems to be a factual mistake.

18. The following documents marked before the Trial Court makes a reference to the age of the first accused in the following manner:-

- a) The medical examination report of the first accused (Ex.P34) indicates his age as 22 years;
- b) wound certificate (Ex.P23) issued by P.W.22 for the first accused refers to his age as 22 years;
- c) order of the Judicial Magistrate for conducting medical examination of the first accused, which forms part of Ex.P28 series, refers to his age as 23 years;
- d) the requisition letter given by the Investigating Officer to CFSL (Ex.P44), refers to his age as 23 years;
- e) the Memo of Arrest (Ex.P50) shows his age as 22 years;



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- f) Arrest/Court Surrender Form (Ex.P51) shows his age as 22 years;
- g) Test Identification Parade Report (Ex.P58) shows his age as 23 years;
- h) proceedings of the Judicial Magistrate to conduct medical examination of the first accused at the Jail (Ex.P69) shows his age as 23 years and
- i) alteration report (Ex.P71) issued by P.W.35 shows his age as 22 years.

19. In paragraph 4 of the counter-affidavit filed by the respondent, the age of the first accused is referred to as 23 years. As claimed by the learned Public Prosecutor, the Trial Court in the cause title of its judgment, had mentioned the age of the first accused as 27 years, which entry is not supported in any other portion of its judgment. Thus, by taking into account the aforesaid documents, it could be said that the first accused was also aged about either 22 or 23 years at the time of commission of the offence.

20. Furthermore, the first accused also does not have any bad



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antecedents. The only difference on the facts between the first and second accused is, while the second accused was doing first year engineering course, the first accused had discontinued his 10th standard. Apart from this difference in their educational status, all the other circumstances touching upon the lives of both the accused, are similar and one and the same. Thus, in consideration of these mitigating and aggravating circumstances, we see no reason as to why a similar modification of sentences should not be extended to the first accused.

21. Accordingly, by taking into consideration that the first accused was only aged about 22 or 23 years at the time of occurrence and that he did not have any bad antecedents, he might have involved in the said crime, possibly driven by lust and that there are lot of chances for his reformation. However, since this is a case of gang rape, we cannot let him go scot free. In consideration of the aggravating and mitigating circumstances, we are of the view that modification of the sentences done in the case of the second accused in the judgment passed in Crl.A.No.109 of 2017 dated 24.04.2017, could be extended to the appellant/first accused also.



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22. In the result, the Criminal Appeal stands partly allowed. The conviction of the appellant/first accused for the offence under Section 363 IPC and Section 6 of POCSO Act are confirmed. However, the sentences imposed for these offences are reduced and he is sentenced to undergo rigorous imprisonment for five years and a fine of Rs.5,000/- (Rupees Five Thousand only), in default to undergo rigorous imprisonment for one week for the offence under Section 363 IPC and to undergo rigorous imprisonment for 10 years and a fine of Rs.50,000/- (Rupees Fifty Thousand only), in default to undergo rigorous imprisonment for three months for the offence under Section 6 of POCSO Act. The above sentences shall run concurrently. The period of sentence already undergone by the appellant/first accused shall be set off under Section 428 Cr.P.C. On realization of the fine amount of Rs.55,000/- (Rupees Fifty Five Thousand Only), by the lower Court, the same shall be paid to P.W.1 as compensation.

[M.S.R.,J.]

[S.M.,J.]



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Index: Yes
Speaking order
Internet: Yes
Neutral Citation: Yes

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- 1.The Special Judge (under the POCSO Act)
- cum - The Principal Sessions Judge,
Puducherry.
- 2.The Superintendent of Prison,
Central Prison,
Puducherry.
- 3.The Inspector of Police,
CBCID Police Station,
Puducherry.
- 4.The Public Prosecutor (Puducherry),
High Court of Madras.



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M.S.RAMESH, J.
and
SUNDER MOHAN, J.

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judgment made in
Crl.A.No.367 of 2019

02.08.2024