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Crl.A.No.134 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	07.08.2024
Pronounced on	23.08.2024

CORAM :

THE HONOURABLE Mr. JUSTICE **M.S. RAMESH**
AND
THE HONOURABLE Mr. JUSTICE **C.KUMARAPPAN**

Crl.A.No.134 of 2019

Mathi @ Mathiazagan

... Appellant/Sole Accused

Vs.

State rep. by
Inspector of Police,
All Women Police Station,
Kangayam, Tirupur District.

... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code to set aside the judgment passed in Spl.S.C.No.23/2016 dated 13.07.2018 on the file of Mahalir Neethi Mandram (Fast Track Mahila Court), Tirupur.

For Appellant : Ms.S.Sridevi
Legal Aid Counsel

For Respondent : Mr.A.Gokulakrishnan
Additional Public Prosecutor



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J U D G M E N T

C.KUMARAPPAN, J.

The instant appeal has been filed by the appellant/sole accused assailing the judgment dated 13.07.2018 passed in SC.No.23 of 2016 by the Mahalir Neethimandram (Fast Track Mahila Court), Tirupur. In the present case, the accused was charged for the offences under Section 5(j)(ii)(l)(n) r/w 6 of “The Protection of Children from Sexual Offences Act, 2012” [hereinafter called as “POCSO Act”] and Section 9(m) r/w 10, 11(iii) r/w 12 of POCSO Act.

2. The brief facts which give rise to the instant Criminal Appeal is that, a Coconut godown was owned by the *de facto* complainant Mr.Mohanasundaram. In his godown, the accused and the victim's family were working. It appears that there are two victims in the instant case. While the “eldest one” is aged about 14 years [hereinafter called as “V1”], the “younger one” is aged about 12 years [hereinafter called as “V2”]. Both the victims' family were working in the *de facto* complainant's godown. It appears that they may not have employment for whole of the year. The parents of the V1 have got six daughters including V1. The another victim



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V2 is related to V1's family. It appears that during the first week of February 2016, V1's mother left the village to attend her eldest daughter, who was in her family way. While so, when she return home on 08.03.2016, V1 and V2 were missing. After a drastic search on 10.03.2016, they came to know that both the victims were under the care and custody of the Child Welfare Committee, Erode. When they met the children [V1 and V2] at the Child Welfare Committee, they learned about the sexual assault of the accused against both the victims. On coming to know about the same, the *de facto* complainant[PW1] gave a complaint on 10.03.2016 before the All Women Police Station.

3. The complaint was registered on 10.03.2016 by PW-13-Head constable at about 23.00 hours in Crime No.4 of 2016 for the offences under Sections 5(l), (n) r/w 6 of POCSO Act. After registering the complaint, the same was forwarded to the Jurisdictional Magistrate as well as to the Investigation Officer-PW-17. On receipt of the copy of the FIR, the Investigating Officer-PW17 proceeded to the Mariyalaya Home at Tirupur where the victims were in care and custody, and met them on 11.03.2016 and obtained their statements. After recording the statement of the victims 1 and 2, the charges were altered to Sections 5(l), (n) r/w 6, 11(iii) r/w 12 of



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POCSO Act. Thereafter, she has also examined and recorded statements of Mr.Mohanasundaram (PW1), Mr.Kathiravan (PW4) and Mr.Ganesan, who is the relative of PW1 and PW4. On 12.03.2016, she recorded the statements from the other witnesses including the Officer of the Child Welfare committee, Erode. On 13.03.2016, he arrested the accused at about 7.00 p.m, and also recorded the confession statement in the presence of the witnesses.

4. Thereafter, on 14.03.2016, the Investigation Officer arranged for a medical examination and found that “V1” is pregnant, and she also made arrangements to know the age of both the victims, and sent a letter to the School, where they have studied. Subsequently, the Investigating Officer-PW17 received the Certificates of age from the Headmaster of the School qua PW8. Since the V2 was less than 12 years, the charges were again altered to Section 5(l), (n) r/w 6, 9(m) r/w 10, 11(iii) r/w 12 of POCSO Act. On 18.03.2016, after getting the consent from “V1” and her mother Shanthi, to protect the welfare of the V1, made arrangements for the abortion to her. On 23.03.2016, she also made arrangements to record the statements of both the victims under Section 164 Cr.P.C before the Judicial Magistrate. In order to find out the biological father of foetus of “V1”, the Investigation Officer



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made arrangements to get the blood samples from the accused/appellant, and “V1”. After getting the blood samples, she sent the same to the Forensic Department for DNA analysis to know about the paternity of the foetus. In the DNA analysis, it was found that the accused is the biological father, and V1 is the biological mother of the foetus. Therefore, on receipt of the above report, PW17-Investigating Officer has also made arrangements to record the statement of the Assistant Director, who undertaken the DNA profiling. Finally, the Investigation Officer, on completion of the investigation, has laid the charge sheet on 29.07.2016 under the relevant provisions of POCSO Act.

5. Before the Trial Court, the prosecution examined as many as 17 witnesses as PW1 to PW17, marked 21 documents as Exs.P1 to P21, and one Material Object.

6. The Trial Court, after having considered the oral and documentary evidence has found the accused guilty for the offence under Sections 5 (j) (ii) r/w 6, 5(l) r/w 6, 5(n) r/w 6, 9(m) r/w 10 and Section 11(iii) r/w 12 of POCSO Act and convicted and sentenced the accused as under:-



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<i>Offence</i>	<i>Punishment</i>
5(j)(ii) r/w 6, 5(l) r/w 6 and 5(n) r/w 6 of POCSO Act	To undergo Rigorous Imprisonment for life along with fine of Rs.10,000/- for each of the offences
9(m) r/w 10 of POCSO Act	To undergo 7 years Rigorous Imprisonment along with fine of Rs.10,000/-
11(iii) r/w 12 of POCSO Act	To undergo 3 years Rigorous Imprisonment along with fine of Rs.10,000/-.
In default of payment of fine, to undergo additional rigorous imprisonment for one year for each of the above offences	

7. Though before the Trial Court, the accused has disputed his involvement in the offence, before the Appellate Court, the learned counsel for the appellant raised alternative argument and would vehemently contend that though there was a physical relationship between V1 and the accused, it was only a consensual one and that V1 was major at the time of occurrence. It was also the contention of the learned counsel for the appellant that the prosecution has miserably failed to prove the age of V1 and V2. Therefore, it was her contention that the charge against the petitioner has not been proved in the manner known to law. It was also the contention of the learned counsel for the appellant that, the charge levelled against the accused in respect of the alleged offence against V2, there is no corroboration except



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the *ipse dixit* of V2. Therefore, it is the contention of the learned counsel for the appellant that the order of the trial Court is liable to be interfered with and the appellant is entitled for an acquittal. It is also the further contention of the learned counsel for the appellant that the accused was aged about 29 years at the time of occurrence, and that the alleged occurrence was not a forcible one, but it was a result of a romantic relationship between V1 and the accused. Therefore, contended that the accused is entitled for an order of acquittal.

8. Per contra, the learned Additional Public Prosecutor would vehemently contend that the occurrence was spoken through PW2 and PW3 viz., V1 and V2, and that the DNA report would further vindicate the involvement of the accused. It is the contention of the learned Additional Public Prosecutor that 2nd victim/PW3 had categorically spoken about the use of force, which had been further corroborated by V1. Therefore, the contention of the learned Additional Public Prosecutor that even the sexual assault against V2 has been proved beyond reasonable doubts. Hence, contended that there are no ground to interfere with the judgment of the learned Sessions Judge and prayed to dismiss the instant appeal.

9. We have given our anxious consideration to either side submissions.



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10. While perusing the evidence of PW2 (V1) and PW3 (V2), they had spoken about the sexual assault meted out to them. As against V1, it was the charge of aggravated penetrative sexual assault, which resulted in pregnancy, and the foetus was sent to the Forensic Department for DNA profiling, through which it was proved that the accused is the biological father and the V1 is the biological mother of the foetus. Therefore, the charge against the accused in respect of an offence under Section 5(g), (j) (ii) of POCSO Act has been proved beyond reasonable doubts.

11. Coming to the other charge viz., charge under Section 5(j)(l) and 5(j) (n) of the POCSO Act, the V1 spoken about the 2nd penetrative sexual assault in her evidence, and the factum of both [V1 and the accused] working in PW1's godown, where the scene of occurrence situate, had also spoken through the evidence of PW1 and V1. The same was further corroborated through the statement recorded under Section 164 Cr.P.C by the learned Judicial Magistrate, which is marked as Ex.P17.

12. It is pertinent to mention here that under Section 29 of POCSO Act, there is a statutory presumption against the accused. Further, as already



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stated, there are no material to discredit the trustworthiness of the testimony of the victim. Thus, in view of the above relevant foundational facts, the finding rendered by the Trial Court that the charge against the accused in respect of each of the above aggravated penetrative sexual assault has been proved beyond reasonable doubts is perfectly in order.

13. However, in respect of the sexual assault meted out to V2, the allegation is that the accused had shown pornographic videos to V2 and compelled her to have sexual relationship with him and has also forcibly pulled her hand. As rightly contended by the learned counsel for the appellant, except the testimony of V2 and V1, no other witnesses had spoken about the occurrence. It is pertinent to mention here that while perusing the statement recorded under Section 164 Cr.P.C before the learned Magistrate, and the evidence deposed before the Trial Court, would unequivocally demonstrate the sexual assault meted out by V2.

14. It is the contention of the learned counsel for the appellant that the statement of V2 was not substantiated or corroborated by any other independent witness. It is pertinent to mention here that admittedly, the accused and V2 were privy to the occurrence and the same was committed in



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the secluded place, albeit immediately after the occurrence, V2 has spoken about the sexual assault with V1. The factum of sharing of the information regarding assault with V1 was spoken by V1. Further, this Court is of the firm view that there are no grounds to disbelieve the evidence of V2 and furthermore, the evidence of V2 was corroborated through the evidence of V1. Thus, this Court is of the firm view that the charges framed against the accused in respect of the sexual assault meted out to V2 has also been proved beyond reasonable doubts.

15. However, the learned counsel for the appellant raised an alternative defence that the V1 was not minor at the time of occurrence and that the sexual relationship was not a forcible one and it was the result of romantic affair between V1 and the accused. The learned counsel for the appellant would further submit that, even according to Ex.P1-complaint, it has been stated that V1 was 17 years old at the relevant point of time. Therefore, it is the contention of the learned counsel for the appellant that V1 was major at the time of occurrence and that the incident was a consensual one.



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16. To substantiate her contention, the learned counsel for the appellant relied upon the judgment of the Hon'ble Supreme Court of India in ***P.Yuvaprakash Vs. State rep. by Inspector of Police*** reported in **2023 SCC OnLine SC 846** and would contend that the prosecution has miserably failed to prove the age of V1. It is also the contention of the learned counsel for the appellant that the record sheets (Exs.P8 and P9) are not the documents referred in J.J.Act, as per the ratio of the above judgment. In this regard, it is useful to refer the relevant portion of the judgment:-

“19. It is clear from the above narrative that none of the documents produced during the trial answered the description of “the date of birth certificate from the school” or “the matriculation or equivalent certificate” from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim's age was below 18 years as per Section 94(2)(iii) of the JJ Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating “that the age of the said girl would be more than 18 years and less than 20 years”. In the cross-examination, she admitted that M's age could be taken as 19 years. However, the High Court rejected this evidence, saying that “when the precise date of birth is available from out of



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the school records, the approximate age estimated by the medical expert cannot be the determining factor”. This finding is, in this court's considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94(2)(i) mandates; nor are they in accord with Section 94(2)(ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the JJ Act was the medical ossification test, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim's bones, stage of their development and opined that she was between 18-20 years; in cross-examination she said that the age might be 19 years. Given all these circumstances, this court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9.”

[Emphasis supplied by this Court]

Thus, it is her contention that the document relating to the age of the victim qua Exs.P8 and P9, produced before this Court, will not come within the meaning of “certificate” referred in Section 94(2)(iii) of the J.J.Act.

17. However, the learned Additional Public Prosecutor would rely upon the latest judgement of the Hon'ble Supreme Court in ***Vinod Katara Vs. State of Uttar Pradesh*** reported in (2024) 4 SCC 150, wherein, the Hon'ble



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Supreme Court has held that Section 94(2) of J.J Act provides as mode of determination of age. In the order of priorities, the date of birth certificate from the school stands at the highest pedestal. The relevant paragraph in the above judgment is paragraph 22 and the same reads as under:-

“22. Section 94(2) of the JJ Act provides for the mode of determination of age. In the order of priorities, the date of birth certificate from the school stands at the highest pedestal whereas ossification test has been kept at the last rung to be considered, only in the absence of Criteria Nos. 1 and 2 i.e. in absence of both certificate from school and birth certificate issued by a Corporation/Municipal Authority/Panchayat.”

18. The learned Additional Public Prosecutor would also rely upon yet another the judgment of the Hon'ble Supreme Court in ***Ram Suresh Singh Vs. Prabhat Singh alias Chhotu Singh and another*** reported in (2009) 6 ***SCC 681*** and would contend that, when date of birth certificate is available and is proved to be genuine, then such record sheet should be relied upon. Through this, the learned Additional Public Prosecutor would contend that in order to prove the age of the victims, the Headmaster of the School-PW8 was examined and record sheets for both the victims [Exs.P8 and P9] were marked. It was also contended by the learned Additional Public Prosecutor



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that these documents are maintained in the regular course of the school, and these are all the extracts of the date of birth certificates of the School. This Court is in full agreement with the submissions made by the learned Additional Public Prosecutor.

19. According to Ex.P8-record sheet of V1, she was born on 03.05.2001. Likewise, as evidenced from Ex.P9, V2 was born on 23.09.2004. Therefore, as on the date of occurrence, both of them were minor and more particularly, V2 was aged below 12 years. Therefore, this Court is of the firm view that the contention of the learned counsel for the appellant that V1 is not minor at the relevant point of time is liable to be rejected. To put it differently, the prosecution has proved the age of both the victims, and that they were minors at the time of occurrence, beyond reasonable doubts.

20. Now, the only point to be considered is the quantum of punishment. It is pertinent to mention here that the Trial Court has imposed Life sentence for the offence of each aggravated penetrative sexual assault committed against V1. Similarly, for the offence of aggravated sexual assault committed against V2, the accused was sentenced to undergo 7 years Rigorous Imprisonment and in respect of the charge of sexual harassment,



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the punishment of 3 years Rigorous Imprisonment has been imposed.

Besides fine and default sentence was also imposed.

21. Thus, the issue has now narrowed down to the awarding of appropriate sentence. In respect of the offence under Section 5(j)(ii) r/w 6, 5(l) r/w 6 and 5(n) r/w 6 of POCSO Act, the Trial Court has imposed life imprisonment for each of the above offences.

22. At this juncture, it is appropriate to refer Section 6 of POCSO Act. The occurrence took place in the year 2016. Section 6 of The POCSO Act met with an amendment by way of an Act 25/2019 only with effect from 16.08.2019. Prior to the above amendment, the punishment for the aggravated penetrative sexual assault was for a term, which shall not be less than 10 years, and which may extend to imprisonment for life. Therefore, the sentence awarded by the Trial Court against the accused/appellant was the maximum sentence.

23. While perusing the judgment of the Trial Court, we could not find any reason as to why the maximum punishment was imposed against the accused. In this regard, it is relevant to refer to the judgment of the Division Bench of this Court in ***Liyakhath Ali Vs. Mani Anbazhagan*** made in



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Crl.A.Nos.619 of 2021 & 272 of 2019 where one of us was a party to the judgment [MSRJ]. The Co-ordinate Bench had followed the judgment of the Hon'ble Supreme Court in **Swamy Shraddananda Vs. State of Karnataka** reported in **(2007) 12 SCC 288** and held that the reasons must be detailed setting clearly why any punishment other than the maximum punishment will not suffice. For ready reference, this Court would like to extract the relevant portions of the **Liyakhath Ali's** case [cited supra]:-

“10. However, as regards the sentence imposed on the appellants, we find that the appellants had been sentenced to the maximum sentence of seven years and also directed to pay fine of Rs.1 Crore and to undergo a default sentence for a period of one year.

*11. On this aspect, we may observe that it has been consistently held in several decisions of the Hon'ble Supreme Court that while awarding sentences, a Judge has a wide discretion within the statutory limits and therefore, there cannot be any uniformity in imposition of such offences. In the case of **State of Rajasthan Vs. Mohan Lal and Another** reported in **(2018) 18 SCC 535**, it has been held that while imposing the punishment, the Courts will have to take into account certain principles while exercising their discretion in sentencing, such as proportionality, deterrence and rehabilitation. In a proportionality analysis, it is necessary to assess the seriousness of an offence in order to determine the commensurate punishment for the offender. The seriousness of an*



offence depends, apart from other things, also upon its harmfulness.

12. The Hon'ble Court in the case of *Soman v. State of Kerala* reported in (2013) 11 SCC 382, observed thus:-

“27.1. Courts ought to base sentencing decisions on various different rationales — most prominent amongst which would be proportionality and deterrence.

27.2. The question of consequences of criminal action can be relevant from both a proportionality and deterrence standpoint.

27.3. Insofar as proportionality is concerned, the sentence must be commensurate with the seriousness or gravity of the offence.

27.4. One of the factors relevant for judging seriousness of the offence is the consequences resulting from it.

27.5. Unintended consequences/harm may still be properly attributed to the offender if they were reasonably foreseeable. In case of illicit and underground manufacture of liquor, the chances of toxicity are so high that not only its manufacturer but the distributor and the retail vendor would know its likely risks to the consumer. Hence, even though any harm to the consumer might not be directly intended, some aggravated culpability must attach if the consumer suffers some grievous hurt or dies as result of consuming the spurious liquor.”



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13. *The same is the verdict of the Hon'ble Supreme Court in the case of **Alister Anthony Pareira v. State of Maharashtra** reported in (2012) 2 SCC 648, wherein it was observed as follows:-*

“84. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.”

14. *On an overall appraisal of the aforesaid decisions, it could be said that the imposition of sentence by a Court would be determinable on the facts and circumstances of each case and would be within the discretion of the concerned Court.*

15. *However, the exercise of such discretion also came to be dealt with by the Hon'ble Supreme Court in the case of **Swamy Shraddhananda Vs. State of Karnataka** reported in (2007) 12 SCC 288, wherein it was held as follows:-*

“66. There is a clear and discernible necessity of caution



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to set the maximum punishment in an offence. And also by implication there must be intensive and exhaustive inquiry into accused-related parameters before employing the maximum sentence by a court of law. Therefore, discretion to the judiciary in this respect (to declare the maximum punishment) is of utmost critical and seminal value. Reasons must be detailed setting clearly why any punishment other than the maximum punishment will not suffice. This is a general and age-old rule of sentencing which has been statutorily recognised under Section 354(3).”

24. In the case on hand, no reason was assigned as to why maximum sentence of life imprisonment was imposed for each of the offences proved. Here, admittedly though the offences were serious in nature, we could not find any traces of injury, threat, coercion against the V1. Further, no bad antecedent was projected against the accused. Besides, he was 29 years at the time of occurrence. Therefore, based on the legal principle emerging through the discussion hereinabove referred, this Court intends to interfere only against the sentence, while confirming the conviction. Hence, this Court would like to interfere in respect of the sentence imposed against the accused for the offence committed against the V1. As far as the sentence for the offence committed against V2, no interference may be required, as there are evidences against the accused for use of force against V2.



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25. Accordingly, this Criminal Appeal is partly allowed in the following terms:-

(i) The conviction of the appellant for the offence under Section 5(j)(ii) r/w 6, 5(l) r/w 6 and 5(n) r/w 6 of POCSO Act is confirmed. However, the sentence is reduced to undergo 10 years Rigorous Imprisonment and to pay fine of Rs.10,000/- for each of offences, in default, to undergo Rigorous Imprisonment of one year;

(ii) In respect of other offences, the conviction and sentence ordered by the Trial Court are confirmed.

(iii) The above sentences are ordered to run concurrently and the period of sentence already undergone by the accused is ordered to be set off under Section 428 Cr.P.C.

[M.S.R., J.] [C.K., J.]
23.08.2024

Index:Yes

Neutral Citation: Yes

Speaking order: Yes

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Note: Issue order copy today (23.08.2024)



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- To
1. The Superintendent of Prison,
Central Prison,
Coimbatore.
 2. Inspector of Police,
All Women Police Station,
Kangayam, Tirupur District.
 3. The Public Prosecutor,
High Court of Madras.



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M.S.RAMESH, J.
and
C.KUMARAPPAN, J.

kmi

Pre-delivery judgment made in
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