



CrI.A.(MD)No.100 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 16.08.2024

PRONOUNCED ON : 06.09.2024

CORAM

**THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN
AND
THE HON'BLE MR.JUSTICE J.SATHYA NARAYANA PRASAD**

CrI.A(MD)No.100 of 2021

Liyakath Ali

... Appellant

VS

**The Inspector of Police,
Suthamalli Police Station,
Tirunelveli District.
(Cr.No.334 of 2013)**

...Respondent

PRAYER: Criminal Appeal filed under Section 374(2) of the Criminal Procedure Code, to set aside the judgment, dated 16.08.2019 made in Special Case No.85 of 2016 on the file of the learned Sessions Judge, Mahila Court, Tirunelveli and to set aside the same as illegal.

**For Appellant : Mr.R.Vinoth Bharathi
For Respondents : Mr.A.Thiruvadi Kumar
Additional Government Pleader**



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JUDGMENT

(Judgment of this Court was delivered by **C.V.KARTHIKEYAN, J.**)

The sole accused, Liyakath Ali, in Cr.No.334 of 2013 registered by the respondent, Inspector of Police, Suthamalli Police Station, Tirunelveli District, under Sections 376 and 511 of IPC and under Section 8 of Protection of Children from Sexual Offences Act, 2012, has filed this Criminal Appeal against the judgment, dated 16.08.2019 passed by the learned Sessions Judge, Mahila Court, Tirunelveli, in Spl.C.No.85 of 2016.

2.After investigation, the respondent Police had filed final report charging the appellant with commission of offences under Sections 341 and 324 of IPC and under Section 6 of Protection of Children from Sexual Offences Act, 2012. After trial, the appellant had been convicted as follows:



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S. No.	Offence	Sentence	Fine	In default sentence
1.	Under Section 341 IPC	1 month rigorous imprisonment	Rs. 500/-	One week simple imprisonment
2.	324 IPC	2 years rigorous imprisonment	Rs. 10,000/-	3 months simple imprisonment
3.	Under Section 6 of POCSO Act	Life imprisonment	Rs. 50,000/-	One year simple imprisonment

3.It had also been held that out of the fine amount, Rs.50,000/- should be kept in a fixed deposit in the name of the victim child till she attains the age of majority.

4.The victim child shall be called xxx in the course of this judgment.

5.It is the case of the prosecution that on 23.11.2013 at around 02.30 pm., xxx, who was aged about 12-13 years at the time of occurrence, was playing near the house of the accused. The accused could be termed as a neighbour. It is the further case of the prosecution that the accused enticed xxx to come into his house and he held her tightly and when she tried to wriggle out, the accused closed the front door and thereby, unlawfully



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restrained her in the house. It is alleged that he forcefully removed her nightie and actually tore the nightie and when she cried and questioned the accused as to why he is so behaving, when she considered him as her father, the accused still did not leave her, but removed her panties and crushed her breasts and committed penetrative sexual assault, thereby, committing the offence punishable under Section 6 of POCSO Act, 2012 and when xxx further resisted, the accused took hold of her head and dashed her on the ground and caused swelling injuries on the right side of the head and then pushed her to wall, wherein, she suffered further injuries on the lower parts of both her legs owing to the small iron rods fixed on the wall and thereby, committing the offences under Sections 341 and 324 of IPC. It is the further case of the prosecution that xxx then ran out and informed about this incident to PW-5, Rani, who was also a neighbour.

6.PW-5, Rani, immediately took xxx to Shanmugathai, PW-3, the grandmother of xxx. Then immediately contacted the mother of xxx, Gangadevi, PW-1, over phone. The mother of xxx, Gangadevi, PW-1, was working as a saleswoman in a textile shop. On receiving this information over phone, PW-1, Gangadevi, immediately rushed to her house by about



03.00 pm. She was informed that the accused had called xxx to his house to buy beedis for him and when xxx entered into his house, he committed the aforementioned offences. Immediately, thereafter, within one hour, PW-1, Gangadevi and xxx went to Suthamalli Police Station and lodged a complaint, Ex-P1. Thereafter, xxx was taken to the Government General Hospital and Medical College at Tirunelveli and was examined at around 11.30 in the night by Dr.Vanitha, Civil Assistant Surgeon, PW-8, who was on duty. She recorded the injuries found on xxx in the accident register, Ex-P5 and issued wound certificate, Ex-P6.

7.In the accident register, Ex-P5, the history relating to the injuries suffered were reduced in writing by PW-8, Dr.Vanitha. In Ex-P5, accident register, she noted:

- (i)a bruise beneath the skin on the left breast about 7x5 mm;
- (ii)linear abrasion in the left breast with red marks measuring 2 cm and 1.5 cm, which were tender on palpation
- (iii)In the right breast, small petechiae like skin injury (multiple) in lateral aspect of right breast;
- (iv)abrasion 4 in number 2 mm depth in right leg;



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(v) abrasion mark in 2 mm depth in both lower part of legs;

(vi) small tender swelling over right fore head measuring 3x4 cm in diameter and 5 mm above the surface;

(vii) Hymen intact, spermatozoa not detected; and

(viii) no other mark of violation anywhere in the body.

8. She had given her opinion that xxx could have been subjected to sexual assault.

9. Thereafter, on the basis of the complaint, FIR in Cr.No.334 of 2013 under Ex-P12, was registered at around 08.00 pm by the respondent under Sections 376 and 511 of IPC and under Section 8 of POCSO Act, 2012. The express copy of the FIR was then forwarded to the jurisdictional Magistrate Court, which reached the Court on 24.11.2013 at around 12.30 pm.

10. During the course of the investigation, the accused was also subjected to medical examination by PW-9, Dr.Selvamurugan, who gave his certificate, Ex-P7. The smear taken from xxx by PW-8 was subjected to



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forensic examination at Regional Forensic Science Laboratory in Tirunelveli and a report was given that spermatozoa were not detected. This report was marked as Ex-P11.

11. Investigation was then conducted by PW-16, Sundaranesan, Inspector of Police, Suthamalli Police Station, who prepared a rough sketch of the scene of crime under Ex-P14 in the presence of Dewan Maideen, PW-7 and Kannan (not examined). He then recorded the statements of Shanmugathai (PW-3), Asman Beevi (PW-4), Rani (PW-5), Dewan Maideen (PW-7) and Kannan (not examined). He had sent xxx to Government General Hospital and Medical College, Tirunelveli for medical examination through a Grade-I Constable, Subbulakshmi (PW-10). He then arrested the accused on 23.11.2013 at 10.30 pm in the night at Suthamalli V.O.C.Nagar Bus Stand and produced the accused on the same day before the Judicial Magistrate Court at Cheranmahadevi. The accused was remanded to judicial custody. He then recorded the statements of Gangadevi (PW-1), xxx (PW-2), Eswaramoorthy (PW-14) the Special Sub Inspector of Police, who had registered the FIR and Dr.Vanitha (PW-8), who had examined xxx at the hospital.



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12.He then handed over the case diary to B.Meenakshi Nathan, PW-17, who took charge as Inspector of Police, Suthamalli Police Station, who took up further investigation and examined the witnesses, whose statements had already been recorded and confirmed the nature of statements. PW-17 then recorded the statements of N.Balamurugan (PW-11) from Regional Forensic Science Laboratory and also examined Dr.Vanitha (PW-8). He then handed over the case diary to Krishna Raj (PW-18), Inspector of Police, Suthamalli Police Station.

13.PW-18 again confirmed the statements of the witnesses recorded earlier and thereafter, obtained certificate from Dr.Selvamurugan (PW-9), who had examined the accused and who issued certificate under Ex-P7. Thereafter, on 20.04.2016, he filed an application before the Chief Judicial Magistrate at Tirunelveli to record the statement of xxx. The said statement was recorded by the learned Judicial Magistrate-II, Tirunelveli on 22.04.2016. He then also recorded the statements of Somasundaram, PW-6, Grade-I Woman Constable, Jyothi, (PW-12) and Sub Inspector of Police, P.Joshpin Mary, PW-13. After completing the investigation, he filed final



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report on 27.04.2016 charging the accused with commission of offences under Section 341 and 324 of IPC and under Section 6 of POCSO Act.

14.The final report was taken cognizance by the Sessions Court/ Mahila Court, Tirunelveli and charges under Section 341 and 324 of IPC and Section 6 of POCSO Act were framed, explained and read over to the accused. The accused pleaded that he was not guilty of the commission of offences. Copies under Section 207 Cr.P.C., were furnished to the accused. The trial then commenced before the Sessions Court/Mahila Court, Tirunelveli, in Spl.C.No.85 of 2016. The prosecution examined PW-1 to PW-18 witnesses and marked Ex-P1 to Ex-P14. On conclusion of trial, the incriminating portion of the evidence was put to the accused under Section 313 Cr.P.C. His statements were recorded. Thereafter, the learned Session Judge, Mahila Court, Tirunelveli, pronounced judgment on 16.08.2019. The accused was convicted and sentenced as follows:



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S.No.	Offence	Sentence	Fine	In default sentence
1.	Under Section 341 IPC	1 month rigorous imprisonment	Rs. 500/-	One week simple imprisonment
2.	324 IPC	2 years rigorous imprisonment	Rs. 10,000/-	3 months simple imprisonment
3.	Under Section 6 of POCSO Act	Life imprisonment	Rs. 50,000/-	One year simple imprisonment

15.The learned Session Judge, Mahila Court, Tirunelveli, also held that out of the fine amount, Rs.50,000/- should be kept in a fixed deposit in the name of the victim child till she attains the age of majority.

16.Heard arguments advanced by Mr.R.Vinoth Bharathi, learned Counsel appearing for the appellant and Mr.A.Thiruvadi Kumar, learned Additional Public Prosecutor appearing for the respondent. The learned Counsel appearing for the appellant also filed written arguments.



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17.Mr.R.Vinoth Bharathi, learned Counsel appearing for the appellant argued that there were many contradictions in the evidence of PW-1, Gangadevi, mother of xxx and PW-3, Shanmugathai, grandmother of xxx and PW-5, Rani (neighbour). He stated that PW-1, Gangadevi, was living with her mother, Shangamuthai, PW-3 along with her two children having separated from her husband. She was working as saleswoman in a textile factory. In her evidence, she had stated that on 23.11.2013 at around 03.00 pm, she received a phone call, when she was at her work place, from PW-5, Rani, who informed her that when her daughter, xxx, was playing in front of the house, xxx was called by the accused, Liyakath Ali, to purchase beedi and when xxx went into his house, the accused closed the door and tore the nightie worn by xxx, removed the panties and pressed her breasts with his hands. He then hit her head on the ground causing injuries on the right side of the head. He then pushed xxx and she suffered blood injuries in both her legs owing to the iron rod fixed in the door. There were also nail scratch marks on the breasts of xxx. She further stated that he forced xxx to lie down and penetrated his penis on the vagina of xxx. She further stated that xxx cried out saying that she considered him as her father and to leave her considering her as his daughter. He then told xxx to count from 1 to 10 and



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that only thereafter, he would leave her. xxx then shouted to leave her. He then permitted her to go out. She further stated that xxx came over to her, (PW-1) and informed this to Shanmugathai, PW-3 and her neighbour, Rani, PW-5. Rani then telephoned and gave this information to PW-1 and immediately, PW-1 reached her house at 03.00 pm.

18.The learned Counsel appearing for the appellant after pointing out the evidence of PW-1, took the Court through the evidence of Shanmugathai, PW-3, who had stated that xxx had first informed this incident to Rani, PW-5, who was a neighbour and Rani brought xxx to her (PW-3) and she, PW-3, informed PW-1, Gangadevi, about the incident.

19.The learned Counsel then pointed out the evidence of PW-4, Asma Beevi, who was running an iron scrap shop next to the house of PW-1 and who noticed xxx running out, crying from the house of the accused at around 02.30 pm in November 2013 and when she enquired her, xxx informed that when she went to watch television in the house of the accused, the accused misbehaved with her. She then stated this to those who were present and who informed PW-1, Gangadevi about the incident.



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20.The learned Counsel then pointed out the evidence of PW-5, Rani, who stated that at around 02.00 pm, when she was eating in her house, xxx came crying to her house and called her and told her that when she went to the house of the accused to watch television, the grandfather had misbehaved with her. She then got the cellphone number of PW-1, the mother of xxx, and informed PW-1.

21.Pointing out all these statements, the learned Counsel appearing for the appellant stated that there were contradictions as to whether xxx went to the house of the appellant to watch television or whether the accused called her to buy him beedi. He also pointed out that there were contradictions as to who informed PW-1, whether it was PW-3, Shanmugathai or PW-5, Rani. The learned Counsel appearing for the appellant also stated that the accused was a land broker and had many enemies in that area, particularly, PW-7, Dewan Maideen. A suggestion was put to PW-7 that there was prior motive and enmity against the accused and therefore, a false complaint had been given.



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22.The learned Counsel then pointed out the further evidence of PW-1, who stated that when she went to Suthamalli Police Station, she dictated the complaint, Ex-P1, to the Writer in the Police Station, who wrote it down. He then pointed out the evidence of PW-14, Eswaramoorthy, who had registered the FIR in Cr.No.334 of 2013 under Section 376 of IPC r/w 511 of IPC and Section 8 of POCSO Act, 2012, who stated that he did not know whether the Writer, Selvaraj, had written down the complaint, as stated by PW-1, Gangadevi. A suggestion was put to him that the original complaint was suppressed and a false complaint had been produced before the Court.

23.The learned Counsel appearing for the appellant further pointed out that the FIR, Ex-P12, which was registered at 08.00 pm on 23.11.2013 was received by the Judicial Magistrate Court on 24.11.2013 only at 12.30 pm and stated that no explanation had been given for the delay. He also pointed out that the statement of xxx before the learned Judicial Magistrate was recorded only on 22.04.2016 nearly after 2½ years and pointed out that no explanation had been given for such delay.



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24.The learned Counsel further pointed out the report of Dr.Vanitha, PW-8, who in Ex-P5 and Ex-P6, accident register and wound certificate had stated that there were no injuries around the vagina of xxx and traces of spermatozoa were not found. This had also been confirmed by Ex-P11, the certificate issued by the Regional Forensic Science Laboratory, Tirunelveli. The learned Counsel therefore pointed out that the entire incident is surrounded with mystery and there was no penetrative sexual assault committed by the accused. He also pointed out the suggestion put to PW-8, Dr.Vanitha, that the scratch marks in the breasts of xxx could also have been caused by scratching owing to allergy.

25.He then pointed out the evidence of PW-16, Sundaranesan, Inspector of Police, who stated in cross examination that he had not seized the torn nightie of xxx and the contradictions between the reasons why xxx went to the house of the accused, namely, to watch television and to purchase beedis for him. It was, therefore, argued by the learned Counsel that the evidence of PW-1 is highly disbelievable. The learned Counsel therefore stated that in view of the contradictions in the case of the prosecution, the judgment convicting the accused should be set aside.



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26.The learned Counsel also placed reliance on a judgment of this Court reported in **2023 (2) TLNJ 195 (Criminal)** in the case of ***B.Mooventhana vs State of Tamil Nadu*** and stated that when there are contradictions in the statements of PW-1 and the victim, a serious doubt is created in the case of the prosecution. He also pointed out that even in that case, the legal evidence did not point out that the appellant therein committed the offence. He therefore, stated that when there is failure to establish the foundational facts, the presumption under Section 29 of POCSO Act cannot be drawn. The learned Counsel relied on the following paragraphs of the said judgment:

“30.In Criminal jurisprudence, the prosecution has to prove the case. However, in view of Section 29 of the POCSO Act, where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the POCSO Act, the Court shall presume that such person has committed or abetted or attempted to commit the offence as the case may be unless the contrary is proved. The presumption to be drawn under Sections 29 and 30 of the POCSO do not absolve the prosecution of its duty to establish the foundational facts. The prosecution has to establish the prima facie case by adducing evidence. Only when the fundamental and primary facts are established by the prosecution, the accused will be under an obligation to rebut the presumptions by adducing cogent evidence where the standard of proof required to rebut the presumption is preponderance of probabilities. In short, the basic, primary and fundamental facts are to be established by the prosecution.



.....
34. *The Investigating officer has not recorded the victims' statements despite the fact that victims were not having any disability and were in a position to give their statement. In this case, the final report was filed on 10.10.2014. Before filing final report, the statement of the victims were neither recorded under Section 161 nor under Section 164 of Cr.PC. The procedure for recording statement of the child under Sections 24 to 26 of the POCSO Act were not followed in this case.*

35. *In this case, charge sheet was filed on 10.10.2014. In the charge sheet, 14 witnesses were cited in the list of witnesses. Among the said witnesses, the Doctor who examined the victims was cited as L.W.10. Despite the fact that statement of examinations of the victims alone is the direct material facts available in the charge sheet, the learned Sessions Judge took cognizance of the offences under Sections 4 and 8 of the POCSO Act and thereafter, framed charges against the appellant on 13.07.2015 under Sections 6 read with 5(f)(l)(m) (2 counts) and Section 10 read with 9(l)(m) (2 counts) and questioned the accused. Since the accused denied the charges as all false and claimed to be tried, trial was ordered. Summons were issued to L.W.1 to L.W.7 witnesses for the hearing date 17.08.2015. Thereafter, fresh summons were issued for the said witnesses on 07.09.2015 and 01.10.2015. At that stage, on 01.10.2015, prosecution filed a petition seeking formal permission to conduct further investigation under Section 173(8) of Cr.P.C., and the said petition was numbered as Crl.MP No.405 of 2015 and the same was allowed on 04.12.2015 and thereby the victims YY's and XX's statements were recorded by P.W.11- Judicial Magistrate on 19.12.2015. To be noted, as per Section 26, the trial court shall record the statement of the witness within 30 days of commencement of trial. In this case, unusually the victims' statements were recorded under Section 164 Cr.P.C., only after commencement of the trial. It is to be noted that statement recorded under Section 164 of Cr.P.C., can be used to either corroborate or contradict the witnesses, other than which, it has no evidentiary value.*

36. *The procedure adopted by the prosecution in the name of further investigation is a legally flawed exercise and cannot be allowed. The prosecution cannot improve and fill up its lacunae*



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after commencement of trial. The course adopted by the prosecution would prejudice the rights of the accused. It appears that no additional report has been filed for the case. On the other hand, the statement of the victims recorded under Section 164 of Cr.P.C., alone were filed in the Court. This court is of the view that the fair trial procedures were not adhered by the trial court. In this case, except the FIR, all other documents including the rough sketch, observation mahazar and the statement of the material witnesses under Section 161(3) were received by the court on 10.10.2014 only i.e., they were filed along with the charge sheet only. The unexplained delay creates suspicion and does not inspire confidence over the prosecution case (vide In Re: KARUNAKARAN AND OTHERS [1975 (1) MLJ 209].”

27.He therefore stated that the appellant/accused is entitled for benefit of doubt owing to improper investigation and contradictory nature of evidence produced by the prosecution witnesses.

28.Mr.A.Thiruvadi Kumar, learned Additional Public Prosecutor however strongly refuted the contentions raised. He pointed out that all the witnesses had uniformly deposed that xxx had entered into the house of the accused and when she came out, her nightie was torn and there were blood injuries on her breasts, a contusion injury on the right side of her head and blood injuries on the lower part of both her legs. These injuries happened inside the house of the accused.



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29.The learned Additional Public Prosecutor stated that therefore, the accused had to explain as to how these injuries occurred inside his house, when he alone was present and the outer door was locked. The learned Additional Public Prosecutor pointed out that opportunity was granted to explain when the incriminating evidence was put to the accused under Section 313 Cr.P.C., but no explanation was given at all. He then pointed out that information of the offence was first given to PW-5, Rani, who was a neighbour. He stated that both PW-3 and PW-5 were present when a phone call was made to PW-1, mother of xxx. With respect to the complaint, he stated that only one complaint had been lodged and there had been no suppression of any earlier complaint.

30.He then pointed out the medical examination, which was done actually at 11.30 on the very same night and injuries were found on the breasts, on the head and on the lower part of the legs and these injuries were in conformity with the statement of xxx. He further pointed out the explanation of PW-8, Dr.Vanitha, that the scratches in the breasts were downward in nature and therefore, could not have been self inflicted.



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31.The learned Additional Public Prosecutor was very emphatic in his submission that penetration as understood is not required, but even a slight penetration is sufficient. That there was penetration had been spoken to by PW-8, Dr.Vanitha, who gave the opinion that xxx had been subjected to sexual assault. The learned Additional Public Prosecutor stated that the contradictions pointed out were minor in nature and the actual fact was spoken by PW-2, xxx, who stated what actually happened inside the house and what she suffered in the hands of the accused. The learned Additional Public Prosecutor stated that PW-2 withstood cross examination.

32.The learned Additional Public Prosecutor was fair to state that it is a fact that the statement was recorded by the learned Judicial Magistrate No.II, Tirunelveli in the year 2016 and that, no explanation had been given by the Investigating Officer but stated that direct evidence was available before the Court. He also pointed out the said statement recorded, wherein, xxx had reiterated the actual details. There had been no contradictions in the complaint with respect to the incident, in the statement recorded by the learned Judicial Magistrate No.II, Tirunelveli and in her evidence before the Court.

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33.He pointed out that the sole testimony of a victim child is sufficient to convict the accused and it does not require corroboration.

34.In this connection, the learned Additional Public Prosecutor placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***State of Punjab vs Gurmit Singh and others*** reported in ***(1996) 2 SCC 384***, wherein, the Hon'ble Supreme Court had held that the grounds on which, the trial Court disbelieved the version of prosecutrix were not at all sound.

The Hon'ble Supreme Court had held as follows:

“8.The grounds on which the trial court disbelieved the version of the prosecutrix are not at all sound. The findings recorded by the trial court rebel against realism and lose their sanctity and credibility. The court lost sight of the fact that the prosecutrix is a village girl. She was a student of Xth class. It was wholly irrelevant and immaterial whether she was ignorant of the difference between a Fiat, an Ambassador or a Master car. Again, the statement of the prosecutrix at the trial that she did not remember the colour of the car, though she had given the colour of the car in the FIR was of no material effect on the reliability of her testimony. No fault could also be found with the prosecution version on the ground that the prosecutrix had not raised an alarm while being abducted. The prosecutrix in her statement categorically asserted that as soon as she was pushed inside the car she was threatened by the accused to keep quiet and not to raise any alarm, otherwise she would be killed. Under these circumstances to discredit the prosecutrix for not raising an alarm while the car was passing through the bus adda is a



travesty of justice. The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. The trial court fell in error for discrediting the testimony of the prosecutrix on that account. In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.”

35.The learned Additional Public Prosecutor also relied on a judgment of Hon'ble Supreme Court in the case of ***Ranjit Hazarika vs vs State of Assam*** reported in ***(1998) 8 SCC 635***, wherein, the Hon'ble Supreme Court held as follows:

“5.The argument of the learned counsel for the appellant that the medical evidence belies that testimony of the prosecutrix and her parents does not impress us. The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a



result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any injury on her private parts. To constitute the offence of rape, penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on “no reasons”.

6. The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated.”

36. Pointing out the ratio laid down, the learned Additional Public Prosecutor argued that the statement of PW-2 in this case also inspires confidence and stated that therefore, the trial Court had correctly convicted the accused of the offences charged.



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37.We have carefully considered the arguments and perused the materials records.

38.The point to be determined is whether the conviction and sentence passed by the Sessions Court/Mahila Court, Tirunelveli, in Spl.C.No.85 of 2016, by judgment, dated 16.08.2019 against the appellant/accused, should be sustained or modified or set aside?

39.The appellant, Liyakath Ali, aged about 57 years was charged with commission of offences under Section 341 IPC, Section 6 of POCSO Act, 2012 and under Section 324 of IPC.

40.The first charge was that the appellant had caught hold of the minor child, xxx, when she entered his house and restrained her from not going out of the house by closing the front door and therefore, had committed the offences under Section 341 IPC.

41.The second charge was that in continuation of such restraint of the minor child, the appellant had pushed her, removed her dress and torn her



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nightie and though the child remonstrated asking why he was behaving like that when she considered him as her father, he also removed her panties and caught hold of her breasts and pressed them and also committed the act of penetrative sexual assault and thereby, committed the offence punishable under Section 6 of POCSO Act.

42.The third charge was that when the child struggled to escape from the clutches of the appellant, he caught hold of her head and hit it on the ground causing contusion injury on the right side of the head and then, pushed her on the wall, where, she suffered injuries on the lower part of both her legs owing to the iron rods fixed in the wall and thereby, the appellant committed offence punishable under Section 324 of IPC.

43.The appellant denied the charges and claimed to be tried. The prosecution was then called upon to prove the charges. Accordingly, during the course of trial, the prosecution examined PW-1 to PW-18 and marked Ex-P1 to Ex-P14. On conclusion of recording of evidence, the appellant was questioned under Section 313 Cr.P.C. The statements given by him were recorded. Finally, by judgment, dated 16.08.2019, the Sessions Court/



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Mahila Court, Tirunelveli, had convicted and sentenced the appellant as follows:

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1.	Under Section 341 IPC	1 month rigorous imprisonment	Rs. 500/-	One week simple imprisonment
2.	324 IPC	2 years rigorous imprisonment	Rs. 10,000/-	3 months simple imprisonment
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44.It had also been held that out of the fine amount, Rs.50,000/- should be kept in a fixed deposit in the name of the victim child till she attains the age of majority.

45.Challenging the conviction and sentence, the appellant had filed the present appeal.

46.During the course of trial, PW-16, Sundharanesan, Inspector of Police, Suthamalli Police Station, who had taken up investigation, had



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visited the scene of occurrence and had prepared a rough sketch, which was marked as Ex-P14. An examination of Ex-P14 would show that at Suthamalli in East VOC Nagar, the victim child was residing at 4th street and the appellant was residing in the 3rd street. During the course of the evidence, it had come to the light that the victim child, xxx, a young girl of about 12-13 years, often used to play in front of the house of the appellant among other places.

47.The incident which led to the registration of the FIR and subsequent to trial, had taken place on 23.11.2013, which was a Saturday and therefore, the school of the victim child was closed. The incident happened at 02.30 pm, when the victim child was playing near the house of the appellant.

48.The mother of the victim child was examined during the course of trial as PW-1. She was working as a Saleswoman in a textile shop at Tirunelveli Town. She had separated from her husband and was living with her mother, Shanmugathai, who was examined as PW-3.



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49.It is the case of the prosecution that when the victim child xxx was playing in front of the house of the appellant at 02.30 pm on 23.11.2013, he called her over to his house to buy him to some beedis. It must also be stated that there is yet another version that she went to the house of appellant to watch television. At any rate, the fact established is that she went inside the house of the appellant. It is stated that she came out running and crying with her dress torn. It is the evidence of PW-4, Asmaa Beevi, who is having an iron scrap shop and residing in the same area that there were blood coming from the chest portion of the victim child. It is her evidence that the victim child told her that she went to the house of the appellant to watch television and at that time, the appellant had “தப்பாக நடக்க பார்த்தாகவும், கட்டிபிடித்ததாகவும், நெஞ்சில் கையை வைத்து கீறியதால் ரத்தம் வந்ததாகவும்”, (misbehaved, held the child tightly and scratched the chest portion and blood came out). Thereafter, the victim child had gone over to the house of another neighbour, Rani, who was examined as PW-5.

50.It is the evidence of PW-5, Rani that when she was eating in her house at around 02.00 pm, the victim child came and called her out and told



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her that she had gone to the house of the appellant to watch television and at that time "அந்த தாத்தா என்னிடம் தப்பபாக நடந்துகொண்டார்" namely, the grandfather there, misbehaved with her. PW-5 further stated that she then contacted the mother of the victim child through phone and informed her. She also further stated that the mother of the victim child came back within about half an hour.

51.The prosecution also examined PW-3, Shanmugathai, the grandmother of the victim child. She stated that when she was cooking at around 02.00 pm on 23.11.2013 and the victim child was playing outside, her neighbour Rani (PW-5) brought the victim child to her. She was informed that the appellant had asked the victim child to purchase beedis and pulled her inside the house, torn open the nightie and thrust his fingers on the private part and caught hold of her head and hit it against the wall. He also threatened the victim child that he would kill her if she mentioned about this incident to anybody else. PW-3 further stated that the victim child somehow escaped and informed this fact to her neighbour Rani (PW-5) who brought the victim child to her.



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52.The prosecution also examined the victim child xxx as PW-2. It must be straightaway pointed out that though the incident had happened on 23.11.2013 and complaint was lodged on the same day and FIR was registered on the same day, the statement under Section 164 Cr.P.C., of the victim child was recorded by the learned Judicial Magistrate No.II, Tirunelveli, only on 22.04.2016 consequent to a requisition made on 20.04.2016 by PW-18, Krishna Raj, Inspector of Police, Suthamalli Police Station. The prosecution has not given any explanation for the lapse in time from the date of accident to the date of recording the statement of the victim child under Section 164 Cr.P.C.

53.The victim child was examined during trial in Court on 22.11.2016. In her evidence, PW-2, victim child, xxx, stated that she knew the appellant, who was residing in the opposite house at Suthamalli VOC Nagar East. She also stated that on the date of the incident, she was aged 12 years old. She further stated that on 23.11.2013 at 02.30 pm, she was playing near her house. The appellant then called her to buy some beedis and she went into the house of the appellant. At that time, there was nobody else present in the house. The appellant then locked the outer door. He then



tore open her nightie and pressed both her breasts. She cried out in pain and stated that she considered him as her father and requested him to leave her.

She further stated that however, the accused hit her head against the ground and she suffered injuries on the lower part of her both legs on contact with the iron rods fixed on the door. She then stated that the accused kept his penis in her vagina. He also put his fingers in her vagina. He then told her to count 1 to 10. She also counted 1 to 10. She was then able to free herself and run outside.

54.She further stated that she informed this particular incident to her grandmother/PW-3 and Rani/PW-5. She also stated that PW-5, Rani immediately informed to her mother PW-1 and her mother had come home at around 03.00 pm. Thereafter, she and her mother went to Suthamalli Police Station and a complaint was lodged stating that the accused had sexually assaulted her. The victim child, xxx, was then taken to the hospital, where she informed what happened to the Doctor (PW-8), who examined her. During cross examination, she admitted that the entire incident happened about three years prior to the date of her deposition. She denied the suggestion that the incident as stated by her did not happen.



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55. Chapter-VI of the POCSO Act contains four Sections, namely, Section 24, which deals with recording of statement of a child, Section-25, which deals with recording of statement of a child by Magistrate; Section -26, which deals with additional provisions regarding statement to be recorded and Section 27, which deals with medical examination of a child.

56. Section 24 of POCSO Act, 2012, is as follows:

“24. Recording of statement of a child.—

(1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.

(2) The police officer while recording the statement of the child shall not be in uniform.

.....

(5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.”

57. PW-13, Joshpine Mary, Sub Inspector of Police in Suthamalli Police Station on 23.11.2013, stated that in the night at 08.00 pm., on that date, PW-1 had come along with xxx, and lodged a complaint on the basis of which, FIR in Cr.No.334 of 2013 had been registered under Section 376



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r/w 511 IPC and under Section 8 of POCSO Act. She further stated that under the direction of the Inspector of Police, xxx was sent to the hospital along with a woman Constable No.2886 for medical examination. PW-13, Joshpine Mary also went to the hospital.

58.During the cross examination, PW-13, Joshpine Mary stated that when xxx was examined in the Police Station, she and the Inspector of Police and all other police personnel were in uniform. She also stated that she has recorded the statement of xxx by calling her separately. She stated that she dictated the statement of xxx and it was written down by the Head Constable. After that, the Inspector of Police also examined xxx. The dictation given by the Inspector of Police was also written down by the Head Constable. She further stated in her cross examination that she and the other woman Constable took xxx to the hospital and even at that time they were in Police uniform. The statement dictated by her and written down by the Head Constable had not been produced as a document before the trial Court or before this Court.



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59.It is seen from the above narration that there has been complete violation of the mandatory provisions of Section 24 of POCSO Act, 2012, which specifically states that the Police Officers who record the statement of a child, shall not be in uniform and also that the statement shall be recorded at the residence as far as practical by a woman Police Officer not below the rank of Sub Inspector of Police. Here, PW-13, woman Sub Inspector of Police was not only in uniform, but the Inspector of Police and all other Police officers were in uniform and the statement was recorded in the Police Station.

60.Section 25 of the POCSO Act, 2012, gives the procedure for recording of statement by the Magistrate. Ex-P2 is the statement of xxx recorded under Section 164 of Cr.P.C., by the learned Judicial Magistrate-II, Tirunelveli. The said statement was recorded on 23.04.2016. The name of the child and her signature in which her name can be clearly read finds place in 15 places.

61.This again is a clear violation of the mandatory provision not to disclose the identity of a minor victim child. There is further no explanation



given by any one of the prosecution witness or particularly by the Inspector of Police for the delay in recording said statement from the date of incident.

During trial, the statement of xxx was recorded on 22.11.2016.

62.The Hon'ble Supreme Court in *State of Karnataka by Nonavinakere Police -vs- Shivanna @ Tarkari Shivanna*, reported in (2014) 8 SCC 913, held as follows:

“10.On considering the same, we have accepted the suggestion offered by the learned counsel who appeared before us and hence exercising powers under Article 142 of the Constitution, we are pleased to issue interim directions in the form of mandamus to all the Police Stations-in-Charge in the entire country to follow the directions of this Court which are as follows:

10.1.Upon receipt of information relating to the commission of offence of rape, the investigating officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement under Section 164 CrPC. A copy of the statement under Section 164 CrPC should be handed over to the investigating officer immediately with a specific direction that the contents of such statement under Section 164 CrPC should not be disclosed to any person till charge-sheet/report under Section 173 CrPC is filed.

10.2.The investigating officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.

10.3.The investigating officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.

10.4.If there is any delay exceeding 24 hours in taking the victim



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to the Magistrate, the investigating officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.

10.5.*Medical examination of the victim: Section 164-A CrPC inserted by Act 25 of 2005 in CrPC imposes an obligation on the part of investigating officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim under Section 164 CrPC.”*

63. There has been a time gap of nearly two years and five months from the date of incident (23.11.2013) and the date when the statement of the victim child xxx was recorded by the Judicial Magistrate (22.04.2016). There is no explanation advanced by the prosecution for this delay.

64. Further, in practically every record maintained by the prosecution, the name of the victim child has been disclosed. Section 24(5) of POCSO Act, which had been extracted above, very clearly stipulates that the Police Officers shall ensure that the identity of the child is protected from public media. Even though it could be argued that the records in the Court have not been exhibited in public media, still the name has been written down in very clear terms at every possible place in which could be so written down.



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65.The victim child, xxx, was then taken for medical examination.

The accident register had been marked as Ex-P5 and the wound certificate had been marked as Ex-P6. The injuries had been noted down in the accident register. In that register also the name of xxx had been disclosed by the Doctor, PW-8. who examined her.

66.In the accident register, Ex-P5, it had been noted that spermatozoa was not detected, but however, an opinion was given that there could be possibility of sexual assault being committed. The hymen was intact. During cross examination, PW-8 was emphatic in her assertion that the scratch marks on the breasts of xxx had a downward motion and therefore, could not have been self inflicted.

67.The evidence as recorded would show that the accused had restrained xxx inside his house; he had torn open her nightie; he had pressed her breasts very violently causing injuries; he had kept his penis on her vagina; he had hit her head on the ground; he had pushed her down owing to which, she suffered injuries on the lower part of her legs. These are facts, which have been clearly stated by PW-2. But, these facts will have to be



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balanced with the manner in which the investigation was done particularly, the recording the statement under Section 164 Cr.P.C., nearly about 2½ years after the incident and not producing before Court the statement of xxx dictated by PW-13, Joshpine Mary and written down by the Head Constable in the Station. The victim child, xxx, had deposed in Court just a day short of three years from the date of incident and at that time, she had become more mature girl and therefore, was able to assert herself.

68.We do not acknowledge the dictum of the Hon'ble Supreme Court that the sole testimony of a prosecutrix is sufficient to convict the accused. We do hold that the testimony of xxx, PW-2 inspires confidence. But the underlying fact is the delay of nearly 2½ years in recording her statement under Section 164 Cr.P.C., and a further delay of six months before she deposed in Court. She had become older, more mature and naturally more assertive. That is a factor to be taken into consideration.

69.Taking all these factors into consideration, we are constrained to extend the benefit to the accused, since the initial statement of the victim child, xxx to PW-5, Rani was that the accused had “தப்பாக



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நடந்துகொண்டார்”. Thereafter, specific details have been given by PW-1 in her complaint.

70.The accused had been charged and committed for punishment of commission of offence under Section 6 of POSCO Act, 2012.

71.Section 6 of POCSO Act, 2012 provides for punishment for aggravated penetrative sexual assault. Aggravated penetrative sexual assault is defined under Section 5 of the Act. The perpetrator of such sexual assault should be a police officer or a member of armed force or security force or a public servant or on the management or on staff of a jail, remand home, protection home or observation home or on the management or staff of a hospital or on the management or staff of an educational institution or religious institution or must be a member of a gang committing penetrative sexual assault or must commit penetrative sexual assault using deadly weapons, fire, heated substance or corrosive substance or must have committed penetrative sexual assault causing grievous hurt to the sexual organs of a child or must commit penetrative sexual assault on a child, which physically incapacitates the child or causes mental illness or any



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impairment or makes the child pregnant or inflicts the child with HIV or causes the death of child or commits penetrative sexual assault taking advantage of the child's mental or physical disability or commits penetrative sexual assault more than once or on a child below twelve years or is the relative of the child or in the ownership or management or staff of an institution providing services to the child or in a position of trust or authority or commits penetrative sexual assault knowing the child is pregnant or commits penetrative sexual assault and attempts to murder the child or commits penetrative sexual assault on a child in the course of communal violence or natural calamity or commits penetrative sexual assault and has been previously convicted of having committed any offence under the POCSO Act or any other law or commits penetrative sexual assault and makes the child to strip or parade naked in public.

72.A reading of the entire records would show that the accused does not fall any of the above category. The only facts established are injury to the head, scratches in the breasts and injuries to the lower part of both legs of the victim child, xxx. It is thus clear that Section 6 of the POCSO Act, 2012 would not be attracted for the offence committed by the accused.



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73. Section 7 and 8 of the POCSO Act, 2012, are as follows:

“7. Sexual assault.—Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

8. Punishment for sexual assault.—Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.”

74. The statement of the child under Section 164 Cr.P.C., that the accused put his penis in her vagina which is admissible in evidence was first recorded on 22.04.2016 nearly 2½ years after the incident by the learned Judicial Magistrate-II, Tirunelveli. The child deposed in Court on 22.11.2016 just a day short of three years from the date of the incident. Taking this particular delay into consideration and the manner in which, the investigation had been done, even though during deposition, xxx had stated that the accused put his penis in her vagina, we are of the considered opinion that it would only be appropriate that the conviction of the accused for punishment under Section 6 of the POCSO Act, 2012, is set aside and



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the accused is convicted for offence punishment under Section 8 of the POCSO Act, 2012, for sexual assault.

75.Insofar as charge Nos.1 and 3 are concerned, namely, offence under Sections 341 and 324 of IPC, the conviction of the accused under those Sections is upheld, since on entering into the house of the accused, the door was locked by the accused and thereby, there had been wrongful restraint of the child, which is an offence under Section 341 of IPC and injuries had been caused to the child, which had been spoken to by practically all the witnesses, particularly, PW-1, the child herself (PW-2), PW-3, PW-4, PW-5 and PW-8, Dr.Vanitha. Therefore, the conviction and sentence under Section 324 of IPC is upheld by us.

76.In the result, we would set aside the conviction imposed against the accused under Section 6 of the POCSO Act, 2012 and we convict the accused for offence punishable under Section 8 of POCSO Act, 2012 and sentence the accused to undergo imprisonment for five years rigorous imprisonment. We would maintain the fine of Rs.50,000/-, as imposed by the trial Court and in default one year rigorous imprisonment. The



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conviction and sentence under Section 341 IPC for one month rigorous imprisonment and fine of Rs.500/- in default one week rigorous imprisonment and under Section 324 IPC for two years rigorous imprisonment and fine of Rs.10,000/- in default 3 months rigorous imprisonment are maintained by us. All the sentences are to run concurrently. The direction that out of the fine, Rs.50,000/- should be deposited in fixed deposit till the child attaining the age of majority is also maintained by us.

77.The Criminal Appeal is, therefore, partly allowed setting aside the conviction and punishment under Charge No.2 from Section 6 POCSO Act, 2012 to Section 8 POCSO Act. 2012.

78.The conviction and sentence under Section 341 IPC and under Section 324 IPC is upheld. If the accused had already undergone rigorous imprisonment for five years and had paid the fine amount and if there are no other impediments, he may be set at liberty. The victim child would have



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completed the age of 18 and therefore, no directions are given with respect to the deposit in fixed deposit of the fine amount. If she had not withdrawn the same, she is at liberty to withdraw the same.

[C.V.K., J.] & [J.S.N.P., J.]
06.09.2024

Internet :Yes/No
Index :Yes/No
NCC :Yes/No

cmr

To

1.The Sessions Judge, Mahila Court, Tirunelveli.

2.The Inspector of Police,
Suthamalli Police Station,
Tirunelveli District.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

4.The Section Officer,
ER/VR Section,
Madurai Bench of Madras High Court, Madurai.



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C.V.KARTHIKEYAN, J.

AND

J.SATHYA NARAYANA PRASAD. J.

cmr

Judgment made in
Crl.A(MD)No.100 of 2021

06.09.2024