



*Crl.A.(MD).No.389 of 2020*

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 03.07.2024

CORAM

**THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA  
AND  
THE HONOURABLE MR.JUSTICE K.RAJASEKAR**

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A.Mano @ Mano Madasamy

.. Appellant/Sole Accused

Vs.

The State of Tamil Nadu,  
Represented by its,  
The Inspector of Police,  
Thalamuthu Nagar Police Station,  
Tuticorin.  
(Crime No.421 of 2016)

.. Respondent/Complainant

**PRAYER:** Criminal Appeal filed under Section 374 of Criminal Procedure Code, to call for the records of the judgment passed in Special S.C.No.201 of 2019 dated 20.10.2020 on the file of the Sessions Judge, Special Court for Protection of Children from Sexual Offences (POCSO Cases), Tuticorin transferred from Mahila Court (Fast Track) in Special S.C.No.52 of 2016, Tuticorin in Crime No.421 of 2016 on the file of the respondent Police Station and set aside the same and acquit the appellant/sole accused.

For Appellant : Mr.T.Thirumurugan

For Respondent : Mr.A.Thiruvadikumar  
Additional Public Prosecutor



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## **JUDGMENT**

**(Judgment of the Court was made by A.D.JAGADISH CHANDIRA,J.)**

This Criminal Appeal is filed against the judgment dated 20.10.2020 passed in Spl.S.C.No.201 of 2019, by the learned Sessions Judge, Special Court for Protection of Children from Sexual Offences (POCSO cases), Tuticorin.

2. The Trial Court framed the charges against the accused, as detailed below:

| <b>Charges</b> | <b>Penal Provision</b>                |
|----------------|---------------------------------------|
| 1              | 366 IPC                               |
| 2              | 493 IPC                               |
| 3              | Section 5(l) r/w 6 of POCSO Act, 2012 |

3. By judgment dated 20.10.2020, the Trial Court convicted the appellant/accused and sentenced him, as detailed below:

| <b>Section of Law</b>                 | <b>Sentence of imprisonment</b> | <b>Fine amount</b>                                             |
|---------------------------------------|---------------------------------|----------------------------------------------------------------|
| Section 5(l) r/w 6 of POCSO Act, 2012 | life imprisonment               | Rs.5000/- in default to undergo six months simple imprisonment |



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The Trial Court found the accused not guilty for the offences under Sections 366 and 493 IPC and he was acquitted of the said charges. The period of incarceration already undergone by the accused was directed to be set off under Section 428 Cr.P.C.

4. The case of the prosecution is as under:

4.1. P.W.1 is the minor victim girl, who was residing with her parents in Thoothukudi and working in a spinning mill. The accused A.Manu @ Mano Madasamy was residing with his parents in Thoothukudi and he was in love with the victim girl for one year. While so, on 14.06.2016, the accused enticed the victim girl that he will marry her and forcibly taken the victim girl to Babanasam Temple and inspite of knowing that the victim girl had not attained majority, the accused had married her on 15.06.2016 and thereafter, taken the victim girl to Chennai. Subsequently, on 17.06.2016, the accused had taken the victim girl to a rental house in Subramaniapuram, Kovilpatti and committed sexual assault on the victim girl.

4.2. On receipt of the complaint (Ex.P2) given by P.W.2, mother of the victim girl on 22.07.2016 stating that her daughter was missing from



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12.07.2016, P.W.8, Sub Inspector of Police, Thalamuthunagar Police Station registered the FIR in Crime No.421 of 2016 under the caption 'girl missing'.

4.3. P.W.9, Inspector of Police took up the case for investigation and visited the scene of occurrence and prepared observation mahazar (Ex.P3) and rough sketch (Ex.P10). He examined the witnesses and recorded their individual statements. During the course of investigation, it came to light that the victim girl was often talking with the accused in the street and on 12.07.2016 at about 8.00 PM, when her parents had gone outside the house, the victim girl was found missing.

4.4 While P.W.9 was in search of the victim girl, on 01.08.2016 at about 10.00 AM, he secured the victim girl and the accused near New Muniyasamipuram with the help of the Woman S.I., P.W.8 and Woman Grade I Constable Rasitha. When P.W.9 enquired the victim girl and the accused, it was stated that the accused had enticed the victim girl and had taken her to Subramaniapuram, Kovilpatti and rented a house and while, they were staying there from 12.07.2016 till 31.07.2016, the accused committed sexual assault on the victim girl. P.W.9 recorded the statement of



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the victim girl and thereafter, altered the offences into Section 4 of POCSO Act and sent the accused to judicial custody. The victim girl was subjected for medical examination and her statement was recorded under Section 164 Cr.P.C by the learned District Munisf cum Judicial Magistrate, Vilathikulam on 09.08.2016 and the same is marked as Ex.P1. The accused was subjected for medical examination on 03.08.2016 and his medical report was marked as Ex.P5.

4.5. P.W.10, Inspector of Police, All Women Police Station, Thoothukudi took up the case for further investigation and she examined the witnesses independently and recorded their statements. After collecting the medical and forensic reports, P.W.10 completed the investigation and filed a final report against the accused for the offences under Sections 366, 493 IPC and Section 5(1) r/w 6 of POCSO Act, 2012.

5. The final report was taken on file in Spl.S.C.No.52 of 2016 by the Mahila (Fast Track) Court, Thoothukudi and subsequently, transferred to the file of the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Thoothukudi and the case was taken up in



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Spl.S.C.No.201 of 2019. The Trial Court framed the charges against the appellant, as detailed in Paragraph No.2 supra.

6. When questioned, the appellant pleaded “not guilty” and sought to be tried. To prove the case, the prosecution examined 10 witnesses and marked 12 exhibits. When the appellant was questioned under Section 313 Cr.P.C in respect of the incriminating circumstances against him, he denied the same and did not come forward to give any plausible explanation. No witness was examined on the side of the appellant nor any document marked.

7. The Trial Court, after hearing either side and considering the evidence on record, by judgment dated 20.10.2020, found the appellant guilty and convicted and sentenced him, as detailed in Paragraph No.3 supra. Challenging the above said conviction and sentence, the present Criminal Appeal is filed.

8. The learned counsel for the appellant would submit that it is a case of love affair and the victim girl had completed 18 years on the date of



occurrence. It is the admitted case of P.W.3 father of the victim that he had handed over the birth certificate of the victim to the police. The prosecution, despite the availability of the birth certificate of the victim girl, has burked the same and instead, has produced the record sheet, Ex.P6, which did not answer the description of documents enlisted in Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 and thereby, the said document cannot be relied upon. Though P.W.2, mother of the victim girl had deposed that the age of the victim girl is 17 years, the victim girl (P.W.1) had deposed that she had voluntarily gone along with the appellant and that only after completion of 18 years, she has gone along with the appellant. It is the further evidence of P.W.1 that the relationship between her and the appellant was consensual in nature and that her mother had given a complaint only after 40 days, since they belong to different communities. The learned counsel would further submit that even as per the evidence of P.W.2, mother of the victim girl, she had deposed that her daughter and the appellant were working together in a mill and that she was aware that her daughter and the appellant were in love with each other and that they had eloped and only after two months of their elopement, P.W.2 had given a complaint. She had further stated that the Police have



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traced the victim girl and the accused after ten days and that her daughter had refused to go along with her and only after some time, her daughter has joined her. P.W.2 had further stated that since the accused belonged to Scheduled Caste community and she belonged to Backward Classes community, she was not interested in the marriage of her daughter and the accused and that only to separate them, she has given a complaint to the Police. The learned counsel would also submit that in the statement recorded from the victim girl under Section 164 Cr.P.C, she had admitted about the love affair between her and the accused and having eloped with the appellant and that they were living together in a rental house and that she had indulged in consensual relationship with the accused. However, the Trial Court failed to take into consideration these aspects and convicted the appellant and thereby, the learned counsel prays to set aside the judgment passed by the Trial Court.

9. In support of his submissions, the learned counsel for the appellant relied on the judgment of the Hon'ble Apex Court in the case of ***P.Yuvaprakash Vs. State represented by Inspector of Police [(2023) 4 MLJ (Crl) 404 (SC)]***.



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10. The learned Additional Public Prosecutor appearing for the respondent would submit that though the victim girl has stated that she had voluntarily gone along with the appellant, as per Ex.P6, the record sheet and the evidence of P.W.6, Headmistress of the School, the date of birth of the victim girl is 31.10.2001 and on the date of occurrence, the victim girl had not completed 18 years. In this case, the appellant had enticed the minor victim girl on the promise of marrying her and committed repeated penetrative sexual assault on her. Hence, it would attract the offences under the POCSO Act and the Trial Court had rightly appreciated the evidence placed on record and convicted the appellant, thereby, he prays for dismissal of the appeal.

11. Heard the learned counsels on either side and perused the materials available on record.

12. It is the case of the prosecution that the appellant had enticed the victim minor girl aged about 15 years on the promise of marrying her and had taken her to several places and married her in Chennai and brought her



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back to Kovilpatti and committed repeated penetrative sexual assault on her.

Coming to the evidence of P.W.1, the victim girl, she had deposed that she knows the accused and that she went along with him and they stayed in a known person's house for ten days and during such time, they had sexual intercourse. However, in the cross-examination, P.W.1 had admitted that a false complaint has been given by her mother and that she had gone along with accused only after completing 18 years. As seen from the evidence of P.W.2, mother of the victim girl, she had deposed that her daughter was aged about 17 years at the time of occurrence and she had also deposed about knowing the love affair between her daughter and the accused and that since the accused belonged to Schedule Caste community and that they belonged to Backward Classes community, she was not interested in their marriage and that she had given a complaint only to separate the accused and her daughter. Coming to the evidence of P.W.3, father of the victim girl, he has deposed that there was a birth certificate for his daughter and that he had handed over the same to the Police at the time of investigation. However, strangely, in this case, the birth certificate of the victim girl has not been marked by the prosecution, whereas, Ex.P6, which is titled as 'Record Sheet' containing the age of the victim girl (P.W.1) was marked through P.W.6



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Headmistress of the School. On perusal of Ex.P6, we find that it is not a document answering the description of documents enlisted in Section 94(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015 and thereby, the same cannot be reliable.

13. In this case, apart from Ex.P6, no other evidence has been let in by the Prosecution to prove the age of the victim girl. In this regard, it is relevant to refer to the judgment of the Hon'ble Apex Court in ***P.Yuvaprakash Vs. State represented by Inspector of Police reported in (2023) 4 MLJ (Crl) 404 (SC)***, wherein, it is held as follows:

*“11.Before discussing the merits of the contentions and evidence in this case, it is necessary to extract Section 34 of the POCSO Act which reads as follows:*

***“34. Procedure in case of commission of offence by child and determination of age by Special Court. - (1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).***

***(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after***



*satisfying itself about the age of such person and it shall record in writing its reasons for such determination.*

*(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.”*

*12.In view of Section34(1)of thePOCSO Act, Section94of theJJ Act, 2015becomes relevant, and applicable. That provision is extracted below:*

*“94. Presumption and determination of age. - (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.*

*(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining -*



- (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;*
- (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;*
- (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:*
- Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.*
- (3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”*

*13.It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:*



*“(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof; (ii) the birth certificate given by a corporation or a municipal authority or a panchayat; (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board”.*

*14. Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through “an ossification test” or “any other latest medical age determination test” conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e.,*



*CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.*

*15. In a recent decision, in Rishipal Singh Solanki v. State of Uttar Pradesh, this court outlined the procedure to be followed in cases where age determination is required. The court was dealing with Rule 12 of the erstwhile Juvenile Justice Rules (which is in pari materia) with Section 94 of the JJ Act, and held as follows:*

*“20. Rule 12 of the JJ Rules, 2007 deals with the procedure to be followed in determination of age. The juvenility of a person in conflict with law had to be decided prima facie on the basis of physical appearance, or documents, if available. But an inquiry into the determination of age by the Court or the JJ Board was by seeking evidence by obtaining: (i) the matriculation or equivalent certificates, if available and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first*



*attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat. Only in the absence of either (i), (ii) and (iii) above, the medical opinion could be sought from a duly constituted Medical Board to declare the age of the juvenile or child. It was also provided that while determination was being made, benefit could be given to the child or juvenile by considering the age on lower side within the margin of one year.”*

*16. Speaking about provisions of the Juvenile Justice Act, especially the various options in Section 94(2) of the JJ Act, this court held in Sanjeev Kumar Gupta v. The State of Uttar Pradesh that:*

*“Clause (i) of Section 94(2) places the date of birth certificate from the school and the matriculation or equivalent certificate from the concerned examination board in the same category (namely (i) above). In the absence thereof category (ii) provides for obtaining the birth certificate of the corporation, municipal authority or panchayat. It is only in the absence of (i) and (ii) that age determination by means of medical analysis is provided. Section 94(2)(a)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule*



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*12(3)(a)(i) the matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category.*

*17. In Abuzar Hossain @ Gulam Hossain v. State of West Bengal, this court, through a three-judge bench, held that the burden of proving that someone is a juvenile (or below the prescribed age) is upon the person claiming it. Further, in that decision, the court indicated the hierarchy of documents that would be accepted in order of preference.”*

On careful perusal of the aforesaid judgment, it is clear that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through an ossification test or any other latest medical age determination test conducted on the orders of the



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concerned authority and mere transfer certificate could not have been relied upon to hold that the victim was aged 18 years. In the case on hand, the prosecution has marked the Record Sheet of the victim through P.W.6 and no documents were marked under Section 94 (2) of the Juvenile Justice (Care and Protection of Children) Act, 2015. In view of the above discussions and in view of the said judgment, this Court is of the view that the prosecution failed to prove the age of the victim as below 18 years and thereby the victim girl will not fall under the definition of 'Child ' as under Section 2(d) of the POCSO Act.

14. Further, in this case, the appellant was charged, *inter alia*, for the offence under Section 6 of the POCSO Act. The offence under Section 6 depends on the proof that a “sexual assault” took place. That term is defined by Section 7, which reads as follows:

*“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.”*

The offence under Section 6, at the relevant time, was defined as follows:



*“Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.”*

Section 3 defines penetrative sexual assault, as follows:

*“3. Penetrative Sexual Assault. - A person is said to commit “penetrative sexual assault” if -*

*(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or*

*(b).....*

*(c).....*

*(d)..... ”*

Section 2(a) of the POCSO Act provides that ‘aggravated penetrative sexual assault’ has the same meaning as assigned to it in Section 5. Therefore, Section 5, which defines ‘aggravated penetrative sexual assault’ is relevant.

Section 5(l) reads as follows:

*“5. Aggravated Penetrative Sexual Assault. -*

*(a)*

*(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or”*

Section 4, at the relevant time, read as follows:



*“(1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.”*

The expression “assault” is defined in Section 351 IPC as

*“Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.”*

The expression “criminal force” is defined by Section 350 IPC as follows:

*“Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.”*

In the present case, the victim girl in her statement recorded under Section 164 Cr.P.C. had deposed that she was in love with the appellant and she had voluntarily gone along with the appellant and married him and lived as husband and wife. From these facts and the definitions under POCSO Act, especially the definitions of “sexual assault”, Sections 5 and 6, read with



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Sections 350 and 351 IPC, it can be seen that it is only when there is penetrative sexual assault, which implies sexual contact with or without consent of the minor victim, that the offences under the POCSO Act are committed.

15. From the evidence placed on record, it is clear that the victim girl who was not a ' Child ' during the relevant time had willingly gone along with the appellant and had celebrated their marriage and that they were living together as husband and wife. To repeat, the victim girl had deposed that she had gone along with the accused only after completion of 18 years.

16. In view of the above discussion, we find that the prosecution has failed to prove the age of the victim as required under law and thereby, the prosecution had failed to prove the case beyond all reasonable doubts. In view of the same, this Court is of the view that the Trial Court had erred in convicting the appellant/accused and the judgment of the Trial Court is liable to be set aside.



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17. Accordingly, the Criminal Appeal stands allowed and the judgment of conviction and sentence passed by the learned Sessions Judge, Special Court for Protection of Children from Sexual Offences (POCSO cases), Tuticorin in Special S.C.No.201 of 2019 dated 20.10.2020 is set aside and the appellant/accused is set at liberty. Bail bonds, if any executed by the appellant, shall stand cancelled. Fine, if any paid by the appellant, shall be refunded.

**(A.D.J.C.,J.) (K.R.S.,J.)**  
**03.07.2024**

NCC : Yes / No

Index : Yes / No

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To

1.The Sessions Judge,  
Special Court for Protection of Children  
from Sexual Offences (POCSO cases), Tuticorin.

2.The The Inspector of Police,  
Thalamuthu Nagar Police Station, Tuticorin.

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

4.The Record Keeper,  
Vernacular Records Section,  
Madurai Bench of Madras High Court, Madurai.



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**A.D.JAGADISH CHANDIRA,J.**  
**and**  
**K.RAJASEKAR,J.**

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