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Crl.A.No.1270 of 2022

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.03.2026

PRONOUNCED ON : 30.03.2026

CORAM:

THE HONOURABLE MR.JUSTICE G.ARUL MURUGAN

Crl.A.No.1270 of 2022

Sundaram,
S/o.Vedi,
Dharumanthoppu Village,
Sivampatti Post,
Burgur Taluk,
Krishnagiri District.

... Appellant/Single Accused

versus

State by the Inspector of Police,
Mathur Police Station,
Krishnagiri District.
(Crime No.435/2019)

... Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C. against the judgment dated 17.11.2021 in Spl.S.C.No.35 of 2020 on the file of the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District.

For Appellant : Mr.E.Kannadasan

For Respondent : Mr.J.Subbiah
Government Advocate (Crl. Side)



JUDGMENT

This Criminal Appeal is preferred by the appellant/sole accused challenging the judgment dated 17.11.2021 in Spl.S.C.No.35 of 2020 on the file of the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District.

2. The appellant/accused was convicted by the trial court and sentenced as detailed below:-

Section of law	Sentence
5(l) r/w Section 6 of POCSO Act, 2012	<i>Rigorous imprisonment for 20 years and to pay a fine of Rs.1,000/-, in default to undergo Rigorous imprisonment for 6 months</i>
506(ii) IPC	<i>Rigorous imprisonment for 5 years</i>
<i>Sentences shall run concurrently</i>	

3. According to the prosecution, PW1 is having one minor daughter [PW2, aged 16 years] and 2 sons and they are residing in Dharumanthoppu Village, Burgur Taluk, Krishnagiri District. PW2 was born on 26.12.2003 and she had studied till 9th standard at Government High School, M.Nadupatti and thereafter discontinued her studies due to health condition. Since PW2 had some mental issues, she had undergone treatment



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from Nimhans Hospital, Bangalore, for 5 months. On 09.12.2019, at 12.00p.m., the appellant, who is a neighbour, had taken PW2/victim to the terrace of his house and had committed penetrative forcible sexual assault for more than thrice on the same day. The appellant had threatened the victim for life if she divulged it to anyone else. Again, on 14.12.2019 at around 6.00p.m., when PW2 was alone at home, the appellant had taken the victim to his house and committed sexual assault. Only then the victim had informed the same to her grandmother, who in turn had informed to PW1. Thereafter, P.W.1 informed her husband/PW3, who was out of station.

4. On arrival of PW3, PW1 lodged the complaint/Ex.P1 on 16.12.2019. PW13/Sub-Inspector of Police received the complaint and registered the FIR/Ex.P11 for offences under Section 5(l) r/w 6 of The Protection of Children from Sexual Offences Act, 2012 [hereinafter referred to as “the POCSO Act”] and Section 506(i) of IPC. PW14/Inspector of Police took up the investigation and prepared the Observation Mahazar/Ex.P2 in the presence of PW4 and PW5 and the rough sketch/Ex.P12. PW12/Head Constable had taken the victim/PW2 for medical examination. PW11/Doctor examined the victim and issued the OP



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register/Ex.P6, Medical Certificate/Ex.P7 and Discharge Summary/Ex.P8.

The samples collected from the victim were sent for chemical examination in Ex.P10 and the report was received in Ex.P9. PW2 was taken before the learned Magistrate and the statement was recorded under Section 164(5) Cr.P.C. in Ex.P14.

5. The appellant/accused was arrested and the confession was recorded in the presence of PW6 and PW7. The accused was taken for medical examination by the Police Constables/PW8 and PW9. PW10/Doctor examined the accused and had issued the potentiality certificate/Ex.P4. On receipt of the report, PW14 altered the offences to Section 2(1)(d), 6 r/w 5(1) and Section 12 r/w 11(i) of the POCSO Act and Section 506(ii) of IPC through the alteration report/Ex.P17. After completion of the investigation, PW14 filed the final report before the trial court.

6. The trial court took up the case, issued summons and after complying with Section 207 of Cr.P.C., framed the charges under Section 5(1) r/w 6, Section 12 r/w 11(i) of the POCSO Act and Section 506(ii) of IPC. On being questioned, the accused pleaded not guilty and stood trial. In



order to prove the charges, the prosecution examined PW1 to PW14 and marked Exs.P1 to P17.

7. On completion of the prosecution evidence, when the accused was questioned under Section 313 Cr.P.C., about the incriminating materials available, he denied the same as false. However, the accused has not examined any witness or produced any documentary evidence.

8. On conclusion of the trial and arguments, after considering the oral and documentary evidence available, the trial court found the accused guilty of the charges and convicted him for offences under Section 5(l) r/w 6 of the POCSO Act and Section 506(ii) of IPC, but however, acquitted the accused for offence under Section 12 r/w 11(i) of the POCSO Act and imposed the sentence as stated supra in paragraph 2. Assailing the conviction and sentence imposed, the appellant/accused has preferred the above appeal.

9. Mr.E.Kannadasan, learned counsel for the appellant argued that the prosecution has not brought in any evidence to prove that the PW2/victim was a child on the date of occurrence. Unless the victim is



proved to be a child, the charge for offence under POCSO Act cannot be sustained. He further contended that there is a procedural violation in as much as there has been no audio-video recording made during recording of statement of the victim by the learned Magistrate as contemplated under Section 26(4) of the POCSO Act. The procedure was required to be scrupulously followed in view of the fact that the victim was alleged to have been suffering from mental disorder and was under treatment. The grandmother of the victim, to whom PW2 had narrated the incident, has not been examined by the prosecution.

10. In the medical certificates/Ex.P6 to Ex.P8, it has been recorded that PW1/mother of the victim and Police Constable/PW12 had forcibly taken the victim from the hospital, saying that they would bring PW2 for treatment on the next day, but however, she was never brought again. PW11/Doctor had only recorded what had been stated by PW1 and from the medical opinion records available in Ex.P6 and Ex.P8, it could be seen that no external injury over genitalia or over the body was found and the hymen was not intact. PW11/Doctor had admitted that the same might be due to the victim riding a bicycle.



11. The chemical analysis report/Ex.P9 did not detect any semen supporting the case of the prosecution. In the statement of the victim in Ex.P14, the victim had not stated anything about the penetrative sexual assault as alleged and charged, however, had only stated that the accused had touched the private parts of the victim and she only feared that her mother/PW1 would beat her and therefore did not inform it to anyone but later informed to her grandmother. However, in her testimony, PW2 had been tutored, due to which she had deposed completely an exaggerated and improvised version in tune with the complaint of her mother/PW1 in Ex.P.1.

12. The trial court had rightly acquitted the appellant for the sexual harassment for offence under Section 12 r/w 11(i) of POCSO Act, but had erroneously convicted him for offence under Section 5(l) r/w 6 of POCSO Act. Even as per the testimony of the victim, there is no allegation of committing repeated penetrative sexual assault. The trial court had mechanically relying on the presumption under Section 29 of the POCSO Act, convicted the accused on presumptions and assumptions.



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13. Per contra, Mr.J.Subbiah, learned Government Advocate (Crl. Side) appearing for the State argued that PW1/mother of the victim, who is the competent person, had deposed about the age of the victim, which has not been disputed by the accused by producing any contra evidence. He submitted that the audio-video recording of the victim is only directory and as per the evidence of PW14/Inspector of Police, the victim/PW2 was mentally sound and was taking treatment for some speech therapy. The learned Magistrate had rightly recorded the statement under Section 164(5) Cr.P.C. in Ex.P13 and no fault can be found with it.

14. The victim in her testimony before the court, which is the substantive evidence, had clearly deposed that the accused had committed the sexual assault and had threatened that she would be killed if it was divulged to anyone. PW1/mother had deposed about the sexual assault committed by the accused, which corroborates the statement of the victim. PW11/Doctor deposed that the victim, along with her mother, had narrated the incident about the sexual assault and issued the medical certificate/Ex.P7, which reveals that even though there are no external or internal injuries have been noted but the hymen was not intact and the



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vagina admits one finger, which proves that the victim had been subjected to penetrative sexual assault. When the prosecution had proved the foundational facts, the accused had not come out with any evidence to dislodge the presumption and thereby the trial court had rightly considered the materials and in view of the presumption under Section 29 of the POCSO Act, had convicted the accused and imposed the minimum sentence statutorily prescribed, which needs no interference.

15. Heard the rival submissions and considered the materials available on record.

16. PW2/victim, is stated to be aged 16 years and had completed 9th standard from the Government High School, Krishnapuram. PW2 is also stated to be under medical treatment for mental health at Nimhans Hospital, Bangalore. As per PW1, victim was born on 26.12.2003 and on the alleged date of occurrence, i.e., on 09.12.2019, she was aged 16 years. The appellant/accused, aged 55 years, is alleged to have committed aggravated penetrative sexual assault on the victim on 09.12.2019 by taking her to the terrace of his house at 12.00p.m. and again he had sexually assaulted the



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victim on 14.12.2019 and thereby he was charged for the offences under Section 5(l) r/w 6 of the POCSO Act and Section 506(ii) of IPC.

17. For invoking the provisions under the POCSO Act, a child must have been subjected to sexual harassment or sexual assault and the child on the date of occurrence, must be below the age of 18 years within the meaning of Section 2(d) of the POCSO Act. It is for the prosecution to prove that the victim who is subjected to sexual harassment is a child below the age of 18 years. As held by the Hon'ble Supreme Court in the case of ***Yuvaprakash v. State of Tamil Nadu reported in (2024) 17 SCC 684***, whenever there is a dispute with respect to the age of the victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of The Juvenile Justice (Care and Protection of Children) Act, 2015 [hereinafter referred to as "J.J. Act"]. Relevant portion of the decision is extracted hereunder;

“15. 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 court concerned has to determine the age by considering the following documents:



“94. (2)(i) The date of birth certificate from the school, or the matriculation or equivalent certificate from the examination Board concerned, 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.”

16. 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 examination board concerned 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 authority concerned i.e. Committee or Board or Court.”

18. As such, the certificate issued by the school or the matriculation certificate are to be relied on to ascertain the age. In the absence of these certificates in clause(i) of Section 94(2) of J.J. Act then the birth certificate of the victim can be filed to prove the age of the victim. Only in the absence of these documents in clause(i) and clause(ii) of J.J. Act, the ossification test or any other medical test could be relied on for determining the age.



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19. In the instant case, strangely, the prosecution had not marked any documents to prove the age of the victim. Admittedly, when the victim had also completed 9th standard from the Government High School, Krishnapuram, but for the reasons best known to the prosecution, did not choose to file any documents to prove the age of the victim. From the records, it is to be noted that a certificate issued by the Headmaster of Government High School M.Nadupatti, is available, wherein it is stated that the victim has studied 9th standard in their school and her date of birth is 26.12.2003, but the same has not been marked.

20. It is also to be noted that even as per the testimony of the victim/PW2, her mother/PW1 and father/PW3, the victim had studied in the Government High School, Krishnapuram, till 9th standard and only the Headmaster of the Government High School, Krishnapuram, could issue a school certificate, it is not explained as to how the Headmaster of the Government High School, M.Nadupatti, had issued a school certificate stating that the victim had studied in their school till 9th standard.



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21. Probably, the prosecution as such had not relied on this document and that School Certificate has not come on record in the trial. When no documents had been filed showing the age of the victim, the prosecution had also not chosen to examine the Headmaster of the school where PW2 studied till 9th standard or anyone for that purpose to depose about the age of the victim. When the victim herself, in her statement in Ex.P14 and also in her testimony, had stated that she does not know the date of birth, her father had deposed that only PW1 is having the date of birth of his daughter. Except the deposition of PW1 that the date of birth of the victim is 26.12.2003, there is no material available to ascertain the date of birth to prove that the victim was below 18 years on the alleged date of occurrence, coming within the meaning of 'child' under Section 2(d) for charging the accused for offences under the POCSO Act.

22. As per the complaint of PW1, before 6 months, the victim fell ill and therefore, she was undergoing treatment by taking tablets as prescribed by Nimhans Hospital, Bangalore. On 09.12.2019, the accused, who was a neighbour, aged 55 years, had taken the victim to the terrace of



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his house at 12.00p.m. and had forcible sexual intercourse. Despite the victim screaming and crying due to pain, the accused had committed repeated forcible sexual intercourse for more than thrice on the same day and had also threatened the victim that he would kill her if she disclosed it to anyone and therefore due to fear, she did not divulge it to anyone. Again, on 14.12.2019, at around 6.00p.m., when the victim was alone in the house, the accused had taken the victim and had committed forcible sexual assault. Pursuant to which, the victim had informed her grandmother of the same. After PW1 returned from work at 7.00p.m. grandmother informed PW1 and the complaint/Ex.P1 came to be lodged on the arrival of her husband/PW3.

23. PW2/victim was taken to the learned Magistrate and her statement was recorded under Section 164(5) Cr.P.C. in Ex.P14. The statement recorded by the learned Magistrate in Ex.P14 shows that the oath of affirmation was taken from the victim and the victim stated that she does not know the date of birth or age and answered that she completed 9th standard and gave the address details. The learned Magistrate has also recorded that except the typist, no one was available when the statement was recorded and the victim has given the statement voluntarily without any



force or inducement. Nothing has been recorded in Ex.P14 about the mental sickness of the victim. PW14/the Inspector of Police, had deposed that the victim was mentally sound and she was only taking treatment for some speech therapy. When nothing about the mental health of the victim was noticed or recorded by the learned Magistrate, the audio-video recording of the victim is only directory as per Section 26(4) of the POCSO Act.

24. However, there is a discrepancy when PW1 in her deposition states that the statement of her daughter/PW2 was video recorded, but nothing about the same is mentioned in Ex.P14. Be that as it may, the victim, in her statement, had stated that the accused had taken her to his house around 3.00p.m. and he touched her private parts, which she did not stop it and she was not aware as to what happened thereafter. She was present there for 3 hours and thereafter, she herself had come back to her house. The victim has stated that fearing her mother would beat, she did not reveal about this to anyone and only after some time informed to her grandmother. As per the statement recorded in Ex.P14, there has been no penetrative sexual assault or aggravated penetrative sexual assault committed by the accused and only a sexual assault is alleged to have been committed by the



accused. PW2 in her evidence had deposed that she would call the accused as grandfather and around one month ago, the accused had sexually assaulted her and she felt pain when the accused inserted his private part and the accused threatened not to divulge it to anyone and she informed to her grandmother later.

25. When the statement of the victim in Ex.P.14 was only to the effect that the accused had touched the private parts and she was not aware as to what happened thereafter and she herself returned back home, her testimony before the court to the effect that she felt pain when the accused committed penetrative sexual assault is exaggerated and the version of PW2 seems to be tutored by her mother/PW1. When she was clear in her statement before the learned Magistrate in Ex.P14, the testimony before the Court was exaggerated, improvised in tune with the complaint given by her mother in Ex.P1.

26. However, when as per the complaint in Ex.P1 given by PW1, there had been penetrative sexual assault repeatedly, nearly thrice on the same day, whereas even as per the improvised and exaggerated testimony of



PW1, the accused had committed sexual assault only once. The testimony that the accused had tried to insert his private part and she felt pain, is not reliable and untrustworthy. Even though the sole testimony of the victim could be sufficient enough to convict the appellant if the testimony inspires the confidence of the court and is reliable with sterling quality, the improvised and exaggerated version of the victim from the statement under Section 164 Cr.P.C. in Ex.P14 and testimony before the court shows that the improvised version is in tune with the version of her mother/PW1 in Ex.P1 and therefore the tutoring of the witness cannot be ruled out and it is unsafe to convict the appellant by relying on the testimony of PW2.

27. PW2 was taken for medical examination before the Doctor/PW11. It is to be noted that PW11 had clearly deposed that the victim was brought for examination only once on 16.12.2019 and the mother/PW1 and the Police Constable/PW12 had forcibly taken the victim from the hospital, stating that she would be brought on the next day but had not been brought again. PW11 had deposed that the version was stated by both the victim and PW1 based on the questions put up by the trial court. PW11 had further deposed that the victim was mentally sound and clear



during examination. However, PW11 had deposed that due to the mental illness stated, she had referred the victim to be examined by Psychological Doctor, which was not done. On examination of the victim as an outpatient, PW11 issued OP register and discharge summary in Exs.P6 and 8. It is specifically noted in Exs.P6 and 8 that no external injury over genitalia or no external injuries over the body was found and the hymen was not intact. These documents have been issued on the same day, i.e., on 16.12.2019.

28. It is recorded that PW1 and PW12 had forcibly taken the victim from the hospital, stating that she would be brought on the next day. However, the medical certificate in Ex.P7 had been brought on record, which had been issued on 10.07.2020. When PW11 had specifically deposed that the victim was never brought for examination after 16.12.2019, it is not explained as to how this medical certificate came to be issued nearly after 7 months. In this medical certificate in Ex.P7, it is noted that the hymen was not intact and the vagina admits one finger.

29. In the meantime, the swabs that were collected from the victim had been sent for chemical analysis and in the report, the presence of any



semen was negative. Therefore, except the fact that the hymen was not intact, there was no injury or any evidence found against the appellant in support of the prosecution. Only thereafter this Ex.P7/medical certificate has been obtained, which improvised the medical examination by including that vagina admits one finger to prove the sexual assault on the victim. PW11/Doctor had also in her deposition admitted that it is possible that the hymen may not be intact, in view of the fact that the victim might be riding a bicycle or due to other habits. As such, from the evidence of PW11 and the medical reports/Exs.P.6 to P8, there were no injuries or any evidence found to arrive at a conclusion that the victim has been subjected to any sexual assault. Except from the complaint given by PW1 in Ex.P1, the statement of the victim in Ex.P14 did not support the case of the prosecution by proving any penetrative or aggravated penetrative sexual assault by the accused.

30. Even as per the exaggerated and improvised testimony of PW2, the evidence does not prove the charge under Section 5(1) r/w 6 of POCSO Act for having committed any aggravated penetrative sexual assault. Even though as per the statement of the victim in Ex.P14, the act would come within the purview of sexual assault under Section 7 of the POCSO Act, the



fact remains that the accused was also charged for sexual harassment under Section 12 r/w 11(i) of the POCSO Act and the trial court had acquitted the accused for offence of sexual harassment, which has been accepted by the prosecution. When the testimony of the victim is unreliable and untrustworthy and the testimony is completely improvised and exaggerated from the statement in Ex.P14, particularly in tune with the complaint/Ex.P1 given by her mother PW1, there is a possibility of tutoring and it is unsafe to convict the appellant relying on the testimony of PW2, as it does not inspire the confidence of this Court.

31. In the absence of the prosecution even proving the age of the victim to be below 18 years to invoke the provisions of the POCSO Act and in view of the improvised and exaggerated testimony of PW2 from the statement recorded in Ex.P14 and the fact that the evidence of PW14/Inspector of Police and the Doctor/PW11 regarding the mental health condition of the victim itself is inconsistent to each other and further, when there are glaring discrepancies even in respect of the medical opinion furnished in Exs.P6 and Ex.P8, which has later been developed in Ex.P7 after a period of 7 months to support the case of sexual assault and



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considering the fact that the appellant was aged 55 years on the alleged date of occurrence and the absence of any spermatozoa in the chemical analysis report in Ex.P9, the prosecution had failed to prove the foundational facts in respect of the charges levelled against the accused to raise the presumption under Section 29 of the POCSO Act.

32. In the absence of the prosecution proving the foundational facts, the trial court miserably erred in shifting the burden on the appellant and convicting the appellant for the offences under the POCSO Act simply by invoking the presumption under Section 29 of the POCSO Act.

33. On reappreciation of the materials and the entire evidence available on record, this Court is of the considered opinion that the finding arrived at by the trial Court in convicting the appellant is completely perverse and suffers from serious infirmity. Therefore, the conviction and sentence imposed on the appellant cannot be sustained and is liable to be interfered with.



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34. In view of the above deliberations, the conviction and sentence imposed on the appellant by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri, Krishnagiri District, in Spl.S.C.No.35 of 2020 dated 17.11.2021, are set aside. The appellant is acquitted from all the charges. The bail bond, if any executed shall stands cancelled. The fine amount, if any paid by the appellant, shall be refunded to him.

35. Accordingly, this Criminal Appeal is *allowed*.

30.03.2026

Speaking order

Index : Yes

Neutral Citation : Yes

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- 1.The Sessions Judge,
Fast Track Mahila Court,
Krishnagiri, Krishnagiri District.
- 2.The Inspector of Police,
Mathur Police Station,
Krishnagiri District.
- 3.The Public Prosecutor,
High Court, Madras.



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G.ARUL MURUGAN, J.

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Pre-Delivery Judgment made in
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