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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 03-11-2026

CORAM

THE HON'BLE MR.JUSTICE D.LINGESWARAN

Crl.A(MD) No.624 of 2024

CNR:{HCMD010712492024}

Perumal

..Appellant/Sole Accused

Vs

The Inspector of Police
All Women Police Station,
Aruppukottai,
Virudhunagar District.
(In Crime No.16/2021)

..Respondent/Complainant

PRAYER: This Criminal Appeal is filed under Section 374(2) of Cr.P.C., to call for the records and set aside the conviction and sentence imposed by the Special Court (POCSO Act Cases), Virudhunagar District at Srivilliputtur in Spl.S.C.No.90 of 2021 on 22.02.2023 and allow this Criminal Appeal.

For Appellant :Mr.Jothi Basu

For Respondent :Mr.G.Ganesh Kumar
Government Advocate (Crl.Side)

JUDGMENT

This Criminal Appeal is filed challenging the judgment of conviction and sentence passed against the appellant by the Special Court (POCSO Act Cases), Virudhunagar District at Srivilliputtur in Spl.S.C.No.90 of

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2021 on 22.02.2023.

2. The appellant, aged 31 years at the time of the occurrence, was a neighbour of the survivor. The case of the prosecution is that on 05.09.2021, at about 11.00 a.m., the appellant took the survivor, a child aged four years and eleven months, to his house and committed oral and vaginal penetration on her. The mother of the survivor noticed a change in the behaviour of the child, but did not enquire further at the time. On 09.09.2021, when the child was with her mother and saw the appellant walking past their house, she showed signs of fear. On being questioned by her mother, the child disclosed what had happened on 05.09.2021 and narrated her ordeal. On the next day, 10.09.2021, a First Information Report was lodged with the respondent Police, who investigated the case, examined witnesses and collected evidence. On completion of the investigation, they filed a final report against the appellant under Section 366 of IPC and Section 6 of the POCSO Act, 2012.

3. The Special Court took the case on file as Spl.S.C.No.90 of 2021, and the learned Trial Judge framed three charges: (i) under Section 366 of IPC; (ii) under Section 5(l) read with Section 6 of the POCSO Act, 2012; and (iii) under Section 5(m) read with 6 of the POCSO Act, 2012. The

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framing of two separate charges under the POCSO Act, 2012, was incorrect. Section 5 only defines the aggravating circumstances, and Section 6 prescribes the punishment, so a single charge under Section 6 of the POCSO Act, 2012, specifying the applicable clause of Section 5, together with the charge under Section 366 of IPC, would have sufficed. However, the appellant has not shown that this irregularity caused him any prejudice or occasioned a failure of justice. It therefore does not vitiate the trial.

4. The prosecution examined eight witnesses and exhibited ten documents. No material object was marked. The defence did not examine any witness or exhibit any document.

5. On a consideration of the entire evidence, the Trial Judge convicted the appellant under Section 6 of the POCSO Act, 2012 and sentenced him to undergo Rigorous Imprisonment for 20 years and to pay a fine of Rs.5,000/-, with a default sentence. The Trial Judge found the appellant guilty under Section 363 of IPC, and not under Section 366 of IPC with which he was charged, and sentenced him under Section 363 of IPC to Rigorous Imprisonment for three years and a fine of Rs.5,000/-, with a default sentence. Aggrieved by the judgment of the Trial Court,

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the appellant has filed the present appeal.

Submissions of the appellant

6. The learned counsel for the appellant noted that PW2, the survivor, was cross-examined only vaguely and not on the material aspects of her evidence, and argued only for a reduction of sentence. As the occurrence was not disputed by the appellant, and the evidence of PW2 was not challenged by the defence, he contended that the proved facts fell only under Section 10 of the POCSO Act, 2012 and not under Section 6 of the POCSO Act, 2012. He submitted that there was no penetration and that the offence could not be elevated to its aggravated form. He further submitted that the appellant let the child go when she shouted, and that this act of mercy brings the offence down from its aggravated form to the lesser form.

7. The learned counsel relied on two judgments of this Court:

(1) Anandan @ Manavari Anandan v. State, represented by the Inspector of Police, All Women Police Station, Uthukkottai, Tiruvallur District, Crl.A.No.384 of 2019, dated 02.08.2024; and

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(2) Loganathan v. State, represented by the Inspector of Police, All Women Police Station, Erode District, 2026 (3) MWN (Cr.) 85.

He submitted that in the first case, the evidence of the doctor showed no injuries on the private part of the survivor, and the offence was therefore brought down from Section 6 to Section 10 of the POCSO Act, 2012, with the sentence modified to five years of Rigorous Imprisonment. In the second case, this Court held that where there was no evidence of penetration even to the smallest extent, the offence was not aggravated penetrative sexual assault but only aggravated sexual assault punishable under Section 10 of the POCSO Act, 2012. Relying heavily on these two judgments, the learned counsel prayed that the sentence be reduced from 20 years to five years.

8. Points for determination

This Court has carefully considered the evidence on record. The following points arise:

(i) whether the conviction under Section 6 of the POCSO Act, 2012 should be reduced to one under Section 10 of the POCSO Act;

(ii) whether the trial is vitiated because a copy of the statement under Section 164 of Cr.P.C. was not furnished to the appellant and the

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statement was not marked as an exhibit;

(iii) whether the Trial Court erred in convicting the appellant under Section 363 of IPC and not under Section 366 of IPC, and what follows from that; and (iv) whether the sentence calls for interference.

Section 6 or Section 10 of the POCSO Act

9. The survivor was barely five years old at the time of the occurrence. She narrated the sequence of events clearly, identified the appellant and deposed that he committed oral as well as vaginal penetration on her. Although PW2 was cross-examined, this implicating part of her evidence was neither challenged nor denied. Not even a suggestion to the contrary was put to her. Where a statement of witness on a material point is left unchallenged in cross-examination, it must be taken as accepted. That also explains why the learned counsel for the appellant confined his argument to reducing the offence from aggravated penetrative sexual assault to aggravated sexual assault. The testimony of a child witness, if found reliable, can by itself sustain a conviction, and corroboration is only a rule of prudence. This Court finds the evidence of PW2 is reliable, and in any event it is amply corroborated.

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10. The oral evidence of PW2 is supported by the medical evidence of PW5, the doctor. PW5 examined the survivor and found that her hymen was ruptured. She found no other injuries on the body of the survivor. The medical evidence thus corroborates the child's account of vaginal penetration. The absence of other injuries does not weaken that conclusion. Section 3 of the POCSO Act, 2012 makes penetration to any extent sufficient to constitute penetrative sexual assault, and injury is not an ingredient of the offence. Once the prosecution established these foundational facts through the evidence of PW2 corroborated by PW5, the Court was bound by Section 29 of the POCSO Act, 2012, to presume that the appellant committed the offence, unless he proved the contrary. The appellant led no evidence and elicited nothing in cross-examination to rebut that presumption.

11. The interval between the occurrence and its disclosure does not cast doubt on the prosecution case. The child, who was not yet five years old, could not have been expected to understand the significance of what had happened to her. She made the disclosure on 09.09.2021 when she saw the appellant passing her house and showed signs of fear. The First Information Report was lodged on the very next day. This sequence is natural, and it is consistent with the mother having noticed a change in

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the behaviour of the child in the days after the occurrence.

12. The two judgments relied on by the learned counsel do not assist the appellant. In those cases, there was no evidence to prove penetration, and this Court therefore converted the conviction from Section 6 to Section 10 of the POCSO Act, 2012. In the present case, there is positive and unchallenged evidence of penetration from the survivor herself, corroborated by the medical evidence. A decision turns on its own facts, and those judgments cannot be read as laying down that the offence must be reduced whenever injuries are absent from the private part, regardless of other proof of penetration.

13. The age of the survivor also places the offence in its aggravated form. As the survivor was below twelve years of age, penetrative sexual assault on her is aggravated penetrative sexual assault under Section 5(m) of the POCSO Act, 2012, punishable under Section 6. The survivor has categorically stated that the appellant penetrated her mouth and her vagina. This is a clear case of both oral and vaginal penetration, and the vaginal penetration is further proved by the rupture of the hymen. Even the lesser offence under Section 10 of the POCSO Act, which the

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appellant seeks, would itself be an aggravated form of sexual assault because of the age of the survivor. This Court is therefore not inclined to convert the conviction from Section 6 to Section 10 of the POCSO Act, 2012. The contention that the act of the appellant of letting the child go, or his good character, reduces the offence from its aggravated form to the lesser form has no basis in law. The offence under Section 6 of the POCSO Act is complete upon the commission of aggravated penetrative sexual assault. The conduct of the offender after the offence cannot alter its classification, and the Act makes no provision for reducing the offence on such a ground. The contention is rejected.

The statement under Section 164 of Cr.P.C.

14. The learned counsel for the appellant further argued that the appellant was not supplied with a copy of the statement recorded under Section 164 of Cr.P.C., and that the prosecution failed to mark that statement as an exhibit. He relied on a judgment of this Court in Crl.A.No.365 of 2019, ***Sabapathi v. State represented by the Inspector of Police, All Women Police Station, Panruti, Cuddalore District,*** dated 16.02.2021, in which this Court found fault with the non-marking of the statement recorded under Section 164 of Cr.P.C.

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15. Firstly, the learned counsel could not establish before this Court the basis for his allegation that a copy of the statement was not furnished to the appellant during trial. Copies of the prosecution documents, including statements recorded under Section 164 of Cr.P.C., are required to be furnished to the accused under Section 207 of Cr.P.C. If a copy of the statement had not been furnished then, the counsel who appeared before the Trial Court ought to have applied to that Court for it. No such request was made. The learned Trial Judge recorded in paragraph No.4 of his judgment that all the documents were furnished to the appellant under Section 207 of Cr.P.C. and that sufficient time was granted to him to prepare his defence. The contention now raised that a copy was not furnished before the commencement of the trial is therefore untenable and cannot be sustained.

16. Secondly, the non-marking of the statement does not vitiate the trial. In Suo Motu W.P.No.1 of 2017 **(*In Re: To Issue Certain Guidelines Inadequacies In Criminal Trials v. State of Andhra Pradesh and Others*)**, judgment dated 20.04.2021, the Hon'ble Apex Court deprecated the practice of marking the entire statement recorded under Section 164 of Cr.P.C. wholesale. A statement under Section 164 of Cr.P.C. is not substantive evidence. It can be used only to corroborate the

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maker under Section 157, or to contradict the maker under Section 145 of the Indian Evidence Act, 1872. Had the prosecution wished to corroborate PW2, it could have drawn her attention to the relevant portion of the statement and, after obtaining her admission of it, marked that portion alone. Had the defence wished to contradict her, it could have used the statement under Section 145 of the Indian Evidence Act, 1872, and recorded the contradiction in the manner known to law. The practice of wholesale marking having been deprecated by the Apex Court, the prosecution cannot be faulted for not marking the statement.

17. Thirdly, the appellant has not shown any prejudice caused by the non-marking of the statement. If he felt that PW2 had said anything in Court that contradicted her earlier statement, nothing prevented him from eliciting the contradiction in evidence and marking the relevant portion as his own exhibit. Having failed to do so, he cannot raise this ground belatedly before this Court. The judgment in ***Sabapathi*** was delivered on 16.02.2021, before the judgment of the Apex Court in Suo motu W.P.No.1 of 2017 on 20.04.2021, and it cannot be applied to the extent that it takes a different view of the marking of such statements. The conviction here rests on the substantive evidence of PW2 given in Court, which is cogent, trustworthy and inspires confidence, and which is

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corroborated by the medical records and the evidence of the doctor. The contention is rejected.

Section 363 or Section 366 of IPC

18. The learned Trial Judge framed a charge under Section 366 of IPC but recorded a conviction only under Section 363 of IPC. Section 363 of IPC prescribes the punishment for kidnapping, with imprisonment of up to seven years and fine. Under Section 361 of IPC, kidnapping includes taking a minor out of the keeping of the lawful guardian without the consent of guardian, a minor being a male under sixteen years or a female under eighteen years of age. Section 366 of IPC is the graver provision, punishable with imprisonment of up to ten years and fine. It applies where a woman is kidnapped or abducted in order that she may be forced or seduced to illicit intercourse. The word "woman" in IPC denotes a female human being of any age, so a female child is within its scope.

19. In the present case, the female child was taken to the house of the appellant only for the purpose of committing sexual assault on her. Though the charge was rightly framed under Section 366 of IPC, the

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learned Trial Judge erred in convicting the appellant under Section 363 of IPC instead of Section 366 of IPC. However, this is not an appeal by the State, and the powers of this Court in an appeal by the convict do not extend to enhancing the conviction or sentence. This Court therefore does not interfere with the conviction and sentence recorded by the Trial Court under Section 363 of IPC. The learned Trial Judge is, however, reminded of this basic distinction.

Sentence

20. The Trial Court imposed the minimum sentence of 20 years prescribed under Section 6 of the POCSO Act, 2012, which this Court has no power to reduce while the conviction under that Section stands. For the offence under Section 363 of IPC, the Trial Court imposed only three years of imprisonment along with fine, which is well within the prescribed limit. The Trial Court ordered the sentences of imprisonment for both offences to run concurrently and gave set-off under Section 428 of Cr.P.C. This Court finds no ground to interfere with the sentence of imprisonment or the fine for either offence.

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Result

21. In fine, this Court is not inclined to interfere with the findings of the Trial Court. The conviction and sentence recorded by the Trial Court under Section 363 of IPC and Section 6 of the POCSO Act, 2012 are upheld, and the Criminal Appeal is dismissed.

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Index: Yes/No
Speaking/Non-speaking order
Neutral Citation: Yes/No

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To
1. The Inspector of Police
   All Women Police Station
   Aruppukottai
   Virudhunagar District

2. The Additional Public Prosecutor
   Madurai Bench of Madras High Court
   Madurai

Copy To :
Section Officer (VR Section)
Madurai Bench of Madras High Court

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D.LINGESWARAN, J.

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