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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.04.2025

CORAM

THE HON'BLE MR. JUSTICE A.D. JAGADISH CHANDIRA

AND

THE HON'BLE MR. JUSTICE K. RAJASEKAR

Crl.A.(MD). Nos. 370 and 445 of 2022

Crl.A.(MD). No.370 of 2022

Sivakumar

... Appellant / Accused No.2

-VS-

The State Rep. by
The Inspector of Police,
All Women Police Station,
Ramanathapuram,
Ramanathapuram District.
(Crime No.21 of 2021)

... Respondent/ Complainant

Crl.A.(MD). No.445 of 2022

Gunasekaran

... Appellant / Accused No.1

-VS-

The State Rep. by
The Inspector of Police,



All Women Police Station,
Ramanathapuram,
Ramanathapuram District.
(Crime No.21 of 2021)

... Respondent/ Complainant

Prayer: These Criminal Appeals filed under Section 374(2) of Criminal Procedure Code to call for the entire records connected to the judgment in Spl.S.C.No.01 of 2022 on the file of the Hon'ble Fast Track Mahila Court, Ramanathapuram dated 23.04.2022 and to set aside the conviction and sentence imposed against the appellants.

For Appellant in Crl.A.(MD). No.370 of 2022 :: Mr. R. Anand

For Appellant in Crl.A.(MD). No.445 of 2022 :: Mr.G. Karuppasamy Pandian

For Respondent in both appeals :: Mr. A. Thiruvadi Kumar
(Additional Public Prosecutor)

J U D G M E N T

(made by K.Rajasekar,J.,)

Both these appeals arising out of the judgment passed in Sp.C.C.No.1/2012 on the file of the Fast Track Mahila Court, Ramanathapuram dated 23.04.2022.

2.1 The appellant in Crl.A.(MD). No.370 of 2022 is ranked as Accused No.2 and the appellant in Crl.A(MD).No.445 of 2022 is ranked as Accused No.1



in Spl.C.C.No.01 of 2012, on the file of Fast Track Mahila Court, Ramanathapuram. Accused No.1 was charged under Sections 7 and 8 of the Protection of Children from Sexual Offences Act (POCSO Act hereafter) and 506(i) of IPC, and Accused No.2 was charged under Section 5(1) and 6 of the POCSO Act. After conclusion of trial, Accused No.1 was found guilty under Section 7 of POCSO Act and punished under Section 8 of the POCSO Act and sentenced to undergo 5 years under rigorous imprisonment and to pay a fine of Rs.50,000/-, in default, one year simple imprisonment, and found guilty under Section 506(i), sentenced to undergo 2 years rigorous imprisonment and to pay fine of Rs.50,000/-, in default, 6 months simple imprisonment. Both sentences each concurrently.

3. The Accused No.2 was found guilty under Sections 5(1) and punished under Section 6 of POCSO Act and sentenced to imprisonment of life, till his death and Rs.5,00,000/- as fine, in default, five years simple imprisonment.

4. The brief facts of the prosecution case is as follows:

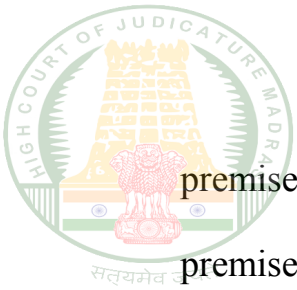


4.1 The victim girl aged about 16 years is the daughter of Accused No.1/ Gunasekaran and P.W.2. The Accused No.1 and P.W.2 have four children and the victim girl herein is their third child. The Accused No.1 was working abroad and in the year 2018, he returned from abroad and stayed with his family. The victim girl was studying VII standard at that time. During her annual exam period, she used to study in the living room (hall) and sleep in the same room of her house. One day while she was sleeping in the living room, she felt somebody was pressing her breast and she woke up and found her father/ Accused No.1 in an inebriated condition, involved in such act. She thought that her father might have accidentally done it and has not informed the same to anyone. After some days, Accused No.1 went back to abroad for his regular work and during the COVID-19 pandemic, in the year 2020, he returned back and stayed along with his family. During that time, the victim was studying IX Standard, used to study in the living room and sleep there. Accused No.1, who used to come home in the late nights, started to sleep in the living room and repeated the act of molesting his daughter. She objected to his act and informed him that she will report the same to her mother. For which Accused No.1 threatened her with dire consequences, that he will kill her as well as her mother.



4.2 The victim girl was unable to bear the act of her father/ Accused No. 1, suffered mental agony and used to cry continuously thinking about the act of Accused No.1. Out of fear, she had not informed her suffering to her family members. On observing her behaviour of weeping alone, without any reason, her mother - P.W.2 had informed the same to her relatives. They started to question the victim, which prompted P.W.2 to take the victim girl to a Doctor for medical advice. The Doctor examined the victim girl, informed the P.W.2 that the victim is alright. Since, there was no change in the behaviour of the victim, P.W.2 and others thought that the victim was possessed by some evil spirits. Accordingly, on 20.09.2021, at about 7:00 PM, the victim was taken to Accused No.2/ Sivakumar, who used to perform various rituals for warding off evil spirits in the locality of the victim.

4.3 The Accused No.2 after seeing the victim girl, informed P.W.2/ mother that the victim girl will die within 15 days and suggested that the victim has to stay in his premises for three days for performing various rituals and thereby the life of the girl will be saved. Initially, P.W.2 reluctant to stay along with his daughter, however, Accused No.2 convinced them by saying that, so many persons used to stay for many days for performing the rituals in his



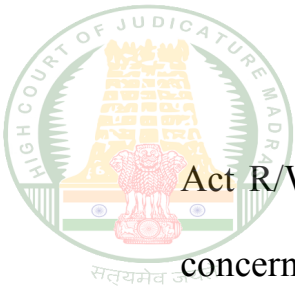
premises. Thereby, P.W.2 accepted to stay along with the victim girl in the premises of Accused No.2. Thereafter, Accused No.2 mixed some kind of powder in a milk and asked the victim girl to drink the same. After drinking that milk, the victim felt nausea and drowsiness and when the victim informed her mother that she needs to sleep, Accused No.2 immediately intervened and directed her to sleep in the cot in the hut of his premises, so that he can easily talk with the evil spirit, which possessed the victim girl. Further, asked P.W.2 to sleep outside the hut. Thereafter, Accused No.2 slept along with the victim girl in the cot and started to interact with the victim, during which, the victim had stated about the sexual assault made by her father/ Accused No.1 and in the guise of performing ritual, Accused No.2 touched all over the body of the victim. Though, the victim tried to stop it, she was unable to arise from the cot and stop the actions of Accused No.2. Thereafter, Accused No.2 had committed aggravated penetrative sexual assault on the victim girl, all the night repeatedly. The next morning, Accused No.2 asked the victim girl to take bath and asked P.W.2 to fetch clothes for the victim girl. Accordingly, P.W.2 went to her home, brought clothes for the victim. The victim girl had felt ashamed and out of fear, she had not informed about the misconduct of Accused No.2 to her mother/P.W.2. Around 10:30 AM , P.W.7 - the maternal grand mother of the



victim girl came there and scolded P.W.2, for bringing the victim girl to such place and taken them to their home. After such incidents, the victim girl felt ashamed, depressed and could not concentrate on her regular activities.

4.4 While so, on 30.10.2021, between 7:00 PM to 8:00 PM, Accused No.1 came in an inebriated condition and scolded the victim as well as P.W.2 using filthy language, which was witnessed by the neighbours. The victim girl unable to bear this incident, coupled with her suffering from sexual assault of her father, attempted to consume insecticide, used to kill ants. Immediately, she was rescued by others and at that time, the victim girl had informed about the sexual assault committed by Accused Nos. 1 and 2 to her mother and other relatives. Next day, P.W.1 called Child Helpline 1098 and informed them about her sufferings. Next day, a representative from Child Helpline - NGO visited her home and with her help, P.W.1 went along with her mother P.W.2, lodged a police complaint at Ramanathapuram Police Station at about 21:00 hours.

4.5 P.W.10 - Sub Inspector of Police, All Women Police Station, Ramanathapuram received the complaint, Ex.P.1 of the victim girl, and registered a F.I.R - Ex.P.9 in Crime No.21 of 2021 under Sections 3, 4, 5(1), 6 of POCSO



Act R/W. 506(1) of IPC. Thereafter, sent the original F.I.R copy to the Court concerned and copy was forwarded to the P.W.13, Inspector of Police, Ramanathapuram who was holding Additional charge for Ramanathapuram All Women Police Station for investigation. After receipt of the copy, next day morning around 6:00AM, P.W.13 inspected the house of the victim in the presence of P.W.3 and witness namely Yamuna, prepared Ex.P.3 - Observation Mahazar and Ex.P.12 - Rough Sketch.

4.6 On the same day, she recorded the statement of P.W.1 to P.W.3, P.W.7, P.W.8 and Raja/ D.W.4. At 8:30 AM, she reached Kottagai Karuppasamy Temple, and in the presence of P.W.9 and witness Sathyandhiran/ P.W.11, inspected the premises of the Accused No.2 and prepared observation Mahazar - Ex.P.10 and Rough Sketch - Ex.P.11, thereafter recorded the statement of the P.W.9 - Bala Boopathi and P.W.11 - Sathyandhiran. On the same day at about 11:00 AM, she arrested Accused No.1 near Pillaiyar Temple at Neelaganda Oorani in the presence of P.W.4 - Koori and P.W.12 - Balakrishnan and recorded the statement from Accused No.1. At about 12:30 noon, P.W.13 went to Sonaiyakovil, Meenakshi Nagar, Ramanathapuram and arrested Accused No.2 in the presence of P.W.4 and P.W.12 and recorded the statement from Accused



No.2, returned back to the Police Station around 14:00 hours.

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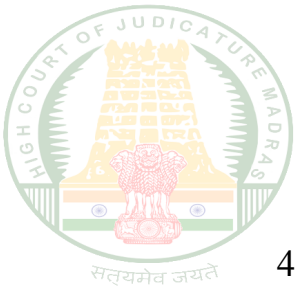
4.7 On the same day, Accused Nos. 1 and 2 were produced before the Magistrate concerned and remanded to judicial custody. In the mean time, the victim girl was produced before P.W.5 - Gynaecology Doctor of the Government Medical College and Hospital, Ramanathapuram for medical examination. In the Medical Report, marked as Ex.P.6, P.W.5 gave a final opinion stating that there is a possibility of sexual assault against the victim girl. On 12.11.2021, P.W.13 has issued requisition to record the statement of the victim girl under Section 164 of Cr.P.C and accordingly, the statement of the victim was recorded on 17.11.2021, on the same day, the accused were subjected to medical examination in Government Medical College Hospital, Ramanathapuram. On 18.11.2021, P.W. 13 recorded the statement of Senthilkumar, Special Sub Inspector of Police, Ilamaran, Velmurgan, Grade I constables and Muthu Irullapasuresh, Head Constable.

4.8 P.W.13 had also sent a requisition letter to P.W.6 - Head Mistress of the school, where the victim was studying, for issuing date of birth certificate and obtained Ex.P.7 - Date of birth Certificate and also recorded the statement of



P.W.6. On the same day, she had sent the material objects recovered from the victim girl and accused for Forensic examination. Thereafter, she recorded the statement of P.W.10 - Sub Inspector of Police, All Women Police Station, Ramanathapuram, who recorded the FIR and handed over the investigation to P.W.14, who is a regular Inspector of Ramanathapuram All Women Police Station.

4.9 On 29.11.2021, P.W.14 once again enquired the victim girl and other witnesses, who are enquired by P.W.13. Since they have not stated any new information other than the statements recorded by the P.W.13, she has not recorded any separate statements from them. On 01.12.2021, P.W.14 had recorded the statement of the Grade.I constable Bagampriyal, who submitted the forensic materials collected from the victim and accused and on 10.12.2021, recorded the statement of the Forensic Officer and obtained the Biological Report - Ex.P.1. On 11.12.2021, she recorded the statement of Dr. Sowmiya, who has conducted the medical test of Accused Nos. 1 and 2 and obtained the Medical Examination Reports, Exs.P.16 and P.17. On 13.12.2021, she examined P.W.5 - Duty Doctor Jagapriya and obtained the Medical Report of the victim girl and completed the investigation and filed Final Report on 15.12.2021.

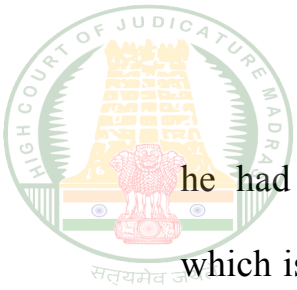


4.10 The Trial Court, after furnishing the copies framed charges against Accused No.1 Under Section 7 and 8 of the POCSO Act, 2012 and Section 506(i) of IPC and as against Accused No.2, under Sections 5(1) and 6 of the POCSO Act. On the side of the prosecution, P.W.1 to P.W.14 were examined and Exs.P.1 to P.17 were marked and on the side of the defence, D.W.1 to D.W.6 were examined and Exs.D.1 to D.9 were marked. After completion of the trial, the accused were sentenced as stated before.

5. Aggrieved over the judgment, the accused have preferred these appeals.

Submissions on behalf of the appellant/ Accused No.1:

6. Mr.G. Karuppasamy Pandian, learned counsel appearing for the appellant/ Accused No.1 submits that there is miscarriage of justice by mis-joinder of charges in this case. The allegation against Accused No.1 was that, he committed sexual assault against the victim girl in the year 2018 and subsequently, in the year 2020. Further the place of occurrence and nature of offence is totally different, whereas, the allegation against Accused No.2 is that,



he had committed aggravated penetrative sexual assault at Kottagai village, which is far away from the place of Accused No.1. He further submitted that the gravity of offence alleged against Accused No.1 is lesser than the charges against Accused No.2 and also both the alleged charges taken place in different times and difference in nature. But, the Trial Court had clubbed all these charges and conducted trial along with Accused No.2, which causes grave prejudice to Accused No.1 and there was also no overlapping of evidence and there is enormous delay in reporting of the offences and no explanation was given by the prosecution for the delay.

7. He further submitted that the defence was able to establish that there is an illicit intimacy between mother of the victim girl/ P.W.2 and one Koori/ P.W.4. To suppress her illegal relationship and by influencing the victim girl, P.W.2 has lodged the complaint. The family members of the victim had categorically deposed before the Court that this illicit intimacy of P.W.2 with the said Koori was objected by Accused No.1 and in spite of objections, P.W.2 had continued her illegal relationship, and thereby, there is a false implication and the same was not properly appreciated by the Trial Court. He further submitted that there is also an involvement of Child Helpline in this case, even prior to



registration of F.I.R. The victim girl was examined by an Official from the Child Helpline, but no one was examined before the Trial Court, hence there is a suppression of prior information. He has also stated that the conduct of the child is also unreliable, since it is specific case of the prosecution that twice, there was a bad touch by Accused No.1, but the same was not informed to anyone, almost for three years. The defence witnesses examined on the side of the defence was not properly appreciated by the Trial Court and P.W.1 is not in a fit state of mind and she had been tutored by P.W.2 and Police, which was also admitted by P.W.1 in her evidence. By examining the defence witnesses, Accused No.1 has probabilized his case that he has been falsely implicated due to the illicit intimacy of P.W.2 with P.W.4.

Submissions on behalf of the appellant/ Accused No.2:

8. Mr. R. Anand, learned counsel appearing for the appellant/ Accused No.2 also relied on, delay in lodging the complaint and further submitted that the evidence of the victim is inconsistent and not enough to inspire the confidence of Court. She has given inconsistent versions about the occurrence and there is also contradictory evidence between P.W.1 and P.W.2, thereby the evidence of P.W.1 lacks credence and is not sufficient to prove the guilty of Accused No.2 and



further, the complaint was lodged before the Child Helpline, but no officials from the Child Helpline was examined. The age of the victim girl was not properly proved in this case by the prosecution. He further submitted that the mental health of the victim is not good enough to state about the true facts, since she has suffered mental illness, but this was not taken into account by the Investigation Officer and the Trial Court. He also contended that there is misjoinder of charges, since the charge levelled against Accused Nos. 1 and 2 is totally difference in nature and clubbing the charges together, caused prejudice to Accused No.2. By examining the defence witnesses, Accused No.2 has probabilized his case but the Trial Court had failed to properly appreciate the witnesses adduced on the side of the defence and has erroneously convicted the accused.

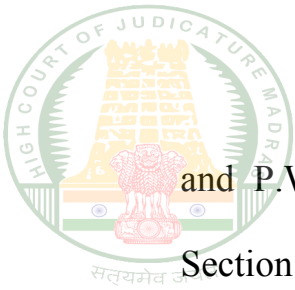
Submissions of the learned Public Prosecutor:

9. The learned Public Prosecutor Mr. A. Thiruvadi Kumar submits that there is no misjoinder of charges, as contended by the defence. He further submitted that, the first occurrence of sexual assault committed by Accused No.1 against the victim girl had taken place in the year 2018, while the victim girl was sleeping and she thought that Accused No.1, who is the father of the victim had



done the same accidentally. However on the second and subsequent occurrences, which had taken place in the year 2020, the victim was sexually harassed, continuously by Accused No.1 and she was also threatened with dire consequence by Accused No.1, which has caused fear in her mind, mental agony and depression. Thereby, she continuously started weeping alone. This was noticed by the family members of the victim and they thought that she was possessed by some evil spirit and thereby they approached Accused No.2, who pretends to perform the rituals for warding off evil spirit in his locality. By taking advantage of the precarious situation, Accused No.2 had committed aggravated Penetrative Sexual Assault against the victim girl. Thereafter, the complaint was lodged and F.I.R was registered, since it is a continuous offence, the time of occurrence and lodging of F.I.R does not cause any misjoinder of charges. As far as age of the victim is concerned, the Certificate issued by School in which the victim was studying, marked as Ex.P.7, and evidence of the Head Mistress of the School is also recorded and there was no dispute raised by Accused Nos.1 and 2 in terms of age of the victim girl.

10. He further submitted that the evidence of P.W.1 - victim, shall be placed in higher pedestal and no question regarding the illicit intimacy of P.W.2



and P.W.4/ Koori is put to her, for attributing motive of false implications.

Section 29 of the POCSO Act, which raises presumption against the accused, for commission of the offence has not been discharged by the accused herein. The evidence of P.W.1 is no way shattered or no grounds were made out to disprove her evidence, thereby the Trial Court after considering the evidences of P.W.1 and defence witnesses has rightly concluded the charges framed against Accused Nos. 1 and 2 were proved and convicted the accused, hence prays to confirm the same.

11. We have considered the submissions made on both sides and perused the materials available on record.

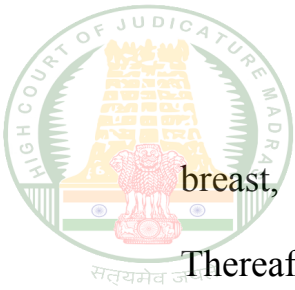
Discussions and conclusions:

12. Before considering the evidence placed on record for sufficiency to prove the guilt of the accused beyond reasonable doubts, the issue regarding misjoinder of charges have to be considered. Both the learned counsels for defence have argued that, by clubbing the offences charged against Accused No. 1, relating to the offence taken place in the house of the Accused No.1 in the year 2018 and 2020 onwards, has been tried along with the offences committed by the



Accused No.2 for the offences taken place on 20th September 2021. The learned counsel for the Accused No.1 submits that since the father has been tried for the commission of lesser offence along with Accused No.2, who is claimed to be a priest, doing rituals of warding of evil spirits had have committed penetrative sexual assault, caused serious prejudice to him since, he was not able to effectively defend the allegation against the Accused No.1. Since the allegation was made based on personal vendetta, if it had been tried separately, his case would have been dealt differently. Thereby it caused him prejudice and resulted in failure of justice. Similarly, the Accused No.2 claims that due to joint trial of the case of Accused No.1 along with Accused No.2, it has caused serious prejudice, since entire allegation was based on previous enmity between the victim's mother and father.

13. On careful analysis of the charges framed against the Accused No.1, who is the father of the victim girl, shows that during the month of March 2018, while the victim girl was studying VII standard, used to study and sleep in the living room of the house. Even though, the date had not been specifically stated, it is stated that, during the month, annual exams scheduled, one day around 11:00 PM, while the victim girl was sleeping, the Accused No.1 pressed her



breast, when she woke up, found that Accused No.1 was involved in the act.

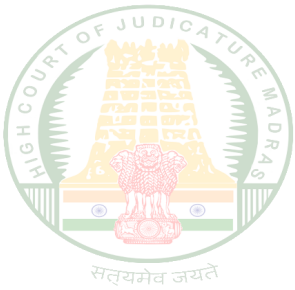
Thereafter, Accused No.1 left to abroad in the year 2019 and due to COVID - 19 pandemic, Accused No.1 returned back to India in the year 2020. The victim girl was studying IX standard at that time and she continued to sleep in the living room of the house alone, Accused No.1 by taking advantage of her loneliness, continuously committed sexual assault on her, which resulted in causing severe mental agony and depression to her and when she tried to intimate the same to her mother, Accused No.1 threatened the victim girl with dire consequences by stating he would murder her and also her mother. Thereby the charges under Sections 7 and 8 of the POCSO Act and also 506(ii) of IPC was framed against the Accused No.1.

14. In pursuant to the victim girl's mental agony and depression, she was not able to cope up with her regular activities, which prompted her mother and family members to provide medical aid and as well as they have searched for some avenues to stop her mental agony without knowing the real reason. Accordingly, the victim girl's mother took her to Accused No.2, who claims to be a priest and capable to ward of the evil spirit. Taking advantage of the precarious situation, under the pretext of warding of evil spirit and also by stating that the



victim girl would die within 15 days, administered her with some intoxicated drink and forced her to sleep in the hut situated in the temple premises, in which the Accused No.2 was doing various rituals and thereby committed aggravated penetrative sexual assault.

15. The clause (d) of the Section 223 of the Criminal Procedure Code envisages joint trial of persons, who have committed difference offences but in the course of same transactions. The primary condition for the application of this clause is that the person should have been accused either in the same offences or different offences committed in the same transactions. The Hon'ble Apex Court in *Balbir vs. State of Haryana and others [AIR 2000 SC 11]* has held that the real and substantial test for determining whether several offences are connected together so as to form the same transaction, depends upon whether they are so related to one another in point of purpose or cause or impact or the principle and subsidiary acts as to constitute one continuous actions. In *Nasib Singh vs State of Punjab [AIR online 2021 SC 871]*, Three Judges Bench of Supreme Court considered the scope of Section 218 to 223, and after considering various previous judgment of Apex Court's on joint trial and separate trials, formulated the following principles in paragraph No.38 as follows:



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"(i). Section 218 provides that separate trials shall be conducted for distinct offences alleged to be committed by a person. Sections 219-221 provide exceptions to this general rule. If a person falls under these exceptions, then a joint trial for the offences which a person is charged with may be conducted.

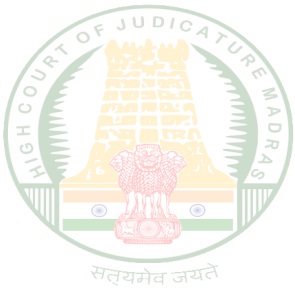
Similarly, under Section 223, a joint trial may be held for persons charged with different offences if any of the clauses in the provision are separately or on a combination satisfied;

(ii). While applying the principles enunciated in Sections 218-223 on conducting joint and separate trials, the trial court should apply a two-pronged test, namely, (i) whether conducting a joint/separate trial will prejudice the defence of the accused; and/or (ii) whether conducting a joint/separate trial would cause judicial delay.

(iii) The possibility of conducting a joint trial will have to be determined at the beginning of the trial and not after the trial based on the result of the trial. The Appellate Court may determine the validity of the argument that there ought to have been a separate/joint trial only based on whether the trial had prejudiced the right of accused or the prosecutrix;

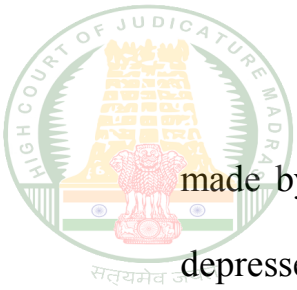
(iv) Since the provisions which engraft an exception use the phrase 'may' with reference to conducting a joint trial, a separate trial is usually not contrary to law even if a joint trial could be conducted, unless proven to cause a miscarriage of justice; and

(v) A conviction or acquittal of the accused cannot be set aside on the mere ground that there was a possibility of a joint trial or a separate trial. To set aside the order of conviction or acquittal, it must be proved that the rights of the parties were prejudiced because of the joint or separate trial, as the case may be."



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16. The offences tried in this case, even though starts in the year 2018, the evidence of the victim girl is that in the year 2018, she found her father committed sexual assault on her, and she thought that her father might have done it accidentally. After Accused No.1 returned back to India from abroad in the year 2020 due to COVID-19 pandemic, he again continued the same and when the victim girl raised objection and while she attempted to inform the same to her mother, she was threatened with dire consequences by Accused No.1. The victim girl unable to bear this, started to weep alone and suffered mental agony and also found depressed. Seeing the girl being depressed and not able to do her regular activities, the family members were under the belief that the victim girl was possessed by some evil spirits and in order to bring her to normal life, P.W.2 had taken the victim girl to the Accused No.2, who performs rituals related to warding of evil spirits. By taking advantage of the situation, the Accused No.2 have committed exaggerated penetrative sexual assault on the victim girl. Even though, the first offence committed by Accused No.1 against the victim girl is said to have taken place in the year 2018, it is a starting point for the commission of the offence, and continued in the year 2020 and thereafter. It is true that the prosecution has not clearly stated the dates on which the subsequent assault was



made by Accused No.1, from the year 2020 onwards. The victim girl become depressed and she was taken to Accused No.2, by the P.W.2 to bring her to normal and stop her depression by availing religious way, but, this was taken advantage by Accused No.2 and he committed penetrative sexual assault. Hence, we are of the view that, the acts of Accused Nos.1 and 2 shall be a form and part of the same transactions. For the argument sake, even if we agree with the learned counsels for defence, that there is misjoinder of charge, that alone is not sufficient to set aside the sentence or invalidate the finding, since Section 464 of the Criminal Procedure Code, prohibits setting aside the finding or sentence on the ground of misjoinder of charges. Section 464 of the Criminal Procedure Code states that if there is any omission to frame or absence of any error in charge including misjoinder of charges, shall not be a ground to invalidate the findings or sentence or Order of the Competent Court unless there is a failure of justice occasioned. In this case, even though, this Court finds there is no proper charges containing essential ingredients of date and time of commission of offence against the Accused No.1, he was able to clearly understood the charge against him and contested the trial.

17. The Hon'ble Apex Court in ***Darbara Singh vs. State of Punjab [AIR***



2013 SC 840] has considered the meaning of the term failure of justice and observed in paragraph no.15 as follows:

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*"15. The 'failure of justice' is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be 'failure of justice'; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasized to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under Indian Criminal Jurisprudence. 'Prejudice', is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then the accused can seek benefit under the orders of the Court.(Vide: **Rafiq Ahmed @ Rafi v. State of U.P.** MANU/SC/0959/2011 : AIR 2011 SC 3114; **Rattiram and Ors. v. State of M.P. through Inspector of Police** MANU/SC/0125/2012 : AIR 2012 SC 1485; and **Criminal Appeal No. 46 of 2005 (Bhimanna v. State of Karnataka)** decided on 4th September, 2012)."*

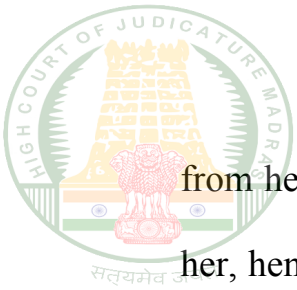
18. Admittedly, accused have not claimed that they have not understood the charges framed against them. They have also understood the entire evidence and thereby cross examined the witnesses. The fact that the defence witnesses examined to probabilize their case and disprove the evidence of prosecution would clearly reveals that both accused have understood the charges for which



they have been facing the trial and they were not able to establish prejudice, if any caused to them. Except the arguments that they have been prejudiced by jointly tried, this Court finds no such prejudice had been caused to them and there is no miscarriage of justice against accused in the trial.

19. Now, we consider the point, whether the prosecution has established the guilt of accused beyond reasonable doubts or not?

20. The evidence of P.W.1/ victim girl, is that while she was studying VIIth standard, she attained puberty, and her house contains two rooms and a living room. She along with her mother and younger brother earlier used to sleep in one room and her another brother would sleep in another room. She further stated that while she was preparing for her VII standard annual exam in the month of March 2018, she used to study late hours in the living room of her house and would not go to her mother's room and sleep in the living room itself. During that period, her father/ Accused No.1 returned from abroad and also sleep in the living room. One day, while she was sleeping, she felt that her breast was pressed by someone, immediately she woke up and found that her father/ Accused No.1, who was sleeping in the living room, next to her in the floor moved away



from her. On seeing this, she felt that her father might have accidentally touched her, hence she had not informed the same to anyone. In the year 2019, her father went to abroad for attending his regular employment and due to COVID -19 pandemic, he returned back in the year 2020 and thereafter, he started molesting the victim girl, during nights. She has not stated that Accused No.1 has committed any penetrative sexual assault. He had continuously sexually harassed her. Though the victim girl tried to inform the same to her mother during a night, Accused No.1 intervened and criminally intimidated her and gone to the extent by stating that he would murder her as well as her mother. This had caused severe depression and mental agony to her, thereby, she started to weep alone and was unable to concentrate in any activities. This prompted her mother/ P.W.2 and she informed the same to her family members, who are also residing in the very same locality of the victim girl. The family members have also enquired the victim girl and in order to bring her to normal, P.W.2 had took her to a Doctor and after examining the victim girl, the doctor has informed that her mental condition is good and prescribed some vitamin and sleeping tablets. However, the victim girl was not able to compose and come to normalcy, hence the family members thought that the victim girl was possessed by some evil spirit and thereby P.W.2 and P.W.8 – uncle of the victim girl took the victim girl to Accused No.2 on



20.09.2021 around 7:00 PM to the place where Accused No.2 was doing various rituals including poojas for warding of evil spirits in the locality of the victim.

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21. The Accused No.2 after seeing the victim girl, informed P.W.2/ mother of the victim that the victim girl would die within 15 days, and demanded them to stay in a temple premises and also suggested to stay for three days for performing various rituals. Initially, P.W.2 reluctant to stay along with his daughter, however, Accused No.2 convinced them by saying that, many persons have stayed for many days for rituals. Thereby, P.W.2 decided to stay along with the victim girl in the small hut of Accused No.2. Later, Accused No.2 mixed some kind of powder in the milk and asked the victim girl to drink it. After drinking that milk, the victim felt nausea and became drowsy. When the victim informed her mother that she needs to lie down, Accused No.2 immediately intervened and directed her to sleep on the cot in the hut, so that he can easily talk with the evil spirit possessing the victim girl. He asked P.W.2 to sleep outside of the hut. Thereafter, Accused No.2 slept along with the victim girl in the cot and started to interact with the victim. While, the victim was stating about the sexual assault done by her father/ Accused No.1, Accused No.2, touched all over her body, even though she tried to raise from the cot, she was unable to object the



actions of Accused No.2. Thereafter, Accused No.2 had committed aggravated penetrative sexual assault on the victim girl, repeatedly.

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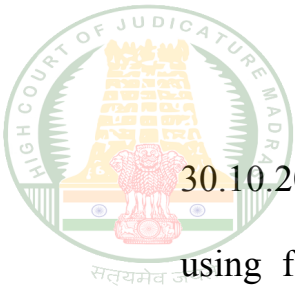
22. P.W.1 further deposed that the next morning, Accused No.2 asked the victim girl to take bath and asked P.W.2 to fetch clothes for the victim girl from her house. Accordingly, P.W.2 went to her home brought clothes for the victim. The victim girl had felt ashamed and suffered mental agony. But due to fear, she had not informed the act of Accused No.2 to her mother/P.W.2. Around 10:30 AM, P.W.7 - maternal grand mother of the victim girl came there and scolded P.W.2 and questioned her, why she had brought the victim girl to Accused No.2 and had taken them to their home. She deposed that, after returning home, she had informed about the sexual assault committed by her father and Accused No.2, to her mother- P.W.2, grandmother - P.W.7, her maternal aunt - P.W.8, another aunt - D.W.2. But they had not taken it seriously and they thought since, she is possessed with evil spirit, she was stating like that.

23. P.W.1 further deposed that she was not able to be normal, and concentrate on her studies. Her father never cared about the family, and used to drink alcohol and quarrel with her mother. On 30.10.2021, at night between 7:00



PM to 8:00 PM, her father came to house in inebriated condition, abused both P.W.1 and P.W.2 using obscene words and quarrelled with them. Unable to tolerate this action, she had consumed insecticide powder and immediately vomited the same. Thereafter, neighbours gathered at her house. She had informed them about the assault made by her father. Next day, she called the Child Helpline number 1098 and informed them about her sufferings. On 01.11.2021, she went to the police station along with her mother, with the help of Childline member, lodged complaint - Ex.P.1.

24. In the cross examination of P.W.1 – victim girl, it is admitted by her that she was suffering from depression and mental agony. P.W.1 and P.W.2 have categorically stated that, though they have taken steps to resolve her depression by way of medical treatment, it had not helped P.W.1. Subsequently, after commission of the offence by the Accused No.2, P.W.1 suffered continuous harassment of Accused No.1. Therefore, she had come forward to lodge the complaint. P.W.1 has stated that she had informed to the family members that she has been molested by Accused Nos. 1 and 2, after returning from the premises of Accused No.2, it was not seriously taken note by the family members. P.W.2 – mother of the victim girl also stated that only after the occurrence taken place on



30.10.2021, where the Accused No.1 had abused the victim girl and her mother using filthy language in public, victim girl had burst out her emotions and informed everything about the commission of offences by Accused Nos. 1 and 2. On careful analysis of the entire evidence of P.W.1, we found that, she has narrated entire incidents thoroughly and clearly.

25. To substantiate the evidence of P.W.1, the prosecution relied on the evidence of P.W.2 - mother of the victim girl, she has also narrated the fact about the depression and mental stress suffered by the victim girl and the facts leading to taking P.W.1 to Accused No.2. She has also stated that she was not aware about the sexual assault made on the victim girl by the Accused No.1. She came to know about the act of the Accused No.2 only after the occurrence taken place on 30.10.2021. It was suggested to her that she was having illicit intimacy with one Koori/ P.W.4 and the defence have also been able to mark a photograph of P.W.2 and P.W.4, in which they have been found together in a beach. By relying on this relationship between P.W.2 and P.W.4 and also by examining the defence witnesses, who are family members of the victim girl, contended that on the instigation of P.W.2 and P.W.4, false case is lodged. The family members of Accused No.1, have stated that six months prior to lodging of this complaint

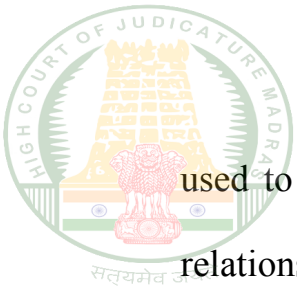


against Accused Nos.1 and 2, P.W.2 and P.W.4 were seen in close intimacy in the terrace of the victim girl's house, by the victim girl. She had quarrelled with P.W.4, slapped him with the slipper and chased him away and thereafter, she had informed the same to her family members. This incident has caused severe mental agony and depression to the victim girl and thereafter based upon the instigation of the P.W.2, she has come forward with this false complaint against Accused No.1. In the cross examination, P.W.2 admits that she went along with P.W.4 to the beach and she denied that she instigated the victim girl to give false complaint against Accused Nos. 1 and 2.

26. The major defence that P.W.2 and P.W.4 were in illicit relationship and on the instigation of P.W.2, false complaint is lodged, was not elicited by examining P.W.1. The entire evidence of P.W.1, in cross examination shows that, P.W.1 was subjected to cross examination concerning various facts such as non-disclosure of occurrence, immediately after commission of same, manner in which the occurrence had taken place, and suggestion denying the allegation etc., The major ground for attacking her evidence is that she was suffering from mental illness. She was subjected to medical care but she was not cured. Due to mental illness, she was making false allegations against the accused. This shows



that, till cross examination of P.W.1, the accused defended their case on the ground that due to mental illness, false case is lodged. Subsequently, the course of defence changed, after marking photograph of P.W.2 with P.W.4. Then suggestions were put to P.W.2 that, with collusion of P.W.4, she instigated her daughter to file false complaint. By examining family members of the victim girl, including P.W.7, P.W.8, and defence witnesses except D.W.3, Accused No.1 able to probabalize his case to the extent that, his wife and P.W.4 were having extra martial relationship. These witnesses also deposed that, six months prior to lodging of complaint, victim girl had seen P.W.2 and P.W.4, inappropriately in her house and victim girl had beaten P.W.4 and thereafter, she became depressed and become mentally ill. They also stated that, this incident was informed by the victim girl to them. Their evidence is that they have not seen this occurrence and they heard it from P.W.1 - victim girl. This crucial fact that six months prior to lodging of the complaint, the victim girl had seen the P.W.2 and P.W.4 in close intimacy, subsequently quarrelled, assaulted P.W.4, was not asked in the cross examination of P.W.1. It is also the specific case of the witnesses that P.W.1 alone had disclosed this occurrence to the family members, whereas she has not stated so in her evidence. That being so, relying on the evidence recorded from P.W.2 and suggestion put to P.W.4 regarding their illicit relationship shall not be



used to discard the evidence of P.W.1. The admission of P.W.2 regarding her relationship with P.W.4 may be helpful to show that they may have illicit intimacy, whereas no evidence was placed on record to show that the victim girl had mentally disturbed and depressed based on this illicit intimacy between P.W. 2 and P.W.4. Similarly, while cross-examination of P.W.2, this occurrence was not raised to her. Hence, we are of the view that, the defence taken by the Accused No.1 that P.W.1 suffered mental illness, due to the above alleged occurrence and he was charged based on the instigation of P.W.2 is not acceptable and his defence of false implication has not been probalized.

27. On the side of Accused No.2, he examined D.W.3 – son of Accused No.2. He stated that in the year 2020, Accused No.2 was working on behalf of one of the candidate namely Devanathan in a local body election, and this Devanathan had given some money to Sathyandhiran/ P.W.11 to hand over the same to Accused No.2, however, P.W.11 has not given that money, thereby there is a money dispute among them. Based on this dispute, P.W.11 and P.W.4 have threatened the Accused No.2 that they would teach him a lesson at appropriate time. It is further deposed by D.W.3 that his father had suffered fracture in the month of August 2021 and undergone treatment for one week and the police have



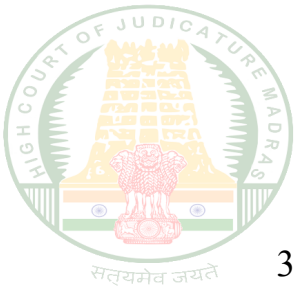
called him to the police station for an enquiry, P.W.11 – Sathyandhiran went to the police station and talked to the police and based upon his instruction, a false complaint has been registered as stated in the earlier paragraph. However, no such question was put to the Sathyandhiran/ P.W.11 regarding the money, which is alleged to be received from the said Devanathan and non payment of money to the Accused No.2.

28. On examination of evidence of P.W.11- Sathyandhiran, we found no such questions regarding the previous enmity or money dispute elicited. However he had admitted that Accused No.2 and P.W.11 had dispute during 'Panchayat election'. The main defence is that P.W.4 and P.W.11 colluded and instigated P.W.2 to lodge a police complaint has not been raised, either to P.W.11 or P.W.4. Similarly, though it was suggested to P.W.4, that he was having dispute with the Accused No.2 relating to a Panchayat Election, due to such enmity, false case is lodged against the Accused No.2 with the help of P.W.2, and it was categorically denied by P.W.4.

29. On the side of prosecution, P.W.7 - mother of P.W.2 and P.W.8 – co-brother of Accused No.1, who had accompanied P.W.2 and the victim girl to the



premises of Accused No.2 were examined to corroborate the evidence of P.W.1 and P.W.2, but they have not supported the prosecution and openly supported the case of Accused No.1. In the cross examination of P.W.7, she has stated certain facts in support of Accused No.1 to the effect that P.W.4 used to visit P.W.2 and they have illicit intimacy. She has also stated that Accused No.1 used to take care of the victim girl properly. P.W.8 also not supported the prosecution case against Accused No.1, however, he stated a new fact that on 25.02.2022 i.e., after registration of FIR, there was a quarrel between P.W.2 and her son Kubendran - P.W.5 regarding the arrival of P.W.4 to their house. Similarly, the defence has also examined the wife of P.W.8 as D.W.1, who is the sister of P.W.2 and she has also stated that P.W.1 was depressed and suffered mental illness, on seeing the illicit intimacy of P.W.2 and P.W.4. The defence has also examined D.W.2 - Sarawathi, D.W.5 - Kubendran, D.W.6 - Karuppaiah, who are the sister, son and elder brother of Accused No.1, who have also reiterated the evidence adduced by P.W.7 and supported the case of the Accused No.1. The combined reading of their evidence shows that, their endeavour is to attribute motive for lodging prosecution against the accused. None of them, able to speak any material facts, which having direct link to discredit or contradict the evidence of P.W.1.



30. The offence committed by the Accused Nos.1 and 2, is against P.W. 1, while she was alone in her disadvantageous situation. Only person, who is capable to state the facts occurred inside the closed doors, would be the victim girl. Hence, the evidence of P.W.1, who has suffered the sexual assault and victim in this case, shall be considered in high pedestal. These defence witnesses may be right in speaking about the relationship between P.W.2 and P.W.4, but their evidence does not support to contradict the evidence of P.W.1 regarding the commission of offence. Thereby, this Court is unable to subscribe the defence version that evidence of P.W.1 is not reliable and trustworthy. It is settled principle of criminal jurisprudence that, the evidence of a prosecutrix in a case of sexual assault is of the same value as that of an injured witness and conviction can be made on the basis of the sole testimony of the prosecutrix. (Refer in *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat [(1983) 3 SCC 21]*, *State of Punjab vs. Gurmit Singh [(1996) 2 SCC 384]* and *Lok Mal vs. The State of Uttar Pradesh [MANU/SC/0332/2025]*).

31. It is also contended by the defence that the first complaint lodged by the P.W.1 and recorded by the Official of the Child Helpline has been suppressed.



This Court is unable to appreciate this contention, since there is a categorical evidence of P.W.1 and P.W.2 that on 30.10.2021, between 7:00 PM to 8:00 PM, Accused No.1 came in an inebriated condition and scolded the victim as well as P.W.2 using filthy language. The victim girl unable to bear the same, she attempted to consume insecticide powder by mixing it in water and immediately vomited. Due to this incident, all the neighbours gathered near her house, at that time, the victim girl had burst out her emotions and informed about the sexual assault committed against her by Accused Nos. 1 and 2 to her mother and relatives. Next day, the victim had contacted the helpline for children, called "Child Helpline" by using helpline number 1098 and narrated her sufferings. According to her, only on 01.11.2021, one volunteer from NGO, came to her home, and she narrated her suffering to the volunteer. Thereafter, with the help of this volunteer, she went along with her mother - P.W.2 to police station, lodged a complaint at Ramanathapuram Police Station at about 21:00 hours.

32. It is further clarified by the Sub Inspector of Police / P.W.10 that P.W.1 and P.W.2 orally narrated about the occurrence to her, she in turn insisted them to give a complaint in writing and accordingly, P.W.1 had given the complaint in her own handwriting, which is marked as Ex.P.1. Based on this, the



Ex.P.9 - FIR was registered by the P.W.10. The 'Child Helpline' is only a NGO, who used to assist based on the distress call made, through helpline. They help children and guide them for protection. They are not statutory authority and do not have any power to investigate or to initiate any legal action against any person.

33. The proven facts shows that after the occurrence on 30.10.2021, around 7:00 PM to 8:00 PM, Prosecutrix -P.W.1, received guidance/ help from the Child Helpline - NGO and complaint was registered. Thereby, this Court finds no merit in the contention raised by the defence, that the official of the Child Helpline was called and they have recorded the statement and this statement has been suppressed.

34. Next contention raised by the defence is that there is an enormous delay in lodging the complaint and there is no explanation for this delay. It is well settled law, that delay in setting the law in motion by lodging complaint, is normally viewed by Courts with suspicion because there is possibility of collection of evidence against the accused. So it is necessary for the prosecution to explain the delay. In this case, as already discussed supra, victim girl was



sexually assaulted by her father and subsequently by a priest, the family members had thought that she was possessed by evil spirit. She has also deposed that, her father had threatened her with dire consequences. She was under constant fear. Since, she had been accused by the family members, that she is mentally unstable, she was under severe depression. Only after the occurrence on 30.10.2021, she had received proper counselling by the NGO-child helpline. Only thereafter, she gained confidence and lodged complaint. The above facts are sufficient to accept the delay in lodging complaint.

35. After registration of FIR, Inspector of Police - P.W.13 investigated the case and the victim girl also subjected to medical examination and the Medical Officer - P.W.5, examined the victim girl, and given the opinion that there is possibility of penetrative sexual assault committed against the victim girl. In the cross-examination, she denied the suggestion that, victim girl was not subjected to any penetrative sexual assault. Similarly, the potency test reports of accused Nos.1 and 2 were marked as Ex.P.16 and Ex.P.17 respectively, which reveals that, both accused are capable to perform sexual act.

36. Based on the above discussions, we are of the view that the



prosecution by examining P.W.1 and P.W.2, proved the facts that both accused have committed sexual assault, as against the victim girl and the evidence of P.W. 1 and P.W.2 are corroborated by the medical evidence. The evidence of P.W.1 is credible, trustworthy and no reasons to find that, her evidence is based on any instigation or by tutoring. We find that taking advantage of precarious conditions, the accused have committed offence against her and the defence evidence adduced is not sufficient to probabalize their case. Thereby, the prosecution evidence produced in this case is sufficient to prove the guilt of accused beyond reasonable doubts against the Accused Nos.1 and 2 for the sexual assault made on the victim girl and the fact that, Accused No.1 had criminally intimidated the victim girl.

37. The next ground raised by the defence is that the age of the victim girl was not properly proved. The Head Mistress of the victim girl was examined as P.W.6 and she has issued a certificate, marked as Ex.P.7, to prove the date of birth. It contains the Date of Birth of the victim girl. She has deposed that, as per the records maintained in the School including the admission register, she has issued this certificate. She further added that, during the time of admission of a student, they collect the necessary informations by collecting birth certificate, and



the same will be entered in the record sheet of each students. Based on this record sheet, she had issued the Ex.P.7 - certificate for date of birth of the victim girl.

38. In the case of **Ravinder Singh Gorkhi Vs. State of UP reported in 2006 [5] SCC 384**, the Hon'ble Apex Court by relying on the decision reported in **1988 Supp.SCC 604 [Birad Mal Singhvi Vs. Anand Purohit]**, has held that certificate issued by the School Headmaster shall satisfy the requirements of Section 35 of Indian Evidence Act and in paragraphs No.17 and 23 observed as follows:-

"17. The school leaving certificate was said to have been issued in the year 1998 A bare perusal of the said certificate would show that the appellant was said to have been admitted on 1-8-1967 and his name was struck off from the roll of the institution on 6-5-1972. The said school-leaving certificate was not issued in the ordinary course of business of the school. There is nothing on record to show that the said date of birth was recorded in a register maintained by the school in terms of the requirements of law as contained in section 35 of the Evidence Act. No statement has further been made by the said Headmaster that either of the parents of the appellant who accompanied him to the school at the time of his admission therein made any statement or submitted any proof in regard thereto. The entries made in the school-leaving certificate, evidently had been prepared for the purpose of the case. All the necessary columns were filled up including the character of the appellant. It was not the case of the said Headmaster that before he had made entries in the register, age was verified. If any register in regular course of business was maintained in the school, there was



no reason as to why the same had not been produced.

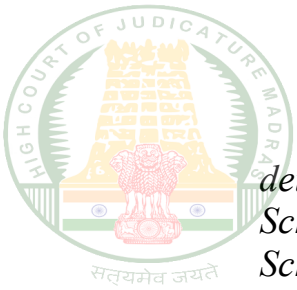
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23. Section 35 of the Evidence Act would be attracted both in civil and criminal proceedings. The Evidence Act does not make any distinction between a civil proceeding and a criminal proceeding. Unless specifically provided for, in terms of section 35 of the Evidence Act, the register maintained in the ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country, in which, inter alia, such register is kept would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible thereunder:- [i] it should be in the nature of the entry in any public or official register ; [ii] it must state a fact in issue or relevant fact ; [iii] entry must be made either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially enjoined by the law of country ; and [iv] all persons concerned indisputably must have an access thereto." [Emphasis Supplied].

39. In **Rajak Mohammad Vs. State of Himachal Pradesh**], reported in **(2018) 9 SCC 248**, a three Judges Bench of the Hon'ble Apex Court has held as hereunder:-

"5. In this regard, we have considered the evidence and materials on record. The age of the prosecutrix has been sought to be proved by the prosecution by bringing on record the School Admission Form [Exhibit PW5/A] and the certificate [Exhibit PW5/B] issued by one Jasdeep Kaur [PW5], JBT Teacher of Government School Dungi Plate. P.W.5 in her deposition has stated that the writings in the School Admission Form [Exhibit PW5/A] are in her handwriting and the signature affixed is that of the mother of the prosecutrix. In cross-examination, PW5 had stated that the



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details mentioned in Exhibit PW5/A have been obtained from the School Leaving Certificate issued by the Government Primary School, Tambol. The certificate issued by the Government Primary School, Tambol on the basis of which the details in the Admission Form [Exhibit PW5/A] was filled up by pW5 has not been exhibited by the prosecution. Nothing hinges on the document exhibited by the prosecution as Exhibit PW5/B as that is the consequential certificate issued on the basis of the entries in Exhibit PW5/A. The mother of the prosecutrix who had allegedly signed Exhibit PW5/A has not been examined by the prosecution."

40. The Hon'ble Apex Court in ***P. Yuvaprakash Vs. State Rep. by Inspector of Police [AIR 2023 SC 3525]***, has interpreted the Section 94(2)(iii) of the Juvenile Justice Act and Section 34(1) of the POCSO Act and has held the date of birth certificate from the school or matriculation or equivalent certificate of the concerned examination board has to be firstly preferred in the absence of Birth Certificate issued by the Corporation or Municipal Authority or Panchayat and only 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. The Apex Court has observed in paragraph No.14 as follows:

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



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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."

41. In this case, P.W.6 has stated that the school used to collect the necessary information, and Date of Birth certificate of the student at the time of admission, and the entries therein are recorded in the Record Sheet of the student. She further stated that, if any student transferred from the school, the necessary entries of the student will be made in the Transfer Certificate. Section 94(2)(i) recognize the determination of age, based on the Date of Birth Certificate issued by the school.

42. Admittedly, P.W.6 has issued Ex.P.7 - age certificate of the victim girl, based on the entries found in the Admission Register. According to her, she



was not having any direct knowledge regarding the entries made in the Admission Register of the victim girl. Further, the admission register was also not produced before the Trial Court. This Ex.P.7 certificate was issued by her, based on the requisition made by the Investigating Officer and entries in this certificate is not in the nature of any public or official register. Hence, this certificate is not fulfil the requisites of Section 35 of the Indian Evidence Act, and also it is not a birth certificate issued by the School. In such circumstances, we of the view that the age certificate issued by P.W.6 is not sufficient to prove the age of the victim girl. The defence has also cross examined the Medical Officer/ P.W.5 - Dr. Jayapriya, to elicit the fact that the victim girl was examined for ossification test. But admittedly, the Radiologist who conducts the Test was not examined and the Test report was also not marked, thereby the prosecution has failed to prove the age of the victim girl in accordance with Section 94(2) of the Juvenile Justice Act, so as to attract the offences under POCSO Act.

43. A Division Bench of this Court in ***M. Loganathan vs. State of Tamil Nadu [2016 (3) MLJ (Crl.) 755]***, while considering similar circumstances, i.e., in the event of prosecution proved the offence with regard to commission of sexual assault, whereas not able to prove the age of the victim girl as 'child', considered the question whether the accused shall be convicted by invoking



Indian Penal Code (IPC) in the absence of any charge, and held in paragraph

Nos.27 to 33 as follows:

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"27. Article 20(1) of the Constitution of India, mandates that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. In the instant case, admittedly, the occurrence was on 28.09.2012 whereas, the of the POCSO Act, came into force only with effect from 14.11.2012. Thus, as on the date of the alleged occurrence, the POCSO Act was not in force and therefore, the conviction of the appellant under Section 4 of the POCSO Act, is unconstitutional as it violates Article 20(1) of the Constitution of India, which has been guaranteed as a fundamental right. Therefore, the conviction of the appellant for offence under Section 4 of the POCSO Act deserves to be set aside.

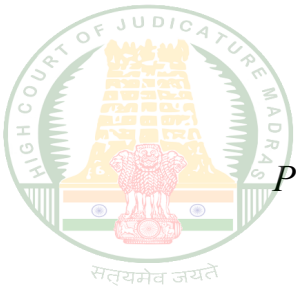
28. Now, the question is whether the accused could be convicted for offence under Section 376 I.P.C., instead of Section 4 of the POCSO Act, though, there was no charge framed by the trial Court under Section 376 I.P.C.

29. In this regard, we may refer to Section 222(1) of the Criminal Procedure Code which reads as follows:--

"222. When offence proved included in offence charged.

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it."

30. Now the next question is whether Section 376 I.P.C, is a minor offence in terms of Section 222(1) Cr.P.C., to Section 4 of the



POCSO Act.

31. *Section 4 of the Protection of Children from Sexual Offences Act, 2012 reads as follows:--*

"4. Punishment for penetrative sexual assault. - 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."

32. *What is a penetrative sexual assault has been defined in Section 3 of the POCSO Act. It states that penetrating the 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, amounts to penetrative sexual assault.*

33. *Undoubtedly, a rape on a child is graver than a rape on an adult woman. Thus, the penetrative sexual assault by penetrating the penis into the vagina as defined in Section 3 of the POCSO Act, is nothing but a rape as defined in Section 375 I.P.C. If rape as defined in Section 375 I.P.C, is committed, as a child, it is an offence under Section 4 of the POCSO Act. Thus, it is ipso facto clear that rape as defined in Section 375 I.P.C, and penetrative sexual assault by penis into vagina have got all common ingredients but, penetrative sexual assault has one more incident (particular) that the victim should be a child. Thus, undoubtedly, Section 376 I.P.C, is a minor offence for the offence under Section 4 of the POCSO Act. It needs to be mentioned that in the matter of extent of punishment also, Section 376 I.P.C, is a minor offence to Section 4 of POCSO Act."*

44. We consider the above principle laid down by the Division bench of this Court in the above case and in agreement with the same. Section 222(1) of Cr.P.C, empower the Criminal Court, when a person, who charged with an offence and facts proved are reduce it to a minor offence, he may be convicted of

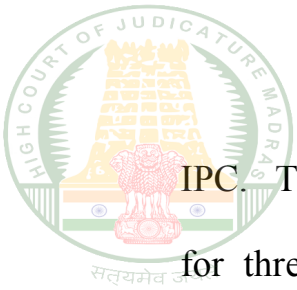


the minor offence.

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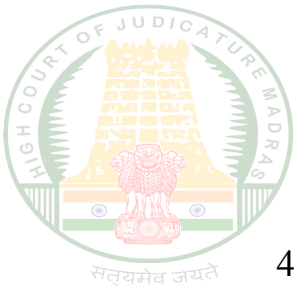
45. In the present case, Accused No.1, who is the father of the victim girl is charged for the offences under Sections 7 and 8 of the POCSO Act and undoubtedly, Section 354 of IPC, is a minor offence for the offences under Sections 7 and 8 of the POCSO Act and similarly, Accused No.2 is charged for the offences under Sections 5(1) and 6 of the POCSO Act and undoubtedly, Section 376(1) of IPC, is a minor offence for the offences under Sections 5(1) and 6 of the POCSO Act. Section 354 of IPC provides that, sentence shall not be less than one year but which may extend to five years, and shall also be liable to fine and Section 376(1) of IPC, the sentence shall be punished with rigorous 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.

46. In view of the discussions made above and considering the aggravating as well as the mitigating circumstances, the Accused No.1 is hereby found guilty and convicted under Sections 354 and 506(i) of IPC and the Accused No.2 is hereby found guilty and convicted for the offence under Section 376(1) of



IPC. Thereby, the Accused No.1 is sentenced to undergo simple imprisonment for three years and to pay fine of Rs.10,000/-, in default, 6 months simple imprisonment for the offence under Section 354 of IPC and 1 year simple imprisonment and to pay fine of Rs.5,000/-, in default, 3 months simple imprisonment for the offence under Section 506(i) of IPC and the Accused No.2 is sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs.25,000/-, in default, one year simple imprisonment.

47. The Trial Court had already ordered payment of Rs.7,00,000/- as compensation to the victim girl by invoking the provisions of the Protection of Children from Sexual Offences (POCSO) Act. We are of the view that, since the accused have been found guilty under IPC, the victim is eligible for getting compensation under the "Tamil Nadu Victim Compensation Scheme for Women Victims/ Survivors of Sexual Assault/ Other Crimes - 2018" for receiving compensation for a sum of Rs.7,00,000/-. Therefore, the Trial Court and District Legal Services Authority, Ramanathapuram is directed to take necessary steps to disburse the above compensation fixed by this Court to the victim girl, if the compensation was not already paid, as per the judgement of the Trial Court dated 23.04.2022 in Spl.S.C.No.01 of 2022.



48. In the result, these criminal appeals are partly allowed in part in the following terms.

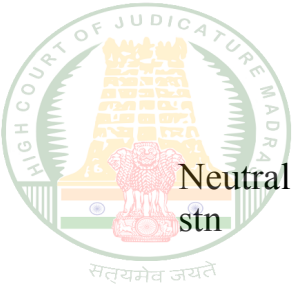
(i). The conviction of the appellant/ Accused No.1 in Crl.A.(MD). No. 445 of 2022 for offence under Sections 8 of POCSO Act is hereby set aside and instead, he is convicted under Sections 354 and 506(i) of IPC and sentenced to undergo simple imprisonment for three years and to pay fine of Rs.10,000/-, in default, 6 months simple imprisonment for the offence under Section 354 of IPC and 1 year simple imprisonment and to pay fine of Rs.5,000/-, in default, 3 months simple imprisonment for the offence under Section 506(i) of IPC.

(ii). The conviction of the appellant/ Accused No.2 in Crl.A.(MD). No. 370 of 2022 under Section 6 of POCSO Act is hereby set aside and instead, he is convicted under Section 376(1) of IPC and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs.25,000/-, in default, one year simple imprisonment.

(iii). It is directed that the sentences imposed herein on the appellants/ Accused No.1 shall run concurrently and the period of sentence already undergone by the appellants/ Accused Nos.1 and 2 is directed to be set off under Section 428 Cr.P.C.

[A.D.J.C., J.] [K.R.S., J.]
28.04.2024

Internet: Yes
Speaking Order: Yes/No



CRL.A(MD). Nos.370 and 445



Neutral Citation Case: Yes/No
stn

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

stn

To:

1. The Section Officer,
VR Section,
High Court,
Madras.

Crl.A (MD). Nos. 370 and 445 of 2022

28.04.2025

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