IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.04.2021

PRONOUNCED ON : 26.07.2021

CORAM :

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Criminal Appeal No.741 of 2019
and Crl.M.P.No.15612 of 2019

Raja ..Appellant/Accused

Vs

State
Rep. By
Inspector of Police
All Women Police Station
Perambalur District
(Crime No.04/2016) ..Respondent/Complainant.

PRAYER : Criminal Appeal filed u/s.389(1) of Cr.P.C., against the judgment dated 08.02.2019 in Spl.S.C.No.18 of 2016 on the file of Sessions Judge, Mahila Court, Perambalur District.

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For Appellant : Mr.C.D.Johnson

For Respondent : Mrs.T.P.Savitha
Govt.Advocate (Crl.Side)

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JUDGMENT

This Criminal Appeal is filed against the judgment made in Special S.C.No.18 of 2016 on the file of Sessions Judge, Mahila Court, Perambalur dated 08.02.2019.

2. The respondent police registered a case against the appellant in Crime No.04/2016 for the offence under Section 5(m) of Protection of Children from Sexual Offences Act, 2012 [hereinafter referred to as POCSO Act] and Section 506(1) IPC. Since offence is against child, subsequently, it was altered into Section 366(A) IPC, Section 5(m) of POCSO Act and Section 506(1) of IPC. After completing investigation, the respondent police laid charge sheet before the Mahila Court, Perambalur. The learned Special Judge taken the charge sheet on file in Spl.S.C.No.18 of 2016. After completing the formalities, Special court framed charges against the appellant for the offence under Sections 366 and 506(1) IPC and under Section 5(m) of POCSO Act.

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3. After framing charges, in order to prove the case of the prosecution, during the trial, on the side of the prosecution, as many as 20 witnesses were examined as P.W.1 to P.W.20. 20 documents were marked as Ex.P.1 to Ex.P.20. Besides six material objects were exhibited as M.O.1 to M.O.6. After

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completing the examination of prosecution witnesses, incriminating circumstances culled out from the evidence of the prosecution witnesses were put before the appellant by questioning under Section 313 Cr.P.C., and he denied the same as false and pleaded not guilty. On the side of defence, 5 witnesses were examined and 2 documents were marked.

4. On completion of trial, after hearing the arguments advanced on either side and also considering the materials available on record, the trial court found the appellant guilty for the following offences and passed the judgment of conviction and sentence as follows:-

(i) For offence under Section 366 IPC, the appellant was convicted and sentenced to undergo 7 years rigorous imprisonment and to pay a fine of Rs.5000/-, in default, to undergo two years simple imprisonment.

(ii) For offence under Section 506(1) IPC, the appellant was convicted and sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs.5000/-, in default, to undergo three months simple imprisonment.

(iii) For offence under Section 5(m) read with 6 of POCSO Act, the appellant was convicted and sentenced to undergo 15 years rigorous imprisonment and to pay a fine of 5000/-, in default, to undergo 3 years simple

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imprisonment.

5. Challenging the said judgment of conviction and sentence, the appellant/accused has filed the present appeal before this court.

6.1. The learned counsel for the appellant would submit that the alleged occurrence is said to have taken place on 06.05.2016 at about 16.30 hours, whereas the complaint was given only at 22.00 hours and on the same day with an inordinate delay of 6 hours. The above facts would go to show that the complaint was given after much discussion and deliberation. After registering the case, the respondent police has not sent express FIR to the court immediately after registering the case. FIR was sent to the court after 16 hours delay and there is no explanation. Therefore, delay in filing the case and delay in registering the FIR and delay in sending the FIR to the court is fatal to the case of the prosecution. The trial Judge failed to consider the same.

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6.2. Further, he would submit that the evidence on the side of the defence D.W.1 to D.W.5 named another person who is responsible for the occurrence. The trial court failed to take note of the same and mechanically

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convicted the appellant. The victim girl was examined as P.W.2. She stated that she was playing with one Selvakumar brother of the victim. The said Selvakumar was not examined. Non examination of the said Selvakumar is fatal to the case of the prosecution. The occurrence was informed to P.W.4 who in turn informed to Village Administrative Officer P.W.5. There are material contradictions between the prosecution witnesses regarding the time and place of the occurrence and time of giving complaint.

6.3. Further he would submit that the recovery of stained clothes is doubtful because victim was not sure of wearing whether chuttidar tops or inskirt. Further, the recovery of clothes in Form 95 was not stated clearly by the recovery witnesses. Therefore, the recovery of the clothes of the victim is highly doubtful. The arrest of the accused itself is doubtful. According to the prosecution, the accused was arrested on 06.05.2016 on the ground of suspicion and this was ably supported by the evidence of P.W.2, P.W.3, P.W.4 and P.W.5. The respondent police played a vital role in screening the real offender and appellant was made as victim of circumstances.

6.4. The doctor one who conducted medical examination on the victim

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was examined as P.W.15. Her evidence clearly shows that there is no injury on the private part of the victim. If there is any forcible sexual assault on the victim girl aged about 7 years, definitely the person would get injured. The doctor who was examined has not stated there there is injury. She has clearly stated that there is no injury on her private part and no symptom of having forcible sexual intercourse on the minor girl. P.W.15 who examined the victim girl also stated that there is no external injury, no nail mark on the vagina part or breast or any other part on the body of the victim and also hymen was intact and therefore, she was virgin.

6.5. P.W.11, doctor who examined the appellant stated that semen was sent to Forensic Science Department. P.W.12 Scientific Officer has clearly stated the appellant blood group is B positive. Therefore, it is not possible that the semen sent for Forensic analysis is not that of the appellant. However, the learned counsel raised serious doubt on the part of the prosecution and assert that the blood group of the appellant is only 'B positive' whereas the semen said to have collected from the appellant and sent to forensic lab has ascertained the group as 'O positive'. Therefore, it is clear that the prosecution has not properly collected the materials from the correct person and the

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samples said to have collected from the appellant differs. Therefore, it is serious lapse on the part of the prosecution. Further he would claim that in order to sub serve the ends of justice also willing to send appellant's fresh sample of blood to find out the group.

6.6 At this juncture, it is appropriate to point out that, this court also directed the appellant to appear before this court and the officer in charge of the respondent police station was called and she was directed to take steps to take the appellant's blood sample in accordance with law in a dignified manner and she also sent the same to Forensic Department in Chennai.

6.7 As per the direction of this court, the samples were collected from the appellant and sent for report from Forensic Science Department. The report of Forensic Department after analysis also reached this court in a sealed cover and that report dated 09.03.2021 shows that it was only “B Positive”.

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6.8. The learned counsel for the appellant would submit that group of the blood is B positive and therefore, the group of the semen also will not change and semen group is also same group. Therefore, the learned counsel

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raised serious doubt as to whether the semen collected from the appellant was sent to Forensic Science Department for analysis and also with respect to clothe collected from the victim which is sent for Forensic Science Department and submitted that it is highly doubtful. The blood group detected from the chuttidar worn by the victim is not tallied with the blood group of the appellant. Therefore, the prosecution failed to prove its case beyond reasonable doubts.

6.9 When two views are possible, the view which is beneficial to the accused has to be taken into consideration. He further submitted that the appellant has not committed any offence. On that day, the victim girl shown yet another person Durai. Though the victim family and the villagers attacked Durai, he was made to escape from the clutches of law and the prosecution foisted false case against the appellant and without any proper explanation, the respondent police laid the charge sheet before the trial court. The trial court also failed to appreciate the evidence of the victim, doctor and the expert opinion. It is duty of the prosecution to prove its case beyond reasonable doubts. If any doubt arise, naturally the benefits would go in favour of the accused. Therefore, the judgment of trial court is liable to be set aside and the

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appeal is to be allowed.

7.1. The learned Government Advocate (Criminal Side) would submit that in this case, the victim girl is aged about 7 years and while she was playing near Pillayar Kovil along with Selvakumar, her younger brother, they set fire in the coir and they were playing. At that time, the appellant approached the victim and called her to put off fire and taken her behind the Ganesha Idol and thorn bushes and made her to lay and he removed the dress and also he laid on her after removing her dresses, embraced her and asked her to embrace him. Her clothe become wet and the appellant asked her to leave from the place and threatened her not to reveal it to anybody. The victim girl also informed Selvakumar and her sister P.W.3. Since the mother was not there at that time, after her return in the evening, she was informed. The mother of the victim in turn informed the occurrence to P.W.4. P.W.4 in turn informed P.W.5 and they made complaint to the Police. The police after making enquiry, arrested the accused. The victim girl was sent to doctor for clinical examination and the victim appeared before the Judicial Magistrate for recording statement under Section 164 Cr.P.C. The Police also sent the recovered items chuttidar from the victim and also collected sample semen and

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sent it for forensic department analysis for getting report. After investigation, the police laid the charge sheet before the court. The trial court, after framing charges conducted trial and found the appellant guilty for the charged offences and passed judgment of conviction and sentence.

7.2. The victim girl was examined as P.W.2. She narrated the occurrence. P.W.3 who is the sister of the victim also clearly narrated the occurrence and that soon after the occurrence, she informed to her sister P.W.3. The evidence of P.Ws.4 and 5 also shows that they came to know about the occurrence on the same day. They also informed to the police. Though the learned counsel for the appellant stated that there is a delay in filing complaint, in sending the FIR to the court and date of arrest, in cases like this, delay is inevitable and on the ground of mere delay, case cannot be thrown away.

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7.3. After the occurrence, the respondent police arrested the accused and subsequently they taken sample and also produced before doctor for potency test and taken blood sample for forensic department analysis. Doctor also stated that there is no injury. But victim has stated that the accused person took her behind the Ganesha Idol and laid on her and committed sexual

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assault. Therefore, non examination of the boy child who played with victim, is not fatal to the case of the prosecution. Further, delay in filing FIR is explained. In cases like this, one cannot expect taking action immediately in the villages. Therefore, though there is a discrepancy in the Forensic Lab report, the victim has clearly narrated the evidence and no eye witness can be expected in this type of cases. Lapse on the part of the prosecution should not lead unmerited acquittal and the evidence of the victim if found cogent, credible and trustworthy, it is to be believed. Therefore, trial court rightly appreciated the evidence and convicted the appellant. There is no merit in the appeal and the appeal is liable to be dismissed.

8. Heard and perused the records.

9. The case of the prosecution is that on 06.05.2016 at 16.30 hours, the victim was playing along with her brother Selvakumar and set fire on coir and played. At that time, the appellant approached the victim and and called her to put off fire and taken her behind the Ganesha Idol and thorn bushes and committed sexual assault. He also threatened her not to reveal it to anybody. The victim girl informed Selvakumar, her sister P.W.3. Victim also informed

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the occurrence to P.W.1 her mother, after her return in the evening, who in turn informed the occurrence to P.W.4 and P.W.4 informed the same to P.W.5 and they made complaint to the Police. The police after making enquiry, arrested the accused. After investigation, the police laid the charge sheet before the court. The trial court, after framing charges conducted trial and found the appellant guilty for the charged offences and passed judgment of conviction and sentence as stated above.

10. This Court, being an Appellate Court, is a fact finding Court, which has to necessarily re-appreciate the entire evidence and give an independent finding.

11. In this case, against the appellant, the Special Court framed the charges for the offence under Section 366, 506(1) IPC and also Section 5 (m) of POCSO Act, which is punishable under Section 6 of POCSO Act.

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12. In order to substantiate the charges framed against the appellant, on the side of prosecution, during trial, examined totally 20 witnesses and marked

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20 documents and exhibited 6 material objects. On completion of prosecution witnesses, on the side of defence, 5 witnesses were examined and 2 documents were marked. Out of 20 witnesses on the side of prosecution, victim was examined as P.W.2 who is the only sole witness to speak about the occurrence. She is only direct witness and her evidence is direct evidence. All other evidences are only hearsay evidence. So a perusal of the evidence of P.W.2 victim girl shows that she has clearly stated about the occurrence and named the appellant and identified the appellant. The appellant is the one who has committed the above said offence against the victim and also threatened her. Further in order to strengthen the case of the prosecution, the victim girl was examined during the investigation. Also after registering the complaint, she was produced before the Judicial Magistrate for recording her statement under Section 164 Cr.P.C. The said statement recorded by Judicial Magistrate under Section 164 Cr.P.C., was marked as Ex.P.16.

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13. A reading of Ex.P.16-statement recorded before the Judicial Magistrate would go to show that the victim clearly narrated about the occurrence. She has clearly stated before the Magistrate that she set fire on coir and playing, at that time, the appellant approached her and informed her that

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he would help and set off fire. He took her behind the Ganesha idol and thorny bush area and he made her to lay down and removed her inner wear, he also removed his dresses and laid on her. After some time, he asked her to leave the place and he threatened her not to reveal to anybody about the occurrence. If she reveal, he would kill her. Further she stated that her inner wear got wet.

14. Earlier, victim was produced before Judicial Magistrate for recording her statement. She was also produced before doctor P.W.15. She has stated in the Accident Register History of the case that known person took her to thorny bushes behind the Ganesha idol and also committed sexual assault.

15. Therefore, a combined reading of evidence of P.W.2 deposed before court, earlier statement given before the Magistrate which was recorded under section 164 Cr.P.C. and before doctor while conducting the medical examination, show that she has clearly named the appellant and also clearly narrated the act committed by the appellant.

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16. The girl is aged about 7 years. She knows what is good things and what is bad things and also she knows who has committed offence. She named the appellant and identified the appellant. Therefore, in cases of this

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nature, no eye witness can be expected. No corroborative evidence is also expected. Since the culprits will take chance of aloofness of the children and try to exploit their innocence and illiteracy, they used to threaten and also commit the offence. Therefore, the children normally will not reveal the incident immediately soon after the occurrence. So after some time, after recovering from the shock and fear and sometimes on the advise of the parents they will come out of the shock and they will reveal the same to the kith and kin who trust on them. Therefore, in this case, delay in filing FIR and delay in sending the FIR, non examination of another child Selvakumar with whom she was playing, are not fatal to the case of the prosecution. It would depend upon facts of each case.

17. It is not the case of the prosecution that apart from the victim girl, some other witnesses have noticed or seen the occurrence and subsequently, they have not supported the case of the prosecution. But in this case, there is no independent eye witness, only witness is victim girl who has clearly spoken about the same before all the places viz., before the doctor while conducting medical examination, before Judicial Magistrate while recording statement under Section 164 Cr.P.C., and before the court while examining as witness as P.W.2. Even before that, she informed to P.W.3 and also mother/P.W.1 and also

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they have spoken about the same. Therefore, the evidence of the victim was corroborated by the evidence of P.W.1, P.W.3. The statement of victim was also recorded before Judicial Magistrate. Doctor's report also shows the same. Further P.W.4, P.W.5 also spoken about the occurrence based on the knowledge about the occurrence who subsequently came to know about the occurrence.

18. Though the evidence of P.W.15 doctor who conducted the medical examination on the victim stated that there is no external injury and the doctor who conducted medical examination on the accused in respect of potency test stated that there was no external injury on the private part of the appellant, before the said doctor-P.W.11, a suggestion was also put that while male having sexual forcible sexual contact with 7 years old child, naturally his private part would sustain injury. But it is not hard and fast rule. It depends upon the force he used and also it depends upon the act committed by him. Both the doctor P.W.11 and P.W.15 have stated that there is no external injury either on the private part of the victim or the appellant. But that may not be the sole ground to disbelieve the case of the prosecution and the evidence of the victim. The victim has not stated that he forcibly penetrated and she had pain or she sustained injury on any part of her body.

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19. A careful perusal of the statement made before Judicial Magistrate and statement before doctor shows that the appellant took her to bushes which was behind the Ganesha Idol and removed her inner wear and he also removed his inner wear and made her to lie on floor and he laid on her. After some time, he asked her to leave and also threatened not to reveal to anybody and she left the place and got her clothe wet. Therefore, mere injury not sustained by either the appellant or the victim may not be the ground to disbelieve the case of the prosecution and the evidence of the victim. Therefore, the opinion of the doctors also not conclusive proof and will not be helpful to take a different view.

20. The learned counsel for the appellant would submit that the appellant blood group is 'B positive'. Chuttidar recovered from the victim was sent to the Forensic Lab and the report shows that the semen found in the chuttidar is of 'O positive' group. The semen sample also collected from the appellant was sent for forensic science laboratory and the report shows that it is 'O positive'. But doctor-P.W.11 who conducted the potency test taken the semen sample and sent it for analysis to Forensic lab and the Forensic Lab report shows that it was only 'B positive'. Therefore, the person who

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committed the offence is not the appellant and the person whose semen found in the chuttidar of the victim is that of blood group "O positive'. Further the appellant counsel would submit that the victim girl shown yet another person one Durai and not the appellant, however, prosecution had not prosecuted and proceeded with that person and case was falsely registered against the accused/appellant and case was proceeded and the appellant is wrongly convicted.

21. Therefore, in order to give substantial justice, after hearing the argument of the appellant, before disposal of the appeal, this court summoned the appellant before this court. The present Investigating officer was directed to get the blood sample from the appellant and send thpe same for forensic science department. After receiving the report dated 09.03.2021, this court found that the blood group of the appellant is 'B'.

22. Further this court also summoned Durai who is the person spoken by the defence witnesses. The same Investigating officer taken steps for collection of samples from the said Durai and sent it to forensic lab and the report shows that it is only 'AB positive'.

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23. Further, a reading of the evidence of the Officer, Forensic Science Department, shows that they received the sample and after analysis they sent the report and they gave the opinion stating that the chuttidar sent for analysis shows 'O positive'. Subsequently, semen also sent which also shows that it is 'O positive'. Whereas blood group of the appellant is only B positive. Even that one suggested person viz., Durai has been summoned and his sample also shows that it is 'AB positive'. Therefore, this court is of the opinion that at the time of analysis, there is possibility of mismatch or misplacement or by mistake occurred, so, the semen sample found in the chuttidar and the earlier blood group sent is reported as 'O positive'.

24. Any opinion of the experts is only a piece of evidence to aid the court to arrive at a just conclusion. But that is not a conclusive proof. Any opinion of the Expert or any report of the Expert is not a conclusive proof. So in this case, it is highly doubtful whether the chuttidar belongs to the victim was collected and blood sample collected from the appellant sent for forensic department. Even assuming that the police sent it, there is possibility of mistake happening by misplacement or any mismatch or on mistaken of sample.

25. In this case, victim clearly stated that she named the appellant. She

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identified the appellant one who has committed the offence. After the complaint, the case was registered and investigation completed. Therefore, in cases like this, only the evidence of the victim has to be taken into consideration, unless any reason to discard the evidence of the victim. So in this case, this court does not find any reason to disbelieve the evidence of the victim who is only aged about 7 years. She need not show the appellant that he has committed the offence. The defence also not established that for good reason, the victim girl wrongly identified the person and also has given a false case. In this case, the victim child is aged only 7 years. With regard to the age of the child, there is no dispute. In order to prove the age of the victim, copy of the birth certificate of the victim Ex.P.18 is marked on the side of prosecution. As per Ex.P.18 date of birth of the victim is 13.03.2007. Date of the occurrence is 06.05.2016. So, the age of the victim girl is 9 years. The doctor, who examined the victim, based on clinical and radiological findings, opined the age of the child as between 7 to 8 years, which is marked as Ex.P.8.

26. It is settled proposition of law that mere delay in lodging the FIR and delay in sending the FIR to the court is not fatal to the case of the prosecution. When delay is explained and there is no contra evidence to show that only after deliberation and discussion, the case was registered against the appellant

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and therefore, sent the FIR to the court with delay, the same is not fatal to the case of the prosecution. In this case, there is material to show that victim girl is aged about 9 years, her parents were not there at house at that time. The appellant also threatened the victim girl not to reveal it to anybody. FIR also registered on the same day at 22.00 hours. The occurrence is said to have taken place at 16.00 hours. Naturally it will take some time for the victim girl to come out of the trauma and reveal the occurrence after some time. Thereafter, mother of the victim informed the same to P.W.3, P.W.4 VAO was also informed about the occurrence and thereafter, they went to the Police Station for registering the case. Therefore, delay is explained and it is not an inordinate delay. Therefore, the learned counsel submission in this regard, is rejected.

27. As far as non appearance of the injury on the private part of the appellant and the victim is concerned, P.W.11 and 15 have clearly stated that there is no injury. But a careful reading of the evidence of the victim, previous statement of the victim, would prove the case of the prosecution beyond all reasonable doubts and hence non-presence of the injuries is not fatal to the case of the prosecution.

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28. The discrepancy regarding group of the blood and semen is concerned, it is not within the control of the victim or the defacto complainant. When it is collected and sent for lab, there will be so many possibilities and reasons that it might get tampered or it may occur in changing the sample or misplacement, or some other mistake might have occurred. Therefore, mere technicalities should not be allowed to stand in the way of administration of justice, unless the defence establish that the samples are purposefully tampered.

29. In this case, there is doubt with regard to semen sample sent for analysis to Forensic Lab since the semen sample is confirmed with blood group of the appellant as 'B positive'. But even as per the defence witnesses, the other person by name one Durai was also caught hold and beaten. This court also summoned the said Durai and directed to take necessary samples and accordingly, samples collected, analysed and report received stating that blood group is not 'O positive' but 'AB positive'. Therefore, the point is whether the sample collected from the inner wear of the victim was only taken and tested by the Forensic Department, is highly doubtful. Therefore, it is not

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the case of the prosecution that the victim girl become pregnant and DNA sent for analysis and it is different from that of the accused. But in this case, the victim girl states that after completing the occurrence, she felt that her chuttidar got wet and Police recovered it, but whether the same clothe was tested by forensic department or not, is highly doubtful. Therefore, on this sole ground, it is not fair to throw away entire case of the prosecution.

30. Defence evidence shows that it is not proved clearly whether the sample taken from the appellant and the sample found in the chuttidar taken from the victim were tested. Therefore, it is highly doubtful. Therefore, the evidence of the victim cannot be discarded and disbelieved. There are possibilities for mismatch, misplacement and tampering of sample and the analysed sample would have been a different one, for which the victim child cannot be faulted. Evidence of the victim girl shows that the appellant is the one who has committed the offence. Since the victim girl is below 12 years, offence falls under Section 5(m) of POCSO Act, punishable under Section 6 of POCSO Act.

31. It is settled proposition of law that any expert opinion is not

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conclusive proof. D.W.4 in his evidence submitted that Durai Murugan was also doubted on the day of occurrence. In order to remove the said doubt, this court summoned Durai and directed the Investigating Officer to send his blood sample for Forensic Lab analysis. Forensic report dated 25.03.2021 clearly shows that blood sample of Duraimurugan is 'AB positive' and therefore, in these circumstances, defence of the appellant is not acceptable.

32. In this case, statement of the victim girl is clear. Even before that, at the earliest possibility of time, victim clearly named the appellant and identified the appellant. Therefore, the trial court rightly appreciated the entire evidence and come to the conclusion that the appellant has committed the offence and presumption under Sections 29 and 30 of POCSO Act would come into play and the burden falls on the appellant/accused to rebut the same.

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33. A careful perusal of the entire records would go to show that as already stated above, in cases of this nature, no eye witness can be expected. The evidence of the sole witness can be taken into consideration unless there is strong reason to discard or disbelieve. Therefore, the settled proposition of law is that if the evidence of the sole witness is cogent, credible and trustworthy,

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conviction is permissible. In this case, there is no reason to disbelieve the evidence of the victim. This court also finds that the appellant has committed the offence since the appellant removed the custody of the victim from the lawful guardian and without their consent, for the purpose of illegal sexual assault. Therefore, he has committed the offence under Section 366 IPC.

34. Further the evidence of the victim girl clearly proved that the appellant threatened her not to reveal the occurrence to anybody. Therefore, the appellant has committed offence under Section 506(1) IPC.

35. According to the learned counsel for the appellant that the appellant had not committed penetrative sexual assault, and hence, Section 3 of POCSO Act would not be attracted. It is pertinent to note that while recording statement under Section 164 (5) of Cr.P.C., the victim child has stated that 'she and one brother set fire on coir and playing and that time, that one person has taken her to set off the fire and his name is Raja. He took her behind the Pillayar temple and there he made her to lie down and he also laid on her, and removed her inner wear and also removed his inner wear, and asked her to hug him and further told to leave from a place after a while. The accused also

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stated that if she disclose to anyone, he would kill her and thereafter, her skirt was wet'.

36. The victim child was examined as P.W.2 and during her evidence, also she has reiterated. During her evidence, she had stated that 'she and brother Selvakumar set fire on coir and playing and that time, the brother Raja came and told that he would set off fire and took her behind the Pillayar temple, near one Velangathan tree, there he made her to lie down and he also laid on her, and removed her inner wear and also removed his inner wear, and asked her to hug him and further told to leave from a place after a while. The accused also stated that if she disclose to anyone, he would kill her and thereafter, her skirt was wet'.

37. The doctor, who examined the victim child was examined as P.W.15. In his evidence, he had adduced that during medical examination, the victim child informed before him (P.W.15) that one Raja, aged about 35 years, told that he would set off the fire and took her to hidden place and there, he forcibly made her to lie down and thereafter, her skirt become wet. He has further stated that as per the reference made by the Dental Doctor, the age of

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the victim child would be 7 to 8 years and on examination, he found that her hymen was intact and there was no injury or scratches in her body, and also issued Ex.P8 certificate to that effect.

38. At this juncture, it would be useful to refer Sections 3 and 5 (m) of the POCSO Act.:-

"**3. Penetrative sexual assault**.-

A person is said to commit "penetrative sexual assault" if--

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

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

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5. Aggravated penetrative sexual assault.-

(m) whoever commits penetrative sexual assault on a child below twelve years;

39. A combined reading of the statement of the statement of the victim child (Ex.P16) and the evidence of the victim child (P.W.2) and the evidence of the doctor (P.W.15) and Ex.P5 certificate, it could be seen that the prosecution has not proved that the appellant has committed the offence under Section 3 of the POCSO Act. The counsel for the appellant even though pointed out certain discrepancies and contradictions, as far as the offence under POCSO Act, is concerned, the said discrepancies may not be the sole ground to disbelieve the entire case of the prosecution and discard the evidence of the victim. However, it is to be tested whether the offence committed by the appellant would fall under any other Section of the POCSO Act. The victim girl has clearly stated that the appellant removed the inner wear of the victim and he also removed his inner wear and he made her to lie down and he also laid on her and asked her to hug him and further told that leave from a place after a while. The accused also stated that if she disclose to anyone, he would kill her and thereafter, her skirt was wet'. At this juncture, it would be useful to refer

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Section 7, and 9 (m) and 10 of the POCSO Act.

7. Sexual Assault

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

9. Aggravated Sexual Assault

(m) whoever commits sexual assault on a child below twelve years; or

10. Punishment for aggravated sexual assault:

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

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It is to be noted that though the offence committed by the appellant would not fall under Sections 3 and 5(m) of the POCSO Act, [penetrative sexual assault and aggravated penetrative sexual assault], a perusal of the prosecution witnesses, and a careful reading of the language of the abovesaid provisions of

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law, the offence committed by the appellant would fall under Section 7 of the POCSO Act, which is punishable under Section 8 of the POCSO Act. However, it is to be noted that the victim child is aged about 9 years at the time of occurrence. With regard to age of the child, there is no doubt, as the doctor, based on radiology test, given the age of the child as between 7 to 8 years. As per Ex.P.18 - Birth Certificate, the age of the victim girl is aged about 9 years, and therefore, offence committed by the appellant falls under Section 9(m) of POCSO Act, which is punishable under Section 10 of the POCSO Act. In view of the above, this court finds that the appellant committed offence under section 9(m) of POCSO Act, which is punishable

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under Section 10 of POCSO Act.

40. In the light of the above discussion, this Court is of the view that the appellant has not committed the offence under Section 5 (m) of the POCSO Act. However, this Court finds that the appellant has committed the offence under Section 9 (m) of the POCSO Act, which is punishable under Section 10 of the POCSO Act. Therefore, sentence of imprisonment of 15 years for the offence under Section 5(m) of the Act is set aside and sentenced to undergo 7 years Rigorous Imprisonment for the offence punishable under Section 10 of the POCSO Act. Since the appellant removed the victim child from the custody of the natural guardian without their consent and committed sexual assault, Section 366 of IPC would attract and as such, the conviction and sentence passed by the learned Judge for the offence under Section 366 of IPC is confirmed. The victim child has clearly stated that, after the occurrence, the appellant threatened her not reveal to anybody, if reveals, he would take away her life. Therefore, the prosecution has proved for the offence under Section 506 (ii) of IPC.

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41. Accordingly, the conviction and sentence imposed by the learned Special Judge, for the offence under Section 5(m) punishable under Section 6 of the POCSO Act, is modified into Section 9 (m) of the POCSO Act, which is punishable under Section 10 of the POCSO Act, and convicted and sentenced to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs.5000/- [Rupees Five thousand only], in default, to undergo simple imprisonment for two years. The conviction and sentence passed under Sections 366 and 506 (ii) of IPC, are confirmed. Considering the facts and circumstances of the case, this Court modifies the sentence of imprisonment from concurrent into consecutive and the above said sentences for three offences would run consecutively.

42. In the result, the Criminal Appeal is dismissed with the above modification. Consequently, connected miscellaneous petition is closed.

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26.07.2021

Index : Yes/No
Internet : Yes/No

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To

1.The Inspector of Police
All Women Police Station
Perambalur District
(Crime No.04/2016)
2.The Sessions Judge, Mahila Court, Perambalur District.

3.The Superintendent, Central Prison, Trichy.

4.The Section Officer, Criminal Section, High Court, Madras.

5.The Public Prosecutor Office, High Court, Madras.

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P. VELMURUGAN, J.

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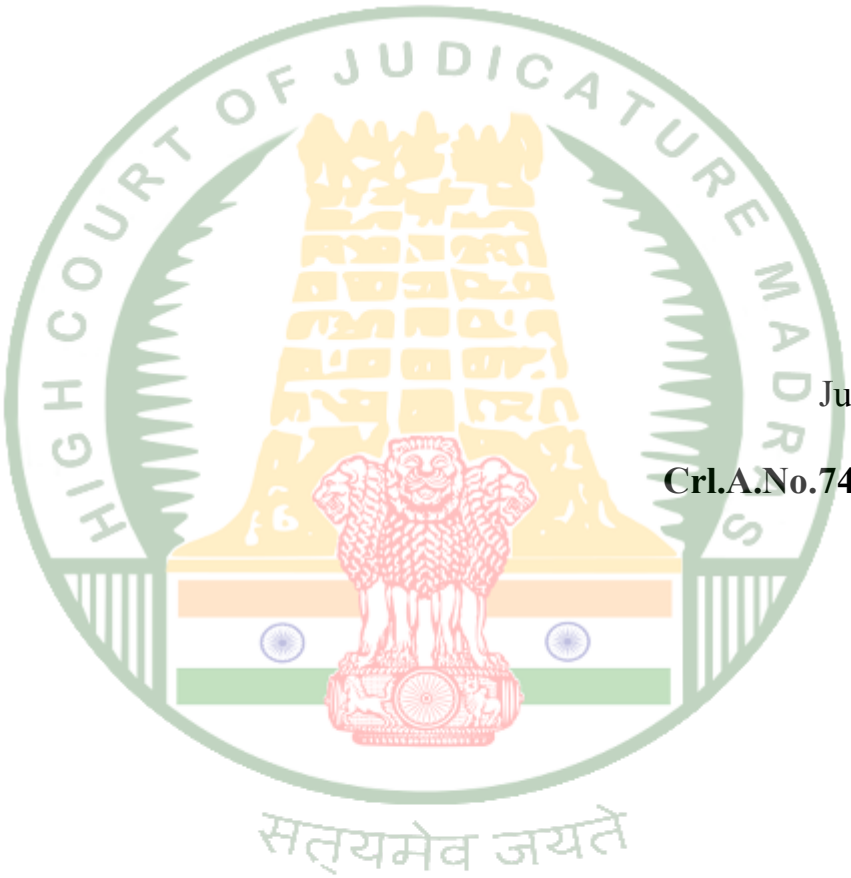

Judgment in

Crl.A.No.741 of 2019

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