IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.07.2022

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.A.No.146 of 2022

Azhagan @ Prabhu .. Appellant

Vs

State by the Inspector of Police
All Women Police Station
Kondalampatti, Salem District.
(Crime No.12 of 2013) .. Respondent

Prayer in Crl.A.No.428 of 2019: Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure to set aside the conviction and sentence imposed on the appellant through the judgment passed in Spl.S.C.No.23 of 2015 by the learned Sessions Judge, Mahila Court, Salem dated 29.06.2018 by allowing the appeal.

For Appellant	:	Mr.S.Jevakumar
For Respondent	:	Mr.S.Vinoth Kumar Government Advocate (Crl. Side)

ORDER

The appellant, being the sole accused in Spl.S.C.No.23 of 2015 on the file of the Mahalir Neethimandram, Salem, has filed an appeal aggrieved by the judgment dated 29.06.2018, in and by which, he is found to be guilty for the offence under Section 6 r/w 5(k) and 5(j)(ii) of the POCSO Act and under Section 506(i) of the Indian Penal Code.

2. On 19.12.2013, ***P.W.1,*** the victim, appeared before ***P.W.12***, the Sub-Inspector of Police, All Women Police Station, Kondalampatti and lodged a complaint to the effect that, she is aged about nineteen years and the appellant who is her neighbor, is aged about thirty years and she got acquainted with the appellant since she used to go to his house for watching television and about three months prior to the complaint, at about 10.00 PM in the night, the appellant called the victim for a physical relationship, when she refused, he forcibly pushed her down on the mud and since she attempted to shout, stuffed her mouth with a piece of cloth and had intercourse and since her periods stopped for the passed three months, when she was going to the medical shop to get some medicines to

abort the foetus, the appellant's sister confronted her and upon which, she confessed the entire issue to her father and thereafter, the complaint is being lodged.

3. On the strength of the said complaint, ***P.W.12*** registered a case in Cr.No.12 of 2013 for the offence under Section 376 and 506 (i) of the Indian Penal Code. Thereafter, ***P.W.13*** and ***P.W.14*** took up the case for investigation and during the investigation, since ***P.W.8,*** the school Headmaster, has given a certificate in ***Exhibit P.6***, stating the date of birth of the child as 19.12.1996 and as per the same, since the girl was less than eighteen years of age at the time of occurence, the offence was altered into one under POCSO Act and laid the final report, proposing the appellant guilty for the offences.

4. Based on the materials on record, the Special Court framed charges under Sections 363, 366 and 506 (i) of the Indian Penal Code and under Section 6 r/w 5(k) and 5(j) (ii) of the POCSO Act. Upon being questioned, the accused denied the charges and stood trial. In order to bring home the charges, the prosecution examined ***P.W.1*** to ***P.W.14*** and

marked ***Exhibit P.1*** to ***Exhibit P.25*** and also produced ***M.O.1***.

5. By way of cross examination on behalf of the defense, ***Exhibit D.1*** to ***Exhibit D.3*** were marked. Upon questioning about the material evidence and the incriminating circumstances on record under Section 313 of the Code of Criminal Procedure, the appellant again denied the same as false. Thereafter, no evidence was let in on behalf of the defence. The Trial Court thereafter, proceeded to hear learned Special Public Prosecutor on behalf of the prosecution and learned counsel for the accused. By the judgment dated 29.06.2018, while acquitting the accused in respect of other offences, found the accused guilty for offence under Section 506(i) of the Indian Penal Code and imposed punishment of rigorous imprisonment for a period of two years and fine of Rs.2,000/- and in failing of payment of fine, to undergo three months simple imprisonment and found the appellant guilty for the offence punishable under Section 6 of the POCSO Act and imposed rigorous imprisonment for a period of ten years and a fine of Rs.50,000/- and in default of payment of fine, simple imprisonment for a period of six months. Aggrieved by the same, the present appeal is laid before this Court.

6. Heard *Mr.S.Jevakumar,* learned counsel for the appellant and *Mr.S.Vinoth Kumar*, learned Government Advocate (Crl. Side) appearing on behalf of the prosecution.

7. Learned counsel for the appellant, taking this Court through the evidence on record, firstly would submit that, in this case, even as per the evidence of ***P.W.1***, the victim girl, she was born on 27.07.1995. In her chief evidence, she has categorically deposed that she was born only on 27.07.1995. When she was further cross examined by learned counsel for the accused, she has mentioned the said date of birth and has also specifically stated that the said date only finds place in all her credentials namely, the school records, the identity certificate on behalf of the Disabilities Department and in her horoscope. As a matter of fact, the identity certificate, issued by the Disabilities Department was marked as ***Exhibit D.1*** and her disability certificate is marked as ***Exhibit D.3***. Even the book given to her for granting various benefits under the Disability Schemes, is also marked as ***Exhibit D.2.*** She has categorically stated that she has obtained the birth certificate and she had even given her transfer

certificate to the police. Therefore, he would submit that, when ***P.W.1*** herself has clearly given her date of birth, which is reflected in some of the documents and when the prosecution has not treated her hostile to that effect and cross examined her, the evidence of ***P.W.1*** should be treated as proof for her own date of birth.

8. Learned counsel would further submit that, on the other hand, the prosecution even though had examined the Headmaster of the school as ***P.W.8,*** marked only the certificate given by ***P.W.8,*** which is neither the transfer certificate nor any actual school record. Therefore, in the absence of the same, when the transfer certificate is very much available in the school, when the prosecution has not categorically established that the date of birth is 19.02.1996 only, the version of the victim should be taken as correct and if the same is taken as correct, even for the offence alleged, the punishment would only be under Section pre-amended 376 of the Indian Penal code, as it stood before the amendment. He would further submit that it may be seen that in this case, the case of the prosecution, as if the offence was committed forcibly cannot be countenanced by wholesome reading of the complaint, the First Information Report, the earliest

statement given under Section 164 of the Cr.P.C and the evidence of the victim before the Court. Therefore, would submit that the victim did not disclose about the offence to anyone and revealed only when she was unable to hide the pregnancy and as a matter of fact, she has given birth to the child. He would further submit that the answer of the appellant / accused for the purpose of questioning about the sentence, he has clearly stated that the act of intercourse had taken place but, with consent and he had prayed for lesser amount of punishment. Therefore, relying upon all the above factors, learned counsel would submit that in this case, the said mitigating facts have to be taken into consideration while punishing the accused and prays for minimum punishment.

9. *Per contra,* learned Government Advocate (Crl. Side) would submit that this is a case, where the victim was not only a minor child but also a physically handicapped child. The appellant is a married man, having two children at the time of occurrence itself. He was thirty years of age at the time of occurrence. Therefore, the victim has categorically deposed that she was forced down on the mud and the intercourse had happened and even the appellant had stuffed her mouth with cloth so as to

prevent her from shouting and therefore, this is a case of grave offence of rape and therefore, he would submit that maximum punishment should be imposed on the appellant. He would submit that, the prosecution has to prove the age of the victim as per Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules. As per the Rule 12, the prosecution has to firstly see whether there is SSLC or 12th Std certificate. In the absence of it, it was for the prosecution to take the certificate from the school regarding the date of birth of the girl. The prosecution has taken ***Exhibit P.6*** certificate and therefore, the date of birth of the girl is duly proved as per the Rule and in this regard, even contra evidence of the victim would not come to the aid of the appellant. Therefore, he would submit that since the child was less than eighteen years of age and since the prosecution has proved that the occurrence happened after the coming into force of the POCSO Act, that is, on 23.10.2013, and the parentage of the child born to the victim has also been proved by marking the DNA report, in this regard, the prosecution has proved the offence to the hilt and there is nothing for this Court to interfere in this appeal.

10. I have considered the rival submissions made on behalf of both

side and perused the material records of this case.

11. The foremost question arising in this case is as to what is the date of birth of the victim child. In this regard, the procedure has already been laid out by the Hon'ble Supreme Court of India in ***Jarnail Singh vs State of Haryana***[1] and it is useful to extract paragraphs 22 and 23, which reads as follows:

> ***"22.*** *On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as "the 2007 Rule"). The aforestated 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:*
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> ***"12. Procedure to be followed in determination of age.*** *(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or*

1 2013 7 SCC 263

as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining

(a)(i) The matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) The date of birth certificate from the school

(other than a play school) first attended; and in the absence whereof;

(iii) The birth certificate given by a corporation or a municipal authority or a panchayat;

(b) And only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii)

or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis if any of the conclusive proof specified in sub-rule (3), the Court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the Court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

23. *Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. ...."*

12. Therefore, in this case, the first option namely, the matriculation or equivalent certificate is not available, since the child was a school drop out at 8th Std, the second option is the date of birth certificate from the school. It is in this context, the controversy in this case is at large. According to learned counsel for the accused, the prosecution ought to have produced the date of birth certificate from the school, which was very

much available in the form of the transfer certificate. A perusal of the cross examination of ***P.W.8*** also reveals that the transfer certificate given by the school when she joined the high-school from another middle-school after completion of 7th Std, is also available with the school. Since she was a drop out and did not continue her education, even as per ***P.W.8***, the transfer certificate of the girl is also available with the school. Therefore, the primary evidence is available and when the same is not marked. The extract given in the form of ***Exhibit P.6*** is disputed by the defence by providing ***D.1*** to **D.3** in which the date of birth is mentioned as 27.07.1995. The victim girl has categorically deposed that her date of birth is only 27.07.1995. The prosecution has not cross examined the victim, in that material aspect treating her hostile and that piece of evidence have been left as final. All through the investigation, right from the First Information Report and the complaint, the age of the victim is mentioned only as nineteen years, therefore, I am of the view that the prosecution has failed to categorically prove the age of the victim as less than eighteen years as on date of the occurrence, that is, on 23.10.2013. I am of the opinion that the evidence of the victim that the date of birth is 27.07.1995, can be accepted as her correct age and as on date of the occurrence, her

age is more than eighteen years and therefore, the alleged intercourse would be an offence under Section 376 of the Indian Penal code and cannot be one under Section 6 of the POCSO Act.

13. The victim has categorically deposed that she was forced into the act. Considering the fact that she was a physically handicapped girl and the time of occurrence and the manner of occurrence, I am unable to accept the contention of learned counsel for the accused that the act happened with the freewill and consent of the victim. Merely because the victim did not immediately complain to her parents or others and was keeping quiet and the fact that there was even chance of repeated assaults by itself will not absolve the appellant from the act and for the victim is not under the Trial in this case, but the appellant is the person who is. The victim behaves differently considering the circumstances in which she is. The victim girl is a physically handicapped girl and she can at least be said, to be forced into this act against her will if not by physical or brutal force and therefore, offence under Section 376 of the Indian Penal Code is made out. Therefore, I find the appellant guilty for the offence under Section 376 of the Indian Penal Code.

14. Now, considering the question of sentence, considering the overall facts and circumstances of the case and the age of the appellant, I am of the view that punishment of rigorous imprisonment for a period of seven years will be appropriate punishment.

15. I find that the Trial Court has directed the State Government to pay Rs.1,00,000/- as compensation to the victim child. Irrespective of the fact that whether the said amount of Rs.1,00,000/- is paid to the victim or not, in this case, the copy of this judgment shall be forwarded to the Tamil Nadu State Legal Services Authority and the Tamil Nadu State Legal Services Authority shall serve a notice to the victim. Upon such notice, the victim shall apply, as per law, for compensation under the relevant Victim Compensation Fund and the said Legal Services Authority shall fix the quantum and pay the maximum permissible compensation to the victim, since, she is now with a child and she is also a physically challenged girl. The Legal Services Authority is also entitled to take into account the sum of Rs.1,00,000/-, if already paid and accordingly adjust the sum with the total sum payable.

16. Apart from the above, over and out of the fine amount paid by the accused, as ordered by the Trial court, a sum of Rs.50,000/- is also directed to be paid as compensation to the victim child.

17. In view of my above findings, this criminal appeal is partly allowed on the following terms:

(i) The judgment of the learned Magalir Neethimandram, Salem dated 29.06.2018 in S.C.No.23 of 2015 is set aside, inasmuch as the accused is found guilty for the offence under Section 6 r/w Sections 5(k) and 5(j)(ii) of the POCSO Act and the conviction is modified as one under Section 376 of the Indian Penal Code;

(ii) For the offence under Section 376 of the Indian Penal Code, the appellant is imposed with punishment of rigorous imprisonment for a period of seven years and a fine of Rs.50,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of six months;

(iii) The other finding of guilty in respect of Section 506(1) of the Indian Penal Code and the sentence thereof, are upheld.

(iv) The accused is entitled to adjust the fine already paid and out of the fine amount already paid, immediately a sum of Rs.50,000/- shall be paid out as compensation to the victim without any formal application on her part, but by identification by the respondent police in this regard.

(v) The accused is also entitled to count the period of imprisonment already undergone by him.

(vi) The Government of Tamil Nadu shall also pay the compensation amount of Rs.1,00,000/- as ordered by the Trial Court.

18. The Tamil Nadu Legal Services Authority shall issue notice to

P.W.1 and ***P.W.1***, upon such notice, is entitled to make such application for compensation under all or any of the available Victim compensation Schemes and the Legal Services Authority shall determine the quantum of compensation payable to the victim in accordance with law and if already a sum of Rs.1,00,000/-, as directed by the Trial Court, is paid to the victim, then the said sum alone can be taken into account.

19. The sentence of the appellant shall run concurrently.

Index: yes/no 27**.07.2022**
Speaking order/Non-speaking order

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To

1. The Inspector of Police
   All Women Police Station
   Kondalampatti, Salem District.
   (Crime No.12 of 2013)

2. The Sessions Judge, Mahila Court, Salem.

3. The Public Prosecutor, High Court of Madras.

D.BHARATHA CHAKRAVARTHY. J.,

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Crl.A.No.146 of 2022

27.07.2022