IN THE HIGH COURT OF JUDICIATURE AT MADRAS

Reserved on : 22.03.2021

Pronounced on : 02.07.2021

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Criminal Appeal No.861 of 2019

Prema,
W/o.Premkumar .. Appellant / Informant

versus

1.The State rep. by,
The Inspector of Police,
Vaduvur Police Station,
Vaduvur, Thiruvarur District. .. Respondent - 1 /
(Crime No.223 of 2017) Complainant

2.S.Prakash,
S/o.Saminathan .. Respondent - 2 / Accused

Prayer: Criminal Appeal filed under Section 372 of the Code of Criminal Procedure, to set aside the judgment of acquittal passed by the learned Sessions Judge [Fast Track Mahila Court], Thiruvarur in Spl.S.C.No.21 of 2017 dated 27.09.2018.

For Appellant : M/s.Deepika Murali
For Respondent No.1 : Mrs.T.P.Savitha
Government Advocate (Crl.Side)
For Respondent No.2 : Mr.S.Paneer Selvam

JUDGMENT

Aggrieved over the judgment dated 27.09.2018 passed by the learned Sessions Judge [Fast Track Mahila Court], Thiruvarur in Spl.S.C.No.21 of 2017, the appellant, who is the *de facto* complainant in the above referred case has filed this Criminal Appeal, praying to set aside the judgment of acquittal and for convicting the second respondent for the offence punishable under Section 10 of POCSO Act.

2. Originally, the respondent Police has registered a case against the second respondent / accused in Crime No.223 of 2017 for an offence punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 [hereinafter called as "POCSO Act"]. After investigation, they laid a charge sheet against the second respondent before the learned Sessions Judge [Fast Track Mahila Court], Thiruvarur. Since the offence charged against the second respondent was against

woman, especially a minor child falls under the POCSO Act, the learned Sessions Judge, had taken the case on file in Spl.S.C.No.21 of 2017 and framed the charge against the second respondent.

3. After trial, on 27.09.2018, the learned Sessions Judge found not guilty of the second respondent for the offence under Section 10 of POCSO Act and thereby, acquitted him. Challenging the said judgment of acquittal passed by the learned Sessions Judge, the appellant / *de facto* complainant has filed the present appeal before this Court.

4. Heard the learned counsel appearing on either side and perused the materials available on record.

5. The learned counsel appearing for the appellant would submit that the learned trial Judge acquitted the appellant on the main ground that the medical evidence does not support the fact that the victim child was sexually assaulted and presumption under Section 29 of the POCSO Act cannot be invoked and there was a delay in lodging the

complaint and there is no sufficient explanation for the said delay or not satisfactorily explained. The evidence of PW.1 / mother of the victim child, is not trustworthy and therefore, the trial Court found that the prosecution failed to substantiate the case of the prosecution and prove the charge framed against the second respondent. The finding of the trial Court is completely erroneous and that, in cases of aggravated sexual assault on a child, the support of medical evidence is not always a necessity.

6. A plain reading of Section 7 of POCSO Act, would reveal that touching of the vagina, penis, anus or breast of the child with sexual intent would amount to a sexual assault. In such incidents, in most cases, there would be no medical evidence proving a sexual assault and therefore, medical evidence would not always reveal a sexual assault.

7. Further, the learned counsel submitted that the Hon'ble Supreme Court repeatedly held that the medical evidence is not always a necessity to prove cases of sexual assault. The absence of visible injuries

or marks would not mean that the victim child was not subjected to sexual assault committed by the accused. Medical evidence is only for the purpose of corroboration, where required, and medical report by itself has to be weighed on the surrounding facts and circumstances. He has relied on the judgment of the Hon'ble Supreme Court in the case of ***STATE OF RAJASTHAN vs. N.K.*** reported in ***MANU/SC/0218/2000***. Further, he relied on the judgment of the Hon'ble Supreme Court in the case of ***MADAN GOPAL KAKKAD vs. NAVAL DUBEY*** reported in ***(1992) 3 SCC 204***. Therefore, the learned trial Judge has failed to consider the said decisions of the Hon'ble Supreme Court and erroneously held that the medical evidence was not supported the case of the prosecution.

8. Further, he would submit that in the instant case, the aggravated sexual assault took place on 17.09.2017 and the medical report of P.W.10 was issued on 21.09.2017. The medical examination was conducted after 5 days from the date of occurrence and hence the medical evidence would have vanished during the intervening period.

9. As per the provisions of Section 29 of the POCSO Act, once a person is prosecuted for the offences under Sections 3, 5 7 and 9 of the POCSO Act, there is a statutory presumption that the accused has committed the offence. Therefore, the accused has not rebutted the presumption under Section 29 of the POCSO Act.

10. The learned trial Judge has failed to appreciate the evidence of the prosecution and wrongly applied the provisions of law and erroneously acquitted the second respondent stating that the prosecution has failed to prove its case. Though the victim girl was produced before the learned Magistrate for recording evidence under Section 164 Cr.P.C., at the time of occurrence, the victim girl was only $2^{3}/_{4}$ years and one cannot expect such an infant to speak about the occurrence even she did not understand, what is good touch and bad touch and the intention of the culprit is to be seen in this type of offence. Therefore, the trial Judge has failed to understand the scope and object of the POCSO Act.

11. Further, the learned trial Judge has given much importance to the delay in lodging the FIR. Though the alleged occurrence took place on 17.09.2017, the FIR was filed on 19.09.2017 and therefore, there was a delay in filing the FIR and there is no proper explanation for the delay in filing the FIR. The learned trial Judge has failed to consider the decisions of the Hon'ble Supreme Court in various cases, recognised that in cases of sexual offence, there could be a delay in filing the FIR, due to various reasons and such delay by itself cannot be a ground to throw the case of the prosecution. He has placed reliance on the decision of the Hon'ble Supreme Court in the case of ***STATE OF RAJASTHAN*** stated *supra* and therefore, the trial Judge has failed to appreciate the oral and documentary evidence and acquitted the second respondent, which warrants interference of this Court.

12. As far as appreciation of the evidence is concerned, the trial Court held that the evidence of P.W.1 cannot be relied on for the fact that the second respondent / accused had brought the child holding her hand, as there was no corroboration of the fact and failed to

appreciate that the corroboration is not always required if there are circumstances to dispense with such requirement.

13. P.W.1 and P.W.6 have categorically stated in their evidence that they have removed the inner garment of the victim child and found that semen-like white colour liquid present on the victim child's vaginal region. But the trial Court has misinterpreted a typographical error and attributed a wrong meaning i.e. it took the tamil meaning of "semman". Further, the trial Court has failed to note that the victim child was then admitted to the Hospital due to aggravated pain in her private part and fever. There could be no other explanation to this but for the indisputable fact that the accused sexually assaulted the victim child.

14. The learned counsel further would submit that the cases like this, it is not necessary that there should be independent confirmation of every material circumstance in the sense that independent evidence in the case, apart from the testimony of the

complainant or the accomplice, should itself be sufficient to sustain conviction.

15. Further, in the instant case, the appellant rightly after the incident called her husband / P.W.2 and informed him and also informed her mother through P.W.7. P.W.7 has testified in her cross-examination that she heard the appellant's mother cried loudly, when the appellant called her on 17.09.2017 and P.W.7 also visited the victim child in the Hospital. In these circumstances, there is sufficient circumstantial evidence to corroborate the fact that there was sexual assault on the victim child and that the victim child was subsequently admitted to Hospital due to prolonged fever and trauma.

16. Per contra, the second respondent / accused led no evidence whatsoever to rebut the presumption under Section 29 of the POCSO Act and in considering the totality of the facts and circumstances, there is sufficient evidence beyond reasonable doubt to convict the accused. The impugned judgment has however error by failing to consider the above evidences and nor properly appreciated the

witness statements in a mechanical manner to acquit the accused.

17. Further, he would submit that the learned trial Judge has failed to appreciate the fact that the victim child was an infant, aged about $2^{3}/_{4}$ years at the time of occurrence and incapable to speak. Otherwise, perpetrators like the accused would always go scot-free by claiming that the statement of the victim, is absent. Therefore, the judgment of the trial Court is liable to be set aside and the appeal may be allowed.

18. The learned counsel appearing for the second respondent / accused would submit that the learned trial Judge has rightly and carefully analysed the evidence of prosecution witnesses, namely, P.W.1 to P.W.10 and P.W.14 and heard the arguments of both sides and acquitted the second respondent / accused for the offence under Section 10 of the POCSO Act.

19. The evidence of P.W.1 reveals that she had 2 daughters and 1 son. First daughter was aged about 4 years and another daughter, the victim child was about $2^{3}/_{4}$ years. When she was going to a tiffin shop to buy idlies with her children, they were crying, at that time, the accused was sitting in his courtyard and noticed the victim child was weeping and asked P.W.1 to leave the children in his custody. After she returned, she did not find the victim child. She searched and called by using her pet name "Chinnakutty, Chinnakutty". The accused was bringing the child by holding her hand, P.W.1, did not ask the accused about other children. There was no members in her house also. P.W.1 did not speak about other children and there is no evidence about the whereabouts of other 2 children.

20. As per the evidence of P.W.1, there was inimical terms between the accused and her husband / P.W.2, who did not speak with the accused. P.W.2 had motive in respect of Kubeta, which was parking by the accused in front of his house, P.W.2 objected to park the vehicle. Other family members of P.W.2 did not speak with the family members

of the accused, except P.W.1. Further, the accused has given life to P.W.1 to go to her parent's house, P.W.2 suspected with this aspect. In these circumstances, how P.W.1 left the children in his custody and how the accused also asked her to leave the children in his custody. Except P.W.1, no witness says that they have seen the victim child, was in the custody of the accused. The owner of the idly shop was not examined as to whether P.W.1 came to his shop to buy idlies on that day. The prosecution has failed to prove that the victim child, was in the custody of the accused on that day.

21. P.W.1 has further stated in Ex.P.1 that after seeing P.W.1, the victim child was coming with weeping and showing her private part and told that Prakash uncle kissed in her private part and asked P.W.1 to remove the inner garment, due to pain. After removing the inner garment, P.W.1 noticed the liquid, which was reddish in colour. It is contrary to P.W.1's evidence that, she has stated that she noticed the liquid, which was white in colour. After the incident, the victim child got fever, which was also not stated in her evidence.

22. P.W.14 / the Investigating Officer has stated that P.W.1 did not say during investigation that she saw the liquid, which was reddish in colour. Further, she says P.W.1 did not produce the inner garment of the victim child, which was wearing on that day. P.W.1 has further stated that she informed this incident to her husband / P.W.2 over phone. P.W.2 called P.W.4 and asked her to see his daughter. P.W.4 came to her house and the victim child told her about the incident, it is not stated so by P.W.1 in her evidence. Further, there were contradictions between the evidence of P.W.1, P.W.2 and P.W.4.

23. The evidence of P.W.4, did not support the case of the prosecution and she says that she was not examined by the Police. She did not know anything about the case. Though P.W.1 stated in her evidence that she has gone to the house of Rajathi and told the incident, but she did not say the same in Ex.P.1. The said Rajathi was also not examined by the prosecution. The said Rajathi and P.W.1 are neighbours and independent witnesses, were available on that day, but the

prosecution has not examined the said Rajathi, which is fatal to the case of the prosecution.

24. Further, P.W.1 stated in her evidence that she informed the incident to the family members of her parents on 18.09.2017 and they came to her house and took them to their village, but P.W.1 did not say so in Ex.P.1. P.W.3, the elder sister of P.W.1 did not say in her evidence that she and her mother went to P.W.1's house on 18.09.2017 and took them to their house, it is contrary to the evidence of P.W.1.

25. Therefore, the material contradictions and the prosecution has failed to substantiate its case, the medical evidence also not supported the case of the prosecution and there are delay in filing the complaint and the trial Court has rightly considered the oral and documentary evidence, acquitted the second respondent / accused and hence, there is no merit in the appeal and the appeal is liable to be dismissed.

26. The learned Government Advocate (Crl. Side) appearing for the first respondent / State would submit that at the time of occurrence, the age of the victim child was only 2 years and 9 months. P.W.1 is the mother of the victim girl. At the time of occurrence, P.W.1 took the victim child along with her to buy idlies and at that time, the second respondent / accused was sitting in his courtyard and P.W.1 left the victim child for buying idlies. When she returned back, she did not find the victim child, the place where she left her and she called the victim child by calling her nick name as "Chinnakutty" and at that time, the second respondent / accused took the victim child by holding her hand and she took the victim child to the house and the victim child made a complaint that she was having pain and was suffering from fever and enquired the victim child, she told her that the second respondent kissed on her private part and P.W.1 removed the inner garment of the victim child and found that there was white colour fluid like semen present on the victim child's vaginal region.

27. While recording evidence before the trial Court, the word "semen" in English was typed as "semman" in Tamil. Taking advantage of that mistake committed by the typist, during trial, the defence has taken the main defence that P.W.1 has stated in her evidence that she found "semman colour" which means red soil colour, but, P.W.1 says before the trial Court as white colour fluid, the word "semen" has misinterpreted as "semman" and they typed as "semman". Therefore, mere technicalities should not be allowed to stand in the way of administration of justice.

28. The case of the prosecution is that on 17.09.2017 at about 9.00am., P.W.1 / mother of the victim child, when she was going to a tiffin shop to buy idlies along with her children, the victim child, who was aged about 2 years 9 months, was weeping, at that time, the second

respondent was sitting in his courtyard and on seeing the victim child, he asked P.W.1 to leave the victim child with him and he will take care of her. Accordingly, P.W.1 also left the victim child with the accused and went to tiffin shop. When she returned home, after half an hour, the victim child did not return to home and therefore, she searched her whereabouts by calling her nick name as "Chinnakutty". When she loudly called her, the second respondent bringing the victim child by holding her hand. After that, since the victim child refused to take food, was weeping, told her mother that she was having pain in her private part and asked P.W.1 to remove her inner garment. P.W.1 removed the inner garment of the victim child and noticed white colour liquid like semen was present on her private part. At that time, her husband / P.W.2 was out of outstation and she informed him over phone and he told P.W.1 to report the same to neighbours and she also informed to P.W.4 and P.W.7 and P.W.2 told P.W.1 not to quarrel with the accused.

29. Thereafter, on the next day, P.W.1 left for grazing the goats along with the victim child and she reported her mother that she

was having pain on her body and P.W.1 reported to her mother, family members of her mother and thereafter, she went to her mother's house along with the victim child. Subsequently, the victim child was taken to Hospital and was getting treatment and the same was informed to the Police and the Police went to the Hospital where she was getting treatment and recorded the statement of P.W.1, since the victim child was only $2^{3}/_{4}$ years old, she could not speak, the respondent Police registered the case and investigated the matter.

30. After completing the investigation, the respondent Police registered the case for the offence punishable under Section 10 of POCSO Act. Since the offence against a minor child, charge sheet was filed before the Special Court. The learned Sessions Judge [Fast Track Mahila Court], Thiruvarur, taking charge sheet on file and after completing the formalities, framed the charge against the appellant for the offence punishable under Section 10 of POCSO Act.

31. During trial, in order to prove the case of the prosecution, on the side of the prosecution, as many as 14 witnesses were examined as P.W.1 to P.W.14 and 9 documents were exhibited as Exs.P.1 to 9 and no material object was marked.

32. After completing the evidence of the prosecution witnesses, when incriminating circumstances culled out from the evidenc of prosecution witnesses were put before the appellant / accused by questioning under Section 313 of Cr.P.C, he denied the same as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was let in.

33. The learned Sessions Judge, on completion of the trial and after hearing the arguments advanced on either side, found that the prosecution has failed to prove the case beyond reasonable doubt and therefore, acquitted the second respondent / accused. Challenging the same, the mother of the victim child / *de facto* complainant has filed the

present Appeal before this Court.

34. Since this Court, being an appellate Court is a final Court of fact finding in this case and it has to independently re-appreciate the entire evidence and give independent finding, accordingly, this Court also thoroughly gone into the entire materials and re-appreciated the entire evidence and has given this finding.

35. Out of the 14 witnesses examined, on the side of the prosecution, the mother of the victim child was examined as P.W.1 and the father of the victim child was examined as P.W.2. Since the victim girl was only 2 years 9 months, one cannot expect the infant to speak about the occurrence even she did not understand what is happening and therefore, the victim child was not examined. In this case, the mother of the victim child was examined as P.W.1, she narrated the incident and she is not an eye-witness for the occurrence, she is circumstantial witness and she clearly spoken that on the date of occurrence, when she took the victim child to a tiffin shop to get idlies, at that time, since the victim

child was weeping, the second respondent / accused was sitting in his courtyard, which was on the way to the tiffin shop and he voluntarily asked P.W.1 to leave the victim child with him, believing that P.W.1 left the victim child with the second respondent / accused and left to the tiffin shop to get idlies for her children. When she returned, she did not find her and she came to the house. After some time, she realised that the victim child did not come to the house, she called her by nick name "Chinnakutty". Since there was no response, she raised her voice and called her loudly, at that time, the second respondent / accused took the victim child by holding her hand.

36. Thereafter, the victim child complained the matter to P.W.1, she was having pain and shows the place to P.W.1, after removing the inner garment of the victim child, P.W.1 saw white colour liquid like semen found in the private part of the victim child. Immediately, she informed the same to her husband / P.W.2, since he was not in station, he asked P.W.1 to inform the same to neighbours and also not to quarrel with the second respondent. Accordingly, P.W.1 also

informed to P.W.4 and P.W.6, the neighbours. On the next day, P.W.1 left for grazing the goats, at that time, the victim child complained of paining in her private part and she also suffering from fever and therefore, she was taken to the Hospital.

37. The victim child was admitted in the Hospital and Accident Register of the victim child was marked as Ex.P.3. On seeing Ex.P.3, it reveals that the victim child was brought to the Hospital, on 19.09.2017, at about 10.25a.m., the Doctor made entry in that regarding alleged sexual assault happened on 17.09.2017, at 9.00a.m. which was committed by a known person. The said statement was given by her mother when the victim child was admitted in the Hospital, which was the earliest version given by the mother of the victim child to the Doctor who is the independent witness.

38. Later, the victim child was produced before the learned Judicial Magistrate for recording the statement under Section 164 Cr.P.C. on 22.09.2017, at about 4.00p.m. and the victim child was produced by

the mother of the victim child / P.W.1. The learned Judicial Magistrate recorded that she asked the victim child about her name and age, for which, the victim child has not replied anything and she was so silent, due to fear. Therefore, the learned Magistrate has not recorded any statement from the victim child. The report was marked as Ex.P.8, which clearly reveals that the age of the victim child, was only $2^{3}/_{4}$ years and therefore, one cannot expect the infant to speak freely to a 3rd person that too a stranger to her.

39. On reading of evidence of P.W.1 has clearly shows that what had happened to the victim child. Though the alleged occurrence is said to have taken place on 17.09.2017, the complaint was lodged on 19.09.2017, after 2 days, the cases like this, that too in the village, no mother would rush to the Police Station immediately soon after the occurrence. Naturally, the mother would think about the future of the child and reputation of the family. The evidence of P.W.2 / father of the victim child clearly reveals that P.W.1 informed P.W.2, since he was far away from the place, he asked P.W.1 to inform the same to neighbours

and accordingly, she informed to P.W.4, however, P.W.4 not supported the case of the prosecution.

40. Normally, in the village, if the accused family and the victim family are in the same locality and the neighbours would not support any of the families and they reluctant to say anything against anyone of the families and support one of the families. Therefore, it is not surprise that P.W.4 has not supported the case of the prosecution. However, Ex.P.3 / Accident Register itself reveals that the victim child was brought to the Hospital, on the next day, on 19.09.2017, i.e. 2 days later and the Doctor, who attended the victim child also made entry in the Accident Register, the case history given by the mother of the victim child. Subsequently, the victim child was produced before the learned Judicial Magistrate, 2 days later i.e. on 22.09.2017 and he also stated that the victim child could not speak freely to a 3rd person that too a stranger to her.

41. Even though, there is a delay in filing the FIR, cases like this, the delay is not fatal to the case of the prosecution. As stated earlier, the victim child was only $2^{3}/_{4}$ years and infant, one cannot expect the victim child to speak everything, even she did not understand what is happening to her and she felt pain, she complained the pain to her mother and the mother explained the same what was stated by the victim child that the Prakash uncle / second respondent had something and which can only say by the victim child, we cannot expect more than that and immediately, she informed to her husband / P.W.2.

42. P.W.1 also did not know after the incident what she has to do so, since her husband was not in station and therefore, when the victim child complained the pain and suffering from fever, she brought her to the Hospital and from there, she informed to the Police and then the Police registered the case and investigated the matter. Therefore, the delay in filing the case, is not fatal to the case of the prosecution. Since the victim child is an infant, the non-examination of the victim child, is

not fatal to the case of the prosecution. The main contention raised by the defence as well as the observations by the learned trial Judge is P.W.1, in her evidence, stated that there was liquid in the colour of red soil, however, P.W.1 has clearly stated that there was a white colour fluid. While recording the statement of P.W.1, Ex.P.1, the police official has written as white colour fluid like semen. The Typist, who was in the Court typed as “semman” instead of typing “semen”, which became wrongly interpreted as colour of red soil.

43. Ex.P.1 / the complaint, which was recorded by the Police has clearly shows that "semen”, P.W.1 had stated that white colour fluid drop from the private part of the victim child and subsequently, it was misinterpreted the word “semen” in English as “semman” i.e. Red soil in Tamil and therefore, it clearly shows that Ex.P.1, the first available document says that there was a white colour fluid drop from the private part of the victim child and also the inner garment of the victim child.

44. An illiterate lady, she did not state as "seman", it is the person, who written the complaint has mentioned as white colour liquid like semen from the private part of the victim child, for which, she cannot be faulted and the mother of the victim child has narrated the events and therefore, the complainant statement recorded by P.W.14 mentioned as "seman" and the Typist typed as "semman" instead of seman. Hence, there is dangerous in writing an English word in Tamil, which is totally turn the case of the prosecution and admittedly, the defence side has taken flimsy defence that P.W.1 has stated as "semman colour" Therefore, this Court while appreciating the evidence has to see the entire materials and the evidence of P.W.10 / the Doctor, who conducted medical examination on the victim child on 23.09.2017 has spoken that the victim child was admitted in the Hospital on 19.09.2017 and one Dr.Soundarya, who made entry in the Accident Register Ex.P.3 and P.W.10 has stated that the victim child, aged about 2 years 9 months, was sexually assaulted by the neighbour and therefore the same was entered in Ex.P3.

45. In this case, there is no eye-witness and the victim child was only $2^{3}/_{4}$ years, since she had a pain and the victim child has clearly stated before her mother that the second respondent committed the offence and she also informed the Doctor when she admitted in the Hospital, after 2 days. As already explained, cases like this, mere delay in filing the FIR, is not fatal to the case of the prosecution and also the reason for delay though specifically not given, one cannot expect the family members of the victim child would rush to the Police immediately soon after the occurrence. Therefore, the learned trial Judge has failed to consider the facts that the victim child was not even completed 3 years and she may not even deliver a word by speaking and in that situation, the Court cannot expect the victim child to speak about the occurrence before a stranger to her.

46. Under these circumstances, the non-examination of the independent witness, is not fatal to the case of the prosecution. The medical reports also not supported, since because the Doctor examined

the victim child, after 5 days of occurrence. Therefore, from the evidence of P.W.1, Ex.P.1 / complaint, Ex.P.3 / Accident Register and Ex.P.8 / the report of the learned Judicial Magistrate under Section 164 Cr.P.C., this Court finds that the prosecution has proved its case beyond reasonable doubt. Though the prosecution not examined the Doctor, one who made entry in the Accident Register and medical examination was not conducted on the victim child on the date of admission and the mere defect in investigation is not fatal to the case of the prosecution and the second respondent / accused cannot be acquitted on the sole ground of defective investigation.

47. In this case, the Investigating Officer should have taken little bit much effort, but, they failed to take that effort, but P.W.1 is an illiterate helpless lady and even she did not know what has to do otherwise. P.W.1 would have immediately taken the victim child either to the Hospital or would have rushed to the Police or she would have produced the victim child to the Social Welfare Officer or would have produced the inner garment of the victim child for test. But,

unfortunately, in our country, the illiterate women have no knowledge about how to proceed further, cases like this, to whom, they have to approach and where they have to approach. Therefore, the culprits are escaping for the technical reason and unfortunately Investigation Wing also not upto the standard and due to either defect in investigation or fault in investigation, most of the cases, the culprits are escaping.

48. The trial Courts also, sometimes not applying their minds and exercising their inherent or discretionary power either to direct for reinvestigation or summon relevant records and only they are searching for proof beyond reasonable doubt and taking advantage of the flaw in the investigation, giving the benefit of doubt to the accused. But cases like this, we cannot give much importance to the technical ground of proof. In this case, the victim is an infant, aged below 3 years, she is not in a position to speak out the charges of crimes or atrocities, under such circumstances, the mother has spoken and no corroboration can be expected, since because the innocence of the mother and the inability of the victim child, the culprit cannot be escaped from the clutches of law.

49. Now, this Court has come to the conclusion that the second respondent / accused has committed the offence and the Court had drawn inference and it is for the accused to explain the same and rebut the presumption. Though it is settled proposition of law that the accused need not come into the witness box and prove his innocence, however, this is not an offence comes under IPC, this is the offence comes under the POCSO Act. The POCSO Act itself designed in such a way that once the prosecution proved the offence and the Court drawn the presumption under Section 29 of the POCSO Act, it is for the accused to rebut the presumption, but, in this case, this Court finds that the second respondent / accused has committed the offence as charged against him and draw presumption under Section 29 of the POCSO Act and also finds that the second respondent / accused has not rebutted the presumption. Therefore, this Court finds that the accused committed the offence under Section 9 of POCSO Act which is punishable under Section 10 of the Act and the judgment of acquittal passed by the trial Court is liable to be set aside.

50. Accordingly, this Criminal Appeal is allowed. The

judgment of acquittal passed by the learned Sessions Judge [Fast Track Mahila Court], Thiruvarur in Spl.S.C.No.21 of 2017 dated 27.09.2018, is hereby set aside.

51. Since it is a reversal judgment and it is necessary to direct the second respondent / accused to appear before this Court for asking question of sentence to be imposed against him. Accordingly, the second respondent is directed to appear before this Court on 09.07.2021.

02.07.2021

Speaking Order/Non Speaking Order
Index : Yes / No
Internet : Yes
sri/cgi

To

1.The Sessions Judge [Fast Track Mahila Court], Thiruvarur.

2. The Inspector of Police, Vaduvur Police Station,
Vaduvur, Thiruvarur District.

3.The Public Prosecutor, High Court, Madras.

P.VELMURUGAN, J.,

sri

Pre-delivery Judgment made in Criminal Appeal No.861 of 2019

02.07.2021

Crl.A.No.861 of 2019

P.VELMURUGAN, J.

In compliance with the order of this Court dated 02.07.2021, the second respondent/accused appeared before this Court and he has been questioned the sentence to be imposed on him. The second respondent/accused stated that he is no way connected with this case and a false case has been foisted against him.

2 In this case, the victim was aged about 2 and 3/4 years, and not completed the age three years, at the time of occurrence. Since the second respondent/accused has committed aggravated sexual assault on the victim, the offence committed by the second respondent/accused falls under Section 9(m) of the POCSO Act, which is punishable under Section 10 of the POCSO Act.

3 At this juncture, it would be useful to refer Sections 9(m) and 10 of the POCSO Act.

Section 9. Aggravated Sexual Assault___

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

Section 10. *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.'*

4 This Court is of the considered view that the second respondent / accused is found guilty for the offence under Section 9 (m) of the POCSO Act, which is punishable under Section 10 of the POCSO Act and hence, the second respondent/accused is convicted and sentenced him to undergo 5 years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo Rigorous Imprisonment for a further period of one year. **The period of detention, if any, already undergone by him is ordered to be set off under Section 428 of Cr.P.C.**

5 In the result, the Judgment passed by the learned Sessions Judge, Thiruvarur (Fast Track Mahila Court), in Special S.C.No.21 of 2017, dated 27.09.2018 is hereby set aside, and this Criminal Appeal is allowed. **The Secretary to the Government, Government of Tamil Nadu, Fort St.Geroge, Chennai is directed to provide compensation of a sum of Rs.1,00,000/- [Rupees One Lakh only]** to the victim child, forthwith.

09.07.2021

Note : (i) Registry is directed to issue copy of the judgment by today itself **(i.e, on 09.07.2021).**

(ii) The first respondent/Police is directed to secure the custody of the accused to execute the period of imprisonment.

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Copy to: (1) The Superintendent of Jail,
Central Prison, Tiruchi.

(2) The Secretary to the Government,
Government of Tamil Nadu,Fort St. George,
Chennai - 600 009