

CRL.A(MD).No. 78 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : **15.06.2023**

PRONOUNCED ON : **08.09.2023**

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

CRL.A(MD).No. 78 of 2023
and
CrI.M.P.(MD)No.1396 of 2023

Mariappan : Appellant / Sole Accused

Vs.

The Inspector of Police,
All Women Police Station,
Rajapalayam, Virudhunagar District.
(Crime No.27 / 2018) : Respondent / complainant

PRAYER:- Criminal Appeal filed under Section 374 Cr.P.C., to call for the records pertaining to the judgment dated 14.12.2022, in Spl.S.C.No.6 of 2020, on the file of the Sessions Judge (Special Court of POCSO Act Cases), Virudhunagar District at Srivilliputhur and to set aside the same.

For Appellant : Mr.K.Muthumalai

For Respondent : Mr.R.Meenakshi Sundaram
Additional Public Prosecutor



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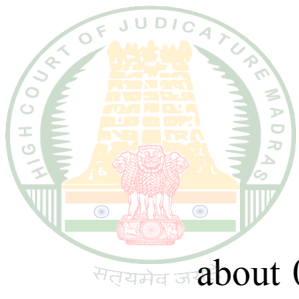
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JUDGMENT

The Criminal Appeal is directed against the judgment of conviction passed in Spl.S.C.No.6 of 2020 dated 14.12.2022 on the file of the Special Court for POCSO Act cases, Srivilliputhur.

2. The Inspector of Police, All Women Police Station, Rajapalayam, Virudhunagar District has laid the final report against the accused alleging the following facts:

The accused is a fruit vendor, in a push cart near Thalavoipuram opticals. The defacto complainant is the mother of the victim girl. The victim girl, who has studied upto 5th std., is aged 13 years 13 days on the date of occurrence, her date of birth is 04.03.2005. The victim's brother was in the habit of receiving fruits for free from the accused. On 17.03.2018, when the brother and sister went to the push cart of the accused, he gave them fruits free of costs and informed that he would give more fruits if they come to his home on that night. The victim and her brother without informing their parents went to the house of the accused at

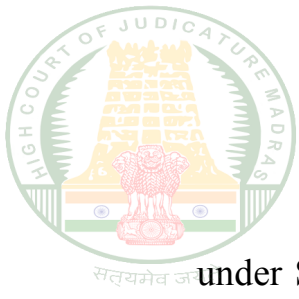


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about 09.00p.m.. On their entry, the accused locked his house from inside and gave mango juice laced with brandy, both drank the same and when they requested the accused to allow them to go to their home, the accused had beaten the victim girl on her thighs and right hand. Due to the intoxication both had then slept off, the accused had thereafter removed the dress of the victim girl and committed penetrative sexual assault. When the victim girl woke up by 05.00a.m., the accused gave Rs.500/- and directed them not to disclose the occurrence and in case of disclosure, he threatened to kill them and their family members. Such incidents continued to happen thrice and the accused committed penetrative sexual assault, therefore, the accused has committed the offences punishable under Sections 366, 328 and 506(ii) I.P.C., and under Section 5(l) r/w 6 of POCSO Act.

3. After the receipt of the final report, the case was taken on file in Spl.S.C.No.6 of 2020, on the file of the Special Court for POCSO Act cases, Srivilliputhur. After appearance of the accused, copies of records were furnished to him under Section 207 Cr.P.C., on free of cost. The learned Sessions Judge, on perusal of records and on hearing both the sides, being satisfied that there existed a *prima facie* case against the accused, framed charges under Sections 366, 328 and 506(i) I.P.C., and



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under Section 5(l) r/w 6 of POCSO Act and the same were read over and explained to him and on being questioned, the accused denied the charges and pleaded not guilty.

4. The prosecution, in order to prove its case, had examined 14 witnesses as P.W.1 to P.W.14 and exhibited 24 documents as Ex.P.1 to Ex.P.24.

5. The case of the prosecution emerging from the evidence adduced on their side, in brief is as follows:

(a) P.W.2 is the victim girl. P.W.1 is the mother, P.W.5 is the father, P.W.3 is the brother and P.W.4 is the sister of the victim girl. They are all residing at Thalavoipuram. P.W.1 and P.W.5 had two daughters and three sons. P.W.2 had studied upto 5th std. The accused is selling fruits in a push cart nearby Thalavoipuram opticals. Four years prior to her examination before the trial Court, she went to the accused shop along with her brother-P.W.3. The accused gave them fruits free of costs. He informed that he would give more fruits if they visit his house on that night. Accordingly, P.W.2 and P.W.3 went to the house of the accused. The accused gave juice

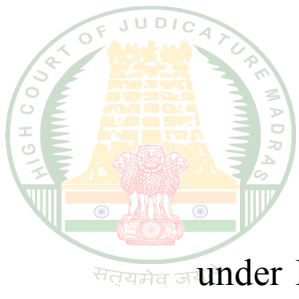


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by mixing some tablets. After taking the drink, both of them have become unconscious. Next day morning, when P.W.2 woke up, she found that her dresses were missing and she experienced pain all over her body and also found sticky fluid on her body. The accused gave Rs.500/- to P.W.2 and threatened her not to disclose the occurrence to anybody. Both of them had spent Rs.500/- for food. By offering fruits, the accused had directed P.W.2 and P.W.3 to visit his home and committed sexual intercourse with her. Thereafter, P.W.2 went to Tuticorin and worked in a fish company along with her maternal aunt. Since P.W.2 had complained of stomach pain, she was sent to her parents. P.W.1 had taken P.W.2 to Manjolai hospital. On 22.08.2018, P.W.1 and P.W.4 had taken P.W.2 to Jameen Kollamkondan Government hospital and after examination, the medical officer – P.W.10 informed that P.W.2 was pregnant. When P.W.2 was enquired, she informed that she was not aware of the person responsible for the same. On 01.12.2018, P.W.2 gave birth to a female child at Kollamkondan Government hospital.

(b) P.W.10 – Medical Officer attached to the Jameen Kollamkondan Primary Health Centre has sent a letter to the Child Welfare Committee

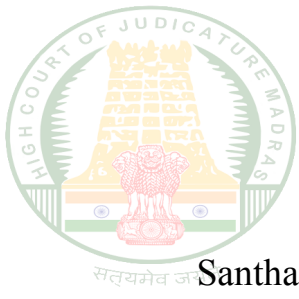


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under Ex.P.8 requesting them to take care of the victim girl and the child born to her, as the victim girl has not completed 18 years of age.

(c) On 06.12.2018, P.W.1 went to the All Women Police Station, Rajapalayam and gave a typed complaint under Ex.P.1. P.W.11, the then Sub-Inspector of Police, received the complaint from P.W.1 and registered a case in Cr.No.27 of 2018 under Sections 5(l), 5(j)(ii) r/w Section 6 of POCSO Act and prepared the F.I.R., under Ex.P.10. P.W.13 – the then Inspector of Police, on receipt of the copy of F.I.R., had taken up the case for investigation, visited MMSS Home and examined the victim girl and recorded her statement. P.W.13 has then examined the medical officers and nurses, who had attended the victim girl. She gave a request to the Judicial Magistrate, Rajapalayam for recording the statements of the witnesses under Section 164 Cr.P.C. Accordingly, the statement under Section 164 Cr.P.C., came to be recorded. Thereafter, she examined the said witnesses and recorded their further statements. On the basis of the statement taken from P.W.2, P.W.13 visited the occurrence place at Thalavoipuram and prepared an observation Mahazar under Ex.P.7 and drew a rough sketch under Ex.P.13 in the presence of P.W.6 – Muthiah and one Bagavathy. P.W.13 along with the Sub-Inspector of Police – P.W.7 and Constables made search for the accused and the accused who was standing near the



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Santhanamariamman temple, Jeeva Nagar, on seeing the police, has attempted to run away from that place and got a slip in the cement floor, fell down and sustained injuries on his mouth. She arrested the accused and recorded the voluntary confession statement given by the accused in the presence of the police and brought the accused to the station.

(d) Thereafter, the accused was taken to Government hospital, Rajapalayam for treatment. After examining some of the witnesses, she sent an alteration report under Ex.P.14 altering the case from 5(l), 5(j)(ii) and 6 of POCSO Act to 294(b) and 506(i) I.P.C., r/w 5(l), 5(j)(ii) and 6 of POCSO Act. On 12.12.2018, the accused was sent to remand. P.W.13 has then taken steps to get FTA card from Regional Forensic Laboratory, Madurai and sent a requisition to the jurisdictional Court for getting the blood samples for conducting DNA test. P.W.13 has also taken steps to record the statements under Section 164 Cr.P.C., from P.W.3 and P.W.5. After receiving the DNA report, she examined the Scientific Assistant and recorded her statement. P.W.13 has examined P.W.2 again on 14.02.2019 and recorded her statement. She examined other witnesses and recorded their statements also. Since P.W.13 was transferred, she had handed over the case file to her successor P.W.14.



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(e) P.W.14 has taken up the case for further investigation. On 26.08.2019, she examined the witnesses and since the witnesses have reiterated the same version given to P.W.13, she has not recorded their statements again. P.W.14 has then examined the victim girl, her parents, her brother and sister and recorded their further statements. On 09.09.2019, she has submitted an alteration report under Ex.P.24 altering the case for the offences under Sections 366, 328, 506(i) I.P.C., r/w Section 5(l) r/w 6 of POCSO Act. After completing the investigation, P.W.14 has laid the final report on 18.12.2019 against the accused for the offences under Sections 366, 328, 506(i) I.P.C., r/w Section 5(l) r/w 6 of POCSO Act.

(f) P.W.7 is the owner of the house in which the accused was residing earlier. P.W.8 is the neighbour of the accused and she deposed that when the accused was taking one boy and a girl to his house, she enquired and the accused informed that they were his relatives. P.W.12, the Headmaster of Aa.Mu.Arunachala Nadar Elementary School, Jeeva Nagar, Thalavoipuram deposed that P.W.2 had studied upto 5th std., and that her date of birth as recorded in her record sheet is 04.03.2005. With the examination of P.W.14, the prosecution has closed their side evidence.

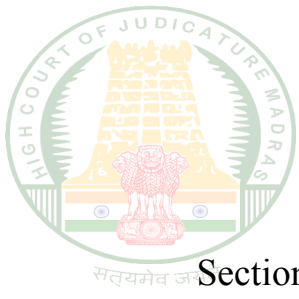


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(g) When the accused was examined under Section 313(1) (b) of Cr.P.C., with regard to incriminating aspects against him, he denied the evidence as false and further stated that a false case has been foisted against him. The accused has further stated that he is not having any defence evidence.

6. The learned Sessions Judge, upon considering the evidence adduced and on hearing the arguments of both sides, has passed the impugned judgment, on 14.12.2022, convicting the accused for the offences under Sections 363 and 506(i) I.P.C., and under Section 5(l) r/w 6 of POCSO Act and sentenced him to undergo 3 years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo 3 months Simple Imprisonment for the offence under Section 363 I.P.C., sentenced him to undergo 2 years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo 3 months Simple Imprisonment for the offence under Section 506(i) I.P.C., and sentenced him to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.10,000/-, in default to undergo 2 years Simple Imprisonment for the offence under Section 5(l) r/w 6 of POCSO Act and acquitted the accused for the offence under



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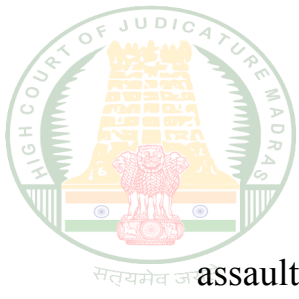
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Section 328 I.P.C. Aggrieved by the said conviction and sentence, the accused has preferred the appeal, now under consideration.

7. Heard Mr.K.Muthumalai, learned Counsel appearing for the appellant and Mr.R.Meenakshi Sundaram, learned Additional Public Prosecutor appearing for the State and perused the materials placed on record.

8. Whether the impugned judgment dated 14.12.2022, made in Spl.S.C.No.6 of 2020 on the file of the Special Court for POCSO Act cass, Srivilliputhur is liable to be set aside ?, is the point for consideration.

9. The trial Court, though charged the accused for the offences under Sections 363, 328, 506(i) I.P.C., and under Section 5(l) r/w 6 of POCSO Act, while acquitting the accused for the offence under Section 328 I.P.C., convicted him for the offences 363, 506(i) I.P.C., and under Section 5(l) r/w 6 of POCSO Act. The main charges against the appellant/accused are that on 17.03.2018, he directed P.W.2 and P.W.3 to come to his house at about 09.00p.m., promising to offer more fruits and when both of them visited his house as directed by him, he committed penetrative sexual



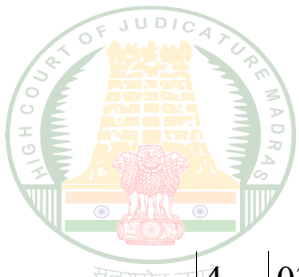
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assault on the victim girl – P.W.2, that the accused had also threatened the victim girl that he would kill her and family if the occurrence is revealed to others and he again committed penetrative sexual assault on the victim girl thrice.

10. At the outset, it is necessary to refer the events chronologically:

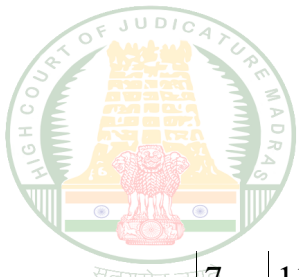
Sl. No.	Date	Events
1	22.08.2018	Since the victim girl – P.W.2 had complained about the stomach pain and on noticing the enlargement of her stomach, P.W.1 – mother and P.W.4 sister had taken P.W. 2 to Manjulai hospital.
2	23.08.2018	As directed by Manjulai hospital, P.W.2 was taken to Jameen Kollamkondan Government hospital - on examination, P.W.10- Medical Officer found that the victim girl was pregnant.
3	01.12.2018	P.W.2 was admitted in Jameen Kollamkondan Government Hospital as she was complaining labour pain; - P.W.9 Doctor and her team of nurses attended the victim girl; - P.W.2 gave birth to a female child at about 09.40a.m., on that day.



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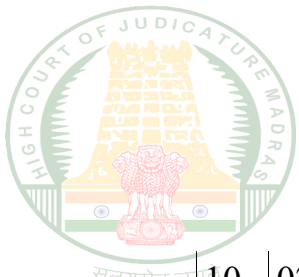
4	03.12.2018	<p>P.W.10 sent a letter (signed by sendor on 05.12.2018) to Child Welfare Committee, Virudhunagar, under Ex.P.8, informing that a minor girl has given birth to a female child and requesting them to take the victim girl;</p> <ul style="list-style-type: none">- P.W.2 was discharged from the hospital under Ex.P.9 discharge summary;- P.W.2 was produced before the Child Welfare Committee, Virudhunagar on that day.
5	06.12.2018	<p>P.W.1 visited All Women Police Station, Rajapalayam and gave a typed complaint under Ex.P.1;</p> <ul style="list-style-type: none">- P.W.11 – Sub Inspector of Police received the complaint and registered the F.I.R., in Cr.No.27 of 2018 under Ex.P.10 for the alleged offences under Section 5(l), 5(j)(ii) and 6 of POCSO Act against the <u>unknown person</u>;- P.W.13 – Inspector of Police has taken up the investigation and examined P.W.2 – victim girl at MMSS Home and recorded her statement under Section 161 Cr.P.C. - examined P.W.1 and P.W.4 and recorded their statements.
6	10.12.2018	<p>As per the requisition of P.W.13, statements under Section 164 Cr.p.C., from P.W.1, P.W.2 and P.W.4 were recorded by the Judicial Magistrate, Rajapalayam under Exs.P.2, P.3 and P.5 respectively;</p> <ul style="list-style-type: none">- According to the Investigating Officers (P.W.13 and P.W.14), P.W.1, P.W.2 and P.W.4 have not named the person responsible for the pregnancy of P.W.2 in their statements recorded under Section 164 Cr.P.C.,



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7	11.12.2018	<p>P.W.13 examined P.W.2 – victim girl for third time;</p> <ul style="list-style-type: none">- According to P.W.13, P.W.2 has named and identified the accused as the person responsible for her pregnancy;- As per the statement of the victim girl, the case was altered and alteration report under Ex.P.14 came to be filed for the offence under Sections 294(b) and 506(i) I.P.C., r/w 5(l), 5(j)(ii) and 6 of POCSO Act, against the accused;- As per the statemen given by P.W.2, P.W.13 visited the occurrence place – ie., the house of the accused and prepared Ex.P.7 – observation mahazar and Ex.P.13 – rough sketch;- when the police team was searching for the accused, he was found available near Santhanamariamman temple, Jeeva Nagar, Thalavoipuram and on seeing the police team, the accused has attempted to run away from that place, but got a slip, fell down and sustained injuries on his mouth;- P.W.13 arrested the accused at 12.30 hours and recorded the confession statement given by him and thereafter brought to the station;- the accused was produced before the Rajapalayam Government Hospital for the injuries sustained by him;- the accused was produced before the jurisdictional Court and was remanded to judicial custody.
8	04.01.2019	<p>As per the requisition of the Investigating Officer and the directions issued by the jurisdictional court, the accused, the victim girl and the child born to the victim girl were produced before the Government head quarters hospital, Virudhunagar for collecting sample for DNA test.</p>
9	30.01.2019	<p>As per the requisition made by P.W.13, statements under Section 164 Cr.P.C., came to be recorded from P.W.3-brother and P.W.5-father by the Judicial Magistrate.</p>



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10	02.02.2019	DNA test report dated 29.01.2019 under Ex.P.19 along four enclosures under Exs.P.20 to P.23 were received by the Fast Track Mahila Court, Srivilliputhur wherein it was found that the accused is excluded from the paternity of the female child.
11	14.02.2019	P.W.13 examined the victim girl for fourth time.
12	26.08.2019	P.W.14 has taken the case for further investigation from P.W.13 and examined P.W.2 and recorded her statement.
13	09.09.2019	P.W.14 sent an alteration report altering the offences to under Sections 366, 328 and 506(i) I.P.C., r/w Section 5(l) and 6 of POCSO Act under Ex.P.24.
14	30.11.2019	P.W.14 examined P.W.2 – victim girl and recorded her statement.
15	26.12.2019	Final report dated 18.12.2019 came to be filed before the POCSO Court.

11. Considering the above, it is pertinent to note that though the family of P.W.2 came to know about her pregnancy on 23.08.2018, the complaint was lodged on 06.12.2018 after the birth of female child on 01.12.2018 and that though the F.I.R., came to be registered on 06.12.2018, the accused was identified only on 11.12.2018.

12. Before entering into further discussion, it's the time to consider the legal position. The Protection of Children from Sexual Offences Act (POCSO) came to be enacted with an intention to protect children from



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offences of sexual assault, sexual harassment and pornography. Sections 29 and 30 have been inserted in the POCSO Act in order to provide better teeth to the prosecution, empowering the Court to draw presumption of guilt against the accused. As already pointed out, this is a case with an allegation of commission of offence under Section 5(1) of POCSO Act, which is punishable under Section 6 of the said Act. In a case under POCSO Act, the prosecution is required to prove some foundational facts, not beyond reasonable doubt, but by preponderance of probability. If the prosecution is not able to prove the foundational facts of the offence based on a preponderance of probability, the presumption under Section 29 of the Act cannot be invoked against the accused.

13. At this juncture, it is necessary to refer Section 29 of POCSO Act, which deals with reverse burden and the same reads as follows :

“Section 29: Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”



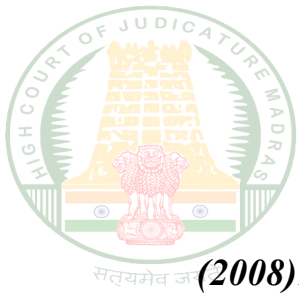
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14. The above section begins with the words “Where a person is prosecuted” covering a complete exercise on the part of prosecution to prove the charge framed against the accused during the course of trial, which is rebuttable subject to developing a strong defence contrary to that established by prosecution till cross examination by defence.

15. It is settled law that establishing the fundamental facts by leading evidence by prosecution, is an essential pre-requisite before the statutory presumption under Section 29 of POCSO Act is triggered so as to shift the onus on the accused to prove the contrary. It is pertinent to note that no presumption is absolute and every presumption is rebuttable. It cannot be stated that the presumption under Section 29 of POCSO Act, is absolute and it would come into operation only when the prosecution is able to establish the facts that would form foundation, for the presumption under Section 29 of POCSO Act to operate.

16. The Hon'ble Supreme Court, while considering the validity of Section 35 and 54 of NDPS Act, which also deals with the reverse burden in the case of *Noor Aga Vs. State of Punjab and another* reported in



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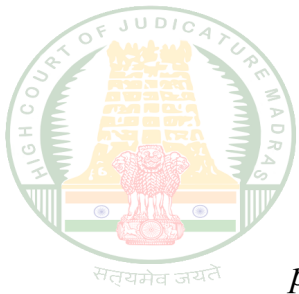
(2008)16 SCC 417 upheld the constitutional validity of the above said provisions and also reiterated that more serious the offence, the stricter is the degree of proof to convict the accused. The Hon'ble Apex Court has further held that an initial burden would lie upon the prosecution and only when it stands satisfied, the legal burden would shift upon the accused and declared the legal position that notwithstanding the concept of reverse burden envisaged by Sections 35 and 54 of NDPS Act, the burden upon the prosecution to prove the foundational fact would still exist.

17. The Gauhati High Court in *Bhupen Kalita Vs State of Assam* reported in (2020)3 GLT 403, after referring to various judgments, has listed out the principles applicable in POCSO Act for drawing presumption under Sections 29 and 30 of the Act and the same are extracted hereunder:

“71. In the light of the discussions above, the following legal positions emerge in any proceeding under the POCSO Act.

(A) The prosecution has to prove the foundational facts of the offence charged against the accused, not based on proof beyond reasonable doubt, but on the basis of preponderance of probability.

(B) Accordingly, if the prosecution is not able to prove the foundational facts of the offence based on preponderance of



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probability, the presumption under Section 29 of the Act cannot be invoked against the accused.

(C) If the prosecution is successful in establishing the foundational facts and the presumption is raised against the accused, the accused can rebut the same either by discrediting the prosecution witnesses through cross-examination or by adducing his own evidence to demonstrate that the prosecution case is improbable based on the principle of preponderance of probability. However, if it relates to absence of culpable mental state, the accused has to prove the absence of such culpable mental state beyond reasonable doubt as provided under Section 30(2) of the Act.

(D) However, because of legal presumption against the accused, it may not suffice by merely trying to discredit the evidence of the prosecution through cross-examination, and the defence may be required to adduce evidence to dismantle the legal presumption against him and prove that he is not guilty. The accused would be expected to come forward with more positive evidence to establish his innocence to negate the presumption of guilt.”

18. Considering the facts and circumstances of the case and the allegations raised by the prosecution, the foundational facts which the prosecution would be required to prove are:



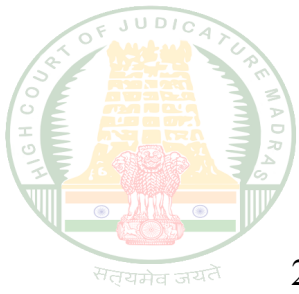
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- (i) that the victim was a child below 18 years of age;
- (ii) that the victim was subjected to penetrative sexual assault; and
- (iii) that the accused was the one who committed penetrative sexual assault on the victim.

19. If the basic and foundational facts of the prosecution case is laid by adducing legally admissible evidence, then the burden shifts on to the accused to rebut it, by establishing from the evidence on record that he did not commit the offence or that no such incident occurred or that the victim is not a child.

20. In the case on hand, the learned trial Judge, by relying on the evidence of P.W.12 – Headmaster and the documents produced under Exs.P.11 and P.12, has come to a decision that the victim girl was born on 04.03.2005 and as such, she was aged 13 years and 13 days on the date of occurrence. The appellant/accused has not specifically disputed the finding of the trial Court with regard to the age of the victim girl.



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21. Now turning to the second foundational fact that the victim was subjected to penetrative sexual assault, the same got proved by her pregnancy and the subsequent birth of the child.

22. Now coming to the third and main foundational fact as to whether the prosecution has *prima facie* proved that the accused had committed penetrative sexual assault on the victim girl. The prosecution, claiming to be the direct witness, has cited and examined P.W.2 – victim girl and her brother P.W.3. P.W.2, in her evidence would say that 4 years prior to her examination before the trial Court, she went to the fruits shop of the accused along with her brother and the accused gave them fruits free of costs, promised that he would give them more fruits if they come to his home on that night and accordingly, P.W.2 and P.W.3 went to the house of the accused, that the accused gave fruit juice by mixing some tablets and after drinking the juice, she became unconscious, that when she woke up the next day, she found that she was not wearing any dress, that she experienced pain through out her body and also found some sticky fluids all over her body, that the accused had informed her that he had intercourse with her on that night, that the accused threatened that he would kill her, if she discloses the occurrence to others, that she woke her brother and left



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that place and that the accused by offering fruits made her to visit his home and had sexual intercourse several times.

23. P.W.3 in his evidence before the trial Court would say that he was studying 4th std., at the time of occurrence, that the accused used to give fruits free of costs, that on amavasai day of Panguni month, when their mother went to the temple, the accused had given fruits to them, when they passed the shop of the accused, that he directed P.W.3 to bring her sister to his house on that night for offering more fruits to them, that both of them went to the house of the accused as directed, that the accused gave yellow colour juice to both of them and locked the house, that P.W.2 woke him up at about 05.00a.m., next day, that the accused had given Rs.500/- to P.W.2 and threatened that he would kill her, if she discloses the occurrence to others and that as per the invitation of the accused, he had taken P.W.2 thrice to the house of the accused. It is pertinent to note that P.W.2 and P.W.3 had neither furnished the particulars about the date and timing nor did they narrate anything about the subsequent occurrences.

24. As rightly pointed out by the learned Counsel for the accused, P.W.2 in her evidence would say that subsequent to the first occurrence, the

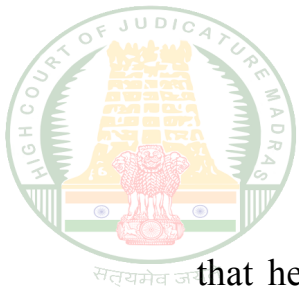


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accused had intercourse with her several times. But P.W.3 would say that subsequent to the first occurrence, he had taken her sister thrice to the house of the accused. But during the cross-examination of P.W.3, a suggestion was made that he had never visited the house of the accused, he would reply that he went to the house of the accused once and that he went to his house previous night and returned on the next day. P.W.3, in his cross-examination, would say that he had studied 4th std., 7 years prior to his examination before the trial Court. Admittedly, P.W.3 was examined before the trial Court on 14.09.2021 and if 7 years period is calculated, the concerned year would be 2014. But according to the prosecution, the first incident was allegedly occurred on 17.03.2018.

25. As rightly contended by the learned Counsel for the appellant, P.W.2 in her evidence before the trial Court, has nowhere whispered that she had witnessed the commission of penetrative sexual assault by the accused on her or she was conscious enough to understand that such an offence was committed on her. As already pointed out, even according to her, after consuming the juice given by the accused, she has become unconscious and when she woke up on the next day morning, she found



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that her dresses were removed and that she experienced bodily pain and also found some sticky fluids on her body.

26. No doubt, P.W.2, in her evidence, would say that the accused had informed her that he had intercourse with her on that night. No doubt, such admission of the accused immediately after the occurrence can be admitted in evidence as *res gestae* as contemplated under Section 6 of the Indian Evidence Act. But the same was allegedly spoken by the accused to the victim. Moreover, the victim has not disclosed the same to her mother or others immediately or subsequently. It is pertinent to note that though P.W.2 was examined under Section 164 Cr.P.C., she has not chosen to disclose the same before the Judicial Magistrate. As already pointed out, the accused was named and identified only on 11.02.2018 and that too after the birth of her child and registration of the case. The other direct witness P.W.3 has nowhere stated that he had witnessed the occurrence.

27. Section 53 of the Indian Evidence Act provides that in criminal cases, good character of the accused is relevant. Section 53-A of the Indian Evidence Act contemplates that evidence of character or previous sexual experience of the victim is not relevant in the cases relating to rape



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and assault of women and an attempt to commit such offences. As per Section 54 of the Indian Evidence Act, the evidence pertaining to the fact that the accused had a bad character is irrelevant and there are two exceptions to the above section, wherein the evidence with regard to the bad character of the accused can be given, in order to rebut the evidence given by the accused of his good character and the second is that the character itself is a fact in issue. When the accused has taken a specific defence, that he was falsely implicated in the above case, the evidence with regard to the conduct and character of the victim becomes relevant. P.W.1 – victim's mother and P.W.4- victim's sister have given categorical evidence that P.W.2 and P.W.3 were known to drink and had drinking habits and that though they were warned, they never cared or heeded the same.

28. It is pertinent to say that P.W.2 has stated that the accused alone was responsible for her pregnancy and it is not her case that she was subjected to penetrative sexual assault by some other person also. As already pointed out, P.W.2 and the child born to her and the accused were subjected to DNA analysis test and a report was received, concluding that



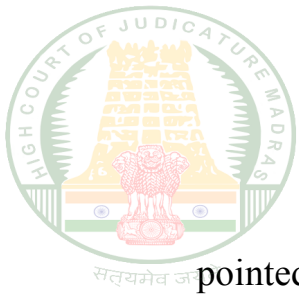
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the accused is excluded from being the father of the female child born to the victim girl.

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29. Hon'ble Supreme Court, in a catena of decisions, has reiterated the legal position that the result of DNA test is almost scientifically accurate method or procedure for ascertaining the paternity of the child and the disputing parent. In the present case, between the accused and the child born to the victim girl. Admittedly, neither the prosecution nor the defacto complainant has specifically disputed the DNA test and the results therefor. Considering the above, the contention of the victim girl that the accused was responsible for her pregnancy has been completely belied by the DNA result.

30. The case of the prosecution can be approached in two ways and the first one, according to them is, the accused had committed penetrative sexual assault on the victim girl thrice and the second one, is that the victim girl has become pregnant through the accused. The contention that the victim girl became pregnant through the accused has already been belied by the DNA report. As already pointed out, P.W.2 and P.W.3 had never deposed that they witnessed the occurrence. No doubt, as rightly

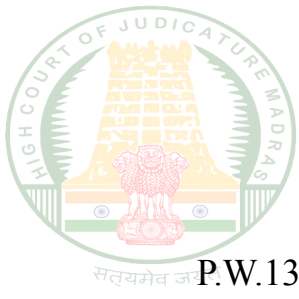


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pointed out by the learned Additional Public Prosecutor, even assuming that there is no direct witness, the Court is duty bound to consider the circumstantial evidence. But it is settled law that in case of circumstantial evidence, the chain has to be complete in all respects to indicate guilt of the accused.

31. The learned Additional Public Prosecutor would submit that P.W.8 – neighbour of the accused would depose that she saw the accused bringing a girl and a boy to his house at about 09.00p.m., in the night and when she had enquired, the accused informed that they were his relatives. In cross-examination, P.W.8 would say that the owner of the accused is residing in the next house, that she is residing two houses away from the accused's house and that there was a distance of one kilometre between the house of the accused and the house of P.W.2.

32. P.W.13 – Investigating Officer, in her Ex.P.7 – observation mahazar and Ex.P.13 – rough sketch has mentioned about the houses situated near the house of the accused and other physical features. As rightly pointed out by the learned Counsel for the appellant, the house of P.W.8 does not find place in the observation mahazar and rough sketch.



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P.W.13 has not noted as to where the house of P.W.8 was located.

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Moreover P.W.8 in her cross-examination would say that the accused had brought the victim girl to his house on 17.03.2018, but immediately she would say that the date, month and the year was informed by her husband, that she had forgotten the date and that she was deposing as stated by her husband. Considering the above, no value can be given to the evidence of P.W.8.

33. Except the above, the prosecution has not produced any evidence to *prima facie* establish that P.W.2 and P.W.3 had visited the house of the accused and that the accused had committed penetrative sexual assault on the victim girl. Since the prosecution has miserably failed to prove the third and main foundational fact, the question of drawing presumption under Section 29 of the POCSO Act never arises.

34. As already pointed out, though P.W.1's family came to know about the pregnancy of the victim girl as early as on 23.08.2018, they never chosen to lodge a complaint to the police nor did they take any steps to find out the person responsible for P.W.2's pregnancy. It is pertinent to note that the entire family of P.W.1 to P.W.5 had kept silent till 06.12.2018



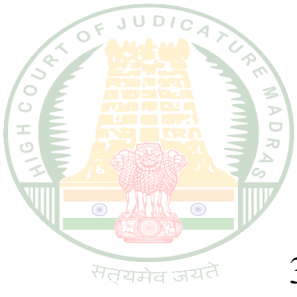
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for about more than three months. As rightly pointed out by the learned Counsel for the appellant, even after the birth of the child on 01.12.2018, they have not chosen to lodge any complaint at that time and since the Kollamkondan Government hospital authorities have sent an intimation to Child Welfare Committee and the police and the victim girl was sent to MMSS home at the instance of the Child Welfare Committee, Virudhunagar, P.W.1, with no other option, has lodged the complaint. P.W. 1, P.W.4 and P.W.5 have not offered any reason or explanation for the inordinate delay.

35. P.W.2 – victim girl in her cross-examination would admit that though she was not having drunken habit, she used to take SR paste.

36. P.W.1, in her evidence, would say, “பாதிக்கப்பட்ட சிறுமியும் P.W.3 – ம் எனது பராமரிப்பில் லேலை என்றால் சரிதான். அவர்களை நான் வீட்டில் நேட்கள் என்று சொன்னாலும் எனது உபச்சை உட்கவில்கலை. பாதிக்கப்பட்ட சிறுமியும் P.W.3 – ம் சிறுவயது முதல அவர்களுக்கு குடிப்பழக்கம் உள்ளது என்றால் சரிதான்.”



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37. P.W.2 would say in her cross-examination,

“எனது தம்பி P.W.3 – ம் நானும் சின்ன வயதிலிருந்து எனது பெற்றார் ுபச்சைக் ுகட்காமல் நேந்து வந்துதாம் என்றால் சரிதான். நான் 5ம் வகுப்பு வரை நான் படித்தன். எனது பெற்றார் படிக்கச் சொன்னார்கள். நான் படிக்கவில்லை. நான் எனது பெற்றார் ுபச்சைக் ுகட்காமல் அடிக்கடி வீட்டை விட்டு வெளிய ுபாய்விடுவன் என்றால் சரிதான். நான் வீட்டில் தான் தட்குவன். துே சம்பந்தமாக எனது அக்கா தட்கமாரி மற்றும் அவரது கணவர் என்னைக் கண்டித்தார்கள் என்றால் சரிதான். எனது அக்காவின் கணவர் பாலகம்பிரமணியம் என்னைத் திருத்துவதற்காக கட்டிவைத்து அடித்தார் என்றால் சரிதான்.”

38. P.W.4 in her cross-examination would say,

“எனது தம்பி P.W.3 – ம் மற்றும் எனது தட்கை பாதிக்கப்பட்ட சிறுமி ஆகிய நேவரும் எனது பெற்றார் ுபச்சை ுகட்க மாட்டார்கள் என்றால் சரிதான். நானும் எனது தட்கைக்கு புத்திமதி சொன்னன் ஆனால் அவள் ுகட்கவில்லை. எனது தட்கை பாதிக்கப்பட்ட சிறுமிக்கும் எனது தம்பி P.W.3 – க்கும் சின்ன வயதிலிருந்து குடி படிக்கம் உள்ளது என்றால் சரிதான். துே சம்பந்தமாக நான் கண்டித்தன். ஆனால் அவர்கள் ுகட்கவில்லை.”

39. It is pertinent to mention that though P.W.1, P.W.2 and P.W.4

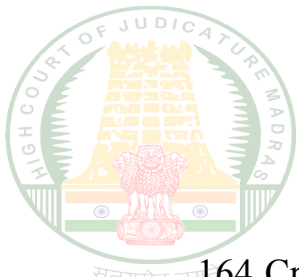


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were examined by the learned Magistrate under Section 164 Cr.P.C., they have not disclosed about the person responsible for P.W.2's pregnancy. As already pointed out, the entire statements recorded under Section 164 Cr.P.C., from P.W.1 to P.W.5 came to be marked as Exs.P.2 to P.6 respectively.

40. The Hon'ble Supreme Court in a suo motu Writ (Criminal) No.1 of 2017 has deprecated the practice of omni-bus marking of Section 164 Cr.P.C., statement of witness. The statement under Section 164 Cr.P.C., is not a substantial evidence, but the same can be used to corroborate or contradict the evidence of author recorded subsequently. It is pertinent to note that the relevant portion of such prior statements of living persons used for contradiction or corroboration under Section 145/157 of the [Evidence Act](#) deserves to be marked separately and specifically. Previously there was a practice in the criminal courts of marking the entire confession statement of the accused and after coming down heavily on the said practice by this Court, the same has been stopped. But the practice of marking the entire statements under Section 164 Cr.P.C., by the Criminal Courts is on the rise. It is high time for the criminal Courts to understand the scope and evidentiary value of the statement recorded under Section

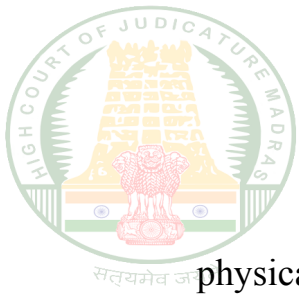


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164 Cr.P.C., and to stop the practice of marking the entire statements,.The
WEB COPY criminal court should permit the prosecution as well as defence, only to
mark the particular portion of the statement recorded under Section 164
Cr.P.C., either for corroboration or for contradiction.

41. The general rule that the statement recorded under Section 164 Cr.P.C., is not a substantive evidence, after amendment to the Code of Criminal Procedure in 2013, is now having an exception, as contemplated under Section 164(5-A) which states that if the maker of the statement is temporarily or permanently, mentally or physically disabled, the statement made by such a person shall be considered as substantive evidence by the trial Court and the maker of the statement need not be examined by chief, but can be subjected to cross-examination directly on the basis of the statement recorded under Section 164(5-A) of Cr.P.C.

42. It is pertinent to note that the newly inserted clause(a) of Sub-section 5-A of 164 Cr.P.C., is made applicable to the statement of the person against whom the sexual offences referred in that clause has been committed and that clause (b) states that a statement recorded under clause(a) of a person who is temporarily or permanently, mentally or



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physically disabled shall be considered a statement in lieu of examination-in-chief and that the maker of the statement can be cross-examined without the need for recording the chief examination at the time of trial.

43. Generally, the statement recorded under Section 164 Cr.P.C., cannot be considered or treated as the evidence of the maker of the statement, but as per the amended provision under Section 164(5-A), the statement recorded from a person against whom the sexual offence was committed, can be considered as their chief examination provided the conditions stated in Section 164(5-A)(a) and (b) are satisfied. Even if the conditions under Section 164(5-A) Cr.P.C., are satisfied, the trial Court cannot mark the entire statement of the victim as an exhibit while examining the maker of the statement, but the statement itself has to be treated as chief examination evidence of the maker.

44. In the case on hand, though the learned trial Judge has exhibited the entire statements recorded under Section 164 Cr.P.C., of P.W.1 to P.W.5, neither the prosecution nor the defence has made any attempt to mark any specific portion therein for corroborating or for contradicting the evidence given by the author of the statements. In the absence of eliciting



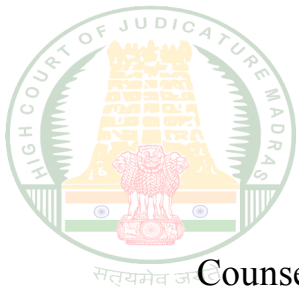
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any corroboration or contradictions, the documents exhibited as Exs.P.2 to P.6 remain as mere documents without any evidentiary value.

45. The learned Counsel for the appellant would submit that even after the arrest of the appellant on 11.12.2018, he was not at all taken to potency test in order to establish that he is capable of committing the alleged crime. Sections 53, 53(A) and 54 Cr.P.c., deal with the examination of the accused. Section 53(A) Cr.P.C., provides specifically for examination of person accused of rape by medical practitioner. Section 53(A) contemplates that when a person is arrested for a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission such offence, which shall be lawful for a registered medical practitioner acting at the request of the police officer to make such an examination of arrested person and to use such force as is necessary for that purpose and that the registered medical practitioner shall without delay forward the report to the Investigating Officer who shall forward to the Magistrate.

46. In the case on hand, as rightly pointed out by the learned



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Counsel for the appellant, the prosecution has not taken any steps for conducting potency test for the accused, despite charging him for the offence of penetrative sexual assault. In *Siva Vallabhaneni Vs. State of Karnatana and another (popularly known as Nithyananda's case)* reported in *(2015)3 SCC 2128*, the Hon'ble Supreme Court has confirmed the dismissal of the petitions by the High Court of Karnataka, confirming the orders passed by the trial Court directing the accused to give his blood sample for test and his voice sample for analysis and also to subject himself for medical examination to assess his sexual potency. The Hon'ble Supreme Court has questioned Nithyananda's reluctance to undergo potency test in a rape case and observed that the accused are expected to cooperate with the Court or else adverse inference may have to be drawn against them.

47. In the case on hand, it is the specific case of the prosecution that the accused has committed penetrative sexual assault and made the victim pregnant. But they have miserably failed to take steps for subjecting the accused to potency test. The prosecution has not offered any reason or explanation for non taking the steps in this regard.

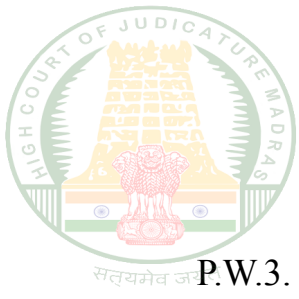


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48. Considering the inordinate delay in lodging the complaint, fixing the accused belatedly, non-conducting of potency test and the negative DNA report, this Court has no hesitation to hold that these aspects indeed create a great suspicion over the entire prosecution case. But the learned trial Judge, mainly relying on the chief examination of P.W.2 and P.W.3 and by simply observing that there was no explanation from the defence as to why a false complaint came to be lodged by the victim's mother against him, has mechanically recorded a decision that the prosecution has proved the charges under Section 5(l) r/w 6 of POCSO Act. Consequently, this Court concludes that the prosecution has miserably failed to prove the main charge under the POCSO Act and the incidental charges under Sections 363 and 506(i) I.P.C., and as such, the judgment of conviction and sentence passed by the trial Court is liable to be set aside.

49. Before parting, this Court is constrained to observe that the victim girl was aged about 13 years at the time of alleged occurrence and that though this Court had observed about the conduct and character of the victim, P.W.1 and P.W.5 – parents of the victim are to be made responsible for the way in which they have fostered their daughter - P.W.2 and son –



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P.W.3. It is pertinent to note that P.W.13 – Investigating Officer came to know about the DNA report in the first week of February 2019 that the accused has been excluded from being the father of the female child born to the victim girl. So, the fact remains that there is a culprit who made P.W.2 pregnant and eventually she gave birth to a female child. But neither P.W.13 nor P.W.14 has adduced any evidence as to the steps taken to find out the real culprit. Except examining the victim girl and recording her further statement on 14.02.2019 by P.W.13 and on 22.06.2019 and 13.11.2019 by P.W.14, they have done nothing. Both the Investigating Officers have not even offered any reason or explanation for stopping the investigation with the present accused and not for proceeding further, to find out who was responsible for P.W.2's pregnancy. Because of their deficient and improper investigation, the real culprit is still roaming in the society.

50. It is quite painful to note that the respondent police, had stopped its investigation with the accused, even after knowing that he is not the biological father of the child born to the victim girl .The respondent police has failed in its lawful duty of finding out the real culprit who made the victim girl pregnant. As no child could be allowed to be bastardised, the

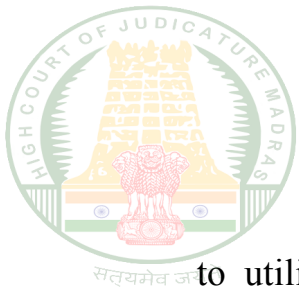


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respondent police is hereby directed to proceed with further investigation to find out the real culprit within a period of four months from the date of receipt of copy of this judgment.

51. After reserving the above case for judgment, it is brought to the knowledge of this Court that the child born to the victim girl was handed over to Claretian Mercy Home, Madurai, as per the directions of Child Welfare Committee, Virudhunagar and that the said child was given in adoption through the Central Adoption Resources Authority (CARA) and as per the orders of the Jurisdictional Court, Madurai. Then this Court sought a clarification from the officials of the Regional Forensic Laboratory, Madurai as to whether the sample blood has to be collected again through the child born to the victim girl, while conducting DNA test to the suspected accused and it is informed that DNA profile of the victim girl and the child born to her would be available in the laboratory, where the DNA test was conducted earlier and there is no need of taking of blood sample and the other test to the child. Hence, the respondent police or the police official entrusted with the further investigation are hereby strictly directed not to approach the child born to the victim girl, presently with the adopting parents and they are directed to request the concerned laboratory



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to utilise the DNA profile already available with the laboratory, while conducting DNA test to the suspected accused.

52. This Court is mindful of the possibility of implicating some other innocent person by P.W.2 or by the police agency. No doubt, Section 53-A Cr.P.C., mandates the arrest of the accused as a condition for subjecting him to the medical examination. In order to avoid the arrest of the suspected persons, this Court in exercise of its power under Section 482 Cr.P.C. to secure the ends of justice, directs the respondent police to conduct DNA test on the suspected accused without arresting him and if the test proves positive, the respondent police is at liberty to proceed in accordance with law.

53. In the result, the Criminal Appeal is allowed and the impugned judgment of conviction and sentence imposed by the learned Sessions Judge, (Special Court of POCSO Act cases), Virudhunagar District at Srivilliputhur om Spl.S.C.No.6 of 2020, dated 14.12.2022 is set aside and the accused is acquitted from the charges levelled against him. It is represented that the appellant is in Jail. The appellant is directed to be set



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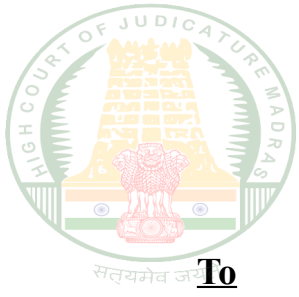
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at liberty forthwith, unless his detention is required in connection with any other case. Fine amount if any paid, shall be refunded to him. Bail bond, if any, shall stand cancelled. The respondent police is directed to conduct further investigation to find out the real accused and to complete the same within a period of four months from the date of receipt of a copy of this judgment by following the directions issued above.

08.09.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes/ No

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To

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1. The Sessions Court (Special Court of POCSO Act Cases),
Virudhunagar District at Srivilliputhur.
2. The Jail Superintendent, Central Prison,
Madurai.
3. The Section Officer,
Criminal Section (Records),
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

SSL

PRE-DELIVERY JUDGMENT MADE IN

CRL.A(MD).No. 78 of 2023

08.09.2023