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Crl. A(MD)No.106 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 06.01.2023

CORAM:

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH
AND
THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

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Rajkumar

: Appellant

Vs.

State through
The Inspector of Police,
Vadamadurai Police Station,
Dindigul District.
(In Crime No.479 of 2017)

: Respondent

PRAYER: Criminal Appeal is filed under Section 374 (2) of the Code of Criminal Procedure, to call for the entire records connected with the judgment rendered by the Sessions Judge, Fast Track Mahila Court, Dindigul, in Special S.C.No.60 of 2018, dated 22.08.2019 and set aside the same and consequently acquit the appellant.



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For Appellant : Mr.R.L.Dhilipan Pandian
for D.Rajaboopathy

For Respondent : Mr.S.Ravi
Additional Public Prosecutor

JUDGMENT

P.N.PRAKASH,J.
AND
DR.G.JAYACHANDRAN, J.

This appeal is preferred by the convict, who was tried as an adult and sentenced to undergo life imprisonment though he was juvenile at the time of alleged occurrence.

2. The case of the prosecution is that on 14.12.2017 at about 10.00 a.m., 4 years old girl child while walking along with her maternal grand-mother Kumarakkal along the Komberipatti to Semanampatti road, the appellant who was a juvenile at that point of time followed them and had offered lift to them in his two-wheeler bearing registration No.TN-57-

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WEB CO AV-1765. He has taken them in his two-wheeler upto the house of Kumarakkal. He told her that he will drop the minor girl at Balwadi but taken her to the graveyard near a hill and committed aggravated sexual assault. When the 4 years old child resisted and tried to raise an alarm, he closed her mouth, smothered and caused her death. Kumarakkal, who later went to Balwadi to bring home the child, was informed the child did not come to Balwadi. Suspecting foul play, she went in search of the child, meanwhile Thiru.Jeyakannan the father of the child returned to the village after visiting the temple at Melmaruvathur. He along with other villagers joined the search. On the information given by some of the villagers, they zeroed down, the spot where the minor girl was seen alive along with the appellant they went searched near the Ciyakani Hill and found the child partly buried under a heap of stones gravels, her leg exposed. The body was exhumed. Complaint was given to the respondent police by the father of the victim, they registered the written complaint Ex.P1 and commenced the investigation. On the next day, i.e., on 15.12.2017 the accused Rajkumar was arrested and after being ascertaining his age and *prima facie* satisfaction that he is juvenile, he was sent to the Juvenile Home at Salem.



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3. On completion of investigation, Final Report was filed in the Sessions Judge, Fast Track Mahila Court, Dindigul. The learned Sessions Judge after furnishing the copies of the document relied by the prosecution framed the charges under Sections 363, 302, 379, 201 IPC and Section 5(m) r/w 6 of POCSO Act, 2012. The accused denied the charges and claimed to be tried.

4. Accordingly, to prove the charges, the prosecution has examined 39 witnesses, marked 30 Exhibits and 6 Material Objects. Incriminating evidence against the accused was put to accused under Section 313 Cr.P.C., and opportunity was given to him to marshal evidence on his behalf. Though the accused denied the evidence as false he has not examined any witness. No document marked on the side of the defence.

5. The trial Court, on appreciating the evidence, held the accused guilty of charges under Sections 363, 302, 379, 201 of IPC and



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Section 5(m) r/w 6 of POCSO Act, 2012, has convicted and sentenced the accused as under:

Offence under Section	Conviction and Sentence
302 IPC	To undergo Rigorous imprisonment for life and to pay a fine of Rs.5,000/-, in default, to undergo simple imprisonment for six months
363 IPC	To undergo 4 years Rigorous imprisonment and to pay a fine of Rs.2,000/-, in default, to undergo simple imprisonment for three months
379 IPC	To undergo 2 years Rigorous Imprisonment and to pay a fine of Rs. 500/-, in default, to undergo simple imprisonment for one month.
201 IPC	To undergo 2 years Rigorous Imprisonment and to pay a fine of Rs. 500/-, in default, to undergo simple imprisonment for one month.
5(m) r/w 6 of POCSO Act	To undergo 10 years Rigorous Imprisonment and to pay a fine of Rs. 5000/-, in default, to undergo simple imprisonment for six months.

The trial Court ordered, the sentences shall run concurrently.

6. Aggrieved by the above conviction and sentence, the present appeal has been filed.

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7. The prosecution case as unravelled through the witnesses

runs as below:-

(i) P.W.1 [Jeyakannan] father of the victim girl child is the first informant and his complaint is marked as Ex.P1. According to him, on his return from Melmaruvathur, was told his daughter is missing from morning and he searched the entire village and enquired the persons, who had the likelihood of seeing his daughter. He was informed by the villagers that his daughter was taken by a boy in a two-wheeler, later he came to know his name as Rajkumar. Based on their lead, body of the child was found in the burial ground near Ciyakkani Hill. Hence he went to the police station and lodged the complaint. Ex.P1 complaint was received by P.W.29 [Muralidharan], the Inspector of Police, Vadamadurai Police Station on 14.12.2017 at about 16.30 hours.

(ii) P.W.2 [Kumarakkal] is the maternal grandmother of the minor child, who had stated that she along with minor girl was taken by the accused in his two-wheeler, while they were walking along with

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Komberipatti road and returning home after purchase of kerosene from the ration shop. She has identified the accused as the one who dropped her at her house at Sriramapuram and took her grand daughter promising to drop her at Balwadi. After 1 ½ hours she went to Balwadi to bring his grand-daughter back, there they told her that her grand-daughter did not come to Balwadi. Thereafter, she started searching the child. Her son-in-law (P.W.1) along with some of the villagers went to nearby hamlets like Mammanur, Valavichettipatti. The residence of Valavichettipatti informed them that they saw a boy taking a child with him towards Kinathupatti. At Kinathupatti they got lead that the boy and the child went towards Ciyankani Hill.

(iii) P.W.3 [Chinnammal] cattle grazer at Chenkanathupatti deposed that about 1 ½ years ago while she was grazing the cattle in the forenoon at the foot of Ciyankani Hill she heard sound of small child cry and sound of dropping stones, but she did not suspect anything, so returned to her house. Again when she went back to the foot of hill for grazing cattle at 03.00 p.m., found lot of villagers searching. When she enquired them, they told her that a child is missing and somebody has kidnapped her. Then she informed them about hearing of weeping noise of a small child and



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showed them the direction from where she heard the noise. The searchers went there and later she came to know that at the foot of the hill, a child was killed and covered with stones.

(iv) P.W.4 (Chinnu) belongs to Kalathupatti village a year ago during the month of Tamil Markazhi, 2017 while he and his villagers were proceeding to the chandy about 50 persons came from West and enquired them about a small child. At that time, one among them by name Murugan informed them that he saw a boy taking a child towards East. They all joined together and went in search of the girl and found a heap of stones near grave yard at Ciyankani Hill and the portion of leg protruding. When they all jointly cleared the stones, they found a dead child naked with bleeding injuries over the body.

(v) P.W.5 (Karuppasamy) Tea shop owner at Thangamapatti Village had deposed that about a year before the deposition, he saw a boy taking a small child in a TVS vehicle. The child was weeping and the boy stopped and purchased biscuit from his shop and gave it to the child. The boy also asked milk and gave to the child. On that day, at about 4.30 p.m., to 05.00 p.m., he heard that a child was found dead near foot of Ciyankani



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(vi) P.W.6 (Rajalakshmi) is the wife of P.W.5. She has deposed corroborating the evidence of her husband examined as P.W.5.

(vii) P.W.7 (Murugan) resident of Kalathupatti village had deposed that a year ago at about 11.00 a.m., while he was engaged in spraying pesticide in the field. He saw a boy taking a small child in his TVS-50. After sometime, a group of people came in search of a child and enquired him. He informed to them he saw earlier a child and a boy going in a TVS-50 vehicle. Later the body of the child was found at East of Kalathupatti near the graveyard.

(viii) P.W.8 (Palanivel) turned hostile.

(ix) P.W.9 (Rajammal) had deposed that while she was grazing the cattle near Ciyankani Hill, she saw the accused weeping at his grandmother's grave and saw a green colour two-wheeler near him. On her return to the home, she saw a group of people searching for the child and to them, she informed that she saw a boy with a child and he was weeping near



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(x) P.W.10 (Kannan) is a grocery shop owner. The accused is known to him. He has deposed that on 14.12.2017 when he was at Sriramapuram he saw the accused in a TVS-50 along with child proceeding towards North. Since he know about the antecedent of the boy Rajkumar, suspecting something cynical, he noted the vehicle number. Sometime later, P.W.1 and others came to his shop and told him that the daughter of P.W.1 is missing, immediately, he gave the two-wheeler number which he has already noted and informed them about the accused.

(xi) P.W.11 (Sivakami) is the mother of the victim child. One day before the incident she has gone to Melmaruvathur temple. He came to know about the missing of her daughter and her death, subsequently on her arrival to Ayyalur.

(xii) P.W.12 (Ramesh) is the relatives of P.W.1 and P.W.11. He is one of the members of the group, which went in search of the minor child after noticing her absense.

(xiii) P.W.13 (Chinniah) has turned hostile and not supported the case of prosecution.



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(xiv) P.W.14 (Karuppaiah) is yet another villager, who had gone in search of the missing girl and found her under the heap of stones.

(xv) P.W.15 (Vadivel) is a resident of Sriramapuram. He had deposed that Kumarakkal (P.W.2) one day at 02.00 p.m., came crying and informed him that a boy claiming himself as sister-in-law's son of Chinraj took her and the minor child in his vehicle and dropped her at the village and took the child promising that he will drop the child at Balwadi. When she went to Balwadi they told that the child did not come to Balwadi on that day. Therefore, he informed the same to Jeyakannan (P.W.1) father of the minor child and they all jointly went in search of the child. They later found the child buried under the heap of stones her leg projecting out.

(xvi) P.W.16 (Alagar) has deposed that he is running a mechanic shop and the accused is known to him. About 1 ½ years ago the accused came to his shop with TVS-XL vehicle and informed that vehicle chain is severed and asked him to rectify it. He left the vehicle and went, but did not return till the police came along with him on the next day. He saw the accused took the silver anklets from the pouch of the vehicle and handing it over to the police.

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(xvii) P.W.17 (Vadivazhagu) is the owner of the two-wheeler TVS-XL bearing registration No.TN-57 AV-1765. The vehicle which was parked out side his vehicle was missing from the night of 13.12.2017. After searching for his vehicle for 2 days he gave complaint to the police. Thereafter, police called him for enquiry and showed the vehicle. The vehicle was purchased by P.W.17 from P.W.18 and the same fact has been elucidated through P.W.18.

(xviii) P.W.19 (Sakthivel) is the ambulance driver, who shifted the body from the foot of Ciyankani Hill and handed over the body to the Dindigul Government Hospital mortuary for postmortem.

(xix) P.W.20 (Vadivel) is the witness to the mahazar marked as Ex.P4 for the recovery of dress materials of the child found near the foot of Ciyankani Hill.

(xx) P.W.21 (Ponraj) a Farmer of Komberipatti village is witness to the rough sketch prepared by the Investigating Officer and Observation Mahazar marked as Ex.P5.

(xxi) P.W.22 (Dr.Munusamy) is the doctor who conducted autopsy and given a report along with his opinion which is marked as Ex.P6



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(xxii) P.W.23 (Krishnamoorthy) is the jewel appraiser, who appraised the value of the pair of Silver anklet worn by the victim child and recovered by the police from TVS-XL pouch based on the information given by the accused.

(xxiii) P.W.24 (Muthukumar) Village Administrative Officer is witness to the confession statement given by the accused. The recovery based on the information given by the accused was reduced into writing. The mahazar Ex.P9 in which P.W.24 has signed as one of the witnesses.

(xxiv) P.W.25 (Dr.Malini) doctor at Government Hospital, Dindigul who saw the deceased child while admitted into the hospital and issued the Accident Register Ex.P10.

(xxv) P.W.26 (Vellaidurai) Head Constable carried the copy of the express FIR and submitted it to the Judicial Magistrate, Dindigul at 3.00 p.m., on 14.12.2017.

(xxvi) P.W.27 (Rajasekar) Inspector of Police, who registered the FIR and arrested the accused had deposed about his role in the investigation.



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(xxvii) P.W.28 (Dr.Rathanbabu) who has conducted the potency test of the accused has opined the accused cannot be an impotent. His report is marked as Ex.P11. He reports normal early morning erection.

(xxviii) P.W.29 (Muralidharan) Inspector of Police, who registered the complaint Ex.P1 and forward the same to his superior officer for further course of action and the same was marked Ex.P12 has deposed about his role as stated above.

(xxix) P.W.30 (Ayyavoo) the photographer who taken the photos of the dress and cheppal which belongs to the minor child had identified it and the same was marked as Ex.P21. The CD file marked as Ex.P22. The two-wheeler and the anklet were photographed and marked as Ex.P23. The CD file marked as Ex.P24.

(xxx) P.W.31 (Vijayendran) is the Scientific Officer attached to Madurai Regional Forensic Science Laboratory. The serology report and biological reports given by him identified and marked as Ex.P.13 and Ex.P14.

(xxxi) P.W.32 (Pheulamary) Investigating Officer, who conducted investigation and recorded the statement of witnesses had



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prepared an inquest report and the same was marked as Ex.P15.

(xxxii) P.W.33 (Dr.Rajasundari) doctor, is the Psychiatrist attached to Rajaji Hospital, Madurai. On the request of the Judicial Magistrate, the accused was examined and his health certificate issued by P.W.33 was marked as Ex.P16 and Ex.P17.

(xxxiii) P.W.34 (Dr. Sureshkumar) is another doctor attached to Rajaji Hospital, Madurai. He treated the accused from 20.08.2018 to 30.08.2018 as Inpatient and his IQ been assessed as 94. He has opined that the accused does not suffer from very serious mental illness there was sign of behaviour deficiency and the report has been marked Ex.P18.

(xxxiv) P.W.35 (Dr.Mahalakshmi) is the doctor, who examined the accused Rajkumar and she has reiterated the opinion given by P.W.34 regarding the behaviour deficiency of the accused. However, the assessment of the accused IQ differ from the assessment of P.W.35. Her certificate was marked as Ex.P19.

(xxxv) P.W.36 (Shyamala) District Child Protection Officer had deposed that during her visit to the Juvenile Justice Board she counselled the accused and submitted her report and the said report marked as Ex.P20.



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(xxxvi) P.W.37 (Anitha Imaculate) Head Constable has deposed about the receipt of the body after the postmortem and handing it over to the relatives.

(xxxvii) P.W.38 (Sivakumar) Inspector of Police deposed about the accused, his earlier conviction by the Juvenile Justice Board in Vadamadurai Police Cr.No.481 of 2017. The judgment of conviction and sentence, dated 17.05.2018 was marked as Ex.P26.

(xxxviii) P.W.39 (Sivakumar) Deputy Superintendent of Police is the Investigating Officer and filed the Final Report. He has spoken about the recovery of material objects under Ex.P13.

8. The trial Court on appreciating the evidence held that the prosecution has proved the guilt of the accused through P.W.2, who had travelled with the accused along with the child in his TVS-XL when the accused offered lift to them. She has deposed that she allowed the victim to go along with the accused since he promised her to drop the victim child at Balwadi. P.W.3 the cattle grazer heard the cry of small child and on her lead the villagers went and saw a heap of stones and leg of the child

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protruding out. The tea shop owner P.W.5 and his wife P.W.6, who saw the accused and the child together in the TVS-XL and incriminating circumstantial evidence which has been believed by the trial Court to hold the accused guilty of the charges.

9. The TVS-XL two-wheeler marked as M.O.6 been identified by the witnesses, who saw the accused taking the child in the TVS-XL, later the accused has left the two-wheeler with P.W.16 complaining about certain repair, but he did not turn back to take the vehicle till the police came and seized it. The silver anklet has been recovered from the pouch in the two-wheeler based on the confession of the accused. The presence of silver anklet in the pouch is the fact exclusive to the knowledge of the accused. The anklet identified as that of the victim girl by the prosecution witness P.W.1 the father of the victim girl. He has identified the anklet and got it back on petition from the Court. The confession statement given by the accused to the Village Administrative Officer leading to the recovery considered by the trial Court for holding the accused guilty.



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10. The learned counsel appearing for the Appellant/accused contended that the appellant was a minor aged around 16 years at the time of occurrence. He ought not to have been tried as an adult. Even otherwise, if he deserves to be tried as an adult, the procedure followed by the Court below to treat him as adult for the purpose of trial is not in consonance with the Act and Rules framed thereunder. Since there is a grave violation of the procedure contemplated to try a juvenile in conflict with law as adult and imposition of life sentence on the convict who is admittedly juvenile is contrary to the provisions of Sections 15 and 21 of Juvenile Justice (Care and Protection of Children) Act, 2015 (herein after referred to as JJ Act, 2015) which specifically prohibits the Courts to impose punishment of death or Life Imprisonment for a juvenile in conflict with law.

11. Apart from the legal infirmity in the trial, the learned counsel submit there are errors in appreciation of evidence. According to the learned counsel for the appellant though prosecution has examined about 39 witnesses, there is no witness to say that they saw the accused committing the alleged offence. There is no eye witnesses to the occurrence. The entire

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prosecution case pegged on circumstantial evidence. When there are two witnesses to the confession statement, the prosecution has examined only one witness and conveniently omitted to examine the other witnesses to the confession statement given by the accused. The evidences of P.Ws.2, 5 & 6 will not fall within the scope of last seen alive together theory.

12. The learned Additional Public Prosecutor appearing for the respondent per contra would submit that P.W.2 Kumarakkal is the person who handed over the child to the accused believing that he will drop the child at Balwadi. When P.W.2 later went to Balwadi to collect the victim girl child, she came to know that the accused has not brought the child to Balwadi. She got panic and informed P.W.1 the father of the victim child and the other villagers. The evidences of P.Ws.1,3,5 & 6 all go to show that the child was with the accused soon before a dead body found at the graveyard near foot hill. The accused had deceitfully taken the child from the custody of P.W.2 and had committed the grave offence of aggravated penetrative sexual assault and murder is established through these witnessess and substantially corroborated by the recovery of M.O.1 and M.O.6 based on the confession.

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13. Relying upon the judgment of the Supreme Court rendered in *State of West Bengal vs. Mir Mohammad Omar and others* reported in (2000) 8 SCC 382, the learned Additional Public Prosecutor submitted that the circumstantial evidence and the fact the accused and the deceased were found together moving towards foot hill in a TVS-XL vehicle and later the accused alone was seen, but the child found dead foot hill sufficient to hold his guilty of murder. Regarding the allegation of violation of Section 15 of JJ Act, 2015, and the accused being tried as an adult, the learned Additional Public Prosecutor submitted that the antecedents of the accused have been properly dealt with as per the procedure laid under the Act for trial of juvenile as adult the accused acquiescence to be tried as an adult after his appeal to the Children's Court not considered favourable. Therefore he cannot plead violation of Section 15 of JJ Act, 2015 when there is no violation. Therefore submitted that the evidence let in by the prosecution proves the chain of event regarding the child last seen alive with the accused and the accused has left his two-wheeler used for kidnapping the girl with P.W.16. In the said context, the confession statement disclosing the facts which were in exclusive knowledge of the accused and leading to

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14. In the course of argument, the counsel for the appellant also submitted that as per Section 21 of JJ Act 2015, no Court can impose punishment of death or imprisonment of life without any possibility of release. However the trial Court has imposed life sentence for offence under Section 302 IPC which is *per se* contrary to law and manifestation of non application of mind by the trial Court.

15. At this juncture, it is pertinent to note that earlier when the matter was taken up for consideration, this Court while about to pass order had found certain violations and recorded its view that unless some solution is formulated for the issues surface it will not be in the interest of justice to dispose of the Criminal Appeal and to enable the Court to formulate some guidelines whenever the child in conflict with law is tried as an adult, the matter was adjourned and the oral order passed on 26.10.2022 was recalled.

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Status report from the Director General of Prisons and Correctional Services was called. Pursuant to the order dated 01.11.2022 status report has been filed by the Director General of Prisons and Correctional Services as well as the Joint Director of Social Defence. Pursuant to the directions reports filed official of Social defence were present and produced records relevant in this case for proper and complete adjudication.

16. Section 21 of JJ Act, 2015 reads as below:-

“ Order that may not be passed against a child in conflict with law.—No child in conflict with law shall be sentenced to death or for life imprisonment without the possibility of release, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code (45 of 1860) or any other law for the time being in force.”

17. The plain reading of this Section clearly indicates that the bar is only to impose the life imprisonment without the possibility of release and it is not a complete or total bar for a Court to impose life imprisonment if there is possibility of release. If sentence of life is imposed with



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possibility of release either premature or on completion of 14 years of imprisonment, such imposition of sentence will not fall within the bar under Section 21 of the JJ Act, 2015.

18. Regarding the duty caused upon the Juvenile Justice Act, 2015 under Section 15 to assess the mental and physical capacity of the child in conflict with law, it is to be noted that in this case, the prosecution has relied upon Exs.P16, 17 & 18 which are the Observation Reports of the doctors who examined the accused on the requisition of the Court before commencement of the trial. Particularly, Ex.P17, which has clarified earlier Observation Report on answering the question raised by the Court would clearly show that the accused had the mental capacity to commit the offence and had ability to understand the consequences of the offence.

19. Ex.P18 and Ex.P19 would show that he has an Average Intellectual Capacity and has features of deviated personality traits. Ex.P20 is the counselling report, wherein, the District Child Welfare Officer has submitted a detailed report about the accused. Therefore, from the above,

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we are satisfied that Juvenile Justice Board has conducted a thorough enquiry under Section 15 of the JJ Act, 2015, by availing the services of Experts in the field as envisaged by the proviso to Section 15(1) of the JJ Act, 2015 and hence, we find no infirmity in the decision of the Juvenile Justice Board that the appellant in this case should be tried as an adult. As regards, the appeal under Section 101 of the JJ Act, 2015, it was contended that the Appellate Court (Children's Court) had not complied with the mandates of Section 101(2) of the JJ Act, 2015. We called for the records and found that the Appellate Court (Children's Court) had also requisitioned the service of the Experts, Psychiatrist and Medical Experts, for determining as to whether the appellant should be tried as an adult. The only procedural error that was done by the Appellate Court (Children's Court) was that, it did not give a positive finding that the appellant should be tried as an adult and had instead, decided to conduct the trial against the appellant by deciding to keep the matter open. Incidentally, in this case, the Appellate Court under Section 101 of the JJ Act, 2015, turned out to be the trial Court and therefore, the Presiding Officer decided to give a finding in this regard, in the final judgment itself. The appellant also acquiesced to this

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procedure and participated in the trial by engaging a counsel and cross-examined all the witnesses effectively. In other words, by conducting the trial against the appellant as an adult, the Children's Court has impliedly negated his request to be tried as a juvenile. Therefore, this failure of Appellate Court (Children's Court) under Section 101 of the JJ Act, 2015 to give a conclusive finding that the appellant should be treated as an adult cannot by itself vitiate the entire trial, when, it is shown that no prejudice was caused to the appellant.

20. Regarding the procedure to be followed in a case of conducting the trial of juvenile in conflict with law, the Hon'ble Supreme Court recently in its judgment ***Barun Chandra Thakur vs. Master Bholu and another*** reported in ***2022 SCC Online SC 870*** dealing with proviso to Section 15(1) which requires preliminary assessment by the JJ Board to treat a juvenile above aged 16 as an adult has concluded as below:-

81. We are conscious of the fact that the power to make the preliminary assessment is vested in the Board and also the Children's Court under sections 15 and 19 respectively. The Children's Court, on its own, upon a matter being referred to under section 18(3), would still examine whether the child is



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to be tried as an adult or not, and if it would come to the conclusion that the child was not to be tried as an adult then it would itself conduct an inquiry as a Board and pass appropriate orders under section 18. Thus, the power to carry out the preliminary assessment rests with the Board and the Children's Court. This Court cannot delve upon the exercise of preliminary assessment. This Court will only examine as to whether the preliminary assessment has been carried out as required under law or not. Even the High Court, exercising revisionary power under section 102, would test the decision of the Board or the Children's Court with respect to its legality or propriety only. In the present case, the High Court has, after considering limited material on record, arrived at a conclusion that the matter required reconsideration and for which, it has remanded the matter to the Board with further directions to take additional evidence and also to afford adequate opportunity to the child before taking a fresh decision.

The Hon'ble Supreme Court further stated that the task of preliminary assessment under section 15 of the Act, 2015 is a delicate task with requirement of expertise and has its own implications as regards trial of the case. In this view of the matter, it appears expedient that appropriate and specific guidelines in this regard are put in place. Without much elaboration, we leave it open for the Central Government and the National Commission for Protection of Child Rights and the State Commission for Protection of



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21. In the light of the above observation made in the judgment of the Hon'ble Supreme Court of India and on the perusal of the records in the instant case, we find that the JJ Board has opined that the appellant has to be tried as an adult and given a finding to that effect based on the medical report. This order which is appealable under Section 101 of the JJ Act, 2015, been rightly exploited by the appellant and has preferred an appeal to the Children's Court. However, as pointed out by the Division Bench earlier in its order, dated 01.11.2022, the Children's Court while passing its order, dated 22.11.2018 dismissing the appeal and had postponed the decision of determining the mental and physical capacity of the appellant to be decided at the time of trial. No doubt, such an inconclusive conclusion could have been avoided by the Appellate Authority while exercising the power under Section 101 of JJ Act, 2015, but that has not prejudiced the accused. Contrarily it has given him further opportunity to sustain his appeal. From

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the records we find the accused has not availed the given opportunity by placing materials during trial to substantiate that why he should not be treated as an adult.

22. Also it is pertinent to point at this juncture that though the Appellate Authority has postponed the decision of deciding the mental and physical capacity of the appellant to be decided at the time of trial, the appellant herein has not thought fit to challenge the order by filing the Revision Petition before the High Court. He has accepted the same and has participated in the trial.

23. Therefore, when material like Exs.P16 to 20 available to show that the accused/appellant mentally and physically capable of defending himself and has rightly defended through his counsel, it is not in the interest of justice to set back the clock and put the accused as well as the prosecution to conduct re-trial after ascertaining the mental and physical capacity of the accused.



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24. This Court conscious of the fact that the occurrence took place on 14.12.2017. After a lapse of 5 years and after the juvenile in conflict with law has attained majority, if the matter remitted back for ascertaining the mental and physical capacity of the accused as on the date of committing the crime will be a farce and meaningless exercise.

25. Further, the material already available on record and marked as exhibits and put to the witnesses as incriminating evidence, not been impeached though opportunity to tests those documents and discredit provided to the accused. He had exploited the right by cross-examining the witnesses who had deposed about Exs.P16 to P20. Though some variation in the rating of IQ seen in the assessment made by two doctors, the exhibits marked as Exs.P16 to P20, no where indicates that the appellant is mentally not fit to face the trial or his mental condition will fall under the exception under Section 84 of IPC. As far as the instant case is concerned since the appellant has not challenged the dismissal of his appeal by the Children's Court regarding treating him as an adult, the issue has to put at rest. The accused has participated in the trial accepting the judgment of the Children's

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WEB COPY Court on his appeal given with an opportunity to canvass the right in the trial.

26. Therefore, it is necessary to meet the ends of justice to proceed with the appeal based on the grounds of appeal and the evidence available to decide whether the finding of the trial Court holding the accused guilty of charges under Sections 363, 302, 379, 201 IPC and Section 5(m) r/w 6 of POCSO Act, 2012 is to be interfered or not.

27. As far as charge under Section 363 IPC is concerned, this Court finds that the evidence of P.W.2 Kumarakkal is singularly sufficient to hold that the accused has committed the offence under Section 363 of IPC. This witness has clearly stated that she and the 4 years old minor girl went for purchasing kerosene and on returning home, the accused came in TVS-XL vehicle and offered lift, they both get into the vehicle. She was dropped near her house. The accused promised that he will drop the child at Balwadi, P.W.2 has allowed the accused to take the minor child. This part of P.W.2 evidence stands unimpeached. The alleged omission and addition found in her deposition contrary to the previous statement not been

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confronted when the Investigating Officer who recorded the previous statement was cross-examined. Further, apart from P.W.2, this Court finds the Tea shop owners P.W.5 and P.W.6 husband and wife have spoken about the fact that the minor girl was weeping and she was under the custody of the accused. After P.W.2 entrusted the child to the accused, the accused and minor child were seen alive by P.Ws.5, 6, 9 & 10, thereafter, the accused alone has come back and seen by P.W.16, the mechanic to whom the accused has made a request to mend his TVS-XL and left the vehicle and key to him and went away. This has happened at 03.30 p.m., on that day. The vehicle belongs to P.W.17 and the same was stolen from his house a day prior to the occurrence. The RC of this vehicle stands in the name of Karuppasamy, who was examined as P.W.18, he has deposed that the vehicle was sold to P.W.17 for a sum of Rs.19,000/- and P.W.17 has not yet transferred the vehicle in his name.

28. From the evidence of P.Ws.16, 17 and 18 the vehicle bearing registration No.TN-57-AV 1765 stands in the name of P.W.18, but sold to P.W.17, which was stolen 15 days prior to the occurrence and the

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same was found in possession of the accused by the witnesses examined by the prosecution and it had been handed over to P.W.16 by the accused to mend the cut in the Chain Sprocket.

29. In this connection the evidence of P.W.10 also gain significance. He is one of the witnesses seen the accused taking a 4 years old in his TVS-XL. This witness know about the bad antecedents of the accused and being surprise and shock to see him taking a child in a two-wheeler, he has taken note of the registration number of the vehicle. This has occurred on 14.12.2017 at about 10.00 a.m., later in the day at about 02.00 p.m., group of people from Semmanampatti had come to Komberipatti in search of the child. To them he has given the vehicle number and detail about the accused. His evidence cannot be just like ignore as afterthought implanted by the prosecution, because in the complaint marked as Ex.P1, dated 14.12.2017 came to be registered at 16.30 hours, the name of the accused and the two-wheeler number is mentioned. The accused though was juvenile been a notorious and known for his notoriocity in and around the village. This is spoken by the prosecution witness in the course of trial and

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the District Child Protection Officer report Ex.P20 speaks volume about the antecedents of the appellant.

30. In the case of *State of West Bengal vs. Mir Mohammad Omar and others* reported in (2000) 8 SCC 382, the Hon'ble Supreme Court had an occasion to analyse the evidenciary value of last seen theory and application of Section 106 of the Evidence Act. The said observation is extracted below since analogy to the facts of the instant case can be drawn profitable.

“35. During arguments we put a question to learned Senior Counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. Learned Senior Counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise.

36. In this context we may profitably utilise the legal



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principle embodied in Section 106 of the Evidence Act which reads as follows: “When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambhu Nath Mehra v. State of Ajmer [AIR 1956 SC 404 : 1956 SCR 199 : 1956 Cri LJ 794] the learned Judge has stated the legal principle thus:

“ This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the



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contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."

39. In the present case, the facts which the prosecution proved including the proclaimed intention of the accused, when considered in the light of the proximity of time within which the victim sustained fatal injuries and the proximity of the place within which the dead body was found are enough to draw an inference that victim's death was caused by the same abductors. If any deviation from the aforesaid course would have been factually correct only the abductors would know about it, because such deviation would have been especially within their knowledge. As they refused to state such facts, the inference would stand undisturbed."

31. The material evidence available before this Court for consideration are:-

(i) the evidence for prosecution through the P.W.2 about



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WEB COPY permitting the accused to take the child in his TVS-XL expecting that he will drop the child at Balwadi.

(ii) P.Ws.5, 6 & 10 had seen the accused taking the child in his TVS-50 towards the Ciyankani Hill.

(iii) P.W.9 the cattle grazer had seen the accused and the green colour vehicle near grave yard.

(iv) P.W.16 has deposed that the accused came with the TVS-XL vehicle and asked him to mend the broken chain sprocket.

32. From these evidences, it is clear that the accused and the child were seen together alive at about 10.00 a.m., near the place where the body of the child was recovered from a heap of stones. The accused alone seen alive subsequently at 03.00 p.m. There is no plausible explanation from the accused what he did after dropping P.W.2 at her house and taking the child in the TVS-XL. The child has been seen naked with bodily injury including her private parts. She had been covered with heap of stones to destroy the evidence. The offence been committed by the accused and same proved through the witnesses for prosecution.



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33. Regarding the silver anklet owned by the deceased minor girl, the same has been recovered from the pouch in the TVS-XL (M.O.6). How the anklet came to the pouch of the TVS-XL which was in possession of the accused is within the exclusive knowledge of the accused and accused has not given any explanation. Therefore, the theft of silver anklet from the minor child also held to be proved.

34. The postmortem report marked as Ex.P6 has observed the following external injuries:-

"External Injuries:-

- 1. Abrasion 4 x 3 cm., over Left Leg.*
- 2. Abrasion 1 x 5 cm., over Medial aspect of Right Knee.*
- 3. Abrasion 2 x 3 cm., over Right Iliac Fossa region.*
- 4. Abrasion 2 x 2 cm., over Right Inguinal region.*
- 5. Multiple abrasions of size 0.5 x 0.5 cm., over Back.*
- 6. Multiple abrasions of size 0.5 x 0.5 over Left back of Thigh, Left Leg and Back of Right Leg.*
- 7. Abrasion 3 x 3 cm., over Lower Jaw.*
- 8. Abrasion 3 x 3 cm., over Left Ankle.*
- 9. Contusion present over the Back and both Shoulders.*
- 10. Contusion present below the Left Eye."*

35. Brutal attack by the accused on the 4 year old girl child is



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WEB COPY clearly seen from the injuries found on her body. Therefore, this Court holds that the prosecution evidence is sufficient enough to hold the accused guilty of kidnapping, murder, committing aggravated penetrative sexual assault on a minor child, theft and attempt to destroy the evidence and same proved beyond any reasonable doubt. The learned counsel for the appellant canvassed violation of Sections 19(3) and 21 of JJ Act, 2015 regarding the sentence while adverting to this point, we find Section 19(3) reads as below:-

“19. Powers of Children's Court.—

(3) The Children's Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail:

Provided that the reformatory services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support shall be provided to the child during the period of his stay in the place of safety.”



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36. The date of birth of the appellant is 21.08.2000. As on date he has crossed 23 years of age. From the record, we find that immediately after his arrest he was sent to Salem Observation home from 16.12.2017 to 10.09.2018 thereafter, transferred to Melur Observation home and kept there from 10.09.2018 to 22.08.2019. Thereafter from 22.08.2019 he is in Central Prison, Madurai.

37. Obviously we find from the above particulars there is some infraction of Section 19(3) of JJ Act, 2015, however, the accused having crossed 23 years of age and what has been done cannot be undone at this point of time, we leave it as it stand, pointing out the infraction.

38. As far as violation of Section 21 of JJ Act, 2015 imposition of Life sentence is concerned, this Court after careful consideration of the provisions under JJ Act, 2015 and POCSO Act finds that the bar under JJ Act, 2015 is with regard to imposing death sentence and life imprisonment without the possibility of release, this Court is of the view that to secure the ends of justice, it is imminent in this case to exercise the power under

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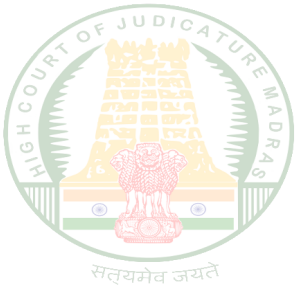
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WEB COPY Article 226 of the Indian Constitution and qualify the sentence of life imprisonment imposed for the offence under Section 302 of IPC by holding that there will not be a bar for his premature release in the meanwhile and fine of Rs.5,000/- in default to undergo 6 months simple imprisonment.

39. Accordingly, this Criminal Appeal is partly allowed. The period of imprisonment already undergone by the appellant/accused shall be set off under Section 428 of Cr.P.C. All other aspects of conviction and sentence imposed by the trial Court is hereby confirmed except that the appellant will not be disentitled to any remission.

[P.N.P., J.] & [G.J., J.]
06.01.2023

NCC : Yes
Index : Yes/No
Internet : Yes
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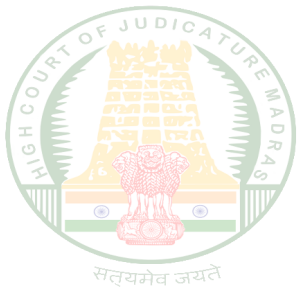


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To

1. The Sessions Judge,
Fast Track Mahila Court, Dindigul.
2. The Inspector of Police,
Vadamadurai Police Station,
Dindigul District.
3. The Additional Public Prosecutor
Madurai Bench of Madras High Court, Madurai.
4. The Record Keeper,
Vernacular Records Section,
Madurai Bench of Madras High Court, Madurai.



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**P.N.PRAKASH, J
AND
DR.G.JAYACHANDRAN, J**

AM

Judgment made in
Crl.A.(MD)No.106 of 2021

06.01.2023