BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserved	07.08.2025
Date of Pronounced	26.08.2025

CORAM

THE HONOURABLE MR. JUSTICE A.D.JAGADISH CHANDIRA
and
THE HONOURABLE MS.JUSTICE R.POORNIMA

Crl.A(MD)No.1063 of 2024
and
Crl.M.P(MD)No.13112 of 2024

Palraj : Appellant/Sole Accused

. Vs.

The Inspector of Police,
Pattiveeranpatti Police Station,
Dindigul District
Crime No.109 of 2022 : Respondent/Complainant

Prayer:-This Criminal Appeal is filed under Section 374(2) of Criminal Procedure Code, to call for the records in Spl.S.C.No.217 of 2023 on the file of the Special Court for Exclusive Trial of Cases under POCSO Act, 2012, Dindigul dated 23.01.2024 and set aside the conviction and sentence imposed on the appellant.

For Appellant : Mr.S.Prabhu

For Respondent : Mr.A.Thiruvadikumar
Additional Public Prosecutor

J U D G M E N T

A.D.JAGADISH CHANDIRA,J.

This Criminal Appeal is filed against the judgment of conviction and sentence passed by the Special Court for Exclusive Trial of Cases under POCSO Act, 2012, Dindigul in Spl.S.C.No.217 of 2023 dated 23.01.2024.

2. By the above judgment the trial Court had convicted the appellant and sentenced him, as detailed below:

Penal Provisions	Sentence of Imprisonment	Fine Amount
366 of IPC	Three years Rigorous Imprisonment	Rs.5,000/- i/d to underg six months simple imprisonment
6 of the POCSO Act	Life Imprisonment	Rs.1,00,000/- i/d to undergo one year simple imprisonment
The sentences shall run concurrently		

As far as compensation to the victim girl is concerned interim compensation amount of Rs. 2,00,000/ has been awarded to the victim girl as per rule 7 of the Compensation Scheme for Women Victim Survivors of Sexual Assault and other Crimes 2018 Scheme or as per Social Welfare and Nutritious Meal Programme SW (5) (2) Department GO (MS).No.33 dated 03.10.2020 and the said compensation has to be paid to the victim girl by the Tamil Nadu

Government within a period of 30 days from the date of receipt of copy of the judgment.

3. The case of prosecution is that on 01-05-2022 at 19.45 hours when P.W.14 was in the police station P.W 1 had given a complaint Ex.P1, stating that his minor daughter XXX studying 10th Standard in NPR Government High School had gone to the shop to buy paper at 09.00 am did not return home till 06.00 pm and that despite deligent search in the houses of relatives she was not found. He had thereby requested the police to find his missing daughter. Based on the complaint P.W.14 the Sub Inspector of Police registered a case in Crime No.109 of 2022 under "Girl Missing" and sent the First Information Report/Ex.P14 and the complaint to the Judicial Magistrate Court and other higher officials. Based on the same P.W.15 Sankareswaran, Inspector of Police took up the case for investigation registered by P.W.14 and went to the place of occurrence and in the presence of Suresh/P.W.4 and Chandraprakash and prepared Observation Mahazhar/Ex.P3 and Rough Sketch/Ex.P15. He then examined Eswaran/P.W.1, Tamil Selvi/P.W.3, Suresh/P.W.4, Chandraprakash and recorded their statements and sent the same to the Judicial Magistrate Court, Nilakottai. He then went in search of the missing victim, but he was unable to trace her. On 10.10.2022 at night, the victim was produced before the police station by her

parents. Since it was late at night, the police asked her to come the next morning. On 11.10.2022, he examined the victim P.W.2, her mother P.W.3 and her father P.W.1 individually and recorded their statements. In that statement, the victim had stated about her love affair with the appellant and also the sexual assault. Thereafter, through the women police, the victim was sent to Dindigul Government Hospital for a medical check-up. On 11.10.2022, he altered the offence to Sections 5(l) r/w 6 of the POCSO Act and filed an alteration report/Ex.P16. On 12.12.2022, the father of the victim filed a Habeas Corpus Petition before this Court in HCP(MD) No.15686 of 2022. In that petition, he filed a report about having sent the victim for medical examination. On 28.10.2022, since the offence had been altered to under the POCSO Act, the case was transferred to All Women Police Station, Nilakottai as per the direction of the Deputy Superintendent of Police. Thereafter, P.W.16 Baby, Inspector of Police, All Women Police Station, while on duty, received the case records relating to Crime No. 109 of 2022 took up the case for further investigation and examined Eswaran, Tamil Selvi and the victim and recorded their statements. On 28.10.2022 at about 11.45 am, she arrested the appellant about 12.10pm and recorded the confession statement of the appellant in the presence of Suresh/P.W.4, Chandraprakash and obtained signatures from them. Thereafter, she sent the appellant for judicial custody. On 29.10.2022 at about 12.00

noon, she went to PKR colony near Usha Theatre and prepared Observation Mahazhar/Ex.P17 and Rough Sketch/Ex.P18 in the presence of Sakthivel and Rajendran. Thereafter, she examined Arunprakash, Kanjana and Mariappan and recorded their statements. On 18.10.2022, she gave a requisition before the Judicial Magistrate to record the statement of the victim and the same was recorded. On 02.11.2022, she gave a requisition for the medical examination of the appellant. On 03.11.2022, through P.W.8 and P.W.9 sent the appellant for medical examination. She also sent the samples taken from the victim to the Regional forensic Lab for examination. On 21.12.2022, she recorded the statement of the Headmistress of the school, P.W.11, where the victim studied. Thereafter recorded the statements of Doctor/P.W.13, who conducted the medical examination of the victim and Doctor/P.W.7, who conducted the medical examination of the appellant. Then, after examining the police personnel who assisted in the investigation, she completed the investigation and filed the final report.

4. On completion of investigation and filing of final report, the copy of the final report and other documents were supplied to the appellant under Section 207 of Cr.P.C. Thereafter the trial Court had framed charges against the appellant of having committed the offence under Sections 366 of IPC and Section 5(l)r/w.6 of POCSO Act and

Section 9 of the Prohibition of Child Marriage Act,2006. When the charges were read over and explained to the accused he pleaded not guilty.

5. In order to prove their case, the prosecution had examined P.W.1 to P.W.16 and marked documents Exs.P1 to P19. No material object was marked. When the appellant was questioned under Section 313(b) of Cr.P.C., on the incriminating circumstances appearing against him he denied the same. However no witnesses were examined and no documents were marked.

6. On the strength of the oral and documentary evidence let-in before the trial Court, the trial court found the appellant guilty of having committed the offences as stated supra and convicted him for the offences under Sections 366 of IPC and Section 6 of POCSO Act. Aggrieved against the judgment and sentence the present appeal has been filed by the appellant.

7. The sum and substance of the submissions made by the learned counsel appearing for the appellant is as under:

i) In order to prove the charge of offences under the POCSO Act 2012, a burden is cast on the prosecution to prove that the victim was Child/Minor on the date of the offence, whereas the prosecution

has failed to discharge the burden of proof concerning the age of the victim. The trial court erred in believing the evidence of P.W11, the Headmistress of the school and placing reliance on Ex.P6 to prove the age of the victim.

ii) The victim P.W.2 has not named the accused in her statement recorded under Section 164(5) by the Magistrate during investigation and she has not supported the case of the prosecution during trial and she had been treated hostile.

iii) Further P.W.4, is the witness before whom observation mahazhar/Ex.P.3 was prepared and who attested the confession statement/Ex.P.4 of the accused. P.W.5 is the witness who deposed about knowing the accused and the victim living together in Tirupur and P.W.6 is the witness relating to recording of confession statement and the above witnesses are related to P.W.1 have not supported the case of prosecution and they have been treated hostile.

iv)When the prosecution has failed to prove the foundational facts and when no other legal and admissible evidence is available to support the case of the prosecution, the trial court committed a grave error and illegality in convicting the accused based on the statement recorded from the victim under Section 161 Cr.P.C and Section 164(5) Cr.P.C, the documents collected by the Investigation Officer during investigation and invoking section 29 and 30 of the POCSO Act 2012.

He would thereby seek to allow the appeal and set aside the judgment

of conviction and sentence.

8. The learned Additional Public Prosecutor appearing for the respondent would submit that the appellant had abducted the victim girl aged 15 years taken her to Tiruppur and committed aggravated penetrative sexual assault on her. The age of the victim was proved by Ex.P6 and the evidence of P.W.11 the Headmistress of the school which remained unchallenged by the defence. Though the victim had not supported the case of the prosecution during trial and treated hostile, she had during course of investigation by the police given a statement under Section 161 Cr.P.C in which she had named the accused to be person who had abducted her and taken her to Tiruppur and committed penetrative sexual assault on her. Further the trial court had relied on the evidence of P.W.13 the Doctor who examined the victim and the name of the accused being mentioned in Ex.P9 Accident Register had convicted the accused. However he would fairly concede that they cannot be treated as substantive evidence for convicting the appellant. He also placed the following decisions:

i) Renuka Prasad vs. The State Represented by Assistant Superintendent of Police, reported in 2025 INSC 657

ii) Siva vs. The State rep. By the Inspector of Police, Thiruvalam Police Station, Vellore District reported in 2022 (4) MLJ (Crl) 113

iii) Chinnathambi and another .vs. The Inspector of Police,

D-4, R.K.Pet Police Station, Thiruvallur District in Crl.A.Nos.355 and 437 of 2016 order dated 04.08.2016

9. Heard the learned counsel appearing for the appellant and Mr. A.Thiruvadikumar, learned Additional public prosecutor appearing for the respondent.

10. Before going further, while culling out the evidence on record P.W.1, father of the victim had deposed that the victim is his daughter and she was born on 10.03.2007 and she was 15 at the time of occurrence and that she was studying 10th std in the NPR Government High school. The appellant was living in the next street and known to him. On 01.05.2022 his daughter who had gone to the shop at 9.00 am for buying paper did not come back home in the evening and despite search she was not found and thereby he had given a complaint/Ex.P1 to the police about missing of his daughter and that on 10.10.2022 his daughter had come back home and when he had enquired her she had informed him that she fell in love with the appellant and gone along with him to Tiruppur and that the appellant tied thali to her in a temple and they lived as husband and wife in a rented house at Tiruppur. Thereby he had taken his daughter to Pattiveeranpatti Police Station and Dindigul Government Hospital and later to a court for recording her statement under Section 164 of

Cr.P.C.,

11. P.W.2 is the victim. She had denied having known the appellant. She had further deposed that on 01.05.2022 she had gone to her aunt's house at Madurai and was staying with her and that her father had given a complaint as if she was missing. She denied having been abducted by the appellant and sexually assaulted by him. Though she had admitted her signature in the statement recorded under Section 164 of Cr.P.C., she had deposed that only based on the instruction by her father she had given a statement to the doctor, police and before the Court. Thereby she was treated hostile and cross examined by the prosecution. However, nothing worthwhile was elicited from her by the prosecution in her cross examination.

12. P.W.3 is the mother of the victim. She had corroborated the evidence of P.W.1 her husband.

13. P.W.4, P.W.5 and P.W.6 who are related to P.W.1 and who are examined as witnesses for preparation of observation mahazhar and recording of confession of the appellant and having known the appellant and the victim living together at Tiruppur have not supported the case of prosecution.

14. P.W.7 is the doctor who has examined the appellant regarding potency and issued potency certificate/Ex.P5 suggesting that the appellant was not impotent.

15. P.W.8 is the Constable who had taken the appellant for medical examination.

16. P.W.9 is the Sub Inspector of Police who had on intimation from the Court had taken the appellant for medical examination to Government Hospital, Dindigul and thereafter took him to remand.

17. P.W.10 is the lady Special Sub Inspector who had taken the victim for medical examination on 11.10.2022 and taken the victim before the Judicial Magistrate for recording her statement.

18. P.W.11 is the Headmistress of NPR Government High School who had issued the school certificate /Ex.P7 regarding the age of the victim after perusing the registers in the school. She had deposed that date of birth of the victim is 10.03.2007. She had deposed that she had not handed over the birth certificate to the police.

19. P.W.12 is the scientific officer who has analysed the material objects and she had deposed that she has not found any sperms in the material objects.

20. P.W.13 is the doctor to whom the victim was produced for medical examination. She has issued Ex.P9/Accident Register and she deposed that when she enquired the victim she had told her that she along with 19yrs aged old boy had gone to Coimbatore and stayed with him there during which time she had sexual intercourse with him on several occasions. Her urine was analysed and she was not found to be pregnant. The analysis report is Ex.P10 and her blood grouping was found to be B-positive and report is Ex.P11 and the victim was referred to doctor Ramya who had issued Ex.P12/HIV certificate and Ex.P13 certificate of examination for sexual offences.

21. P.W.14 is the Sub Inspector of police who had registered the girl missing FIR.

22. P.W.15 is the Inspector of police who had conducted the initial investigation. He deposed that on 10.10.2022 at night hours the victim along with her parents appeared before the police and they were asked to come on the next day and that on 11.10.2022 the

victim gave a statement and it was recorded by a women Head Constable and thereafter he had sent the victim for medical examination and that on 11.10.2022 he altered the girl missing FIR to offences under Section 366 IPC and under sections 5(l) r/w. 6 of POCSO Act. Thereafter he had sent the alteration report/Ex.P16 to the Court and later on the instructions of Deputy Superintendent of Police, Nilakottai transferred the same to All Women Police Station, Nilakottai. He had admitted that P.W.1 to P.W.5 were residing in the same house and that he had not received the birth certificate of the victim.

23. P.W.16 is the Inspector of Police, All Women Police Station, Nilakottai. She had after receiving the altered FIR obtained statements of P.W.1, P.W.2 and P.W.3 and 28.10.2022 arrested the appellant in the presence of P.W.4 and one Chandraprakash and recorded their statement and thereafter on 29.10.2022 went to Tiruppur to the house in Chinnakanna compound at Tiruppur where the appellant and the victim were living and prepared the observation mahazhar/Ex.P17 and rough sketch/Ex.P18 and she had obtained a statement from the witnesses and that on 18.10.2022 gave intimation letter to the Judicial Magistrate based on which a statements was recorded by the Magistrate on 31.10.2022 and thereafter on 02.11.2022 subjecting the appellant for medical examination and medical examination of the appellant was conducted on 03.11.2022

and thereafter she had sent the slide of the vaginal swab for scientific examination to the Regional Forensic Lab, Madurai and on 21.12.2022 gave the request to NPR Government High School and obtained the certificate of the victim regarding her age and obtained the statement of the Headmistress and thereafter obtained statements of the doctors who have examined the appellant and the victim and also the police personnel who have assisted her in the investigation and further based on the statements altered the case under Ex.P19 for the offences under Section 366 of IPC and Section 5(l) r/w. 6 of POCSO Act and under Section 9 of the Prohibition of Child Marriage Act. During cross examination she had admitted that nobody had attested the complaint and that the witnesses P.W.1 to P.W.5 belong to the same family and that the victim had not named any one in her statement recorded under Section 164(5) of Cr.P.C.

24. After completion of examination of the witnesses on the side of the prosecution when the appellant was questioned regarding the incriminating materials against him he had denied the charges stating that it was a false case. However no oral or documentary evidence was marked on his side.

25. Based on the above evidence the trial Court while acquitting the appellant for offence under Section 9 Prohibition of Child

Marriage Act and found the appellant guilty for offence under Section 366 and section 6 of the POCSO Act and convicted him as stated above.

26. Admittedly the victim P.W.2 has not supported the case of prosecution and she has been treated hostile. Though she has admitted her signature in the statement recorded from her under Section 164(5) of Cr.P.C., she had deposed that the statement in the Court and the statements to the doctor and police naming the appellant were made by her on the instructions of her father/P.W.1. Whereas the trial Court placing reliance on the statement recorded under Section 161 of Cr.P.C and Section 164(5) of Cr.P.C and the entry made by the doctor/P.W.13 in Ex.P19 had believed the case of the prosecution and convicted the appellant. The reasoning for convicting the appellant is set out in paras 33 to 40 of the trial court judgment.

27. Now what is to be seen is, whether the trial Court is right in relying on the above material and finding the accused guilty of the charges.

28. In order to prove the age the prosecution has relied on Ex.P6 a hand written certificate titled as "School Education Certificate" issued by P.W.11/Headmistress of NPR Government School,

Ayyampalayam. The trial Court had relied on the same and the evidence of P.W.11 as proof of age. In Ex.P6 the period of study is shown as 2021-2022. Ex.P6 does not satisfy the requirement under Rule 12 of the erstwhile Juvenile Justice Rules, (which is in *pari materia*) with section 94(2) of the Juvenile Justice Act, and thus it does not satisfy the requirement under Section 34 (1) of the POCSO Act and Section 94 of Juvenile Justice Act as held in ***P.Yuvaprakash vs. State rep. By Inspector of Police*** reported in ***2023 SCC Online SC 846*** and thereby the age of the victim has not been proved beyond reasonable doubts.

29. Now coming to the other aspects of the judgments, the learned trial Judge inorder to convict the appellant had relied on the statements recorded from the victim under Sections 161 Cr.P.C., Section 164(5) of Cr.P.C., and the entries made by P.W.13/Doctor in Ex.P.9/Accident Register based on the statements said to have been given by the victim at the time of being examined by P.W.13.

30. Section 161 of Cr.P.C., deals with the examination of witnesses by the police during investigation. Such statements are not substantive evidence. They can only be used for limited purpose during trial. Section 162 Cr.P.C specifically restrict the use of Section 161 statements. They cannot be used as evidence to convict or

corroborate and they can only be used to contradict a prosecution witness under Section 145 of the Indian Evidence Act. In **Renuka Prasad vs. The State Represented by Assistant Superintendent of Police,** reported in **2025 INSC 657,** the Apex Court has dealt with the scope of placing reliance on statements recorded from the witnesses under Section 161 of Cr.P.C., when the witness had resiled from their earlier statements during trial. The relevant paras are extracted here under:

> *"25.Section 162of the Criminal Procedure Code, 1898 was dealt with in Kali Ram v. State of H.P. [(1973) 2 SCC 808] to hold that the provision makes it plain that 'the statement made by any person to a police officer in the course of an investigation cannot be used for any purpose except for the purpose of contradicting a witness, as mentioned in the proviso to sub-section (1) or for the purposes mentioned in sub-section (2)' (sic para-17). The said principle was reiterated with reference to Section 162under the Criminal Procedure Code, 1973 in* ***R. Shaji v. State of Kerala [(2013) 14 SCC 266]****. It was held by this Court that 'statements under Section 161Cr.P.C. can be used only for the purpose of contradiction and statements under Section 164Cr.P.C. can be used for both corroboration and contradiction' (sic para-25). It was further held that though the object of the statement of witness recorded under Section 164 is two-fold, there is no proposition that if the statement of a witness is recorded under Section 164before a Magistrate, the evidence of such witness in Court should be discarded.* ***Rajendra Singh v. State of U.P.*** *reported in* ***(2007) 7 SCC 378*** *was a case in which the High Court, as in the present case, relied upon the statements of six*

witnesses, recorded by the IO under Section 161Cr.P.C., to enter a finding that the respondent could not have been present at the scene of crime, as he was present in the meeting of the Nagar Nigam at Allahabad. It was unequivocally held that 'a statement under Section 161Cr.P.C. is not a substantive piece of evidence. In view of the proviso to sub-section (1) of Section 162Cr.P.C., the statement can be used only for the limited purpose of contradicting the maker thereof in the manner laid down in the said proviso' (sic para-6). It was found that the High Court committed a manifest error of law in relying upon wholly inadmissible evidence in recording a finding on the alibi claimed by one of the accused.

26. The statements made by the IOs regarding the motive, conspiracy and preparation comes out as the prosecution story, as discernible from the Section 161statements of various witnesses who were questioned by the police during investigation; which statements are wholly inadmissible under Section 162of the Cr.P.C. Merely because the IOs spoke of such statements having been made by the witnesses during investigation, does not give them any credibility, enabling acceptance, unless the witnesses themselves spoke of such motive or acts of commission or omission or instances from which conspiracy could be inferred as also the preparation, established beyond reasonable doubt. We are unable to find either the motive, the conspiracy or the preparation or even the crime itself to have been established in Court, at the trial through the witnesses examined before Court. The witnesses had turned hostile, for reasons best known to themselves. The only inference possible, on the witnesses turning hostile is that either they have been persuaded for reasons unknown or coerced into resiling from the statements made under Section 161 or that they had not made such

statements before police officers. Merely because the story came out of the mouth of the IO, it cannot be believed and a legal sanctity given to it, higher than that provided to Section 161 statements under Section 162 of the Cr.P.C".

31. This Court in the case of ***Siva vs. The State rep. By the Inspector of Police, Thiruvalam Police Station, Vellore District*** reported in ***2022 (4) MLJ (Crl) 113*** has held as follows:

> *"14. It is a peculiar case where almost all the independent prosecution witnesses including the witnesses to the arrest and seizure of the weapon of offence produced by the prosecution have turned hostile. The alleged author of Ex.P1 complaint, who is the niece of the deceased, has also turned hostile. Virtually, except the official witnesses, no independent witness has supported the case of the prosecution and the prosecution has not taken proper initiative to prove its case. However, the Trial Court has proceeded to rely upon the statements recorded from such witnesses under section 164 Cr.P.C. viz., Exs.P11 to P14 to render the conviction against the appellant.*
>
> *15. The law is well settled that a statement recorded under Section 164of the Code of Criminal Procedure is not substantive evidence and it can be used to corroborate the statement of a witness and it can be used to contradict a witness. In* ***Ram Kishan Singh vs. Harmit Kaur and another(1972) 3 SCC 280****, it has been laid down that a statement recorded under Section 164of the Code of Criminal Procedure is*

not substantive evidence and it can be used to corroborate the statement of a witness and it can be used to contradict a witness.

16.In ***Baij Nath Sah vs. State of Bihar (2010) 6 SCC 736*** *also, the Apex Court has held that mere statement of the prosecutrix recorded under Section 164 Cr.PC. is not enough to convict the appellant and it is not substantive evidence and it can be utilised only to corroborate or contradict the witness vis-a-vis statement made in court.*

17. In the case on hand, the Trial Court has held that though the eyewitnesses to the occurrence had turned hostile during their examination in court, their statements recorded under Section 164 Cr.P.C. corroborates the medical evidence viz., the wounds found on the dead body as revealed in the postmortem certificate and thereby found the appellant guilty. However, strangely, the Trial Court has ignored the fact that when the occurrence is said to have taken place on 20.9.2010 and the postmortem certificate was issued on 21.9.2010, the statements from the witnesses had been recorded on 6.10.2010. Such a long delay in recording the statements of the witnesses speaks much.

18. Further, the Trial Court, taking presumption available under Section 80 of the Indian Evidence Act, 1872, had proceeded to rely upon

Exs.P11 to P14, the statements recorded from the witnesses under Section 164Cr.P.C. to render conviction against the appellant.

19. Of course, there a presumption is available under Section 80of the Indian Evidence Act, 1872 as to the documents produced as record evidence. The legal provision reads as under:-

> *"80. Presumption as to documents produced as record of evidence.—Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume— that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken."*

20. The question as to whether such presumption is applicable to the statement (memorandum of identification proceedings) recorded by a Magistrate under Section 164 Cr.P.C. has been elaborately dealt with by a Three Judges Bench in ***Sheo Raj vs. State [(1963) SCC OnLine All 123]***

and held that a statement made under Section 164, Cr.P.C. is not 'evidence', is not made in a 'judicial proceeding' and is not given under oath. It has been held therein as under:-

> *" .... A statement made by a person to a police officer in the course of an investigation cannot be used for any purpose at any enquiry or trial in respect of the offence under investigation (except for contradicting him), vide Section 162; it is open to any person to make a statement or confession before a Magistrate (of a certain class) in to course of an investigation, or at any time thereafter, but before the commencement of an enquiry or trial and the statement or confession will be recorded by the Magistrate under Section 164and is not subject to the bar imposed by Section 162. Such a statement, being a previous statement, may be used only to contradict the person when he appears as a witness at the enquiry or trial of the offence or to corroborate him. A statement made by a person before a Magistrate of the required class holding an identification proceeding and recorded by him is a statement governed by Sec. 164; there is no dispute on this point. It is to be noted that* Sec. 164 *simply mentions "any statement or confession made to him in the course of an investigation" and not "any statement or confession made to him in the course of an investigation by any witness or accused person." It does not state whose statement of confession is to be recorded by him Actually at this*

stage, when the offence is still under investigation, there are no witnesses and no accused persons (except in the sense of persons against whom a charge of having committed the offence is levelled and is under investigation). It is only after the investigation has been completed that the police can decide who is to be the accused of the offence before a Magistrate and who are to be the witnesses in the case. Till then there can be no decision about the status of a person as an accused person or as a witness and all persons examined by the police during the investigation are mere interrogatories or informants or statement-makers. The provisions in the Code relating to investigation do not refer to any person as a witness. Though "witness" is not defined in the Evidence Act, Secs. 118, 119 and 120 of it make it clear that a witness is a person who testifies before a court. Under section 59 all facts may be proved by oral evidence and "oral evidence" is defined in Sec. 3 to mean and include all statements made by witnesses before a court. The definition of "proved" shows that the question of proof of a fact arises only before a court so long as there is no court there is no question of a fact being proved and consequently no question of oral evidence and witnesses. Evidence can be given only in respect of the existence or non-existence of a fact in issue or a relevant fact, vide Sec. 5. Which is a fact in issue or a relevant fact is a matter that arises only before a court because only before a

court there can arise the question whether a certain fact is proved or not. These provisions of the Evidence Act make it clear that no person can claim the status of a witness except in relation to a proceeding before a court. It follows that while an offence is still under investigation there is nobody who can be called "witness" and there is no statement that can be called "evidence."

....

A Magistrate is certainly authorized by law to take evidence but only in a case of which he has taken cognizance; he is not authorised by law to take evidence in a case pending before another Magistrate or in a case that has already been decided by himself or another Magistrate or in a case that has not yet reached a court. He is not authorized by law to record evidence of any person in any matter and in any circumstance. A Magistrate recording a statement under Sec. 164 is not authorized by law to take evidence for the simple reason that he is not charged with the fluty (sic for "duty") of deciding any case and there is no matter to be proved or disproved before him. The other alternative is that the evidence must have been given in a judicial proceeding. When a Magistrate records a statement under Sec. 164there are only two proceedings in which it can possibly be said to have been recorded, (1) the investigation by the police and (2) the proceeding of recording the

statement itself. The investigation by the police is not a judicial proceeding. "Judicial proceeding" is not defined in the Evidence Act, but since we are concerned with a statement recorded under the Code of Criminal Procedure the question whether it was recorded in a judicial proceeding or not must be decided in the light of the definition given in the code. "Judicial proceeding" is defined in Sec. 4(1) (m) to mean "any proceeding in the course of which evidence is or may be legally taken on oath." If evidence may be legally taken on oath it is enough even though evidence is actually not taken on oath. An investigation is a judicial proceeding only if it can be predicated that in the course of it evidence may be legally taken on oath. "In the course of which" means "in the carrying out of which" or "in the conducting of which" and not "during the pendency of which." Anything that is done while a proceeding is pending is not necessarily done in the course of it; if it is not a part of it or is done by one not connected with it, it is not done in the course of it even though it is done during its pendency. In the course of an investigation no evidence can be legally taken on oath by anybody concerned in the investigation. The police have no power to administer oath. As I explained earlier, there is no question of evidence being taken in the course of an investigation. If a Magistrate does something while an investigation is pending it is not done in the course of it. An investigation which would not be a

judicial proceeding if a Magistrate did not do something during its pendency does not become one simply because he does something, such as recording a statement under Sec. 164. Since an investigation is to be done solely by the police nothing that he does during its pendency becomes a part of it and can be said to have been done in the course of it. Consequently even if a Magistrate can legally administer oath to a person before recording his statement under Sec. 164the investigation does not become a judicial proceeding.

....

12. Thus I find that the statement made by a person under Sec. 164cannot be said to be made in a judicial proceeding. Sec. 80, Evidence Act, is, therefore, not applicable to it."

21. The principles laid down in the above decision make it clear that presumption under Section 80of the Indian Evidence Act, 1872 cannot be drawn to rely upon the Statements of witnesses recorded under Section 164Cr.P.C during investigation to render a conviction.

32. Apart from placing reliance on the statements recorded from the victim under Section 161 of Cr.P.C., and 164(5) of Cr.P.C., during the course of investigation the trial Court has also relied on the statements alleged to have given by the victim to doctor /P.W.13 and

which is entered in the accident register/Ex.P.9 to convict the appellant. The victim/P.W.2 during testimony before the Court has resiled from the statements and had stated that she had given those statements on the instructions of her father/P.W.1 and in the Court during evidence had denied knowing the appellant and denied having been subjected to sexual assault by the appellant.

33. From the above we find that there is absolutely no legal evidence to find the accused guilty. When the foundational facts had not been proved by the prosecution the trial Court erred in invoking presumption as under Section 29 and 30 of the POCSO Act. The trial Court without understanding the fundamental principle of criminal law had convicted the appellant and thereby had committed a grave error and illegality.

34. In this regard a Division Bench of this Court in the case of ***Chinnathambi and another vs. The Inspector of Police, D-4, R.K.Pet Police Station, Thiruvallur District*** in **Crl.A.Nos.355 and 437 of 2016 order dated 04.08.2016** in a similar circumstances finding that conviction had been based relying on statements under Section 161 of Cr.P.C., had lamented about the conduct of the concerned trial Judge had directed the Registry to sent the learned Judge to attend training programs in the Judicial Academy. The

relevant para is extracted hereunder:

"16. It is rather unfortunate that a Sessions Judge, who is empowered to impose even death penalty is unaware of this fundamental principle of criminal law that the statements made under Section 161 Cr.P.C could be used only to contradict the maker of the respective statement, if he is examined as prosecution witness, except for the purposes of Sections 27 and 32 of the Evidence Act. As a matter of fact, when a miscellaneous petition was filed by the petitioner seeking suspension of sentence, the learned counsel for the petitioner brought to our notice that the Trial Court has convicted the accused relying on the statement of witnesses made under Section 161 Cr.P.C. Then we called for remarks from the learned Judge. The learned Judge in her remarks submitted interalia as follows:-

> *"I humbly submit this piece of arguments made me to discuss on Section 161 Cr.P.C. Statement of the witnesses.*
>
> *...While discussing this aspect, as the Learned Defence Counsel based his arguments on Section 161 Cr.P.C. Statement, even though I have not relied on Section 161 Cr.P.C. Statement, I was constrained to explain the circumstances discussing on the evidence of PW3 as stated above and on Section 161 Cr.P.C. Statement of PW6 Kumari, the aunt of deceased stating on 22.05.2011 also the accused had teased, the deceased. That there are several*

occasions, where the accused had teased the deceased. However, in Page No.20 in Paragraph No.22 of my judgment, I have stated "As the motive is spoken by the witnesses to be the enmity developed when the Accused are warned for teasing the deceased, this Court feels that the evidence of Prosecution witnesses supports the prosecution case" and on that proved circumstances alone, I have convicted the accused. "

17. On going through the explanation, we felt that the learned Judge had not realised the illegality committed by her and she was ignorant of this fundamental principle of legal provision. Therefore, we have directed the Registry to send the learned Judge to Tamil Nadu State Judicial Academy to attend training programme for the next three sessions. We are highlighting this aspect because we are pained to note that some of the learned Judges do not realise their onerous responsibility to do justice to the litigants within the frame work of law."

35. We are of the opinion that the learned trial Judge who had convicted the appellant based on the statement recorded from the victim during investigation also needs to be sent for judicial training. We direct the Registry to send the learned trial Judge to State Judicial Academy to attend training programs to understand the fundamental principles of criminal law.

36. Ultimately having found no evidence against the accused and the prosecution having failed to prove the case beyond reasonable doubts the appellant is entitled to acquittal.

37. In the result, the Criminal appeal stands allowed. The conviction and sentence passed in Spl.S.C.No. 217 of 2023 dated 23.10.2024 by the Special Court for Exclusive Trial of Cases under POCSO Act, 2012, Dindigul is set aside and the appellant is acquitted of all the charges. The appellant is set at liberty forthwith unless required in any other case. Bail bond executed, if any, shall stand cancelled. Fine amount paid, if any,shall be refunded to the appellant. Consequently connected miscellaneous petition stands closed. Since the victim has not supported the case of the prosecution and denied having been subjected to sexual assault by the accused she is not entitled for any compensation as ordered by the trial Court. In the event of compensation had been paid to the victim the Government/District Collector concerned to recover the same from her.

[A.D.J.C,J.] [R.P.J.,]

26.08.2025

Index : Yes/No
Internet : Yes/No
aav

Note: Registry is directed to communicate a copy of this order to the Registrar General, High Court, Madras.

To:

1.The Sessions Judge,
Fast Track Mahila Court,
Theni.

2.The Inspector of Police,
Palanichettipatti Police Station,
Theni District.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

4. The Section Officer
Criminal records
Madurai Bench of Madras High Court,
Madurai.

A.D.JAGADISH CHANDIRA, J.
and
R.POORNIMA,J.

aav

Crl.A(MD)No.1063 of 2024

26.08.2025