BAIL SLIP

The Appellant/accused namely Ezhilvannan, aged 40 years, S/o.Devaraj, was directed to be released on bail in CRL MP No.1 of 2015 in CRL A No.622 of 2015 order dated 08.10.2015 by this Honourable Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.08.2018

DELIVERED ON : 20.12.2018

CORAM:

THE HONOURABLE MR.JUSTICE RMT. TEEKAA RAMAN

CRL.A.No.622 of 2015

Ezhilvannan ... Appellant/Accused

-vs-

The State of Tamil Nadu Rep.by
The Inspector of Police
All Women Police Station
Villupuram District ... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 of Cr.P.C., against the order of conviction passed by the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court) Villupuram in S.C.No.261 of 2012 dated 28.09.2015 convicting the appellant under Sections 354 and 506 (ii) of IPC and sentenced to undergo two years Rigorous Imprisonment and fine of Rs.500/- indefault to undergo 6 months simple Imprisonment in respect of 354 IPC and in respect of 506(ii) IPC imposed six months rigorous imprisonment and fine of Rs.500/- in default to undergo 15 days imprisonment.

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For Petitioner : Mr.M.Devaraj

For Respondent : Mrs.V.Saratha Devi
Government Advocate (Crl.Side)

JUDGMENT

The alleged date of occurrence is prior to the date of commencement of POCSO Act.

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2. The convicted sole accused is the appellant herein.

3. This appeal has been preferred by the accused challenging the judgment passed by the learned Sessions Judge, Fast Track Mahila Court, Villupuram in S.C.No.261 of 2012 dated 28.09.2015, wherein the appellant was found guilty and convicted for offences under Sections 354 and 506(ii) of IPC and sentenced to undergo two years rigourous imprisonment and a fine of Rs.500/- and in default to under go one month simple imprisonment for the offence under Section 354 of IPC; sentenced him to undergo Rigorous Imprisonment for six months and to pay a fine of Rs.500/-, in default, to undergo fifteen days Simple Imprisonment for the offence under Section 506(ii) of IPC and the sentence is ordered to run concurrently.

4. The learned counsel for the appellant would contend that the respondent police have filed charge sheet alleging that the accused herein from 20.12.2011, continued to commit sexual assault upon the minor victim girl aged about 4 years showing her obscene pictures in his cellphone and by putting his mouth in the private part of the minor victim girl In furtherance, the accused had also threatened the child with dire consequences not reveal the incident to any body. The above act of the accused was complained by the victim child to her mother. The mother of the child had lodged Ex.P.1 complaint before the police against which a case was registered in Crime No.6 of 2012, under Sections 376,377,506(ii) of IPC. After observing the formalities the case was taken on file in PRC No.32 of 2012 by the learned Judicial Magistrate No.II, Villupuram. On Committal the case was registered as S.C.No.261 of 2012 and made over to the learned Sessions Judge, Magalir Neethimandram,(Fast Track Mahila Court), Villupuram for disposal in accordance with law.

5. The learned Government Advocate(Crl.Side) would state that the act of the accused towards the victim girl /PW1 was clearly spoken by the victim girl in the witness box and it is clear that the act of the accused amounts to the offence as defined under Section 376 IPC. The injury suffered by the victim girl is also described by PW8 Doctor, who examined the victim girl immediately after the occurrence and much before filing of the complaint by PW2 before the police. Further, PW2 mother of the victim girl has also spoken about the sequence of events which led to the filing of the appeal and she also reiterated the same in the witness box which falls within the ambit of section 376(2)(f) of IPC. However, the learned Government Advocate(Crl.Side) fairly conceded that eventhough charge was framed against the accused for the offence under section 376 of IPC, the trial court has convicted the appellant for offence under Sections 354 and 506(ii) of IPC. Dehorns the same, the

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learned Government Advocate(Crl.Side) would submit that there are ample of evidence made available against the accused which was rightly considered by the trial Court while convicting him.

6. During the trial prosecution has examined PW1 to PW 17 and marked Exhibits P.1 to Exhibit P.13 and no documents or material objects were marked and no witnesses were examined on the side of the defence.

7. Based upon the evidence of victim girl /PW1 and her parents PW.2 and PW 3 coupled with PW 12 Doctor, the learned Sessions Judge has come to the conclusion that charge under section 376(2)(f) of IPC is not made out. However, based on the prosecution witnesses convicted the accused under Sections 354 and 506(ii) of IPC and sentenced him to undergo two years rigourous imprisonment and a fine of Rs.500/- and in default to undergo one month simple imprisonment for the offence under Section 354 of IPC and sentenced him to undergo Rigorous Imprisonment for six months and to pay a fine of Rs.500/- in default to undergo fifteen days Simple Imprisonment for the offence under Section 506(ii) of IPC. Challenging the correctness of conviction and sentence the the accused preferred this appeal.

8. The learned counsel appearing for the appellant would contend that there was some dispute between the appellant and the PW 2 on account of which a complaint has been given in Crime No.48 of 2012 on 13.01.2012 which is still pending. In such a situation, after clear deliberation and tutoring, the present complaint had been filed against the appellant, wherein as per PW3 evidence, the complaint was written by him, whereas the ExP.1 is written by one Theanmozhi/PW6. PW 6 who is the member of Madar Sangam was instrumental in seeing that they become popular by making out the false case and creating sensation. PW.2,3 and 4 have deliberately stated falsehood using the child namely PW 1 to wreck vengeance against the appellant.

9. Point for determination is whether the conviction and sentence under sections 354 and 506(ii) of IPC is sustainable under law and whether sentence awarded there on is excessive?

10. After hearing the submissions of rival parties and also perusing the oral evidence of PW1 to PW7 and after perusing the Exhibits P.1 to P.13, it is seen that PW2 (Shankari) and PW 3(Saravanan) are the parents of the victim child (PW1) aged about 4 years at the material time, they are the residents of Kandamangalam Village. The accused Ezhilvannan, who also belong to the same locality had sexually abused the minor victim child in many ways from 20.12.2011 whenever she went to the house of

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the accused to play with his children. P.W.2 the mother of the victim child noticed the difference in the behavior of PW1 and enquired her. At that time, PW1 in detail complained the act of the accused. Thereafter, PW2 informed her husband(PW 3) about the act of the accused. Thereafter, the parents of the victim child took her to the Pondicherry New Medical Centre for consultation. Dr.Sathyamoorthy (PW8) after examining the victim , reported that the child is not psychologically affected, but she did not like the incident. He further advised the parents to seek the help of the Child Welfare Centre. The parents approached the Child Welfare Centre and there they were advised to lodge a complaint against the accused. Accordingly the mother of the victim child lodged a complaint and the child was referred to the hospital for medical examination. Dr.Gitanjali (PW 12) and Dr.Vinoth Kumar(PW 13) along with team of doctors examined the victim child, prepared the medical report (Ex.P.4). Dr.Gitanjali in her evidence and report stated that " No external injuries on the surface of the body. Labia Majora fully opposed. Labia Minora- intact. Vulva- Hymen intact. Vagina intact. Fourchette, Perineum and anal region intact. No congestion, No tenderness, No visible stain seen:. During the course of investigation, the accused was referred to the medical officer for potentiality test and a certificate (Ex.P.13) in this regard was obtained in which it is opined that there is nothing to suggest that the accused could not perform the said act. The investigation was conducted by PW 17 which according to her were sufficient to prosecute the accused for the offences mentioned in the final report and contended that the medical evidence does not show any injury on the victim child. The medical evidence does not in any manner support the prosecution case. It is further contended that the place of occurrence was not proved by the prosecution. It is further contended that only interested witness were examined on the side of the prosecution and they did have a strong motive for foisting a false case against the accused to wreck vengeance against the accused who had lodged a criminal case against the defacto complainant and her husband. The inordinate delay in lodging the complaint is also fatal to the prosecution. Since based upon the evidence of PW8 doctor and the version of PW1 the victim girl the learned sessions judge has held that the accused has not committed the offence under section 376(2)(f) r/w.511 of IPC and convicted and sentenced the accused under Section 354 and 506(ii) of IPC.

11. On perusal of the medical evidence of PW 8 Doctor, it is seen that the doctor who had medically examined the victim child categorically stated that in his evidence and report that there is no evidence of rape. Hence the offence of rape is not substantially established by the prosecution. On the question as to whether it is an attempt to rape or an indecent sexual

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assault the difference is rather some time is very meager. It is well established principle that in a case of attempt to commit rape, there should be some action on the part of the victim, towards the commission of rape. It is necessary for the prosecution to establish that the accused has gone beyond the stage of preparation. It is greater defee of determination that make a difference between mere penetration and actual attempt to commit an offence. Taking note of the decision reported in 1988 Crl.Law Journal, 666, in the case of Madan lal Vs. State of Jammu and Kashmir the trial judge has held that the act of the accused on the body of PW 1/ victim girl would squarely fall under section 354 of IPC and not under section 376(ii) IPC.

12. The learned counsel for the appellant would contend that it is case of false implication and there is delay in filing the First Information Report and the child witness has to be analyzed in the proper perspective since she is subjected to tutoring , consequently challenging the competence of PW1.

13. Per contra, the learned Government Advocate(Crl.Side) relied upon the following decisions:

(i) Radhey Shyam -Vs- State of Rajasthan reported in (2014) 5 Supreme Court Cases 389

(ii) Madhay Pradesh -vs- Ramesh and another reported in (2011) 4 Supreme Court Cases 786

(iii) K.Venkateshwarlu -vs- State of Andhrapradesh reported in (2012)8 Supreme Court cases 73

(iv) Acharaparambatah Pradeepan and another -vs- State of Kerala reported in (2006) 13 Supreme Court Cases 643.

14. From the above decisions of the Honourable Apex Court, regarding examination and evaluation of testimonial of child witness and the test for credibility of such child witness could, summarized as under :

a) the evidence of child witness must be subjected to close scrutiny to rule out possibility of tutoring- It can be relied upon, if court find that child witness has sufficient intelligence and understanding of obligation of oath- As a matter of caution, Court must find adequate corroboration to child witness' evidence- if found reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation.

b) Reliability of testimony of child witnesses and its Competency can be assessed and inferred unless Court may rely upon evidence of child witness, in case her deposition inspires confidence of court and there is no embellishment or improvement – Every witness is competent to depose unless court considers that she is prevented from understanding the

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question put to her due to tender age, extreme old age, disease whether of body and mind.

c) A child Witness, by reason of his tender age, is a pliable witness- He can be tutored easily, either by threat, coercion or inducement – Hence, his statement can be accepted only if court comes to conclusion that child understands questions put to him and he is capable of giving rational answers and that the child is not tutored and his evidence has a ring of truth- Careful evaluation of evidence of a child witness in the background and context of other evidence on record for purpose of corroboration is a must before court decides to rely upon it: d) all persons are competent to testify unless by reason of tender years, the court considers that they are incapable of understanding the questions put to them and of giving rational answers- Satisfaction of judge necessary- In the instant case, child witnesses were found competent by judge and his satisfaction recorded.

15. Keeping the above propositions for evaluation child witnesses in mind and facts of the case in hand, after going through the evidence of PW 2 touching upon the incriminating evidence against the accused for the charge under section 354 IPC and also taking into consideration the evidence of PW.8- Doctor, (Psychologist) to whom PW 1 and PW 2 has sought the consultation before filing FIR, this Court finds that the facts proved on the basis of evidence of the victim are to the effect that the accused committed indecent sexual assault upon her. There is no evidence that the accused attempted to commit sexual intercourse upon the victim child. Even the victim does not say an attempt of penetration, though she had stated that there was a pain on her private part, the medical evidence produced under Exhibit.P.4 reveals no injury at all. So, in the absence of anything in the evidence of the victim about the accused's attempt to penetrate her private organ, mere the act of the accused as narrated by the victim child does not tantamount to an attempt to commit rape. The act of the accused would certainly an offence of outraging the modesty of a woman and hence the accused could be punished for the offence falling under Section 354 of IPC and I find that the reasoning assigned by the Sessions Judge for convicting the accused based upon private prosecution witness is well considered and well merited.

16. At this juncture, it is relevant to state that the four decisions relied on by the learned Government Advocate (Crl.Side),as stated supra and based upon the guidelines issued by the Hon'ble Apex Court in evaluating the evidence of child witness especially in connection with the sexual offence has been kept in mind and on scanning and scrutinizing the evidence of PW1/ victim girl and also PW 8 Doctor to whom PW1

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and PW2 went for consultation for psychologist and on 09.01.2017 he had examined PW1/victim girl and the case history has been recorded by him, which is much before the complaint on 22.01.2012, wherein PW4 could depose that "அந்த குழந்தையின் தாய் என்னிடம் இரவு நேரங்களில் அந்த குழந்தை தன்னுடைய பெண் உறுப்பில் கை வைத்து சொரிந்து கொண்டிருப்பதாக கூறினார். சில நேரங்களில் தூங்கும் போது சத்தம் போடுவதாகவும் கூறினார். மனரீதியாக பிரச்சனை ஏதாவது உள்ளதா என்று அறிந்து கொள்ள என்னிடம் அழைத்து வந்ததாக கூறினார். அந்த குழந்தையிடம் நான் தனியாக ஆலோசனை செய்த போது அந்த குழந்தை என்னிடம் தான் பக்கத்து வீட்டில் விளையாட செல்லும் போது எழில்மாமா என்னுடைய உள் ஆடைகளை கழற்றி பெண் உறுப்பில் கை வைத்தார் ..... மற்றபடி அந்த குழந்தை விளையாடுவதிலும், தூங்குவதிலும் நடந்து கொள்வதிலும் எவ்வித மனரீதியான பாதிப்பு இருப்பதாக தெரியவில்லை. ஆனால் நடந்த விஷயம் அவருக்கு பிடிக்கவில்லை என்பது என்னால் உணர முடிந்தது".

17. It remains to be stated that after consultation of PW 8 psychologist as per his advise, their parents have sought the assistance of child helpline and thereafter Ex.P1 complaint was lodged on 22.01.2012 leading to registration of Ex.P.8 First Information Report and after the investigation, final report was filed.

18. It remains to be stated that the statement of PW1/ victim girl ,PW2 and PW3 parents of the victim were recorded under section 164 Cr.P.C by PW- 15 Judicial Magistrate and the same was marked as Ex.P.7. On a combined reading the version of PW1 and her cross examination in connection with the act of the accused on the body of PW 1 / (victim girl) coupled with the 164 Cr.P.C statement recorded by PW 15 the Judicial Magistrate which is marked as Ex.P.7 and this court finds that the evidence of child witness PW1, passed the test of credibility and competency.

19.Further more even before the examination of PW1, the Sessions Judge at the time of recording evidence of PW1, she being the child witness (at the time of occurrence she was only 4 years old and at the time of examination before the Court she was seven years old) and in such circumstances, the Sessions Court inorder to ascertain the mental capability of child as to whether she is competent to depose before the Court about the incident and has asked certain questions to the child witness and being fully satisfied with the answers given by the child witness, the Sessions Judge has come to the conclusion that the child witness (PW1) was mentally capable of giving evidence about the incident and recorded his reasonings about the subjective satisfaction as to competence of child to give evidence and record a finding that PW 1 is a competent to give evidence.

20.Taking into consideration, PW 1 is free from bias and her previous statement and her version before the court and also her statement before PW 8 doctor (which is much before the setting the criminal law into motion), this Court is of the considered view that PW 1 is competent to depose and her

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evidence can be look into and relied upon and the same inspires confidence. In the absence of any materials with regard to the vital factor of touching the essential ingredients of charge under section 354 of IPC, as stated supra, the evidence of PW1 regarding the act of the accused on the body of the victim is clear and cogent and there is no contradiction with her previous statements and furthermore, the narration of the events as spoken to by PW1, much before the setting the criminal law into motion and as could seen from the evidence of PW 8 and hence ,I have no hesitation to hold that PW.1 pass the test of competency, though she is child and her competency to depose what has happened is clear and cogent. Further with regard to the act of accused the evidence of PW1 was duly corroborated by the evidence of PW.s 2 , 3 and 4 and also duly corroborated by the medical evidence of PW.12 and hence this Court hold that the version of PW 1 inspire the confidence and accordingly, I do not find any irregularity or illegality in convicting the accuded for the offence under Section 354 of IPC by the learned Sessions Judge, Fast Track Mahila Court and accordingly the findings rendered by the Mahila Court is hereby confirmed.

21. The learned counsel for the appellant would content that there is delay in preferring the complaint. It remains to be stated that the Apex Court in Om Prakah -vs- State of Hariyana AIR 2011 SC 2682 that wherein it is held that there is some delay in lodging of a First Information Report would not necessarily prove fatal to the case of the prosecution.

22.Moreover, the learned counsel for the appellant argued that there is discrepancies in the evidences of the prosecution witnesses as to single instance. According to the victim child the accused had sexually abused her on various days. Hence, it is difficult to fix the occurrence place in one place. Hence, the above contention made by the appellant counsel is also unsustainable. There is glaring evidence that the accused committed indecent sexual assault upon the minor victim girl and criminally intimidated her. Accused is thereby held guilt of offence described under Sections 354 and 506(ii) of IPC.

23. The another contention of the learned counsel for the appellant is that the theory of false implication and the learned Sessions Judge has taken note of the said plea raised by the appellant side and also negatived of the said contention by observing that the theory of false implication qua reputation of child and family at stake and crucifying of their child and there is no material on record for the above persons to adduce false evidence against the accused and hence all the plea raised by the appellant/ accused that

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i) there is a delay in preparing the First Information Report and ii) the place of occurrence has not been proved in the manner known to law and

iii) the false acquisition are all considered by the sessions judge and on analysis of evidence on proper perspective have rightly rejected by the trial Court by assigning proper reasons and the reason assigned by the trial Judge does not suffer from any irregularity or illegality and accordingly the said findings of the Court below is confirmed. In Fine, the conviction laid by the trial court for the offence under Section 354 and 506(ii) of IPC are hereby confirmed.

24. The trial Court has convicted and awarded the sentence of two years Rigorous Imprisonment after taking into consideration the act of the accused as per the statements of PW.1,2 and 8 and also taking note of the facts and circumstances of the case, I am of the considered view that interest of justice will be met by reducing the sentence to one year RI for the offence under Section 354 of IPC and reducing the sentence to three months for the the offence under Section 506(ii) of IPC. However, the fine amount awarded is kept intact. The trial court is directed to secure the accused/ appellant and commit him to prison to undergo the remaining period of sentence and the period of custody already underwent is given set off.

25. In the result, the Criminal Appeal is partly allowed to the extent indicated above.

Sd/-
Assistant Registrar(CS III)

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Sub Assistant Registrar

aav

To

1. The Sessions Judge, Magalir Neethimandram
(Fast Track Mahila Court) Villupuram

2. The Judicial Magistrate No.II,
Villupuram

3. Do through The Chief Judicial Magistrate, Villupuram.

4. The Inspector of Police
All Women Police Station
Villupuram District

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5.The Public Prosecutor,
High Court, Madras

+1 cc to M/s.M.Devaraj, Advocate Sr.No.89676

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CRL.A.No.622 of 2015

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