



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : **06.09.2021**

CORAM:

THE HONOURABLE MR.JUSTICE **R.PONGIAPPAN**

Crl.A. (MD) No. 202 of 2017

Thakkaan @ Mani

... Appellant/Sole Accused

Vs.

State rep by
The Inspector of Police,
All Women Police Station,
Thirupathur,
Sivagangai District.
(in Crime No.09 of 2013).

... Respondent/Complainant

PRAYER: The Criminal Appeal is filed under Section 374(1) of the Code of Criminal Procedure, to call for the record and set aside the order of conviction and sentence made in S.C.No, 86 of 2013 dated 16.02.2016 on the file of the learned District and Sessions Judge, (Fast Track) Mahila Court, Sivagangai by allowing this appeal.

For Appellant	: Mr.P.Ganapathy Subramanian Legal aid Counsel
For Respondent	: Mr.E.Antony Sakaya Prabahar Government Advocate (Crl.side)

JUDGMENT

The present Criminal Appeal is directed against the conviction and sentence, dated 16.02.2016, made in S.C.No.86 of 2013, on the file of the learned Sessions Judge, Mahila Court , Sivagangai.

2.The appellant is the sole accused. He stood charged for the offences punishable under Section 376 of IPC and Section 6 &10 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred as "POCSO Act"). After full-fledged trial, the learned Sessions Judge, (Fast Track) Mahila Court, Sivagangai, found the appellant guilty under Section 5(1)(m) r/w 6 of POCSOAct and sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs.5,000/-, in default, to undergo rigorous Imprisonment for 6 months. Challenging the said conviction and sentence, the appellant is before this Court, by preferring this Criminal Appeal.

3.The relevant facts of the case, which gave rise to filing of this appeal are necessary to be recapitulated for the disposal of this appeal:-



(i) P.W.2 is the victim child. P.W.1-Petchiammal is her mother and P.W.3-Palani is her father. Both accused and victim child are residing in Kambanoor, wherein the victim child was studying in 4th standard in a school situated in the same village. On 04.08.2013 around 11.00 a.m., both PW2 and her brother P.W.17, in order to watch the television, went to the house of accused and while at the time, both P.W.2 and P.W.17 watching the television, the accused after giving some snacks to P.W.17, took the PW2 to his bedroom and after putting the clothes in her mouth, removing her gown and jatty inserted his male organ into the vagina of victim child. After such occurrence, while at the time the victim child was cried, the accused threatened her that he would kill her. However, after returning to her home, P.W.2 informed the same to P.W.1 as what had happened.

(ii) Immediately, after knowing the same, P.W.1 searching whereabouts of the accused but at the same time he was not found available. Thereafter, P.W.1 took the victim child to the village tank and after taking a bath, on the same day around 10.00 p.m., she informed the occurrence to P.W.5-Eswari, who is the village nurse, who in turn after giving first aid to P.W.2, informed to P.W.1 that there was a tenderness in the vagina of P.W.2. On the next day, P.W.1 with the help of P.W.5 brought the victim child to the Primary Health Centre, Kundrakudi, wherein, P.W.4-Dr.Meenakumari around 12.30 a.m., examined P.W.2 and issued a OP sheet under Ex.P.2 stating that there was a contusion in the vagina of P.W.2. She advised P.W.1 to go to Government Hospital, Karaikudi, for further treatment, but instead of go to Karaikudi, P.W.1 after getting treatment from P.W.4, went to the Police Station and lodged a complaint under Ex.P.1.

(iii) On receipt of the said complaint, P.W.18-M.Jeyanthi, the then Inspector of Police, All Women Police Station, Thirupathur, registered a case against the accused in Crime No.09/2013 under Section 376 IPC and Section 6 & 10 of POCSO Act. The printed FIR was marked as Ex.P.8. After registering the case, through police memo, she referred the victim child for medical examination.

(iv) In turn, P.W.12-Deventhi the then Head Constable, All Women Police Station, Thirupathur, had produced the victim child in Government Hospital, Sivagangai, wherein, around 10.10 p.m., P.W.11-Dr.Josephine Amutha, examined the victim child and issued a certificate under Ex.P.4 stating that there are no external injuries found on the body of the victim child. She collected the vaginal smear and send the same for chemical examination, wherein, in the chemical examination, no semen is detected.

(v) Further, P.W.14-Dr.Pandiya Rajalakshmi examined the victim child by taking X-ray and issued a age certificate stating that the age of the victim child is between 7 to 10 years. The X-ray taken



issued by him was marked as EX.P6.

(vi) In continuation of investigation, P.W.18 visited the scene of occurrence and in the presence of witnesses, she prepared an Observation Mahazer under Ex.P.9. She has drawn the Rough Sketch and the same was marked as Ex.P10. She examined the witnesses and recorded their statements.

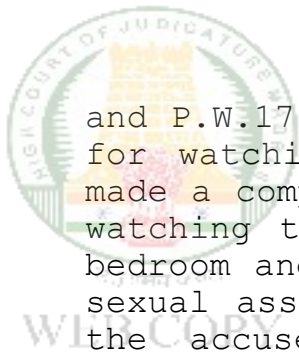
(vii) On 06.08.2013 around 6.30 a.m., she arrested the accused and sent him to the remand. She submitted an application before the learned Judicial Magistrate, Thiruppathur, for conducting medical examination to the accused and in turn, in view of the proceedings issued by the learned Judicial Magistrate, P.W.13-Rajkumar, produced the accused before the Doctor in Government Hospital, Sivagangai, for medical examination, wherein P.W.19-Dr.Selvakumar, examined the accused and issued the certificate under Ex.P.13 stating that nothing was found available to suggest that he is impotent. In the meantime, P.W.14-Dr.Pandiya Rajalakshmi, examined the accused radiologically and issued the age certificate under Ex.P.5 stating that the age of the accused is about 21 years. The X-ray taken in respect to the said examination was marked as M.O.1.

(viii) In continuation of investigation, P.W.18 submitted an application before the learned Chief Judicial Magistrate, Sivagangai, for recording 164 Cr.P.C statement from P.W.2. In turn, the learned Judicial Magistrate, Thirupathur, recorded 164 Cr.P.C statement from P.W.1 and the same was been marked as Ex.P.11. P.W.18 sent a requisition to the Headmaster of the School, in which the victim child was studying and after receipt of the said requisition, P.W.16-Santhana Mary issued a record sheet under Ex.P7 stating that the date of birth of the victim child is 12.02.2005. After receipt of the said certificate, P.W.18 examined the Headmistress, the Doctors, who examined the victim child and the accused and recorded their statements. After concluding the investigation, she came to the positive conclusion that the accused herein is liable to be convicted under Section 376 IPC and Sections 6 & 10 of POCSO Act 2012. He filed the final report accordingly.

4. From the above materials, the trial Court framed the charges for the offences punishable under Section 376 IPC and Sections 6 & 10 of POCSO Act 2012. The accused denied the charge and opted for trial. Therefore, the accused was put on trial.

5. During the course of trial proceedings, in order to prove their case on the side of the prosecution, 19 witnesses were examined as P.W.1 to P.W.19 and 13 documents were exhibited as Ex.P1 to Ex.P13, besides 3 Material Objects as M.O.1 to M.O.3.

6. Out of the above said witnesses, P.W.1-Petchiammal, who is the mother of the victim child, speaks about the occurrence as
<https://hccsereports.in/hccsereports> relevant point of time, when she was in her home, P.W.2



and P.W.17, who are her daughter and son, went to the accused house for watching the television and after returning their home, they made a complaint against the accused as while at the time they were watching the television, the accused took the victim child to his bedroom and after tying her hands, removed her clothes committed a sexual assault. Immediately, after hearing the same, she searched the accused, but his whereabouts are not identified by her. Thereafter, she made arrangements for taking bath to the victim child, also she brought the victim child before the Nurse, who is residing in her village. She has further speaks at the time the said Nurse giving treatment found that there was a contusion in the vagina of P.W.2 and after seeing the same, she advised the P.W.1 to go to Government Hospital and also instructed to lodge a complaint.

(ii)P.W.2-Sigapi, the victim child narrated the occurrence as alleged by the prosecution.

(iii)P.W.3-Palani, who is the father of victim child claims that on the date of occurrence around 09.00 p.m., when he was returned to his home after grazing his sheep, P.W.1 informed the occurrence and thereafter, he along with P.W.1 brought the victim child to the hospital situated in Maruthangudi.

(iv)P.W.4-Dr.Meenakumari, who is the doctor attached with Primary Health Centre, Kundrakudi, spoken about the examination of the victim child.

(v)P.W.5-Eswari, the nurse working in the occurrence village, testified about the incident as on 04.08.2013 around 10.00 p.m., the victim child was brought by her mother (P.W.1) and made allegation against the accused as he sexually assaulted the victim child. She claims that after giving first aid, she advised P.W.1 to go to Government Hospital, Karaikudi.

(vi)P.W.6-Karuppayee, who is the grandmother of victim child speaks that she knows the occurrence from her daughter P.W.1.

(vii)P.W.7-Balayee, is the resident of Kambanoor village. She knows P.W.1 and P.W.2 and she gave evidence that after knowing the occurrence through P.W.1, she went to the house of P.W.5, wherein, P.W.5 has advised P.W.1 to go to Government Hospital, Karaikudi.

(viii)P.W.8-Muthu deposed that on 05.08.2013 around 6.30 p.m., the Inspector of Police, All Women Police Station, Thiruppathur came to the accused house and prepared an Observation Mahazer in his presence.

(ix)P.W.9-Rajathi, is also a resident of same village gave a similar evidence as that of the evidence given by P.W.7.



(x) P.W.10-Muthuraman, is the Village President, who heard the occurrence through P.W.1.

(xi) P.W.11-Dr. Josephine Amutha attached with Government Medical College Hospital, Sivagangai, speaks about the examination of victim child.

(xii) P.W.12-Deventhi, the then Head Constable, All Women Police Station, Thirupathur, has stated that in view of the direction given by the Inspector, she produced the victim child before the Government Medical College Hospital, Sivagangai, for medical examination.

(xiii) P.W.13-Rajkumar, who is also a police officer, speaks about the production of accused in the hospital for medical examination.

(xiv) P.W.14-Dr. Pandiya Rajalakshmi attached with Government Medical College Hospital, Sivagangai, gave evidence in respect to the medical examination of accused, the victim child and about the issuance of age certificate.

(xv) P.W.15-Selvam, who is also a resident of the same village, speaks about the occurrence in support of the evidence given by P.W.1.

(xvi) P.W.16-Santhanmery, who is the Headmistress working in Kambanoor Primary School, speaks about the issuance of record sheet for showing the date of birth of the victim child.

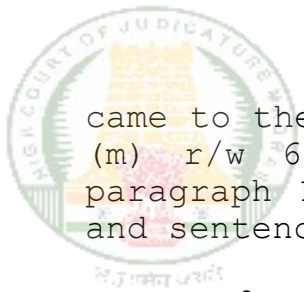
(xvii) P.W.17-Ramakrishnan, who is the brother of victim child, narrated the occurrence as stated by P.W.2.

(xviii) P.W.18-Jeyanthi, the then Inspector of Police, All Women Police Station, Thirupathur, speaks about the receipt of the complaint, registration of the case, examination of the witnesses and about the filing of final report.

(xix) P.W.19-Dr. Selvakumar attached with Government Medical College Hospital, Sivagangai, speaks about the details in respect to the examination of accused. He issued the certificate stating that nothing is available to suggest that the accused is impotent.

7. The learned trial Judge in respect to the said incriminating materials, examined the accused under Section 313 of Cr.P.C., for which the accused denied the same as the evidence given by the prosecution witnesses are false. However, he did not chose to examine any witness nor mark any document on his side.

8. Having considered all the above materials, the learned Sessions Judge, (Fast Track) Mahila Court, Sivagangai,



came to the conclusion that the accused is guilty under Section 5(1) (m) r/w 6 of POCSO Act 2012 and sentenced him as stated in paragraph No.2 of this judgment. Aggrieved by the said conviction and sentence, the accused is before this Court with this appeal.

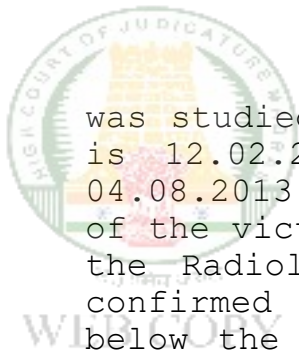
9.I have heard Mr.P.Ganapathy Subramanian, learned counsel appearing for the appellant/accused and Mr.E.Antony Sahaya Prabakar, learned Government Advocate (Crl.side) appearing for the State. I have also perused the records carefully.

10.The learned counsel appearing for the appellant would contend that the Doctor, attached with Sivagangai Government Medical College Hospital, who examined the victim child, gave evidence as there was no injury found on the body of victim child. On the other hand, P.W.4, the Doctor, attached with Primary Health Centre, Kundrakudi, who examined the victim child issued the certificate that there was a contusion in the private part of the victim child. Since, both the Doctors were examined the victim child within the short interval, the said contra evidence given by them would create a doubt whether the alleged occurrence is true or not. Further, previously while at the time of investigation P.W.17, who is the brother of victim child, has not been examined as witness by the Investigation Officer. Only during the time of trial, he has been examined as witness and therefore, the evidence given by P.W.17 cannot be taken into account for deciding the issue raised in this case. According to him, P.W.1 and the accused are having the land dispute and therefore, in order to threatening the accused, PW1 with the help of P.W.2, foisted the false case and accordingly, he prayed to allow this appeal.

11.Per contra, the learned Government Advocate (Crl.side) appearing for the respondent/police would contend that if really the accused and P.W.1 is having the land dispute, P.W.1 did not permit the P.W.2 and P.W.17 to go to the house of the accused for watching the television. Further, the Doctor attached with Government Medical College Hospital, Sivagangai, had examined the victim girl only after examining the victim girl by P.W.4. So, there may be a possibility for the disappearance of the contusion which found earlier and therefore, the submission made by the learned counsel for the appellant cannot be taken into account. According to him, the reason given by the trial Court for convicting the accused is having material and therefore, interference of this Court is not necessary.

12.I have considered the rival submissions made by the learned counsel appearing on either side.

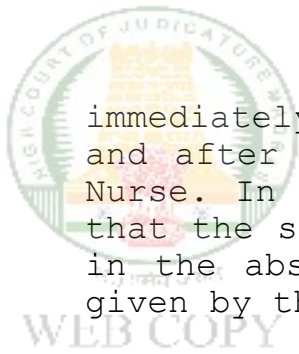
13.Initially, on going through the age of the victim child, the Doctor who examined her has stated in his evidence as the age of the victim child is between 7 to 10 years. In order to substantiate the case against the accused, the Headmistress of the school, in which P.W.2



was studied, has stated that the date of birth of the victim child is 12.02.2005, whereas, the alleged occurrence had happened on 04.08.2013. Therefore, according to the said certificate, the age of the victim child is about 8 years. In all, the evidence given by the Radiologist and the entries made in the record sheet, were confirmed that during the time of occurrence the victim child is below the age of 12 years. On the other hand, the Doctor, who examined the accused, issued a certificate under Ex.P.5 stating that the age of the accused is more than 21 years. In respect to the said evidence, there was no denial on the side of the accused that he is not having the age below 21 years. Accordingly, in this connection the age of the accused at the time of occurrence was determined as 21 years.

14.Secondly, in respect to the alleged occurrence, before the trial Court P.W.2 and P.W.17 gave evidence fully in support of the case of the prosecution. It was the specific evidence given by P.W.2 that during the time of occurrence, the accused after removing her dress, penetrated his penis into the vagina. Further, in order to corroborate the said evidence, P.W.4, who is the qualified Doctor, examined the victim child, issued a OP sheet, that there was a tenderness in the vagina of the child. Accordingly, the evidence given by the Medical Officer is also in support of the evidence given by P.W.1. It is true, P.W.11-the Doctor, who has also examined the victim child, issued a certificate under Ex.P.4, stating that there was no external injuries found in the body of victim child. In this regard, it is necessary to see that the said Doctor had examined the victim child nearly after 2 days from the date of occurrence. On the other hand, P.W.5, the Nurse, who is working in the said village examined the victim child on the same day, gave evidence as during the time when she was examined the victim child, there was a contusion in her vagina. Further, in order to support the said evidence, P.W.4, who examined the victim child on the next day, has also given evidence that there was injury. In the said circumstances, on considering the nature of injury sustained by the victim girl, all are aware that if the contusion is caused, there may be a chance to disappear within a reasonable time. Therefore, being the reason that the nature of the injury sustained by PW4 is only the tenderness the opinion given by the Doctor, who is working in the Government Medical college Hospital, Sivagangai, is not at all relevant to disbelieve the case of prosecution. Therefore, I do not find that there is discrepancy found in the evidence given by the Doctor. cartridge

15.Secondly, it is the case of the prosecution that immediately after the occurrence, the same was reported to P.W.1 and then all are went to met the Nurse and consequentially, upon the complaint given by PW1, the case has been registered. In this regard, on going through the evidence given by P.W.9 and P.W.7, who are the residents of the same village, accompanied with P.W.1 for service records to victim child, stated in their evidence as



immediately, after came into the knowledge, P.W.1 informed the same and after taking bath to PW2, P.W.1 produced the P.W.2 before the Nurse. In otherwise, it is not reported on the side of the accused that the said witnesses are having enmity with the accused. Hence, in the absence of any material, we cannot disbelieve the evidence given by the said witnesses.

16. Here, it is the case during the time of giving statement before the Judicial Magistrate as well as before the trial Court, the victim child has narrated the occurrence and shown a prima facie case in favour of the prosecution. The said evidence given by the victim child is a narrow and inspired the confidence of this Court that while at the time of occurrence the accused committed aggravated penetrative sexual assault over her. After showing the case of the prosecution as above, Section 29 of POCOS Act came into play and thereafter, it is for the accused to show the probability that the alleged occurrence narrated by P.W.2, is due to some other reasons.

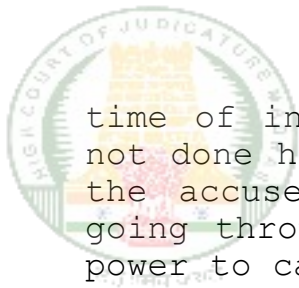
17. In this case, the only stand taken by the accused is that due to land dispute, P.W.1 lodged a false complaint against him.

18. On considering the said defence with the evidence given by the prosecution witnesses, if really the story put forth by the defence is found correct, being the reason that P.W.1 is having previous enmity with the accused, she did not permit her daughter to go to the house of the accused. Therefore, the said circumstance reveals the fact that the accused and P.W.1 is not having any previous enmity and accordingly, it cannot be said that P.W.1 foisted a false case against the accused due to previous enmity.

19. The another contention raised by the learned counsel for the appellant is that P.W.17, who is the brother of the victim child, accompanied along with the victim child at the time occurrence, has not been examined during the time of investigation by the Investigation Officer. But, he has been examined as a witness only during the time of trial and therefore, the evidence given by the said witness cannot be looked into for deciding the issue raised in this appeal.

20. Now, on considering the same, the Investigation Officer in his cross-examination admitted that the said P.W.17 has not been examined during the time of investigation. In this regard, on going through the evidence given by P.W.1 and P.W.2 as well as the averments found in the complaint, it was stated that P.W.17 was also went along with P.W.2 for watching the television. Therefore, it is

<https://hccres.courts.gov.in/cse/vces/>



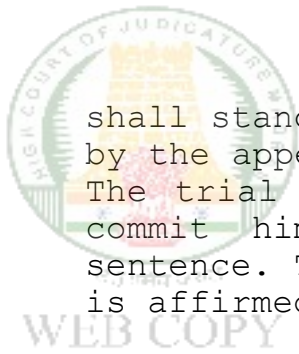
time of investigation. In this case, the Investigation Officer has not done his duty properly. However, for the defect pointed out by the accused, P.W.1 is no way responsible. In this occasion, on going through Section 311 Cr.P.C., the trial Court is having every power to call any person as a witness for just decision of the case.

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21. In fact, it is obligatory on the part of the Court to call such a person to identify the truth. Therefore, herein also, the prosecution examined P.W.17 as a witness, which is well within the purview of Section 311 Cr.P.C. and hence, it cannot be held that the examination of P.W.17 is against the settled law, even assuming that the evidence given by P.W.17 cannot be taken into account for deciding the issue raised in this case. As already observed, the evidence given by P.W.2 is very clear and narrow one that while at the time of occurrence, the accused herein committed an offence of aggravated sexual assault. In the said circumstances, the absence of rebuttal evidence from the accused in order to show the probability that he is not committed an offence, this Court is not in a position to accept the contention raised by the learned counsel appearing for the appellant.

22. Now, on going through the judgment rendered by the trial Court, the accused has been convicted under Section 5(1)(m) read with Section 6 of POCSO Act 2012. In this occasion, in respect of provision under Section 5(1) read with Section 6 of POCSO Act, it is necessary for the prosecution to prove that the accused committed penetrative sexual assault on the victim child more than once or repeatedly. Here, it is a case, it was stated in the complaint that the accused committed sexual assault more than once. Further, during the time of giving evidence, P.W.1 and P.W.2 have stated before the trial Court that before the date of occurrence, on one Sunday, the present accused has committed the same offence. In this regard, to cull out the evidence given by P.W.1 and P.W.2, if the said occurrence narrated by P.W.1 and P.W.2 is true one, it is for them to lodge a complaint immediately after the occurrence, which alleged to be happened on one Sunday. Further, in respect of the said occurrence, P.W.17, who is the child always accompanied with P.W.2, has not stated about the previous occurrence. Therefore, the evidence given by P.W.1 and P.W.2 is intolerable one and the same cannot be accepted. Accordingly, this Court concludes that the appellant/accused is not guilty under Section 5(1) read with Section 6 of the POCSO Act, 2012. In otherwise, he is guilty under Section 5(m) read with Section 6 of the POCSO Act, 2012.

23. Accordingly, in view of the above, this Criminal Appeal is dismissed and the conviction and sentence, awarded by the trial Court under Section 5(m) read with Section 6 of the POCSO Act 2012, is set aside. The accused is to be released on bail bond, if any, executed by the appellant / accused



shall stand cancelled. The period of imprisonment already undergone by the appellant shall be given set off under Section 428 of Cr.P.C. The trial Court is directed to secure the appellant / accused and commit him to prison for undergoing the remaining period of sentence. The compensation amount already awarded by the trial Court is affirmed.

Sd/-

Assistant Registrar (CS III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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To:-

- 1.The District and Sessions Judge,
(Fast Track) Mahila Court,
Sivagangai.
- 2.The Inspector of Police,
All Women Police Station,
Thirupathur,
Sivagangai District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 4.The Section Officer,
Criminal Section Records,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

Copy to:

- 1.The Authorized Officer,
Legal Aid Service Committee,
Madurai Bench of Madras High Court,
Madurai.

CrI.A(MD)No.202 of 2017
06.09.2021

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