



Crl.A.No.575 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :28.10.2022

Pronounced on :15.11.2022

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Crl.A.No.575 of 2017

Sudhakar

.. Appellant

/versus/

State, represented by
The Inspector of Police,
All Women Police Station,
Ariyalur District.
(Crime No.5 of 2016)

.. Respondent

Prayer: Criminal Appeal has been filed under Section 374(2) of Cr.P.C., to set aside the judgment and order in Special Sessions Case No.18 of 2016 dated 17.09.2016 on the file of Fast Track Mahila Court, Ariyalur.

For Appellant :Mr.R.Sankarasubbu

For Respondent :MrR.Kishore Kumar
Govt. Advocate (Crl.Side)



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JUDGMENT

The Criminal Appeal is preferred by the accused against the judgment of the trial Court for offences under Sections 366 IPC and imposed 5 years RI with fine of Rs.1,000/-, convicted under Section 506(i) of IPC and imposed 6 months RI with fine of Rs.1,000/- and convicted under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (in short “POCSO Act”) and imposed 15 years RI with fine of Rs.10,000/- vide, judgment dated 17/09/2016 in Spl. S.C.No.18 of 2016.

2. The case of the prosecution is that, on 09/07/2016, the victim girl child (PW-2) along with her mother (PW-1) and her father (PW-3) went to the function held on eve of the marriage of one Selvi, who resides next to her house. At about 9.30 p.m, when PW-1 was helping the bride’s family in decorating the vessels, the child, who was playing with other children was told by her mother to have dinner. Accordingly, she went to the dining room, had her dinner and went to the side by lane to wash her hands. The



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accused/appellant, who is the husband of the bride's sister, gagged the child mouth, took her to the nearby babul grove, put the child down, removed her skirt and under garment, then he rubbed the child's private part (vagina) with his private part (penis). The mother of the child (PW-1) on noticing her daughter is missing, raised alarm. She along with her husband and others went in search of the her daughter. From the babul grove the child came crying. She told PW-1 that she was taken to the grove by the accused. He removed her skirt partially and her under garment, put his penis on her vagina and rubbed. Seeing the light of the torch, people coming in search of the girl, the accused ran away threatening her that if she reveals, he will kill her.

3. About the above said incident occurred on 09/07/2016 at about 9.30 p.m, the complaint (Ex.P-1) was registered by the respondent police on 11/07/2016 at 08.00 hrs in FIR Crime No:5/2017. The trial Court, based on the materials collected during the course of investigation and the Final Report, framed charges against the accused for the offences under Section



366 IPC, Section 5(m) r/w 6 of POCSO Act and Section 506(i) of IPC.

4. After considering the evidence, the trial Court concluded that the version of the victim child (PW-2) is very well supported by the corroborating evidence of PW-1, PW-3, PW-7 to PW-10 and DW-1. The evidence of prosecution witnesses proves that the complaint was lodged on 10/07/2016 itself. However, the PW-18 (Investigating Officer) due her ignorance about her duties, neglected to register the complaint immediately. Since the crime was reported on 10/07/2016 on the next day of occurrence and taken up for investigation, there is no prejudice to the accused in registering the FIR belatedly.

5. The aggrieved accused, has preferred the appeal wherein he has stated that, the trial Court has travelled a long way on illogical reasons and rendered a perverse finding. The complaint is an act of malice. The evidence of the defence witness to prove that the complaint was given with an ulterior motive by tutoring the child has not been considered by the trial Court



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properly. The improvement in the prosecution version stage by stage not corroborated with documentary or oral evidence, not taken into consideration by the trial Court.

6. The explanation for the two days delay in lodging the complaint is not convincing and contrary to evidence. The trial Court has gone beyond the prosecution case and has held that the oral complaint was made on the day next to the incident which occurred on the previous day night. Hence, no prejudice to the accused. While the evidence indicates, the alleged occurrence happened on 09/07/2016 at about the 9.30 to 10.00 p.m., the complaint received and FIR registered on 11/07/2016 at about 08.00 hrs. No material evidence or previous statement of the prosecution witnesses say that, PW-1 gave an oral complaint to the Police on 10/07/2016. The trial Court relying upon the testimony of the hostile witnesses and contradictory statement before the Court, had held that the complaint was given on 10/07/2016. However, the trial Court has not addressed the ill-consequence of suppressing the first complaint/information.



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7. The Learned Counsel for the accused/appellant further submitted that the prosecution has not proved the ingredients required to punish under Section 366 IPC or Section 506(i) of IPC. Also to attract Section 5(m) of POCSO Act, the allegation of manipulation of any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the child should be made and the same should have been spoken by the victim and corroborated by medical evidence. In this case, PW-2 has not complained about any manipulation, hurt or injury. Ex.P-6, the Accident Register given by PW-13 Dr.Suguna after medical examination of PW-2 does not show any external injuries. The mother of the victim girl has told to the Doctor PW-13 she did not notice any injuries on her daughter's body. The police had not recovered the dress of the accused or the victim girl child. No reason given by the prosecution for the omission to recover the dress materials. While so, the trial Court on surmises has held that the accused had committed aggravated penetrative sexual offence of manipulating the body part of the victim girl child and liable to be punished with 15 years RI to instil fear in the mind of the sexual offenders.



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8. The Learned Counsel for the appellant reading out the testimony of PW-7 to PW-10, who were treated hostile witnesses by the prosecution, submitted that though PW- 7 to PW-10 did not support the prosecution case and treated hostile, the trial Court by extracting certain response to the suggestions made in the cross examination out of context, has perversely observed that their testimony corroborates PW-2 version. Likewise, the testimony of DW-1 does not corroborate the version of PW-2, but the trial Court has perversely and deliberately has observed that DW-1 evidence corroborates the version of PW-2, though not a single fact spoken by PW-2 is corroborated by DW-1.

9. The delay in lodging the complaint with embellishment and untruth has been ignored by the trial Court and by giving its own reasoning and justification, based on the admission by PW-18. In the cross examination, PW-18 has admitted that PW-1 came to the police station on 10/07/2016 and orally informed about the incident, but she did not register



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the complaint on that day, since PW-1 said that the victim being a girl child her future may get affected so she will give complaint on the next day. This fact is spoken for the first time during examination of witnesses and not while recording statement under Section 161 of Cr.P.C.

10. In the complaint Ex.P-1, the defacto complainant (PW-1) has stated that the victim (PW-2) was taken to the Ariyalur Hospital immediately on the same day night and she was admitted in the hospital. Since she was attending her daughter in the hospital, she give the complaint on 11/07/2016. The Accident Register maintained by the Ariyalur hospital which is marked as Ex.P-6, reveals that PW-1 brought her daughter PW-2 to the hospital only on 11/07/2016 at about 2.30 p.m after lodging the complaint and registered as Cr.No. 05/2016. The testimony of PW-1 and PW-18 about reporting the crime orally the previous day is a patent lie and goes contrary to the documentary evidence Ex.P-6, which speaks about the date and time of PW-2 admission into the hospital for treatment. Ex.P-6, a contemporaneous record and a crucial evidence to appreciate the prosecution



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case has been totally ignored by the trial Court while appreciating the evidence.

11. The trial Court erred by holding that the no corroboration is required for the evidence of PW-2 (victim) the child witness, ignoring the rule of evidence that while appreciating the child witness, the probability of tutoring has to be ruled out in that respect. The trial Court appreciation of the child evidence is against law and also against prudence. The Court below has wrongly held that the evidence of hostile witnesses and defence witnesses corroborate the version of (PW-2) the victim girl child while the fact does not prove.

12. Per contra, the Learned Government Advocate (Crl.Side) appearing for the State submitted that, the crime committed on a child in a grove in pitch darkness. The accused, who attempted to ravish the child ran away after relatives came in search of the child. While fleeing, the accused got his leg injured and the same is proved through the AR marked as



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Ex.P-5. The trial Court has rightly held that the flight of the accused immediately after accusations made against him is relevant under Section 8 of the Indian Evidence Act and indicates the guilt. Soon thereafter, the child had narrated to her mother (PW-1) about what happened to her and the same is testified before the Court and rightly appreciated by the trial Court. The trial Court has also rightly concluded that there is no delay in reporting the crime. The delay in registering the complaint, due to the ignorance or omission of PW-18 to register the complaint immediately on receiving the information cannot be a reason to disbelieve the un-impeached testimony of the victim.

13. Heard the learned counsels. Records perused.

14. As per the documents, the investigation has commenced, after FIR (Ex.P-8) was registered on receipt of the written complaint (Ex.P-1) on 11/07/2016. The prosecution to prove the charges had examined 18 witnesses. Marked 9 documents. The testimony of the defence witnesses



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DW-1 and DW-2, being relatives to the accused were held not reliable. The trial Court has observed that the evidence of PW-2 need no corroboration, but as a law of prudence taken the evidence of PW-1 and PW-2 for corroboration. In addition, part of the testimony of PW-7 to PW-10, who all turned hostile were also found corroborates the version of PW-2.

15. Mr.R.Sankarasubbu, the Learned Counsel appearing for the appellant forcibly submitted that, the trial Court has provided reasoning not supported by evidence. There are material contradictions between the testimony of PW-2 the victim girl child and her parents. Further, no other witnesses had supported the case of the prosecution. Particularly, PW-7 to PW-10 has turned hostile, but contrary to the evidence available on record, the trial Court has perversely held that they all corroborate the version of PW-2. While the testimony of PW-2 a child witness itself bristles with falsehood and not reliable, the trial Court miserable erred in holding that PW-2 evidence needs no corroboration.



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16. The main attack on the trial Court judgment are on three folds:

(a) Failed to consider the delay in lodging / registering the complaint;

(b) Failed to note PW-2 version lack corroboration and failure of fair appreciation of evidence;and

(c)The evidence as such believed by the trial Court does not satisfy the necessary ingredients to convict the accused for the offence of aggravated penetrative sexual offence.

DELAY:

17. As per the prosecution case, the complaint in writing was received on 11/07/2016 at 8.00 hrs. The defacto complainant in her complaint Ex.P-1 had given reason for the delay in reporting. According to Ex.P-1, the victim child was taken to the Ariyalur hospital immediately after the occurrence i.e 09/07/2016. The child was admitted in the hospital. Since PW-1 was with her daughter (PW-2) and attending her in the hospital, she has lodged the complaint on 11/07/2016. The said reason for delay finds



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place in the complaint Ex.P-1 and also reflected in the FIR Ex.P-8. In the chief examination of PW-1, who is the defacto complainant, she has deposed that the child was taken to the Ariyalur hospital on the same day night. Doctor examined the child and admitted the child as inpatient. Fearing repercussion to the child, she did not give any complaint to the police. She gave the complaint Ex.P-1 after a day.

18. In the cross examination, PW-1 has asserted that on 09/07/2016 night at about 11.00 p.m she, her husband, neighbours Ethiraj and Velayutham took the victim girl to the Ariyalur hospital. Neither Ethiraj nor Velayutham examined. PW-2, the victim girl in the cross examination had deposed that she was taken to the hospital on the same day night at about 11.00 p.m and she was treated as inpatient for 4 days. She know the accused by name on that day, her mother (PW-1), her father (PW-3), Priya - the wife of the accused (PW-9), mother-in- law of the accused (not examined), brother-in-law of the accused (not examined) and one Nithya (PW-15) came in search of her and rescued her near the Babul grove. She



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narrated to her mother what happened and at that time, others were present.

Whereas, PW-3 her father does not say, he heard what PW-2 said to her mother. PW-9 and PW-15 had turned hostile. Therefore, the evidence of PW-2 that they were present along with her parents when she came out from the grove and they both heard what she told to her mother, is not proved.

19. To believe the testimony of PW-2 and to arrive at an irresistible conclusion that her testimony needs no corroboration, at least her testimony that she was taken to the hospital on the same night and was treated as in-patient for 4 days must have been proved. Whereas, on the scrutiny of Ex.P-6 which is the Accident Register maintained at Ariyalur Govt. Hospital, it is clearly stated that the child was brought to the hospital only on 11/07/2016 at about 2.30 p.m after lodging the complaint. She was escorted to the hospital by Grade-I Women Police Constable by name Vasantha (PW-17). PW-1 has accompanied PW-2. The Crime Number and Sections are mentioned in Ex.P-6. Further, PW-1 has stated to the Doctor Suguna - PW-13 who has recorded the Accident Register that the child told her that



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while she was playing near her house, she was forcibly lifted by a known person (name not known), who gagged her mouth and took her to the nearby babul grove. Removed her skirt and undergarment and rubbed his penis on the vagina of the child, on seeing the torch light, he ran away. Whereas, the case of the prosecution in trial has turned out to be a kidnap from the lane when the girl child came to wash her hands after taking dinner in the house of PW-8.

20. PW-1 has reported to the Doctor (PW-13) that after the alleged occurrence, for two days the child was tired and silent. On 11/07/2016 she has returned to normalcy. Ex.P-6, the document maintained in the course of transaction and recorded contemporaneously could not be tweaked or manipulated. This document shakes the very root of the prosecution case, particularly PW-2 version that she was taken to the hospital on 09/07/2016 night and she was treated as in-patient for 4 days. There is nothing to prove that PW-2 was admitted on 09/07/2016 and treated for 4 days. Contrarily, PW-17 Vasantha, Woman Police Constable, has deposed that she presented



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the Child to the Doctor for examination on 11/07/2016.

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21. Therefore, the prosecution case that the child was admitted in the hospital immediately on the night of 09/07/2016, hence, the mother was not able to come and give complaint immediately, thus, there was a delay in filing the complaint is proved to be false. If it is contended that there was no delay in registering the FIR, since the crime was informed to the police on the next day 10/07/2016 itself and the same is to be believed, then such assertion goes contrary to documentary evidence, such as Ex.P-1 and Ex.P-8.

22. The conclusion of the trial Court that the complaint was given on 10/07/2016 but the PW-18 did not record the complaint, due to ignorance of law, is based on the statement of the witnesses made during the cross examination. As held by the Courts in catena of judgments, mere delay in registering the First Information Report or delay in lodging complaint *per se* will not vitiate trial. However, will put the prosecution case under doubt.



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In this case, PW-18 has explained the reason for delay in registering First Information Report. The said explanation is plausible and reasonable in view of the social stigma attached to the victim of rape which deter the victim to seek redressal through organised police machinery.

23. For the delay in registering FIR, the trial Court has concluded that, one cannot expect to give complaint immediately after the occurrence. The trial Court from the testimony of the witnesses PW-7, had concluded that on 10/07/2016 itself, the police was informed about the crime and Priya (PW-9) the wife of the accused was taken to the police station for enquiry. According to the trial Court judgment, the oral complaint given to the police on 10/07/2016 was not registered immediately by PW-18 and it no way cause prejudice to the accused. The facts and circumstances of the case and evidence available supports the view of the trial Court.



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24.The learned counsel appearing for the appellant, regarding contradictions to PW-2 evidence, which been heavily relied by the trial Court listed out the following points.

(a) There is a contradiction in the complaint (Ex.P-1) and the Accident Register (Ex.P-6) about the fact when the child was kidnapped. Whether it happened, while she was playing with other children near her house as found in Ex.P-6 or when she went to the ill-lighted lane to wash her hands after dinner at the function house as found in Ex.P-1.

(b) There is contradiction in the evidence of PW-1, PW-2 and PW-3 about the fact that when PW-1 and PW-3 went in search of PW-2 along with few villagers, they saw PW-2 coming out from the babul grove. Though PW-2 has stated names of the persons, who came in search of her along with her parents, neither PW-1 nor PW-3 has whispered their names. The prosecution has not examined the persons, who alleged to have joined PW-1 and PW-3 in the search of PW-2. Though PW-2 had deposed that when she narrated the incident to her mother, apart from her father (PW-3) and others,



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Priya (PW-9) and Nithya (PW-15) were also present and heard what she told to her mother (PW-1). None of these three witnesses supports PW-2 version. PW-3, the father of the child has deposed that he did not hear what her daughter (PW-2) said to her mother (PW-1) and only through PW-1, he came to know what happened to his daughter. PW-9 and PW-15 have turned hostile and they have denied accompanying PW-1 and PW-3 in search of PW-2.

25. The testimony of the victim child is more reliable, since she has suffered the trauma and being a child, there is no reason to embellish the fact or implicate a wrong person. In the instant case, PW-2 evidence stands unimpeached and her evidence is natural and genuine. She has not whispered anything improbable or in exaggeration. She has deposed that she was taken away to the babul grove by the accused. He removed her skirt and undergarment and rubbed his private part on her private part. He ran away on hearing voices and light of the torch. The fact that the accused got injured on his leg at the same point of time is deposed by PW-10-



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Chinnadurai and PW-11-Senthilkumar. Therefore, the minor contradictions in the prosecution evidence are ignorable. It is natural in case of this nature which involve an innocent child on one side and grown up adults on other side.

26. The third limb of the defence argument is, the evidence is not sufficient to convict the accused for the offence of aggravated penetrative sexual offence. The prosecution case is that the accused took the child forcibly to a secluded place, removed her undergarment and rubbed his private part on the child private part. For this offence, charge under Section 5(m) of the POCSO Act, 2012 framed.

27. Section 5(m) of POCSO Act, 2012, says whoever commits penetrative sexual assault on a child below 12 years said to have committed aggravated penetrative sexual assault.



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28. Section 3(c) of POCSO Act, 2012 says, a person is said to commit “penetrative sexual assault” if -

(c)he manipulates any part of body of the child so as to cause penetration into vagina, urethra, anus or any part of the body of the child or make the child to do so with him or any other person; or

29. From PW-2 evidence, it is proved that the accused rubbed his penis on the vagina of the child. No evidence or allegation that attempt to penetrate or penetration or to cause penetration is found in the prosecution case. Under POCSO Act “to touch the part of the body by hand or any act involving physical contact without penetration” is defined as sexual assault under Section 7.

30. The POCSO Act taking into consideration several form of sexual act has listed out the various manifestation of the crime and based on its gravity punishment is prescribed. Touching part of the body or rubbing the part of the body may be manipulation of the body but not always to



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cause penetration. To attract Section 3(c) of the POCSO Act, the said manipulation must be to cause penetration. Manipulation need not even be with 'penis' or on 'vagina'. It may be by any means and on any part of the body, but to attract the said manipulation should be for causing penetration.

31. Therefore, in the instant case, PW-2 has stated that the accused rubbed his penis on her vagina. In the absence of allegation of penetration or manipulation to cause penetration, Section 3(c) r/w 5(m) of the POCSO Act, is not attracted. Only Section 7 of POCSO Act is attracted which defines sexual assault. The said sexual assault gets the form of aggravated sexual assault under Section 9(m) of the POCSO Act since the victim child is below 12 years old.

32. The reading of Section 3(c), 5(m) and Section 7 of the POCSO Act, in just a position, the difference will be clearly understood, hence extracted below for the sake of clarity.



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Section 3(c) : Penetrative sexual assault:- A person is said to commit "penetrative sexual assault" if-

(a).....

(b).....

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

Section 5(m): Aggravated penetrative sexual assault- whoever commits penetrative sexual assault on a child below twelve years; or

Section 7: Sexual assault- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

Section 9(m): Aggravated sexual assault- whoever commits sexual assault on a child below twelve years; or



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33. The case of the prosecution as proved through its witnesses is that the accused kidnapped PW-2, took her to grove, placed his private part on the private part of the child and rubbed. On hearing sound and seeing the light of the torch, the accused ran away after intimidating the child, Hence, offence under Section 366 IPC, Section 506(i) IPC and Section 9(m) r/w 10 of POCSO Act instead of Section 5(m) r/w Section 6 of POCSO Act is made out.

34. Accordingly, this Criminal Appeal is partly allowed. The conviction under Section 5(m) r/w 6 of the POCSO Act is modified as below:-

Section modified by this Court	Sentence modified by this Court
366 IPC	Sentence imposed on him to undergo 5 years RI and to pay a fine of Rs.1000/- in default to undergo 6 months SI
506(i) IPC	Sentenced imposed on him to undergo 6 months RI and to pay a fine of Rs.1000/-.
9(m) r/w 10 of POCSO Act instead	Sentenced him to undergo 7 years RI and to pay a fine of Rs.10,000/- in default to



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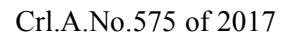
Section modified by this Court	Sentence modified by this Court
of Section 6 of POCSO Act	undergo 2 years SI.

The period of sentenced shall run concurrently.

35. In the result, **this Criminal Appeal is partly allowed.** The judgment of the trial Court viz., the Sessions Judge, Fast Track Court, Mahila Court, Ariyalur in Spl. S.C.No.18 of 2016, dated 17.09.2016 is set aside. Out of total fine amount, a sum of Rs.10,000/- is ordered to be paid to the victim girl as compensation. The period of imprisonment already undergone by the accused shall be set off. The sentence of imprisonment shall run concurrently. The accused shall be in prison for the remaining period of sentence imposed by this Court.

15.11.2022

Index:yes
speaking order/non speaking order
ari



1.The Special Sessions Court,
Fast Track Mahila Court, Ariyalur.

3.The Central Prison, Trichy.

4. The Public Prosecutor, High Court, Madras.

DR.G.JAYACHANDRAN,J.



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Delivery Judgment made in
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