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*Crl.A.Nos.245 of 2016
& 154 of 2017*

In the High Court of Judicature at Madras

Dated : 03.4.2023

Coram :

The Honourable Mr.Justice N.ANAND VENKATESH

Criminal Appeal Nos.245 of 2016 & 154 of 2017

A.Muthupandi

...Appellant in
Crl.A.No.245/2016 &
Respondent in
Crl.A.No.154/2017

State rep.by the Public Prosecutor,
High Court, Madras.

...Appellant in
Crl.A.No.154/2017

Vs

The State rep.by the Inspector of
Police, Tiruppur All Women Police
Station, Tiruppur District.

...Respondent in
Crl.A.No.245/2016

Crl.A.No.245 of 2016 : APPEAL under Section 374 of the Criminal Procedure Code against the judgment, conviction and sentence rendered by the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court), Tiruppur, Tiruppur District in S.C.No.87 of 2012 dated 16.3.2016.



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Crl.A.No.154 of 2017 : APPEAL under Section 377 of the Criminal Procedure Code against the same judgment, conviction and sentence rendered by the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court), Tiruppur, Tiruppur District in S.C.No.87 of 2012 dated 16.3.2016.

For Appellant/Accused : Mr.R.Harikrishnan,
Legal Aid Counsel

For Respondent/State : Mr.L.Baskaran,
Government Advocate
(Crl.Side)

COMMON JUDGMENT

Crl.A.No.245 of 2016 has been filed by the appellant/accused aggrieved by his (i) conviction under Section 376(2)(f) of the Indian Penal Code (hereinafter called the Code) and (ii) sentence to undergo three years rigorous imprisonment and to pay a fine of Rs.10,000/- and in default, to undergo one year rigorous imprisonment.

2. Crl.A.No.154 of 2017 has been filed by the State seeking for enhancement of the punishment imposed on the accused in the same judgment on the ground that the Trial Court failed to impose the



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minimum sentence that has been prescribed under Section 376(1) of the Code.

3. The case of the prosecution is as follows :

(i) The victim girl - P.W.2 was aged about 5 years at the time of occurrence. On 27.1.2010 at about 5 PM, the accused, who was a neighbour, was said to have taken the victim girl into his house, removed the undergarments of the victim girl and committed penetrative sexual assault against the victim girl. The victim girl told her parents that she was experiencing pain in her vagina. When enquired by the mother, the victim girl explained about the incident.

(ii) A complaint - Ex.P.1 was given by P.W.1 - the father of the victim girl on 04.2.2010 at about 21 hours before P.W.9 - the Sub-Inspector of Police, All Women Police Station, Tiruppur. P.W.9, on receipt of the complaint, registered the first information report - Ex.P.9 in Cr.No.7 of 2010 for offences under Sections 376 and 506(ii) of the Code. P.W.9 thereafter forwarded the first information report to P.W.10 - the Inspector of Police, North Police Station, who was in charge of the All Women Police Station, Tiruppur at the relevant point of time.



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(iii) P.W.10 took up the investigation and he went to the scene of crime at about 21.40 hours on 04.2.2010 and prepared the observation mahazar marked as Ex.P.2 and the rough sketch marked as Ex.P.10 in the presence of witnesses. He also recorded the statements of the victim girl, her parents and other neighbours. On 05.2.2010 at about 6 AM, the accused was arrested, produced before the Court concerned and remanded to judicial custody. Thereafter, a requisition was made to the Court concerned for conducting medical examination of the victim girl and the accused.

(iv) The victim girl was examined by P.W.6 - the doctor and through her, Ex.P.8 was marked. As per the report of P.W.6, no injuries were found over the medial aspect of both thighs and perineum. However, it was found that hymen was not intact (injured) and that this had given the evidence of intercourse.

(v) The accused was examined by P.W.5 - the doctor and through him, Ex.P.7 report was marked, which would show that there was no anatomical reason to conclude that the accused was impotent.

(vi) P.W.10 thereafter went on transfer and the investigation was taken up by P.W.11. The Investigation Officer recorded the evidence of the remaining witnesses, collected medical reports and ultimately laid



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the charge sheet on 13.12.2010 before the Judicial Magistrate No.1, Tiruppur. It was taken on file as P.R.C.No.41 of 2010.

(vii) The accused appeared before the Court concerned and was served with the copies under Section 207 of the Criminal Procedure Code (for brevity, the Cr.P.C.). The case was thereafter committed under Section 209 of the Cr.P.C., to the Principal District and Sessions Court, Coimbatore, which was, prima facie, convinced with the materials placed before it and hence, proceeded to frame charges against the accused for the offences under Section 376(2)(f) and 506(ii) of the Code. When the charges were put to the accused person, he denied the same and pleaded 'not guilty'. The case was thereafter made over to the Trial Court.

(viii) The prosecution examined P.W.1 to P.W.11 and marked Ex.P.1 to Ex.P.10. The defence examined D.W.1 and marked Ex.D.1. The incriminating evidence that was gathered during the course of trial was put to the accused person, when he was questioned under Section 313(1)(b) of the Cr.P.C., and he denied the same as false.

(ix) The Trial Court, on considering the facts and circumstances of the case and on appreciation of the oral and documentary evidence, came to the conclusion that the prosecution had proved the case



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beyond reasonable doubts for the offence under Section 376(2)(f) of the Code and accordingly, convicted and sentenced the accused. Aggrieved by the same, Crl.A.No.245 of 2016 has been filed before this Court by the accused person.

(x) The prosecution is also aggrieved by the sentence imposed by the Trial Court and the State has filed Crl.A.No.154 of 2017 seeking enhancement of the punishment imposed on the accused.

4. I have heard the learned counsel appearing for the accused and the learned Government Advocate (Criminal Side) appearing for the State.

5 . The learned counsel for the accused submitted that there is a serious doubt with regard to the very incident. To substantiate the same, he brought to the notice of this Court the complaint marked as Ex.P.1. In the complaint given by P.W.1, it had been stated that the incident had taken place on 30.1.2010 whereas P.W.1, in his evidence had stated that the incident had taken place on 27.1.2010. According to him, likewise, D.W.1 - the doctor, who was examined on the side of the defence, had given a report marked as Ex.D.1 wherein it was



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found that the incident had taken place on 03.2.2010. Hence, the learned counsel for the accused submitted that there was no clarity as to the date, on which, the incident had taken place. This, coupled with the fact that there was previous enmity, which had been spoken to by the accused, when he was questioned under Section 313(1)(b) of the Cr.P.C., shakes the very foundation of the case of the prosecution.

6. The learned counsel for the accused further submitted that there was a contradiction with regard to reports of both P.W.6 and D.W.1, that D.W.1 did not make any observation in the report marked as Ex.D.1 as was done by P.W.6 and it was D.W.1, who had seen the child first even before P.W.6. According to the learned counsel, - Ex.P.8 - the very report of P.W.6 becomes questionable.

7. The learned counsel for the accused also pointed out to the evidence of the victim girl, who was examined as P.W.2 and submitted that the Trial Court did not even properly ascertain the competency of the victim girl to testify before it as mandated under Section 118 of the Indian Evidence Act, 1872. Hence, it was contended that the evidence of P.W.2 cannot be acted upon.



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8. Per contra, the learned Government Advocate (Criminal Side) appearing for the State submitted that the victim girl had clearly spoken in her evidence about the incident, which was supported by the medical evidence of the doctor - P.W.6, through whom, Ex.P.8 was marked. According to him, the discrepancies that were pointed out by the learned counsel appearing for the accused will not, in any way, vitiate the case of the prosecution.

9. The learned Government Advocate (Criminal Side) further submitted that the Trial Court, after having found that the accused had committed the offence under Section 376(2)(f) of the Code, ought to have imposed the minimum sentence prescribed under Section 376(1) of the Code and that this case requires enhancement of punishment.

10. This Court has carefully considered the submissions of the learned counsel on either side and the materials available on record.

11. Before dealing with the evidence that is available on record, it is noticed that the mother of the victim girl, who was one of the main witnesses in this case, unfortunately died in the year 2013. The



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victim girl confided about the incident only to her mother on 27.1.2010. Only thereafter, the father of the victim girl - P.W.1 came to know about the incident.

12. In cases of sexual assault on children, the delay in lodging the complaint can never be a ground to dislodge the case of the prosecution since the complaint is given after a lot of hesitation, fearing social repercussions.

13. In cases of this nature, the evidence of the victim child assumes a lot of significance. If the same is reliable and can be acted upon, the Court need not go in search of corroboration.

14. The victim girl was examined as P.W.2. The age of the victim girl at the time of incident was five years. The same has been spoken to by P.W.4, through whom, Ex.P.3 report was filed. By the time the victim girl was examined in court during the year 2014, she was aged about 9 years. Unfortunately, the Investigation Officer did not take the child for recording the statement under Section 164 of the Cr.P.C., immediately after the complaint was lodged. Even though Section

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164(5-A) of the Cr.P.C., came into force on 03.2.2013, the Courts have always insisted for recording the statement of the victim girl under Section 164(5) of the Cr.P.C., as soon as the commission of offence is brought to the notice of the Police.

15. The learned counsel for the accused attempted to cause a dent on the case of the prosecution by pointing out certain discrepancies in the date, on which, the alleged offence was committed.

16. The evidence of both P.W.1 and P.W.6 consistently reiterates that the incident had taken place on 27.1.2010. In the complaint that was marked as Ex.P.1, it was mentioned as 30.1.2010. The report of D.W.1 stated as if the incident had taken place on 03.2.2010. D.W.1, in her evidence, had explained this discrepancy and stated that the actual date of occurrence was 27.1.2010 and by mistake, it was noted as 03.2.2010.

17. In the considered view of this Court, the discrepancy in the date of incident does not really go to the root of the matter. Both



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Ex.P.8 and Ex.D.1 reports spoke about the alleged rape committed on the victim girl and both these reports emanated only from the doctors, who were working in the Government Hospital, Tirupur. The discrepancy in the date does not take away the fact that an incident of rape had taken place in this case. P.W.2 had spoken about the same in the evidence and it was corroborated by the evidence of P.W.6, through whom, Ex.P.8 was marked.

18. Section 118 of the Indian Evidence Act, 1872 speaks about the competency of witnesses, who can testify before court. The said provision makes it clear that all persons shall be competent to testify before court except a particular category of persons mentioned in the said provision. When it comes to persons falling under that category, the Court has to satisfy itself that those persons are capable of understanding the questions put to them and giving rational answers to those questions. A child of tender age has also been brought within this category.

19. Through a catena of decisions, it is now too well settled that in order to determine the competency of a child witness, the Judge has



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to form his or her opinion. While doing so, it is left to the Judge to test the capacity of a child witness by adopting any method and there is no precise rule laid down to check the degree of intelligence and knowledge, which will render a child a competent witness. A child will become incompetent only in cases where the Court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner.

20. The entire law was discussed by the Apex Court in the case of ***P.Ramesh Vs. State [reported in 2020 (1) LW (Crl.) 683]***.

21. In the instant case, it is not clear from the evidence of P.W.2 as to what type of questions the Trial Court had put to her before ascertaining that she was capable of understanding the questions and giving cogent answers. The Trial Court made the following remark before proceeding with the examination of P.W.2 :

*"ePjpkd;w Nfs;tpfSf;F rhl;rpaspj;j gjpy;fs;py; ,Ue;J
rhl;rp> rhl;rpak; mspf;fj; jFjpahdth; vd KbT nra;J %ba
ePjpkd;wj;jpy; rhl;rpak; gjpag;gl;lJ ."*



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22. After making the above remark, the Trial Court put the child under oath and recorded the evidence. Even though this Court is not fully satisfied with the procedure that was adopted by the Trial Court, it will be too late in the day to once again subject P.W.2 - the victim girl by calling her to the Court at the appellate stage since, by now, P.W.2 would have become a major and her mental capacity would have completely changed. It will be impossible to understand the competency of P.W.2 when she was nine years old by examining her nearly after nine years. In view of the same, this Court has to necessarily go through the evidence of P.W.2 carefully and satisfy itself as to whether P.W.2 was a competent witness and had given rational answers to the questions put to her.

23. P.W.2 had cogently explained about the incident that took place inside the house of the accused. For a child aged about nine years and more particularly coming from a rural area, it is not possible to explain a sexual act with such graphic details.

24. For proper appreciation, the relevant portion of the deposition of P.W.2 about the incident is extracted as hereunder :

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"M[h; vjphpapd; ngah; Kj;Jghz;b. ehq;fs; rk;gt
rkaj;jpy; FbapUe;j tPl;bw;F gf;fj;J tPl;by; M[h; vjphp
FbapUe;jhh;. kjpak; Neu;jjpy; ehd; M[h; vjphp tPl;bw;F
Nfuk; tpisahl nrd;Nwd;. M[h; vjphp fjit g+l;btpl;lhh;. vd;
thapy; Jzpia itj;J milj;J tpl;lhh;. mtUila Ngd;l;> [l;bia
fow;wpdhh;. vd;Dila [l;biaAk; fow;wp tpl;lhh;. ehd;
rpWePh; fopf;Fk; ,lj;jpy; M[h; vjphpapd; Mz; cWg;ig
itj;J mKf;fptpl;lhh;."

The above evidence of P.W.2 has not been discredited during cross examination.

25. A child witness will broadly fall under two categories; the first category is where the child is a witness to an incident; and the second category is where the child itself is a victim and hence, a witness for what the child underwent. In cases falling under the first category, the chances of tutoring a child cannot be ruled out and hence, the Court must be very careful while dealing with the evidence of the child in those cases. However, in cases that are falling under the second category, the child cannot be tutored since it is incomprehensible for a child to understand a sexual act. Therefore, the child will be able to understand about the incident only if it had really



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gone through the same. That is the reason why the Apex Court has repeatedly held that the evidence of victims of sexual assault must be dealt with more sensitivity and it should not be appreciated in the manner, in which, the regular evidence is appreciated. If the above test is applied to the facts of the present case, there is no reason to disbelieve the evidence of P.W.2. The evidence of P.W.2 was further corroborated by the evidence of P.W.6 read with Ex.P.8.

26. If, according to the accused person, a false complaint has been lodged against him due to previous enmity, the foundation has to be laid during the cross examination of the witnesses. However, the defence has not even put a single question to P.W.1 - the father of the victim girl to establish that there was a previous enmity between the parties. The attempt made by the accused person to come up with such a version, when he was questioned under Section 313(1)(b) of the Cr.P.C., will be of no avail to him since it is his ipse dixit and it has not been tested during the process of recording the evidence. Previous enmity between the parties is not a matter of assumption or surmise and it has to be established by the accused person.



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27. In other words, the onus of proof is on the accused person to establish that there was a previous enmity between the parties, which resulted in the false complaint lodged against him. The accused person completely failed even to establish the foundational facts in this direction and hence, this defence has to be outright rejected.

28. The last submission made by the learned counsel appearing for the accused is with regard to the discrepancy between the report marked as Ex.P.8 through P.W.6 and the report marked as Ex.D.1 through D.W.1.

29. On a careful reading of the above reports, this Court does not find any major discrepancy.

30. The learned counsel for the accused person submitted that the victim girl was subjected to medical examination even before P.W.6 had examined the victim girl and that the prosecution had concealed about the same. To substantiate this submission, the learned counsel relied upon the evidence of D.W.1, through whom, Ex.D.1 was marked.

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31. D.W.1 is also a doctor, who was working at the Government Hospital during the relevant point of time. P.W.6 was also working in the same hospital at the relevant point of time. The report marked as Ex.D.1 would show that D.W.1 examined the victim girl on 05.2.2010 at about 5.55 PM whereas P.W.6 examined the victim girl at about 7 PM on 05.2.2010. This Court is not able to decipher anything from Ex.D.1 to conclude that this report is in contradiction with the report of P.W.6. Even otherwise, in the evidence of D.W.1, it had been categorically stated that the child was brought to the hospital by her father informing that the child was subjected to sexual assault by the accused Muthupandi. Therefore, the reason for bringing the child to the hospital is consistent from the evidence of both P.W.6 and D.W.1. If at all there is any contradiction, the defence, while cross examining P.W.6, should have put Ex.D.1 before P.W.6 and established the same. This was not done and hence, the contradiction has not been established by the defence.

32. At this juncture, this Court has to necessarily record its displeasure in the manner, in which, the witnesses are cross examined. On a daily basis, this Court is able to find that the standard



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of cross examination of witnesses has gone down drastically. It is quite unfortunate that the trial court advocates are not developing their skills of cross examination. Most of the questions, which are put to the witnesses, are irrelevant and illogical.

33. For instance, when P.W.6 was cross examined in this case, a question was put to her and was asked to explain as to whether hymen will get ruptured due to insect bite. This would show the amount of ignorance on the part of the counsel on human anatomy and medical jurisprudence. This is only a sample and many such illogical questions are being noticed by this Court on a daily basis.

34. The Trial Court advocates must bear in mind that they are defending the right of a person guaranteed under Article 21 of The Constitution of India. Hence, it is their bounden duty to put appropriate questions during the cross examination, failing which, their client will lose his or her liberty by suffering a sentence. The art of cross examination was considered as a crown in advocacy skills. If this art is lost, the charm in conducting a trial before a court will also be lost.



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35. In many cases, the effort seems to be to make as many witnesses as possible as hostile witnesses rather than effectively cross examining the witnesses by defending the valuable right of an accused person. This Court is forced to record its displeasure in the manner, in which, the cross examination is conducted in courts, with the fervent hope that the leaders of the bar will take note of it and will provide a platform for young juniors to learn the art of cross examination.

36. Even though common sense plays a major part during cross examination, thoroughness in knowing the provisions of the Cr.P.C., the Indian Evidence Act and the substantive law goes hand-in-hand to make the cross examination more effective. An advocate, who is not strong in procedural laws, can never be an effective trial lawyer and he will not be able to effectively cross examine a witness. This lament made by this Court should hopefully pave way for an improvement in the quality of trial, which is conducted in subordinate courts and more particularly in criminal trials.

37. In the considered view of this Court, on carefully going through the evidence available on record and on carefully considering



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the findings of the Trial Court, I do not find any ground to interfere with the conviction of the accused for the offence under Section 376(2)(f) of the Code.

38. Section 376(2)(f) of the Code, as it stood before substitution by the Criminal Law (Amendment) Act, 2013, which came into force with effect from 03.2.2013, provided for punishment for rape on a woman when she is under twelve years of age. In this case, the victim girl was five years old at the time of incident. The Protection of Children from Sexual Offences Act, 2012 had not come into force at the relevant point of time and hence, the accused was convicted under Section 376(2)(f) of the Code as it existed then.

39. In so far as the sentence is concerned, Section 376(1) of the Code provides for a minimum sentence. The minimum sentence that was provided prior to coming into force of the Criminal Law (Amendment) Act, 2013 was for a term not less than seven years, but which may be for life or for a term, which may extend to ten years. This was further enhanced after coming into force of the Act 22 of 2018 with effect from 21.4.2018, which provides for a minimum term



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of not less than ten years, but which may extend to imprisonment for life.

40. The Trial Court sentenced the accused to undergo three years rigorous imprisonment. This sentence is below the minimum sentence provided under Section 376(1) of the Code. It is true that the Proviso to Section 376(1) of the Code gives the Court powers to impose a sentence lesser than the minimum sentence for adequate and special reasons. This Proviso should not be put to operation in a case of this nature. When a child has been sexually abused, the Courts should never show leniency on the accused and it has to be necessarily dealt with sternly and severely. In the light of the above discussions, the sentence imposed on the accused by the Trial Court requires interference of this Court. Accordingly, the term of imprisonment shall be enhanced to seven years rigorous imprisonment.

41. In so far as the fine amount and the default sentence imposed by the Trial Court is concerned, the same is hereby sustained.



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42. In the result, Criminal Appeal No.245 of 2016 filed by the appellant/accused stands dismissed. Criminal Appeal No.154 of 2017 filed by the State is allowed, the judgment and order passed by the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court), Tiruppur, Tiruppur District in S.C.No.87 of 2012 dated 16.3.2016 is modified in so far as the sentence is concerned and the term of imprisonment is enhanced to seven years rigorous imprisonment. The judgment of the Trial Court is upheld with respect to other findings including the conviction of the accused. The Trial Court is directed to secure the presence of the accused so as to make him serve the remaining period of sentence as enhanced in this common judgment.

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To

- 1.The Sessions Court, Magalir Neethimandram (Fast Track Mahila Court), Tiruppur, Tiruppur District
- 2.The Inspector of Police, Tiruppur All Women Police Station, Tiruppur District.
- 3.The Judicial Magistrate No.1, Tiruppur.
- 4.The Public Prosecutor, High Court, Madras.

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