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Crl.A.No.357 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.03.2023

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.A.No.357 of 2016

Gnansigamani, M/A 78 years

... Appellant

Versus

State rep by,
The Inspector of Police,
Vellakovil Police Station,
Thiruppur District.
(Crime No.392 of 2013)

...Respondent

Prayer: Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code, to set aside the conviction and sentence imposed upon the Appellant/Accused by the Learned Session Judge, Mahalir Neethimandram, Thiruppur in Spl.S.C.No.12 of 2014, dated 14.04.2016 and allow the appeal.

For Appellant : Mrs. S. Hemamaalini,
Legal Aid Counsel.

For Respondent : Mr.R.Kishore Kumar,
Government Advocate (Crl.Side)

JUDGMENT

On 16.12.2013 when P.W.11, the Sub-Inspector of Police was on duty at the *Vellakovil* Police Station, *Thiruppur* District, upon receipt of the information, he went to the scene of occurrence and got a statement from



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P.W.1/the mother of the victim child, to the effect that P.W.1 was living with her family consisting of her husband, a daughter aged 15 years, and a son aged 13 years. The daughter was studying in 9th std in high school. While so, she returned to home at about 6.00 P.M.. Since previously she and her daughter were having the usual menstruation cycle on the same dates, since on the said date, her daughter did not get her periods, she enquired her. Immediately, her daughter started crying and she revealed to her that the accused, the old man who is the owner of the Mercy stores, had some days before pulled her hand and by forcing her, removed her clothes and had intercourse with her. Upon hearing P.W.1 become shell shocked, thereafter, immediately, she went to her brother/P.W.2/*Jothivel's* house, who was residing at the next street. She went and told to *Jothivel* as to what was happened to her daughter, and thereafter, she and her brother came back to her home. However, the door was locked, upon breaking open the door, they found that her daughter hanging herself by using P.W.1's Saree. They brought her down but was found dead. Thereafter, the body was straight away taken to the hospital.

2. On the strength of the said statement given to him at about 18.30 hours, the case in Crime No.392 of 2013 was registered at 20.00 hours,



thereafter, the case was taken up for investigation. Initially, P.W.13, took up the investigation, and thereafter, P.W.14, had continued the investigation and completed the investigation, and laid a charge sheet before the Trial Court, proposing the accused guild of the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012, and Section 306 of I.P.C. The case was taken on file as Spl. S.C. No.12 of 2014. On 11.11.2014, charges were framed by the Trial Court for the offence punishable under Sections 3 & 4 of the POCSO Act, and Section 306 of I.P.C. Upon being questioned, the accused denied the charges and stood trial.

3. So as to bring home the charges, the mother of the victim child was examined as P.W.1; P.W.1 has spoken about the revelations of her daughter and immediately rushing to her brother's house, and then both immediately rushing back to her house, and found her daughter dead. The brother of P.W.1 was examined as P.W.2, who also spoke about the fact that her sister, who was residing near the next street, came to his house, and upon hearing, both of them went back to her house, there they found that the child had committed suicide by hanging herself. Her another brother was also residing along with P.W.2 was examined as P.W.3, who also corroborated



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the same version of P.W.2. A neighbour, one *Pandian*, who heard about the incident as hearsay, was examined as P.W.4. Another neighbour, one *Saravanan*, who came to the house of P.W.1, upon hearing the commotion to find that the victim child had committed suicide by hanging, was examined as P.W.5. The Doctor, who examined the accused and issued Potency Certificate, was examined as P.W.6. The another Doctor, who also examined the accused along with P.W.6, was examined as P.W.7. The witness to the Observation Mahazar and Rough sketch, namely, one *Subramani*, was examined as P.W.8. The Photographer, who took the pictures of the victim child found hanging at her home, was examined as P.W.9. The Judicial Magistrate, who recorded the statements of P.W.1 & P.W.2, under Section 164 of Cr.P.C., was examined as P.W.10. The Sub-Inspector of Police, who registered the First Information Report, by obtaining the statement of P.W.1, was examined as P.W.11. The *Dr.Kulainthavelu*, Civil Surgeon of Forensic medicine, who conducted the Postmortem of the dead body of the victim child, was examined as P.W.12. Both the Investigating Officers of this case were examined as P.W.13 & P.W.14.



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4. On behalf of the prosecution, the Birth Certificate of the child was marked as **Ex.P-1**. The complaint statement given by P.W.1 was marked as **Ex.P-2**. The Accident Register copy in respect of the accused was marked as **Ex.P-3**. The Medical Certificate issued in respect of the accused is marked as **Ex.P-4** and the Final opinion is marked as **Ex.P-5**. The Observation Mahazar was marked as **Ex.P-6**. The 164 statements of P.W.1 & P.W.2, were marked as **Ex.P-7** & **Ex.P-8**. The printed First Information Report was marked as **Ex.P-9**. The Postmortem report and the Final opinion of the Doctor were marked as **Ex.P-10** & **Ex.P-11**. The Rough Sketch was marked as **Ex.P-12**. The Inquest Report was marked as **Ex.P-13**. The Alteration Report to change the provision of law, was marked as **Ex.P-14**. The pictures taken by the photographer/P.W.9, were produced as **M.O.1** series. The CD containing the images was produced as **M.O.2**.

5. Thereafter, when the accused was questioned about the material evidence and incriminating circumstances on record, the accused denied the same as false. Thereafter, no evidence was let in on behalf of the defence.

6. The Trial Court, therefore, proceeded to hear the learned Public Prosecutor on behalf of the prosecution and the learned Counsel for the



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accused and by a Judgment dated 12.04.2016 found that the evidence of P.W.1, P.W.2 and P.W.3 and the prompt complaint given by P.W.1 and the timing of registration of the first information report and the conduct of the investigation, all proved the offence punishable under Section 4 of the POCSO Act. However, the Trial Court found that the prosecution failed to bring home the charge punishable under Section 306 of IPC., and acquitted the accused in respect of the said charge by giving him to benefit of the doubt. For the offence punishable under Section 4 of the POCSO Act, the accused was sentenced to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.50,000/- and in default of payment of fine to undergo further one year Rigorous Imprisonment. The entire fine amount paid by the accused, was ordered to be paid as compensation to P.W.1/the mother of the victim child. Aggrieved by the same, the present appeal is laid before this Court.

7. Heard, *Mrs.S.Hemamalini*, learned Legal Aid Counsel appearing on behalf of the appellant and *Mr.R.Kishore Kumar*, learned Government Advocate (Crl.side) appearing on behalf of the prosecution.



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8. *Mrs.S.Hemamalini*, learned Counsel for the appellant taking this Court through the evidence on record would contend that except the evidence of P.W.1, there is no evidence to prove that the victim child was subjected to any sexual assault. There is absolutely no material evidence whatsoever to connect the accused with the incident. From the medical evidence of the Postmortem surgeon, it is clear that the victim child was not pregnant and there was no evidence whatsoever that she was subjected to any sexual assault. Secondly, the name of the accused was not clearly mentioned in the first information report. She would submit that, in this case, there is no medical evidence which is available on record and unfortunately, the victim child also did not survive to narrate about the incident. Therefore, it is only based on the surmise and accusation by P.W.1/the mother of the victim child the entire conviction was made. The personal liberty of the accused especially when he is imposed with punishment for such a serious offence cannot be lightly made without there being strong evidence on record. Therefore, she would pray that the appeal be allowed and also the accused should be acquitted from all the charges.

9. Per contra, the learned Government Advocate appearing for the prosecution would submit that, in this case, the victim child was the only



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person who knew of the alleged sexual assault. She revealed about sexual assault to her mother immediately upon the confrontation. Further fearing shame, within minutes after her revelation the victim child committed suicide. Therefore, the evidence of P.W.1, to whom the incident was revealed by the victim, is admissible evidence as per the principles of *res gestae* as contained under Section 6 of the Evidence Act, 1872. He would submit that the evidence of P.W.1 is further corroborated by the evidence of P.W.2 & P.W.3. This apart, the occurrence happened at 6.30 P.M., in the evening. Within one and half hour, the first information report was registered, in which clearly names the accused. Thus, it can be seen from the earliest point of time, the evidence of P.W.1 & P.W.2 were unwavering, clear-cut, and stellar in quality. Both of them also gave statements before the Judicial Magistrate under Section 164 of Cr.P.C. He would submit that even though the victim child was not pregnant, but, when her mother enquired as to why she did not get periods, immediately, the victim child responded, which clearly is natural and given the teenage of the girl studying only in 9th std, and with the tears she had confided with her mother. The behaviour of the child victim is very normal as would any other child victim would behave as they are normally hesitant to reveal the incident to anyone, immediately after the incident. He would also further take this



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Court through the postmortem report, even though the child was not pregnant, but, it was mentioned clearly that hymen was torn and three old tears were found in her private organ. Therefore, that piece of the evidence also corroborates the version as revealed by P.W.1. He would submit that the accused being 78 years old at the time of occurrence, who was sitting in the shop idle with a perverted mind had misbehaved with the small child, leading to the death of the child. Therefore, the Trial Court even though had given the benefit of doubt for the offence under Section 306 of IPC., has rightly convicted for the offence punishable under Section 4 of the POCSO Act.

10. I have heard the rival submissions made on either side and perused the material records of this case.

11. The Hon'ble Supreme Court of India, in the Judgment of ***Krishan Kumar Malik Vs. State of Haryana***¹, has categorically held that in respect of the offences involving sexual assaults, if the survivor, after the offence, revealed the same to any person, that could squarely fall within the Section 6 of the Evidence Act, under the principles of *res gestae*, and that piece of evidence could not be rejected as hearsay and it would be an admissible

¹ <https://www.mhc.tn.gov.in/judis>
(2011) 7 SCC 130



evidence. Paragraphs 33 to 37 of the Judgment is reproduced hereunder:-

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“33. As per the FIR lodged by the prosecutrix, she first met her mother Narayani and sister at the bus-stop at Kurukshetra but they have also not been examined, even though their evidence would have been vital as contemplated under Section 6 of the Evidence Act, 1872 (for short “the Act”) as they would have been res gestae witnesses. The purpose of incorporating Section 6 in the Act is to complete the missing links in the chain of evidence of the solitary witness. There is no dispute that she had given full and vivid description of the sequence of events leading to the commission of the alleged offences by the appellant and others upon her. In that narrative, it is amply clear that Bimla Devi and Ritu were stated to be at the scene of alleged abduction. Even though Bimla Devi may have later turned hostile, Ritu could still have been examined, or at the very least, her statement recorded. Likewise, her mother could have been similarly examined regarding the chain of events after the prosecutrix had arrived back at Kurukshetra. Thus, they would have been the best persons to lend support to the prosecution story invoking Section 6 of the Act.

34. We shall now deal with Section 6 of the Act, which reads as under:

***“6.Relevancy of facts forming part of same transaction.—** Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.”*

35.Black's Law Dictionary defines res gestae as follows:

“(Latin: ‘things done’) The events at issue, or other events contemporaneous with them. In evidence law, words and statements about the res gestae are usually admissible under a hearsay exception (such as present



sense impression or excited utterance).”

36. The said evidence thus becomes relevant and admissible as res gestae under Section 6 of the Act.

37. Section 6 of the Act has an exception to the general rule whereunder hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or immediately thereafter. Admittedly, the prosecutrix had met her mother Narayani and sister soon after the occurrence, thus, they could have been the best res gestae witnesses, still the prosecution did not think it proper to get their statements recorded. This shows the negligent and casual manner in which the prosecution had conducted the investigation, then the trial. This lacunae has not been explained by the prosecution. The prosecution has not tried to complete this missing link so as to prove it, beyond any shadow of doubt, that it was the appellant who had committed the said offences.”

12. Therefore, the evidence of P.W.1/ the mother of the victim is admissible. P.W.2, the brother of P.W.1, has also corroborated the evidence of P.W.1. It can be seen that, immediately, after the revelation at about 6.30 hours, P.W.1 has went to her brother's house and informed him about the same and within minutes they returned back home, only to find that the poor victim child having committed suicide. As a matter of fact, P.W.11, the Sub-



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Inspector of Police, immediately rushed to the spot and recorded the statements and even while the child was carried to the hospital. Within one and half an hour, the first information report was registered which contains the particulars about the accused that he is being the owner of Mercy Stores. The version in the earliest point of complaint, thereafter in 164 statement, and thereafter, the evidence before the Trial Court and even after a probing cross-examination is unwavering, clear and categorical. The evidence of P.W.1, is stellar in quality. Apart from the corroboration of P.W.2 & P.W.3, the Postmortem Certificate, even though did not find that the girl as pregnant, however, found three old tear injuries in the private part of the child, which reads as follows:-

*“..... Uterus : Enlarged measuring 10 x 7 cm.
Cut section shows empty with Bicornuate uterus.*

*- Old tear noted over Hymen at 2', 5' and 10' O
clock position.....”*

13. P.W.12/Dr. Kulanthaivelu, had also spoken about the same in his evidence, which reads as follows:-

*“.....பெண்ணின் இன உறுப்பு ஆய்வு
செய்ததில் பெண்ணின் இன உறுப்பு 2 மணி, 5
மணி, 10 மணி ஆகிய பகுதிகளில் பழைய
கிழிந்ததற்கான தடையங்கள் காணப்பட்டன.....”*



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14. Therefore, the above evidence clearly and categorically point out only towards the guilty of the accused. It is in this context the defence of the accused *vis-a-vis* presumption under Section 29 of the POCSO Act, becomes relevant. The defence of the accused seems to be that on account of political rivalry in the municipal War Councilor election between the Communist party and DMDK political party, he is falsely implicated. Firstly the same is highly ill-logical. Secondly, it is not by way of any after thought name of the accused was roped in, but, within minutes from the time of occurrence, the name of the accused clearly mentioned by P.W.1 in the complaint. Thirdly, P.W.1, being a mother of the victim child will be the person who will be more interested in bringing to books the real accused especially in case where the victim child suffered aggravated penetrative sexual assault and even committed suicide on account of the said incident. Therefore, I am of the view no exception whatsoever can be taken to the well considered finding by the Trial Court and accordingly, I hold that the submissions made on behalf of the appellant to acquit him for the offence punishable under Section 4 of POCSO Act as unsustainable and without any merits and as such rejected.



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15. Now coming to the sentence, the learned Counsel would plea that the accused was aged 78 years old at the time of occurrence and had undergone punishment for more than 700 days and now he is aged 88 years. In view of the time lag and considering his physical condition being fragile in nature would pray this Court to impose the mandatory minimum sentence which was 7 years at that point of time. Considering the quantum of punishment as per Section 4 of the POCSO Act, it stood as it as on the date of occurrence and considering the present age of the accused and physical condition of the accused, I am of the view that the substantive sentence of Rigorous Imprisonment for a period of 10 years alone shall be modified to that of 7 years, the fine amount shall remain the same.

16. In the result,

(i) The Crl.A.No.357 of 2016 is partly allowed;

(ii) The conviction of the appellant for the offence under Section 3 and punishable under Section 4 of the POCSO Act, by the Judgment dated 12.04.2016 in Spl.S.C.No.12 of 2014, on the file of the Learned Sessions Judge, Mahalir Neethimandram, (FTC), Thiruppur, is upheld;

(iii) The substantive sentence imposed on the appellant alone is modified from 10 years Rigorous Imprisonment to that of 7 years Rigorous



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Imprisonment and the fine of Rs.50,000/- and compensation to be paid to

P.W.1, are all confirmed.

(iv) One month time is granted to the appellant to surrender before the Trial Court to undergo the remaining period of sentence, failing which, the Trial Court shall issue a warrant and do the needful in accordance with law.

03.03.2023

Index:Yes/No

Speaking order/Non-speaking order

Neutral Citation : Yes/No

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To

1.The Sessions Judge, Mahalir Neethimandram, Thiruppur.

2.The Inspector of Police,
Vellakovil Police Station,
Thiruppur District.

3.The Public Prosecutor,
Madras High Court.



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D.BHARATHA CHAKRAVARTHY, J.

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