



Crl.A(MD).No.65 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 14.08.2023

DELIVERED ON: 10.11.2023

CORAM

**THE HON'BLE MR JUSTICE M.S.RAMESH
AND
THE HON'BLE MR JUSTICE M.NIRMAL KUMAR**

Crl.A(MD).No.65 of 2021
and
Crl.M.P.(MD).No.12509 of 2022

Packiyaraj

.. Appellant/Sole Accused

Vs.

State,
represented by Inspector of Police,
All Women Police Station,
Srivaikundam,
Thoothukudi District.
(Crime No.10/2016)

.. Respondent/Complainant

PRAYER: Appeal filed under Section 374(2) of CrPC, to set aside the judgment and conviction dated 11.09.2020 by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Thoothukudi in Spl.S.C.No.191 of 2019 (Old Special Sessions Case No.6/2017) and acquit the appellant.



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For Appellant : Mr.C.Mayilvahana Rajendran
for M/s.P.Banu Prasath
For Respondent : Mr.A.Thiruvadikumar
Additional Public Prosecutor

JUDGMENT

(Judgment of the Court was delivered by M.S.RAMESH,J.)

The appellant herein is the sole accused before the Special Court for Exclusive Trial of Cases under the POCSO Act, Thoothukudi, who has been convicted and sentenced to undergo life imprisonment for commission of an offence punishable under Section 5(i) and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) and to pay a fine of Rs.5000/-, in default, to undergo six months rigorous imprisonment. He is also sentenced to undergo rigorous imprisonment for three years for the offence under Section 506(ii) IPC and to pay a fine of Rs.3000/-, in default to undergo six months simple imprisonment, through a judgment passed in Special Sessions Case No.191 of 2019 dated 11.09.2020. This judgment is put under challenge in the present Criminal Appeal.

2. The brief case before the Trial Court as projected by the Prosecution are as follows:



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(i) On 07.04.2016 at 07.30 PM, when the victim girl P.W.1, born on 18.06.2001 and aged about 15 years and 10 months, was going alone to attend a tuition class, the appellant/accused had snatched the hand of P.W.1 and dragged her into the bushes, after gagging her mouth with a towel and after causing scratch injuries on the face and thighs, had slapped P.W.1 on her left cheek. Thereafter, he had forcefully torn her clothes, squeezed her breasts and forcibly had sexual intercourse with her. He then had threatened P.W.1 to refrain from revealing the incident to anyone, failing which, he would kill her parents. Thereafter, he had left P.W.1 in the place of occurrence. P.W.1, after about 10 minutes, had left the place and went back to her house and informed both her parents about the incident.

(ii) The parents had then taken P.W.1 to the place of occurrence and finding nobody there, they had on the same day went to Eral Police Station. Therein, they were advised to approach the Women Police Station at Srivaikundam. Accordingly, they had reached the Srivaikundam Police Station at 3.00 AM of 08.04.2016 and P.W.1 had given a complaint (Ex.P1) at 4.30 AM of 08.04.2016.

(iii) P.W.1 was then taken to the Government Hospital and the



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incident was recorded in the Accident Register (Ex.P9) prepared on 08.04.2016 at 12.45 PM. The Doctor, P.W.11, who had examined P.W.1, had taken the vaginal and cervical smears and sent it to the Forensic Science Department for examination. In the Accident Register, the nature of injuries reveals, among others, that the hymen was not intact and there was no evidence of semen.

3. The Investigation Officer, P.W.13 had filed the charge sheet charging the appellant to have committed the offences under Section 5(i) r/w 6 of the POCSO Act and Section 506(ii) IPC, through a charge memo, which was taken on file on 18.06.2018. Before the Trial Court, while the victim girl was examined as P.W.1, the mother of the victim, who had accompanied the girl after the incident to the Police Station and the hospital, was examined as P.W.2. P.W.3 and P.W.4, who were claimed to have witnessed the girl returning after the incident, had turned hostile. The Doctor, who rendered first aid to the victim girl, was examined as P.W.5. P.W.6 and P.W.8 are the observation mahazar witnesses. P.W.7, Doctor had examined the accused and conducted the potency test, the report thereof was marked as Ex.P6. While the woman Police Constable, P.W.9, had taken



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P.W.1 for the medical treatment, the Head Constable P.W.10 had taken the accused for medical examination. P.W.11 is the Doctor, who had treated the victim girl and the Accident Register prepared by her was marked as Ex.P9. The forensic report on the smear test was marked as Ex.P10. The Head Constable, who had registered the First Information Report on 08.04.2016 at 4.30 AM, was examined as P.W.12. The Investigation Officer is P.W.13.

4. The statement of the victim girl under Section 164(5) CrPC was marked as Ex.P2. The birth certificate issued under the Registration of Births and Deaths Act by the Government of Tamil Nadu was marked as Ex.P16, evidencing that P.W.1 was born on 18.06.2001. The report of the Forensic Science Department dated 24.06.2016 was marked as Ex.P17, declaring that there were no blood or semen on the clothes of P.W.1.

5. The Trial Court, after analysing the oral evidences of the witnesses, had placed reliance on the presumption under Section 29 of the POCSO Act and by holding that the testimony of the child victim is corroborated by the medical evidence and after finding that there was no rebuttal evidence in respect of the age and date of birth of the victim child, as evidenced in



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Ex.P16, had found the accused guilty of having committed the offences under Section 5(i) punishable under Section 6 of the POCSO Act and Section 506(ii) IPC, had convicted him and imposed the sentence as stated above.

6. The learned counsel for the appellant submitted that there are discrepancies in the date of the incident. According to him, the incident is alleged to have occurred on 06.04.2016 as per Ex.P1 and P.W.1 was referred for medical examination only on 08.04.2016 at 12.45 PM, which is after 24 hours and violates Section 164A CrPC. He further submitted that since the medical reports establish that there was no semen either on the smears obtained from P.W.1's private parts or on her clothes, there was no penetrative sexual assault as alleged by the prosecution.

7. On the other hand, the learned Additional Public Prosecutor appearing for the respondent submitted that the victim girl, P.W.1, had made categorical statements with regard to the penetrative sexual assault on her and that there is a statutory presumption against the accused of his involvement in the commission of the offence under Sections 29 and 30 of



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the POCSO Act. He further submitted that the testimony of the child victim is corroborated by the medical evidence, which reveals that the hymen of P.W.1 was ruptured and therefore, the ingredients of penetrative sexual assault have been attracted. He also placed reliance on Ex.P16, birth certificate of P.W.1, to substantiate that she was a child as defined under the POCSO Act. With these submissions, he sought for dismissal of the present Criminal Appeal.

8. The case of the prosecution is that the incident had occurred on 07.04.2016 at 7.30 PM. The First Information Report (Ex.P11) was registered on 08.04.2016 at 4.30 AM, in which, the complaint of P.W.1 was recorded holding that the incident had taken place at 7.30 PM on 07.04.2016. P.W.1 and P.W.2, in their oral testimony, have also stated that the incident had occurred at 7.30 PM on 07.04.2016. The Accident Register (Ex.P9), that was prepared at 12.45 PM of 08.04.2016, had recorded the incident that had taken place on 07.04.2016 at 7.30 PM. However, the handwritten complaint of the victim girl, which has marked as Ex.P1, states that the incident had taken place on 06.04.2016 at 7.30 PM. Ex.P9, which is the Accident Register, which was perused by us, reveals that the recording



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of the incident on 07.04.2016 seems to have been manually altered from 06.04.2016 to 07.04.2016. FIR (Ex.P11) and the Accident Register (Ex.P9) are the very first documents that comes into existence after the alleged incident had taken place.

9. Though no suggestions have been put to P.W.1 during the course of trial on the discrepancies in the date of the incident in the complaint (Ex.P1) and FIR (Ex.P11), P.W.2, who had accompanied P.W1 when the complaint (Ex.P1) and FIR (Ex.P11) were registered, as well as to the Government Hospital, when the Accident Register (Ex.P9) was prepared, had stated in her cross-examination that the complaint (Ex.P1) given by her daughter has recorded the incident to have taken place on 06.04.2016 at 7.30 PM, when P.W.1 was returning from the tuition. P.W.12 is the Head Constable, who had recorded the complaint (Ex.P1) and registered the FIR (Ex.P11). In the cross-examination, P.W.12 had admitted that the date of incident has been referred to as 06.04.2016 in Ex.P1. Likewise, the Investigation Officer, P.W.13, has also admitted in her cross-examination that the incident took place on 06.04.2016. In the light of the evidences of P.W.2, who had accompanied P.W.1 when Ex.P1 and Ex.P9 were prepared and the oral



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testimonies of P.W.12 and P.W.13, the alteration in the Accident Register (Ex.P9) of the date of the incident from 06.04.2016 to 07.04.2016 creates a doubt on the very date of occurrence itself. Before the Trial Court, the accused had proposed a prior motive on P.W.1 and her family for having given a false complaint stating that the accused had witnessed P.W.1 having a love affair with one Jebastin, who was running sound service shop, which fact was also revealed by the accused to the villagers. Such a suggestion was denied both by P.W.1 and P.W.2.

10. P.W.1 was produced before the Doctor P.W.11 on 08.04.2016 at 12.45 PM and she was subjected to medical examination. In the Accident Register (Ex.P9), it was recorded that there was no semen on the body of P.W.1 on examination. The vaginal and cervical smears were taken by P.W.11 and sent to the Forensic Science Department. Ex.P10 is the report of the Forensic Science Department, which has recorded that spermatozoa were not detected on both the vaginal and cervical smears that were received by them from the Police. Likewise, in the report of the Forensic Science Department (Ex.P17) also, it was recorded that neither blood nor semen was detected on the three sample items of the clothing of P.W.1



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received by them from the Police.

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11. The two discrepancies found in the evidences before the Trial Court touching upon the doubt on the date of incident as to whether the same could have occurred on 06.04.2016, as well as the absence of the semen of the accused on both the body of P.W.1 and her clothing, raises a doubt with regard to the date of occurrence as well as of penetrative sexual assault.

12. However, the medical evidence under Ex.P9 reveals that there were multiple linear small abrasions present over the forehead, cheeks, chin, neck, thighs and private parts of the victim girl. The report further states that the hymen was not intact and admits one finger.

13. When there is a doubt that the incident itself could have occurred on 06.04.2016, the consequential position would be that P.W.1 may not have been referred to a medical practitioner for examination within 24 hours from the time of receiving the information. Consequently, the absence of semen in Ex.P9 may have been owing to the belated production of P.W.1 for



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medical examination at 12.45 PM on 08.04.2016, had the incident occurred on 06.04.2016 itself.

14. At the cost of repetition, for further clarity, the evidence of the victim girl P.W.1 along with medical evidence of P.W.7, P.W.11 and Exs.P1, P2, P9, P10, P14, P15 & P17 are discussed below.

15. From the complaint Ex.P1, it is seen that the appellant is said to have caused bruises on the victim, using his hands on her neck, face, thigh, apart from biting her cheek and further, her clothes (MO1 to MO3) were forcibly removed and torn. Further, the appellant had squeezed her breast and committed penetrative sexual assault. P.W.3 and P.W.4 were standing a little away from the scene at that time. After ten minutes, when she came out from the bush, she again saw P.W.3 and P.W.4 but had not informed them about the penetrative sexual assault. It is seen that the names of P.W.3 and P.W.4 were found in the complaint Ex.P1. But P.W.3 and P.W.4 had not supported the case of the prosecution and were declared hostile. From the Seizure Memo (Ex.P14) and Form 91 (Ex.P15) pertaining to the clothes (MO1 to MO3), it is seen that they were not in a torn condition. On the



other hand, PW1 asserts that the appellant tore her clothes forcibly while committing the alleged penetrative sexual assault.

16. The victim girl P.W.1, a Class X Student, in her complaint gave the date of occurrence as 06.04.2016 at about 07.30 p.m. P.W.2, the mother of the victim girl signed in the complaint and her signature was marked as Ex.P3. P.W.2 in her evidence admits that in the complaint, the date is mentioned as 06.04.2016. P.W.12, Head Constable who received the complaint and registered FIR (Ex.P11) admits that in the complaint, the date mentioned is 06.04.2016, but in the FIR it is recorded as 07.04.2016. It is pertinent to note that in the Accident Register (Ex.P9), there is a correction on the date from 6th to 7th, to tide over the discrepancy, the Casualty Doctor P.W.5 attached to the Government Hospital, Srivaikundam, has been examined to show that on 08.04.2016 at about 05.00 a.m., the victim girl accompanied by P.W.9, Grade-I Women Police Constable came to the hospital at Srivaikundam and thereafter, P.W.9 took the victim girl to the Government Hospital, Thoothukudi.

17. The evidence of P.W.5 Casualty Doctor, attached to the



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Government Hospital, Srivaikundam is that he gave first aid to the victim girl and thereafter, she was referred to a Lady Doctor. But strangely from the Government Hospital, Srivaikundam, there is no Accident Register or any corresponding medical memo produced by the prosecution. P.W.11 is the Doctor attached to the Government Hospital, Thoothukudi, who had examined the victim girl on 08.04.2016, at about 12.45 p.m., and issued Accident Register Ex.P9. From the Accident Register, it is seen that some abrasions were found on the forehead, both cheeks, chin, both sides of neck. However, it is clearly recorded that there was no evidence of bite marks, injuries on the breast or the lower abdomen. The hymen was not intact and admitted one finger. P.W.11 clarifies it is little finger admission which rupture is possible due to sports and physical activities. PW11, who had collected the vaginal smear and cervical smear for further examination, records in Ex.P9 that there is no presence of semen in the clothes, which fact is further confirmed by Ex.P17. The report of the Scientific Officer from the Forensic Science Department confirms neither blood nor semen was deducted from MO1 to MO3. Further, Ex.P10, Regional Forensic Laboratory Report confirms that there was no presence of spermatozoa, on examination of the glass slides with vaginal smear and cervical smear. The



absence of semen in the clothes (MO1 to MO3) or on the private organs of the victim girl, causes a doubt about the very commission of penetrative sexual assault. Thus, in view of the evidence of P.W.1, P.W.11 and Exs.P9, P10 & P17, it cannot be conclusively held that the appellant committed penetrative sexual assault on P.W.1 or whether it was a mere sexual assault alone, as defined under Section 7 of the POCSO Act.

18. The phrase “penetrative sexual assault” is defined under Section 3 of the POCSO Act in the following manner:

“3. Penetrative sexual assault. - A person is said to commit "penetrative sexual assault" if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(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



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(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

19. While construing the aforesaid provision, a person is said to have committed a sexual assault if the perpetrator penetrates his penis into any opening of the child's body or the perpetrator inserts any other part of the body into any opening of the child's body or manipulates any part of the child's body so as to cause penetration into the body. In all these three instances, the presence of penetration is required to attract the provision. Subsection (d) relates to the perpetrator using his mouth on the body of the child, where the act of penetration is absent. Thus, the act of penetration is a mandatory requirement for commission of penetrative sexual assault under Section 3 (a), (b) and (c) of the Act and the act of an oral usage of the perpetrator's mouth on the child's body would amount to penetrative sexual assault under subsection (d).

20. The Stedman's Medical Dictionary defines 'penetrate' as follows:-

'Penetrate – to pierce; to pass into the deeper tissues or into a cavity.'



21. From the medical evidence in Ex.P9, Ex.P10 and Ex.P17, coupled with the oral evidence of P.W.11, we are of the view that the prosecution has failed to substantiate the actual act of penetration required under Section 3 of the POCSO Act beyond reasonable doubt. However, the mere absence of penetration may not absolve the accused of having sexually assaulted P.W.1. From the oral evidence of P.W.11, which corroborates the testimony of P.W.1, read with Accident Register (Ex.P9), it is seen that P.W.1 was indeed, subjected to an assault in view of the injuries on her body. It is the categorical case of P.W.1 in her complaint as well as in the oral testimony that such abrasions on her body was caused by the accused. It is also her case that such an assault was done by the accused with a sexual intent. The nature of the abrasions could have been caused only through physical contact by the accused in view of her statement. The defence have not discredited such statements of P.W.1, wherein, the accused had pushed, beaten and bit her with sexual intent. While that being so, the accused having been prosecuted for having committed a sexual offence under the POCSO Act, the Special Court shall presume that the accused only ought to have committed the offence unless the contrary is proved. Thus, we are of the view that the overt acts attributed to the accused would constitute only a



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sexual assault as defined under Section 7 of the POCSO Act and not penetrative sexual assault under Section 3 of the POCSO Act. Such commission of sexual assault would be termed as an aggravated sexual assault under Section 9(i) of the POCSO Act, when the same causes bodily harm and injury or injury to the sexual organs of the child.

22. Section 9(i) of the POCSO Act reads as follows:

“9. Aggravated Sexual Assault:

(i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child;”

23. In the light of the above findings, we are of the affirmed view that the accused had not caused penetrative sexual assault, but had caused aggravated sexual assault under Section 9(i) of the POCSO Act and thus, would be liable to be punished for aggravated sexual assault under Section 10 of the POCSO Act, which is punishable with an imprisonment for not less than five years, but extendable to seven years along with fine.



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24. Accordingly, the judgment of the Trial Court in Spl.S.C.No.191 of 2019 dated 11.09.2020, finding the accused guilty for the offences under Section 5(i) r/w 6 of the POCSO Act is set aside. Consequently, the appellant/accused is found guilty for the offence under Section 9(i) r/w Section 10 of the POCSO Act, 2012 and under Section 506(ii) IPC and thereby sentenced to undergo rigorous imprisonment of five years for commission of the offence under Section 9(i) and punishable under Section 10 of the POCSO Act and also to pay a fine of Rs.5000/- (Rupees Five Thousand only), in default to undergo rigorous imprisonment for six months. The appellant is also sentenced to undergo rigorous imprisonment for three years for the offence under Section 506(ii) IPC and also to pay a fine of Rs.3000/- (Rupees Three Thousand only), in default to undergo six months of simple imprisonment, as ordered by the Trial Court. Both the sentences shall run concurrently. The period of detention, if any, already undergone by the appellant/accused, is directed to be set off under Section 428 CrPC.

25. In the result, the Criminal Appeal stands partly allowed. Consequently, connected miscellaneous petition stands closed.



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(M.S.R.,J.) (M.N.K.,J.)
10.11.2023

NCC:Yes
Index:Yes
Speaking order
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- 1.The Inspector of Police,
All Women Police Station,
Srivaikundam,
Thoothukudi District.
- 2.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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M.S.RAMESH,J.
and
M.NIRMAL KUMAR,J.

Lm

Pre-delivery Judgment made
in Crl.A(MD).No.65 of 2021

10.11.2023