

Crl.A(MD)No.372 of 2021

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 18.02.2025

Pronounced on : 04.03.2025

CORAM:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

AND

THE HONOURABLE MS.JUSTICE R.POORNIMA

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Murugappan

.. Appellant/Sole Accused

Vs.

State represented by,

The Inspector of Police,

Keeranur All Women Police Station,

Pudukkottai District.

(In Crime No.07/2020).

.. Respondent/Complainant

PRAYER: Criminal Appeal is filed under Section 374 (2) of the Code of Criminal Procedure, against the judgment dated 02.08.2021 in Spl.S.C.No. 30 of 2020 on the file of the Mahila Court, Pudukkottai.



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For Appellant : Mr.E.Somasundaram
For Respondent : Mr.A.Thiruvadikumar
Additional Public Prosecutor

JUDGMENT

Dr.G.JAYACHANDRAN, J.
and
R.POORNIMA, J.

The appeal is against the judgment of conviction and sentence imposed by the Mahila Court, Pudukottai. The appellant was sentenced to undergo Life imprisonment (till the remainder of the natural life) and fine of Rs.70,000/-, in default, to undergo one year simple imprisonment for the offence under Section 5(m) r/w 6 of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act').

Prosecution case unravelled through its witnesses and documents:

2. The prosecution has examined 9 witnesses and marked 15 Exhibits and 6 Material Objects.



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3. As per the complaint Ex.P-1, on 15.08.2020 at about 12.00 noon, PW-1, the mother of the child victim, left her 5 year old girl child (the victim) in the house of Bhakiyalakshmi(PW-5) requesting Mariammal(PW-3) to take care of the child and went out to mend her two wheeler tube. When she returned back at about 12.30 p.m, she found her daughter missing. On enquiry with Mariammal, she informed that the appellant (known as 'Meenakshi thatha' in the locality) had taken the child to his house. She went to the appellant's house and peeped through the partially opened door. She saw her daughter holding her undergarment and pant in her hand, the appellant nude below hip. She rushed out and the daughter followed her.

4. On enquiry, her daughter told that the appellant removed her dress and undergarment, put her on the cot and kissed her vagina. She complaint pain in her private part. On examining the private part, it was reddish in colour. So, PW-1 applied sesame oil and enquired how it happened. Then the child opened up and told that the appellant put his penis



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on her vagina. Next day, after husband came home from duty, she informed the matter to her husband. She and her husband along with one Number Chinnaiya went to the house of the appellant and questioned him why he did this to the minor child. The appellant pleaded guilty and sought apology for his conduct. The matter was informed to the village elders like Velu and Subramanian. On their advice, she went to Police Station along with the child and the cloth of the child which she was wearing at the time of occurrence. Along with her complaint, handed over the clothes.

5. PW-8, Tmt.Sowmiya Banu, Sub Inspector of Police, All Women Police Station, Keeranur registered FIR in Cr.No.07/2020 dated 16.08.2020 at 10.00 Hrs. (Ex.P-10) and placed it before the Inspector of Police, Tmt.Kavitha (PW-9). She delivered a copy of the FIR to the Judicial Magistrate, Keeranur at his residence on the same day at 06.45 pm.

6. PW-9, Tmt. Kavitha Inspector of Police, took up the investigation. Seized the clothes of the victim girl under Form 95 (Ex.P-11).

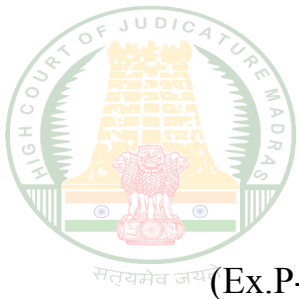


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Recorded the statement of the victim girl and her mother. She then forwarded the victim child with escort for medical examination at Pudukottai Government Hospital. Dr.Sangeetha(PW-7) examined the child. The Accident Register is Ex.P-9. Meanwhile, PW-9 visited the house of the appellant and prepared observation mahazar (Ex.P-7) and rough sketch (Ex.P-12). Ganesan (PW-4) is one of the witness to the observation mahazar. On receipt of the information at 15.30 hrs, PW-9 went to Koodakudi Toll Plaza and arrested the appellant and brought him to the Station at about 16.30 hrs. The appellant gave his statement voluntarily and it was recorded in the presence of witnesses Velu and Subramanian at about 16.50 hrs. M.O.4 and M.O.5, the shirt and lungi respectively, of the appellant were recovered under Mahazar Ex. P-13.

7. The accused was remanded to Judicial custody on the same day. He was subjected to medical examination with the permission of the court on 18.08.2020. Dr.Valliappan (PW-6) examined the appellant and the medical report of the appellant is Ex.P-8, The statements of the minor child



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(Ex.P-5), her mother (Ex.P-4) and Mariammal (Ex.P-6) recorded under Section 164 of Cr.P.C., by the Judicial Magistrate on 19.08.2020.

Case of the appellant as spoken by the witnesses for defence:

8. The appellant/accused to establish his innocence had mounted the witness box and also examined 4 more witnesses. The gist of the evidence spoken through DW-1 to DW-5 are as below:-

8.1. According to the appellant examined as DW-1, on 15.08.2020, he was in his house along with his son and daughter-in-law. Between 12.30 to 1.00 pm, his son and daughter-in-law left the house to purchase clothe for their wedding anniversary. He then arranged his cot outside the room and slept. At about 3.30-4.00 pm his son and daughter-in-law returned home. He left the home at about 4.00 pm to bring his wife. After he came back, his sambandi (father-in-law of his son) came home at 4.30 p.m to see his daughter. At about 8.30 p.m, his sambandi left. At about 8.30 p.m, Ramasamy and Ganesan came to his house and quarrelled with his son. Ganesan was drunk. They both attacked him saying, “ having



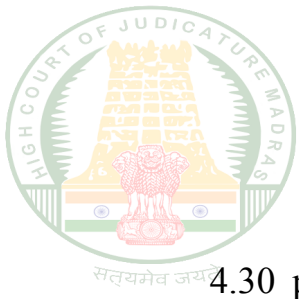
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come from outside, why are you doing atrocity” and told “inspite of repeated instruction to vacate the house, you are refusing to go. You must be beaten and chased out”. Soon crowd gathered. He was dragged and taken by force to the nearby temple and was beaten. Village President Mathi who was present there, warned him to vacate the house immediately or will be taken to police station. The crowd gathered there beat him and took him to the police station.

8.2. DW-2, is son of the appellant. He had deposed that, for a long time, they are in loggerhead with Ganesan. On 16.08.2020 morning Ramasamy came to him in a drunken state and asked for the two wheeler. He refused to give the two wheeler. Ramasamy quarrelled with him by calling him as outsider. Ganesan along with Ramasamy and their caste people joined together and attacked him and his father(appellant). They took his father to the police station. He went to hospital for treatment.

8.3. DW-3, Mr.Manickam, the sambandi of the appellant had deposed that on 15.08.2020, he went to the house of the appellant at 4.00-



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4.30 pm and left the house on the next day at about 7.00-7.30 am. His daughter, on Monday called him over phone and informed that police had arrested her father-in-law (the appellant). DW-4 and DW-5 who are friends of the appellant and deposed that they know the appellant for more than 15 years. He is man of good character. They don't believe the accusation against him.

9. The learned Session Judge, holding that the evidence of the victim child is cogent and corroborated in all aspects. Her evidence is natural, reliable and trustworthy. No contradiction in the previous statements of the witnesses recorded under Section 164 of Cr.P.C and their deposition before the Court. Accepting the prosecution witnesses, convicted the appellant.

10. The learned Counsel appearing for the appellant contended that, the trial Court grossly erred in appreciating the evidence. It failed to consider the child witness been tutored by her mother and others to depose



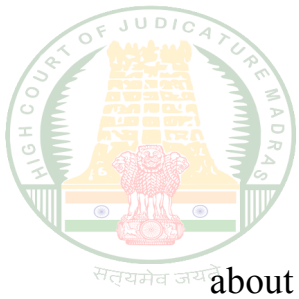
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contrary to the truth. The uncorroborated evidence of a child evidence without proof been relied to convict the appellant with the aid of Section 29 of the POCSO Act.

11. The trial Court miserably failed in note that the minor child has initially only said that the appellant kissed her. Later improved her version and said the appellant removed her undergarment and kissed her private part. Much later, had said the appellant placed his genital on her vagina. The embellishment due to tutoring though palpable, the trial Court failed to address this embellishment in the prosecution case. It also not considering the medical evidence namely, Accident Register of the victim girl. In the absence of external injuries and no sign of sexual violence, the trial Court ought not to have convicted the appellant for the offence of aggravated penetrative sexual assault under section 5(m) of the POCSO Act.

12. The occurrence alleged to have happened on 15.08.2020 at about 12.30 hrs. The complaint given to the police only on the next day at



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about 10.00 hrs. The delay of more than 20 hrs in lodging the complaint not properly explained by PW-1. Her explanation that she was waiting for her husband to come cannot be taken as a excuse for the delay, particularly, when the said Murugesan, the husband of PW-1 not examined to corroborate the version for delay given by PW-1. It is the case of the prosecution, that PW-1 along with her husband and villagers Chinnaiya, Velu and Subramaniam went to the house of the appellant on 16th morning before going to the police station at 9.00 am. If so, to corroborate the evidence of PW-1, the prosecution ought to have examined Murugesan, Chinnaiya, Velu and Subramaniam who are vital witnesses.

13. PW-7, the Doctor who examined the minor child after two days of the alleged occurrence had admitted that reddishness in the vagina could have caused due to insect bites or frequent scratching. PW-1 in her complaint as well as chief examination had deposed she applied sesame oil on the private part of her daughter and rubbed. Therefore, the manipulation of the private part of the minor girl admitted done by PW-1 not taken into



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consideration by the trial Court.

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14. The presumption under Section 29 of the POCSO Act is a rebuttable presumption. It is the duty of the prosecution to prove the foundational facts beyond doubt, before drawing any presumption. The reverse burden on the accused can be rebutted by preponderance of probability and need not be beyond doubt. The trial Court in the instant case failed to consider the evidence of the defence witnesses. Particularly, the testimony of the accused/DW-1 who had given a detail account of his activity on 15.08.2020 to show there was no incident occurred on 15.08.2020 in his house between 12.00 to 12.30 hrs.

Submission by the Additional Public Prosecutor on behalf of the State:

15. The case of the prosecution is based on the evidence of the victim child aged about 5 years. The child statement was recorded by two Judicial officers. First under Section 164 of Cr.P.C by the Judicial



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Magistrate, Keeranur on 19.08.2020 (4th day of the occurrence) and next by the District and Sessions Judge, Mahila Court on 22.01.2021. Both the Judicial officers have recorded specifically their satisfaction about the capacity of the child witness to understand and answer questions.

16. In both her statement, the child witness had narrated what happened to her. The aggravated penetrative sexual act committed on her by the appellant been consistently stated by the child witness examined as PW-2. In the cross examination, it was suggested to the child witness that she is deposing on tutoring. The child has denied the suggestion and had stated that she not been tutored and she depose voluntarily.

Delay in complaint:

17. In case of sexual offences, particularly, when the victim is a child, the delay in reporting it to the police may not be fatal. In many cases the victim and her family to report out of fear of social stigma. In some



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cases, the vulnerability or weakness of the victim as against the perpetrator of the crime may take some time to muster aid and courage to lodge the complaint, or as in this case, sometimes for absence of family elder or head delay may cause. The duty of the Court is to look whether the delay is satisfactorily explained and no embellishment due to delay.

18. The credibility of a child witness is based on the factors like age, the possibility of tutoring, understanding the difference between truth and falsehood, capacity to express and the intelligence level. In this case Ex.P-3 is the birth certificate of the child victim. Her date of birth is 08.07.2016. On the alleged date of occurrence ie., 15.08.2020, she had just completed 4 years, 1 month and 7 days. Four days thereafter, her statement under Section 164 Cr.P.C recorded on 19.08.2020 in the presence of her mother who is the first informant. When she was 4 ½ years old, she was examined as PW-2 on 22.01.2021.

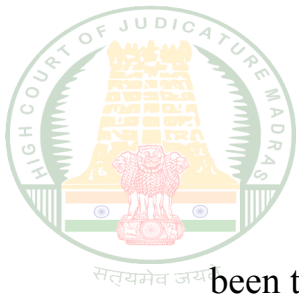


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19. Questions put to her to ascertain her suitability to be a witness and her answers given a satisfactory impression to the Trial Judge that the witness knows the difference between true and false. She has the capacity and readiness to depose. Hence, the learned trial Judge has observed that the response of PW-2, the victim child reveals that they are natural and spontaneous as well as true. Her competency to testify remains unchallenged in the cross examination.

20. The crime came to light soon after the occurrence, when the mother of the victim child saw the appellant and the child semi-nude. The child (PW-2) had told her mother what the appellant did to her and same is found in the complaint and FIR. The child has reiterated the same before the Doctor(PW-7) and the Judicial Magistrate. After six months, she had deposed before the Court that the appellant took her to his house, placed her on the cot and put his genital on her vagina. He kissed her. This portion of the evidence is consistent to her earlier statements. No improvement or embellishment could be noted. The suggestion put to PW-2 whether she



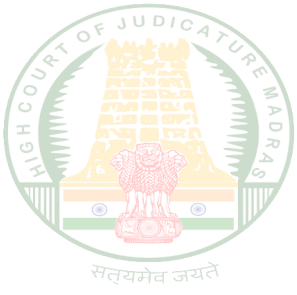
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been tutored to say so, she had denied it.

21. The version of the child is corroborated by the medical evidence namely, the Accident Register (Ex.P-9) and the testimony of the doctor (PW-7) who examined the victim and found ‘introitus congestion’. Also, at this juncture, it is profitable to refer ***Dattu Ramrao Sakhare and Ors., vs State Of Maharashtra*** reported in **1997 (5) SCC 341**, where the Hon’ble Supreme Court has observed that,

“The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored. There is no practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record.”



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22. Reverting back to the case in hand, even assuming rest of the witnesses, except the victim, are only hearsay witnesses in respect of the crime, the evidence of PW-1 who went in search of his daughter in the house of the appellant and saw the appellant standing without dress below hip near her daughter, who without pant and undergarment cannot be ignored. This piece of evidence is admissible under Section 8 of the Evidence Act. The child has reported pain in the private part immediately to the mother and then to the Doctor (PW-7). These portion of the prosecution evidence is sufficient corroboration to the testimony of the child witness.

23. Therefore, the conviction based on the unimpeached evidence of the victim corroborated by medical evidence cannot be set aside taking into consideration the omissions to examine the father of the victim or the seizure mahazar witnesses. These omissions are trivial not adequate to reject the testimony of the victim. Likewise, the defence witnesses particularly, DW-2 (son of the appellant) and DW-3 (sambanthi) does not lend any support to the appellant to rebut the presumption against him.



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24. The learned counsel for the appellant as his last limb of argument pleaded that, even if there is some evidence of sexual offence, it will only fall under Section 9(m) of the POCSO Act (sexual assault on a child below 12 years) and not under section 5(m) of the POCSO Act (Aggravated penetrative sexual assault on a child below 12 years). Hence, the life sentence till the natural death is improper.

25. The above submission in our considered view is not sustainable, Placing the penis on the vagina and applying mouth to kiss her vagina falls under (a) and (d) of Section 3 of the POCSO Act which defines 'Penetrative sexual Offence'. Since the testimony of the victim child aged below 12 years proves the act of penetrative sexual offence, the said offence gets the form of 'aggravated penetrative sexual offence' to attract Section 5(m) punishable under Section 6 of the POCSO Act which prescribes Rigorous Imprisonment for a period of not less than 20 years or Life Imprisonment which shall mean imprisonment for the remainder of natural life and fine or Death.



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26. Considering the facts and circumstances, the age of the victim as well as the accused/appellant, the trial Court has imposed sentence of Life Imprisonment with fine of Rs.70,000/-. We find the said sentence is proportionate to the crime and need no interference.

27. In fine, the Criminal Appeal stands dismissed. The judgment passed by the learned Sessions Judge, Mahila Court, Pudukkottai in Spl.S.C.No.30 of 2020 dated 02.08.2021, is hereby confirmed.

**[G.J.,J] & [R.P., J]
04.03.2025**

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
PJJ

To

1.The Sessions Judge,
Mahila Court, Pudukkottai.

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2.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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**DR.G.JAYACHANDRAN, J.
AND
R.POORNIMA, J.**

PJL

**Judgement made in
Crl.A(MD)No.372 of 2021**

04.03.2025