



Crl.A(MD)No.265 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 07.08.2025

CORAM:

THE HON'BLE Dr.JUSTICE R.N.MANJULA

Crl.A(MD)No.265 of 2018

Chellapandi

... Petitioner

Vs

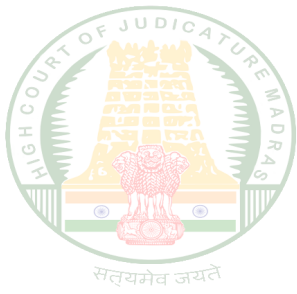
The Inspector of Police,
All Women Police Station, Usilampatti,
Madurai District, Crime No.62/2015.

... Respondent

Prayer: This Criminal Appeal Case filed under Section 374 of Cr.P.C to set aside the conviction and sentence passed under Section 9(m) of POCSO Act, 2012 vide Judgment, dated 15.05.2018, passed by the learned Sessions Judge, Mahila Court, Madurai in Special SC No.39 of 2016.

For Appellant : Mr. Thirupathi Chellasamy

For Respondent : Mr.A.Albert James
Government Advocate (Crl.Side)



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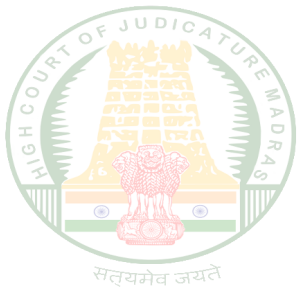
JUDGMENT

The present Criminal Appeal has been filed challenging the Judgment of the learned Sessions Judge, Mahila Court, Madurai, dated 15.05.2018 made in Spl.S.C.No.39 of 2016.

2.The appellant is the sole accused, who has been convicted and sentenced in the following manner:

S. No	Provisions under which convicted	Sentence of imprisonment	Fine amount
1	9(m) r/w 10 of POCSO Act	5 years rigorous imprisonment	Rs.5.000/- in default to undergo one year simple imprisonment

3.The case of prosecution as it appears from the records is that on 08.11.2015 at about 05.00 p.m., when the victim child, PW1, who is the grandchild of PW2/defacto complainant was playing near Panchayat School at her village along with other children. The accused came there and gagged her mouth, took her to a lonely place behind verandah wall and committed the offence of sexual assault on her.



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4. On the complaint given by PW2, FIR has been registered in Cr.No.62 of 2015 and was taken up for investigation. At the conclusion of investigation, charge sheet has been filed against the accused under Sections 9(m) r/w 10, 5(i) r/w 6 of POCSO Act. As the accused denied his involvement, he was subjected to trial. At the conclusion of trial, the accused was found guilty under Section 9(m) r/w 10 of POCSO Act and he was convicted and sentenced as stated *supra*.

5. Aggrieved over that, the accused has filed this appeal.

6. The learned counsel for the appellant submitted that PW2, who is the grandmother of PW1/victim child has given a complaint, Ex.P.1 during the midnight of 09.11.2015; in the complaint, she has stated that the accused had gagged the victim child and took her to a lonely place near the School Verandah and committed sexual assault on her; but in the charge sheet it is alleged that the accused had committed sexual assault on keeping his private part on the face and other parts of the victim including her genitals.

7. The learned counsel further submitted that PW1 stated in her evidence that when she was sitting along with her brother on the steps outside the school and was watching the games, the accused came

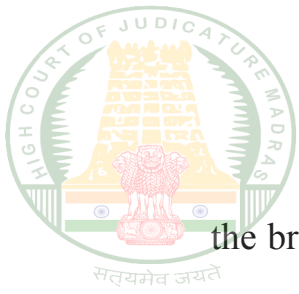


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there and lifted her; PW1 in her evidence has also stated that apart from her brother, other children were also present, but those children were not examined including her brother; in the evidence of PW1, she has not stated that the accused had committed penetrative sexual assault by keeping his genitals in her private parts, but she has stated that the accused had kept his genitals and rubbed it on her body and kissed her.

8.The learned counsel further submitted that if the offence of aggravated penetrative sexual assault is not proved, the accused cannot be convicted for the offence of aggravated sexual assault; there is no evidence to prove the aggravated sexual assault, because there was no semen found in the panties of the victim child; the evidence of the victim child has not been corroborated with the medical evidence.

9.The learned counsel for the appellant further submitted that PW1 has stated in her evidence that the accused is known to the victim child as he is residing in the next street; she further stated that PW2 warned the victim not to talk with the accused and she should not go to the house of the accused; in this regard, PW2 has stated that there was a problem between the family of PW2 and the family of the accused; however, this was not stated in the complaint or during the investigation;



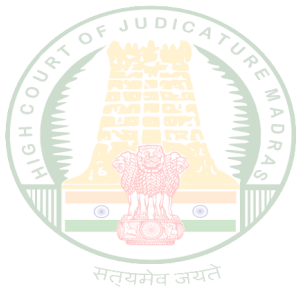
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the brother of the victim was said to have been present near the place of occurrence, but he has not been examined as a witness.

10.The learned Government Advocate (Crl.Side) appearing for the respondent submitted that the accused has been charged for the offence under Sections 6 and 10 of POCSO Act and has been punished only for the offence under Section 10 of POCSO Act, as the Court was not satisfied with regard to the offence in respect of penetrative sexual assault; PW1 has stated in her evidence about the act of sexual assault committed by the accused and that has been corroborated with the evidence of PW2, PW3, PW4 and PW6.

11. I have given my anxious consideration to the submissions made on either side and carefully perused the records.

12. The prosecution has claimed that the child was 8 years at the time of occurrence and it was denied by the accused. The child was studying in 2nd standard and hence, by look of her itself, it shall be ascertained that she is an 8 years old child. So there is no difficulty in determining the age of child as 8 years. Hence, it is a case under POCSO Act involving a child below 12 years of age.



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13.The complaint, Ex.P.1 has been given by the grandmother of the victim child, who has been examined as PW2. She has stated in the complaint that the victim is one of her grandchildren through her daughter. As her daughter and son-in-law were employed abroad, their children viz., the victim and her brother are in the custody of PW2. With regard to the occurrence, it is stated in the complaint that on 08.11.2015 at about 05.00p.m., when the victim child was playing with other children, the accused, who also belonged to the same village, had taken the victim by gagging her mouth and made her to lie on the verandah and committed the offence of sexual assault on her. Though the complaint contained a generalised statement about the sexual assault, in the evidence of PW2, she has stated that after lifting the child, the accused had kissed the victim and made her to lie on the verandah and pressed his two hands on her and covered his lungi on the child and prevent her from shouting.

14.However, the victim, who was examined as PW1 has stated in her evidence that while she was studying in the 2nd standard, one day her brother and other children were playing outside the school and



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they also sat on the steps and were watching the other children playing.

The accused came there and took her to the school verandah and rubbed his genitals on her body and kissed her. He also covered her with lungi and made her not to shout. It is stated that the victim child had bitten him but still he kissed her.

15.During cross examination of PW1, she has stated that the verandah will be visible from the place where the children were sitting on the steps and watching Cricket.

16.In such case, it should have been visible to the eyes of her brother also. In fact, when the victim child was taken away by the accused, it is surprising to note that the brother of the victim did not raise any alarm to alert others or to prevent the accused with other children from taking away his sister. Despite, being an eye witness, he was not examined as a witness on the side of prosecution.

17.In the further cross examination of PW1 she has stated that the accused is known to her, as he is residing in the next street and her grandmother, PW2 warned her that she should not go to the house of the accused and speak to him. When PW2 was confronted about the previous motive about the accused, she has also admitted in her evidence



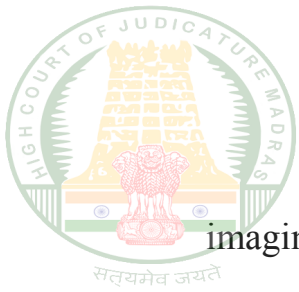
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that the house of the accused is in the neighbouring street and there was some problem between her family and the family of the accused. She had further stated that she did not state about the previous enmity in her complaint and she had warned her grandchildren not to talk to the accused.

18.By making reference to the above cross examination, where PW1 and PW2 have stated about the previous misunderstanding between the accused and PW2, the learned counsel for the appellant submitted that the complaint is a motivated one and it was given by PW2 just to take revenge against the accused.

19.Motive is like a double edged weapon and it might also act against the accused, as he could have thought of bothering the child and thereby disturb PW2, in view of his previous enmity with her. Though certain amount of caution has to be exercised when the defence exposes the previous motive, in the cases of this nature, the whole evidence have to be appraised in a comprehensive manner, without considering the alleged motive in isolation.

20.As the child was just 8 years old at the time of occurrence and she was under the custody of her grandmother, it is difficult to



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imagine that a person like PW2 would misuse the child and that too, by lodging a false complaint of sexual assault committed on her. PW2 would be aware of the consequential social embarrassment that might arise. In fact, PW2 has stated in her evidence that she dared to give the complaint as she should spread social awareness for others also. So the case of prosecution cannot be rejected in *toto* by stating that there was some previous motive.

21. However, there was some lacunae in the prosecution case, which is patently visible. It is obligatory on the part of the Investigation Officer to ascertain whether there was motive between the accused and the defacto complainant in order to rule out the motive behind the complaint. But he has omitted to do that.

22. Though the brother of the victim child was also sitting in the same place, from where the victim was taken away by the accused, the brother was not examined as a witness to the occurrence. The victim child has stated that the verandah where she was made to lie could be visible from the place where the children were sitting on the steps. Hence, it is imperative on the part of the prosecution to not to ignore an important witness like the brother of the victim child. Even the other

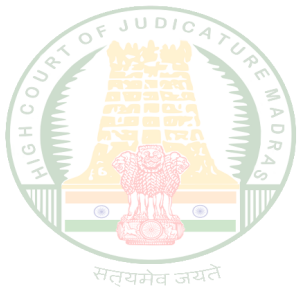


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children, who were playing in that area were also not examined and their evidence is not available before the Court.

23.In fact, the charges have been framed for the offence of penetrative sexual assault as well as sexual assault. When the larger offence of penetrative sexual assault is there, it is inclusive of other sexual assault caused incidentally during the commission of the offence of penetrative sexual assault. Had the victims been different and the accused have caused penetrative sexual assault on one child and sexual assault on the other child, it is understandable that the Court should frame two charges one for penetrative sexual assault and another for sexual assault. In the instant case, though there is one victim and the Court was pleased to frame a charge under Section 6 of POCSO Act for the offence of penetrative sexual assault and another charge under Section 10 of POCSO Act for the offence of sexual assault, which is unnecessary and superfluous.

24.In any case, the victim child has not stated about the commission of the act of penetration as defined under Section 3 of POCSO Act. For a better clarity, section 3 of POCSO Act is defined as under:



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

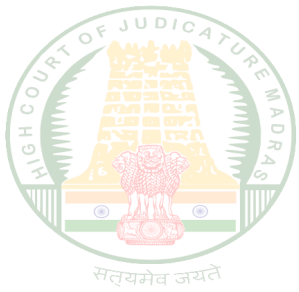
(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(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

(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.”

25.As the child was below 12 years of age, the above penetrative sexual assault or sexual assault would come under the category of aggravated penetrative sexual assault or aggravated sexual assault as defined under Section 5 and 9 of the POCSO Act respectively.



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26.As the victim child has stated that the accused had rubbed his genitals on her body, the learned trial Judge thought it fit to find the accused guilty for the offence under section 10 of POCSO Act alone.

27.Though the evidence of the child cannot be ignored and it has to be looked into with all seriousness but when there are other circumstances causing doubt on the case of prosecution, it is better to seek for any corroborative evidence.

28.The POCSO Act comprises of Sections 29 and 30, which enable the Court to draw an adverse presumption against the accused as to his act and intention, when prosecution for any of the offence under Sections 4, 6, 8 and 10 of POCSO Act has been made. As the accused is burdened with the obligation to rebut the initial presumption drawn against him, it is essential to look into the direct evidence if any given on the side of the defence or the deficiencies or infirmities in the case of prosecution for the purpose of considering the same as rebuttal proof.

29.In the case on hand, the accused did not let in any direct evidence. However, the cross examination of prosecution witnesses will bring out the fact that there was previous enmity between the accused and the defacto complainant and that the investigation officer has not



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investigated on this aspect, by making due enquiry. The children, who were sitting along with the victim child including his brother have not been brought before the Court as witnesses in order to support the case of prosecution. Even the evidence of PW1 victim child is also not largely compatible with her 164 Cr.P.C., statement.

30.PW9 Doctor has stated in his evidence that the victim girl has got simple injury. With regard to the details of injury, he has recorded that there was a swelling on the right side of forehead and an abrasion measuring 1.0 c.m., x 0.5 c.m., on the right ear dorsal aspect. PW10 is the Doctor, who examined the victim child, has registered the history of the case as alleged attempt of rape by one known person on the child at about 05.00 p.m., in a School. She had examined the child at 01.00 a.m., on 09.11.2015.

31.No doubt, when the child was examined by the Doctor, PW9, there was a swelling on her right side of her forehead and abrasion on her right ear. As the children were playing at the relevant point of time, it is not known as to whether these injuries have been caused while she was playing or by the accused. The evidence of PW1 is not clear as to how she got abrasion on her ear. But she has simply stated that there



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was bleeding in her ears, when the accused assaulted her sexually. It is difficult to reject the evidence of the victim child. However, at the same time, it is not easy to ignore the material discrepancies between the evidence of the victim child and her 164 Cr.P.C., statement. In the 164 Cr.P.C., statement the victim has given more elaboration about penetrative sexual assault committed by the accused, but in the evidence she has not given that much of elaboration. So a doubt arises, whether the child was tutored by someone.

32.The absence of eye witness to the occurrence coupled with the previous motive between the accused and PW2 along with failure of the investigating agency to investigate on this aspect, I feel that there are some patent irregularities and inadequacies present in the case of prosecution. The above disadvantage present in the case of prosecution will no doubt act as a rebuttal circumstances in favour of the accused.

33.Once these infirmities rebutted the initial presumption against the accused, then the prosecution will be burdened with the usual obligation of proving guilt against the accused beyond reasonable doubts. The prosecution was unsuccessful as it did not examine all the material



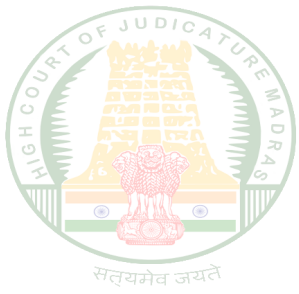
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witnesses and there are material contradictions seen in the evidence of the other witnesses, especially the victim child. Though the complaint given by PW2 cannot be strictly called as a false complaint and concluded that it is a false case, there are glaring omissions on the part of prosecution to do proper investigation and bring out the full facts and evidence before the Court in order to affix the stamp of better reliability on the case of prosecution.

34.In view of the above stated reasons, it can be an inescapable conclusion that the prosecution has not proved the guilt of the accused for the offence under Sections 9(m) r/w 10 of POCSO Act beyond reasonable doubts, subsequent to the rebuttal of the initial presumption.

35.As the learned trial Judge has not given a comprehensive analysis of the evidence in the background of motive and in the absence of evidence of material witnesses, but proceeded to find that the accused is guilty without giving him the benefit of rebuttal circumstances and the consequential benefit of doubt, the Judgment of the trial Court holding the accused guilty requires interference.



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36. Accordingly, *the Criminal Appeal stands Allowed and*

the appellant is acquitted from all the charges levelled against him and bail bond executed by the appellant if any, shall stand terminated and the fine amount, if any paid by the appellant shall be refunded to him.

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NCC : Yes/No

Index : Yes/No

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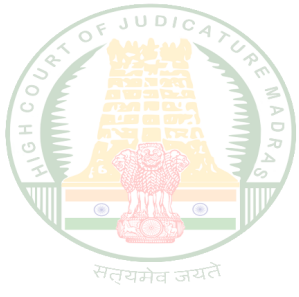
To

1. The Sessions Judge, Mahila Court, Madurai

2. The Inspector of Police,
All Women Police Station, Usilampatti,
Madurai District, Crime No.62/2015.

3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

4. The Section Officer,
Criminal Record Section,
Madurai Bench of Madras High Court, Madurai.



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Dr.R.N.MANJULA, J.

PNM

JUDGMENT IN

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