



Crl.A(MD)No.970 of 2024

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 09.12.2025

CORAM:

**THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN
AND
THE HONOURABLE MS.JUSTICE R.POORNIMA**

**Crl.A(MD)No.970 of 2024
and
Crl.M.P(MD)No.12137 of 2024**

Udaiyan,
S/o. Aathimuthu,
No. 1/16, East Street,
K.P.Thalavaipuram,
Thoothukudi .
(Presently Confined at Central Prison,
Palayamkottai.) ... Appellant/Sole Accused

Vs.

The State of Tamil Nadu,
Represented by the Inspector of Police,
All Women Police Station,
Pudukottai,
Thoothukudi District.
Crime No. 15/2017. ... Respondent/Complainant



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PRAYER:- Criminal Appeal is filed under Section 415(2) of B.N.S.S0, 2023, to call for the records in Spl.S.C.No.171 of 2019 on the file of the Special Court, for Exclusive Trial of Cases under POCSO Act, Thoothukudi dated 28.07.2023 and set aside the same.

For Appellant : Mr.D.Venkatesh

For Respondent : Mr.T.Senthil Kumar
Additional Public Prosecutor

JUDGMENT

**(Judgment of the Court was delivered by
G.K.ILANTHIRAIYAN, J.)**

This appeal is directed as against the Judgment passed in Spl.S.C.No.171 of 2019 on the file of the Special Court, for Exclusive Trial of Cases under POCSO Act, Thoothukudi, dated 28.07.2023, thereby convicted the appellant for the offence punishable under Section 5(m) r/w 6 of the Protection of Children from Sexual Offences Act, 2012 (in short hereinafter referred to as 'the POCSO Act') and sentenced him to undergo imprisonment of life and imposed with the fine of Rs.10,000/- in default to undergo six months Simple Imprisonment.



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2.The case of the prosecution was that on 23.11.2017 at about 05.00 p.m., while the minor victim girl, aged about 4 years, was playing in front of her house with her brother, her mother, who was inside the kitchen, heard the child crying. When she was rushed out, she saw the appellant running out of the house. When she had enquired the minor victim girl, she informed her mother that the appellant had laid her down after removing her clothes and had committed aggravated penetrative sexual assault on her. Therefore, the mother of the victim girl lodged a complaint before the respondent and F.I.R had been registered in Crime No.15 of 2017 for the offences punishable under Section 5(m) r/w 6 of POCSO Act. After completion of investigation, the respondent filed a final report and the same has been taken cognizance by the trial Court in Spl.S.C.No.171 of 2019 on the file of the Special Court for Exclusive Trial of Cases under POCSO Act, Thoothukudi.



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3.On the side of the prosecution, in order to bring the charges to home, they had examined P.W.1 to P.W.17 and Exs.P1 to P13 were marked. On the side of the appellant, no one was examined and no documents were produced before the trial court.

4.On perusal of the oral and documentary evidence, the trial Court found the appellant guilty for the offence punishable under Section 5(m) r/w 6 of POCSO Act and sentenced him to undergo imprisonment of life and imposed with the fine of Rs.10,000/- in default to undergo six months Simple Imprisonment. Aggrieved by the same, the present appeal has been filed.

5.The learned counsel appearing for the appellant submitted that there were contradictions between the evidence of P.W.1 and P.W.2. The victim child was examined as P.W.1 and her mother was examined as P.W.2. That apart, the victim girl was only



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aged about 4 years at the time of alleged occurrence. No such occurrence was happened and a false case has been foisted as against the appellant.

6. According to the learned counsel, P.W.2 deposed that the alleged occurrence had taken place in front of the house, whereas P.W.1 deposed that the alleged occurrence took place inside the house. Even assuming that the said occurrence happened inside the house, P.W.2 was very much present in the house and there was absolutely no chance that the said occurrence could have happened that too aggravated penetrative sexual assault on the minor victim girl. The minor victim girl was aged about only 4 years and it could not be possible for aggravated penetrative sexual assault. The victim minor girl was subjected for medical examination before P.W.8.

7. P.W.8 deposed that the victim girl did not sustain any injury on her private part and her hymen was intact. Therefore, the



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medical evidence did not support the case of the prosecution and even then, the trial Court without considering the above facts and circumstances mechanically convicted the appellant that too for the offence punishable under Section 5 (m) r/w 6 of POCSO Act. Even assuming that the case of the prosecution is true at the worst the appellant can be convicted only for sexual assault.

8.Per contra, the learned Additional Public Prosecutor submitted that the victim girl was aged only 4 years at the time of occurrence. In order to prove the charges, the victim girl was examined as P.W.1 and her mother was examined as P.W.2. Both categorically deposed that the appellant had committed aggravated penetrative sexual assault on the victim. The minor discrepancies and contradictions are not fatal to the case of the prosecution. Though the medical evidence did not support the case of the prosecution, the victim girl categorically deposed that the appellant had committed aggravated penetrative sexual assault on her.



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Therefore, the trial Court rightly convicted the appellant and it does not require any interference by this Court.

9.Heard the learned counsel appearing on either side and perused the materials available on record.

10.The appellant is none other than the paternal uncle of P.W.2. At the time of alleged occurrence, the appellant was in inebriated condition by consumption of alcohol. He is the grandfather of the victim girl. He used to visit the victim's house frequently to play with the victim girl and her brother. On the date of the alleged occurrence, P.W.2 was very much present in the house and she was cooking. At that juncture, the victim girl was playing with her brother, who is younger to the victim girl.

11.According to the case of the prosecution, the victim was subjected for aggravated penetrative sexual assault at the hands of



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the appellant herein. She deposed that after removing her dress, the appellant also removed his dress and laid on her to commit sexual assault on the victim. The victim girl cried and immediately P.W.2 had come and the appellant ran away from the house. On the same day, P.W.2 lodged a complaint at about 10 p.m., before the respondent.

12.On perusal of the cross examination of P.W.1 revealed that even after the alleged occurrence, the appellant visited the victim's house and he was playing with the victim and her brother. Further he used to come to her house to watch TV and also to play with them. But P.W.2 deposed that the appellant was in inebriated condition and he consumed alcohol. After the occurrence, she had also beaten the appellant with a stick. Thereafter, she lodged a complaint on the advice of neighbours. Therefore, it is completely contradictory to the evidence of P.W.1. She also admits that the appellant used to visit their house, since he is a close relative. The



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neighbours who advised P.W.2 to lodge a complaint turned hostile before the trial Court. After registration of F.I.R on 23.11.2017, the victim girl was subjected for medical examination on the next day i.e. on 24.11.2017. After examining the victim girl, P.W.8 deposed that no external or internal injury on the private part of the victim girl. Her hymen was intact. She issued an accident register which was marked as Ex.P.6. As per the medical records, the victim's hymen was normal. No external or internal injuries on the genital part of the victim girl. Therefore, there is no evidence or material to attract the offence under Section 5 (m) r/w Section 6 of POCSO Act.

13.In order to bring the charges under Section 5 of the POCSO Act, the prosecution should have proved that the appellant committed the act of penetration as defined under Section 3 of the Act. It is relevant to extract the provision under Section 3 of the POSCO Act, which reads as follows:



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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.”



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14. Thus, it is clear that the penetration is a sine qua non for an offence of penetrative sexual assault and in order to cause penetration, there must be a clear and cogent evidence to prove that some part of the virile member of the accused there within the labia of the pendulum of the woman, no matter how little. Therefore, even the slightest degree of penetration of any part of the accused into the vagina is sufficient to hold the accused guilty of the offence under the aggravated penetrative sexual assault.

15. In the case on hand, as per the evidence of PW1 and PW2, there was no aggravated penetrative sexual assault at the hands of the appellant. However, there was sexual assault at the hands of the appellant. The 'Sexual assault' defined under Section 7 of the POCSO Act is as follows:

“7. Sexual assault.—Whoever, with sexual intent touches the vagina, penis, anus or breast of the



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child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

16. Therefore, touching a part of the body or rubbing a part of the body may amount to only manipulation of the body but an act without penetration will not amount to an offence under Section 5 of the POCSO Act i.e aggravated penetrative sexual assault. Though manipulation need not even be with penis on vagina, it may be by any means or any part of the body, but, to attract the provision under Section 3 of POSCO Act, such manipulation must be to cause penetration.

17. In the case on hand, as per the evidence of P.W.1 and P.W.2, the prosecution proved the sexual assault as defined under Section 7 of the PSCSO Act against the appellant herein. Further, the



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victim girl is aged about only 4 years at the time of occurrence and is below 12 years of age, the sexual act gets the form of aggravated sexual assault as defined under Section 9(m) r/w Section 10 of the POCSO Act. The aggravated sexual assault is punishable under Section 10 of the POSCO Act.

18. Accordingly, the conviction and sentence imposed on the appellant under Section 5(m) r/w Section 6 of the POCSO Act, cannot be sustained and is liable to be set aside, but the appellant is liable to be convicted for the offence punishable under Section 9(m) r/w Section 10 of the POCSO Act.

19. In view of the above, the conviction and sentence imposed on the appellant in Spl.S.C.No.171 of 2019 on the file of the Special Court, for Exclusive Trial of Cases under POCSO Act, Thoothukudi, dated 28.07.2023, is modified under Section 9(m) r/w Section 10 of the POCSO Act and sentenced him to undergo 5 years



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Rigorous Imprisonment with a fine of Rs.10,000/- in default to undergo 6 months Simple Imprisonment.

20. Accordingly, the Criminal Appeal is partly allowed. It is also made clear that if the appellant already paid the fine, it can be adjusted towards the fine amount imposed by this Court. The sentences of imprisonment shall run concurrently. The period of imprisonment already undergone by the appellant shall be set off. Consequently, connected Miscellaneous Petition is closed.

**[G.K.I.J.,] & [R.P.J.,]
09.12.2025**

NCC : Yes/No
Index : Yes/No
Internet : Yes
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To

1.The Special Court for Exclusive Trial of Cases
under POCSO Act,
Thoothukudi.

2.The Inspector of Police,
All Women Police Station,
Pudukottai,
Thoothukudi District.

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



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G.K. ILANTHIRAIYAN, J.
AND
R. POORNIMA, J.

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