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Crl.A.No.765 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.06.2024

PRONOUNCED ON : 20.06.2024

CORAM :

THE HON'BLE MR. JUSTICE M.S.RAMESH

AND

THE HON'BLE MR. JUSTICE SUNDER MOHAN

Crl.A.No.765 of 2022

and

Crl.M.P.No.15561 of 2023

Kalimuthu

... Appellant/Accused No.2

v.

State represented by
Inspector of Police,
All Women Police Station,
Dharapuram, Tiruppur District.
(Crime No.2 of 2017)

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, 1973, against the conviction of the appellant/A2 and sentence in Spl.S.C.No.35 of 2017 dated 28.03.2019, on the file of the learned Sessions Judge, Magalir Neethimandram [Fast Track Court], Tiruppur, and set aside the conviction and sentence imposed in judgment dated 28.03.2019 and



CrL.A.No.765 of 2022

acquit the appellant/A2.

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For Appellant : Mr.N.Ponraj

For Respondent : Mr.A.Gokulakrishnan
Additional Public Prosecutor

JUDGMENT

(Order of the Court was delivered by SUNDER MOHAN,J.)

This Criminal Appeal has been filed by Accused No.2, challenging the conviction and sentence imposed upon him, vide judgment dated 28.03.2019 in Spl.S.C.No.35 of 2017, on the file of the learned Sessions Judge, Magalir Neethimandram [Fast Track Court], Tiruppur.

2.(i) It is the case of the prosecution that the victim, a minor girl aged 14 years at the time of occurrence, while she was with her friend-PW5, near a public toilet at Sandhaipettai, on 09.03.2017 at about 9.30 p.m., the appellant (A2) and A1 came in a TVS-50 Moped bearing Regn.No.TN38 A 4576 assaulted PW5 and took the victim girl in PW5's bike to the corn fields belonging to one Prabhavathy at Dharapuram and committed repeated penetrative sexual assaults on her.



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CrL.A.No.765 of 2022

(ii) It is the further case of the prosecution that the victim girl made a complaint [Ex.P1] to the police on 10.03.2017 at about 3.00 p.m., before the respondent police. PW13, the Sub Inspector of Police, registered the FIR in Cr.No.2 of 2017 for the offences under Sections 366-A and 392 of the IPC and Section 5(g) read with Section 6 of the Protection of Children from Sexual Offences Act (hereinafter referred to as 'POCSO Act') against the appellant and A1. The printed FIR was marked as Ex.P17.

(iii) PW16, the Inspector of Police, took up the investigation and went to the scene of the occurrence on 10.03.2017 at about 4.35 p.m., and prepared the Observation Mahazar [Ex.P5] and Rough Sketch [Ex.P20] in the presence of the witnesses. She seized the earring [M.O.6] and a black-coloured sports bra [M.O.5] belonging to the victim from the scene of the occurrence under Seizure Mahazar [Ex.6]. Thereafter, she examined the witnesses and at about 9.00 p.m., arrested both the accused on the identification of PW5. She recorded the confession of the accused and seized the vehicle of PW5 [M.O.7] viz., TVS Victor bearing Regn.No.TN57



X 8061 from the possession of the accused, under the Seizure Mahazar [Ex.12]. Thereafter, she sent the accused for medical examination. She also seized a light blue-coloured full hand shirt [M.O.10] and a dark green and cement coloured checked lungi [M.O.12], belonging to the appellant and thereafter, sent all the dress materials and other articles seized, to the Court under Form-95. She sent the accused for medical examination to conduct potency test on 14.03.2017.

(iv) In the meanwhile, on 13.03.2017, learned Judicial Magistrate No.II, Udumalaipet, recorded the Section 164 Cr.P.C., statement of the victim. On 15.03.2017, PW16 made a requisition to the Magalir Neethimandram [Fast Track Court], Tiruppur, to send the vaginal smear and vaginal swab taken from the victim to the Forensic Science Laboratory. Thereafter, she examined all other witnesses and after obtaining the report from the Forensic Science Laboratory, she handed over the investigation to PW17.

(v) PW17, the Inspector of Police, thereafter took up the investigation and filed the final report against both the accused, for the offences under



CrL.A.No.765 of 2022

Sections 366 and 394 of the IPC and Section 5(g) read with Section 6 of the POCSO Act, before the learned Sessions Judge, Magalir Neethimandram [Fast Track Court], Tiruppur, which was taken on file as Special S.C.No.35 of 2017.

(vi) On the appearance of the accused, the provisions of Section 207 Cr.P.C., were complied with and the trial Court framed charges against the accused, and when questioned, the accused pleaded 'not guilty'.

(vii) To prove the case, the prosecution examined 17 witnesses as P.W.1 to P.W.17, marked 27 exhibits as Exs.P1 to P27 and marked 13 Material Objects as M.O.1 to M.O.13. When the accused were questioned, u/s.313 Cr.P.C., on the incriminating circumstances appearing against them, they denied the same. The accused examined one Premalatha, mother of A1 as DW1 and did not mark any documents.

(viii) On appreciation of oral and documentary evidence, the trial Court found that the prosecution had established its case beyond reasonable doubt and held the accused guilty of the offences levelled against them and



CrL.A.No.765 of 2022

thus, convicted and sentenced them as follows:

<i>Accused No.</i>	<i>Offence under</i>	<i>Sentence imposed</i>
A1	394 IPC	To undergo RI for 10 years and to pay a fine of Rs.5,000/-, in default to undergo RI for 2 years
	366 IPC	To undergo RI for 10 years and to pay a fine of Rs.5,000/-, in default to undergo RI for 2 years
	5 (g) r/w 6 of POCSO Act	To undergo RI for life and to pay a fine of Rs.20,000/-, in default to undergo RI for 2 years
A2	394 r/w 109 IPC	To undergo RI for 10 years and to pay a fine of Rs.5,000/-, in default to undergo RI for 2 years
	366 IPC	To undergo RI for 10 years and to pay a fine of Rs.5,000/-, in default to undergo RI for 2 years
	5 (g) r/w 6 of POCSO Act	To undergo RI for life and to pay a fine of Rs.20,000/-, in default to undergo RI for 2 years
The sentences were ordered to run concurrently.		

Hence, the appellant/A2 has preferred the appeal challenging the said conviction and sentence.

3. Heard, Mr.N.Ponraj, learned counsel appearing for the appellant/A2, and Mr.A.Gokulakrishnan, learned Additional Public Prosecutor appearing for the respondent/State.

4. (i) The learned counsel for the appellant/A2 submitted that the case has been fabricated; that admittedly the victim was a stranger to the accused and no Test Identification Parade was conducted after their arrest; that the



Crl.A.No.765 of 2022

prosecution has not clearly spelt out as to how they identified the accused; that the FIR reached the Magistrate on 11.03.2017, after the accused were arrested on 10.03.2017 at 9.00 p.m., and hence, the names of the accused were found in the FIR; that the vehicle which is said to have been abandoned by the accused, has not been seized and there is no investigation in this regard; that PW5, who claims to be the friend of the victim girl has stated that the accused came by walk, which is contrary to the prosecution case; that PW5 had not given any complaint on the night of 09.03.2017 and there is no explanation for the same; that his conduct does not inspire confidence; and that the evidence of the victim, regarding the alleged incident is unbelievable.

(ii) The learned counsel further submitted that the medical evidence also cannot be relied upon, since there is no evidence to establish as to who took the blood samples from the accused and with regard to the chain of custody of the blood samples, which would ensure the authenticity of the report and relied upon the judgment of the Hon'ble Supreme Court in ***Prakash Nishad @ Kewat Zinak Nishad v. State of Maharashtra***, in **Crl.A.Nos.1636-1637 of 2023 dated 19.04.2023**, in support of his



CrL.A.No.765 of 2022

submission. He also relied upon the judgment of the Hon'ble Supreme Court in **Kanan v. State of Kerala**, reported in (1979) 3 SCC 319, in support of the submission that in the absence of Test Identification Parade, the identification in Court for the first time, would be valueless. Hence, he prayed for acquittal of the appellant/A2.

5. The learned Additional Public Prosecutor mainly relied upon the testimony of PW1, her identification of the accused in the Court and the DNA Report [Ex.P19] which confirms that the seminal stains found in the vaginal swab and the dress materials of the victim belong to that of the accused and therefore submitted that the trial Court, was right in convicting the appellant (A2) and A1 and there is no reason to set aside the finding of guilt rendered by the trial Court. Hence, he prayed for dismissal of the appeal.

6. We have carefully considered the rival submissions and have perused all the relevant records.

7. (i) PW1 is the victim; PW2 is the mother of the victim; PW3 and



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PW4 are the observation mahazar witnesses; PW3 turned hostile; PW5

is the friend of the victim, who was attacked by the accused as per the prosecution case; and PW6 is the witness to the confession of the accused and to the recovery of the bike belonging to PW5 from the possession of the accused.

(ii). PW7 is the sister's husband of the victim, who speaks about the fact that the victim went missing in the evening of 09.03.2017 and they went in search of the victim, that he met two persons and one of them informed him that two persons beat him up, took his bike and had taken the victim in the said bike; that about 12.30 a.m., the victim was walking near a tea shop and when asked, she informed that two people, viz., the appellant and another whose name is Sethupathy (A1) had committed sexual assault on her; PW8 is a hearsay witness, who came to know that the victim was kidnapped by two people; and PW9 is the witness to the confession of the accused;

(iii). PW10 is the Doctor who had examined the victim and had taken



Crl.A.No.765 of 2022

the vaginal smear which contained sperm cells. She made entries in the Accident Register Ex.P13; PW11 is the doctor who examined both the accused and issued potency certificates i.e., Ex.P14 in respect of A1 and Ex.P15 in respect of the appellant (A2); PW12, is the Tahsildhar who speaks about the rainfall data in the occurrence place from 01.03.2017 to 15.03.2017 and issued Ex.P16-certificate; PW13 is the Sub-Inspector of Police, who registered the FIR; PW14 is the Scientific Officer in the Forensic Science Laboratory, who found seminal stains in the dress materials of the victim and sent for chemical analysis and for DNA comparison to the Directorate of Forensic Science Department; PW15 was the Assistant Director of DNA Department of the Forensic Science Laboratory and had issued the DNA Report-Ex.P19 stating that the seminal stains found in the vaginal smear belonged to the accused; PW16 and PW17 are in the investigating officers, who conducted the investigation and filed the final report.

8. From the above narrative, it could be seen that the complaint was lodged by the victim herself at 3.00 p.m., on 10.03.2017. As per the complaint and the evidence of PW7, who is the victim's uncle (sister's



CrL.A.No.765 of 2022

husband), the victim returned to the house in the early morning of 10.03.2017 i.e. at about 12.30 a.m. It is not known, as to why the complaint was not lodged immediately.

9. Be that as it may. The victim's version is that she came to know the names of the accused, while they were talking with each other during the occurrence. Therefore, both accused were named in the FIR. However, we may note that though the FIR is said to have been registered at 3.00 p.m., on 10.03.2017, it was sent to the jurisdictional Magistrate only the next day i.e., 11.03.2017 at about 11.20 a.m., as could be seen from the endorsement made by the learned Magistrate in Ex.P17-FIR. The accused were arrested according to the prosecution on 10.03.2017 at about 9.00 p.m., which means that the FIR reached the Magistrate only after the arrest of the accused. There is no explanation as to why the FIR was not sent immediately to the Magistrate. Though, PW13 the Sub Inspector of Police in the cross examination claims that the FIR was sent to the Magistrate on 10.03.2017, it is not so. Therefore, this throws a serious doubt as regards the prosecution version that the victim had given the names of the accused in her complaint.



Crl.A.No.765 of 2022

10. Strangely, PW5 who claims to be the friend of the victim and assaulted by the accused, does not inform or complain of the assault to anyone. He would state in his deposition that after he was assaulted and his bike was stolen by the accused, he went to his village. Though, he admits that there was a temple festival and there were policemen all around, he neither informed them about the occurrence nor went to the police station to complain about the kidnapping. He further deposed in the cross examination that both accused were arrested by the police at 9.00 a.m., in the morning of 10.03.2017, which is much before the registration of the FIR. PW5 would add that both accused came walking, attacked him before taking away the bike and kidnapped the victim. This version is contrary to the version of PW1 that the accused came in a TVS-50 moped. That apart, it is seen that the TVS-50 moped was not seized by the police and there is absolutely no investigation in this regard, though it is the prosecution case that the accused abandoned the TVS moped and took the victim girl in PW5's bike.

11. We may note another aspect which again belies PW5's version. PW7 in his deposition would state that when they went in search



of the victim, they saw two persons out of whom one of them (PW5) informed that he was attacked and the victim was taken away by two unknown persons. However, PW5 does not reveal about PW7's enquiry or about his informing PW7 about the occurrence. In the Accident Register [Ex.P13], it is seen that the victim had stated to the Doctor [PW10] that two known persons had committed penetrative sexual assault. It is again contrary to the prosecution case that both accused were not known to the victim earlier.

12. Another strange aspect that we find in this case is that though the accused were arrested, the investigating officers had not taken any steps to conduct the Test Identification Parade. It is not known as to how the investigating officers confirmed the identity of the accused, in the absence of a Test Identification Parade. Though it is claimed by the investigating officer that PW5 identified the accused after their arrest, there is nothing on record to show as to how and on what basis the two accused were fixed as accused. It is needless to mention that the identification of PW5 at the time of arrest would hardly be of any relevance, as no value can be attached to it.



That apart, both PW6 and PW9, who were said to be witnesses to the arrest and confession of the accused have not stated about any alleged identification by PW5.

13. As regards the victim's version we find that no Test Identification Parade was conducted.

14. It is also admitted that it was raining at the relevant point in time and there was a power cut. The occurrence took place during the night hours. Therefore, in the absence of a Test Identification Parade, we are of the view that the victim's identification in Court for the first time nearly 18 months after the occurrence would have no value. In this regard, we may rely upon the following observations of the Hon'ble Supreme Court in ***Kanan's case*** [cited supra]

“It is well settled that where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T. I. parade to test his powers of observations. The idea of holding T. I. parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his



CrL.A.No.765 of 2022

capability to identify an unknown person whom the witness may have seen only once. If no T. I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court.”

15. As stated earlier, the FIR was sent to the Magistrate only on 11.03.2017 at about 11.20 a.m. The accused, according to the prosecution were arrested at 9.00 p.m. on 10.03.2017. Therefore, in the light of the several infirmities that we have just pointed out above and the delay in registration of the FIR, it is highly doubtful as to whether the victim had given the names of the accused. That apart, the victim had stated before the Doctor that two known persons had committed penetrative sexual assaults. It is the prosecution case and the evidence of PW1 that both the accused were not known to her. This contradiction, in our view, also throws a doubt as regards the version of the victim.

16. As regards the medical evidence, the relevant portion of the DNA report [Ex.P19] reads as follows:

“(i) The seminal stains on item 2 – vaginal swab (male traction) (of ref.2) and item 7 Churidar top (of ref.3)



CrL.A.No.765 of 2022

are that of the alleged accused 1 Sethupathi and alleged accused 2 – Kalimuthu.

(ii) The seminal stains on item 2 – vaginal swab (female traction) (of ref 2) are that of the victim xxxxxx.”

17. It is well settled that if the DNA report is sought to be relied upon by the prosecution, it must be clear from the evidence as to what samples were compared and as to whether the samples were taken from the victim or the accused. In the present case, it is stated that the prosecution has compared the vaginal swab with the blood samples taken from the accused. There is absolutely no evidence as to when the blood samples were taken from the accused. Even assuming that blood samples were taken from the accused, the 'chain of custody' of the sample has not been established. In the absence of the same, the report based on comparison of such a sample, would be of no value.

18. In a similar case, where there is no evidence of blood sample being taken from the accused and in the absence of establishing the chain of custody, to ensure that the blood samples were in fact taken from the person concerned, packed and preserved



properly, the Hon'ble Supreme Court in ***Prakash Nishad's case*** [cited supra] held that the DNA report cannot be held to be dependent in such circumstances. The judgment laid stress on the importance of establishing the chain of custody of the sample. The relevant observation are as follows:

“62. The document also lays emphasis on the ‘chain of custody’ being maintained. Chain of custody implies that right from the time of taking of the sample, to the time its role in the investigation and processes subsequent, is complete, each person handling said piece of evidence must duly be acknowledged in the documentation, so as to ensure that the integrity is uncompromised. It is recommended that a document be duly maintained cataloguing the custody. A chain of custody document in other words is a document, “which should include name or initials of the individual collecting the evidence, each person or entity subsequently having custody of it, dated the items were collected or transferred, agency and case number, victim’s or suspect’s name and the brief description of the item.””

19. That apart, as regards the reliability of the DNA Report, in a recent Judgment in ***Manoj Vs. State of Madhya Pradesh***, reported in (2023) 2 SCC 353. The Hon’ble Supreme Court held as follows:

"151. During the hearing, an article published by the Central Forensic Science Laboratory, Kolkata [DNA Profiling in Justice Delivery System, Central Forensic Science Laboratory, Directorate of Forensic Science, Kolkata (2007).] was relied upon. The relevant extracts of the article are reproduced below:



“Deoxyribonucleic acid (DNA) is genetic material present in the nuclei of cells of living organisms. An average human body is composed of about 100 trillion of cells. DNA is present in the nucleus of cell as double helix, supercoiled to form chromosomes along with intercalated proteins. Twenty-three pairs of chromosomes present in each nucleated cells and an individual inherits 23 chromosomes from mother and 23 from father transmitted through the ova and sperm respectively. At the time of each cell division, chromosomes replicate and one set goes to each daughter cell. All information about internal organisation, physical characteristics, and physiological functions of the body is encoded in DNA molecules in a language (sequence) of alphabets of four nucleotides or bases : Adenine (A), Guanine (G), Thymine (T) and Cytosine (C) along with sugar phosphate backbone. A human haploid cell contains 3 billion bases approx. All cells of the body have exactly same DNA but it varies from individual to individual in the sequence of nucleotides. Mitochondrial DNA (mtDNA) found in large number of copies in the mitochondria is circular, double stranded, 16,569 base pair in length and shows maternal inheritance. It is particularly useful in the study of people related through the maternal line. Also being in large number of copies than nuclear DNA, it can be used in the analysis of degraded samples. Similarly, the Y chromosome shows paternal inheritance and is employed to trace the male lineage and resolve DNA from males in sexual assault mixtures.

Only 0.1 % of DNA (about 3 million bases) differs from one person to another. Forensic DNA Scientists analyse only few variable regions to generate a DNA profile of an individual to compare with biological clue materials or control samples.

DNA Profiling Methodology

DNA profile is generated from the body fluids, stains, and other biological specimen recovered from evidence and the results are compared with the results obtained from reference samples. Thus, a link among victim(s) and/or suspect(s) with one another or with crime scene can be established. DNA profiling is a complex process of analyses of some highly variable regions of DNA. The variable areas of DNA are termed genetic markers. The current genetic markers of choice for forensic purposes are Short Tandem Repeats (STRs). Analysis of a set of 15 STRs employing Automated DNA Sequencer gives a DNA profile unique to an individual (except monozygotic twin). Similarly, STRs present on Y chromosome (Y-STR)



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CrL.A.No.765 of 2022

can also be used in sexual assault cases or determining paternal lineage. In cases of sexual assaults, Y-STRs are helpful in detection of male profile even in the presence of high level of female portion or in case of azoospermic or vasectomized male. Cases in which DNA had undergone environmental stress and biochemical degradation, min ISTRs can be used for over routine STR because of shorter amplicon size.

DNA profiling is a complicated process and each sequential step involved in generating a profile can vary depending on the facilities available in the laboratory. The analysis principles, however, remain similar, which include:

1. isolation, purification & quantitation of DNA
2. amplification of selected genetic markers
3. visualising the fragments and genotyping
4. statistical analysis & interpretation.

In mtDNA analysis, variations in Hypervariable Region I & II (HVR I & II) are detected by sequencing and comparing results with control samples:

Statistical Analysis

Atypical DNA case involves comparison of evidence samples, such as semen from a rape, and known or reference samples, such as a blood sample from a suspect. Generally, there are three possible outcomes of profile comparison:

(1) Match : If the DNA profiles obtained from the two samples are indistinguishable, they are said to have matched.

(2) Exclusion : If the comparison of profiles shows differences, it can only be explained by the two samples originating from different sources.

(3) Inconclusive : The data does not support a conclusion of the three possible outcomes, only the “match” between samples needs to be supported by statistical calculation. Statistics attempt to provide meaning to the match. The match statistics are usually provided as an estimate of the Random Match Probability (RMP) or in other words, the frequency of the particular DNA profile in a population.

In case of paternity/maternity testing, exclusion at more than two loci is considered exclusion. An allowance of 1 or 2 loci possible



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CrL.A.No.765 of 2022

mutations should be taken into consideration while reporting a match. Paternity or Maternity indices and likelihood ratios are calculated further to support the match.

Collection and Preservation of Evidence

If DNA evidence is not properly documented, collected, packaged, and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving. DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be identified, preserved, packed and sent for DNA profiling.”(emphasis supplied).

152. In an earlier judgment, Rv.Dohoney & Adams the UK Court of Appeal laid down the following guidelines concerning the procedure for introducing DNA evidence in trials : (1) the scientist should adduce the evidence of the DNA comparisons together with his calculations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the Crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the basis of the calculations; (3) the Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.

153. The Law Commission of India in its Report [185th Report, on Review of the Indian Evidence Act, 2003.], observed as follows:



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CrL.A.No.765 of 2022

“DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not “match”, then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA “profile” or “fingerprint” is found. It may be, for example, that the relevant profile is found in 1 person in every 1,00,000 : This is described as the “random occurrence ratio” (Phipson 1999, 15th Edn., Para 14.32).

Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a court of law.”
(emphasis in original)

154. *In Dharam Deo Yadav v. State of U.P. [Dharam Deo Yadav v. State of U.P., (2014) 5 SCC 509 : (2014) 2 SCC (Cri) 626] this Court discussed the reliability of DNA evidence in a criminal trial, and held as follows : (SCC pp. 528-29, para 36)*

“36. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made up of a double stranded structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. ... DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on



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CrL.A.No.765 of 2022

the quality control and quality assurance procedures in the laboratory.”

155. The US Supreme Court in District Attorney's Office for the Third Judicial District v. Osborne [District Attorney's Office for the Third Judicial District v. Osborne, 2009 SCC OnLine US SC 73 : 557 US 52 (2009)] dealt with a post-conviction claim to access evidence, at the behest of the convict, who wished to prove his innocence, through new DNA techniques. It was observed, in the context of the facts, that : (SCC OnLine US SC)

“Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue. ... DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others.”

156. Several decisions of this Court — Pantangi Balarama Venkata Ganesh v. State of A.P. [Pantangi Balarama Venkata Ganesh v. State of A.P., (2009) 14 SCC 607 : (2010) 2 SCC (Cri) 190], Santosh Kumar Singh v.State [Santosh Kumar Singh v.State, (2010) 9 SCC 747 : (2010) 3 SCC (Cri) 1469], State of T.N. v. John David [State of T.N. v. John David, (2011) 5 SCC 509 : (2011) 2 SCC (Cri) 647], Krishan Kumar Malik v.State of Haryana [Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130 : (2011) 3 SCC (Cri) 61], Surendra Koli v. State of U.P. [Surendra Koli v. State of U.P., (2011) 4 SCC 80 : (2011) 2 SCC (Cri) 92] , Sandeep v. State of U.P.[Sandeep v.State of U.P., (2012) 6 SCC 107 : (2012) 3 SCC (Cri)



18] , *Rajkumar v. State of M.P.* [*Rajkumar v. State of M.P.*, (2014) 5 SCC 353 : (2014) 2 SCC (Cri) 570] and *Mukesh v. State (NCT of Delhi)* [*Mukesh v. State (NCT of Delhi)*, (2017) 6 SCC 1 : (2017) 2 SCC (Cri) 673] have dealt with the increasing importance of DNA evidence. This Court has also emphasised the need for assuring quality control, about the samples, as well as the technique for testing in *Anil v. State of Maharashtra* [*Anil v. State of Maharashtra*, (2014) 4 SCC 69 : (2014) 2 SCC (Cri) 266] : (*Anil case* [*Anil v. State of Maharashtra*, (2014) 4 SCC 69 : (2014) 2 SCC (Cri) 266] , SCC p. 81, para 18)

“18. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory.”

157. This Court, in one of its recent decisions, *Pattu Rajan v. State of T.N.* [*Pattu Rajan v. State of T.N.*, (2019) 4 SCC 771 : (2019) 2 SCC (Cri) 354], considered the value and weight to be attached to a DNA report : (SCC p. 791, para 52)

“52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to



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CrL.A.No.765 of 2022

be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party."

158. This Court, therefore, has relied on DNA reports, in the past, where the guilt of an accused was sought to be established. Notably, the reliance, was to corroborate. This Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case."

In the above judgment there is a reference to the article published by the Central Forensic Science Laboratory, Calcutta, which states that if DNA evidence is not properly documented, collected, packaged, and preserved, it would not meet the legal and scientific requirements for admissibility in a Court of law. The report also states that DNA evidence can be contaminated when DNA from another source gets mixed with the DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his or her mouth, nose, or other parts of the face and then touches an area that may contain the DNA to be tested. Therefore, it is evident that DNA testing can be a powerful technique in investigations and criminal trials. However, care has to be taken to ensure that the samples collected are properly documented, packaged, and preserved, which is not so in this case.



CrL.A.No.765 of 2022

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20. Thus, from an overall reading of the evidence, we find that in the facts and circumstances of the case, the fact that there was a delay in lodging the complaint and sending it to the Court with a further delay, would render the prosecution case highly doubtful. Though PW7 claims that the victim was secured at 12.30 a.m. on 10.03.2017, the complaint was lodged only at 3.00 p.m. on 10.03.2017. As stated earlier, it was only after the arrest of the accused, the FIR was despatched to the Court. Therefore, the fact that the names of the accused were found in the FIR would not be of any use to the prosecution. On the contrary, it raises a doubt as to whether it was the victim who had given the names of the accused. The version of PW5 and his conduct do not inspire confidence. There is no investigation as regards the TVS-50 moped in which the accused have said to have come and abandoned before taking the victim in PW5's bike. It is also PW5's version that the accused were arrested at 09.00 a.m., on 10.03.2017 which makes the prosecution case even more doubtful.

21. From the evidence of PW5 and PW7, it could be seen that the arrest of the accused was not at the time and place stated by the prosecution.



CrL.A.No.765 of 2022

The complaint also could not have been made at that time, and the presence of the police even before the registration of the FIR, cannot be ruled out.

There is no Test Identification Parade conducted and the contradiction in PW1's version in her deposition that two unknown persons committed the offence, as opposed to her version which is found in the Accident Register that two known persons, were involved make it highly unsafe to convict the appellant/A2 on the basis of the said evidence. The prosecution, therefore, in our view has failed to establish its case. Hence, the judgment of the trial Court, convicting the appellant is liable to be set aside.

22. Accordingly, the Criminal Appeal is allowed. The conviction and sentence imposed upon the appellant/A2 in Spl.S.C.No.35 of 2017 dated 28.03.2019, on the file of the learned learned Sessions Judge, Magalir Neethimandram [Fast Track Court], Tiruppur, are set aside. The appellant/A2 is acquitted of all the charges and directed to be released forthwith, unless his presence is required in connection with any other case. The fine amount, if any, paid by the appellant shall be refunded. Bail bond, if any, executed shall stand discharged. Consequently, the connected Criminal Miscellaneous Petition is closed.



CrL.A.No.765 of 2022

WEB COPY

23. The learned Additional Public Prosecutor, on instructions submits that A1 has not filed any appeal against his conviction. However, since we are of the view that the prosecution has not established its case, the observations made by us, would enure to the benefit of A1 as well. Therefore, A1-Sethupathy, is also acquitted of all the charges and directed to be released forthwith, unless his presence is required in connection with any other case. The learned Additional Public Prosecutor states that A1 is confined in Central Prison, Coimbatore. The Superintendent of Prisons, Central Prison, Coimbatore, shall release A1-Sethupathy, forthwith.

(M.S.R.,J.) (S.M.,J.)
20.06.2024

Index : yes/no
Speaking /Non-speaking order
Neutral citation : yes/no
ars

To

1. The Sessions Judge,
Magalir Neethimandram [Fast Track Court],
Tiruppur.



CrL.A.No.765 of 2022

2. The Inspector of Police,
All Women Police Station,
Dharapuram, Tiruppur District.

3. The Superintendent,
Central Prison, Coimbatore.

4. The Public Prosecutor,
High Court, Madras.



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Crl.A.No.765 of 2022

M.S.RAMESH,J.
AND
SUNDER MOHAN,J.
ars

Pre-delivery judgment in
Crl.A.No.765 of 2022

20.06.2024